



Every thing is possible – Humanity – Integrity - Humility – Inspiration

COMMENTS ON THE DRAFT CALL TERMINATION REGULATIONS

Notice in terms of sections 4(4) and 67(4) of the Electronic Communications Act No 36 of 2005 and section 4 of the Independent Communications Authority of South Africa Act No 13 of 2000 as amended

Published as General Notice 314 of 2010 in Government Gazette 33121

Submission date: 18 June 2010

1. Introduction

- 1.1. Smile Communications (Pty) Ltd ("Smile") welcomes the opportunity that has been provided by the Independent Communications Authority of South Africa (the Authority") to submit its written comments on the draft Call Termination Regulations published on 16 April 2010.
- 1.2. We would appreciate the opportunity to make an oral presentation, should any public hearing ensue from this process.
- 1.3. As the Authority is aware, Smile is a new entrant in the sector who intends to provide affordable communications services to the lower end of the market in the country (people who cannot afford essential communications services and earn around R15 or less per day). We acknowledge that in order to provide affordable services, current and conventional methods cannot be employed. We are therefore an operator who wants to do things differently as we understand that doing business differently is what will enable the provision of much needed cheaper services.
- 1.4. There are however both internal and external factors that are involved in bringing down communication prices in this country for an operator like Smile. The internal factors are those which are within our control to address – in this regard, we will be making use of innovative technologies combined with new creative models across our business streams that will lower the cost of communications to end-users e.g. implementing a unique distribution model, empowering local people and communities to sell our service offering, etc. The majority of the external factors, not entirely within our control, comprise regulatory issues such as infrastructure and service licensing, access to scarce national resources such as frequency spectrum, high interconnect rates, etc.
- 1.5. We view call termination rates as a one of the key factors that will enable the provision of affordable communication services. Having a fair regulatory

regime for call termination will enable the fulfilment of our vision to serve the poor and contribute towards the attainment of universal service and access. We see this process as an opportunity for the Authority to finally facilitate an effective call termination framework.

- 1.6. Smile notes that the call termination charges have been the subject of much media attention in the past months where it has been reported that the current charges are a constraint to effective competition as well as a driver of high retail prices in South Africa ("SA").
- 1.7. We commend the Authority for a job well done in publishing the draft Call Termination Regulations, as once finalised competition will be ushered into the market. The draft regulations present the opportunity for new players in the market to compete with incumbent telecom operators and to offer a variety of electronic communications services at affordable prices to SA consumers. This process in trying to achieve an efficient call termination framework in SA is supported by the very objects of the Electronic Communications Act No 36 of 2005 ("ECA") to:
 - Encourage investment, including strategic infrastructure investment, and innovation in the communications sector;
 - Promote competition within the ICT sector;
 - Ensure the provision of a variety of quality electronic communications services at reasonable prices;
 - Promote the interests of consumers with regard to price, quality and variety of electronic communications services; and
 - Promote stability in the ICT sector;
- 1.8. Smile acknowledges the extensive consultative process undertaken by the Authority in relation to the draft Call Termination Regulations. We further note and appreciate that the publication of the draft Call Termination Regulations is in line with the approach followed by other regulators in Africa especially in Nigeria, Tanzania, and Namibia where measures were taken to

reduce termination rates and pro-competitive remedies in the wholesale call termination market were imposed. These measures have been imposed as an outcome of a market review and in others as a requirement of the relevant legislation.

1.9. Smile conceptually agrees with the Authority's approach in the draft Call Termination Regulations. We further believe that the Authority's approach in the draft Call Termination Regulations is consistent with section 67(4) of the ECA that envisages that these steps can be dealt with in one regulation.

1.10. Smile fully supports the pro-competitive remedies imposed upon SMP licensees and established SMP licensees as they will address the competition problems identified by Authority in the explanatory note for the draft Call Termination Regulations¹ ("explanatory note"):

- Cross subsidization
- Excessive pricing
- Inefficiency
- Refusal to deal/denial to interconnect
- Raising rival costs (delay tactics, undue requirements, tying and bundling.

1.11. We further believe that those ex ante remedies are proportionate and justified as they are specifically targeted at addressing market failure and solving potential competition problems in the call termination market. In addition, they are specifically tailored to each licensee given their size and potential to harm competition.

1.12. We provide our comments in response to the draft Call Termination Regulations below.

¹ Explanatory Note for the draft Call Termination Regulations, Government Gazette 33121

2. Detailed comments on the draft Call Termination Regulations

2.1. Regulation 1 – Definition of Mobile Call Termination

2.1.1. Smile notes that licensees providing call termination services using VoIP technology are included in the definition of “Fixed Call Termination” and not in the definition of “Mobile Call Termination”. The Authority mentions in the explanatory note that VoIP services are currently provided through fixed networks (i.e. Skype) allowing callers to speak via computer broadband connection at cheaper costs in SA.

2.1.2. Smile has recently launched a network and is providing services in Uganda. In our vision to deliver affordable services, we have developed a cutting edge product for the provision of voice over IP (VoIP) and messaging services. We have the same intentions for SA and once licensed with the requisite frequency spectrum, we will deploy a mobile WIMAX network based on IEEE 802.16e with the evolution towards 802.16m, which has full handover and therefore mobility capabilities. The network will be a true 4G network, employing mobile broadband data, across a full IP end to end network. As indicated, we have already deployed such a network in Uganda and we are expanding our portfolio of service offerings and products across the network as technology and economies of scale dictate. Smile’s current product is a battery powered wireless desk top phone, which has full mobility enabled, allowing use in cars, around offices and to be taken with the user across the network, providing full mobility. Many phone owners already use the phone whilst travelling to work, at work, some as a business using the phone for public access and for the family at home.

2.1.3. Taking into account the description of our product, we submit that the Smile VoIP service offering specifically, does not rightfully fall within the definition of “fixed call termination”. Leaving the definition as is will incorrectly place Smile in the fixed call termination definition.

2.1.4. Seeing that particularly for Smile, the distinction between fixed and mobile call termination is blur, we propose that the Authority include licensees providing call termination using a VoIP network like Smile in the definition of “mobile call termination”. As can be seen, our product constitutes mobile subscriber equipment enabled by wireless technology. This will have an impact in the determination of fair and reasonable prices to be charged in terms of Regulation 9(2). We propose a revised definition as follows:

“Mobile call termination means a wholesale call termination service provided by an electronic communications network services or electronic communications services licensee to mobile subscriber equipment enabled by wireless technology and includes licensees providing call termination using VoIP to mobile subscriber equipment”

2.1.5. We submit that the above definition takes into account that VoIP can be used in both the fixed and mobile context.

2.2. Regulation 7 – Access, Non Discrimination, Transparency

2.2.1. Smile submits that the interconnection framework in SA has not necessarily been an efficient one. In the spirit of using this opportunity to address the inconsistencies that prevailed in past experiences where Value Added Network Service (VANS) Licensees approached the incumbent operator to interconnect, we suggest that when the Authority assesses the Reference Interconnect Offer (RIO) there are no prohibitive clauses that seek to prevent interconnection from taking place.

2.2.2. Some of the issues that prevailed previously are stated below to ensure that the Authority guards against these practices:

- 2.2.2.1. Limitation on voice traffic to traffic originating and terminating nationally;
- 2.2.2.2. Restrictions on collocation – previous agreements stipulated that no co-location of operator’s equipment with that of the interconnect provider was allowed;
- 2.2.2.3. The imposition of a monthly floor charge – incumbents required that all interconnecting operators must pay a monthly floor charge in accordance with the following rule:
 - 2.2.2.3.1. In consideration for the general provision by the Interconnect Provider, Interconnection, Transit and Onward Routing services; the Interconnection seeker was required to pay monthly in advance, a Floor Charge of around R50 000.00.
 - 2.2.2.3.2. It was stipulated that under utilization of the Floor Charge during any particular accounting period, which shall occur if the total Interconnection, Transit and Onward Routing Fees are less than the Floor Charge paid in respect of such accounting period, shall be to the benefit of Interconnection Provider and shall not be carried over to the next or any other accounting period.
 - 2.2.2.3.3. As security for non – payment by the Interconnection Seeker of the various fees and charges provided for in the Interconnection Agreement; the Interconnection Seeker is required to, prior to the commercial date, provide the Interconnection Provider with a bank or other guarantee from a recognized banking or financial institution, or such other form of financial security as may be acceptable or pay a cash deposit, to the amount of R150 000 per POIL (Point of Interconnect Link). The specified amount shall apply per POIL installed between the Telecommunications Systems and the guarantee, security or deposit, shall accordingly need to be

increased, or a new guarantee, security or deposit provided, each time that an additional Point of Interconnect Link is installed.

2.3. Regulation 9 – Price Control

2.3.1. Smile is supportive of the price control obligation imposed on established SMP licensees in regulation 9(1) (b) of the draft Call Termination Regulations. We believe that this will help to address competition problems such as inefficient pricing and enable other SMP licensees to compete equally with established SMP licensees.

2.3.2. We further support the price control obligation imposed on other SMP licensees that they must charge “fair and reasonable” rates for call termination services. Whilst Regulation 9 (2) creates the opportunity for a proportionate application of the price control remedy to be applied as stated in the explanatory note, we submit that the current process as outlined in the draft Call Termination Regulations may lend itself to abuse.

2.3.3. Regulation 9 (2) allows for the process of commercial negotiations to determine fair and reasonable prices for call termination. If there is a dispute, then the resolution procedure applies. We submit that unnecessary delays may be caused and this can be avoided if the Authority considers a procedure whereby rates for operators like Smile are agreed with the Authority prior to Smile commencing negotiations with other operators. In this regard, we suggest the following process be put in place and included in Regulation 9 (2):

2.3.3.1. An SMP licensee is permitted to submit a proposal to the Authority for the imposition of higher call termination rates than those set for established SMP licensees;

- 2.3.3.2. The proposal must be in writing and must set out the reasonable grounds for an SMP licensee to charge higher call termination rates;
- 2.3.3.3. The Authority, after receiving the request, must assess and determine whether the SMP licensee can be allowed to charge higher call termination rates than those set for established SMP licensees;
- 2.3.3.4. In reaching the determination as contemplated in 2.3.3.3 above, the Authority is to take into account including but not limited to the following factors:
- a) The date of entry of the SMP licensee to the market;
 - b) The prevailing circumstances of entry of the SMP licensee to the market including access to frequency spectrum and other associated licensing costs;
 - c) The subscriber base of the SMP licensee and in the case of a new entrant, the time it will take for this SMP licensee to acquire a subscriber base;
 - d) The volumes of traffic of the SMP licensee and in the case of a new entrant, the fact that lower call volumes will be encountered;
 - e) The time taken to gain economies of scale; and
 - f) Any other factors which may be used in making the determination as contemplated in 2.3.3.3.
 - g) The Authority may convene a meeting with the SMP licensee in order to obtain further clarity and information concerning its proposal if required;
 - h) After considering all the relevant information contained in the proposal and the supplementary information collected in the meeting, the Authority will furnish its final decision to the SMP licensee and the rate agreed to shall be the call termination rate applicable to the SMP licensee.

3. Conclusion

3.1. We are thankful to the Authority for being afforded the opportunity to provide our comments in response to the draft Call Termination Regulations.

3.2. The key points canvassed in our submission can be summarised as follow:

- We broadly support the Call Termination Regulations as once finalised this will assist to lower the current termination rates and foster competition in the sector;
- We suggest that the definition of “mobile termination rates” be amended to cater for licensees using VoIP on mobile subscriber equipment; and
- We further submit that SMP licensees on a case-by-case should be allowed to charge higher termination rates than those set for established SMP licensees on basis of criteria such as late entry in the market for a period of three years. This should be dealt with in terms of a procedure between the SMP licensee and the Authority.