

## **SUBMISSION TO THE DRAFT E-RATE REGULATIONS**

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### **1 INTRODUCTION**

Telkom SA Limited ("**Telkom**") welcomes the opportunity to provide comments to the draft E-rate Regulations.

Telkom would like to request an opportunity to make oral representations, the duration of which will not exceed 45 minutes.

Telkom's submission is divided into 4 parts which are as follows:

- **Introduction**
- **Substantive comments to the draft E-rate Regulations**
- **Conclusion**

Telkom welcomes the Independent Communications Authority of South Africa's ("the Authority") decision to begin the process which will culminate into the introduction of Regulations that will give effect to and enable the implementation of Section 73(3) of the Electronic Communications Act No 36 of 2005 ("the EC Act"). Telkom's position has been that until the Regulations contemplated in section 73(4) of the EC Act vis a vis implementation of Section 73(3) are in place in order to provide guidance and procedures for such an implementation, neither Telkom nor other electronic communication network service licensees would be able to give effect to Section 73(3). Implementation in the absence of Regulations would have been haphazard; arbitrary and possibly subjected to legal challenges. The Regulations once finalised will provide the requisite certainty needed to ensure smooth implementation.

The one area of critical concern for Telkom in as far as the implementation of Section 73(3) of the EC Act is concerned is around implementation of the 50% discount with respect to unbundles ECF and this concern is dealt with extensively in paragraph 2.3 below. The other concern is around monitoring implementation and compliance to ensure that there is no abuse of this system, as abuse of this discount will have dire financial consequences for ECNS licensees who have to pass on the discount.

## 2 Substantive comments on draft E-rate Regulations

Following hereunder is Telkom's substantive and specific comments to the sections of the draft E-rate Regulations:

### 2.1 Section 1 – Definitions

3.1.1 Telkom recommends that the **E-rate definition** sub-section 1(3) be amended as follows:

**“E-rate”** means the discount of no less than 50% applicable to the total charge levied by a licensee to qualifying public schools or public further training institutions, as well as independent schools or private further education and training institutions, as prescribed, to be entitled to the discount for the utilising Internet services provided by a licensee.

The amended section will read as follows:

*“E-rate” means the discount of no less than 50% applicable to the total charge levied by a licensee to qualifying public schools or public further training institutions, as well as independent schools or private further education and training institutions, as prescribed, for the Internet services provided by a licensee.*

3.1.2 The **definition of “retail rate”** in section 1(6) of the draft E-rate Regulations seems not to be aligned with the intention of Section 73(3) of the EC

Act to the extent that Section 73(3) provides that the retail rate be levied by the ECNS licensee to the ECS licensee for the electronic communication facilities provided to the ECS licensee for providing internet services to qualifying institutions. However section 1(6) of the draft regulations seems to be referring to the retail rate that ECS (ie the licensee making available internet services to public schools) charges the school that qualifies for E-rate discount.

Telkom recommends that this definition be reviewed and in reviewing same have regard to how the drafters of the legislation intended that the retail rate referred to in Section 73(3) of the EC Act be implemented, as Telkom's understanding has been that retail rate is charged to subscribers / end users and that licensees charge wholesale rates to each other.

3.1.3 The **definition of "upstream licensee"** in section 1(7) of the draft E-rate regulations is not aligned to section 73(3) of the EC Act, which provides that the ECNS licensee be the licensee that gives the 50% discount to the licensee who obtains electronic communication facilities from it to provide internet services to qualifying school. Section 1(7) of the draft E-rate regulations when read with section 3(1) provides that the discount will be given by either an ECS or ECNS licensee and this is contrary to section 73(3) of the EC Act which provides that the discount is provided by an ECNS licensee.

Telkom recommends that the definition of 'upstream licensee be amended as follows:

**'Upstream licensee'** means a licensee who provides ~~ECS or~~ ECNS services to a licensee who in turn provides Internet services to public schools or further education and training colleges or independent schools that qualify for the E-rate discount.

The amended section will read as follows:

**Upstream licensee**” means a licensee who provides ECNS services to a licensee who in turn provides Internet services to public schools or further education and training colleges or independent schools that qualify for the E-rate discount.

## 2.2 Section 2- Purpose, Scope and application of the Regulation

Save to note that this section provides for the Regulations to be applicable to Electronic Communications Services (ECS) and Electronic Communication Network licensees (ECNS) and not to licence exemptees, such a resellers and PECN, Telkom has no further comments to make to this section.

## 2.3 Section 3 - IMPLEMENTATION OF E-RATE

### 2.3.1 Section 3(1) Requirements

Section 73(3) of the EC Act provides that the 50% is obtained by a **licensee**<sup>1</sup> who provides internet services to qualifying institutions in respect of the **electronic communication facilities**<sup>2</sup> and the licensee is entitled to 50% off the **retail rate**<sup>3</sup> charged to it by the ECNS licensee for the facilities in question.

<sup>1</sup> Means a person issued with a licence to provide services in terms of Chapter 3 of the ECA

<sup>2</sup> Electronic Communication facility includes but is not limited to any-

- (a) wire;
- (b) cable (including undersea and land based fibre optic cables);
- (c) antenna;
- (d) mast;
- (e) satellite transponder;
- (f) circuit;
- (g) cable landing station;
- (h) international gateway;
- (i) earth station; and
- (j) radio apparatus or other thing'

which can be used for, or in connection with, electronic communication, including where applicable –

- (i) collocation space
- (ii) monitoring equipment;
- (iii) space on or with in poles ducts, cable trays, manholes; hand holds and conduits; and
- (iv) associated support systems, sub-systems and services, ancillary to such electronic communications facilities or other wise necessary for controlling connectivity of the various electronic communications facilities for proper

Section 3(1) of the draft E-rate Regulations is intended to give effect to the implementation of the 50% discount for the electronic communications facilities (ECF) obtained and used for the provision of internet services to qualifying schools / institutions. What has been happening in practice, in cases of ECS licensees who do not own their network, is that the ECS licensees would lease the connectivity medium between the qualifying institutions and the ECS licensees for the access links from Telkom or any other ECSN licensee to provide the internet/value added service to qualifying schools / institutions. This scenario is one that is easy to manage in as far as the implementation of the 50% discount is concerned.

The ECS licensees also lease bulk national and international telecommunication facilities from Telkom or any other ECSN licensee to provide an all inclusive internet service to its customers which includes qualifying schools / institutions.

In this scenario how does Telkom calculate and apportion the correct input costs associated with the delivery of these services to the school (apart from the last mile) and apply the 50% discounts accordingly to these input costs. This refers to the national and international telecommunication facilities the ECS licensees procure from Telkom for the provision of its internet services as these services are not exclusively used for qualifying schools / institutions.

It is for this reason that Telkom would not support the unbundling of the ECF in terms of providing the 50% discount as it would almost be impossible to establish the percentage cost allocations per service element used within this bulk national and international telecommunication facilities. Going down that route would result into never ending billing disputes, litigation that could end up clogging ICASA, the CCC and courts dispute resolution systems. It is Telkom's view that the 50% discount on the connectivity medium could be considered, however, the ECS

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functionality, control, intergration and utilisation of such electronic communications facilities

<sup>3</sup> means the lowest commercial charge levied for a service contemplated in terms of section 73(3) of the ECA by a licensee for making services to public schools or further education and training colleges or independent schools that qualify for an E-rate discount

portion must be contributed by the ECS licensees as part of their social responsibility. Telkom Internet provides the 50% discount on the total internet service to qualifying schools / institutions.

Section 3(1)(b) of the draft E-rate Regulations provides that *“an upstream licensee shall grant the 50% discount off the retail rate charge for all electronic communications facilities **and / or services** provided by a licensee to other licensees and used for the provision of Internet services..”* (our emphasis). The inclusion of electronic communication services is contrary to Section 73(3) of the EC Act which provides for the discount to be applied only to ECF to the extent that same is used to provide Internet service to qualifying schools.

Telkom recommends that the words “and or services” be deleted from this section.

### **2.3.2 Section 3(2) Application processes / Guiding principles**

Sub- section 3(2)(b) of the draft E-rate Regulations provide that a licensee who requests the 50% discount must submit a list of schools intended for internet connectivity as proof to another licensee.

Telkom’s view is that the submission of list of schools is not adequate proof that the internet connectivity is intended for and will in fact be used for qualifying schools and also is not an adequate safeguard against abuse of the E-rate discount. Telkom recommends that additional document be requested from the licensee, including copy of the Schedule A form attached to the draft E-rate Regulation duly completed and signed by the authorised people in the school requiring internet services. The licensee seeking discount should be required to sign a declaration that ECF facilities will be used only for the qualifying schools and that none adherence will attract the penalty prescribed in section 4.

### **2.3.3 Section 3(3) – Agreement principles**

Telkom is not sure about the relevance and / or suitability of latter portion sub-section 3(b)(aa)(i) in the E-rate agreement, as Telkom’s interpretation of the

implementation of Section 73(3) of the EC Act is that the parties involved is an ECS and ECNS licensees and not ECNS together with another ECNS.

Accordingly Telkom recommends that sub-section 3(b)(aa)(i) be amended as follows:

(i) Contains the standards acceptable to all parties ~~and that these enable electronic communications networks to be connected~~; and

The amended sub-section will read as follows:

*“(i) Contains the standards acceptable to all parties; and”*

#### **2.3.4 Section 3(4) Unfair discrimination**

Telkom has no comments to this section.

#### **2.3.5 Disputes and Complaints**

Telkom has no comments to this section.

### **2.4 Section 4 - RECORD KEEPING**

In order to deter abuse of E-rate discounts, an ECNS licensee (upstream licensee) who provided an E-rate discount to a licensee should be able to request that such a licensee provide the ECNS licensee (upstream licensee) who provided an E-rate discount with documents to show that the facilities is used for the purpose provided for.

Telkom recommends that a section be included to facilitate the request in this regard.

### **2.5 Section 5 – PENALTIES**

In order to deter abuse of the discount granted under Section 73(3) of the EC Act and the E-rate Regulations.

Telkom recommends that the following section be included under section 5:

*“A licensee who utilised the facilities subject to an E-rate discount obtained under section 3(1) for any other purpose other than the provision of Internet services to public schools, public further education and training institutions or independent school, as prescribed, shall be liable for a fine not exceeding...”*

## **2.6 Section 6- REPEAL**

Telkom notes the repeal in their entirety of the Regulations published under Government Gazette No 31979 (Notice 246 of 2009) (“the effective Regulation”), which would mean the repeal of section prescribing the implementation of Section 73(1) and (2) of the EC Act, as encompassed in Section 3 of the effective E-rate Regulations. The draft E-rate Regulation does not contain a section similar to section 3 of the effective E-rate Regulations. In light of the requirement in Section 73(4) of the EC Act that *“the implementation of this section must be in the manner prescribed”* Telkom is not sure whether the Authority did in fact intended to repeal the entire Regulation without having repeating / transplanting section 3 of the effective Regulation to the draft E-rate Regulations.

## **2.7 Conclusion**

Telkom trusts that this input will assist the Authority in coming up with Regulations that will ensure effective implementation of E-rate and is available for public hearings in order to share with the Authority practical implementation considerations as alluded to under paragraph 2.3 above.

**END**