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GENERAL NOTICE

NOTICE 1215 OF 2002

In terms of section 96 (6) of the Telecommunications Act, 1996 (Act No. 103 of 1996, as amended), I, Dr. Ivy Matsepe-Casaburri, Minister of Communications hereby approve and publish the following regulations made by the Independent Communications Authority of South Africa ("the Authority") in terms of section 44 of the Act regarding Facilities Leasing Guidelines.

I MATSEPE-CASABURRI

Minister of Communications

SCHEDULE

SUPPLEMENTARY FACILITIES LEASING GUIDELINES

1. DEFINITIONS

- 1.1 The provisions of the Facilities Leasing Guidelines published in General Notice No. 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:

- 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 "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.

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.
- 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 the local loop by the SNO in terms of section 32A (2) (a), to provide services while the Facilities Provider continues to use the same local 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 In these guidelines words will have the meaning given to them in the Telecommunications 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 No. 1260 of 2000) and

together from a single unified regulatory framework for Facilities Leasing under section 44 of the Telecommunications Act. Facilities Leasing agreements entered into pursuant to these guidelines shall comply in all respects to the Facilities Leasing Guidelines.

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 Telecommunications Act. Pursuant to section 32A (2) (a) and section 32A (4) (c) of the Telecommunications 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 Telecommunications Act by the second network operator and Telkom relating to Facilities Leasing 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 No. 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 telecommunication 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 No. 358 of 2002 (*Gazette* No. 23236) and conclusions drawn by the Authority that the telecommunication 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 Telecommunications 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.
- 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 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 Telecommunications 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 Telecommunications Act.

Essential facilities of a major operator include—

- (a) shared access to the local loop by SNO in terms of section 32A (2) (a) of the Telecommunications Act;
- (b) switching facilities;
- (c) collocation space and facilities where such space exists, allowing for reasonable expansion by the major operator in determining space availability;
- (d) transmission facilities connecting two or more local exchanges within a local exchange area;
- (e) rights of way, way leaves or servitudes to the extent permissible under the major operator's rights—due regard shall be given to s32B (5) (d) and (e) of the Act; and
- (f) 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.

Any services that are ancillary and necessary for the provision of the above shall be provided.

- 3.4 The list of essential facilities set forth in section 3.3 above is not exhaustive. Subject to any restrictions or other limitations in these guidelines or the Telecommunications Act, the Authority may declare additional telecommunication facilities a essential by notice in the *Gazette* where such additional telecommunication facilities 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 Telecommunications Act.
- 3.5 In the application of section 3.3 or section 3.4 above, the Authority shall not require a Facilities Provider to make telecommunication facilities 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 Nothing in these guidelines should be construed to require a Facilities Provider to lease or otherwise make available to a Facilities Acquirer customer premise section 44 of the Telecommunications Act.
- 3.9 Any term or condition of any Facilities Leasing agreement that violates the Telecommunications Act, these guidelines or the Facilities Leasing Guidelines shall be null and void and have no legal effect to the extent of its illegality.
- 3.10 The provision of section 12 of the Facilities Leasing Guidelines shall apply to the charges for all telecommunication Facilities 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.
- 3.11 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 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 (COA/CAM).
- 4.5 Allowable common costs are costs efficiently incurred in providing a group of essential facilities that cannot be attributed directly to individual essential facilities.
 - (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 COA/CAM.
 - (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 services offerings other than the essential facility 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 of 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.

- 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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