



18 January 2010

The Chairperson

The Independent Communications Authority of South Africa (ICASA)

Pinmill Farm

164 Katherine Street

Sandton

2146

Attention: Ms Thenjiwe Dube

Per e-mail: tdube@icasa.org.za

cc: imasilo@icasa.org.za

Dear Ms Dube

NOTICE OF INQUIRY IN TERMS OF SECTION 4(4) OF THE ELECTRONIC COMMUNICATIONS ACT, 36 OF 2005: PROPOSED AMENDMENT TO THE E-RATE REGULATIONS (GOVERNMENT GAZETTE NO 32789 OF 2008)

Please find herewith Vodacom's written comments in response to the aforementioned notice. Vodacom hereby confirm its willingness to participate in any further consultative process which the Authority may schedule in respect of this matter.

Yours sincerely

PAKAMILE PONGWANA

MANAGING EXECUTIVE: REGULATORY AFFAIRS

Vodacom (Pty) Ltd's Written Submission in Response to Notice of Intention to Amend the Regulations on E-Rate (Notice 1610, Government Gazette No: 32789 dated 7 December 2009)

1. INTRODUCTION

Vodacom (Pty) Ltd ("Vodacom") welcomes the opportunity to comment on the notice of intention to amend the E-Rate Regulations ("Proposed Amendments") pursuant to an invitation for submissions published by the Authority dated 7 December 2009¹. Vodacom hereby confirms its willingness to participate in any oral hearings which may be scheduled by the Authority.

Vodacom participated in the previous consultative process which culminated in the promulgation of the Final Regulations on E-rate², ("the 2008 Final Regulations"). Vodacom welcomes the fact that the Authority has taken on board some of the various stakeholders' comments submitted during that consultative process.

Vodacom's comments are limited to specific comments on the Proposed Amendments. Suggested additions are marked in **bold and underlining** whilst proposed deletions are marked in ~~**bold and strikethrough**~~.

2. SPECIFIC COMMENTS ON THE AMENDED REGULATIONS

2.1 Regulation 1: Definitions

2.1.1 Regulation 1(3) – Definition of E-rate

In its submissions to the Authority on the draft³ preceding the 2008 Final Regulations Vodacom submitted that the definition of E-Rate as set out in the regulations be reworded to be in accordance with the empowering provisions of section 73 of the Electronic Communications Act, 36 of 2005 ("EC Act"). In this regard the following definition was proposed:

"E-Rate means the **minimum** discount of ~~no less than~~ 50% **to be granted by the licensees in respect of internet services as contemplated in section 73(2) of the Act provided** to public schools **and** or public further training institutions, as well as independent schools or private further education and training institutions **as prescribed in terms of section 73(5) of the Act** ~~to be entitled to the discount for utilising internet services provided by a licensee".~~

Vodacom reiterates its submission that the definition be reworded as proposed above.

¹ Government Gazette No 32789

² Published in terms of Notice 246, Government Gazette 31979 dated 3 March 2009

³ Published in terms of Notice 927, Government Gazette 31291 dated 1 August 2008

2.1.2 Regulation 1(6) – Definition of retail rate

Vodacom seeks clarity on the rationale for the inclusion of the definition of retail rate i.e. the lowest commercial charge for a service contemplated in terms of section 73(3) ... by a licensee for making services available to public schools ... that qualify for e-rate.

Vodacom notes that in terms of section 1 of the EC Act, the word retail is defined as:

“the sale, lease or otherwise making available of services offered by the licensees to subscribers”.⁴

Vodacom submits, based on the afore-said definition, that the use of the phrase retail rate in section 73(3) of the EC Act as well as the manner in which it is defined in the Proposed Amendments is a misnomer for the following reasons:

- Licensees do not charge each other retail rates as per the definition of the word retail in section 1 of the EC Act. Retail rates are charged to the individual end-user / members of the public. What licensees charge each other are 'wholesale rates' as defined in section 1 of the EC Act.⁵
- Reference to section 73(3) of the EC Act in regulation 1(6) i.e. the definition of retail rate as per the regulations is for the afore-mentioned reason a misnomer as the definition contemplates the retail rate to be a rate charged to public schools etc (i.e. subscribers) whilst section 73(3) contemplates a rate charged between licensees.
- The use of the phrase retail rate in regulation 3(1)(b) and 3(2)(a) of the regulations contemplates a charge between licensees. This is not consistent with regulation 1(6) i.e. the definition of retail, as the latter contemplates a charge to subscribers (in this case the qualifying schools and institutions).
- Furthermore, regulation 1(6) refers to the 'lowest charge for a service contemplated in section 73(3) ... by a licensee for making services available to public schools that qualify for e-rate'. Section 73(3) does not contemplate a service by a licensee to public schools that qualify for e-rate. Rather, to the extent that any service is contemplated at all, it would be the service by an ECNS licensee to an ECS licensee in respect of the leasing of EC facilities by the latter from the former.

⁴ A subscriber is defined in section 1 of the EC Act as “a person who lawfully accesses, uses or receives a retail service of a licensee ... for a fee ...”

This definition of retail is consistent with the ordinary meaning of the word as per the Concise Oxford English Dictionary which defines retail as “the sale of goods to the public for use or consumption rather than for resale.”

⁵ Wholesale is defined in section 1 of the EC Act as “the sale, lease or otherwise making available an ECNS or ECS by an ECNS licensee or ECS licensee to another licensee ...”

Based on the above Vodacom submits that the definition of retail rate contained in regulation 1(6) serves no purpose, besides to create confusion, and should be deleted. The deletion of the definition will not affect the obligation imposed on licensees to grant an E-Rate discount to all institutions contemplated in section 73(1) and 73(5) of the EC Act. Neither will it affect the obligation imposed on all ECNS licensees to grant a [wholesale] discount of 50% to ECS licensees in respect of the leasing of facilities to be used in the provision of internet services to qualifying schools and institutions.

2.2 Regulation 2: Purpose, scope and application of the regulations

Vodacom has no comment on the provisions of regulation 2

2.3 Regulation 3: Implementation of E-Rate

2.3.1 Regulation 3(1) – Requirements

(i) Regulation 3(1)(a)

Vodacom has no comments on the provisions of regulation 3(1)(a).

(ii) Regulation 3(1)(b)

Vodacom submits, for reasons set out under 2.1.2 above, that reference to retail rate be substituted for 'wholesale rate'.

2.3.2 Regulation 3(2)

Vodacom submits, for reasons set out under 2.1.2 above, that reference to retail rate in regulation 3(2)(a) be substituted for wholesale rate.

2.3.3 Regulation 3(3) – Agreement principles

Vodacom has no comments on the provisions of regulation 3(3).

2.3.4 Regulation 3(4)

Vodacom has no comments on the provisions of regulation 3(4).

2.3.5 Regulation 3(5) – Disputes and complaints

(a) Regulation 3(5)(a)

Regulation 3(5)(a) provides that all complaints will be dealt with in accordance with regulations prescribed by the Authority. Vodacom notes that the Authority has prescribed several regulations under various sections of the EC Act. Most, if not all, of these regulations contain dispute resolution procedures. As such Vodacom seeks clarity which prescribed regulations are being referred to in regulation 3(5)(a).

(b) Regulation 3(5)(b)

Regulation 3(5)(b) provides that “Where a dispute arises between licensees, any of the licensees may refer the dispute to the Complaints and Compliance Committee (CCC) so as to resolve the dispute and make a binding order”.

Vodacom submits that regulation 3(5)(a) is contrary to the provisions of section 17C and 17D of the Independent Communications Authority of South Africa Act, 13 of 2005 (“ICASA Act”) for the in that:

- Licensees and other persons refer their disputes and complaints to the Authority and not the CCC;
- The Authority, at its discretion, may refer the dispute or complaints to the CCC for consideration ;
- The CCC is not empowered to make binding orders or final decisions on disputes referred to it. Instead the CCC submits its findings and recommendation to the Authority for a decision regarding the action to be taken;
- The Authority will make a final decision and binding order based on the recommendations of the CCC.

Based on the above Vodacom proposes that regulation 3(5)(b) be amended to read as follows:

“Where a dispute arises between licensees, any of the licensees may refer the dispute to the Authority for a decision.

2.4 Regulation 4: Record keeping

Vodacom has no comments on the provisions of regulation 4.

2.5 Regulation 5: Penalties

Vodacom has no comment on the provisions of regulation 5.

2.6 Regulation 6: Repeal

Vodacom has no comment on the provisions of regulation 6

2.7 Regulation 7: Short title and commencement

Vodacom has no comment on the provisions of regulation 7