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## GENERAL NOTICE

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### NOTICE 994 OF 2002



#### **INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA (ICASA)**

#### **NOTICE OF INTENTION TO AMEND AND SUPPLEMENT THE EXISTING FACILITIES LEASING GUIDELINES ISSUED BY THE AUTHORITY IN TERMS OF SECTION 44 OF THE TELECOMMUNICATIONS ACT OF 1996 AS AMENDED AND WHICH WERE PROMULGATED BY THE MINISTER UNDER GAZETTE 20993 NOTICE NO. 1260 OF 2000.**

The Independent Communications Authority of South Africa (the Authority) hereby gives notice that on 15 March 2002 a notice (government gazette no. 23236) was issued inviting comments on the proposed Supplementary Facilities Leasing regulations that the Authority intends to prescribe. Subsequent to receipt of such comments the Authority held hearings on these proposed regulations on 23 May 2002.

As a consequence of the process set out above the Authority intends to amend the existing Facilities Leasing Guidelines (Gazette 20993 Notice No. 1260 of 2000) by prescribing the Supplementary Facilities Leasing regulations which are attached herein under the schedule. The amendments will be effected in terms of section 96 of the Act read with sections 44 and 32A. The existing Facilities Leasing Guidelines shall remain in full force and effect, except as may be amended by these Supplementary Facilities Leasing regulations once they come into effect.

Interested persons are hereby invited to submit written representations or comments with regard to the proposed amendments to the existing Facilities

Leasing Guidelines and the Supplementary Facilities Leasing regulations no later than 13H00 on the **18 of July 2002** by post, hand delivery or facsimile transmission. Where available a softcopy of the corresponding hardcopy of the representations should be e-mailed to [smadyibi@icasa.org.za](mailto:smadyibi@icasa.org.za)

The written representations must be addressed to Mr Siyabonga Madyibi, SNO Project Leader, ICASA, Private Bag X10002 Sandton 2146 at Block C Pin Mill Farm 164 Katherine Street Sandton, Facsimile (011) 448 2171 Tel (011) 321 8442 or cell 083 326 0833.

**MANDLA LANGA**  
**CHAIRPERSON**  
**ICASA**

## **SCHEDULE**

### **SUPPLEMENTARY FACILITIES LEASING GUIDELINES**

#### **1. DEFINITIONS**

- 1.1 The provisions of the facilities leasing guidelines published in General Notice 1260 of 2000 ("the facilities leasing guidelines") shall continue to apply as supplemented and amended by these guidelines.

These guidelines shall, unless the context indicates the contrary, be interpreted and applied in a manner consistent with the facilities leasing guidelines. For avoidance of doubt, except as may be amended by these guidelines once approved and published by the Minister, the existing facilities leasing guidelines shall continue in full force and effect, without change, and shall continue to apply to all facilities providers and facilities acquirers whether licenced prior to the date of enactment of the Telecommunications Amendment Act No. 64 of 2001 or any time thereafter without prejudice.

- 1.2 The facilities leasing guidelines are hereby amended:

- 1.2.1 By the substitution in section 1 of the definition of "Telecommunications Act" with the following definition:

Telecommunications Act means the Telecommunications Act of 1996 (Act No. 103 of 1996) as amended from time to time, including the Telecommunications Amendment Act of 2001 (Act No. 64 of 2001).

- 1.2.2 By the substitution in section 1 of the term "Service Provider" in the definition of "Major Operator" with the term "Facilities Provider".

- 1.2.3 By the substitution in section 1 of the definition of "Public Operator" with the following definition:

Public Operator means a provider of public switched telecommunication service, public mobile cellular telecommunication service and Sentechnics in respect to its license to provide an international telecommunication gateway service as a carrier of carriers.

- 1.2.4 By the substitution in section 1 of the definition of "Facilities Acquirer" with the following definition:

Facilities Acquirer means a provider of a telecommunication service, including a provider of public switched telecommunication services, who has leased facilities or has requested to lease facilities from a facilities provider.

- 1.2.5 General amendment: In any case where these guidelines expand upon or conflict with the existing facilities leasing guidelines in respect to the subject matter addressed herein these guidelines once approved in terms of section 96 of the Act shall take precedence.

- 1.3 Affiliate means any person that is legally or in fact controlled by, under common control or controls a facilities provider whether directly or indirectly.
- 1.4 Customer Premise Equipment means end user telephone, computer or other communications equipment and any associated software located at the customer's premises and connected to the network of a facilities provider for communicating over such network.
- 1.5 Local Loop means any wire, including wiring on the network side up to and including the terminal connection point (excluding wiring on the user side of such terminal connection point), cable, antenna, mast or other thing used to connect users to the facilities provider's local exchange and "sub loop" shall have a corresponding meaning where reference is made to a portion of the local loop.
- 1.6 Person shall include individuals, bodies corporate and unincorporated associations, partnerships, joint-stock companies, trusts and similar legal entities recognized under applicable law.
- 1.7 Shared Access means the leasing of a portion of the local loop or sub loop, generally the higher frequency spectrum of the local loop, to provide services such as high-speed data and Internet services while the facilities provider continues to use the same local loop or sub loop to provide services to its customers.
- 1.8 Terminal Connection Point means any point or points and associated equipment at which signals are conveyed to or from one or more items of customer premises equipment.
- 1.9 Unbundled Local Loop means the leasing to a facilities acquirer of a local loop on an exclusive basis.
- 1.10 In these guidelines words will have the meaning given to them in the Telecommunication Act 103 of 1996, as amended, or if any words are not defined therein, then they shall have the meaning given to them herein or in the facilities leasing guidelines, as amended from time to time.

## **2. APPLICATION OF THESE GUIDELINES**

- 2.1 These guidelines apply to all facilities providers and facilities acquirers and set out additional rights and obligations applicable to such persons when entering into facilities leasing agreements. These guidelines should be read in conjunction with the facilities leasing guidelines (General Notice 1260 of 2000) and together form a single unified regulatory framework for facilities leasing under section 44 of the Telecommunication Act. Facilities leasing agreements entered into pursuant to these guidelines shall comply in all respects to facilities leasing guidelines and vice-a-versa.

These guidelines do not:

- a. Limit the matters which may be dealt with in a facilities leasing agreement but provide a minimum set of issues which may be addressed; or
- b. Prevent the parties to a facilities leasing agreement from negotiating or entering into bilateral or multilateral agreements, which deal with issues other than those addressed in these guidelines.



- 2.2 These guidelines and the facilities leasing guidelines are without prejudice to the rights granted to the second network operator under section 32A of the Telecommunication Act. Pursuant to section 32A(2)(a) and section 32A(4)(c) of the Telecommunication Act, any facilities leasing agreements entered into by the second network operator with Telkom relating to resale for the purpose of providing public switched telecommunication services shall lapse two years after the date of their conclusion. The term of any facilities leasing agreements entered into pursuant to section 44 of the Telecommunication Act by the second network operator with Telkom relating to facilities leasing for purposes other than resale shall be governed by the terms and conditions of such facilities leasing agreements and applicable law.
- 2.3 For purposes of these guidelines and the facilities leasing guidelines (General Notice 1260 of 2000), Telkom is declared a major operator. The Authority further finds and declares that for so long as Telkom remains a major operator; the telecommunications facilities of Telkom listed in section 3.3 below shall be essential facilities. The Authority's determination under this section is based upon the public record developed in response to General Notice 358 of 2002 (gazette no. 23236) and conclusions drawn by the Authority that the telecommunications facilities listed in section 3.3 are predominantly provided by a single or limited number of suppliers and cannot feasibly be substituted at the present time. Independently, the Authority is of the opinion that declaring such telecommunication facilities as essential facilities will promote the objects of the Telecommunication Act as amended.

### **3. OBLIGATIONS OF FACILITIES PROVIDER**

- 3.1 It shall be the obligation of facilities providers to lease or otherwise make available to facilities acquirers telecommunication facilities, which shall include any wire, cable, antenna, mast or other thing, which is or may be used for or in connection with telecommunication. For avoidance of doubt, in making telecommunication facilities available, facilities providers shall also make available those services, which are ancillary to such facilities or otherwise necessary for proper functionality and utilization of the acquired telecommunication facilities. Facilities providers are not required, however, under these guidelines or the facilities leasing guidelines to make such services available separately but only in cases where a facilities acquirer leases the telecommunication facilities associated with such services.
- 3.2 Facilities leasing agreements entered into pursuant to these guidelines shall comply with section 3.1 of the facilities leasing guidelines.
- 3.3 A request for any of the following listed essential facilities and ancillary services shall be deemed reasonable when provided by a major operator unless the Authority determines otherwise where the reasonableness is disputed and such dispute is referred to the Authority pursuant to section 44(6) of the Telecommunication Act. The reasonableness of any dispute under this section 3.3 shall be determined by the Authority, after considering any written representations and after hearing the parties, based on the factors referred to in section 43(1)(b)(i) and (ii) of the Telecommunication Act.

Essential facilities of a major operator include:

- (a) Shared access to the local loop and any portion thereof (sub loop) on a shared basis with the major operator;

- (b) Unbundled local loops after the expiration of the two-year period referenced in section 44(4) of the Telecommunication Act;
  - (c) Network interface facilities, such as subscriber line cards in exchange, network termination units and other such sub-elements of the local loop;
  - (d) Switching facilities;
  - (e) Collocation space and facilities where such space exists, allowing for reasonable expansion by the major operator in determining space availability, including access to power, heating, ventilation, air conditioning, and related amenities;
  - (f) Line conditioning;
  - (g) Transmission facilities connecting two or more local exchanges within a local exchange area;
  - (h) Operations and monitoring facilities;
  - (i) Maintenance, repair, and testing;
  - (j) Rights of way, way leaves or servitudes to the extent permissible under the major operator's rights; and
  - (k) Space on or within poles, ducts, cable trays, manhole, hand holds and conduits owned or controlled by the major operator and where such space exists allowing for reasonable expansion by the major operator in determining space availability.
- 3.4 The list of essential facilities and ancillary services set forth in section 3.3 above is not exhaustive. Subject to any restrictions or other limitations in these guidelines or the Telecommunication Act, the Authority may declare additional telecommunication facilities and ancillary services as essential by notice in the Gazette where such additional telecommunication facilities and services are identified in instances where the Authority is called upon to exercise its authority to resolve disputes in accordance with section 44(6) of the Telecommunication Act.
- 3.5 Within five (5) business days of receipt of a written request of a facilities acquirer to enter into a facilities leasing agreement, the requested facilities provider shall respond in writing informing the facilities acquirer whether the facilities provider considers such request unreasonable and the basis for the facilities provider's response. In any case where the facilities provider determines that the request is unreasonable and the facilities acquirer disputes the determination, either party may refer the dispute to the Authority and the provisions of section 44(6) of the Telecommunication Act shall govern.
- 3.5.1 Requests to enter into a facilities leasing agreement shall identify the type of telecommunication facilities and, as applicable, associated ancillary services and other information such as relevant geographical area(s) affected in sufficient detail to allow the facilities provider to make a determination with regard to the reasonableness of such request.
- 3.5.2 For purposes of these regulations in any case where a writing is required, the requirement is met if the document or information is:
- (a) in paper form; or
  - (b) in the form of a data message that is accessible in a manner usable for subsequent reference.
- 3.6 In the application of section 3.3 or section 3.4 above, the Authority shall not require a facilities provider to make telecommunication facilities and associated ancillary services available where such facilities provider does not also make such



telecommunication facilities available to itself or an affiliate or otherwise uses such telecommunication facilities in offering its own competing services.

- 3.7 Subject to section 32A(2) and (4) of the Telecommunication Act, no public switched telecommunication service licensee shall be required to unbundle its local loop for the period of two years referred to in section 32A(2)(a) and (4) of the Telecommunication Act. For avoidance of doubt, access to the local loop and sub loops where the loops (sub loops) are leased on a shared basis with the facilities provider shall not constitute unbundling of the local loop.
- 3.8 Nothing in these guidelines should be construed to require a facilities provider to lease or otherwise make available to a facilities acquirer customer premise equipment for purposes of meeting such facilities provider's obligations under section 44 of the Telecommunication Act.
- 3.9 Subject to 32A(2)(a) and 32A(6) of the Telecommunication Act, a facility provider shall not place any restrictions on the resale of the telecommunication facilities and associated ancillary services obtained by any facilities acquirer authorized to provide resale. Section 5 of the facilities leasing guidelines applies to all facilities leasing agreements entered into pursuant to these guidelines.
- 3.10 Any term or condition of any facilities leasing agreement that violates the Telecommunication Act, these guidelines or the facilities leasing guidelines shall be null and void and have no legal effect to the extent of its illegality.
- 3.11 The provision of section 12 of the facilities leasing guidelines shall apply to the charges for all telecommunication facilities and ancillary services leased by a facilities provider to a facilities acquirer that have not otherwise been declared by the Authority to be an essential facility that is provided by a major operator.
- 3.12 Except during the transition period specified in section 4 below, the provisions of section 13 of the facilities leasing guidelines shall apply to the charges for essential facilities and ancillary services of major operators under these guidelines.

#### **4. TRANSITION PERIOD -- FACILITIES LEASING CHARGES**

- 4.1 The guidelines of this section 4 are intended to permit the orderly transition to the LRIC pricing regime prescribed in section 13 of the facilities leasing guidelines and shall apply only for a period of two years from the date on which they are adopted, unless extended by the Authority by notice in the Gazette.
- 4.2 Cost-based charges must be used by major operators of essential facilities in leasing essential facilities to any requesting public operator as calculated pursuant to the guidelines in this section 4.
- 4.3 Reasonable cost of capital shall be used in calculating the cost of an essential facility.
- 4.4 The depreciation rates used in calculating economic costs of essential facilities shall be the depreciation rates set forth in the relevant section of the major operator's Chart of Accounts/Cost Allocation Manual (COACAM).

- 4.5 Allowable common costs are costs efficiently incurred in providing a group of essential facilities and ancillary services that cannot be attributed directly to individual essential facilities or ancillary services.
- a. The sum of the allocation of common costs for all essential facilities and services shall equal the total common costs associated with the relevant accounts from the COACAM.
  - b. The following factors shall not be considered in a calculation of economic costs of an essential facility:
    - i. Avoidable costs. Avoidable costs are the costs of marketing, billing, collection, and other costs associated with offering retail telecommunications services to subscribers who are not telecommunications service providers.
    - ii. Opportunity costs. Opportunity costs include the revenues that a major operator would have received for the sale of telecommunications services, in the absence of competition from public operators that purchase essential facilities.
    - iii. Revenues to subsidize other services. Revenues to subsidize other services include revenues associated with essential facilities or telecommunications service offerings other than the essential facility and ancillary service (as applicable) for which a rate is being established.
- 4.6 The cost-based charges per unit of an essential facility equals the actual cost of the essential facility, as illustrated in section 4.7 below, divided by the total number of units of the essential facility that the major operator has provided to requesting public operators and has used in offering its own services during the most recent measuring period for which such costs and numbers are available.
- 4.7 Essential facility rates shall be structured consistently with the manner in which the costs of providing the essential facilities are incurred.
- 4.7.1 The costs of dedicated facilities shall be recovered through flat rate charges.
  - 4.7.2 With respect to essential facilities that a major operator offers on a flat-rate basis, the number of units is defined as the discrete number of essential facilities (e.g. shared local loops) that the major operator uses or provides.
  - 4.7.3 With respect to essential facilities and services that a major operator offers on a usage-sensitive basis, the number of units is defined as the unit of measurement of the usage (e.g. minutes of use or call related database queries) of the essential facility.

For example, if an essential facility is supplied on the basis of measurement, such as a cable, the unit would be a meter or a kilometer; if an essential facility is supplied on the basis of a period of time, such as the duration of a call, the unit would be a minute; and if an essential facility is supplied on the basis of an occurrence, such as a database query, the unit shall be a single such occurrence.

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- 4.8 A major operator must provide the Authority with a cost study that complies with the guidelines set forth in this section 4 and any underlying supporting documentation sufficient to allow the Authority to determine that the rate for each essential facility such major operator offers does not exceed the cost-based charges per unit of providing the essential facility.
- 4.8.1 The Authority may determine that the cost study and supporting documentation made available to it by the major operator with respect to one or more essential facilities does not support the adoption of a rate or rates that are consistent with the requirements set forth in this section 4. In that event, the Authority may establish a rate for an essential service that is consistent with the best current practices in the international market taking into account the views of the major operator and interested parties.
- 4.8.2 Any rate(s) established through the use of international best current practices shall be superseded once the Authority has completed review of a cost study that complies with the cost based pricing guidelines described in this section 4, and has concluded that such study is a reasonable basis for establishing essential facility rates.
- 4.9 The cost-based charges of any essential facility shall not include any costs for which recovery is already provided through other cost recovery mechanisms.
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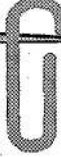
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