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GOVERNMENT NOTICE

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

No. R. 468

31 May 2010

**INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA****"ELECTRONIC COMMUNICATIONS FACILITIES LEASING REGULATIONS"**

**IN TERMS OF SECTION 4 AND 44 OF THE ELECTRONIC COMMUNICATIONS
ACT OF 2005 (ACT NO. 36 OF 2005) READ WITH SECTION 4 (3) (J) OF THE
ICASA ACT OF 2000 (ACT NO. 13 OF 2000)**

I, Paris Mashile, Chairperson of the Independent Communications Authority of South Africa ("ICASA") hereby confirm that the above regulations were approved by the Independent Communications Authority of South Africa under section 4 read with 44 of the Electronic Communications Act, 2005 (Act No. 36 of 2005) of the ICASA Act, 2000 (Act No. 13 of 2000).

A handwritten signature in black ink, appearing to read "Paris Mashile". The signature is written over a horizontal line.

**PARIS MASHILE
CHAIRMAN**

SCHEDULE

ELECTRONIC COMMUNICATIONS FACILITIES LEASING REGULATIONS

PART I

1. DEFINITIONS

In these regulations, any word or expression to which a meaning is assigned in the Act or the ICASA Act shall have the same meaning unless the context indicates otherwise:-

“Act” means the Electronic Communications Act, 2005 (Act No. 36 of 2005);

“ECNS” means electronic communications network service;

“Electronic communications facilities provider” means an ECNS licensee who is requested to lease its electronic communications facilities in terms of section 43(1) of the Act;

“Electronic communications facilities seeker” means any person licensed in terms of the Act, and persons providing services pursuant to a licence exemption requesting electronic communications facilities, including an applicant for an individual licence;

“ICASA Act” means the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000)

2. PURPOSE OF REGULATIONS

The purpose of these regulations is to:

- (a) Facilitate the conclusion of electronic communications facilities leasing agreements by stipulating:
 - (i) agreement principles;
 - (ii) timeframes and procedures to be followed by parties; and
 - (iii) the procedures for the submission, review and filing of agreements.

- (b) Provide for the requirements for the leasing of electronic communications facilities; and
- (c) Provide for dispute resolution processes and the timeframes for lodging disputes.

PART II

Electronic Communications Facilities Leasing

3. Requests for electronic communications facilities

- (1) A request for electronic communications facilities must be in writing and must, amongst others include:
 - (a) the date of the request;
 - (b) the electronic communications facilities seeker's technical requirements and physical parameters; and
 - (c) the type of electronic communications facilities that are requested.
- (2) An electronic communications facilities provider must respond to a request to lease facilities within seven (7) days of receipt of the request stating its minimum requirements for entering into the electronic communications facilities leasing agreement.
- (3) The parties must finalise the electronic communications facilities leasing agreement within forty five (45) days from the date of request provided that the parties may agree on a longer period, which period must not exceed sixty (60) days.

4. Financial feasibility

- (1) For purposes of section 43(4) of the Act, a request is financially feasible where there are no material adverse financial consequences.
- (2) Any dispute of financial feasibility will be determined by the Authority on a case by case basis.

5. Technical feasibility

- (1) For purposes of section 43(4) of the Act a request is technically feasible where it meets the following minimum requirements:
 - (a) the network does in fact meet the technical parameters of the requesting party's network at the time that the request is made; and
 - (b) offering facilities to the electronic communications facilities seeker will not have a material negative effect on the facilities provider.
- (2) Any dispute on technical feasibility will be determined by the Authority on a case by case basis.

PART III

Principles for electronic communications facilities leasing agreements

6. Quality of service and standards

- (1) The parties to an electronic communications facilities leasing agreement must ensure that their agreement:
 - (a) contains the technical standards of both parties; and
 - (b) complies with all relevant national standards and recommendations of the International Telecommunications Union as agreed to by the Republic of South Africa and any other standard as prescribed by the Authority.

7. Service level parameters

An electronic communications facilities leasing agreement must contain service levels and provide reasonable remedies and penalties for any failure to meet such service levels.

8. Confidentiality

An electronic communications facilities leasing agreement may not contain a provision that prevents the public disclosure of the agreement by the Authority or by either of the parties, subject to the provisions of section 4D of the ICASA Act read with section 45 of the Act.

9. Non-discrimination

- (1) The parties to an electronic communications facilities leasing agreement must not unfairly discriminate in the negotiation, conclusion and implementation of such agreement, unless otherwise requested by the electronic communications facilities seeker;
- (2) Requests from an electronic communications facilities seeker, including requests for additional facilities in terms of an already concluded electronic communications facilities leasing agreement, must be dealt with in the order in which they are received; and
- (3) An electronic communications facilities provider must apply similar terms and conditions, including those relating to rates and charges, in similar circumstances to itself, affiliates and other electronic communications facilities seekers requiring similar services, unless otherwise requested by the electronic communications facilities seeker

10. Transparency

- (1) Billing and settlement procedures must be transparent.
- (2) Where the provision of one service or facility is dependent in practice on the provision of another service or facility, such a relationship must be clearly identified.
- (3) Charges for electronic communications facilities must be sufficiently unbundled so that an electronic communications facilities seeker does not have to pay for anything it does not require for the requested electronic communications facility or facilities.

11. Electronic communications facilities leasing information

- (1) Any party to an electronic communications facilities leasing agreement may publish on its website and must, on request and within ten (10) days, provide to the other party information that is in its possession or control relating to:
 - (a) a list of electronic communications facilities leasing products or services offered by the electronic communications facilities provider;

- (b) process and commercial information that may assist the electronic communication facilities seeker to formulate a request for leasing electronic communications facilities, including but not limited to:
- (i) any material changes to the electronic communications facilities leasing agreements that may affect the electronic communications facilities leasing agreements;
 - (ii) plans of an electronic communications facilities provider or services and /or products offered by the provider
- (c) Technical information that will assist the electronic communications facilities leasing parties in planning, establishing or maintaining their electronic communications network, including but not limited to:
- (i) the technical specifications of the electronic communications network;
 - (ii) any material changes to the electronic communications facilities leasing arrangements that may affect the electronic communications facilities leasing arrangements or plans of an electronic communications facilities seeker or the services such party provides or intends to provide by means of that electronic communications facilities leasing.

12. Exemptions

Electronic communications network service licensees who are found not to have significant market power in terms of section 67 of Act shall not be required to comply with regulations 9 (3) and 10 (3).

PART IV

Framework, model terms and conditions of agreements

13. Terms and conditions of electronic communications facilities leasing agreements

An electronic communications facilities leasing agreement must, except where a matter is not relevant to the electronic communications facilities leasing services in question, address the following:

- (a) definition of terms and abbreviations;

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- (b) the technical scope of electronic communications facilities leasing which includes:
- (i) a description of the purpose of the electronic communications facilities leasing;
 - (ii) a description of the electronic communications facilities proposed to be leased;
 - (iii) a description of the technical specifications of the facilities;
 - (iv) mechanisms for changes to the purpose, technical scope and specifications of the electronic communications facilities leasing; and
 - (v) a description of the location of the electronic communications facilities.
- (c) infrastructure sharing and co-location, which includes:
- (i) availability;
 - (ii) infrastructure sharing and co-location procedures;
 - (iii) security procedures and requirements;
 - (iv) supplementary services required, such as power supply; and
 - (v) physical access to facilities;
- (d) billing and settlement which includes:
- (i) billing procedures;
 - (ii) payment terms and conditions; and
 - (iii) billing and settlement disputes procedures;
- (e) charges, setting out:
- (i) detailed charges per electronic communications facility or set of electronic communications facilities leased; and
 - (ii) mechanisms for review of charges

- (f) quality of service and service levels, covering:
 - (i) service levels and quality of service obligations;
 - (ii) penalties;
 - (iii) testing and maintenance;
 - (iv) fault reporting and repair;
 - (v) service level disputes;
 - (vi) network protection and safety measures; and
 - (vii) initial capacity
- (g) date of coming into operation of agreement;
- (h) termination of agreement covering:
 - (i) grounds for termination; and
 - (ii) termination procedures;
- (i) contractual dispute resolution and arbitration procedures.

PART V

14. Dispute resolution

- (1) Where:
 - (a) the reasonableness of any request is disputed, the party requesting electronic communications facilities leasing may notify the Authority in accordance with regulation 14 of these regulations;
 - (b) the electronic communications facilities provider has not responded to the request for electronic communications facilities leasing within the time set out in regulation 3(2) of these regulations, the party requesting electronic communications facilities may notify the Authority;

- (c) parties have not reached agreement on the terms and conditions of an electronic communications facilities leasing agreement within the time prescribed in regulation 3 (3) of these regulations, either party may notify a dispute to the Authority.
- (2) A dispute notified to the Authority in terms of regulation 14 (1) of these regulations, must be in writing and must set out the details of the alleged dispute.
- (3) The party lodging the dispute must provide the Authority with sufficient information to allow it to make its decision.
- (4) Where the Authority, after considering all relevant information, determines that the dispute warrants further investigation, then the Authority shall:
- (a) provide the other party to the dispute with a copy of the complaint setting out the nature of the alleged unreasonableness or details of the unwillingness to negotiate or agree within fourteen (14) days of the notification of the dispute;
 - (b) afford the other party to the dispute with a reasonable opportunity to respond to the allegations in writing within fourteen (14) days of receipt of the copies of the complaint referred to in regulation 14(4)(a) of these regulations; and
 - (c) afford the party which notified the dispute a reasonable opportunity to reply to the response in writing within fourteen (14) days of receipt thereof.
- (5) The Authority may call for oral representations after the submissions made by the parties referred to in regulation 14 (4) of these regulations;
- (6) Notwithstanding the provisions of regulation 14(5) of these regulations, the Authority may determine the matter on the basis of the papers submitted to it by the parties.
- (7) The Authority will, within fourteen (14) days as provided for in regulation 14 (4) (b) or (c) of these regulations or such longer period as is reasonably necessary, furnish the parties to the dispute with its final decision; and
- (8) Regulation 14 of these regulations does not, in any manner, limit the power of the Authority to refer a matter to the Complaints and Compliance Committee in terms section 43 (5) (c) of the Act.

PART VI

Submission, filing, review and timeframes of agreements

15. Submission and review of electronic communications facilities leasing agreements

An electronic communications facilities leasing agreement and electronic communications facilities leasing amendment agreement must be submitted to the Authority in terms of section 45 of the Act within five (5) days of the date of signature of the agreement.

16. Consideration by the Authority for compliance

- (1) The Authority will notify the parties in writing within thirty (30) days of submission whether the agreement is consistent with the Act and these regulations.
- (2) If the Authority delays in notifying the parties of compliance beyond the stipulated thirty (30) period in regulation 18 (1) of these regulations, the Authority will provide written reasons for the delay to the parties to the agreement.
- (3) If the parties to the agreement do not receive any written notification from the Authority within the thirty (30) day period, the agreement is deemed to be compliant.
- (4) Where the Authority determines that the electronic communications facilities leasing agreement is consistent with the Act and these regulations, the Authority will notify the parties of compliance.
- (5) Where the Authority determines that the agreement is not consistent with the Act and these regulations, the Authority must direct the parties to agree on new terms and conditions that are consistent with the Act and these regulations within a period determined by the Authority, which period must not exceed thirty (30) days.
- (6) Where the parties submit an amended agreement in terms of section 45(7) of the Act, the Authority must notify the parties in writing within thirty (30) days whether or not the amended agreement is consistent with the Act and these regulations.

17. Filing of electronic communications facilities leasing agreements

An electronic communications facilities leasing agreement is considered to be filed with the Authority in terms of section 45(2) of the Act after the Authority has reviewed the agreement and notified the parties of compliance.

PART VII

General

18. Commencement date

- (1) Parties may agree on a date to commence the leasing of electronic communications facilities. Notwithstanding that date, the Authority may direct the parties to amend certain terms and conditions of the agreement based on the outcome of the review of the agreement.
- (2) In the event that the parties have not agreed on the date of commencement, such date shall be the date of notification of compliance.

19. Suspension and termination of agreement

- (1) An electronic communications facilities leasing agreement must provide for suspension and termination procedures that minimize any adverse effect of the suspension or termination of services on end users.
- (2) An electronic communications facilities leasing agreement must not allow the suspension of electronic communications facilities leasing except where this is necessary to address quality of service degradation of electronic communication networks or services or other material threat to the maintenance or the operation of the electronic communications facilities.
- (3) Neither party to an electronic communications facilities leasing agreement may terminate an electronic communications facilities leasing agreement unless the termination is as a result of:
 - (a) material breach of the electronic communications facilities leasing agreement;
 - (b) vis major; or
 - (c) The liquidation, deregistration or insolvency of one of the parties to the electronic communications facilities leasing agreement, or

(d) The parties have mutually agreed to terminate the agreement;

- (4) Either party to an electronic communications facilities leasing agreement must give prior written notice of its intention to terminate the agreement to the Authority and the other party specifying in such notice the grounds for termination and, in the case of material breach, requiring that the breach be remedied within a period of not less than thirty (30) days.

20. Contraventions and penalties

- (1) Upon a determination of non-compliance by the Complaints and Compliance Committee in terms of the ICASA Act, the Authority may impose a fine not exceeding:

(a) Five Hundred Thousand Rand (R 500 000.00) for contravention of regulations 9, 10 (3) and 19;

(b) Fifty Thousand Rand (R 50 000.00) for contravention of all regulations not specified in regulations 20 (1) (a) of these regulations;

21. Short title and commencement

These regulations are called the Electronic Communications Facilities Leasing Regulations, 2010 and commence on 30 June 2010.

22. Transitional period

- (1) Any electronic communications facilities leasing agreement concluded prior to the commencement of these regulations must be submitted to the Authority in terms of section 45(1) of the Act in accordance with the time periods set out in the following table:

Year electronic communications facilities leasing agreement entered into	Date to be submitted to Authority
On or before 01 January 2007	On or before 31 January 2011
After 01 January 2007	On or before 30 June 2011

- (2) Before submitting an electronic communications facilities leasing agreement to the Authority in terms of this section, the parties must review and amend the

electronic communications facilities leasing agreement where necessary to ensure that the agreement complies with the requirements of these regulations and the Act.

- (3) The process set out in the Act and these regulations applies with the necessary changes to the review by the Authority of electronic communications facilities leasing agreements submitted in terms of this regulation 22.

23. Repeals

The Facilities leasing guidelines published in Notice 1260 of 2000, Government Gazette Number 20993, and the amendments; the Supplementary Facilities Leasing Guidelines published in Notice 1215 of 2002, Government Gazette 23613; the Facilities leasing guidelines and supplements published in Notice 1301 of 2004, Government Gazette 26539 are hereby repealed.

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