COMPLAINTS AND COMPLIANCE COMMITTEE[1]

Date of Hearings: 19/10 and 20/11 2017 **CASE NUMBER 261/2017**

INTERCEL ONLINE AFRICA (Pty) Ltd **COMPLAINANT**

TELKOM SA SOC LTD **RESPONDENT**

PANEL: Prof JCW van Rooyen SC, Cllr Dr Keabetswe Modimoeng, Mr Peter Hlapolosa, Mr Mzimkulu Malunga, Prof Kasturi Moodaliyar, Mr Jack Tlokana

On behalf of Intercel Online, the Managing Director: Mr Andrew Portokallis
For the Respondent: Adv MS Baloyi instructed by Edward Nathan Sonnenbergs, Johannesburg
Coordinator: Ms Lindisa Mabulu with, from her Office, Assessor Ms Meera Lalla (Attorney)

JUDGMENT

JCW VAN ROOYEN SC

INTRODUCTION

[1]Intercel Online Africa (Pty) Ltd ("IOLA") is the holder of Electronic Communications licences issued to it by the Independent Communications ICASA of South Africa ("ICASA"). It concluded an interconnection contract with Telkom SA SOC Ltd ("TELKOM"), which was signed on 6 April 2016. IOLA's Managing Director, Mr Portokallis, disputed the amount of the Telkom interconnection charge and communicated this to the Telkom representative

[1] An Independent Administrative Tribunal at ICASA, which was set up by the ICASA Council in terms of the ICASA Act 13 of 2000. In 2008, the CCC was confirmed as an independent tribunal in terms of section 33 of the Constitution of the RSA by the Constitutional Court in *Islamic Unity Convention v Minister of Telecommunications* 2008 (3) SA 383 (CC). It, inter alia, decides disputes referred to it by ICASA in terms of the Electronic Communications Act 2005, complaints filed with it by members of the public or licensees, matters referred to it by the Compliance Division of ICASA or certain disputes between licensees in terms of the relevant legislation. The present matter in essence amounts to a dispute filed at the CCC by a licensee against another licensee in terms of section 40 of the Electronic Communications Act 2005.

before and after the signing of the contract. He nevertheless signed the agreement to get matters underway, since Telkom's representative was not mandated to adjust this charge.

[2] On 12 October 2016 Mr Portokallis notifed ICASA regarding the interconnection charge. It was stated that IOLA had disputed the interconnection charges from the inception of the negotiations for interconnection -

[5] but in order for the internet to be established accepted to sign documents to this effect, but pointing out this practice was not supported by the existing regulations and IOLA would enter into discussions to this effect at a later stage.

[6] IOLA has made numerous requests to Telkom to remove these charges and subsequently attended several meetings to resolve the issue. IOLA pointed out at these meetings that it had established interconnects with other licensees in the same DATA Centre and each licensee has to carry its own cost to the first point of interconnect.

[7] Furthermore, it is also to be noted that IOLA, in order to establish the interconnect, agreed to pay for the fibre cost to meet Telkom at their first point of interconnect, cost paid entirely by IOLA, as IOLA's equipment is situated on the second floor of the DATA Centre and Telkom's equipment on the Ground Floor of the same DATA Centre.

[8] IOLA requests that ICASA:

1. Provides guidance and advice on the procedure to be followed for the resolution of the complaint.

2. Investigates the matter and assists with actions required to resolve this issue.

[3] The Senior Manager Compliance at ICASA requested Telkom to respond to the complaint on or before 25 January 2017. Telkom's response was, in essence, as follows:

1. That the Regulations do not address contracts that had already been concluded.

2. Any dispute that arises should be dealt with in terms of the dispute resolution clause in the contract.

3. In any case, once a contract has been concluded, the terms thereof cannot be disputed before the ICASA.

4. Telkom charges the same interconnection fees to other licensees which are similarly connected.

5. Accordingly, Telkom requested ICASA to dismiss the complaint.

[4] Thereafter the matter was investigated and considered by ICASA. It came to the following conclusion, as set out by the General Manager Compliance, ICASA, in a letter dated 31 May 2017:

2. The Authority has carefully considered the matter and all the information both IOLA and Telkom have provided…

3. Therefore, having regard to the merits of the complaint, the Authority has concluded as follows:

3.1 There is no information to indicate Telkom was in breach of section 37 of the ECA or the Interconnection Regulations, 2010.

3.2 IOLA should approach TELKOM and resolve the matter in line with the dispute resolution clauses in the interconnection agreement.

3.3 The matter has been closed.

4. For further clarification or enquiries, please feel free to contact … by email…or by telephone…[details were provided of the said official, an email-address and telephone number]

APPROACH TO THE CCC

[5] On the 20th July 2017 IOLA lodged a complaint with the Complaints and Compliance Committee at ICASA. IOLA stated (in summary):

That the main issue of the complaint had not been dealt with sufficiently by the ICASA. IOLA also noted that it had informed Telkom of this action taken by it. It averred that Telkom was unwilling to negotiate further and that IOLA felt prejudiced as a small operator. Furthermore, IOLA stated that it had reserved the right for further investigation and negotiation on the responsibility for the charges. The fact that Telkom agreed to subsequent meetings on this issue indicated, according to IOLA, clearly that they accepted IOLA's right to negotiate after signing of the agreement. The matter of "unwillingness to negotiate and the unreasonableness" regarding the charges was discussed in several meetings with the ICASA's staff and diagrams and information were provided and discussed in several meetings as requested by ICASA's staff. IOLA also offered a site visit for further clarification. The main ingredient of the dispute is whether Telkom has the right to charge for their link to the interconnect partner – in this case, IOLA. This is standard practice in the industry and other operators carry their own costs and do not attempt to transfer their own costs to their partners. The question that arises is: why would IOLA carry the costs of the link between Telkom infrastructure, i.e. from Telkom equipment to Telkom equipment….IOLA is not

disputing the interconnect agreement but the charges and since it took longer for the negotiations, IOLA brought the complaint to ICASA as soon as the issue reached a stage of uncompromised positions between the parties.

JURISDICTION OF THE CCC

[6] Ms *Baloyi*, acting for Telkom, argued *in limine* that the CCC did not have jurisdiction in this matter since ICASA had, already, determined that the complaint lodged with it was not justified. She also argued that the complaint was, in any case, too late since section 17C of the ICASA Act requires that a matter be referred to the CCC by ICASA within 30 working days. The said 30 days had already expired when IOLA lodged its complaint. The answer to the first point is that if IOLA's complaint was indeed lodged as a complaint in terms of the ICASA Act, IOLA lodged its complaint with the CCC Coordinator in terms of section 17B of the ICASA Act. No time limit is set by section 17B. On closer consideration IOLA, in fact, lodged a dispute in terms of section 40 of the ECA. Once again, no time limit is set by the said section.

[7]Mr Portokallis was, with respect, incorrect in stating that the matter had been *escalated* to the CCC, as if the CCC is an appeal body against a decision taken by ICASA. Decisions by ICASA are only subject to review by a Court of Law.[2] However, the instances where ICASA has jurisdiction in terms of section 37 of the ECA generally relate to the stage where the contract is in the phase of negotiation. In a case of alleged unwillingness or inability to interconnect ICASA may, however, refer a matter to the CCC. Once the contract is concluded, however, the CCC has jurisdiction to entertain a complaint or a dispute without a reference by ICASA.[3]

MERITS OF THE MATTER BEFORE THE CCC

[8] Section 37 of the Electronic Communications Act 2005 provides as follows:

Obligation to interconnect

(1) Subject to section 38, any person licensed in terms of Chapter 3 must, on request, interconnect to any other person licensed in terms of this Act and persons providing service pursuant to a licence exemption in accordance with the terms

[2] See section 3(5) of the ICASA Act 2000.
[3] See section 40 of the ECA and section 17B of the ICASA Act.

and conditions of an interconnection agreement entered into between the parties, unless such request is unreasonable.

(2) Where the *reasonableness* of any request to interconnect is disputed, the person requesting interconnection may notify the *ICASA* in accordance with the regulations prescribed in terms of section 38 and the ICASA must, within 14 days of receiving the request, or such longer period as is reasonably necessary in the circumstances, determine the reasonableness of the request.

(3) For the purposes of subsection (1) a request is reasonable where the *ICASA* determines that the requested interconnection -
   (a) is technically and economically feasible; and

   (b) will promote the efficient use of electronic communications networks and services.

(4) In the case of *unwillingness* or *inability* of a licensee to negotiate or agree on the terms and conditions of interconnection, either party may notify the Authority in writing and the Authority may -
   (a) impose terms and conditions for interconnection consistent with this Chapter;
   (b) propose terms and conditions consistent with this Chapter which, subject to negotiations among the parties, must be agreed to by the parties within such period as the ICASA may specify; or
   (c) refer the dispute to the *Complaints and Compliance Committee* for resolution on an expedited basis in accordance with the procedures prescribed in terms of section 38.

(5) For purposes of subsection (4), unless otherwise agreed in writing by the parties, a party is considered unwilling to negotiate or unable to agree if an interconnection agreement is not concluded within the time frames prescribed.

(6) The interconnection agreement entered into by a licensee in terms of subsection (1) must, unless otherwise requested by the party seeking interconnection, be non-discriminatory as among comparable types of interconnection and not be of a lower technical standard and quality than the technical standard and quality provided by such licensee to itself or to an affiliate or in any other way discriminatory compared to the comparable network services provided by such licensee to itself or to an affiliate.

[9] As appears from the above section, the powers of ICASA are limited to disputes concerning aspects of the *negotiations*.[4] Once a contract has been concluded, the CCC has jurisdiction to consider a complaint such as the one lodged by IOLA. However, in spite of the complaint having initially been treated

[4] See, however, Regulations 17, 18 and 19 of the Interconnection Regulations, 2010 which deal with the filing of the interconnection agreement with ICASA.

as one within the ambit of section 17B of the ICASA Act, in essence, the matter amounts to a dispute as to the contract. Section 40 of the ECA deals with disputes which have arisen under an interconnection agreement. We are satisfied that since the parties gave evidence under oath during the hearing, the requirement in the CCC's procedural regulations that affidavits be filed in such a dispute, was substantially complied with. Section 40 of the ECA provides as follows:

(1) A party to a dispute arising under an interconnection agreement that has been filed with the Authority may notify the Complaints and Compliance Committee in writing of the dispute and such dispute must be resolved, on an expedited basis, by the Complaints and Compliance Committee in accordance with the regulations prescribed by the Authority.

(2) ……..

(3) A decision by the Complaints and Compliance Committee concerning any dispute or a decision concerning a dispute contemplated in section 37(4)(c) is, in all respects, effective and binding on the parties to the interconnection agreement unless an order of a court of competent jurisdiction is granted against the decision.

[10]A written contract represents the common intention of the parties and they are, by law, bound to it. However, Mr Portokallis argued that the CCC has a right to intervene – even in a contract which is clear as to the interconnection charge. In fact he argued in his written complaint that the mere fact that Telkom was willing to discuss the matter after the conclusion of the contract, indicates that it had conceded that his approach to the interconnection charge was justified. However, the fact that Telkom was willing to discuss the matter is not an indication that it agreed that IOLA had a case. IOLA's view would be justified if an Act of Parliament or a Regulation of ICASA supports its view.

[11] IOLA's complaint is not of such a nature that it could, simply, be rejected out of hand. The Constitutional Court has held that even if a person does not have a valid complaint on the face of it, it would, in the ordinary course, be constitutionally prudent to *hear* him or her.[5]

[5] Compare *Stopforth Swanepoel & Brewis Inc v Royal Anthem (Pty) Ltd and Others* 2015 (2) SA 539 (CC) where Nkabinde J (as he then was) states as follows: "[19] Section 34 of the Constitution entitles everyone 'to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court'. The right to a fair public hearing requires 'procedures . . . which, in any particular situation or set of circumstances, are right and just and fair'. '(A)t heart, fair procedure is designed to prevent arbitrariness in the outcome of the decision.' In *De Lange* this court said that

The Contract

[12] An interconnection contract had already been concluded when IOLA referred the matter to ICASA and, thereafter, the CCC. Clause 41 of the signed contract clearly states that "this Agreement constitutes the whole agreement as to the subject matter of this agreement and no agreements, representations or warranties between the parties other than those set out herein will be binding on the parties." This is not a case where the parties misunderstood each other as to the matter under dispute or a case where a representation was made which was reasonably misunderstood by Mr Portokallis – see *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A) per Harms AJA at 239I – J:

'(T)he decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention?'

[13] Mr Portokallis stated that he would take the matter of the interconnection fee up after conclusion of the contract. He wished to get the matter underway and, thus, despite his disagreement as to the charge, signed the contract. The employee of Telkom, with whom the contract was concluded, was also not authorised to amend the standard fee. Mr Portokallis then initiated talks with Telkom. When he was unable to get a positive reaction from Telkom, he protested to ICASA.

[14] ICASA considered the matter and found that there was no basis to interfere with the contract. Although the CCC is not called upon to make a finding whether ICASA was justified in coming to the conclusion it did, it should be

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'(t)he time-honoured principles that no-one shall be the judge in his or her own matter and that the other side should be heard … aim toward eliminating the proscribed arbitrariness in a way that gives content to the rule of law. They reach deep down into the adjudicating process, attempting to remove bias and ignorance from it. . . . *Everyone has the right to state his or her own case, not because his or her version is right, and must be accepted, but because, in evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance. Absent these central and core notions, any procedure that touches in an enduring* and far-reaching manner on a vital human interest . . . points in the direction of a violation.' [footnotes omitted.]

observed that in the light of section 37 of the ECA, ICASA was justified in its decision for the following reasons:

(i) Section 37 of the ECA, quoted above, creates possibilities for ICASA to interfere *before* the contract is concluded when certain grounds are found to exist.[6] IOLA, however, did not approach ICASA, as is required by section 37, *before* the agreement was concluded. It did so, as pointed out, *after* the conclusion of the agreement.

(ii)A *further* basis for intervention by ICASA could have been the unwillingness of Telkom to interconnect (at the fee put forward by Mr Portokallis). Once again, ICASA could only have intervened *before* the contract had been concluded. It could then also, alternatively, have referred the matter to the CCC to inquire into the matter of unwillingness to conclude an agreement.

INTERCONNECTION REGULATIONS 10 AND SECTION 37(6) OF THE ECA.

[15] There are two provisions which would make it possible for the CCC to declare the interconnection fee invalid. Mr Portokallis argued that he could not care what other interconnectors were paying. The fee is simply too high and not justified. Telkom should stand in for the costs up to the point of interconnection and IOLA should not be made to pay such costs as part of its fee.
[16]The said two provisions are inter-related, though the Regulatory rule is slightly wider than the sub-section in the ECA. I will firstly deal with the wider provision in the Regulations. Regulation 10 of the ICASA Interconnection Regulations 2010, provides as follows:

> **Non discrimination**
>
> (1) The parties to an interconnection agreement must not *unfairly discriminate* in the negotiation, conclusion and implementation of such agreement, unless otherwise requested by the interconnecting party.
>
> (2) …..
>
> (3) An interconnection provider must apply *similar* terms and conditions, including those relating to rates and charges, in similar circumstances to itself, affiliates and other interconnection seekers, providing similar services, unless otherwise requested by the interconnecting party. (Accent added)

[6] However, see footnote 4 above.

Within context "discriminate" means to differentiate and "unfair" means not fair, not equitable or unjust.[7] The first question is, however, whether there is discrimination. Ms *Baloyi,* representing Telkom, led the evidence of an expert in the service of Telkom, Mr Barnard. Mr Barnard's expertise and experience within the technological field of interconnection was evident. He testified under oath that Telkom complies with both the standards required in regulation 10. It does not discriminate and its interconnection charges do not differentiate between licensees to which Telkom provides interconnection in the same manner as to IOLA. He also referred to extracts from interconnection agreements with various other licensed operators, which have the same form of interconnection as IOLA. They are not, as appears from the evidence under oath, treated differently from IOLA as to rates. So as not to unduly lengthen this judgment, a part of his evidence, as summarised by him, is annexed to this judgment.

[17]It is thus not possible to find that Regulation 10 had been contravened by Telkom in so far as the contract with IOLA is concerned. There was no discrimination and there is no legal provision that determines fees. ICASA has not made pricing regulations in this regard. The ECA grants ICASA an option to make or not make such regulations.[8]

[18] Section 37(6) of the ECA is in similar vein as regulation 10, but concentrates on the contract and does not include the negotiations and the implementation:

The interconnection agreement entered into by a licensee in terms of subsection (1) must, unless otherwise requested by the party seeking interconnection, be non-discriminatory as among comparable types of interconnection and not be of a lower technical standard and quality than the technical standard and quality provided by such licensee to itself or to an affiliate or in any other way discriminatory compared to the comparable network services provided by such licensee to itself or to an affiliate.

Once again, the Telkom fee is not discriminatory. The fee by Telkom is structured in the same manner for all its interconnecting partners.

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[7] *Shorter Oxford English Dictionary* and *Webster's New Standard Dictionary.*

[8] See section 41.Interconnection pricing principles: The Authority *may* prescribe regulations establishing a framework of wholesale interconnection rates to be charged for interconnection services or for specified types of interconnection and associated interconnection services taking into account the provisions of Chapter 10.(accent added)

[19] Lastly, a constitutional question arises. It is a basic rule of the law of contract that contracts must be abided by. At common law it is expressed as *pacta sunt servanda.*[9] Section 39(2) of the Constitution of the Republic, however, provides that when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. In, inter alia, *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2017 (4) SA 243 (GJ) the Court, on the facts of that case, found that it was unfair, within the spirit of *Ubuntu* and other constitutional principles, to apply a cancellation clause in a contract strictly.[10] In the present matter, unfairness against IOLA is, however, not a value which needs to be introduced. The fee charged by Telkom, as pointed out above, accords with the rates charged to other interconnection partners and is, accordingly, not discriminatory. The opportunity to raise unreasonableness is provided for in section 37(2) and (3) of the ECA. However, this should have been raised by IOLA with ICASA *before* the conclusion of the contract.

CONCLUSION

[20] The CCC's conclusion is, in summary, as follows:

1. Any dispute as to reasonableness in negotiations for interconnection must be lodged with ICASA in terms of section 37 of the ECA *before* the conclusion of the contract. This was not done by IOLA.
2. When a written contract has been signed a party to the contract is not, in terms of South African Law, entitled to raise a defence under the contract when she or he very well knew at the signing of the contract that the contract does not support that defence. There was no misunderstanding as to the interconnection fee. The difference of opinion as to the rates is irrelevant if the contract, as signed, provides the contrary.
3. The Constitutional value of *Ubuntu* does not assist IOLA for reasons set out above.

[9] Compare (as part of the *Corpus Juris Civilis*) Codex 2.3.7; 4.54.8 and Codex 2.3.29.1.

[10] As to the effect of the principle of *Ubuntu*, the judgment of Sachs J in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at para [39] was also considered but distinguished on the facts.

4. Section 37(6) of the ECA, which pertains to a concluded contract (as is the case with IOLA's contract with Telkom) is not applicable to the present contract since there is no difference in pricing principles and thus, also, no discrimination between IOLA's rate and that of other entities with which Telkom has concluded similar interconnection contracts.
5. Insofar as Regulation 10 is concerned, there is also no unfair discrimination.
6. Section 41 of the ECA provides as follows:

   The Authority may prescribe regulations establishing a framework of wholesale interconnection rates to be charged for interconnection services or for specified types of interconnection and associated interconnection services taking into account the provisions of Chapter 10.

   ICASA has a discretion to make regulations in this regard. No such regulations have been made and, accordingly, section 37 of the ECA and the 2010 Regulations established the statutory framework within which this matter was decided. Constitutional values were also considered, but were held not to support IOLA's case.

The dispute is, accordingly, decided in favour of Telkom in terms of section 40 of the ECA.[11]

J. C. W. van Rooyen

JCW VAN ROOYEN SC 19 December 2017
CHAIRPERSON

The Members of the CCC agreed with the above judgment.

ADDENDUM ATTACHED

[11] Section 40(3) of the ECA provides as follows: (3) A decision by the Complaints and Compliance Committee concerning any dispute or a decision concerning a dispute contemplated in section 37(4)(c) is, in all respects, effective and binding on the parties to the interconnection agreement unless an order of a court of competent jurisdiction is granted against the decision.

ADDENDUM

SUMMARY OF TELKOM'S EVIDENCE

1 The following is a summary of the evidence presented by Telkom at the hearing on 20 November 2017.

DEFINITIONS

2 The following definitions apply to the summary of evidence in paragraph 3 –

2.1 "**Electronic Communications Network (ECN/network**)" shall have the meaning ascribed to it in the Electronic Communications Act 36 of 2005;

2.2 "**ME / Metro Ethernet**" means a metropolitan area network service that is based on Ethernet standards which utilises carrier Ethernet technology to enable service providers to deliver Ethernet connectivity services and Ethernet access services;

2.3 "**ME Point of Interconnect Link / ME POIL**" means a fixed link in South Africa, being a dedicated point-to-point transmission link utilizing metro Ethernet technology with a transmission speed of at least 2 Mbit/s, in multiples of 1 Mbit/s up to 100 Mbit/s complying with ITU-T recommendations and provided by Telkom for the conveyance of signals between the network of another licensed operator and Telkom's network;

2.4 "**Interconnection**" means the physical and logical connection of two networks of licensed operators to allow each operator to collect or terminate their traffic from or to the other's network at their designated POIs;

2.5 "**OLO**" means other licensed operator;

2.6 "**Openserve**" means a division of Telkom. Openserve and Telkom are used interchangeably in this summary;

2.7 "**PE Port**" means the port on Telkom equipment on which ME POILs provided terminate;

2.8 "**Point/s of Interconnection or POI/s**" means a designated PE Port at which signals from the network operated by either Telkom or an OLO, as the case may be, are handed over and carried from the network of either Telkom or the OLO, as the case may be, to the network of either Telkom or the OLO.

2.9 "**SIP**" means Session Initiation Protocol.

OVERVIEW OF SIP VIA ME INTERCONNECTION OFFERED BY TELKOM

3 This section provides an overview of the process involved in procuring Interconnection from Telkom by OLOs.

3.1 OLOs request SIP via ME Interconnection from Openserve.

3.2 Openserve provides a draft standard SIP via ME Interconnection Agreement and the parties discuss and agree the specific terms applicable to the OLO's requirements and incorporate these in the final agreement that is signed by the parties.

3.3 To interconnect, ME POIL's are required to carry interconnection traffic to the POI's.

3.4 In the Interconnection Agreement concluded between Telkom SA SOC Ltd t/a Openserve and Intercel, the Telkom POIs are defined and form part of Appendix 1 to the agreement..

3.5 As the Interconnection Agreement is for SIP via ME, it also stipulates that as part of the ordering process the OLO needs to provide a circuit number of its Telkom ME access circuit/service upon which the ME POIL is to be provisioned. Without this, Telkom is unable to provide interconnection to the OLO. Intercel opted for the Telkom MetroClear access product in this instance. The ME access service comprises of an access link connected to Telkom's ME cloud over which is provisioned a logical ME POIL to carry interconnection traffic between the POIs.

3.6 The ME access service is ordered by the OLOs from Telkom in terms of a separate agreement. Under this agreement, the OLO pays in full for these ME access services and separately from the ME POILs.

3.7 Bandwidth is provisioned over the above ME access service in the form of ME POILs, and this bandwidth is charged for under the Interconnection Agreement.

3.8 In terms of the Interconnection Agreement, the cost of the ME POILs is shared 50:50 between the parties in the first year and on a pro-rata basis thereafter based on the proportion of voice traffic being sent from one party's network to the other party's network and vice versa (traffic split).

3.9 Once the parties have signed the Interconnection Agreement, the agreement is lodged with ICASA and the OLO then proceeds to order the ME access service and the ME POILs as required. Telkom then builds the applicable ME access service and ME POIL services. Once completed, the ME POILs are handed over to the OLO for connection to their network POIs. The parties then make test calls to validate that the ME POIL service is functioning correctly. Once confirmation of successful test calls has been confirmed including billing verification, the parties then activate the ME POIL in order to carry live traffic.

3.10 Where ME POILs are to be provided at a data hosting centre, where the OLO is hosting its POI, Openserve will terminate the relevant ME POILs on a handover point in a meet-me room in the hosting centre where the OLO will pick up the service from Telkom.

3.11 The OLO is responsible to procure and pay for the connection from the handover point in the meet-me room to its own equipment housed in the hosting centre. This connection is procured from, and payment is made to, the owner of the hosting centre. Similarly, Telkom also pays for the housing of its transmission equipment as well as for any connection to the handover point in the meet-me room to the owner of the hosting centre.

3.12 All OLOs are treated the same in respect of the above-mentioned connection to the hosting centre for the provision of SIP via ME Interconnection by Telkom.

3.13 Annexure **"A"** of this statement is a schematic representation of how the various components of the parties' network fit together for interconnection to take place.

3.14 Annexure **"B"** is a copy of Intercel's Order Form for Metroclear.

3.15 Annexure **"C"** is a copy of the quotation from Openserve to Intercel for Metro Clear Services.

3.16 Annexure **"D"** is a copy of Intercel's Application Form for ME POIL.

3.17 Annexure **"E"** is a copy of extracts of the Interconnection Agreement between Telkom SA SOC Ltd t/a Openserve and Intercel as well as Interconnection Agreements which Telkom has with other OLOs.

THE TELKOM-INTERCEL INTERCONNECTION AGREEMENT

4 Intercel signed the SIP via ME Interconnection Agreement on 6 April 2016. The Agreement regulates the relationship between the parties.

5 Intercel placed an official order with Telkom for an ME access service dated 24 March 2016 in terms of the signed Metro Clear Agreement between the parties.

6 Telkom provided Intercel with a quote for the service and this was accepted on 31 March 2016. An order was placed on Telkom's ordering system effective from 7 April 2016 (circuit number 100183430) and was delivered on 19 June 2016 to Intercel.

7 Intercel also placed an official order with Telkom for a ME POIL service dated 7 April 2016 in terms of the SIP via ME Interconnection Agreement between the parties. The application form also indicated the circuit number of the ME access service to be utilised upon which the ME POIL would be provisioned. An order was placed on Telkom ordering system effective from 11 April 2016 (circuit number IOL0000001) and was delivered on 19 June 2016 to Intercel.

8 Billing for Intercel commenced effective for both services from 19 June 2016, in accordance with the Interconnection Agreement.

INTERCEL's COMPLAINT dated 23 October 2017

9 *Section 2, paragraph 3* - Telkom carries its own costs for its portion of the Telkom network as depicted in annexure "**A**", paginated page 10, as highlighted in the orange dotted block and in compliance with clause 4.6 of the Interconnection Agreement. Intercel carries its own costs for the Intercel's network as depicted in annexure "A", paginated page 10, as highlighted in the red dotted block and in compliance with clause 4.7 of the Interconnection Agreement.

10 *Section 3, paragraph 2 read with attachment 1 and 2 thereto* – The parallel drawn by Intercel between the provision of interconnection services at the Teraco Hosting Centre ("**Teraco**") and that of Internet Solutions Parkland Hosting Centre is misplaced and uncomparable. This is because the network design in the two centres differs. MTN have installed nodes at the various Teraco sites and thus extended its network into the various Teraco sites, as is apparent from annexure A hereto (paginated page 13). However, Telkom has not installed a node at the Internet Solutions Parkland Hosting Centre and therefore has not extended its network into the Internet Solutions Parkland Hosting Centre. Telkom's nearest node is at Rosebank. Thus, Telkom has to install the applicable services to the required client site from Telkom's nearest node as per the client's request, which in this case is the Rosebank node. Telkom will only install its transmissions service at the client's site to provision the specific service requested by

the client. A client's site could be their own premises or that of a hosting centre belonging to another party.

11 *Section 3, paragraph 6* - Call Termination Regulations only apply to the rate which a party may charge the other party for terminating a call on its network (Intercel applies the asymmetry fixed termination rate while Telkom applies the symmetry fixed termination rate). The Call Termination Regulations do not apply to the charges for facilities for the setup of Interconnection between the parties. This is addressed in the Interconnection Agreement.

12 *Section 3, paragraph 7* - The cost of the ME POIL between the parties network is shared on a 50-50 basis (measured in minutes) for the first year. The parties further agreed to annually review the volume of traffic flowing (in minutes) in each direction between the parties networks for the previous year and to derive a new pro-rata ratio for traffic which need to be applied to the ME POIL charges for the following year.

13 *Section 3, paragraph 8* – Telkom treats Intercel no different from any other OLO seeking the same form of interconnection. Annexure "**E**" is relevant extracts from Interconnection Agreements with various OLOs (Intercel Online Africa, Internet Solutions, Octanox and Directel).