

# Government Gazette Staatskoerant

REPUBLIC OF SOUTH AFRICA  
REPUBLIEK VAN SUID-AFRIKA

Vol. 534

Pretoria, 4 December 2009  
Desember

No. 32786

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**CONTENTS***No.**Page  
No.      Gazette  
No.***GENERAL NOTICE****Independent Communications Authority of South Africa***General Notice*

1600 Electronic Communications Act (36/2005): Notice in terms of section 4 (4) read with section 44 (1) ..... 3 32786

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## GENERAL NOTICE

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### NOTICE 1600 OF 2009



#### INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

#### **NOTICE IN TERMS OF SECTION 4(4) OF THE ELECTRONIC COMMUNICATIONS ACT READ WITH SECTION 44(1) OF THE ELECTRONIC COMMUNICATIONS ACT 36 OF 2005.**

- (1) The Independent Communications Authority of South Africa ("ICASA") 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 Electronic Communications Facilities Leasing Regulations in terms of sections 4 and 44 of the Act and section 4(3)(j) of the Independent Communications Authority of South Africa Act No. 13 of 2000, ("the ICASA Act").
- (2) Interested persons are invited to submit written representations on the draft Electronic Communications Facilities Leasing Regulations no later than **21 January 2010**, by post, hand delivery, facsimile transmission, or electronically transfer (in Microsoft Word) for the attention of:

Ms N Makhubu  
ICASA  
Private Bag X10002  
Sandton  
2146

or

Block A  
Pin Mill Farm  
164 Katherine Street  
Sandton

Fax: (011) 566 3682  
Telephone: (011) 566 3681

E-mail: [NMakhubu@icasa.org.za](mailto:NMakhubu@icasa.org.za)  
cc: [nmaku@icasa.org.za](mailto:nmaku@icasa.org.za); [pcokie@icasa.org.za](mailto:pcokie@icasa.org.za)

- (3) Persons making written representations are notified that no public hearings will be held with respect to these draft regulations.

- (4) All written representations submitted to ICASA pursuant to this notice will be made available for inspection by interested persons at the ICASA library and copies of such representations will be obtainable on payment of the prescribed fee.
- (5) At the request of any person who submits written representations pursuant to this notice, ICASA 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) The final regulations will be published in the Government Gazette.

**INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA****REGULATIONS IN TERMS OF SECTIONS 4 AND 44 OF THE ELECTRONIC COMMUNICATIONS ACT OF 2005 (Act No.36 of 2005) READ WITH SECTION 4 (3) (j) ICASA ACT OF 2000 (Act No.13 of 2000) IN RESPECT TO ELECTRONIC COMMUNICATIONS FACILITIES LEASING**

I, Paris Mashile, Chairperson of the Independent Communications Authority of South Africa ("ICASA") hereby approve and publish the draft regulations in the schedule made in terms of sections 4 and 44 of the Electronic Communications Act and section 4 (3) (j) of the ICASA Act 2000.



**PARIS MASHILE**  
**CHAIRPERSON**

## **ELECTRONIC COMMUNICATIONS FACILITIES LEASING REGULATIONS**

### **PART I**

#### **1. Definitions**

(1) 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 otherwise specified.

(2) The following words and phrases shall have the following meanings:

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

"collocation" means the physical space including physical infrastructure at which more than one licensee install their electronic communications equipment and facilities along with, on the same floor or in the same premises as other licensees' electronic communications equipment and facilities, and in some cases, interconnects to other licensees;

"compliance notice" means the certificate issued by the Authority in terms of regulation 16;

"ECNS" means electronic communications network services;

"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 and any person currently providing electronic communications facilities;

"Electronic communications facilities seeker" means any person 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);

"physical infrastructure" means buildings, masts, power systems, ducts, air conditioning and other physical mechanisms for obtaining access to or providing electronic communications equipment or facilities.

#### **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 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 8 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 45 days from the date of request provided that the parties may agree on a longer period, which period must not exceed 60 days.

#### **4. Financial feasibility**

- (1) For purposes of section 43(4) of the Act, financial feasibility is where electronic communications facilities leasing request meets the following minimum requirements:
  - (a) There are no major adverse financial consequences due to overloading of the network of the electronic communications facilities provider;
  - (b) The electronic communications facilities provider does not have to build further network capacity ahead of budgeted spend; or
  - (c) In the event that the electronic communications facilities provider is required to expand the available network capacity ahead of budgeted spend, the electronic communications facilities seeker shall be afforded an opportunity to cover a proportion of the costs involved to facilitate the expansion.

- (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 if 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 tend to have a negative effect on the electronic communications facilities provider's physical network, network elements or capacity.

- (2) Any dispute of 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**

The parties to an electronic communications facilities leasing must ensure that their agreement:

- (a) contains the technical standards of both parties; and
- (b) complies with all relevant international standards and recommendations of the International Telecommunications Union and any other standards 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 those service levels.

#### **8. Confidentiality**

Subject to the provisions of section 4D of the ICASA Act 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.



## 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.
- (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.
- (3) An electronic communications facilities provider must apply similar terms and conditions, including those relating to charges, in comparable circumstances to electronic communications facilities seekers requiring equivalent services.

## 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, this relationship must be clearly identified.
- (3) Charges for electronic communications facilities must be sufficiently unbundled so that a facilities seeker does not have to pay for anything it does not require for the requested electronic communications facilities leasing.

## 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 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 leasing 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 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 parties in planning, establishing or maintaining their electronic communications network, but not limited to:
  - (i) the technical specifications of the electronic communications network;
  - (ii) physical infrastructure associated with electronic communications facilities leasing; and
  - (iii) any material changes to 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.

## **PART IV**

### **Framework, model terms and conditions of agreements**

#### **12. Terms and conditions of electronic communications facilities leasing agreements**

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

- (a) definitions of terms and abbreviations;
- (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 and any physical infrastructure;
  - (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 physical infrastructure and 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 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; and
  - (vi) network protection and safety measures;
- (g) date of coming into operation of agreement;
- (h) termination of agreement covering:
  - (i) grounds for termination; and
  - (ii) termination procedures;
- (i) dispute resolution and arbitration procedures including contractual dispute resolution procedures.

## Part V

### 13. 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 this regulation 13.
- (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), the party requesting electronic communications facilities leasing may notify the Authority in accordance with this regulation 13.
- (c) parties have not reached agreement on the terms and conditions of an electronic communications facilities agreement within 45 days of the request to lease electronic communications facilities being agreed to or determined as reasonable, then any party may notify a dispute with the Authority.

- (2) A dispute notified to the Authority in terms of regulation 13 (1), (a), (b) and (c) must be in writing and must set out the details of the alleged dispute.
- (3) Where the Authority is notified of a dispute the notifying party must provide the Authority with sufficient information to allow it to make its decision on the complaint notified with it.
- (4) The Authority must, within 14 days of the notification of the dispute and after considering all relevant information, determine whether the dispute warrants further investigation and, if not, dismiss it accordingly.
- (5) 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 14 days of the notification of the dispute;
  - (b) afford the other party to the dispute to respond to the allegations in writing within 14 days of receipt of the copies of the complaint referred to in sub-regulation 13(5)(a); and
  - (c) afford the party which notified the dispute to reply to the response in writing within 14 days.
- (6) The Authority may call for oral representations after the submissions made by the parties referred to in regulation 13 (5).

- (7) Notwithstanding this section, the Authority may determine the matter on papers submitted to it by the parties where the Authority is of the opinion that the matter is urgent.
- (8) The Authority shall, within 14 days of the last day as provided for regulation 13 (4), or 13 (5) (b) or 13 (5) (c) whichever occurs last, furnish the parties to the dispute with its final decision.
- (9) Regulation 13 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**

#### **14. Submission and review of electronic communications facilities leasing agreements**

An electronic communications facilities leasing agreement and/or electronic Communications facilities leasing amendment agreement must be submitted to the Authority in terms of section 45(1) of the Act within 5 days of the date of signature of the agreement.

#### **15. Consideration by the Authority and compliance notice**

- (1) The Authority shall notify the parties in writing within 20 days of submission whether the agreement is consistent with the Act and these regulations.
- (2) Where the Authority determines that the electronic communications facilities leasing agreement or electronic communications facilities leasing amendment agreement is consistent with the Act and these regulations, the Authority shall issue a compliance notice.
- (3) Where the Authority determines that the agreement is not consistent with the regulations, then the Authority shall direct the parties to agree on new terms within a period determined by the Authority, which period must not exceed 30 days.
- (4) Where the parties submit an amended agreement in terms of section 45(7) of the Act, then the Authority shall notify the parties in writing within 20 days whether or not the amended agreement is consistent with the Act or these regulations.

#### **16. Filing of electronic communications facilities leasing agreements**

- (1) An electronic communications facilities leasing agreement and/or the electronic communications facilities leasing amendment 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 issued a compliance notice. The date of filing is the day when the compliance notice is issued by the Authority.

- (2) The Authority shall publish the electronic communications facilities leasing agreement and electronic communications facilities leasing amendment agreement and make copies available in its library within thirty (30) days of issuing the compliance notice.

## **PART VI**

### **General**

#### **17. Date of operation of agreement**

The parties may agree on a date when the electronic communications facilities leasing agreement and/or the electronic communications facilities leasing agreement comes into operation, which date must be after the filing of the agreement with the Authority.

#### **18. 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 on end users.
- (2) An electronic communications facilities leasing agreement or 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) Either party to an electronic communications facilities leasing agreement may not terminate an electronic communications facilities leasing agreement unless:
  - (a) the termination is as a result of:
    - (i) material breach of the electronic communications facilities leasing agreement;
    - (ii) vis major.
- (4) Before terminating an electronic communications facilities leasing agreement or an electronic communications facilities leasing amendment agreement, a party to that agreement must give written notice of its intention to terminate to the Authority and the other party. The notice must specify the grounds for termination and, in the case of material breach, requiring that the breach be remedied within a period of not less than 30 days.



## 19. Contraventions and Penalties

- (1) Upon a determination of a contravention 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 and 14;
  - (b) One Hundred Thousand Rand (R 100 000.00) for contravention of regulations 6(a);
  - (c) Fifty Thousand Rand (R 50 000.00) for contravention of all regulations not specified in regulations 19 (1)(a) and 19(1)(b).

## 20. Short title and commencement

These draft regulations are called the Electronic Communications Facilities Leasing Regulations, 2010 and commence on the date of publication of the final regulations in the Gazette.

## 21. Transitional provisions

- (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
Before January 2007	Within 3 months of the date of commencement of these regulations
From January 2007 to the date of commencement of these regulations	After the 3 months mentioned above, within 6 months after the coming into effect of the regulations

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

## **22. 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.



## **ANNEXURE A: EXPLANATORY NOTE**

### **DRAFT ELECTRONIC COMMUNICATIONS FACILITIES LEASING REGULATIONS**

#### **1. INTRODUCTION**

##### **1.1 Purpose**

- 1.1.1 The purpose of this explanatory note is to provide stakeholders with an explanation of the contents of the latest draft of the electronic communications facilities leasing regulations.
- 1.1.2 Given the time delay since the last published drafts (i.e. December 2007) this explanatory note seeks to: (a) contextualize the introduction of new concepts including financial and technical feasibility and dispute resolution, as required by the Electronic Communications Act, Act No. 36 of 2005 ("the Act"); (b) explain why certain provisions have either been included or omitted with reference to the history of the regulations on electronic communications facilities leasing in South Africa and the needs of the industry as set out in the written and oral responses made to the Authority as reflected in the December 2007 draft regulations; and (c) set the regulations in context with reference to international best practice.
- 1.1.3 This note is not legally binding, nor is it a legal opinion. It is published purely to assist stakeholders and to provide insight into the thinking behind the regulations.

##### **1.2 Background**

- 1.2.1 Electronic communications facilities leasing is an important way of introducing competition in the electronic communications sector.
- 1.2.2 The Authority does not intend to regulate the parties' commercial relationships, but to instruct parties on the required form and minimum requirements in relation to the content of electronic communications facilities leasing agreements and to facilitate the attainment of the objectives of the Act particularly those set out in Chapter 8 of the Act.
- 1.2.3 The first draft electronic communications facilities leasing regulations drafted in terms of Chapters 8 of the Act were published in July 2007 to

replace the Facilities Leasing Guidelines of 2000; the Supplementary Facilities Leasing Guidelines of 2002 and the Interconnection and Facilities Leasing Guidelines and Supplements of 2004.

- 1.2.4 Written representations were received from interested parties and public hearings were held in October 2007
- 1.2.5 A revised set of regulations was published in Government Gazette 30611 of December 2007, incorporating the comments received from the earlier public consultation process.
- 1.2.6 Comments on the December 2007 draft regulations were received in February 2008.
- 1.2.7 This was followed by a public workshop held in April 2008.
- 1.2.8 The current draft regulations thus capture stakeholders' comments and concerns raised through the public workshop and consultation processes referred to hereinbefore.
- 1.2.9 The remainder of the explanatory note sets out the key changes to the latest draft of the regulations and provides the Authority's rationale for such changes.

## **2. DRAFT REGULATIONS**

### **2.1 Definitions (regulation 1)**

In general substantive matters are provided for within the body of the regulations. Only specific definitions are provided where necessary. Below are the terms defined:

#### *2.1.1 "Compliance Notice"*

This notice will be issued by the Authority in the discharge of its obligations in terms of section 45(5) of the Act. The regulations refer to a Compliance Notice to be issued by the Authority once the agreement submitted to it has been found to be in compliance with the regulations and the Act ("the governing framework"). If the agreement is not compliant, the parties will receive certificate from the Authority within the

stipulated timeframes indicating the amendments that need to be made in order to align the agreement with the governing framework. Once a Compliance Notice has been issued, the agreement is considered to have been filed with the Authority and will become effective and enforceable. This notice will be issued by the Authority in the discharge of its obligations in terms of section 39 (4) of the Act.

#### *2.1.2 "Electronic Communications Facilities Provider"*

In the regulations, the definition of the term electronic communications facilities provider includes all electronic communications network licensees that are leasing electronic communications facilities.

#### *2.1.3 "Electronic Communications Facilities seeker"*

The definition of an electronic communications facilities seeker is not limited to existing licensees, but includes applicants for an individual licence.

### **2.2 Purpose of regulations (regulation 2)**

- 2.2.1 The regulations seek to guide the industry on how the process of conducting negotiations and concluding agreements should be handled.

### **2.3 Requests for electronic communications facilities (regulation 3)**

- 2.3.1 The Act requires the Authority to determine time periods for responses to requests from facilities seekers. These timeframes form the basis of disputes on the inability or unwillingness to agree or negotiate an agreement under section 43(5). Where a request is made it should refer to the facilities seeker's technical requirements and physical parameters. This requirement will assist in the speedy determination of disputes on reasonableness in terms of section 43(2) of the Act.
- 2.3.2 The Authority has taken account of suggestions on time periods for the negotiation of agreements and considers 45 days, which are business days as defined in the Act, to be sufficient to conclude a standard electronic communications facilities leasing agreement.

## **2.4 Financial and technical feasibility (regulation 4 and 5)**

### *"Financially feasible" and "technically feasible"*

- 2.4.1 The definition of "technical feasibility" and "financial feasibility" is 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 electronic communications facilities leasing, but in the future, in relation to other forms of access as well. The concepts also introduce an important commercial consideration namely that a request for electronic communications facilities leasing must be considered in relation to the spreading of or allocation of risk between the parties' respective networks, their businesses, and ultimately, their financial viability.
- 2.4.2 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. These concepts as set out in the regulations seek to guide the industry on the Authority's thinking on how a technical feasibility or financial feasibility determination will be made. It should be noted that the Authority has defined "financially feasible" to include "economically feasible" since licensees are likely to follow different accounting and financial models.
- 2.4.3 *Should bank guarantees form part of a consideration of financial feasibility?*

The Authority is of the view that a pronouncement on bank guarantees would constitute interference in the commercial activities of the operators. This is because the Authority would be telling the leasing parties how to run their businesses. What this therefore means is that the question of whether an electronic communications facilities leasing seeker should provide a bank guarantee before leasing facilities is a business decision based on how parties run their respective businesses.

## **2.5 Principles for electronic communications facilities leasing agreements (Part III)**

- 2.5.1 Quality of service for electronic communications facilities leasing 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.

- 2.5.2 Electronic communications facilities leasing information, which is basic information, must be made generally available in order to prevent discrimination, and to facilitate the conclusion of agreements.
- 2.5.3 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.
- 2.5.4 With respect to regulation 9 (1) the Authority is of the view that this regulation does not give parties power to place unreasonable volumes to each other so as to be seen as not unfairly discriminating e.g. placing of similar volume requirements on similarly sized licensees.
- 2.5.5 The Authority is cognizant of the fact that regulation 10 (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 10(3) relates to transparency in charges for bundled products and/or services. What this therefore means is that where the electronic communications facilities leasing products and/or services are offered in a bundle charges for each product and/or service must be clear and transparent.

## **2.6 Electronic communications facilities leasing information (regulation 11)**

- 2.6.1 The Authority believes that the provision of electronic communications facilities leasing information is an important requirement in that information must be available as provided by the electronic communications facilities leasing provider and based on such provider's own requirements. This will cut down on frivolous requests and will similarly facilitate reasonable requests.
- 2.6.2 This provision is a specific requirement of the Act.

## **2.7 Required terms and conditions of agreements (regulation 12)**

- 2.7.1 This section sets out the required 'standard' terms and conditions for electronic communications facilities leasing 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.

## **2.8 Disputes (regulation 13)**

- 2.8.1 The dispute resolution regulation is an important part of the electronic communications facilities leasing regulatory framework in 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 complete failure to agree. Such failure to agree, will be contrary to section 2 (b) of the Act and may ultimately have a negative effect on consumers.
- 2.8.2 It is crucial to note that regulation 13 does not seek to regulate matters that fall squarely within the jurisdiction of the Complaints and Compliance Committee (CCC), i.e. disputes that are notified with the CCC in terms of section 46 of the Act. Instead regulation 13 relates to disputes notified with the Authority in terms of section 43(2) and 43(5) of the Act.

## **2.9 Requirements for submission of information to the Authority**

- 2.9.1 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.
- 2.9.2 Concern was raised in some submissions with respect to ICASA's ability to request information from time to time regarding electronic communications facilities leasing information from the industry. ICASA confirms that it may, under section 4(3) (g) of the ICASA Act, request such information.



## **2.10 Review and filing of agreements (regulations 14, 15, and 16)**

2.10.1 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), and must be a date after the Compliance Notice is issued.

2.10.2 The Act requires that electronic communications facilities leasing agreements be "submitted" to the Authority once concluded. It further 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 Compliance Notice will be issued and the agreement would be filed by the Authority. The agreement will become effective and enforceable upon filing.

2.10.3 The Authority is the central repository for electronic communications facilities leasing agreements and will take responsibility for the pro-active publication of the agreements and ensure that such agreements are available in its library. Operators are not required to publish their agreements but must provide agreements upon request.

## **2.11 Operation, suspension and termination of agreements (regulation 17 and 18)**

This part of the regulations is consistent with previous approaches in previous drafts of the regulations. In addition to the previous requirements, this section now provides for the commencement of agreements and requires that, for the avoidance of doubt, the commencement date of an agreement must be after the issuance by the Authority of a Compliance Notice.<sup>1</sup>

## **2.12 Contraventions and penalties (regulation 19)**

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

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<sup>1</sup> See regulation 18

### 2.13 Transitional provision (regulation 21)

2.13.1 The Authority shall ensure that all agreements that have been entered into historically, in terms of the Telecommunications Act of 1996, Act No. 103 of 1996, (as amended), 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.

2.13.2 The Authority is of the view that a total of six months is required to review all of the agreements in the sector. The table set out below will assist the Authority in ensuring that it is not inundated with agreements that are submitted at the last minute, but rather that the submission is staggered thus enabling the Authority to manage its workload. The Authority has used 2006, the year in which the Act became effective, to determine when agreements should be submitted for review.

Year agreement entered into	Date to be submitted to ICASA
On or before 01 January 2007	Within 3 months after the coming into effect of the regulations
On or after 01 January 2007	After the 3 months mentioned above the agreements then within 6 months after the coming into effect of the regulations

### 2.14 Repeal of regulations (regulation 22 )

Once published, these regulations will repeal the previous regulations published under the Telecommunications Act, 1996 (as amended), in their entirety hence the requirement to resubmit existing agreements to the Authority and to make them consistent with these regulations.

## 3. Other matters not included in the regulations

### 3.1 Pricing

3.1.1 Some submitters' representation stated that the Authority must deal with matters pertaining to section 47 of the ECA in particular setting of charges for interconnection services. Section 47 reads as follows: "*The Authority may prescribe regulations establishing a framework of wholesale rates*



*applicable to specified types of electronic communication facilities and associated services taking into account the provisions of Chapter 10".* The Authority had in previous draft provision dealing with pricing framework in detail. The Authority is of the view that section 47 does not empower the Authority to prescribe wholesale pricing but to establish a **framework** of the rates to be charged. To reiterate section 47 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.

#### 4. CONCLUSION

The Authority has published this explanatory note along with the latest draft of the electronic communications facilities leasing regulations in the hope that it provides interested parties with a context for the present draft.