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GENERAL NOTICE

NOTICE 58 OF 2005



INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

NOTICE OF INTENTION TO MAKE REGULATIONS IN RESPECT TO FACILITIES LEASING

The Independent Communications Authority of South Africa ("the Authority") hereby gives notice that it intends making the following regulations in terms of section 44 (5) of the Telecommunications Act, (Act No 103 of 1996).

Interested persons are hereby invited to submit written comments or written representations with regard to the proposed regulations, to be received by no later than 16h00 on 02 March 2005 by post, hand delivery or facsimile transmission for the attention of Ms Nomvuyiso Batyi, Independent Communications Authority of South Africa, Private Bag X10002, Marlboro, 2063; Block C, Pin Mill Farm, 164 Katherine Street, Sandton; telephone (011) 321 8415, Facsimile (011) 321 8536 or e-mail: nbatyi@icasa.org.za / mnkopane@icasa.org.za

MANDLA LANGA
CHAIRPERSON

1. DEFINITIONS

- 1.1 In these Guidelines the following words will have the meaning given to them unless the context otherwise requires:

"Affiliate" means any Person that is legally or in fact controlled by, under common control or controls a Facilities Provider whether directly or indirectly.

"COA/CAM" means the Chart of Accounts/Cost Allocation Manual adopted pursuant to the Telecommunications Act.

"Customer" means a retail end user customer of the provider of a telecommunication service.

"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.

"Economic Cost" means, in respect of Facilities Leasing by a Facilities Provider, the sum of:

- (a) The incremental cost of the relevant facility or service;
- (b) The relevant common costs allocated to that facility or service including a competitive return on the capital employed for the purpose of such provision.

"Essential Facility" means a telecommunication facility or related service that:

- (a) is exclusively or predominantly provided by a single or limited number of suppliers; and
 - (i) cannot feasibly, whether economically and / or technically be substituted in order to provide a service; or
- (b) is declared by the Authority, acting in accordance with clause 16.7 of these

Guidelines, to be an Essential Facility, where, in its opinion, this would promote the objects of the Telecommunications Act.

“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.

“Facilities Information” means information in the possession or control of the Facilities Provider that relates to a facilities request and which may assist the Facilities Acquirer:

- (a) to better formulate its request for facilities;
- (b) to plan, establish or maintain its telecommunication system or a telecommunication service, including but not limited to:
 - (i) technical, traffic and other relevant information;
 - (ii) system and facilities specifications; and
 - (iii) any material changes to that information or specifications which may impact on the Facilities Acquirer’s Facilities Leasing arrangements or the services it intends to provide to customers by means of that Facilities Leasing.

“Facilities Leasing” means the leasing or otherwise making available of telecommunication facilities or related services by a Facilities Provider to a Facilities Acquirer.

“Facilities Leasing Agreement” means an agreement in relation to Facilities Leasing.

“Facilities Provider” means a provider of a telecommunication service who is required to lease facilities under the *Telecommunications Act*.

“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.

“Major Operator” means a Facilities Provider which

- (a) has at least 35% market share in the Telecommunications Market in which it operates, unless it can show that it does not have market power,
- (b) has the ability to materially affect the terms of participation (having regard to price and supply) in the Telecommunications Market(s) as a result of:
 - (i) control over Essential Facilities; or

- (ii) use of its position in the market
- (c) is declared by the Authority, acting in accordance with clause 16.7 of these Guidelines, to be a Major Operator where, in its opinion, this will promote the objects of the Telecommunications Act.

“Person” shall include individuals, bodies corporate and unincorporated associations, partnerships, joint-stock companies, trusts and similar legal entities recognized under applicable law.

“Public Operator” means a provider of a public switched telecommunication service or a mobile cellular telecommunication service; or any second national operator (SNO) licenced under the Telecommunications Act; or Sentech; or any provider of under-served area telecommunications service, national long-distance telecommunications service, local access telecommunications service or public pay-telephone service licensed under the Telecommunications Act.

“Shared Access” means the leasing of the local loop by a second network operator (SNO), as provided for in the Telecommunications Act, to provide services while the Facilities Provider continues to use the same local loop to provide services to its Customers.

“Telecommunications Act” means the *Telecommunications Act 1996* (Act No 103 of 1996) as amended, or any successor legislation.

“Telecommunication Market” means any of the following markets:

- (a) Public switched telecommunication services;
- (b) National long distance telecommunication services;
- (c) Local access telecommunication services;
- (d) Public pay-telephone services;
- (e) International telecommunication services;
- (f) Mobile cellular telecommunication services; and
- (g) any other market(s) identified by the Authority acting in accordance with clause 16.7 of these Guidelines.

“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.

- 1.2 Words used in these Guidelines that are not defined by these Guidelines but are defined by the Telecommunications Act shall have the meaning given to them by the

Telecommunications Act.

2. APPLICATION OF FACILITIES LEASING GUIDELINES

2.1 The Telecommunications Act requires the Authority to prescribe guidelines relating to the form and content of Facilities Leasing Agreements including amongst other matters:

- (a) the time by or period within which Facilities Leasing pursuant to a Facilities Leasing Agreement shall be carried out;
- (b) the quality or level of service applicable to Facilities Leasing;
- (c) the fees and charges payable for Facilities Leasing.

2.2 These Guidelines:

- (a) are issued by the Authority under the Telecommunications Act;
- (b) will be applied by the Authority in the manner contemplated by the Telecommunications Act;
- (c) apply to all Facilities Providers and Facilities Acquirers although specific parts of these Guidelines apply only to certain Facilities Providers or certain Essential Facilities;
- (d) do not restrict a Person's rights under the Telecommunications Act; and
- (e) may be varied by the Authority from time to time, acting in accordance with clause 16.7 or any other procedures provided for in the Telecommunications Act.

2.3 These Guidelines are not intended:

- (a) to limit the matters which may be dealt with in a Facilities Leasing Agreement but to provide a minimum set of issues which should be addressed;
- (b) to prevent or delay parties from negotiating or entering into bilateral or multilateral agreements which deal with matters other than those addressed in these Guidelines; or
- (c) to vary or restrict any rights granted to the second network operator under the Telecommunications Act, including any right of resale of Telkom facilities for the purpose of providing public switched telecommunication services.

2.4 For the purposes of these Guidelines, the Authority finds that the Telecommunication Markets with regard to Facilities Leasing are:

- (a) Public switched telecommunication services;
 - (b) National long distance telecommunication services;
 - (c) Local access telecommunication services;
 - (d) Public pay-telephone services;
 - (e) International telecommunication services; and
 - (f) Mobile cellular telecommunication services.
- 2.5 The Authority has established that Facilities Leasing in these Telecommunication Markets is supplied by a single or limited number of providers and cannot feasibly be substituted in order to provide service, and therefore that the facilities identified in clause 3.3.1 are Essential Facilities.
- 2.6 Telkom SA Limited being the holder of at least 35% of the Telecommunications Markets identified in clauses 2.4(a) to 2.4(e) above, the Authority declares that Telkom SA Limited is a Major Operator for the provision of Facilities Leasing in these markets.
- 2.7 The Authority may: (i) identify additional Telecommunications Markets for Facilities Leasing; (ii) identify additional telecommunication facilities or related services declared to be Essential Facilities; and (iii) make determinations regarding Major Operators in relevant Telecommunications Markets, all in accordance with clause 16.7 of these Guidelines.
- 2.8 These Guidelines shall apply regardless of whether a Facilities Provider or Facilities Acquirer has entered into any facilities, systems, network or other management agreement, including any outsourcing agreement. A Facilities Provider that is a party to any such agreement shall ensure that the agreement does not interfere with the supply of telecommunications facilities and related services required by the Telecommunications Act, these Guidelines and any relevant Facilities Leasing Agreement.
- 2.9 At such time as a Major Operator can demonstrate that, because of:
- (a) A reduction in its share of the relevant Telecommunications Market; or
 - (b) An industry change that requires reclassification of an Essential Facility, such Major Operator should no longer be considered a Major Operator, then:
- 2.9.2 Such Major Operator shall file a written request with the Authority accompanied by all supporting documentation establishing a reasonable basis for such request.
- 2.9.3 If the Authority finds, upon consideration of the request and supporting documentation and any additional information or documentation that the Authority may request, that there is a reasonable basis for removing the Major

Operator determination from one or more of the Telecommunication Markets, the Authority shall:

- 2.9.3.1 publish the request in the Gazette,
- 2.9.3.2 seek comments from the public, and
- 2.9.3.3 conduct any hearings that it may find necessary.

2.9.4 At the expiry of the time within which public comments may be filed and any hearings that it may have scheduled, if supported by the record before it, the Authority may declare by notice in the Gazette that such licensee is no longer a Major Operator in one or more of the Telecommunication Markets.

2.10 At such time that any party can demonstrate that:

- (a) A licensee's share of the relevant Telecommunication Market is at least 35%, or
- (b) An industry change that requires reclassification of an Essential Facility has occurred, necessitating that such licensee should be re-classified as a Major Operator, then:

2.1.1 Such party shall file a written request with the Authority accompanied by all supporting documentation establishing a reasonable basis for such request.

2.1.2 If the Authority finds, upon consideration of the request and supporting documentation and any additional information or documentation that the Authority may request, that there is a reasonable basis for considering to declare such licensee to be a Major Operator, the Authority shall:

- 2.1.2.1 publish the request in the Gazette,
- 2.1.2.2 seek comments from the affected licensee and the public, and
- 2.1.2.3 conduct any hearings that it may find necessary.

2.1.3 In the alternative to the processes described in clause 2.10.1 and 2.10.2 above, the Authority may initiate consideration of whether a licensee should be classified as a Major Operator, or whether its status as a Major Operator has changed, on its own initiative by publishing a notice in the Gazette seeking comments from the affected licensee and the public, and conducting any hearings it may find necessary.

2.1.4 At the conclusion of the process outlined in clauses 2.10.2 or 2.10.3 above, the Authority may, based on its findings, declare such licensee to be a Major Operator in one or more Telecommunication Markets.

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 clause 4.1 and the other requirements of these Guidelines.
- 3.3** A request for any of the following listed essential facilities shall be deemed reasonable when requested from or 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 clause 16. The reasonableness of any dispute under this clause 3.3 shall be determined by the Authority, after considering any written representations and after hearing the parties, based on the requirements of the Telecommunications Act.
- 3.3.1** Essential Facilities of a Major Operator include:
- (a) shared access to the local loop by the SNO as provided for in the Telecommunications Act;
 - (b) switching facilities;
 - (c) collocation space and facilities where such space exists and allowing for reasonable expansion by the Major Operator in determining space availability, as determined by the Authority;
 - (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, and subject to any other provisions or requirements of the Telecommunications Act; and
 - (f) space on or within poles, ducts, cable trays, manholes, hand holds and conduits owned or controlled by the Major Operator, where such space exists and allowing for reasonable expansion by the Major Operator in determining space availability, as determined by the Authority.
- Any services that are ancillary and necessary for the provision of the above shall also be provided.
- 3.4** The list of Essential Facilities set forth in clause 3.3.1 above is not exhaustive. Subject to clause 16.7 and any restrictions or other limitations in these Guidelines or the Telecommunications Act, the Authority may declare additional telecommunication facilities to be Essential Facilities.

3.5 In the application of clauses 3.3 or 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 use such telecommunication facilities in offering its own services.

3.6 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.

4. CONTENTS OF FACILITIES LEASING AGREEMENTS

4.1 A written Facilities Leasing Agreement must *inter alia* address each of the following matters unless it is not relevant to the Facilities Leasing that has been requested:

- (a) the scope and specification of the facilities to be provided;
- (b) access to all ancillary or supplementary services or access to and use of premises or land that are required to support the provision of facilities;
- (c) service levels and the maintenance of facilities;
- (d) charges for the facilities;
- (e) billing and settlement procedures;
- (f) ordering, forecasting, provisioning and testing procedures;
- (g) the provision of co-location for facilities and the terms and conditions in accordance with which co-location is to be provided;
- (h) the provision of information regarding system modernisation or rationalisation;
- (i) technical specifications, standards and interoperability tests;
- (j) information handling and confidentiality;
- (k) duration, renegotiation and review procedures;
- (l) dispute resolution procedures.

4.2 The Facilities Leasing Agreement shall contain all the terms and conditions of the agreement between the parties related to Facilities Leasing matters, and no amendments, alterations, additions, variations or consensual cancellations will be of any force or effect unless they are reduced to writing, signed by both parties and approved by the Authority.

5. PROMOTION OF USE OF SERVICES AND FACILITIES

5.1 The terms and conditions of a Facilities Leasing Agreement must, in the opinion of the

Authority, promote the increased public use of telecommunication services or more efficient use of telecommunication facilities.

6. FACILITIES LEASING AGREEMENTS NOT TO PRECLUDE RIGHTS

6.1 A Facilities Leasing Agreement must not:

- (a) seek to preclude or frustrate the exercise of any statutory powers or prevent any Person from seeking the exercise of statutory powers;
- (b) impose any penalty, obligation or disadvantage on a Person for seeking the exercise of any statutory powers;
- (c) prohibit a Person from providing a telecommunication service or facility which that Person is lawfully able to provide; or
- (d) frustrate the provision of a telecommunication service or facility by a Person which that Person is lawfully able to provide.

6.2 A facility acquired under a Facilities Leasing Agreement may not be used for any unlawful purpose.

6.3 A Facilities Acquirer may at any time request that a Facilities Provider vary any term or condition of a Facilities Leasing Agreement. A Facilities Provider may refuse that request but if it does so this will be a dispute for the purposes of clause 16 of these Guidelines.

7. REQUESTS FOR FURTHER FACILITIES LEASING AND GOOD FAITH NEGOTIATIONS

7.1 A Facilities Provider must provide Facilities Information to a Facilities Acquirer who requests reasonable Facilities Information. A Facilities Provider need not provide Facilities Information if the Authority determines that it is not to be provided.

7.2 The parties to a Facilities Leasing Agreement must negotiate in good faith and use their reasonable endeavours to resolve all disputes relating to the facilities the subject of that agreement or any other facility.

8. CONTINUATION OF LEASING OF FACILITIES

8.1 A Facilities Provider may not terminate a Facilities Leasing Agreement unless:

- (a) the termination is for
 - (i) fundamental breach of the Facilities Leasing Agreement; or
 - (ii) vis major; or
 - (iii) liquidation, deregistration or insolvency of one of the parties to the

Agreement.

- (b) the Facilities Provider gives reasonable written notice of its intention to terminate specifying the grounds of termination and, in the case of breach, requiring that the breach be remedied within three (3) months; and
- (c) the Facilities Acquirer has been given the opportunity to remedy the breach and has failed to do so.

8.2 A Facilities Provider of an Essential Facility may not terminate a Facilities Leasing Agreement without the Authority's consent.

8.3 A Facilities Leasing Agreement must not allow the suspension of Facilities Leasing except where this is necessary to address material degradation of telecommunication systems or services or other material threat to the maintenance of the facilities.

8.4 A Facilities Leasing Agreement must establish termination and suspension procedures that minimise any adverse affect of that termination or suspension on Customers.

9. NON-DISCRIMINATION PRINCIPLES

9.1 A Facilities Provider must treat each:

- (a) Facilities Acquirer on a basis that is non discriminatory in its provision of facilities and no less favourable than the treatment which the Facilities Provider affords to its subsidiaries, its Affiliates, or other similarly situated telecommunication service providers;
- (b) telecommunication service of a Facilities Acquirer on a basis that is non discriminatory and no less favourable than the treatment which the Facilities Provider affords to the telecommunication services of itself, its Affiliates, or other similarly situated telecommunication service providers; and
- (c) Customer of a Facilities Acquirer on a basis that is non discriminatory and no less favourable than the treatment which the Facilities Provider affords to its own Customers or the Customers of its subsidiaries, its Affiliates, or other similarly situated telecommunications service providers.

10. REQUESTS FOR THE LEASING OF FACILITIES, TIME FOR SUPPLY AND QUALITY OF FACILITIES

10.1 A Facilities Leasing Agreement must be entered into as soon as practicable after the Facilities Provider has received a request for Facilities Leasing, but in any event not later than three (3) months after the Facilities Provider has received a request for Facilities Leasing. This period may however be extended by such time as allowed by the Authority in any particular case.

- 10.2 A Facilities Leasing Agreement will include time periods for the provisioning of each type of facility in each type of area which must not exceed forty five (45) calendar days or as directed by the Authority in writing for that type of facility for that type of area.
- 10.3 A Facilities Leasing Agreement will contain service levels that reflect good facilities leasing practice.
- 10.4 A Facilities Leasing Agreement must provide reasonable remedies for any failure to meet time periods for the provisioning of facilities or applicable service levels.
- 10.5 The parties to a Facilities Leasing Agreement will comply with all relevant standards of the International Telecommunications Union and such other technical standards as the Authority may prescribe from time to time.
- 10.6 In the event of the parties failing to reach an agreement with regard to the quality or level of service, the quality or level of service will be determined by the Authority.

11. EFFICIENT PROVISIONING

- 11.1 The provisioning of facilities by a Facilities Provider under a Facilities Leasing Agreement must be efficient and occur in accordance with the timetable negotiated between the parties and specified in the Facilities Leasing Agreement.
- 11.2 Provisioning procedures must not include any unnecessary steps. A Facilities Acquirer's request for facilities should be given reasonable priority over the Customer orders of the Facilities Provider.

12. FACILITIES CHARGING STRUCTURE

- 12.1 Charges for the provision of facilities shall be structured to distinguish and separately price the following aspects:
 - (a) the establishment and implementation (if any) of the physical facilities, including testing;
 - (b) rental charges for use of facilities, equipment and resources; and
 - (c) variable charges for ancillary and supplementary services.
- 12.2 All charges for the Facilities Leasing shall be transparent and sufficiently unbundled so that the Facilities Acquirer does not have to pay for anything that it does not require for the service to be provided by the Facilities Acquirer.
- 12.3 Charges for Facilities Leasing must not exceed retail charges for the provision of services or facilities equivalent to those to be provided by that Facilities Leasing.
- 12.4 A Facilities Acquirer is free to acquire services from a Facilities Provider at any retail price offered by the Facilities Provider without prejudice to any rights to acquire the same or

similar services under a Facilities Leasing Agreement.

- 12.5 Clauses 12.1 to 12.4 shall apply to the charges for all telecommunication facilities or related services that have not been declared by the Authority to be an Essential Facility provided by a Major Operator. Clause 13 shall apply to the charges for all telecommunication facilities or related services that have been declared by the Authority to be an Essential Facility provided by a Major Operator.

13. FACILITIES LEASING CHARGE OBLIGATIONS FOR MAJOR OPERATORS

- 13.1 Major Operators shall provide Essential Facilities to any requesting Facilities Acquirer at the long run incremental cost (LRIC) of those Essential Facilities, unless otherwise determined by the Authority acting in accordance with clause 16.7.

- 13.2 LRIC for Essential Facilities of a Major Operator shall be calculated in accordance with this clause 13.2, and any other determinations or directions published by the Authority.

13.2.1 Unless otherwise directed by the Authority, LRIC shall be calculated on the basis of relevant forward looking economic costs calculated for an efficient telecommunications service provider and including a reasonable cost of capital.

13.2.2 LRIC shall be calculated by the Major Operator on the basis of the LRIC Statements pursuant to the Procedures Manual for Accounting Separation Methodology of the Major Operator as approved by the Authority, pursuant to applicable COA/CAM Regulations.

13.2.3 Major Operators shall submit LRIC calculations and the resulting charges, including for the designated Essential Facilities, prepared in accordance with clauses 13.2.1 and 13.2.2, for approval by the Authority at the times stipulated by the Authority.

13.2.4 Failing submission of LRIC calculations by a Major Operator in accordance with clause 13.2.3, the Authority shall prepare its own LRIC calculations, taking into account, where available, the Regulatory Financial Statements pursuant to the Procedures Manual for Accounting Separation Methodology of the Major Operator as approved by the Authority, pursuant to applicable COA/CAM Regulations, or such other information as is available to the Authority. The Major Operator shall provide any information or other assistance requested by the Authority in connection with the preparation of LRIC calculations, within seven (7) days of the request or such other time as is stipulated by the Authority, in accordance with these Guidelines and the Telecommunications Act.

- 13.3 The Authority may determine, on an interim basis and until LRIC calculations have been prepared for one or more Major Operators, other methodologies to ensure that the rates for Essential Facilities are cost-oriented. Such methodologies may include:

13.3.1 The calculation of Fully Allocated Costs (FAC) of providing the Essential

Facility; or

- 13.3.2 Costs and charges for the Essential Facilities calculated on the basis of benchmark formulas or benchmark values, as determined by the Authority with reference to international measures of costs or charges for an efficient operator; or
- 13.3.3 Any other methodology determined by the Authority, acting in accordance with clause 16.7, to reasonably reflect the costs to the Major Operator of the Essential Facilities.
- 13.4 In calculating FAC for Essential Facilities of a Major Operator in accordance with clause 13.3.1:
- 13.4.1 Where FAC is to be calculated by a Major Operator, the Major Operator shall prepare the calculation in accordance with the Regulatory Financial Statements pursuant to the Procedures Manual for Accounting Separation Methodology of the Major Operator as approved by the Authority, pursuant to applicable COA/CAM Regulations.
- 13.4.2 Major Operators shall submit FAC calculations and the resulting charges for the designated Essential Facilities prepared in accordance with clause 13.4.1 for approval by the Authority at the times stipulated by the Authority.
- 13.4.3 Failing submission of FAC calculations by a Major Operator in accordance with clause 13.4.2, the Authority shall prepare the FAC calculations and resulting charges, taking into account, where available, the Regulatory Financial Statements pursuant to the Procedures Manual for Accounting Separation Methodology of the Major Operator as approved by the Authority, pursuant to applicable COA/CAM Regulations, or such other information as is available to the Authority. The Major Operator shall provide any information or other assistance requested by the Authority in connection with the preparation of FAC calculations, within seven (7) days of the request or such other time as is stipulated by the Authority, in accordance with these Guidelines and the Telecommunications Act.

14. CONFIDENTIALITY

- 14.1 All confidential information provided by a party to another party in relation to Facilities Leasing must:
- (a) be kept confidential and only used in relation to the Facilities Leasing except where the disclosure is authorised in writing by the other party, authorised or required by law or is lodged with the Authority, and
 - (b) only be disclosed to employees, agents or advisers who need to know that information for the purpose of the Facilities Leasing or advising thereon.

14.2 Confidential information of a party received by the other party in relation to the leasing of facilities or information generated by the telecommunication system of a party as a result of Facilities Leasing must not be disclosed to any Person involved in the development or provision of retail services of the other party or its subsidiaries or Affiliates.

14.3 Confidentiality provisions of a Facilities Leasing Agreement must not prevent or frustrate the public disclosure of any Facilities Leasing Agreement including its publication in accordance with clause 15.

15. TRANSPARENCY OF AGREEMENTS

15.1 Each Facilities Provider shall make any Facilities Leasing Agreement it has entered into publicly available, including disclosure of all related rates and charges, by filing a copy of the agreement with the Authority and either publishing the agreement on its website or providing copies on request by any Facilities Acquirer. Facilities Providers shall be entitled to charge their reasonable costs of preparing copies of Facilities Leasing Agreements.

16. DISPUTES, ENFORCEMENT AND OTHER PROCEDURES

16.1 The requesting party shall advise the Authority of any new request for Facilities Leasing or any request for amendment of a Facilities Leasing Agreement.

16.2 Prior to a Facilities Acquirer or Facilities Provider referring a dispute as to reasonableness or inability to negotiate to the Authority for a formal determination, either party may request the Authority's assistance in resolving the dispute through mediation.

16.3 Disputes between Facilities Acquirers and Facilities Providers as to the reasonableness of a request for Facilities Leasing are to be referred to the Authority by one or both of the parties for a decision as to the reasonableness of the request.

16.4 Where a Facilities Acquirer or Facilities Provider alleges that another Facilities Acquirer or Facilities Provider is unwilling to negotiate or agree on any term or condition on which Facilities Leasing arrangements are to be provided, the issue is to be submitted to the Authority for decision.

16.5 A Facilities Leasing Agreement must make provision for the Authority's determinations to be applied retrospectively to the date on which a dispute is notified to the Authority.

16.6 Where an operator or any other Person alleges that there has been a contravention or failure to comply with:

- (a) the provisions of the Telecommunications Act;
- (b) the appropriate guidelines; or
- (c) a Facilities Leasing Agreement,

then the Authority shall investigate and make a decision in response to the allegation.

- 16.7 The Authority may issue decisions, determinations or additional guidelines regarding Facilities Leasing from time to time, including the requirements of Facilities Leasing among particular categories of licensees or in particular Telecommunications Markets, or the calculation of charges for Essential Facilities. The Authority shall publish any additional or revised guidelines in the Gazette, and shall provide a period of at least thirty (30) days for public comment or consultation prior to adopting same. The Authority shall provide reasons for any decisions or determinations relevant to Facilities Leasing, and shall otherwise comply with the procedures and other requirements of the Telecommunications Act.
- 16.8 Failure to comply with the requirements of these and any additional Facilities Leasing guidelines or determinations shall be subject to the enforcement provisions of the Telecommunications Act. The Authority, acting in accordance with clause 16.7 and the Telecommunications Act, shall be entitled to prescribe specific penalties for failure to comply with these Guidelines, any related decisions or determinations of the Authority or any Facilities Leasing Agreement.
- 16.9 Subject to any transition period or process approved by the Authority, any term or condition of any Facilities Leasing Agreement that does not comply with the Telecommunications Act or these Guidelines shall be unenforceable between the parties and shall have no legal effect to the extent of its non-compliance.
17. **REPEAL**
- 17.1 The Facilities Leasing Guidelines published in Notice 1259 of 2000, as supplemented by the Supplementary Facilities Leasing Guidelines published in Notice 1215 of 2002, are hereby repealed.
-