



# **Submission**

to the

**Independent Communications  
Authority of South Africa**

on the

**Draft wholesale call termination  
regulations**

published in

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## INTRODUCTION

### INTRODUCING VOX

1. Vox Telecom Limited (“**Vox**”) is listed on the Alternative Exchange (“**AltX**”) of the JSE Limited. We have positioned ourselves to become the leading alternative independent telecom operator, providing voice and data services to the Southern African market, through brands such as DataPro, @lantic, Vox Telecom and Vox (collectively, the “**Vox group**”).
2. A number of entities within the Vox group previously held value added network service (“**VANS**”) licences that were issued under the Telecommunications Act 103 of 1996 (the “**Telecommunications Act**”). These licences were subsequently been converted into individual electronic communications network service licences (“**I-ECNS**”) and individual electronic communications service (“**I-ECS**”) licences under the Electronic Communications Act 36 of 2005 (the “**ECA**”) in January 2009.
3. Notwithstanding that it is a smaller network operator and new market entrant, the Vox group has been active in the call termination market since 2005. Despite this, Vox’s voice network has shown robust growth, such that Vox has emerged at the forefront of the emerging operators in terms of voice traffic volume.

### BACKGROUND TO THE DRAFT REGULATIONS

4. Wholesale call termination rates have been at the forefront of ICASA’s agenda for some time now. After undertaking negotiations with the mobile network operators (“**MNOs**”), ICASA approved a drop in the wholesale peak call termination rates of Vodacom, MTN and Cell C in February 2010 from R1.25 to R0.89 per minute with effect from 1 March 2010, whereas the off-peak rate remains unchanged at R0.77 per minute.
5. During that process, ICASA undertook to regulate the remaining aspects of interconnection and wholesale call termination pursuant to a market review undertaken in terms of section 67 of the Electronic Communications Act 36 of 2005 (the “**ECA**”).
6. On 16 April 2010, ICASA published its wholesale call termination market review. The review was accompanied by draft the draft call termination regulations (the “**draft regulations**”), to which ICASA requested comment from the public by 18 June 2010. The scope of the draft regulations is wider than the process previously followed by ICASA with the MNOs, in the regulations extend to the fixed line environment in addition to the mobile environment.
7. This submission has been drafted in response to ICASA’s request for comments from the public.

## NATURE OF THIS SUBMISSION

8. We at Vox wish to thank ICASA for giving us this opportunity to make representations regarding the draft regulations. We wish to make oral representations at any public hearings that ICASA may hold and request that we be allocated a slot for this purpose.
9. This submission will be broken up into three parts, namely:
  - 9.1. Vox's general comments on its experiences of the call termination market thus far;
  - 9.2. Vox's general comments on the broad regulatory issues that are implicated by the draft regulations; and
  - 9.3. Vox's specific responses to the draft regulations.
10. Kindly note that Vox's comments on the draft regulations have been drafted so as to take into account the final interconnection regulations that were published by ICASA on 9 April 2010 (the "**interconnection regulations**").
11. In summary, our key submissions are as follows:
  - 11.1. **Established SMP licensees versus other licensees:** Given that wholesale call termination markets must necessarily be defined with reference to call termination on each individual operator's network, Vox welcomes the proposal to distinguish between 'established SMP licensees' (Vodacom, MTN, Cell C and Telkom) and 'other SMP licensees'. However, Vox questions whether any regulatory consequences should attach to other SMP licensees for the purpose of section 67 of the ECA. This is especially as other SMP licensees do not have market power (that is, the ability to act independently of their competitors, suppliers and customers), notwithstanding that they may hold 100% of the market share in respect of call termination on their own networks.
  - 11.2. **Fixed, mobile and VoIP:** The draft regulations fail to distinguish adequately between the concepts of fixed and mobile, which are erroneously defined with reference to the deployment of wireless technologies rather than to the mobility of the end user. Moreover, the draft regulations reference voice over internet protocol ("**VoIP**") as a sub-category of fixed-line services, even though mobile VoIP applications are commercially available. In our view, the draft regulations should be technology neutral and all reference to VoIP should be omitted.
  - 11.3. **Price controls:** Vox welcomes the imposition of cost-orientated wholesale call termination rates on established SMP licensees. However, the scope of the requirement for other SMP licensees to charge "commercially negotiated fair and reasonable rates" is unclear. In any

event, and for the reasons given above, it is submitted that it is not necessary to impose price controls on other SMP licensees.

- 11.4. **Non-discrimination:** The ECA currently requires interconnection to be non-discriminatory in relation to comparable types of interconnection, technical standards and quality. The draft regulations should also explicitly preclude established SMP licensees from engaging in price discrimination. Moreover, the draft regulations should enable asymmetrical interconnection to facilitate the entry of new market entrants.
- 11.5. **Reference interconnect offers:** The draft regulations require established SMP licensees to publish a reference interconnect offer (“RIO”), which must comply with the principles listed in the annexure to the draft regulations. Unfortunately, this does not go far enough: the regulations should also preclude established licensees from imposing unfair or anti-competitive terms in their RIOs. Moreover, established SMP licensees should be prohibited from concluding interconnect agreements that materially deviate from the ICASA-approved RIO without ICASA’s prior written consent.

## VOX’S EXPERIENCE

12. From a commercial and business point of view, it is necessary for smaller operators such as Vox to be able establish their own prices for terminating calls on their networks. It is not feasible for small operators and new market entrants to charge cost-based termination rates at the outset, as significant amounts of capital expenditure (“capex”) are required to roll out a new network and thereby compete with the incumbents.
13. In the past, small operators like Vox have subsidised this cost in an attempt to reach economies of scale. However, as the cost decreases due to increasing economies of scale, it is necessary for smaller operators to obtain a return on their investment in order to roll out infrastructure, fund future roll out and increase penetration ratios. The incumbents been given the opportunity to fund their own infrastructure investments from the profits derived from them on interconnection. It is only fair that smaller operators be afforded the same benefit, thereby expanding the footprint of their networks to the benefit of South Africa as a whole.
14. ICASA’s proposal to define VoIP providers such as Vox as fixed service providers is problematic, as this automatically brings into question any rate that Vox wants to charge over and above what “established SMPs” in the same fixed category must charge. Vox believes it is fair and reasonable to charge at least what the highest “established SMP licensee” is allowed to charge (regardless of technology), and where that interconnect charge is regulated below its cost plus the acquisition cost of customer, it may be able to motivate an asymmetrical interconnect charge.

15. In the context of the regulations, if Vox is forced to charge the 15c rate currently being mooted for call termination on a fixed network, this would be below Vox's cost and consequently Vox would effectively be required to subsidise the incumbents.
16. The interconnect rate charged may be higher than the rate charged to the business. In the COA/CAM regulations (clause 8.3), it is stated that the interconnect price charged must not be less than the interconnect price to the business. In this regard, one of the benefits that our customers receive when they sign up with Vox, is an unlimited number of on-net calls. The implication here then is that termination is free, which it clearly is not and is borne by other revenue streams in the business. The risk to the consumer is mitigated as if it has enough traffic to the network, it can opt to sign up as a customer and least cost route. The further risk to this approach is that operators engage in interconnect bypass by masking CLI and delivering interconnect traffic via a consumer solution.
17. Vox has to have one rate on to its network. If, as is contemplated in the draft regulations, a network is required to charge a symmetric rate with its interconnect party, the remaining networks will choose the cheapest termination rate onto that network, effectively negating the symmetrical interconnect arrangement. In this regard, it is respectfully submitted that it is anti-competitive to restrict the delivery of traffic via specific routes, and no sooner than a regulation prescribing operators to interconnect at different costs, the old Mobile Operators will raise this with the Competition Commission. Vodacom, MTN and CellC all used the favoured nations clauses to restrict this practice in the past. MTN has also actively arbitrated Vox in the past.
18. Uncertainty over regulation means lack of investment. Some of the emerging telecommunications operators (incidentally the most successful ones) have built business models based on the existing regime. By changing rapidly and not allowing time to adjust, the regulator puts these businesses under threat.
19. By necessity Vox is efficient as there now many other operators all competing with very little to differentiate it. Vox has been at the forefront of dropping rates in the past. Vox has actively pushed for deregulation and has passed on portions of the discounts received from reselling other operators' products to give clients the benefits of better savings.
20. As ICASA is aware, the call termination market is characterised by a few established players and a number of smaller network operators. In its own experience, Vox has experienced the following at the hands of the larger networks:
  - 20.1. **Delaying tactics in the signing of interconnect agreements:** MTN delayed the first agreement with Vox years after Vox first requested interconnection with MTN, and a year after the first agreement with Vodacom was signed. Additionally, with the agreed reduction in call termination rates to 89 cents on 1 March 2010, further delay tactics by MTN and Cell C

have resulted in Vox not receiving the benefit of the initial call termination decrease that was agreed between the MTN, Cell C, Telkom and Vodacom.

- 20.2. **Unilateral cancellation of existing interconnection agreements:** Vodacom and MTN have both in the past attempted to unilaterally cancel interconnect agreements.
- 20.3. **Unfair competition:** Vodacom has in the past declared traffic destined to Vox's customers as being in contravention of the interconnect agreement. Vodacom then set up a competing service through a subsidiary and advertised the competing service to Vox's customers. Vodacom was able to do this by mining the confidential information relating to Vox's customers in its customer base.
- 20.4. **Delays regarding POILs:** Both MTN and Vodacom have deliberately delayed the installation of point of interconnect links ("POILs") in an effort to restrict Vox's capacity to carry traffic. Vox is a net receiver of calls from these networks. It thus benefits Vodacom and MTN to do this, as it decreases the revenues that Vox earns.
- 20.5. **Increasing barriers to entry:** The incumbent network operators have forced Vox to interconnect by inefficient means in an effort to increase costs. In particular, Vox has been required to implement TDM interconnects over copper wires because this is more expensive and less scalable than IP interconnect over fibre (this is despite deploying these technologies when interconnecting with other parties). The incumbent operators have also tended to demand large floor charges which are not reciprocal (this has even been the case in circumstances when Vox had asymmetrical traffic in its favour and was the creditor).
- 20.6. **Unfair pricing:** Mobile operators classify all of the new entrants as an off network mobile call. There is no incentive for a small operator to drop its interconnect below its peers when that benefit is not passed on to the customer. This only serves to increase the mobile operators' margins.

## GENERAL COMMENTS

### 'ESTABLISHED SMP LICENSEES' VERSUS 'OTHER SMP LICENSEES'

21. Vox questions whether any regulatory consequences should attach to other SMP licensees for the purpose of section 67 of the ECA. This is especially as other SMP licensees do not have market power (that is, the ability to act independently of their competitors, suppliers and customers), notwithstanding that they may hold 100% of the market share in respect of call termination on their own networks.

22. As ICASA is aware, certain anomalies have arisen in defining SMP, given that the ECA equates market share with dominance under the Competition Act 89 of 1998 (“**Competition Act**”), which equates dominance with market share. Pursuant to the market review conducted by ICASA into wholesale call termination, ICASA made a determination to the effect that call termination on each individual licensee’s network constitutes a distinct market.<sup>1</sup>
23. The effect of this is that all mobile network operators as well as fixed network operators have been declared as holding 100% of the market share (and accordingly SMP) in relation to call termination on their own networks, regardless of their market share in the broader market. This method of defining call termination markets narrowly is now a widely accepted principle in the European Union (the “EU”).
24. However, under the EU framework, holding 100% of the market share will not automatically lead to an SMP designation by a national regulatory authority (an “**NRA**”), especially where small operators and new entrants are concerned. The reason is that countervailing buyer powers in reality can offset the market power of new entrants. Within the EU several NRAs have therefore declined to declare SMP status for new entrant operators. (This is unlike in South Africa, where a finding that a firm holds 100% of the market share automatically leads to a designation of SMP in the relevant market).
25. Section 67(5) of the ECA defines SMP as referring to the situation where (i) a licensee is dominant (as defined in section 7 of the Competition Act), (ii) has control of essential facilities, or (iii) is vertically integrated in a manner that ICASA considers to be harmful to competition. Unlike in the EU (where dominance is equated to market power),<sup>2</sup> section 7 the Competition Act defines dominance with reference to a hierarchy of market shares. In particular:
- 25.1. there is an irrebutable presumption that a firm is dominant if it holds 45% or more of the share of the relevant market;
- 25.2. there is a rebuttable presumption that a firm is dominant if it holds 35% of the market share, unless it can be shown that it does not hold market power;
- 25.3. firms that hold less than 35% of the market are presumed not to be dominant unless it can be shown that they hold market power.
26. Thus market power is not dependent solely on the absolute size of a firm in a market. The concept of market power is defined in section 1 of the Competition Act as “the power of a firm to control

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<sup>1</sup> GN 1627, *Gazette* 30499, 9 November 2007.

<sup>2</sup> Section 14(2) of the Framework Directive (2002/21/EC, 7 March 2002) defines SMP as follows:

“An undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position of dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.”

- prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers”.<sup>3</sup>
27. The implications of this are that, in South Africa, if a firm holds 100% of the market share in a narrowly defined relevant market, then the firm will automatically be considered to have SMP / be dominant in that market, regardless of its market share in the broader market. Practically speaking, this could have the effect of exposing even a small under-served area licensee to pro-competitive regulation.
28. ICASA has sought to circumvent the adverse consequences of this by distinguishing between ‘established SMP licensees’ and ‘other SMP licensees’, so as to avoid casting the regulatory net too widely. In this regard, the draft regulations define ‘established SMP licensees’ to refer to those licensees who are “subject to additional pro-competitive remedies”.
29. Notwithstanding this, ICASA has sought to impose lighter pro-competitive obligations on ‘other SMP licensees’, in particular:
- 29.1. the obligation to act fairly and reasonably (section 67(7)(a));
- 29.2. the obligation not to discriminate (section 67(7)(c)); and
- 29.3. the obligation to publish all information relating to interconnection so as to ensure transparency (section 67(7)(d)).
30. With the exception of the obligation not to discriminate, which applies to all interconnecting parties by virtue of section 37(6), regardless of whether they hold SMP, Vox questions whether as a matter of principle and law, it is appropriate for ICASA to impose pro-competitive obligations on other SMP licensees, given that they do not wield market power in wholesale call termination markets, and accordingly have no incentive to act unreasonably or anti-competitively.
31. In other jurisdictions that allow for a similar system of pro-competitive remedies, it is established practice for national regulatory authorities to forebear from imposing regulatory obligations on licensees in the absence of a compelling policy reason to do so.

#### **FIXED, MOBILE AND VOIP**

32. The draft regulations fail to distinguish adequately between the concepts of fixed and mobile, which are erroneously defined with reference to the deployment of wireless technologies rather than to the mobility of the end user. Moreover, the draft regulations reference VoIP as a sub-category of fixed-line services, even though mobile VoIP applications are commercially available. In our view, the

<sup>3</sup> See section 1 of the Competition Act.

draft regulations should be technology neutral and all reference to VoIP should be omitted.

33. The draft regulations define “fixed call termination” with reference to whether a call is terminated at a fixed location, or whether a call is made using “fixed wireless services”. “Mobile call termination is defined with reference to whether a call is terminated on “mobile subscriber equipment enabled by wireless technology”.
34. It is respectfully submitted that the technology used in the provision of voice services is irrelevant. The reason for this is that fixed line operators may (and frequently do) make use of wireless / microwave point-to-point links to transmit signals between two fixed points in their networks. Conversely, mobile network operators frequently deploy copper or cable lines to transmit signals between base stations. In this regard, it is respectfully submitted that whether a service is considered to be mobile, fixed mobile or fixed needs to be adjudged according to the degree of mobility of the end user who originates or terminates a call on the relevant network.
35. This was the approach followed under the now-repealed Telecommunications Act 103 of 1996 (the “**Telecommunications Act**”). In this regard, the definition of a mobile cellular telecommunication network (“**MCTN**”) in section 1 of the Telecommunications Act made it clear that it was intended that the mobility of the end user who is originating or terminating the call on the MCTN should not be restricted in any way when that person is moving between cells. The exact wording of the definition states:
- “**mobile cellular telecommunication network**’ means a telecommunication network designed to use limited radio frequency spectrum between cellular terminal equipment and network transceivers to provide a mobile service across a cellular network according to technical standards that are applicable to the assigned frequencies by -
- (a) allocating a limited number of frequencies within each of a number of defined geographical areas or cells;
  - (b) allowing the re-use of the same frequencies in different non-adjacent cells; and
  - (c) enabling users to maintain connections whilst moving through different geographical areas by making use of call handover between adjacent cells.”
- (Our emphasis).
36. For unknown reasons, the draft regulations treat terminating VoIP traffic as a subset fixed call termination. It is respectfully submitted that this is not practicable. VoIP is merely a transmission technology that was initially conceived of as a cheaper alternative to circuit switched calls in the fixed-line environment. However, mobile applications of VoIP are increasingly becoming commercially available (such as Fring and Skype for mobile). For this reason, it is respectfully submitted that ICASA should avoid associating particular technologies (such as VoIP) with fixed or mobile services. The draft regulations should accordingly be as technology neutral as possible.

## PRICE CONTROLS

37. Vox welcomes the imposition of cost-orientated wholesale call termination rates on established SMP licensees. However, the scope of the requirement for other SMP licensees to charge “commercially negotiated fair and reasonable rates” is unclear. In any event, and for the reasons given above, it is submitted that it is not necessary to impose price controls on other SMP licensees.
38. In our view, the proposed price control structure is the most critical aspect of the draft regulations, as this is likely to have the greatest impact on consumers and on licensees alike.
39. In this regard, the price control measures in the draft regulations fall into two categories, namely:
- 39.1. **Price controls on established SMP licensees:** the draft regulations require established SMP licensees to lower their wholesale call termination fees over a period of 3 years, in accordance with the rates specified in clause 9. Different rates apply to fixed and mobile wholesale call termination respectively.
- 39.2. **Price controls on other SMP licensees:** the draft regulations propose to require other SMP licensees to offer “commercially negotiated fair and reasonable prices for call termination”. Although not explicit, this proposal seems to derive from section 67(7)(a) of the ECA, which empowers (but does not oblige) ICASA to impose an obligation to act fairly and reasonably on SMP designees.
40. For the reasons indicated above, we question whether it is appropriate for ICASA to impose pro-competitive remedies on other SMP licensees, as a matter of policy and principle, particularly in view of the fact that they do not have market power within the broader call termination market.
41. In this regard, the remedies in section 67(7) embody a “toolkit” of pro-competitive remedies that ICASA may deploy where necessary to promote a competitive environment. However, ICASA is by no means obliged to impose some or all of the remedies listed in section 67(7).
42. In this regard, ICASA’s powers to impose pro-competitive remedies are constrained by section 67(4) of the ECA, which empowers ICASA to impose pro-competitive conditions on SMP designees only, and then only in markets that ICASA determines have ineffective competition. Implicit in the wording of this section is the assumption that ICASA must forebear from imposing pro-competitive remedies on licensees where this is not necessary in order to counter anti-competitive conduct.
43. Whilst the need for “established SMP licensees” to levy cost-orientated wholesale call termination rates has been recognised for some time, we respectfully submit that there is no need to impose any price controls of other SMP licensees. In the explanatory note to its review of wholesale call termination markets (the “**market review**”), ICASA explicitly acknowledged that other SMP licensees

do not have countervailing buying power in wholesale call termination markets, notwithstanding that they hold 100% of the share in respect of call termination on their own networks.

44. In this regard, the executive summary of the market review states as follows:

**“Assessment of Competition**

The assessment of the effectiveness of competition in the defined markets allows for the identification of licensees which possess Significant Market Power (SMP).

The Authority finds that both the fixed and mobile call termination markets identified are ineffectively competitive. This is based on a number of factors including that each licensee identified in each market has 100 per cent market share of call termination on its own network. There is a lack of demand side and supply side substitutes, which are unlikely to change of the period of this market review. In addition, there are absolute barriers to entry and ineffective Countervailing Buying Power (CBP) in each of the markets identified. Less established networks with fewer customers are likely to be more constrained by CBP in the setting of wholesale call termination rates when compared to large more established service providers. The Authority’s position is that the CBP faced by more established networks is now powerful enough to constrain the level of wholesale call termination to competitive levels.”

(Our emphasis).

45. Other SMP licensees in wholesale call termination simply do not have the power to dictate pricing and other contractual terms to their interconnecting counterparties, particularly where the counterparty is an established SMP licensee. There is accordingly no need for ICASA to impose price controls on other SMP licensees, as their conduct will necessarily be constrained by the behaviour and pricing strategy of established SMP licensees.
46. On this basis, it is respectfully submitted that all references in the draft regulations to the imposition of price control regulation on other SMP licensees, should be removed.

**NON-DISCRIMINATION**

47. The ECA currently requires interconnection to be non-discriminatory in relation to comparable types of interconnection, technical standards and quality. The draft regulations should also explicitly preclude established SMP licensees from engaging in price discrimination. Moreover, the draft regulations should enable asymmetrical interconnection to facilitate the entry of new market entrants.

48. Both the ECA (in section 37(6)) and the interconnection regulations (in clause 10) impose non-discrimination obligations on interconnecting parties. In practical terms, this means that an interconnection provider may not interconnect at a lower technical standard and quality than the technical standard and quality provided by such licensee to itself or to an affiliate. In this regard, it is

respectfully submitted that the obligation not to discriminate should apply in all respects including in relation to price.

49. Moreover, there has been an unfortunate tendency on the part of certain licensees (particularly in the MNO sector) to translate this into an obligation on interconnecting parties (inclusive of the interconnection provider and the interconnection seeker) to charge uniform call termination prices to each other. The danger with this practice is that it encourages collusion and price fixing, both of which are prohibited practices under the Competition Act.
50. In this regard, ICASA should make it clear that non-discriminatory interconnection should not preclude asymmetrical interconnection to facilitate the entry of new market entrants. Put differently, a non-discrimination obligation would require a licensee to offer interconnection to all third parties on the same terms, but does not otherwise require interconnecting parties to offer interconnection to each other on the same terms.

#### REFERENCE INTERCONNECT OFFERS

51. The draft regulations require established SMP licensees to publish an RIO which must comply with the principles listed in the annexure to the draft regulations. Unfortunately, this does not go far enough: the regulations should also preclude established licensees from imposing unfair or anti-competitive terms in their RIOs. Moreover, established SMP licensees should be prohibited from concluding interconnect agreements that materially deviate from the ICASA-approved RIO without ICASA's prior written consent.

52. The draft regulations require established SMP licensees to publish an RIO, which must deal with all of the matters listed in appendix A. Some of the matters in appendix A have already been prescribed in the interconnection regulations. To avoid confusion, we suggest that overlaps between the interconnection regulations and the wholesale call termination regulations should be avoided as much as possible.
53. Moreover, the draft regulations are silent as to the consequences that will apply if SMP licensees conclude interconnect agreements that are at odds with the RIO. In this regard, we propose without established SMP licensees should be precluded from concluding an interconnection agreement that materially deviates from the ICASA-approved RIO without ICASA's prior written consent. Failure to do so should attract significant penalties.
54. In addition, and whilst the attempt to harmonise the contractual terms of the RIOs of established SMP licensees is a welcome move, it is respectfully submitted that the regulations could go further by prohibiting the inclusion of manifestly unfair or anti-competitive terms in RIOs and in the interconnection agreements of established SMP licensees. The use of such a mechanism would not

be new, and has been most recently deployed in the Consumer Protection Act 68 of 2008 (the “CPA”).

55. In Vox’s experience, established SMP licensees have used their bargaining power effectively to coerce smaller operators to agree to onerous contractual terms and conditions in their interconnection agreements with them. Some more onerous contractual terms include the following:

- 55.1. imposing onerous floor charges;
- 55.2. stipulating an inefficient means of interconnect (such as SS7 instead of IP, which translates into small upgrades in capacity at a time);
- 55.3. allowing only limited or no facilities sharing;
- 55.4. prohibiting the use certain routing paths or requiring mandatory use of other routing paths;
- 55.5. implementing upgrades slowly (which have resulted in traffic being retarded);
- 55.6. allowing established SMP licensees to terminate interconnection agreements for convenience / without cause (the new interconnection regulations no longer permit this); and
- 55.7. forcing smaller operators to agree not to charge their customers a retail rate that exceeds the wholesale call termination rate (this amounts to minimum retail price maintenance, which is prohibited under the Competition Act).

56. This is not meant to be an exhaustive list, but provides a good indication of some of the pressing issues that small operators typically confront in their dealings with SMP licensees. ICASA may wish to consider other contractual terms that may no longer be included in the interconnection agreements of established SMP licensees.

## SPECIFIC COMMENTS

### DEFINITIONS (clause 1)

#### Definition of ‘established SMP licensee’

57. In the same way that ICASA must declare licensees to hold SMP, ICASA must likewise declare which SMP designates should be regarded as being ‘established’.

58. We accordingly recommend that this definition be amended as follows:

“**Established SMP licensee**’ means an ~~SMP licensee~~ ~~licensee with SMP~~ that has been declared by the Authority as being subject to additional pro-competitive remedies”.

### Definition of 'fixed call termination'

59. The concept of fixed calls should be defined with reference to the non-mobility of the end user who receives the call only. The definition should be technology neutral. Accordingly, the references to VoIP and to fixed wireless should be removed.

60. We thus propose that the amended definition should read as follows:

“**Fixed call termination**’ means a wholesale call termination services provided by an electronic communications network services or electronic communications services licensee to a geographically fixed location, ~~and includes licensees providing call termination to a a fixed location and fixed wireless services”.~~

### Definition of 'interconnection seeker'

61. This definition is nonsensical, as it includes applicants for individual licences. In this regard, it is not legally permissible for an interconnection provider to provide interconnection to a third party who is a non-licensee, unless the third party is licence exempt.

62. We accordingly propose that this definition be amended as follows:

“**Interconnection seeker**’ means any person licensed in terms of the Act and persons providing services pursuant to a licence exemption that is requesting interconnection, ~~including an applicant for an individual licence”.~~

### Definition of 'mobile call termination'

63. The concept of mobile calls should be defined with reference to the mobility of the end user who receives the call only. The definition should be technology neutral. Accordingly, the references to wireless technology should be removed.

64. We thus propose that the amended definition should read as follows:

“**Mobile call termination**’ means a wholesale call termination services provided by an electronic communications network services or electronic communications services licensee to a location that is not geographically fixed ~~mobile subscriber equipment enabled by wireless technology”.~~

### MARKET DEFINITION (clause 3)

65. The purpose of this clause is not clear. We suggest that it be amended to provide for the fact that ICASA has identified a number relevant wholesale call termination markets, being the fixed call termination market and the mobile call termination market on each licensee’s network.

66. We accordingly propose that this clause be reworded as follows:

#### **“MARKET DEFINITION**

The Authority has identified ~~the following relevant~~<sup>separate</sup> wholesale voice call termination markets in respect of each electronic communications network and electronic communications service licensee in South Africa; namely:

(a) wholesale fixed voice call termination; and

(b) wholesale mobile voice call termination.

#### **EFFECTIVENESS OF COMPETITION (clause 5)**

67. The wording of this clause is not entirely clear in its intention, as follows:

67.1. It does not differentiate between fixed and mobile wholesale call termination markets, which ICASA has declared constitute distinct relevant markets.

67.2. It does not indicate if competition is ineffective in respect of call termination on each licensee’s individual network (the “**narrow market**”) or on all licensees’ networks (the “**wider market**”). Given ICASA’s stated intention to impose additional pro-competitive regulation on established SMP licensees only, this clause should refer to the ineffectiveness of competition across the wider market.

#### **ACCESS, NON-DISCRIMINATION, TRANSPARENCY (clause 7)**

68. With the exception of the non-discrimination obligation (which already applies to all licensees by virtue of section 37(6) of the ECA), these obligations should be imposed on established SMP licensees only.

69. It is also not strictly necessary to mandate compliance by other SMP licensees with the interconnect regulations or with the non-discrimination obligations in section 67(7)(c) of the ECA, as these obligations automatically apply by force of law.

70. Accordingly, we propose that this clause be amended to read as follows:

#### **“ACCESS, NON DISCRIMINATION, TRANSPARENCY**

All established SMP licensees must comply with section 67(7)(a), ~~(e); and (d)~~ of the Act ~~by complying with the provisions of the Interconnection Regulations.~~”

#### **PUBLICATION OF REFERENCE INTERCONNECT OFFERS (clause 8)**

71. We suggest the inclusion of the following sub-clauses in clause 8:

- 71.1. **New interconnect agreements concluded prior to RIO approval:** SMP licensees should be precluded from concluding any new interconnection agreement after the regulations come into force, before such time as the SMP licensees' RIOs have been approved by ICASA.
- 71.2. **New interconnect agreements concluded after RIO approval:** SMP licensees should be precluded from entering into any new interconnection agreement that materially differs from the ICASA-approved RIO without ICASA's prior written consent.
- 71.3. **Amendment of existing interconnect agreements concluded prior to the commencement of the regulations:** The draft regulations should require established SMP licensees to bring their existing interconnection agreements in line with the provisions of the regulations within a fixed period of time after the regulations have been finalised. Ideally, this should be provided for in a separate clause dealing with transitional arrangements.

#### **PRICE CONTROL (clause 9)**

72. For the reasons given above, there should be no price controls on other SMP licensees. Accordingly, clause 9(2) should be deleted in its entirety.
73. The interconnect regulations apply by operation of law. It is not necessary to restate that licensees must follow the dispute resolution procedures in the interconnect regulations if negotiations between them break down. Accordingly, clause 9(3) should be deleted in its entirety.
74. The provisions of clause 9(4) are very wide, in that they seek to give ICASA the unfettered discretion to make an "industry determination" which is not defined, "based on information submitted". It is not clear what the nature of such a determination would be, or what type of information would form the basis of such a determination, or by whom the information must be submitted. Clause 9(4) should accordingly be deleted.

#### **KEEPING OF ACCOUNTS, RECORDS AND OTHER DOCUMENTS (clause 11, appendix B)**

75. Clause 11(2) requires all SMP licensees to retain relevant documentation for a minimum period of 5 years. This period is longer than the prescription period currently provided for in law (which is 3 years). We accordingly submit that this period be reduced from 5 to 3 years.

#### **EFFECTIVE DATE (clause 12)**

76. For the sake of clarity, we suggest that this clause be reworded as follows:

"These regulations will be effective from the date of publication of the final regulations in the Government Gazette."

## CONTRAVENTION AND PENALTIES (clause 14)

77. It is respectfully submitted that the penalties in clause 14 may not be extensive enough. For example, penalties should be payable if an established SMP licence concludes an interconnection agreement that materially differs from its ICASA-approved RIO.
78. Moreover, the quantum of the penalties seem to be fairly low, and may not serve as a sufficient deterrent to errant established SMP licensees who break the law.
79. In addition and in order to prevent the value of the penalties from decreasing in real terms over time, ICASA should consider applying an automatic increase to the penalties in line with the rate of inflation (CPI).

## RIO PRINCIPLES (appendix A)

80. For the reasons indicated above, the draft regulations should also include a list of prohibited clauses. If prohibited contractual terms are not specified, then established SMP licensees may be tempted to coerce smaller operators to accept onerous contractual terms to their detriment.
81. As regards appendix A, it is respectfully submitted that the following clauses require further consideration:

### 81.1. Initiating negotiations / amendment of existing agreements (clause 1.2)

The requirement for an RIO to specify the procedure for initiating negotiations is nonsensical, as a process for this is already contained in the interconnect regulations. The provisions of this clause should apply to the initiation of amendments to existing agreements only.

### 81.2. Dispute resolution (clause 1.7)

81.2.1. This clause regulates the position when disputes arise during the currency of an interconnection agreement. As ICASA is aware, interconnecting parties may (and frequently do) contract out of the ICASA/CCC dispute resolution mechanism contractually, as the CCC process is slow and cumbersome. This has partly has to do with the fact that the CCC does not have any powers of its own. It can only make recommendations to the ICASA counsel, but the ICASA counsel takes the ultimate decision. Rather than raise a dispute with ICASA, in our experience weaker parties often give in to the larger operators' wishes, because they simply cannot afford the costs and delays involved with the regulatory process. Referring a dispute to ICASA should be a last resort, rather than a default arrangement.

- 81.2.2. In order to circumvent this weakness in the statutory dispute resolution framework, we suggest that RIOs should make provision for post-agreement interconnection disputes to be referred to arbitration.

## CONCLUSION

82. Vox again wishes to express its thanks to ICASA for giving it the opportunity to comment on these issues.
83. We realise that many of the issues that we have raised in this submission may be controversial. As a smaller player in the market, Vox is anxious to ensure that the market is regulated effectively (so as to prevent dominant providers from abusing their market position) whilst simultaneously sustaining and facilitating the viability of the industry (which will ultimately facilitate competition).
84. For this reason, we have attempted to give ICASA a very honest assessment of how we believe call termination should be regulated by ICASA. We have attempted to be as non-partisan as possible, in the hope that ICASA will use our suggestions to build a legally defensible foundation from which to regulate interconnection in the future.