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INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

**"DRAFT CALL TERMINATION REGULATIONS"
PURSUANT TO SECTION 67(4) OF THE ELECTRONIC
COMMUNICATIONS ACT NO. 36 OF 2005**

I, Stephen Mncube, Chairperson of the Independent Communications Authority of South Africa hereby publish the draft Regulations set out in the Schedule in terms of section 4 read with section 67(8) of the Electronic Communications Act No. 36 of 2005.

Dr Stephen Mncube
Chairperson

"DRAFT CALL TERMINATION REGULATIONS" PURSUANT TO SECTION 67(4) OF THE ELECTRONIC COMMUNICATIONS ACT NO. 36 OF 2005

1. DEFINITIONS

In these Regulations, unless the context indicates otherwise, a word or expression to which a meaning has been assigned in the Act or the ICASA Act, 2000 (Act No. 13 of 2000), as amended, has the meaning so assigned, and the following words and expressions shall have the meaning set out below:

"0N" means a geographic area code as specified in the Numbering Plan Regulations published by the Authority;

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

"ECNS" means an electronic communications network service as defined in the Act;

"ECS" means an electronic communications service as defined in the Act;

"Fixed voice call termination service" means a wholesale voice call termination service provided by an ECNS or ECS licensee to a fixed location, and includes such a service provided by a licensee providing call termination using fixed wireless services;

"LRIC" means the Long Run Incremental Cost Standard

"Mobile voice call termination service" means a wholesale call termination service provided by an ECNS or ECS licensee to mobile subscriber equipment enabled by wireless technology;

"Retail service" means a service offered by an ECS licensee to end-users;

"SMP" means significant market power as defined in section 67(5) of the Act;

"Wholesale service" means a service that an ECS or ECNS licensee offers other ECS or ECNS licensees.

2. PURPOSE OF REGULATIONS

The purpose of these Regulations is to: -

(a) Define and identify the wholesale call termination markets that exist within the Republic of South Africa based on trends post 2010;

(b) Set out the methodology used in the review of the effectiveness of competition in such markets post 2010;

(c) Declare licensees that have SMP in terms of paragraphs (a) and (b) above;

(d) Set out the pro-competitive measures to be imposed to remedy market failure in the relevant markets found to have ineffective competition;

(e) Set out the schedule for periodic review of the relevant markets and the effectiveness of competition in such markets; and

(f) Provide for the enforcement of these Regulations.

3. MARKET DEFINITION

The markets are categorised according to the type of service provided to the end-user and are defined as follows:

(a) Market 1: The market for wholesale voice call termination services to a mobile location on the network of each ECS/ECNS licensee who offers such a service within the Republic.

(b) Market 2: The market for wholesale voice call termination services to a fixed location on the network of each ECS/ECNS licensee who offers such a service within the Republic, consisting of:

i. The market segment for wholesale voice call termination to a fixed location within an 0N area code; **and**
ii. The market segment for wholesale voice call termination to a fixed location between 0N area codes.

4. METHODOLOGY

In determining the effectiveness of competition in the wholesale voice call termination markets, the Authority has applied the following methodology:

(a) the identification of relevant markets and their definition according to the principles of the Hypothetical Monopolist Test, taking into account the non-transitory (structural, legal, or regulatory) entry barriers to the relevant markets and the dynamic character and functioning of the relevant markets;

(b) the assessment of licensees' market shares in the relevant markets; and

(c) the assessment on a forward-looking basis of the level of competition and market power in the relevant markets.

5. EFFECTIVENESS OF COMPETITION

Pursuant to regulation 4, the Authority has determined that competition in the wholesale voice call termination markets, as defined in regulation 3, is ineffective owing to inefficient pricing.

6. SMP DETERMINATION

The Authority determines that each ECNS and ECS licensee that offers wholesale voice call termination services has SMP in its own market.

7. PRO-COMPETITIVE TERMS AND CONDITIONS

(1) The Authority has identified the following market failures in the respective wholesale voice call termination markets:

(a) inefficient pricing

(2) All licensees must comply with the following pro-competitive terms and conditions to overcome the market failures identified in sub regulation (1):

(a) Charge fair and reasonable prices for wholesale voice call termination consistent with Appendix A

(3) The Authority has determined that additional pro-competitive terms and conditions are necessary to correct the market failures identified in regulation 7(1), which are to be imposed on the following licensees:

(a) Licensees that have historically benefitted from reciprocal treatment by the Authority in the allocation of spectrum;

(b) Licensees that benefit from economies of scale and scope in maintaining a share of total minutes terminated in the respective markets of greater than 20 per cent as of December 2012.

(4) The Authority determines that the following licensees have the characteristics listed in sub regulation (3):

(a) Market 1:

i. MTN Pty Ltd (MTN)
ii. Vodacom Pty Ltd (Vodacom)

(b) Market 2:

i. Telkom SA SOC Limited (Telkom)

(5) Additional pro-competitive terms and conditions

(a) Price Control: Cost oriented pricing

i. This obligation is imposed on those licensees listed in sub regulation (4).
ii. For the period 01 March 2014 to 01 March 2016, the licensees identified in sub regulation(4)(a) must charge the wholesale voice call termination rates to a mobile location as specified in Table 1:

Table 1: Wholesale voice call termination rates to a mobile location (Market 1)

Period	Rate
1 March 2014	R 0.20
1 March 2015	R 0.15
1 March 2016	R 0.10

iii. For the period 01 March 2014 to 01 March 2016, the licensees identified in subregulation(4)(b) must charge the wholesale voice call termination rates to a fixed location as specified in Table 2:

Table 2: Wholesale voice call termination rates to a fixed location (Market 2)

Period	Within ON area code	Between ON area code
1 March 2014 to 1 March 2016	R 0.12	R 0.19

(b) Bottom-up LRIC Cost Model

i. This obligation is imposed on those licensees listed in subregulation (4).
ii. Such licensees are obliged to provide any information the Authority deems necessary to develop such a Cost Model
iii. Information requests are to be complied with within 30 days of receiving the request.
iv. The Authority may amend existing rates based on the outcomes of this model.

8. SCHEDULE FOR REVIEW OR REVISION OF MARKETS

The Authority will review the wholesale voice call termination markets to which these regulations apply, as well as the effectiveness of competition and the application of pro-competitive measures in those markets, as and when necessary, based on observable trends in the defined markets.

9. CONTRAVENTIONS AND PENALTIES

(1) A licensee which fails to comply with regulation 7(2) is liable to a fine of Five Hundred Thousand Rand (R 500 000.00).

(2) A licensee which fails to comply with regulation 7(5)(a), (b) is liable to a fine not exceeding One Million Rand (R 1 000 000.00).

10. SHORT TITLE AND COMMENCEMENT

These Regulations are called the Draft Call Termination Regulations and will become effective upon date of publication. All Stakeholders have 30 days to submit written comments on the draft regulations.

Appendix A: APPLICATION OF THE FAIR AND REASONABLE OBLIGATION

1. PRINCIPLES OF IMPLEMENTATION OF FAIR AND REASONABLE OBLIGATION

1.1. For the purposes of regulation 7(2)(a), "fair and reasonable" prices are rates that are equivalent to the cost-oriented rates imposed on the licensees identified in Regulation 7(4).

1.2. Licensees must charge the following rates:

1.2.1. Reciprocal rates with the rate set for MTN and Vodacom if these licensees are in Market 1;

1.2.2. Reciprocal rates with the rate set for Telkom if these licensees are in Market 2.

2. Licensees not listed in Regulation 7(4)(a) may charge higher termination rates based on the following factors:

2.1. Spectrum allocation. A licensee must justify why it is adversely affected by current spectrum allocation.

2.2. Economies of scale and scope based on the share of total minutes terminated in the relevant market. A licensee qualifies, for a period of 5 years from the 1st March 2014, for an asymmetric rate if it has less than 20 per cent of total terminated minutes in the relevant market as of December 2012.

2.3. Thereafter, a licensee qualifies for an ongoing asymmetric rate of 40% if it has a market share of less than or equal to 10 per cent of total terminated minutes in the relevant market.

2.4. Licensees with a market share of greater than 10% after five years have passed are obliged to charge symmetrical rates.

2.5. A licensee may only qualify for an asymmetric rate if both factors are applicable.

2.6. A licensee who qualifies for an asymmetric rate in Market 1 may charge a maximum rate) according to the following table:

Table A1: Maximum Asymmetry Rate

	Maximum rate that may be charged
Current	R 0.44
01-Mar-14	R 0.39
01-Mar-15	R 0.33
01-Mar-16	R 0.26
01-Mar-17	R 0.20
01-Mar-18	R 0.14
01-Mar-19	R 0.10

3. Licensees not listed in Regulation 7(4)(b) may charge higher termination rates based on the following factor:

3.1. Economies of scale and scope based on the share of total minutes terminated in the relevant market. A licensee qualifies, for a period of 5 years from the 1st March 2014, for an asymmetric rate of 10% above the rates specified in Table 2 of these Regulations if it has less than 20 per cent of total terminated minutes in the relevant market as of December 2012.

3.2. Thereafter, a licensee qualifies for an ongoing asymmetric rate of 10% if it has a market share of less than or equal to 10 per cent of total terminated minutes in the relevant market.

3.3. Licensees with a market share of greater than 10% after five years have passed are obliged to charge symmetrical rates.

Explanatory Note to the Draft Call Termination Regulations

1. Introduction

1.1. The Authority introduced cost-oriented termination rates through the Wholesale Voice Call Termination Regulations (GG 33698) in October 2010.

1.2. The Authority has reviewed these regulations in line with Section 67(8) of the Electronic Communications Act, no 35 of 2006 (the "ECA"), where Section 67(8) states the following:

67(8) Review of pro-competitive conditions:

(a) Where the Authority undertakes a review of the pro-competitive conditions imposed upon one or more licensees under this subsection, the Authority must—

(i) review the market determinations made on the basis of earlier analysis; and

(ii) decide whether to modify the pro-competitive conditions set by reference to a market determination;

1.3. The Authority informed stakeholders of its intention to conduct such a review using the Request for Information published in Government Gazette 36532 on the 4th of June 2013.

1.4. This explanatory note is structured as follows:

1.4.1. Market definition

1.4.2. Determination of Significant Market Power

1.4.3. Evaluation of the effectiveness of competition

1.4.4. Pro-competitive remedies

2. Market Definition

2.1. After analysis of the information requested from licensees by the Authority, the Authority sees no need to amend the definitions of the markets as determined in 2010 because there is no technical change that changes the characteristics of termination to a mobile versus fixed location[1]

2.2. Therefore the market definitions remain the same:

2.2.1. Market 1: The market for wholesale voice call termination services to a mobile location on each ECS/ECNS licensee's network who offers such a service within the Republic of South Africa.

2.2.2. Market 2: The market for wholesale voice call termination services to a fixed location on each ECS/ECNS licensee's network who offers such a service within the Republic of South Africa, consisting of:

2.2.2.1. The market segment for wholesale voice call termination to a fixed location within the 0N area code

2.2.2.2. The market segment for wholesale voice call termination to a fixed location between 0N area codes[2]

[1] See page 48 of Government Gazette 33121 of 16 April 2019

[2] As per the National Numbering Plan

3. Determination of Significant Market Power

3.1. In 2010 the Authority determined that:

> *"each ECNS and ECS licensee that offers wholesale voice call termination services has SMP in its own market"*[3]

3.2. After analysis of the information requested from licensees by the Authority, the Authority sees no reason to amend this determination, as the nature of voice call termination has not changed.[4]

4. Determination on the Effectiveness of Competition

4.1. In 2010 the Authority determined that the two markets for call termination were ineffectively competitive for the following reasons

4.1.1. a lack of the provision of access

4.1.2. the potential for discrimination between licensees offering similar services

4.1.3. a lack of transparency

4.1.4. inefficient pricing

4.2. Upon review of the conditions of the market, the Authority determined that the two markets remain ineffectively competitive, with the two markets being highly concentrated.

Table 1: Concentration in Market 1: Termination to a mobile location

Termination Revenue Shares				
	Jun-2011	**Dec-2011**	**Jun-2012**	**Dec-2012**
Licensee 1	36%	35%	36%	37%
Licensee 2	44%	44%	46%	45%
Licensee 3	16%	17%	15%	14%
Licensee 4	4%	3%	4%	3%
HHI	**3499**	**3511**	**3618**	**3660**

Table 2: Concentration in Market 2: Termination to a fixed location

	2011	**2012**
Licensee 1	98%	94%
Licensee 2	2%	6%
HHI	**9664**	**8912**

4.3. The Authority determines that these markets remain ineffectively competitive owing to inefficient pricing.

5. Pro-competitive Remedies

[3] Regulation 6 of the 2010 Regulations (Government Gazette 33698)

[4] See Section 2.3 on Countervailing Bargaining Power in Government Gazette 33121

5.1. Amongst others, the Authority imposed cost-oriented pricing on the pricing arrangements for voice call termination in the 2010 Regulations.

5.1.1. For Market 1, the Authority determined that the cost of termination in Market 1 was R 0.40 per minute.

5.1.2. For Market 2, the Authority determined that the cost of termination was R 0.19 and R 0.12 per minute dependent on the market segment in which the call is made.

5.2. On review of industry data, the Authority recommends revised rates for Market 1 whilst determining that there is no need to change the existing rates for Market 2

5.3. The Authority determines that the cost of termination in Market 1 is now approximately R 0.10 per minute based on, amongst others, the increase in traffic on licensees' networks, where an increase in traffic reduces the cost per unit in the provision of call termination services.

5.4. The Authority further determines that this level should be reached in three years. Therefore the proposed revised termination rates over the next three years are:

Table 3: Mobile Termination Rates: 2014-2016

	Rand	% Decline
01 March 2013	0.40	
01 March 2014	0.20	50%
01 March 2015	0.15	25%
01 March 2016	0.10	33%

Table 4: Proposed fixed line termination rates: 2014-2016

	Between ON	Within ON
Fixed Termination Rate	R 0.19	R 0.12

5.5. The 2010 Regulations also imposed a limited amount of asymmetry available to licensees that met certain criteria, as outlined in Appendix B of the 2010 Regulations.

Table 5: Limitations to Asymmetry as per the 2010 Regulations

	Maximum percentage above rate set for identified licensees
Current	-
01-Mar-11	20%
01-Mar-12	15%
01-Mar-13	10%

5.6. The qualifying criteria for an asymmetric termination rate in 2010 were:

"1.3. Licensees not listed in Regulation 7(4) ***(of 2010)*** *may charge higher termination rates based on the following factors:*

1.3.1. Spectrum allocation. A licensee must justify why it is adversely affected by current spectrum allocation.

1.3.2. Economies of scale and scope based on the share of total minutes terminated in the relevant market. A licensee qualifies for an asymmetric rate if it has less than 25 per cent of total terminated minutes in the relevant market as of June 2009.[5]"

5.7. The Authority is of the view that the share of total terminated minutes should be reduced from 25 per cent of total terminated minutes to 20 per cent of total terminated minutes. This amendment is reflected in Appendix A of these draft Regulations.

5.8. The Authority is concerned that the markets continue to reflect ineffective competition and that a reduction in termination rates may not be sufficient.

5.9. The introduction of asymmetry is a regulatory determination taking into account a number of factors, including:

5.9.1. traffic imbalances reflecting economies of scale

5.9.2. promotion of investment

5.9.3. encouraging competition

5.9.4. fostering SMMEs

5.10. Given the importance of investment in infrastructure in ensuring the achievement of sufficient scale and the differences in traffic volumes that exist in Market 1, the Authority believes it necessary to sustain and increase asymmetry for a further period of five years.

5.11. At the end of this asymmetric period, licensees are to be charging symmetrical termination rates. However, in the interests of fostering small businesses, the Authority proposes that licensees with less than 10% of total terminated minutes in the respective market at the end of this five-year period may retain the asymmetric benefit of the final year.

5.12. The table below outlines the asymmetric glide-path of termination rates available to those licensees that meet the qualification criteria:

Table 6: Maximum asymmetric termination rate which a qualifying licensee may charge for termination in Market 1

	Maximum Rate
01 March 2014	R 0.39
01 March 2015	R 0.33
01 March 2016	R 0.26
01 March 2017	R 0.20
01 March 2018	R 0.14
01 March 2019	R 0.20

[5] See "Appendix B:Application of the Fair and Reasonable Obligation" of the 2010 Regulations

Table 7: Maximum asymmetric termination rate which a qualifying licensee may charge for termination in Market 2

	Between ON	Within ON
01 March 2014	10%	10%
01 March 2015	10%	10%
01 March 2016	10%	10%
01 March 2017	10%	10%
01 March 2018	10%	10%
01 March 2019	10%	10%

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