

TELKOM SA LIMITED'S SUBMISSION REGARDING THE AUTHORITY'S PROPOSED CODE OF CONDUCT ON THE SALE, LEASE, RENTAL OR SUBSIDISATION OF SUBSCRIBER EQUIPMENT PURSUANT TO CHAPTER 12 OF THE ELECTRONIC COMMUNICATIONS ACT NO. 36 OF 2005: GENERAL NOTICE 1622 IN GAZETTE NO. 32803 OF 11 DECEMBER 2009

1.0 INTRODUCTION

Telkom SA Limited ("Telkom") appreciates the opportunity to comment on the proposed amendments to the above regulations.

Telkom would appreciate an opportunity to take part in any further processes that the Authority may deem necessary in these matters, including any oral representations, workshops or hearings.

With regard to the format used by Telkom in this submission, where Telkom has chosen to comment on a draft regulation, that draft regulation will be reproduced in **highlighted bold italics**, followed by Telkom's comments in normal font. Instances where Telkom has proposed alternative text will be indicated in **underlined bold italics**.

2.0 GENERAL COMMENTS

Telkom is in agreement that consumers should be afforded transparency in their dealings with licensees, their agents or resellers ("licensees"). While the provision of a handset that is subsidised in one way or another serves to lower the barrier of entry to subscribers who may not be able to afford the full price of a handset, there should also be transparency regarding the various items in a package, in order that subscribers can make informed choices.

Licensees currently use various marketing practices to present an array of packages/bundles in a manner that will attract certain categories of subscribers to products that will suit both their calling requirements and their pockets. Hence certain packages will be suited to business needs, while others to the needs of the student population, for example.

A common practice is that the subscriber buys access to the network, which can be comprised of various combinations of voice airtime, Internet browsing, Email and other features. The prices of such bundles, along with the relevant terms and conditions, are filed with the Authority. Various types of handsets may be included as an incentive for taking out a contract for a period (e.g. 24 months), and are offered as part of the bundle. The handset is, in effect, provided in lieu of subscribing for 24 months and, as such, is related to the term of the contract. We will refer to this as Model A.

Variations of Model A could include a once-off fixed amount payable on the handset, particularly in cases where an expensive handset is chosen.

Model A appears to Telkom to be a reasonably uncomplicated option for subscribers to understand and for licensees to implement. Telkom is, therefore, of the view that this model should not be prohibited, provided that sound accounting practices are employed. The model in which the handset and the airtime (and other features) are always listed separately appears to be the model most favoured by the Authority. We will refer to this as Model B.

Telkom would urge the Authority, however, not to limit innovation in the presentation of offerings, bearing in mind, of course, that sound accounting practices and the interests of subscribers should always be upheld.

In the fixed domain, subscriber equipment can be purchased at various retail outlets, but can also be purchased, separately from an airtime package, from a licensee such as Telkom.

Telkom is strongly opposed to the proposal that capacity be rolled-over from month to month (indefinitely), and that licensees must repay subscribers for unused capacity on termination of a contract. This practice will not only have onerous consequences on network dimensioning, but the requirement to pay out accumulated bandwidth will place a considerable financial liability on licensees. The result is likely to be that licensees will need to change current tariff structures, which may not be to the benefit of users.

3.0 SPECIFIC COMMENTS

3.1 Definitions

Telkom will comment on the following definitions:

"electronic communications provider" means any natural or juristic person that sells, leases, or rents subscriber equipment to members of the public;

The term "electronic communications provider" is not used in this regulation, and therefore Telkom proposes that this definition be deleted from the text.

"Subscriber Equipment" means any equipment which may be used by an end user to access electronic communication services, including mobile handsets, portable computers, fixed line telephones, 3G data cards, wireless modems, but excluding electronic payment terminals and two way radios;

Telkom is of the view that the definition of 'subscriber equipment' in the Electronic Communications Act, No. 36 of 2005 ("the Act") is comprehensive, and cannot see any reason to re-define 'subscriber equipment' in this regulation. The specific exclusion of 'two-way radios' in the proposed definition is, in our view, covered by section 31 of the Act which provides that:

- a) no person may transmit any signal by radio or use radio apparatus without a radio frequency spectrum licence (s31(1)); except
- b) in the course of making due and proper use, as a subscriber, of an

electronic communications service (s31(5)(a)).

Purpose of these Regulations

2. The purpose of these regulations is to:

(1) prescribe a code of conduct in relation to the sale, lease, rental or subsidisation of subscriber equipment and minimum standards in that regard for end-user and subscriber service charters;

(2) protect consumers of the services envisaged in Section 69 of the Act.

Telkom has no comment on the purpose of these Regulations

Applications of these regulations

3. (1) These regulations are applicable to the sale, lease, rental or subsidisation of subscriber equipment offered by a licensee, its agent or any resellers to the extent that they provide services to the public in terms of a contract concluded with a subscriber.

(2) The obligations imposed upon a licensee, its agent or resellers, in terms of these regulations should not be regarded as relieving them from any obligations imposed upon them in terms of any other law (including regulations or codes of conduct) including but not limited to the obligations relating to the advertisement of retail services and protection of consumers of such services.

Telkom has no comment on the application of these Regulations.

Contractual issues

4. (1) Post-paid and pre-paid offerings or packages that are purported to include a subsidy with respect to the sale, lease, rental or subsidization of subscriber equipment must clearly indicate the following -

(a) capital cost of the subscriber equipment;

Telkom assumes that the capital cost, in this context, refers to the retail price that the consumer will pay for the subscriber equipment. As mentioned under General Comments, the model whereby the subscriber equipment is provided wholly or partially free as part of a bundle taken out for a contractual period (Model A) should not be prohibited, provided that sound accounting practices are upheld.

(b) the interest charged in respect of the repayment of the capital cost;

In the provision of various product offerings, interest is usually not applicable.

Telkom assumes that 4(1)(b) will only apply in cases where interest is actually charged.

(c) the subsidy offered and the monetary value of the services offered by the licensee, its agent or a reseller; and

The monetary value of the services offered will be in accordance with a tariff filed with the Authority for a particular package/bundle.

(d) distinctly specify any other items charged by the licensee, its agent or reseller in respect of such post-paid or pre-paid offerings or packages.

Telkom has no comment on the above requirement.

(2) Post-paid offerings must indicate clearly in the billing statement and on a monthly basis -

(a) the outstanding amount of the capital cost payable by the subscriber in respect to the sale, lease, rental or subsidisation of the subscriber equipment;

As in 4(1)(a) above, Telkom assumes that the capital cost is the retail price of the subscriber equipment.

(b) the number of remaining installments for the settlement of the capital cost and interest in respect of the subscriber equipment;

Assuming Model A is applicable, the outstanding amount is merely a function of the monthly amount payable, multiplied by the duration (in months) remaining in the contract.

(c) the charges, including penalties payable by a post-paid subscriber for terminating a contract before the expiry date.

As above, assuming Model A is applicable, the outstanding amount is merely a function of the monthly amount payable, multiplied by the duration (in months) remaining in the contract.

If Model B is applicable, then the handset will be listed separately to the airtime.

(3) A subscriber intending to enter into a post-paid contract shall be given a choice of the various contractual periods available and be made aware of the full financial implications for each such choice, including the consequences for default and early termination thereof. A licensee, or its agent or reseller must ensure that billing in respect of free and non-free units, capacity or minutes, as the case may be, and other ancillary charges, is transparent and easily understandable by subscribers.

Telkom has no comment on the above requirement.

(4) A licensee, or its agent or reseller must, at least once a month, notify subscribers via short message service "sms" or any other convenient means agreed to between the subscriber and the licensee or its agent or reseller of any unused units, data, capacity or minutes accruing to the subscriber in a particular month including such units, capacity or minutes as may have been accumulated from previous months.

(5) A licensee, its agent or reseller shall not be entitled to require the subscriber to forfeit any unused units, capacity or minutes, as the case may be, in respect of any period. A licensee, its agent or reseller shall give subscribers a credit for any unused units, capacity or minutes, as the case may be, upon termination of the contract.

Telkom voices its strong opposition to draft regulations 4(4) and (5). Apart from the fact that the above two requirements pertain to the usage of communication services, and not to the sale, lease, rental or subsidization of subscriber equipment, and in our view are not relevant to this Regulation, they hold extremely onerous financial and technical consequences for licensees.

With regard to network usage, licensees typically utilize a model that allows for a degree of overselling of capacity, and networks are dimensioned accordingly. This presupposes a degree of certainty regarding the load on the network (both access and core network) at any particular time. By selling bundles that 'force' subscribers to use their available bandwidth within a specified period, licensees can more accurately predict the load on the network, and can dimension the network accordingly. This ensures that users have a reasonably constant experience, and do not have unnecessary periods of high congestion. This would particularly be the case with wireless access. The proposed roll-over of bandwidth would remove this degree of certainty, and could force licensees to adopt other methods of tariffing, that may not be as attractive for users.

Although it is, at this stage, not clear what the full intention is of these requirements, and the extent of their implementation (pre-paid, post-paid or both), our understanding is that they may extend to all contracts that have caps, or bundled services of any kind. This being the case, we are of the view that this would have serious implications on existing tariffing models, and could force licensees to adopt models that would offer a degree of protection to both finances and networks.

With regard to repayment for unused capacity on cancellation of a contract, this would involve costly resources to monitor, and more importantly, would create a financial liability for the company. Most companies in general try to limit such financial liabilities (for example, by not allowing large accumulations of unpaid leave by staff members).

Telkom strongly urges the Authority to delete these requirements from the regulation.

(6) Charges, if any, for the renewal or reconnection of a contract by

post-paid subscribers, shall be transparent, fair and reasonable.

Telkom has no comment on the above requirement.

(7) A potential subscriber will not be regarded as being in a position to make an informed decision, unless a licensee, its agent or reseller:

(a) explains in clear detail and makes reasonable efforts to interact with the subscriber in his or her preferred official language, and makes available in writing, the terms and/or conditions and consequences of each offering to the potential subscriber;

It is not clear from the text above whether or not the terms and conditions must also be made available in any preferred language, or whether this only applies to the verbal interaction.

(b) specifically points out to a post-paid subscriber the consequences arising from a breach or early termination of the contract by such a subscriber, and penalties payable in respect of such a breach or early termination;

(c) clearly states in writing the actual charges or penalty in respect of the services and/or subscriber equipment, and how the licensee, its agent or reseller intends to recoup them from the post-paid subscriber in the event of a breach or early termination of the contract. A written statement to this effect should be made to the subscriber before a contract is concluded with the licensee, its agent or reseller, whatever the case may be.

Telkom does not have any comments on points (b) and (c) above.

(8) A licensee, its agent or reseller must ensure that a post-paid subscriber is notified in writing of the expiry or termination of the contract, at least one (1) month before the expiry of the contract.

(9) The notification referred to in paragraph 8 above shall be done by means of sms, e-mail or in any other written form which shall serve as proof of such notification and accepted by the subscriber in a similar manner.

Telkom does not have any comments on points (8) and (9) above.

(10) A contract must not be automatically renewed. Post-paid subscribers must be given the opportunity to re-negotiate terms and conditions before the expiry of a contract. Where a contract is to be renewed, a post-paid subscriber must be entitled to negotiate terms and conditions upon which a contract is to be renewed, including the duration of the new contract.

Telkom is of the view that, in cases where a subscriber is notified but fails to renew his/her contract, the provisions of the Consumer Protection Act, No. 68 of 2008, ("the Consumer Act") should apply. Section 14(1)(d) of the Consumer Act provides that on the expiry of the fixed term of the consumer agreement, it will be automatically continued on a month-to-month basis, subject to further provisions.

(11) A licensee, its agent or reseller must clearly state in writing the actual charges of services, as well as how the licensee, its agent or reseller intends to recover or recoup service charges from the subscriber. The explanation should be given to the customer before a post-paid or pre-paid contractual relationship is established.

Telkom has no comment on the above provision.

Freedom to purchase subscriber equipment

5. (1) Subscribers must be given a choice not to conclude an agreement for the acquisition of any subscriber equipment in conjunction with the purchase of retail services or other offerings from the licensee, its agent or reseller, unless it is technically not possible to use or provide the service or offering other than through the subscriber equipment offered by the licensee, its agent or reseller.

Telkom's understanding of the above is that a subscriber wanting only to purchase a handset should not be forced to take any other offerings with the handset. This being the intention, Telkom is in agreement.

Please refer too to our proposed combining of the text of 5(1) to (4) below.

(2) Both post-paid and pre-paid subscribers must have the option to purchase, lease or rent any subscriber equipment, independently of, or in combination with other product or service offerings.

Purchase of a handset on its own would normally only apply to Prepaid. Our comments under General Comments are also applicable here.

(3) A licensee, its agent or reseller must not make it a prerequisite for the provision of any element of the service or offering that a customer must acquire subscriber equipment offered by such a licensee, its agent or any reseller, unless it is technically not possible to provide to such a subscriber the service required by him or her without such a subscriber equipment

(4) A licensee, its agent or reseller shall not penalise or prejudice a subscriber for choosing not to use subscriber equipment offered to him or her by such licensee, its agent or reseller together with the services or product offerings required by the subscriber.

Seeing that the above four requirements are similar in nature, Telkom proposes that

they be combined into a single paragraph, as follows:

“Both post-paid and pre-paid subscribers must have the option, without any penalty or prejudice, to purchase, lease or rent any subscriber equipment, independently of, or in combination with other product or service offerings, unless it is technically not possible to use or provide the service or offering other than through the subscriber equipment offered by the licensee, its agent or reseller”

(5) Any equipment purchased by the subscriber must not be subjected to any network locks, a subscriber must be able to use the equipment independent of where it was purchased or acquired.

Telkom has no comment on the above requirement.

Tariffs

6. (1) The tariffs lodged by the licensees with the Authority constitute maximum charges which a licensee, its agent or reseller may levy in respect of its offerings. A licensee, its agent or reseller shall be entitled to offer discounts, to subscribers on such tariffs.

Telkom has no comment on the above requirement.

(2) A licensee, its agent or reseller may not enter into a contract with a subscriber that prohibits discounts on tariffs.

Telkom does not believe that the above requirement is practical. Packages/bundles are constructed in such a way that subscribers can choose from many options, according to their particular needs and calling patterns. Such options will include combinations of the fixed monthly subscription charge, free minutes included in the package, different rates for the various categories of calls, etc. In our view, it would not be practical to offer (and implement) further discounts within these offerings.

Offences and Penalties

7. (1) Any subscriber who is aggrieved by the failure of a licensee, its agent or reseller to comply with this code of conduct may lodge a complaint with the Authority for investigation, and where appropriate, adjudication by the Complaints and Compliance Committee as envisaged in Sections 17B and 17C of the ICASA Act and for the imposition of a sanction by Council as envisaged in Section 17E of the ICASA Act.

(2) Upon a determination of non-compliance by the Complaints and Compliance Committee in terms of the ICASA Act, the Authority may impose a fine not exceeding:

(a) R250 000. 00 (two hundred and fifty thousand rand) for the contravention of regulation 4;

(b) R150 000. 00 (one hundred and fifty thousand rand) (for the contravention of regulations 5 and 6(2));

(c) R50 000. 00 (fifty thousand rand) for the contravention of all regulations not specified in regulation 7(2) (a) and (b) above.

Telkom does not have any comment on the above requirements.

Date of Commencement

8. Unless otherwise prescribed, these regulations will become effective a month from the date upon which they are published.

Due to the complexities of the changes that may be required in the billing, and other, systems to implement many of the proposed requirements, Telkom would urge the Authority to consider a period of 12 months from the effective date for implementation.

END OF SUBMISSION