

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

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Independent Communications Authority of South Africa

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**INDEPENDENT COMMUNICATIONS AUTHORITY OF
SOUTH AFRICA**

ICASA PREMIUM RATED SERVICES CODE OF CONDUCT REGULATIONS

REASONS DOCUMENT

A. INTRODUCTION

1. The Independent Communications Authority of South Africa (the Authority) published the draft Regulations on the Code of Conduct for Premium Rated Services GG 39539 (the draft Regulations) on 17 December 2015, in terms of sections 69 (2) of the Electronic Communications Act, 2005 (Act No. 36 of 2005) (the ECA).
2. The draft Regulations were developed to guide and promote transparency in the provision of premium rated services by Individual Electronic Communication Service (IECS) and Individual Electronic Communication Network Service (IECNS) licensees and other parties who through the networks of IECNS licensees provide premium rated services.
3. In this document, the Authority sets out the reasons for the adoption of the final Regulations on the Code of Conduct for Premium Rated Services.

B. BACKGROUND

4. In 2012 the Authority published revised Numbering Plan Regulations in the Government Gazette 35737, these regulations released new numbering ranges dedicated to premium rated services. The Authority also sought the need for a code of conduct to guide the provision of such services in interest of transparency and best practice.
5. The Authority commenced the development of the code in consultation with stakeholders through an industry led numbering forum. The inputs of this forum were considered by the elected committee tasked with the promulgation of the regulations.
6. The overarching objective of these draft Regulations was to introduce mechanisms to protect the interest of the public and consumers. Thus ensuring that users of premium rated services are confident in the use of such services.

7. The draft Regulations set out to address the abovementioned objectives by:
 - 7.1 Setting out the conduct and ethical norms to be observed by licensees offering premium rated services (either directly or indirectly);
 - 7.2 Promoting fair and transparent practices in the provision of premium rated service and uniformity in premium rated service market practices; and
 - 7.3 Addressing consumer issues that are unique to premium rated services i.e. Automatic\ false subscriptions.

C. PROCESS FOLOWED BY THE AUTHORITY

8. Section 4 of the Electronic Communications Act of South Africa of 2005 ("the Act") prescribes the process that the Authority must follow in the promulgation of its regulations - Section 4(1) *"The Authority may make regulations with regard to any matter which in terms of this Act or the related legislation must or may be prescribed, governed or determined by regulation...."*.
9. Section 4 of the Act further guides on the consultation of the promulgated regulations in that:

"(4) The Authority must, not less than thirty (30) days before any regulation is made, publish such regulation in the Gazette, together with a notice -

- (a) declaring the Authority's intention to make that regulation; and*

(b) *Inviting interested parties to make written representations on the regulation.*

Furthermore, that

(6) The Authority may conduct public hearings in respect of the draft regulations.”

10. In light of the above guidance derived from the Act, the Authority published the draft regulation for public comment on 17 December 2015. Interested parties were invited to submit written representations within 30 days of the publication of the draft Regulations with the submission deadline being the 12th of February 2016.
11. Public hearings for the draft Regulations were convened on 31 March 2016. All parties that had made written submission with the exception of two parties, were represented.

D. SUMMARY OF WRITTEN REPRESENTATIONS

12. The Authority received 9 written submissions from interested stakeholders, namely:
 - 12.1 Cell C (Pty) Ltd (Cell C);
 - 12.2 Telkom SA SOC Limited (Telkom);
 - 12.3 Vodacom (Pty) Ltd (Vodacom);
 - 12.4 Wireless Application Service Providers' Association (WASPA);
 - 12.5 Neotel (Pty) Ltd (Neotel);
 - 12.6 Mobile Telephone Networks (Pty) Ltd (MTN);
 - 12.7 National Association of Broadcasters (NAB);
 - 12.8 Internet Service Providers Association (ISAPA); and
 - 12.9 Mr Solly Tayob.

13. There were several broad themes that emanated from the different submissions, which have been summarised below. The summary in this reasons document does not comprehensively address each and every submission made or point raised but attempts to address the primary submissions made.

13.1 Scope of the draft Regulations

13.1.1 Several submissions raised concerns on the scope of the draft Regulations with some proposing that the scope be limited to voice as there is an existing code for Premium Rated Services (PRS) data services.

13.1.2 Telkom proposed that the Authority withdraw the draft regulations as the scope of the draft regulations duplicates the functions of existing bodies. Alternatively, the Authority revise the scope of the draft Regulations and limit it to:

13.1.3.1 PRS voice services;

13.1.3.2 PRS SMS (35xxx and 45xxx); and

13.1.3.3 Premium rated USSD.

13.1.3 Vodacom proposed that the Authority consider appropriate alternative models such as co-regulation and/or self-regulation. It also proposed that the Authority consider the self-regulatory measures currently in force.

- 13.1.4 WASPA proposed a co-regulatory relationship in respect to PRS in light of the vast experience it has in the PRS market. They furthermore propose that its current code could be expanded to include provisions for PRS voice.
- 13.2 Most representations made during the public hearings also advocated for the option of co-regulation and/or self-regulation model.
- 13.3 The Authority has, as a mandate, enshrined in the Independent Communications Act of South Africa of 2000 (ICASA Act), to regulate electronic communications in the public interest.
- 13.4 It is in the public interest that the Authority drafted and developed the draft Regulations regarding the code of conduct for Premium Rated Services.
- 13.5 The ICASA Act prescribes that in exercising its function, the Authority shall be independent and subject only to the constitution and the law. Furthermore, that the Authority shall be impartial and perform its functions without interference.
- 13.6 The Authority would like emphasise that it is not adverse to co-regulate or self-regulate where appropriate. The Authority supports the resolutions of the National Integrated ICT Policy Review Report (Resolution 169).
- 13.7 However, it is implausible that the Authority adopt a co-regulation\self-regulation model that does not advance the objectives and mandate of the Authority as contained in the ICASA Act.

14. Premium Rated Service Providers (PRSPs), Individual Electronic Communication Service (IECS) and Individual Electronic Communication Network Service (IECNS) Licensees

14.1 A number of submissions raised concerns on the enforceability of the draft regulations to third parties.

14.2 Vodacom submitted that the draft regulations do not provide means to hold PRSPs directly accountable. Hence non-adherence carries no sanctions to the PRSPs. Licensees cannot be responsible for non-adherence by PRSPs. They further submitted that the draft regulations can only address services provided by licensees and not their third parties.

14.3 Telkom also submitted that the scope of the regulations be applicable to only PRSPs and not necessarily to licensees who do not directly provide premium rated services.

14.4 MTN requested that the Authority provide clarity on how to deal with PRSPs who may be able to avoid the jurisdiction of the Protection of Personal Information Act by housing their data in other legal jurisdictions.

14.5 Section 69 of the Act provides that:

"(2) The Authority may develop different codes of conduct applicable to different types of services. All electronic communication network service licence and electronic communication service licensees must comply with the Code of Conduct for such services as prescribed."

- 14.6 The Act is clear that compliance with a Code of Conduct for a service is inclusive of both an ECS and an ECNS licensee.
- 14.7 Furthermore, the Authority, as provided for under chapter 3 of the Electronic Communications Act of 2005, issues ECNS licensees to which licensees have an obligation to ensure that services provided over the licensed network comply with the applicable statutory prohibitions and obligations as provided by the Authority.
- 14.8 The Regulations on the code of conduct for premium rated services provide guidelines towards the provision of premium rated services and at best set minimum standards for PRSPs who may not be licensees but provide such services through the facilitation of a licensed network.
- 14.9 Thus the Authority has placed an obligation on all licensees (ECS and ECNS) to ensure that the service complies with the said regulations.

15. *Development of the draft Regulations*

- 15.1 Vodacom submitted that the Authority developed the draft regulations without consulting other interested parties particularly user organizations.
- 15.2 The Authority developed the Regulations on the code of conduct for premium rated services with inputs from interested industry stakeholders and publicly consulted on the draft regulations (paragraph 3 "Process followed by the Authority").
- 15.3 The Authority remains committed to an open dialogue and consultation with the public and interested parties.

16. Definitions

- 16.1 Cell C recommend that the conclusion of the draft regulations be held in abeyance pending the conclusion of the Numbering Plan Regulations (NPRs) as the draft regulations are dependent on the conclusion of the PRS definition currently underway in the NPRs.
- 16.2 ISPA advised that the Authority consult with the Film and Publication Board (FBP) on the definition and scope of adult services in light of the current amendments to the act.
- 16.3 Telkom submitted that the draft Regulations refer to the FBP guidelines on the definition of "adult services" and as these guidelines are currently being contested, reference to these guidelines would be unworkable.
- 16.4 WASPA on the other hand proposed that the Authority expand on the definition of "adult services" to "*Adult service*" means a service containing material or adult experiences not appropriate for any persons under the age of 18 as classified in terms of the Film and Publication Board's Classification Guidelines issued classified as X18 by the Film and Publications Board in terms of the Film and Publications Act, Act No. 65 of 1996 or which would have been so classified had it been submitted for classification;"
- 16.5 The Authority has noted that the FBP guidelines have provided a definition for "adult services" and such the Regulations have defined "adult services" in line with the prevailing definition as contained in the FBP guidelines.

17. *REGULATION 2*

- 17.1 Cell C sought clarity on the intention of sub regulation 2(3). Cell C is of the view that if provisions are dealt with in other legislations, ICASA should not include them in the draft regulations.
- 17.2 It should be noted that the Regulations only address matters specific to premium rated services (for ECS and ECNS licensees and not to broadcasting services). The Regulations are cognisant that certain provisions are dealt with extensively in other legislations and as such those provisions shall apply.

18. *REGULATION 4*

- 18.1 Cell C proposed a two-year change period or alternatively valid reasons for a deviation as it submits that ICASA would be interfering with commercial matters. While MTN proposed a 12-month period.
- 18.2 Both MTN and Telkom submitted that the frequency of migration reporting be revised and proposed a frequency of a quarterly basis and every 3 months respectively.
- 18.3 The process of migration of premium rated services commenced in 2012 with the publication of the 2012 NPR and as such, affected stakeholders have been sensitized of the migration.

- 18.4 The revised migration period took into consideration the above as well as a period that will have limited inconvenience to end users. As such the initial migration period of 6 months has been revised to 12 months.

19. REGULATION 5

ISPA submitted that licensees bind their PRSPs through commercial terms and furthermore licensees could bind PRSPs contractually to comply with the provisions of the code thereby creating indirect enforcement. But also submitted that at most licensees can prohibit misconduct on pain of termination but cannot ensure that PRSPs obey the law hence they recommended that the terms "reasonable steps" be used rather than the term "ensure".

20. REGULATION 6

- 20.1 MTN submitted that the Authority must be clear on the requirements for double opt-in as contained in sub regulation 6(3).
- 20.2 While Vodacom submitted that the opt-in requirement of sub regulation 6(3) is not practical nor appropriate for services that do not follow the subscription model.
- 20.3 Cell C submitted that sub regulation 6(4) was onerous, resource intensive and impractical. Cell C recommended that sub regulation 6(4) be removed as the subscriber has the option to opt out of the service by using the USSD and/or self-service portal.

- 20.4 In consideration of the above the sub regulations have been revised and contextualized.
- 20.5 In other texts pertaining to regulation 6, ISPA and Telkom were of the view that the 5 seconds announcement was too short and instead recommended a 10 seconds or 8 seconds announcement respectively.
- 20.6 Neotel was also of the view that the timeframe for the announcement was too short and also sought clarity as to who is responsible for the announcement. Neotel further recommended that the regulation make it clear that the announcement must be made before the call is answered
- 20.7 The timeframe requirement of 5 seconds has been revised to 10 seconds.
- 20.8 The Regulations speak to the current provisioning of premium rated services (on-net) in the absence of an adopted and approved off-net model. As such each respective licensee will advise its subscribers accordingly in line with the current model.

21. REGULATION 8

- 20.9 MTN submitted that sub regulation 8 (1) maybe impractical due to the nature in which it assigns numbers. It submitted that it does not have control over which services are applied to service codes as that is done on an application level by the third party provider. Hence information required could be inaccurate.

- 20.10 MTN also proposed in sub regulation 8 (2) that the information be made accessible to the end user only if the information is relevant to the end user enquiring.
- 20.11 Neotel was of the view that the requirement of sub regulation 8(2) should be the responsibility of PRSPs and not licensees.
- 20.12 Vodacom submitted that it would not be able to comply with the requirement of sub regulation 8(2), as it submitted that it is not allowed to intercept the content of these services and would thus not be able to provide information on them. Vodacom however indicated that it would be practical to provide details for voice and only high level description for SMS\MMS

22. REGULATION 9

- 22.1 Cell C submitted that the requirements of the regulation are a repetition of the requirements in the Advertising Standards Association of South Africa (ASASA) code and the Consumer Protection Act (CPA), and are therefore unnecessary.
- 22.2 While MTN was of the view that the requirement under Regulation 9 would only be enforceable if the PRSP is the licensee, in the event that the PRSP is not a licensee this requirement would be impossible for the Authority to enforce.
- 22.3 Vodacom submitted that Regulation 9 should be removed as it is dealt with under the CPA.
- 22.4 As a result of the inputs received, **Regulation 9** has been deleted.

23. *REGULATION 14*

- 23.1 Cell C proposed that the regulation 14 be removed and only retain the contents of sub regulation 14(1) which it proposes that it should be rephrased to read as follows "All promotions and advertising of premium rated services must comply with requirements as prescribed in the Advertising Standards Authority of South Africa, Advertising Code of Practice and the Consumer Protection Act, 2008"
- 23.2 The draft Regulations take nothing away from the Advertising Code of Practice and the Consumer Protection Act, 2008 "code" and as such, the draft Regulations have aligned its provisions with the code.
- 23.3 The draft Regulations however do acknowledge that there is a need to place specific emphasis on advertising and promotional material emanating from premium rated services and thus provide provisions that are specific to the service.

24. *Regulation 16*

- 24.1 Cell C: recommend that "PRS voice services" be recorded on the bill as a total and each call be captured as follows: date, time, duration, destination number and amount in rands and cents per event where the destination is either 090/1/2.
- 24.2 ISPA submitted that the requirements of sub regulation 16(2)(a) is impractical due to the definition "premium rated service provider". The billing licensee may not necessarily be the terminating licensee.

- 24.3 ISPA further recommended that:
- 24.3.1 the definition of PRSP be amended to only include licensees and a not third party or amending sub regulation 16(1)(a) to “the name of the licensee to whom the premium rate number has been allocated”;
 - 24.3.2 Requirements of sub regulation 16(2)(b) are entirely impractical – the billing network operator would not know what services are being provided on each of the PRS numbers of the other licensee; and
 - 24.3.3 Requirements of sub regulation 16(2)(c) and (d) are also impractical due to the inability of the billing licensee to have access to information of the terminating licensee.
 - 24.3.4 Requirements of sub regulation 16(4) are impractical in instances whereby a subscriber has signed a debit order or has lodged a dispute on or after the due date.
- 24.4 As a result of the above submissions, sub regulation 16(2) has been revised.
- 24.5 Neotel was of the view that Regulation 16 requires significant manpower to support. Furthermore, sub regulation 16(4) may not necessarily be just as it requires the originating licensee not to recover costs pending an outcome however the terminating licensee still requires their termination costs.

- 24.6 The Authority would like to reiterate that the draft Regulations have been developed in light of the current provision of premium rated services (On-Net), however above principle of the point highlighted remain relevant and such the requirement placed by sub regulation 16(4) has been revised.
- 24.7 Majority of the respondents raised concerns with sub regulation 16(5) and (6).
- 24.7.1 ISPA submitted that the requirements make an attempt at "a one size fits all" solution. It submits that the amounts may be too high for an individual but too low for a corporate i.e. teleconferencing.
- 24.7.2 Hence ISPA proposed that amounts be removed and be replaced with "a specified threshold" which may be amended in accordance with the account holder's instructions.
- 24.7.3 Mr S Tayob submitted that the notification of advising for the charge of the PRS service should be done through an SMS and email to account for delivery failure. The notification should be sent by both the PRSP and the billing operator upon receipt of instructions from the PRSP.
- 24.7.4 He also proposed that if the charge exceeds R10.00 a day a legal agreement must be signed between the licensee/Premium Rated Service Provider and end user to ensure that the terms and conditions are clear. This agreement must also be required if the service is used for more than 20 days.

- 24.7.5 He further proposed that there should be a provision to blacklist licensees/PRSPs that are found to be abusing this facility, with possible criminal charges. Once a licensee/Premium Rated Service Provider is blacklisted, the billing network operator should block the licensee/Premium Rated Service Provider on their network.
- 24.7.6 Mr S Tayob submitted that PRS charges should be separate to an end users cell phone account. He also submitted that the word "reasonable" in sub regulation 16(3) is open ended. Furthermore, S Tayob recommended that limits be set to R50.00 and at R100.00 these services must be automatically terminated.
- 24.8 MTN were of the view that if an end-user has knowingly and willingly opted in to a service that will cost more than R200 per month then this should be sufficient authorisation from an end-user to be billed accordingly for the services consumed. If the end-user, no longer wants the services they should use the facility to opt out.
- 24.9 Neotel stipulated in its submission that the limits drafted in sub regulation 16(5) and 16(6) should not be the responsibility of the network operators to monitor usage. End users must request for call limits.
- 24.10 Vodacom submitted that the responsibility for PRS usage notifications to the end user lies with the PRSPs and not the licensees. And that the cost of building in a system to monitor usage would be substantial. While Telkom sought clarity on whether the R200 Limit applies for all PRS or per PRS.

- 24.11 The requirement under sub regulation 16(5) and (6) has been revised to account for the different requirement and needs of different subscribers (i.e. corporations' vs individual subscribers).
- 24.12 The requirement has also taken into consideration the resources required to provide such a functionality and weighed that against the public interest. As submitted by Mr. Solly Tayob it is common experience by subscribers to be alarmed by the invoice of the charges against their cell phone accounts.
- 24.13 Subscribers should be empowered and be provided with full knowledge of amounts credited or debited to their cell phone accounts, this is in the spirit of promoting transparency in the provision of premium rated services.
- 24.14 The provision has also taken into account the practicality of such a requirement. The limit requirement shall be per premium rated service.

25. *REGULATION 17*

- 25.1 Cell C recommended that the same procedure as contained in the End User and Subscriber Charters be used when managing subscriber complaints on PRS.
- 25.2 Neotel submitted that disputes lodged will incur costs and as such the draft regulations must make provision for an origination cost which the originating network could off-set against the interconnection fees payable to the PRSP's terminating network. Neotel furthermore submitted that:

- 25.2.1 Disputes should not put the originating licensee “out of pocket” by allowing the end user to withhold payment.
- 25.2.2 This requirement favours a PRSP who has a financial benefit in discarding disputes at the expense of the originating network licensee.
- 25.2.3 As such it proposed a delayed payment billing of 90 days to PRSPs and terminating networks.
- 25.3 Mr Solly Tayob recommended that the contact number for queries\disputes should be a toll free number.
- 25.4 Meanwhile Vodacom submitted that it could not be held liable for sub regulations 17(1),(4),(5),(6),(7),(8),(11),(12),(13),(14),(15), and (16). It views that these requirements fall outside the Authority’s jurisdiction as they go beyond the regulation of communications services as contemplated in the ECA. It further submits that they cannot cease and bar access to the service on its network as that would infringe on the rights of the PRSPs.
- 25.5 Vodacom further submitted that it is already committed to the end user and subscriber charters when it comes to dealing with complaints thus any regulation contemplated by the Authority in dealing with customer complaints should consider existing regulations covering the same.
- 25.6 The provision as contained in the End User and Subscriber Charters provide mechanisms for electronic communication services in general while the provisions contained in draft Regulations are specific to premium rated services.

25.7 The draft Regulations do not take away the provisions in the End User and Subscriber Charters and as such, as per sub regulation 2(3) *"If any other legislation provides for conditions for the provision of premium rated services that are more extensive than those set out in these Regulations, the extensive conditions shall prevail."*.

26. REGULATION 18

25.8 Most respondents submitted that the one-month timeframe was too short and proposed periods of either 3, 6 or 12 months.

25.9 In consideration of the submissions received the timeframe has been revised to six (6) months.

27. THE AUTHORITY'S VIEW

27.1 The Authority is of the view that it has followed the provisions as set out in the Act in the promulgation of these Regulations. The Authority has taken into consideration all submissions and representations made by stakeholders in the finalisation these Regulation (as each abovementioned regulation).

27.2 The Authority is satisfied that these Regulations meet the objectives which are fundamentally based on the interests of consumers and to promote transparency.