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ACKNOWLEDGEMENTS

The Independent Communications Authority for South Africa ("the Authority") would like to acknowledge the contributions of various stakeholders and other members of the public who participated in the draft interconnection regulations processes, including public hearings and workshop to develop and finalise the regulations on interconnection.

The following stakeholders participated in the consultation processes:

1) M-Web,
2) Telkom;
3) Vodacom;
4) Cell C;
5) National Association of Broadcasters;
6) MTN;
7) Neotel;
8) ECN;
9) Altech;
10) Broadband INFRACO;
11) Fast Comm;
12) Internet Solutions;
13) Multi Choice;
14) Screamer;
15) Smile;
16) Switch;
17) Transnet;
18) Internet Service Providers Association (ISPA);
19) Communications Users Association of South Africa (CUASA);

20) TelFree;
21) Sentech;
22) Standard Bank;
23) Wireless Business Solution (WBS);
24) Digital Broadband International;
25) Virgin Atlantic;
26) Blue IQ;
27) South African Communication Forum (SACF);

REASONS DOCUMENT IN RESPECT OF INTERCONNECTION REGULATIONS, 2010

SECTION A: INTRODUCTION AND BACKGROUND

1. INTRODUCTION

1.1 Interconnection is an important way of introducing competition in the electronic communications sector.

1.2 The Authority does not intend to regulate the parties' commercial relationships, but to guide contracting parties on the form and minimum requirements in relation to the content of interconnection agreements and to facilitate the attainment of the objectives of the Act particularly those set out in Chapter 7 of the Electronic Communications Act.

1.3 The Authority undertook various consultative sessions with interested parties on the regulatory process herein.

1.4 On 24 July 2007[1], the Independent Communications Authority of South Africa ("the Authority") published the draft interconnection regulations and invited interested parties to make written representations on the draft regulations. The deadline for the submission was initially 03 September 2007 and which was later moved to 07 September 2007.

1.5 The Authority convened public hearings on 11 and 12 October 2007.

1.6 On 24 December 2007, the Authority published[2] another set of draft regulations having taken into account the comments from interested parties. The closing date for written submissions was 11 February 2008.

1.7 In April 2008, the Authority held a workshop on interconnection and invited interested parties to participate therein.

[1] Government Gazette No.30091
[2] Government Gazette No.30611

1.8 On 12 July 2009 the Authority published the third draft interconnection regulations for public comment.

1.9 The closing date for receiving comments from stakeholders was 20 August 2009.

2. LEGISLATIVE FRAMEWORK

2.1 The Authority is empowered in terms of section 38 (1) of the Electronic Communications Act No. 36 of 2005 ("ECA") "to prescribe regulations to facilitate the conclusion of interconnection agreements by stipulating interconnection agreement principles".

2.2 Section 4 of the ECA as well as section 4 (3) (j) of the Independent Communications Authority of South Africa Act, 2000 Act, No 13 of 2000 ("ICASA Act") empowers the Authority to make regulations on any matter consistent with the objects of the Act, and any matter which in terms of the Act must be prescribed, governed or determined by regulation.

2.3 In order to discharge the above functions, the Council of the Authority established a committee in terms of section 17 of the ICASA Act. The functions of the committee were amongst others to: develop the draft and final interconnection regulations, undertake the consultative process and make recommendations to Council on the proposed regulations.

3. PURPOSE

3.1 The purpose of this document is to provide stakeholders with an explanation of the contents and set out rationale for some of the sub-regulations of these regulations interconnection regulations.

SECTION B: REGULATIONS AND REASONS

4. Definitions (regulation 1)

Definitions have been provided only to the extent necessary. Hereinafter are the terms we have defined:

4.1.1 "Interconnection Provider"

In the regulations, the definition of the term interconnection provider are the licensees that are obliged to interconnect in terms of section 37 (1) of the Act.

4.1.2 "Interconnection seeker"

The definition of interconnection seeker is not limited to existing licensees, but includes applicants for an individual licence as contemplated in section 38(3) (k) of the Act.

4.2 Purpose of regulations (regulation 2)

4.2.1 The regulations seek to guide the industry on how the process of conducting negotiations and concluding agreements should be handled. In the case of interconnection this is done with a view to facilitating any to any and end to end electronic communications.

4.3 Requests for interconnection (regulation 3)

4.3.1 The Act requires the Authority to determine time periods for responses to requests from interconnection seekers. These timeframes form the basis of disputes on the inability or unwillingness to agree or negotiate an agreement under section 37(4). Where a request is made it should refer to an interconnection seeker's technical standards requirements in relation to the interconnection providers' technical standards. This will minimise the number of frivolous requests received by interconnection providers. It will also assist in the speedy determination of disputes on reasonableness in terms of section 37(2) of the Act.

4.3.2 The Authority has taken account of recommendations on time periods for the negotiation of agreements and considers 45 days to be sufficient to conclude a standard interconnection agreement. The Authority however affords the parties the liberty to decide on a longer period which must not exceed sixty (60) days. The longer period is inclusive of the forty five (45) days considered to be sufficient to conclude an interconnection agreement.

The debate about the ability of broadcasters to provide interconnection services has been duly noted by the Authority. The Authority believes that the inclusion of broadcasters in the scope of the regulations is necessary from a legal view point,

given that the definition of “interconnection” in the Act includes broadcasting service licensees.

4.4 Financial and technical feasibility (regulation 4 and 5)

“Financially feasible” and “technically feasible”

4.4.1 The Authority seeks to establish the minimum requirements for technical and financial feasibility which are intended to assist the Authority and the industry in establishing useful guidelines and benchmarks for the determination of what is “reasonable” in relation to the provision of interconnection, but in the future, in relation to other forms of access as well.

4.4.2 Disputes are dependent on the Authority’s determinations regarding the “reasonableness” of a request. The Act stipulates that “reasonableness” will be measured by technical and financial feasibility, and promotion of efficient use of networks and services.

4.5 Maintenance of any to any connectivity (regulation 6)

The primary reason for interconnection regulation is to facilitate any to any, end to end communications. This must be facilitated in a technology-neutral manner, hence the technology-neutral approach taken in drafting these regulations. Technology specific terminology is used in these regulations in a descriptive manner, to illustrate for example the types of Points of Interconnection. The use of technology-specific terms is not intended to limit the technology choices for licensees.

4.6 Principles for interconnection agreements

4.6.1 Quality of service for interconnection is regulated with reference to other regulations published by the Authority and in this regard (i.e. end user regulations, and technical standards regulations), and international obligations.

4.6.2 Interconnection information, which is basic information, must be made generally available in order to prevent discrimination, and to facilitate the conclusion of agreements.

4.6.3 The Authority has noted the concerns raised in stakeholders’ submissions on the previous drafts of the regulations regarding the confidential treatment of information. As stated hereinbefore, the relevant general provisions in relation to confidentiality under the ICASA Act (section 4D) will be applicable in this regard. It must also be borne in mind that in terms of section 39(3) of the Act, interconnection agreements may be made available to any person who requests such upon payment of a fee. This may mean that once filed, an interconnection agreement is not a confidential document.

4.6.4 The Authority is cognisant of the fact that regulation 11(3) might be equated with a pro-competitive remedy imposed on operators identified to have significant market power following a chapter 10 process. This is however not the case. Regulation 11(3) relates to transparency in charges for bundled products and/or services. What this therefore means is that where interconnection products and/or services are offered in a bundle charges for each product and/or service should be clear and transparent.

4.7 Interconnection information (regulation 12)

4.7.1 The Authority is of the view that the provision of interconnection information is an important requirement in that information must be available as provided by the interconnection provider and based on such provider's own requirements. This will cut down on frivolous requests and will similarly facilitate reasonable requests.

4.7.2 This provision is a specific requirement of the Act.

4.8 Point of Interconnection (regulation 13)

4.8.1 The principal approach to interconnection is technical and financial feasibility and not historical reasons. Thus a request to interconnect at a local exchange could be refused based on the fact that it is technically not feasible to interconnect at that point.

4.9 Exemption (regulation 14)

4.9.1 The rationale for the exemption clause is found in section 38 (5) of the Act. As the regulations currently stand they are applicable to every person licensed person under Chapter 3.

4.10 Required terms and conditions of agreements (regulation 15)

4.10.1 This section sets out the required 'standard' terms and conditions for interconnection agreements. The list of terms and conditions has been considered against international best practice and the detail of the agreements, under the proposed headings, will be left to commercial negotiations between the parties.

4.11 Disputes (regulation 16)

4.11.1 The dispute resolution regulation is an important part of the interconnection regulatory framework particularly where there is information asymmetry and where operators have different positions in the market. To leave disputes to operators to resolve between them may well result in a complete failure to agree. Such failure to agree, particularly where one licensee holds a dominant position, can cause prejudice to other licensees and eventually have a negative effect on consumers.

4.11.2 The Authority notes that the interested parties should be guided, by a single set of dispute resolution procedures which will be consistent, for both disputes emanating from interconnection agreements and other disputes brought before the Authority and the Complaints and Compliance Committee ("CCC").

4.11.3 It is crucial to note that regulation 16 does not seek to regulate matters that fall squarely within the jurisdiction of the CCC, i.e. disputes that are notified with the CCC in terms of section 41 of the Act. Instead regulation 16 relates to disputes notified with the Authority in terms of section 37(2) and 37(4) of the Act.

4.12 Requirements for submission of information to the Authority

4.12.1 The Authority notes concerns raised by parties in their submissions around the treatment of confidential information. The Authority confirms that confidentiality applies where relevant, under section 4D of the ICASA Act.

4.12.2 Concern was raised in some submissions with respect to ICASA's ability to request information from time to time from the industry. ICASA confirms that it may, under section 4(3) (g) of the ICASA Act, request such information.

4.13 Review and filing of agreements (regulation 17, 18, and 19)

4.13.1 A distinction must be made between the date on which the agreement is effective and enforceable, and the commencement date. The commencement date is a date that is commercially agreed by the parties, with reference to their internal requirements (such as a target launch date).

4.13.2 The Act requires that interconnection agreements be "submitted" to the Authority once concluded. It furthermore requires that such agreements must be "reviewed" by the Authority to ensure consistency with the Act and the regulations. Once reviewed and if the agreement complies with the regulations a notification of compliance will be issued and the agreement would be filed by the Authority.

4.13.3 The Authority is the central repository for interconnection agreements and will take responsibility for the pro-active publication of the agreements and ensure that such

agreements are easily accessible (on line and in its information centre). Licensees are not required to publish their agreements but are encouraged to do so however they must provide agreements upon request.

4.13.4 The Authority proceeds on the understanding that it is the current practice, and given the nature and history of interconnection in South Africa, that all interconnection agreements must be reviewed by the Authority. The parties to the agreement are given discretion to agree on the date on which the agreement comes into operation which may be before the notification of compliance. However that does not preclude the Authority from directing the parties to amend terms of the agreement.

4.14 Contraventions and penalties (regulation 22)

The penalties imposed will be relative to the offence and it is anticipated that interconnection offences will in the main be for non-compliance by a licensee with an order of the Authority or the CCC.

4.15Transitional arrangements (regulation 24)

4.15.1 The Authority must ensure that all agreements that have been entered into historically, in terms of the Telecommunications Act of 1996, Act No. 103 of 1996, are amended and aligned with the new governing framework. It is therefore incumbent on stakeholders who have entered into existing agreements to review and where necessary amend them for submission to the Authority within the timeframes stipulated.

4.15.2 The Authority has used 2006, the year in which the Act became effective, to determine when agreements should be submitted for review.

4.16 Repeal of regulations (regulation 25)

Once published, these regulations will repeal the previous regulations published under the Telecommunications Act, in their entirety hence the requirement to resubmit existing agreements to the Authority and to make them consistent with these regulations.

5. Other matters not included in the regulations

5.1 Pricing

5.1.1 Some written submissions stated that the Authority must deal with matters pertaining to section 41 of the Act in particular setting of charges for interconnection services. Section 41 reads as follows: *The Authority may prescribe regulations establishing a framework if wholesale interconnection rates to be charged for interconnection services or specified types of interconnection and associated interconnection services into account the provisions of Chapter 10.* The Authority had in previous drafts provisions dealing with pricing framework in detail. However, so as not to have provisions in regulations that cannot be implemented we removed those provisions. It should be noted that section 41 does not empower the Authority to prescribe wholesale pricing but to establish a **framework** of the rates to be charged. To reiterate section 41 does not contemplate specific rates being set out in the regulations. More importantly, section 67(4), read with section 67(7) (h), of the ECA expressly permits the imposition of price controls, but under specific circumstances.

5.2 Exemptions

5.2.1 Submitters who were presenting the views of broadcasters were of the opinion that the Authority must exempt broadcasters from the obligation to interconnect due to mainly of the inability of broadcasting service licensees capability being unidirectional not bidirectional. Whilst the Authority understands the assertion by broadcasting service licensees, it is guided by the legislation. It is apparent that the obligation to interconnect is on every licensee and exemptions **may be** granted where the Authority has not found a licensee to have significant market power in the relevant market. The only instance wherein a broadcasting licensee may not interconnect will be when it is not technical feasible to do so.

6. CONCLUSION

The Authority has published this document along with the final regulations in the hope that it provides interested parties with a context of its position.