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GENERAL NOTICE

Independent Communications Authority of South Africa

General Notice

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GENERAL NOTICE

NOTICE 1800 OF 2007



INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

REGULATIONS PRESCRIBING A LIST OF ESSENTIAL FACILITIES AND MATTERS RELATED THERETO, PURSUANT TO SECTION 43(8) OF THE ELECTRONIC COMMUNICATIONS ACT NO. 36 OF 2005 ("THE ACT")

1. The Independent Communications Authority of South Africa ("the Authority") hereby gives notice in terms of section 4(4) of the Electronic Communications Act No. 36 of 2005 ("the Act") of its intention to prescribe a list of Essential Facilities and matters related thereto pursuant to sections 43(8) of the Act and section 4(3)(j) of the Independent Communications Authority of South Africa Act No. 13 of 2000 as amended "The ICASA Act").
2. Interested persons are invited to submit written representations on these draft Regulations, by **11 February 2008** (no extensions will be granted) by post, hand delivery, facsimile transmission, or electronic transfer (in Microsoft Word) for the attention of:

Thamsanqa TM Kekana
ICASA

164 Katherine Street
Pinmill Farm: Block B
Sandton

or Private Bag X10002
Sandton
2146

Fax: (011) 321-8233
Telephone: (011) 321-8542

E-mail: tkekana@icasa.org.za; cc mnkopane@icasa.org.za

3. Persons making written representations are requested to indicate if they wish to make oral submissions in the event that the Authority decides to conduct oral hearings in terms of section 4(6) of the Act, the duration thereof not to exceed 45 minutes.
4. All written representations submitted to the Authority pursuant to this notice will be made available for inspection by interested persons at the Authority's library and copies of such representations may be obtained on payment of the prescribed fee.
5. At the request of any person who submits written representations pursuant to this notice, the Authority will determine whether such representations or any portion thereof is confidential in terms of section 4D of the ICASA Act. If the request for confidentiality is refused, the person making the request will be allowed to withdraw such representations or portion thereof.
6. With respect to written representations or portions thereof determined to be confidential in terms of paragraph 5 above, ICASA may direct that the public or any member or category thereof, shall not be present while any oral submissions relating to such representations or portions thereof are being made; provided that interested parties must have been notified of this intention and allowed to object thereto. The Authority will consider the objections and notify all interested parties of its decision.
7. The final regulations will be published in the Government Gazette.

PARIS MASHILE
CHAIRPERSON

ESSENTIAL FACILITIES REGULATIONS

Definitions

In these Regulations, any word or expression to which a meaning is assigned in the Electronic Communications Act No. 36 of 2005 or the Independent Communications Authority of South Africa Act No. 13 of 2000, as amended, shall have the meaning assigned to it unless otherwise specified.

“Access” means the making available of electronic communications network services to a duly licensed person on a non-exclusive basis for the purposes of providing electronic communications services, and is inclusive of access to, but not limited to the following –

- (a) Electronic communications facilities,
- (b) Associated electronic communications facilities, and
- (c) Operational Support Systems, or equivalent facility or system;

“Access charges” means the calculated costs inclusive of VAT based upon the forward-looking long-run average incremental costs for providing access to an essential facility;

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

“Associated electronic communications facilities” means electronic communications facilities associated with an electronic communications network and/or an electronic communications services which enables and/or supports the provision of electronic communications services through that electronic communications network, and is inclusive of any other system, process or mechanism which –

- (a) facilitates the provision of electronic communications network services or electronic communications service,
- (b) facilitates the provision of other services provided by means of an electronic communications network, or
- (c) supports the provision of such other services;

“Backhaul circuit” means a domestic electronic communications network circuit which connects a cable landing station to the electronic communications network or associated electronic communications facilities controlled by a person in control of access to an essential facility;

“Cable landing station” means the electronic communications facility, including where applicable, collocation space, monitoring equipment, space on or within ducts, cable trays, conduits and beach joints which connects to an electronics communications facilities. Cable landing station shall also include all associated support systems, sub-systems and services, ancillary to facilitate connection to undersea cables and electronic communications facilities;

“COACAM Regulations” means the Regulations on Chart of Accounts and Cost Allocations Manual promulgated by the Authority pursuant to section 46 (1) of the repealed Telecommunications Act No. 103 of 1996, as amended;

“Collocation space” means the physical space and technical facilities necessary to reasonably accommodate and connect the electronic communications facilities of another electronic communications network service licensee or electronic communications service licensee. Collocation space is inclusive of, but not limited to:

- (a) *Physical collocation*, which includes building space, power, environmental services, security and site maintenance, and
- (b) *Distant collocation*, which includes the space where a duly licensed person has its electronic communications facilities and associated electronic communications facilities located distantly from where the main distribution frame of a person in control of access to an essential facility is located, and uses an external cable to connect its electronic communications facilities and associated electronic communications facilities to those of a person in control of access to an essential facility;

“Dispute” refers to where a duly licensed person has a particular grievance with a person in control of access to an essential facility based on the failure to adhere to the obligations stipulated in these Regulations and which grievance is capable, through reasonable endeavour, to be resolved through direct negotiation between a duly licensed person and a person in control of access to an essential facility;

“Duly licensed person” means –

- (a) An Individual Electronic Communications Network Service licensee,
- (b) Class Electronic Communications Network Service licensee, or
- (c) Any exempt licensee in terms of section 6 (1) of the Act;

“Earth station” means an electronic communications facility located either on the earth's surface, or within the major portion of the earth's atmosphere and is intended for and capable of receiving and/or transmitting electronic communications services and/or broadcasting services –

- (a) with one or more space stations, or
- (b) with one or more stations of the same kind, by means of one or more reflecting satellites or other objects in space;

“International electronic communications facilities” means electronic communication facilities utilised for the purposes of facilitating the provision of international electronic communications services;

“International gateway” means a switching system that routes international electronic communications services between international electronic communications networks and the domestic electronic communications networks;

“Land-based fibre optic cables” means fibre optic cables designed to be placed above the surface of the earth or on land and excludes undersea-based fibre optic cables;

“Local Loop” means the physical circuit connecting the electronic communications network termination point at the subscriber's premises to the main distribution frame or equivalent facility in an electronic communications network, and/or means the physical twisted metallic pair circuit connecting the electronic communications network termination point at the subscriber's premises to a concentration point or a specified intermediate access point in an individual electronic communications network;

“Local sub-loop” means a partial local loop connecting the electronic communications network termination point at the subscriber's premises to a concentrator or a specified intermediate access point in an individual electronic communications network;

“Main distribution frame” means a distribution frame on one part of which the external trunk cables entering a facility terminate, and on another part of which the internal user subscriber lines and trunk cabling to any intermediate distribution frames terminate;

“Network components” means an assembly, or parts thereof, that are essential to the operation of the electronic communication network;

“Operational Support Systems” refers to computer software and hardware systems and processes used for supporting processes related to maintaining network inventory, provisioning of services, configuration of network components and fault management;

“Person in control of access to an essential facility” means a person capable of exercising direct and/or indirect control of access to an essential facility;

“Person who requests access to an essential facility” means a duly licensed person;

“Pertinent information” includes the following, but is not limited to –

- (a) Any contracts,
- (b) Wholesale and retail prices,
- (c) Terms and conditions of supply of wholesale and retail services,
- (d) Performance measures and statistics regarding response times, technical performance and quality of services data,
- (e) Plans and forecasts, and
- (f) Network capacity information;

“Undersea-based fibre optic cables” means optic fibre cables designed to be placed under the sea to facilitate the transmission of electronic communications services between and amongst sovereign countries.

Purpose of Regulations

- 2.1 The purpose of these Regulations is to give effect to section 43(8) of the Act by prescribing a list and the description of the electronic communications facilities and associated facilities determined to be an essential facility as defined in the Act and to give effect to the terms upon which access to such facilities is to be regulated.

Prescription of Essential Facilities

- 3.1 The list of essential facilities includes –

- 3.1.1 Those referred to in Section 43(8) (a) of the Act and includes the following associated electronic communications facilities:

- (a) Co-location space,
- (b) Land based fibre optic cables,
- (c) Main distribution frame, and

- 3.1.2 Those referred to in Section 43(8) (b) of the Act and, but not limited to the following:

- (a) Backhaul circuit,
- (b) Cable landing station,
- (c) Co-location space,
- (d) Earth station,
- (e) International gateway,
- (f) Land based fibre optic cables,
- (g) Main distribution frame, and
- (h) Undersea-based fibre optic cables.

General conditions of access to an essential facility

- 4.1 A person in control of access to an essential facility must provide fair and non-discriminatory access to the essential facility upon receipt of a written request to access an essential facility.
- 4.2 A person in control of access to an essential facility must negotiate in good faith on any matter concerning access to the essential facility with a person who requests access to an essential facility.
- 4.3 A person in control of access to an essential facility may not withdraw or impair the nature of access once such access has been granted.
- 4.4 A person in control of access to an essential facility must apply the same conditions in similar circumstances to any person who requests access to an essential facility, and provide access to an essential facility pursuant to the same conditions and of the same quality as it provides to itself, its subsidiaries, related parties or persons which it possesses a financial interest.
- 4.5 A person in control of access to an essential facility must provide access to operational support systems or similar software systems necessary to render the provision of electronic communications services and broadcasting services by a person who requests access to an essential facility.

Procedure for the Request to access the Essential Facility

- 5.1 A person in control of access to an essential facility must upon receiving a written request, confirm receipt of such a request by notifying a person who requests access to an essential facility within two (2) days.
- 5.2 A person who requests access to an essential facility must submit a written request for access to an essential facility to the Authority at the same time that such a request is submitted to a person in control of access to an essential facility.
- 5.3 A person in control of access to an essential facility must respond to a written request for access within five (5) days of receipt of the request.
- 5.4 The response contemplated at regulation 5.3 must stipulate the commencement date for access to the essential facility, inspection of the essential facility and associated facilities and matters related thereto.

- 5.5 A person in control of access to an essential facility must communicate the terms and conditions of access to the essential facility within thirty (30) days from the date of confirmation of receipt of a written request for access to an essential facility.
- 5.6 A person in control of access to an essential facility must notify the Authority of its response and the terms and conditions of access to the essential facility within five (5) days of the expiration of the thirty (30) days referred to regulation 5.5 above.

Requirements for the submission of information to the Authority by a person in control of access to an essential facility

- 6.1 For the purposes of facilitating the monitoring and compliance with the general conditions of access to an essential facility detailed at regulation 4 above, the Authority may require a person in control of access to an essential facility to prepare and disclose the pertinent information regarding the operations and the terms and conditions regarding any aspect of its operations which are duly licensed by the Authority.
- 6.2 The Authority may direct any person in control of access to an essential facility to submit the pertinent information within fourteen (14) days upon receiving a written request from the Authority.

Access charges

- 7.1 A person in control of access to an essential facility must provide such access at a charge which is based on the forward looking long-run average incremental costs of an efficient operator providing access to the essential facility, unless the person in control of access to an essential facility and a person who requests access to an essential facility agree on another basis for the determination of access charges.
- 7.2 The Authority may review the access charges stipulated in these Regulations from time to time and determine any other basis for the calculation of access charges.
- 7.3 The implementation of the access charges will be determined on the regulatory financial information submitted to the Authority by a person in control of an essential facility which has been compiled pursuant to the guidelines stipulated in the COACAM Regulations.
- 7.4 Where a person in control of an essential facility is not obliged to submit regulatory financial information pursuant to the COACAM Regulations, a transition phase for the determination and imposition of access charges from the current charges imposed, will be for a period of twenty-four (24) months from the effective date of these Regulations.

- 7.5 Within the transition phase detailed in regulation 7.4 above, a person in control of access to an essential facility must charge an average unit cost, or the fully distributed unit cost standard as defined in COACAM Regulations to a person who requests access to an essential facility.

Procedure for the submission of disputes to the Authority regarding access to an essential facility

- 8.1 Where a dispute arises regarding any obligation stipulated in these Regulations binding a person in control of access to an essential facility, the persons to the dispute must have made reasonable attempts, in good faith, to resolve such a dispute through negotiation, mediation and arbitration prior to referring such a dispute to the Authority pursuant to regulation 8.2 below.
- 8.2 Any dispute regarding access to an essential facility which is submitted to the Authority must be in writing and adhere to the following principles:
- (a) The scope of the dispute must be sufficiently clear;
 - (b) There must be a statement by a duly licensed person serving to indicate the obligation imposed on a person in control of an essential facility arising from these Regulations to which the dispute directly relates;
 - (c) The duly licensed person must indicate its preferred remedy which would serve to sufficiently alleviate the dispute;
 - (d) The duly licensed person must indicate the adverse effect which may be reasonably anticipated to accrue as a result of the failure to resolve or remedy the dispute, and
 - (e) The duly licensed person must indicate the extent to which exhaustive attempts were made to resolve the dispute with a person in control of an essential facility prior to the referral of the dispute to the Authority.
- 8.3 Dispute resolution proceedings are deemed to be initiated upon receipt by the Authority of a written notice of a dispute.
- 8.4 The Authority may in relation to any dispute referred pursuant to these Regulations direct that the parties implement an interim arrangement for access to an essential facility which the Authority may consider appropriate, having regard to the circumstances and nature of the dispute.

- 8.5 Any interim arrangement for access to an essential facility must be implemented by the parties within a reasonable period or as determined by the Authority, and must remain effective until such time as the dispute has been resolved to the satisfaction of the Authority.
- 8.6 The Authority will consider any submissions as may be made by the parties to the dispute in the formulation of an appropriate interim arrangement.

Resolution of disputes by the Authority regarding access to an essential facility

- 9.1 The period within which the Authority will endeavour to resolve disputes referred pursuant to regulation 8 above, is thirty (30) days, and such period will commence upon a date determined by the Authority once it is satisfied with the adherence of the requirements detailed at regulation 9.2 below.
- 9.2 Upon receipt of a referred dispute, the Authority will determine whether such referred dispute adheres to the requirements of regulation 8.2, and further:
- (a) Whether the referral amounts to a dispute within the meaning of these Regulations, and
 - (b) Whether the information contained in the referral is adequate for the Authority's consideration.
- 9.3 The Authority will within seven (7) days of receipt of a referred dispute notify a person in control of an essential facility of the following:
- (a) A copy of the dispute, subject to the conditions detailed at regulation 10 below, and
 - (b) The commencement of the period within which the dispute must be resolved.
- 9.4 The Authority will within seven (7) days of receipt of a referred dispute notify a duly licensed person of the commencement of the period within which the dispute will be resolved.
- 9.5 Upon the commencement of the period within which the dispute must be resolved, the nature and scope of such a referred dispute may not be modified without the written consent of the parties to the dispute.
- 9.6 Upon the commencement of the period within which the dispute must be resolved, the parties to a referred dispute will be required to respond to the following within a period of seven (7) days:

- (a) Any requests for additional information by the Authority;
 - (b) Any meetings to be convened by the Authority, and
 - (c) Any other requirements which may be stipulated by the Authority within the period which the dispute must be resolved.
- 9.7 The Authority will, where it determines that it has sufficiently considered all relevant information and disregarded any irrelevant information presented by the parties to the referred dispute, publish a draft determination for the resolution of the referred dispute detailing the following:
- (a) The manner in which the referred dispute has or is to be resolved;
 - (b) Invitation to the parties to the referred dispute to submit written representations on the adequacy of the draft determination for the resolution of the referred dispute within fourteen (14) days, and
 - (c) The proposed date for the implementation of any proposed remedies pertinent to the resolution of the referred dispute.
- 9.8 Upon receipt of written representations from the parties to the referred dispute within the period stipulated at regulation 9.7 above, the Authority will thereafter within a period of thirty (30) days publish a final determination for the resolution of the referred dispute.
- 9.9 The final determination will detail the substantive reasons for the proposed resolution of the referred dispute.
- 9.10 The final determinations issued by the Authority are binding upon the parties to the referred dispute and may not be referred to the Complaints and Compliance Committee.
- 9.11 The final determinations issued by the Authority shall not preclude either party from instituting an action before a competent court of law.

Confidentiality

- 10.1 Where a person who requests access to an essential facility acquires information from a person in control of access to an essential facility prior to, throughout the course of, or after the process of negotiating access and where such information is acquired in confidence, in connection with and solely for the purpose of such negotiation or arrangements, such information must be used solely for the purposes for which it was furnished and it must be retained or transmitted as being confidential.

- 10.2 A person who acquires, is furnished or comes to possess confidential information pursuant to negotiations entered into for the purposes of facilitating access to an essential facility must not transmit, publish or disclose such information to any other person without the written consent of the person deemed to be the proprietor of such information.

Offences and Penalties

- 11.1 A person who contravenes the provisions of these Regulations or an order or determination made by the Authority in terms thereof, is guilty of an offence, and if convicted, is liable to a fine not exceeding ten (10) percent of the person's annual turnover over the period within which the contravention continues.

Amendment and Repeal

- 12.1. The Authority may amend or repeal these regulations in terms of section 43(9) of the Act, by notice in the Gazette.
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