

TERTIARY EDUCATION AND RESEARCH NETWORK OF SOUTH AFRICA



(Association Incorporated under Section 21)
Registration Number 2000/020780/08
Registered Nonprofit Organisation: 014-801 NPO
VAT Registration Number: 4190191926

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Independent Communications Authority of South Africa

Pinmill Farm
Sandton
Johannesburg

Attention: Ms Thenjiwe Dube, Project Leader

Per email: tdube@icasa.org.za, cc. Imasilo@icasa.org.za

Dear Ms Dube

Draft Amendment to the E-rate Regulations

1. The Tertiary Education and Research Network of South Africa (TENET) has noted the publication by the Authority of notice of its intention to amend the regulations previously promulgated under sections 73(3) & (4) of the Electronic Communications Act of 2005 ("the ECA") in respect of the E-rate ("the Draft Amendment").
2. TENET has certain concerns regarding the proposed amendments which it wishes to bring to the attention of the Authority, and is grateful for the opportunity afforded to it to do so.
3. As an honorary member of the Internet Service Providers' Association (ISPA), TENET has read the submission prepared on behalf of ISPA and is in full agreement therewith. This submission is intended to supplement the ISPA submission by focusing on issues with the Draft Amendment of specific concern to TENET.
4. TENET is an Association Incorporated under Section 21 of the Companies Act (Registration Number 2000/020780/08) as also a registered non-profit organisation under the Non-Profit Organisations Act of 1997.

5. TENET operates exclusively on a cost-recovery basis. This has been exhaustively vetted by the South African Revenue Services (SARS) which has issued out a directive exempting TENET from paying income tax in respect of services which are provided on this basis. The maintenance of recognition of this income tax exemption by SARS depends on TENET continuing to operate on such cost-recovery basis.
6. In order to achieve its primary mandate of providing world-class and affordable connectivity solutions to tertiary education and research institutions, TENET has entered into an Indefeasible Right of Use (IRU) agreement with Seacom Ltd. In terms of this IRU TENET has secured ownership of capacity on the Seacom international submarine cable. This capacity – which is available over the anticipated 20 year lifespan of the Seacom cable - has been paid for in full by TENET.
 - 6.1. Seacom Ltd, recognising the very specific nature of the services provided by TENET to beneficiary institutions, has provided a significant discount on the purchase price of the capacity purchased by TENET.
 - 6.2. In order to access this discount TENET has undertaken in the IRU that the purchased capacity will be supplied only to those non-profit, public education and research institutions specified in the IRU (“a Permitted Resale”).
 - 6.3. Any Permitted Resale by TENET of the purchased capacity may only be affected on the basis that the price for the resale, lease or transfer of such purchased capacity shall not exceed TENET’s cost recovery of such Purchased Capacity on a non-profit basis.
7. TENET, in seeking to extend the benefits accruing to it under the Seacom IRU, has entered into an agreement with the e-Schools’ Network (eSN). eSN is a non-profit, self funded organization that provides the school and FET College community in South Africa with the following services:
 - 7.1. Connectivity and communication solutions, which are negotiated annually with Internet Service Providers to bring best priced quality services to schools;
 - 7.2. Call centre support tailored to the unique needs of the school and FET College environment;
 - 7.3. Consultancy and training support service in the area of educational technology, with a particular focus on providing and sustaining connectivity and online communication services in schools; and
 - 7.4. Project development and management on behalf of a wide range of clients, especially where e-Schools’ Network is able to grow ICTs in educational communities that are in need.
8. Services provided by TENET to eSN are provided on a strictly applied cost-recovery basis. This cost-recovery character is reflected in the detailed invoicing delivered to eSN which reflects the costs to be recovered in respect of each component of the service provided by TENET.

9. In terms of this Agreement and with reference to the Draft Amendment, TENET can be regarded as an upstream licensee in respect of the connectivity services it provides to eSN.
10. In assessing, however, whether TENET should be required to provide the upstream discount contemplated in section 73(3), it must be borne in mind that it is not correct to speak of the services being provided TENET (or eSN) as being provided at either a retail rate or a wholesale rate, as neither term is applicable within a cost-recovery environment.
11. TENET submits that, within the cost-recovery model set out above, the following position should apply with regard to the E-rate:
 - 11.1. The E-rate should not apply to recognised non-profit organisations / public benefit organisations (PBOs) which are involved in the provision of Internet services to the institutions contemplated in section 73(1) of the ECA ("qualifying institutions").
 - 11.2. To the extent that any such entity is the recipient of the E-rate from an upstream provider as set out in section 73(3) of the ECA, the entity is required by its NPO / PBO status to pass this discount on to any downstream licensee which is providing services to qualifying institutions.
 - 11.3. A failure to pass on the discount would be in breach of the cost-recovery principles to which such entity is in law required to adhere.
12. Noting that the Draft Amendment in no way caters for the issues raised above, TENET is concerned about the substantial uncertainties which the Draft Amendment would introduce to its operation in general and relationship with eSN specifically. TENET would accordingly greatly appreciate a further opportunity to address the Authority in this regard and will seek an appointment with the project team in order to achieve this.

Kind regards



Duncan H Martin
Chief Executive Officer