



Submission to ICASA: “Notice of Intention To Amend Regulations In terms of Section 73 of the Electronic Communications Act in respect of E-Rate regulations published in General Notice 1610 of 2009”

Government Gazette No. 32789, 7 December 2009

Submission Date: 22 January 2010

INTRODUCTION

1. On 7 December 2009, the Independent Communications Authority of South Africa (“the Authority”) published Notice No. 32789 which seeks to repeal the Notice issued in Government Gazette No. 31979 published on the 3 March 2009, which proposes regulations pursuant to section 73 of the Electronic Communications Act, in respect of the E-Rate.
2. Neotel would like to thank ICASA for the opportunity to comment on the Notice and would like an opportunity to participate further, should ICASA hold public hearings.
3. Neotel congratulates the Authority for the revised regulations and remains in support of E-rate implementation. Pursuant to this objective, in formulating a response to the draft regulations, Neotel has endeavoured to provide some general and specific comments.
4. Neotel has also suggested some alternative approaches to the principles adopted in the regulation. These suggestions are offered to assist in addressing certain challenges that may be encountered in the implementation of the regulation.

GENERAL COMMENTS

5. Neotel appreciates that there are a sizeable number of schools situated in areas where basic telecommunications infrastructure is non-existent or where available infrastructure does not support the provision of data or Internet services. This is an untenable situation which is further compounded by the fact that there are educational institutions and facilities that have no funding or insufficient government funding to enable them to access any type of communication services.
6. In an endeavor to encourage roll-out of infrastructure and connectivity to these institutions, the Authority together with the Department of Communications introduced licence obligations regarding Internet connectivity to schools. As a result certain categories of Licensees have, as

part of their licences, obligations to provide connectivity to listed schools within the Republic of South Africa.

7. In addition to roll-out by such licensees, various provincial educational administrations have embarked on Internet connectivity initiatives, like for example the GautengOnline Project and the Khanya Project in the Western Cape. The Department of Communications has also initiated projects such as the Dinaledi Schools and the E-Nepad School project.
8. All these projects have a common objective of increasing the reach of connectivity. However, each of these initiatives have their own challenges and, as a result most of these educational institutions remain without any access to connectivity.
9. It is within the context of these implementation challenges and the importance of connecting schools and educational facilities that Neotel strongly supports efforts to ensure the implementation of the E-Rate. In order to ensure effective implementation of this regulation Neotel proposes to address some of the areas of concern in relation to the present draft of the regulation.

Authority's scope in terms of the Act

10. Section 73 of the Electronic Communications Act 36 of 2005 ("ECA") contain the Authority's mandate in so far as promulgating regulations that give effect to the implementation of the E-Rate.¹
11. As such, the scope of the regulation needs to conform to the application of E-Rate to "*Public Schools and Public further Education and Training Institutions*". This provision may only be extended to incorporate "*independent schools and private further education and training institutions*" by way of a declaration by the Minister.² Such a declaration does not form part of this regulation and therefore falls beyond the scope of this regulation.
12. Before this regulation is extended to encompass "*private schools and private training institutions*", the Minister is required to issue such a declaration. Hence in its current form, the regulation purports to introduce private institutions, which have not been declared, as provided for in section 73 of the ECA. Such institutions are therefore incapable of being beneficiaries of this provision until such declaration has been issued.
13. **Neotel therefore submits that the Authority may only extend the application of E-rate in the context of "private schools and private training institutions" after the Minister has issued the requisite declaration in terms of which categories of institutions may be included.**
14. Neotel supports the inclusion of "*private schools and private training institutions*", provided that the discount is actually passed to the end user, and that the "*private schools and private*

¹ Electronic Communications Act No 36 of 2005, Chapter 13

² Sec 73(5) The Minister may in consultation with the Minister responsible for Education , declare categories of independent schools or private further education and training institutions to be entitled to the discount mentioned in subsection (1).

training institution” does not realise an increase in profit, given the fact that private institutions already charge a premium in school fees.

SPECIFIC COMMENTS

Definitions contained in the Schedule

1(3) “E-Rate”

15. The principle is defined in the Act as a minimum discounted rate of 50% of the total charge levied by the Licensee providing internet services, to all public schools and all public further education and training institutions.
16. The proposed definition in the draft regulation broadens the definition to include independent schools and private further education and training institutions, prior to the actual declaration required by the Minister.
17. In terms of the provision of the Act, the E-Rate principle can only be applied to these private institutions after the declaration. Therefore, in line with our comments above, the definition should presently be confined to public schools and institutions.

1(6) “Retail Rate”

18. The “retail rate” is defined in the draft regulations as the “lowest commercial charge levied for a service contemplated in terms of section 73(3) of the Act by a licensee for making available services to public schools or further education and training colleges or independent schools that qualify for the E-rate.”³
19. Neotel submits that the reference to the word “lowest” be removed as the retail rate is determined by the market and adjusted accordingly. Different licensees will have different rates although they may pertain to similar services.
20. Furthermore, the reference to independent schools and colleges is inconsistent with the Act and should accordingly be removed. Once a declaration has been issued, these institutions will automatically qualify for the discount.

1(7) “Upstream Licensee”

21. Although there is an attempt to distinguish between the licensee providing the service and the licensee who requests the service (“the requesting Licensee”), to be provided to the educational institution, there is no clarity in this regard.
22. Neotel submits that there needs to be a definition of the **“Requesting Licensee”** in order to demarcate their respective roles and obligations within the context of this regulation.

³ GG No. 32789 published 7 December 2009 - DEFINITIONS(1)(6)

Regulation 3 - Implementation of E-Rate

Regulation 3(1) - Requirements for E-Rate

23. Regulation 3(1) (a) places an obligation on an upstream licensee to provide E-rate to requesting licensee.
24. In its current form, this requirement may become onerous and should be qualified within the context that such a request should be reasonable in that the upstream licensee does in fact have infrastructure or facilities in the area which is the subject of the request.
25. The main objective of this regulation is targeted at schools and educational institutions, which if required to pay the standard rates for such services, will be unable to offer this facility to students or learners. In an attempt to increase Internet access, this regulation was introduced to narrow the gap between those who are able to pay for access and those who cannot. That is, with the policy intent of “*bridging the digital divide*”
26. Although the regulation categorically specifies that the rate will only apply to schools and educational institutions, there is no mechanism in place to ensure that the services, capacity or bandwidth requested by the licensee from the upstream licensee, is in fact being utilised only for that specific purpose.
27. Any capacity obtained for Internet services cannot be segregated, as it is a common network used to service all users of the requesting licensee, which may include commercial users.
28. The resultant effect is that capacity which is acquired at an E-rate, may well be used for commercial purposes, thereby constituting a misuse of the upstream licensee’s network.
29. Where the network is then shared between the educational institutions and commercial services of the requesting licensee, this will inevitably cause the quality of service provided to the educational institution to deteriorate.
30. Some upstream licensees have historically been assigned licence obligations in the form of the provision of internet connectivity to various schools. It is submitted that where an “upstream licensee” has been assigned licence obligations to educational institutions, then the “upstream licensee” should be able to receive credit towards the fulfilment of its obligations where services are supplied to an educational institution using its facilities. This should be the case even where the educational institution has signed service agreement with the “Requesting Licensee”.
31. It is also submitted that the proposed discount structure in the regulation may impact negatively on the roll-out obligations of the upstream licensee in terms of reducing the market in relation to access to educational institutions.

32. The present formulation of the discount structure may create an incentive for schools to choose to obtain their services from a “requesting licensee” rather than the “upstream licensee”, simply because they receive a discount on two levels: first, the discount passed on from the “upstream licensee” to the requesting licensee and second, a further 50% discount from the requesting licensee.
33. The effect of this scenario is that it then becomes difficult to evaluate which licensee receives credit for the roll-out in terms of complying with licence obligations.
34. This discount structure may also serve as a disincentive to future infrastructure rollout and investment, on the basis that an ECNS licensee is obliged to re-sell services on a discounted structure and is unable to recover the costs of the investment.

Neotel Proposals:

35. **The proposed discount structure should only apply to licensees who have been assigned schools and educational institutions as licence obligations, so that the impact on such licensees is minimised, in terms of reducing educational institutions as a market for complying with the licence obligations.**
36. **Given the fact that the discount structure has a direct impact on the licence obligations, a suggested solution is to remove the roll-out of connectivity to schools as such an obligation, from existing ECNS licensees, based on the business opportunity and incentives that have now been created by this regulation.**
37. **The relationship between the “upstream licensee” and the “requesting Licensee” should be a commercial arrangement, and only the educational institution should receive the 50% discount, based on the principle that the market is now liberalised and there is sufficient competition which will regulate the pricing of services between the different categories of licensees.**
38. **The regulator must implement a monitoring mechanism to ensure that the services obtained by the “requesting Licensee” is used solely for the purpose of providing connectivity to schools and not to serve the commercial part of their operations. This process must also include an audit to be conducted annually.**

Regulation 3 (2) - Application process/Guiding principles

39. Neotel submits that this requirement must be qualified with the proviso that an application may only be lodged where the “upstream licensee” has on-net capabilities or facilities available in the area pertaining to the request.
40. There is an assumption that the application that is lodged in terms of section 73(3) must be completed in the format contained in “Schedule A - Application Form”. If this assumption is correct, then regulation 2 must refer to the attached schedule as a reference in terms of the information to be provided when lodging such an application.
41. The application form itself does not make provision for the details and information of the “Requesting Licensee”. Such details are crucial and relevant to the application and should therefore be captured in the application schedule.
42. This provision should also indicate the entity at which the application is lodged and whether the response need also be lodged at the same entity, before a dispute is declared.
43. This process should further make provision for a verification process by the relevant school or educational institution, confirming that it has in fact requested such licensee to provide internet access, attaching the proposal made by the requesting licensee.

Regulation 3(3) - Agreement Principles

44. Neotel supports the conclusion of such an agreement and would suggest that all such agreements be filed with the Authority to facilitate monitoring, implementation and auditing of the service.
45. Once again Neotel draws the Authority’s attention to the point that Internet services are provided from a common network and if this network is shared with commercial services this would have a negative impact on the quality of service to the E-rate service. It is therefore essential that there is a monitoring mechanism, to ensure that the service provided by the “Requesting Licensee” is dedicated to the provision of E-Rate.

Regulation 3 (4) - Unfair Discrimination

46. Neotel is of the view that the Authority should implement mandatory filing of such agreements, similar to requirement in terms of the interconnection and facilities leasing agreements, to ensure that there is no unfair discrimination.
47. We further submit that the stipulated time period to conclude such agreements may be inadequate and that it be extended to sixty (60) days and ninety (90) days respectively, due to the fact that there may be certain internal approvals that are required by the parties to the agreement, which may not be secured within the thirty (30) day period.

48. Neotel further proposes that the time frames should rather be couched in more appropriate wording to allow for some flexibility. In this regard, we suggest the insertion of the following words in underlined and in italics:

3(4)(d) If there is infrastructure available to provide the service, ***parties must initiate an E-rate agreement within sixty (60) days from*** date of notification by a licensee that it intends to provide internet services to public schools, public further education and training institutions and declared categories of independent schools or private further education and training institutions, ***to be concluded no later than ninety (90) days*** from the date of notification.

49. This construction should also apply to regulation 3(4)(e), so that there is an automatic extension in the event of any delay and so that there is no need for the administrative burden of the parties agreeing to an extension as this might serve to create unforeseen delays.

Regulation 3(5) - Disputes and Complaints

50. The ICASA Act⁴ specifically contains provisions which address complaints and disputes as well as the manner and procedures for dealing with disputes that fall within the ambit of this Act.

We therefore suggest that the provisions under regulation 3(5) be deleted and replaced with the following wording:

3(5)(a) ***“any dispute arising from the implementation of this regulation, may be referred by any of the licensees to the Complaints and Compliance Committee in terms of the ICASA Act.”***

Regulation 4 - Record Keeping

51. Neotel is of the view that the “Requesting Licensee” must be obliged to keep and maintain billing records for the duration of the contract.

Regulation 5- Penalties

57. This provision should be subject to the process conducted by the Complaints and Compliance Committee (“CCC”).

58. This requires that a penalty may only be imposed after a finding by the CCC and that it should be proportionate to the non-compliance and NOT exceed R500 000, 00 (Five hundred thousand rand).

⁴ ICASA Act 13 of 2000, section 17-Committees

CONCLUSION

59. Neotel welcomes the revised proposed E-rate regulations and sees them as valuable in the ultimate implementation of the important goals and objectives underpinning the E-rate initiative.
60. Neotel urges the Authority to ensure that these regulations are clarified to ensure their implementation. We refer the Authority to our comments and proposals contained herein.
61. Moreover, Neotel specifically urges the Authority to consider the impact that the proposed regulation will have on a licensee, such as Neotel, who presently has (uniquely so) the obligation to roll-out to schools or educational institutions.
62. We believe that this matter should form the subject of a broader discussion that streamlines licence obligations and policy objectives in a competitive environment.
63. Importantly, Neotel has raised concern that the draft regulations in its current form may expose the proposed discount structure to abuse by certain licensees.
64. Finally, Neotel requests the Authority to reconsider some of the underpinning principles as alluded to in the proposals contained in the submission to ensure the effective implementation of this regulation and the important policy objectives that underpin it.

