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GENERAL NOTICE

NOTICE 299 OF 2012

CROSS-BORDER ROAD TRANSPORT AGENCY

The Cross-Border Road Transport Agency, hereby publish for public comments the draft guidelines for the consideration of cross-border road transport permits for the conveyance of passengers.

Interested persons are invited to submit written comments on these draft guidelines for the consideration of cross-border road transport permits, to the Executive: Regulatory and Legal Services, within 30 days from the date of publication of this notice, to:

Mr Ronald Stuurman

Cross-Border Road Transport Agency

P O Box 560

Menlyn

PRETORIA

0063

E-mail: rstuurman@cbrta.co.za

Tel: 012 348 1357

Fax: 012 369 8477

DRAFT GUIDELINES FOR THE CONSIDERATION OF CROSS BORDER ROAD TRANSPORT PERMITS FOR THE CONVEYANCE OF PASSENGERS

INTRODUCTION

1. As an organ of state the Cross Border Road transport Agency (CBRTA) is enjoined to comply with various statutory provisions.
2. The purpose of these guidelines is to provide insight into the manner in which the Regulatory Committee (the RC) of the CBRTA exercises its statutory functions in disposing of applications for cross border road transport permits for the conveyance of passengers.
3. The RC recognises that circumstances may differ and stresses that every application will, despite these guidelines, be decided on its own merit.
4. The principles of accountability and transparency enshrined in the Constitution are set out in the Promotion of Administrative Justice Act, 3 of 2000, and the Promotion of Access to Information Act, 2 of 2000, and the RC will comply with the relevant provisions of these acts, especially since they were enacted after the Cross-Border Road Transport Act 4 of 1998 (the CBRT Act) came into force.

CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, ACT 108 OF 1996 (the Constitution)

5. In terms of section 33 of the Constitution everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
6. The RC will ensure that the basic values and principles governing public administration as recorded in Section 195 of the Constitution are adhered to.
7. In dealing with matters that come before it the RC will accordingly:
 - promote and maintain a high standard of professional ethics;
 - exercise its duties impartially, fairly, equitably and without bias;
 - be development oriented;
 - promote the efficient, economic and effective use of resources;
 - respond to people's needs; and
 - foster transparency.
8. In terms of section 237 of the Constitution the RC must perform all of their constitutional obligations diligently and without delay.

9. In terms of section 9(1) of the Constitution everyone is equal before the law and has the right to equal protection and benefit of the law.
10. Section 9(2) of the Constitution provides that:
 - equality includes the full and equal enjoyment of all rights and freedoms; and
 - to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
11. Section 9 of the Constitution must be read with sections 28(1)(a) and 27(1)(1A) of the CBRT Act to which reference is made below.
12. It bears emphasis that in appropriate instances the RC will accordingly adopt measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination.
13. The RC takes decisions that apply extra-territorially (i.e. beyond the borders of South Africa). The RC's extra-territorial powers are derived in part from international agreements as envisaged in terms of section 2 of the Act.
14. It is imperative that the provisions of such agreements are taken into account when applications for cross-border road transport permits are considered.
15. In terms of section 2 of the CBRT Act, read with section 231(3) of the Constitution, such agreements:
 - are concluded by the Minister of Transport subject to the provisions of the Constitution;
 - must be promulgated by the President by Proclamation in the *Gazette*;
 - will have the force of law in the Republic with effect from the date of promulgation or any later date specified in the Proclamation; and
 - must be tabled in the Assembly and the Council within a reasonable time.
16. In terms of section 25 of the CBRT Act applications for permits must be made in accordance with the regulations as well as the provisions of:
 - any relevant extra-territorial agreement; alternatively
 - any executive arrangement, where the Minister has concluded such an arrangement in anticipation of an extra-territorial agreement being concluded.
17. These provisions are peremptory and non-compliance cannot be condoned. Accordingly applications that do not comply with these requirements cannot be considered.

PROMOTION OF ADMINISTRATIVE JUSTICE ACT 3 OF 2000 (PAJA)

The following provisions of PAJA are especially pertinent:

18. Section 3, which deals with the requirements for administrative action to be procedurally fair, including that interested persons be given:
 - adequate notice of the nature and purpose of the proposed administrative action;
 - a reasonable opportunity to make representations;
 - a clear statement of the administrative action;
 - adequate notice of any right of review or internal appeal, where applicable; and
 - adequate notice of the right to request reasons in terms of section 5.

19. Section 5, which requires the RC to furnish adequate written reasons for its decisions within 90 days after being called upon to do so by any person whose rights have been materially and adversely affected by its decisions.

20. Section 6, which records the grounds upon which a decision of the RC can be reviewed and set aside. These include taking a decision that is:
 - biased or taken in circumstances where there is a reasonable suspicion of bias;
 - not in compliance with a mandatory and material procedure;
 - procedurally unfair; materially influenced by an error of law; taken for a reason not authorised by the CBRT Act; taken for an ulterior purpose or motive; because irrelevant considerations are taken into account or relevant considerations are not considered; because of the unauthorised or unwarranted dictates of another person or body; or acting in bad faith; arbitrarily or capriciously;
 - not authorised by the CBRT Act; or that is not rationally connected to:
 - the purpose for which it was taken;
 - the purpose of the CBRT Act;
 - the information before the RC; or
 - the reasons given for the decision;
 - so unreasonable that no reasonable person could have so exercised the power or performed the function; or
 - otherwise unconstitutional or unlawful.

21. Section 7(2), which requires an aggrieved person to first exploit internal remedies before a decision of the RC can be taken on review.

PROMOTION OF ACCESS TO INFORMATION ACT 2 OF 2000 (PAIA)

22. PAIA was enacted to
- give effect to the constitutional right of access to information that is required for the exercise or protection of any rights;
 - to foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information; and
 - to actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights.
23. PAIA contains an elaborate procedure whereby interested parties will be able to call upon the RC to provide access to all documents in its possession and that have a bearing on any matter that has or may come before it for a decision.
24. The RC is bound by and, when properly called upon to do so, must comply with these provisions. The Agency's Promotion of Access to Information Manual should be consulted in this regard.

CROSS-BORDER ROAD TRANSPORT ACT 4 OF 1998 (the CBRT Act) AND REGULATIONS (the Regulations).**Reasons for regulating competition in so far as it relates to the conveyance of passengers**

25. In terms of Section 23 of the CBRT Act the Board must regulate access to the market by the passenger industry in respect of cross-border road transport by the issuing of permits.
26. The objective stated in the preamble to the CBRT Act is to improve safety, security, reliability, quality and efficiency of services.
27. These objectives require that a balance be struck between not authorizing excessive competition on the one hand and not unduly restricting competition on the other.
28. South Africa and its neighbours face unique challenges with a need to extend passenger transport services that are safe, secure, reliable, of good quality and efficient over long distances between business centres and also to outlying areas so as to enable Africa to develop to its full potential.
29. Issues such as congestion, resulting in environmental nuisance and accidents currently plaguing cross border transport in more developed regions may not as yet be a major concern in the southern regions of Africa but should nevertheless serve as an early warning of the problems the region could be faced with if market entry is not properly regulated.

Distinction between the cross border road transportation of freight and passengers

30. These guidelines are concerned only with the cross-border conveyance of passengers. In order to gain a proper understanding of the relevant provisions of the CBRT Act it is however important to take note of the distinction that is made in the Act between the cross border conveyance of freight and passengers:
- In the case of freight transport the pre-~~amble~~ of the CBRT Act records the need to “liberalise market access progressively”.
 - In the case of cross border passenger transport the object is different and the pre-~~amble~~ records a need “to introduce regulated competition”.
31. The liberalization of market access in respect of freight whilst at the same time regulating competition in respect of the transportation of the public by road accords with trends in many countries, although the mechanisms employed may differ from country to country.
32. In South Africa competition in respect of cross-border passenger conveyance is regulated by placing an onus on new entrants to satisfy the regulatory authority (*inter alia*) that:
- there is a need for the particular service that they wish to render taking into account the available transport facilities;
 - they have the ability to provide the particular service safely and effectively; and
 - having regard to the circumstances it will be expedient in the public interest to grant the permit that is applied for.
33. Each of these onus bearing considerations are dealt with more fully in clauses 55 to 59 below. There are also a number of other considerations (non-onus bearing considerations) that must be taken into account by the RC when it considers an application for the issue of permits for the cross-border transportation of passengers. These are set out in clauses 60 to 67 below.
34. Although the non-onus bearing considerations also apply to applications for permits in respect of freight, the onus bearing considerations do not apply to such applications.
35. Applicants for permits for the cross border conveyance of passengers would be well advised to bear this important distinction in mind.

Permit applications

36. Section 25(2) requires permit applications to comply with the applicable extra territorial agreements and the regulations.
37. Regulation 2 sets out the requirements that an applicant for a permit needs to comply with.
38. It bears emphasis that both section 25 and regulation 2 are couched in peremptory terms and accordingly an applicant for a permit must comply with these requirements and the RC has no authority to condone non-compliance with any of these requirements.

Publication

39. In the case of an application for permits for cross-border passenger road transport (and cabotage), Section 33 of the Act prescribes that the RC ... 'must' in every instance publish... 'the particulars of any application as may be prescribed and invite any person to make representations in the manner and within the time prescribed, in respect of such application' in the Government Gazette.
40. In the case of freight (other than cabotage) the Minister is given discretion to order publication.
41. Regulation 3 sets out the requirements that the publication must comply with. Once again the requirements are couched in peremptory terms and the RC cannot condone non-compliance with any of these requirements.

Pre-hearing evaluation of applications and publications

42. The RC has a sub-committee that evaluates applications and publications before matters are heard.
43. In instances where it is of the opinion that the application does not comply with the aforementioned requirements it will, in an endeavour to save costs, advise the applicant accordingly before the matter is set down for hearing.
44. It should be noted that the sub-committee acts in advisory capacity only and its recommendations are not binding on either the applicant or the RC.

HEARINGS BEFORE THE RC

Procedural requirements and points in-limine

45. Before turning to the merits of any matter the RC must consider whether or not:

- the relevant portions of the prescribed form have been completed and properly submitted to the RC as required by regulation 2(1);
- the information, particulars and documents referred to in regulation 2(2) have been furnished;
- the application was accompanied by the prescribed fee as required by regulation 2(4);
- the application is otherwise in accordance with regulations and any applicable extra territorial agreement or an executive arrangement;
- the application was published in the Government Gazette at least four weeks prior to the hearing as required by regulation 3(1);
- the publication in the Government Gazette contained the information referred to in regulation 3(1)(a)(i) to (v); and
- objections to the application have been tabled and, if so, whether or not they have complied with regulation 3(2).

46. Non-compliance with any of the above procedural formalities that materially affect the rights of interested parties will result in applications not being considered on their merits. In this regard the RC must also take cognisance of the interests of parties that are absent and that may be adversely affected by the non-compliance.

Considering the merits of the applications

47. Section 27 records a number of factors that the RC must take into consideration in making its decision "based on the information presented to it by the Chief Executive Officer".

48. Regulation 4(5) requires the Chief Executive Officer to verify the information provided by an applicant for a permit authorising passenger transport and to present the information contemplated in section 28 of the CBRTA Act to the RC.

49. All hearings for passenger conveyance are attended by the CEO and to date he has delegated this function to a regulatory official who in his presence places relevant information before the RC at the commencement of the hearing.

50. It is anticipated that as the revised integrated permit management system comes into effect more and more relevant information will be communicated in this manner.

51. In order to satisfy the requirement of fair and transparent decision making the entire procedure must take place in the presence of all of the interested parties and they must be afforded an adequate opportunity to respond thereto.
52. All of the factors listed in section 28 must be taken into account by the RC. These include both the onus-bearing and non-onus bearing considerations.

ONUS BEARING CONSIDERATIONS

53. Section 28(2) of the CBRT Act stipulates that the onus rests on the applicant to prove paragraphs (b), (c), (d), (e) and (f) of subsection (1).
54. Each of these requirements will be dealt with under separate headings below. At the outset it is however important to note the following:
 - The CBRT Act does not place these factors (or any of the non-onus bearing considerations) into any order of ascendancy;
 - Section 28(2)(c) expressly places an onus on the applicant to prove each of the factors listed in the paragraphs referred to;
 - What kind of evidence will suffice in order to discharge that onus will depend on the circumstances of each application;
 - Mere submissions made by legal representatives will rarely suffice, especially not in matters that are opposed;
 - Where appropriate, documentary evidence must be provided and witnesses must be called to testify so that they can be questioned by the RC and cross examined by interested parties;
 - What follows is no more than a rough guide as to the kind of evidence that may be taken into account;
 - Applicants are accordingly free to conduct their cases as they see fit and the RC will take due cognisance of all evidence, documentary or otherwise that is placed before it.

55. Section 28(1) (b) – Whether the applicant has forwarded completed passenger lists

This requirement applies in those instances where the applicant previously held permits. In such an instance passenger lists as prescribed must have been provided.

56. Section 28(1) (c) - The need for the particular service, taking into account the available transport facilities

- 56.1 Applicants must prove that there is a need for the particular service that they wish to render taking into account the available transport facilities.
- 56.2 Available transport facilities are not defined.
- 56.3 Available transport facilities are accordingly not limited to other available road transport facilities for the conveyance of passengers and that are rendered in terms of permits issued by the board but would in an appropriate case also extend to:
- transport by air;
 - rail transport; and
 - transport by car and by mini as well as midi-busses.
- 56.4 In order to establish a need evidence can be provided from ,inter alia:
- Educationalists;
 - Sporting organizations;
 - Religious bodies;
 - Business and industry associations;
 - Tourism bodies;
 - Community leaders;
 - Political bodies;
 - Local and regional government
 - Individuals, including those with special needs or requirements; and
 - Labour and Consumer bodies.
- 56.5 The Applicant can also rely on:
- independent surveys;
 - expert evidence;
 - passenger-list data;
 - factors that may impact on need such as:
 - Macro and micro economic factors;
 - Political circumstances that impact on need such as regional or neighbouring instability;
 - any other circumstances indicating a need.
- 56.6 The issue of temporary permits on a regular basis in terms of section 26 of the CBRTA Act may be a good indicator of the need for the introduction of a new transport facility for the conveyance of passengers on a permanent basis over a particular route with due regard being had to its effect on the existing transport facilities.
- 56.7 It bears emphasis that the above is a non-exhaustive list issued for guidance purposes only and is not necessarily compulsory depending on circumstances.

57. Section 28(1) (d) - whether the applicant operates from the address furnished by him /her

57.1 Applicants must prove that they are operating from the address furnished by submitting a duly executed ranking authority / permissions from the relevant transport planning authorities, i.e. Metro or local municipal authority.

57.2 The authority / permissions must be provided for both the departure and destination points.

58. Section 28(1) (e) - the ability of the applicant to provide the particular service safely and effectively

58.1 Due regard being had to the purpose of regulating cross border road transport of passengers this is a very important requirement. The RC would not be fulfilling its statutory purpose were it to issue permits to an applicant that does not have the ability to provide the service that he or she wishes to introduce safely and effectively.

58.2 There are many ways in which an applicant can discharge the onus of proving that he or she has the ability to provide a particular service safely and satisfactorily including the following:

- The submission of a business plan demonstrating the financial viability of the proposed service and how it will be provided safely and effectively;
- The applicants experience in transport and related industries;
- Proposed vehicles, staff and other relevant infra-structure and equipment that will be utilized;
- Proposed maintenance regime;
- Current commitments;
- Available resources;
- The applicant's safety record; and
- Testimonials from reliable and verifiable sources.

59. Section 28(1) (f) - having regard to the circumstances, whether it will be expedient in the public interest to grant the permit

59.1 A purposive interpretation must be applied when considering the meaning of these words.

59.2 As already explained the preamble makes it clear that as far as cross border passenger transport is concerned the purpose is to introduce regulated competition so as to improve safety, security, reliability, quality and efficiency of services.

59.3 In fulfilling its statutory mandate to regulate competition the RC is enjoined to achieve these public interest objectives and, before granting an application for cross border permits in respect of passengers, it must be satisfied by the Applicant that doing so will improve safety, security, reliability, quality and efficiency of services.

59.4 The disadvantages of a lack of adequate competition are higher prices and reduced service levels. This is not expedient in the public interest.

59.5 On the other hand, excessive competition in the market for the conveyance of passengers over specific routes or between specific points can lead to predatory pricing and compromise passenger safety as competitors resort to cost cutting on service levels and safety in order to survive. This is also not in the public interest.

59.6 Recognised benefits for the common good that can be achieved by introducing regulated competition in respect of passenger services, include:

- Optimum utilization of scarce economic resources, including manpower; natural resources (e.g. fuel); infra-structure (roads and vehicles) and money;
- The prevention of predatory pricing which could lead to the safety of passengers being undermined;
- The introduction of timetables that are sufficiently different to ensure that operators do not snatch each other's passengers and generally make transport facilities more accessible;
- Cross subsidization of services so as to provide passenger services to outlying communities.

59.7 On the other hand regulating competition does not mean that competition must be completely eliminated. Where a route can accommodate two or more carriers it is highly desirable that they be allowed to compete thus ensuring that the benefits of the cheapest rates and the best service levels are still attained.

59.8 An applicant can adduce any evidence he deems appropriate in order to discharge this onus and the RC can and will take a wide range of factors into account, such as the following

- Potential harmful effects of a lack of competition such as reduced service levels and high prices;
- An applicant could discharge the onus by showing that either of these are present over a particular route;

- Expert or other acceptable evidence could be adduced to show that excessive prices are being charged by the existing operators;
- Factual evidence could be adduced to show that service levels are inadequate and below acceptable standards;
- Evidence of collusion between existing operators would be a very strong indicator that further competition is necessary.

OTHER NON-ONUS BEARING FACTORS THAT THE RC MUST TAKE INTO ACCOUNT

60. Section 28(1) (a) read with section 27(1) (a) - whether the applicant and the vehicle complies with the relevant provisions of the National Road Traffic Act, 93 of 1996, as amended.

61. Section 28(1)(a) read with section 27(1)(b) - whether the applicant has a good road transport law enforcement profile based on the information contained in the points demerit system referred to in section 45.

62. Section 28(1)(a) read with section 27(1)(d) - a foreign state's track record with regard to reciprocity where the applicant is from a state with which South Africa does not have an agreement providing for permits with extraterritorial jurisdiction.

63. Section 28(1)(a) read with section 27(1)(e) - in the case of an application for a cabotage permit, the following considerations:

- (i) the foreign state's track record on granting cabotage permits to South African carriers;**
- (ii) whether a South African carrier is able to provide a similar service.**

64. Section 28(1)(a) read with section 27(1)(eA) - whether a South African carrier has submitted a valid tax clearance certificate from the South African Revenue Services indicating that the applicant's tax affairs are in order.

65. Section 28(1)(a) read with section 27(1)(eB) - any conditions, factors or criteria specified in a relevant agreement contemplated in section 2 or specified or determined by a joint committee or similar body in terms of such an agreement

66. Section 28(1)(a) read with section 27(1)(1A) - Where the applicant is a South African carrier the Board must take into account-

- (a) the promotion of small business;
- (b) the empowerment of persons historically disadvantaged by unfair discrimination; and
- (c) any relevant code of good practice or transformation charter published in terms of the Broad-Based Black Economic Empowerment Act, 2003 (Act 53 of 2003) (Section 27(1)(1A))

66.1 These provisions must be read with section 9(1) and 9(2) of the Constitution referred to above.

66.2 The requirement is couched in peremptory terms and the RC is accordingly compelled to take the aforementioned factors into account in every instance in which the Applicant is a South African carrier.

67. Section 28(1) (a) - Any other factor which, in the opinion of the Chief Executive Officer, must be considered.

67.1 This provision affords the CEO a wide discretion to introduce additional factors for consideration. These must however be:

- relevant;
- fair;
- reasonable; and
- exercised within the bounds of the Constitution, PAJA and accord with the CBRT Act and the CEO's powers and functions in terms of that Act.

67.2 These factors could include any of the following:

- Potential for conflict between operators;
- The existence of sufficient, safe and secure ranking facilities and the necessary approvals in relation thereto.
- The existence of Joint venture agreements with foreign operator counterparts in foreign countries;
- Single pick-up and discharge points;
- Route descriptions;
- Input from associations and other bodies;
- Route Management Group and Joint Management Group feedback in terms of Regulation 10;
- Resolutions of Joint Committee Meetings held in terms of the provisions of bi-lateral agreements;
- Consultations with the authorities and relevant stakeholders referred to in section 36 of the CBRT Act;

- Reports from the Road Transport Inspectorate in terms of section 39(2) of the CBRT Act and regulation 19.

67.3 Should the RC consider taking any factor which the CEO deems relevant into account the parties should be advised thereof so that they can make representations in regard thereto.

PROCEDURE TO BE FOLLOWED AT HEARINGS

68. Section 17 of the CBRT Act sets out the procedures that can be followed in dealing with matters that come before it.
69. Although these procedures are not couched in ~~peremptory~~ terms, they give effect to the requirements provided for in section 33 of the Constitution and PAJA that everyone is entitled to administrative action that is ~~lawful~~, reasonable and ~~procedurally~~ fair.
70. In the result these requirements will be complied with whenever it is practicable and necessary in order to arrive at a decision that is just and equitable.
71. Section 17(1)(a) provides that the RC ~~may~~ allow any person affected by or interested in such matter, or the duly authorised ~~representative of such a person~~, to appear before it and-
- to give evidence or make oral representations relevant to such matter;
 - to call witnesses and lead evidence on any question relevant to such matter; or
 - to question any person who testified as a witness in such matter;
72. Section 17(1)(b) enables the RC to summon any person to appear before it or to produce any ~~book~~, plan or other document or article in his or her possession or under his or her control which ~~may~~ be reasonably necessary to the meeting.
73. Section 17(1)(c) enables the RC to call upon any person present in or at the place where such matter is dealt with by it, to appear before it to give evidence in connection with any matter which may be reasonably necessary to the meeting or to produce any book, plan or other document or article in the possession or under the control of that person which may be reasonably necessary to the meeting.
74. Regulation 4(6) provides that the presiding officer at the hearing must allow the applicant to present his or her case first, where after the objectors must be afforded an opportunity to present their cases, and thereafter the applicant must be afforded an opportunity to respond to any allegations made by the objectors.

DECISIONS AND REASONS

75. The RC must advise all interested parties of its decision in writing and where called upon to do so, provide adequate reasons in writing for its decision.

CONCLUSION

76. In performing its statutory duty to regulate competition in respect of cross border passenger transport the RC will seek to achieve the object of improving the safety, security, reliability, quality and efficiency of services for the cross border conveyance of passengers.
77. It will also have due regard to the other statutory provisions that regulate its decisions as set out herein.

TITLE

78. These Guidelines are called the "Cross-Border Road Transport Regulatory Guidelines for Passenger Permits, 2012"
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