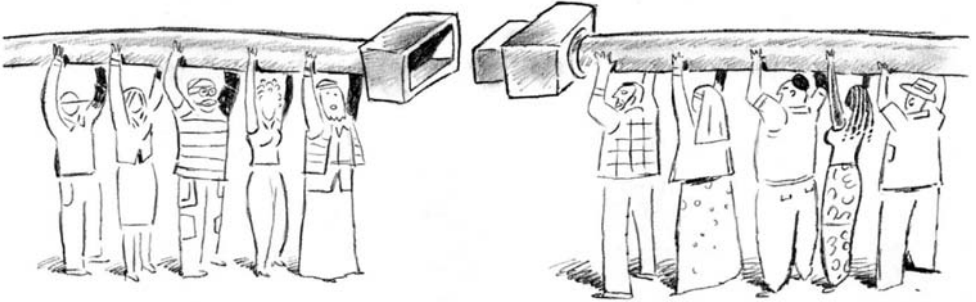


# Interconnection and Facilities Leasing

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# INTRODUCTION

In the world we live in, access to information and the means of access to the plethora of media through which the information is disseminated, is crucial. Telecommunications in its broadest sense is about making contact with others. Interconnection and facilities leasing are two ways in which telecommunication service providers obtain access to the networks or facilities of other service providers, ultimately allowing customers access to other communication services.<sup>2</sup> The first part of the chapter discusses interconnection and facilities leasing, what it is, why it is important and whether it should be regulated. Thereafter the regulatory framework governing interconnection and facilities leasing in South Africa, with the primary focuses on the Telecommunications Act<sup>3</sup> and the applicable regulations, is discussed.

## 1. WHAT ARE INTERCONNECTION AND FACILITIES LEASING AND WHY ARE THEY IMPORTANT?

Interconnection is defined in the Telecommunications Act, as the linking of two telecommunications systems so that users of either system may communicate with users of, or utilise services provided by means of, the other system or any other telecommunications system.<sup>4</sup> The definition of interconnection in the Telecommunications Act refers to both customers and services. Customers on one network can only speak to customers on another network (or access the services on another network) if the two networks are interconnected through a physical or logical link.<sup>5</sup> If two or more networks are not interconnected, the customers of the one would not be able to communicate with customers of the other networks nor use the services of the other networks. Network service providers usually conclude interconnection agreements between themselves, which regulate the technical, physical and commercial aspects of the interconnection relationship.

Facilities leasing refers to a vertical relationship between network service providers and other service providers.<sup>6</sup> One service provider leases the facilities of another in order to provide services to end-users; however the facilities need not necessarily only be leased, as the wording of the Telecommunications Act makes reference to both lease or otherwise make available telecommunication facilities. The facilities to which a service provider would want to have access would include wire, antenna, towers, underground ducting, cables, buildings, fixed links,<sup>7</sup> and land on which the facilities are located. There are a number of reasons why a

<sup>2</sup> For a discussion on the notion of universal access, that is access to telecommunication services by end-users, see chapter 8 herein.

<sup>3</sup> Telecommunications Act, 103 of 1996 as amended by the Telecommunications Amendment Act, 64 of 2001.

<sup>4</sup> s 1 of the Telecommunications Act.

<sup>5</sup> *Newton's Telecom Dictionary* defines interconnection as '[a] term generally used to describe the connection with or without a protective connecting arrangement, of customer or phone company-provided communications equipment to facilities of the local phone companies' H Newton *Newton's Telecom Dictionary* 18 ed (2002) 380. This definition is specifically written with the US context in mind, as in South Africa we do not have local phone companies, yet.

<sup>6</sup> s 44(2) of the Telecommunications Act provides: 'Telkom and any other provider of a public fixed switched telecommunication service shall, when requested by any other person providing a telecommunication service, including a private telecommunication network, lease or otherwise make available telecommunication facilities to such other person pursuant to an agreement to be entered into between the parties, unless such request is unreasonable.' Facilities Leasing is defined as 'the leasing or otherwise making available of telecommunication facilities' in GN 1260 /2000 GG 20993 dated 15 March 2000 guideline 1.1.

<sup>7</sup> Fixed link is defined as 'a telecommunications line connecting two points neither of which is Terminal Equipment', in GN 1078/1993 GG 15232 dated 29 October 1993. A further definition of 'fixed link' is 'A communications link between two fixed points. Such links

service provider would want to have access to the facilities of another service provider, particularly that of an incumbent service provider. Such reasons would include reduction in the duplication of resources, for example sharing a tower or building to install receiving equipment. Another reason is to reduce start up costs by new entrants by utilising an established network. At times, and usually in developing markets which are in the process of liberalisation, the regulatory framework requires new entrants and service providers such as value added network service providers (Vans) to obtain facilities from the incumbent provider of telecommunication services usually a state owned entity. Service providers usually conclude agreements in relation to facilities leasing. These agreements typically regulate the technical specifications of the leased facility and commercial aspects of the leasing arrangement.

## 2. SHOULD INTERCONNECTION AND FACILITIES LEASING BE REGULATED?

Often the biggest hindrance to a competitive telecommunications industry is the service providers themselves, especially in an industry where service providers have enjoyed monopoly or duopoly status. Historically, in most countries, telecommunications services were provided by monopoly players. Often these were, and in some countries they still are, publicly owned monopolies. 'Strategic anti-competitive behaviour on interconnection matters by incumbents has retarded or prevented competition in many telecommunications markets around the world.'<sup>8</sup> In many countries, when government introduced competitors to these incumbents or liberalised particular segments of the market such as the Vans segment, it would typically require new entrants and liberalised segments to obtain their facilities from the incumbent. For example in South Africa, each of the licences of Cell C<sup>9</sup>, MTN<sup>10</sup> and Vodacom<sup>11</sup> stipulate that these operators have to obtain their fixed links from Telkom<sup>12</sup> or another public switched telecommunications service (PSTS) licensee, unless Telkom or the other PSTS licensee is unable or unwilling to provide these links. This is required by section 37(2) of the Telecommunications Act. Section 40(2)<sup>13</sup> of the Telecommunications Act, as amended provides that Vans licensees must obtain their facilities from Telkom or another PSTS licensee until a date to be fixed by the Minister of Communications. In South Africa, as in many other countries, the monopoly incumbent would also be operating in the Vans segment, thus competing with new

may be uni-directional (eg carrying television programme material to a transmitter) or bi-directional (eg carrying telephone traffic), and may be point to point or point to multipoint'; available at [http://www.radio.gov.uk/topics/spectrum-strat/document/sm\\_96/spec12.htm](http://www.radio.gov.uk/topics/spectrum-strat/document/sm_96/spec12.htm) accessed on 12 February 2004.

<sup>8</sup> Hank Intven and McCarthy Tetrault *Telecommunications Regulation Handbook* (2000) Module 3 3-1; also William Melody (ed) *Telecom Reform, Principles, Policies and Regulatory Practices* (Den Private Ingeniorfond, Technical University of Denmark, Lyngby, 1997) for an overview of the development of the telecommunications industry in the international context.

<sup>9</sup> Cell C (Pty) Ltd. Licence issued in terms of GN 1601/2001 GG 22429 dated 29 June 2001.

<sup>10</sup> Mobile Telephone Networks (Pty) Ltd. Licence issued in terms of GN 1078/1993 GG 15232 dated 29 October 1993.

<sup>11</sup> Vodacom (Pty) Ltd. Licence issued in terms of GN 1078/1993 GG 15232 dated 29 October 1993.

<sup>12</sup> Telkom SA Ltd (Telkom) licence can be found in GN 768/1997 GG 17984 of 7 May 1997 (Telkom PSTS licence).

<sup>13</sup> s 40(2) of the Telecommunications Act provides:

'A licence to provide any value-added network services, including, but not limited to, electronic data interchange, electronic mail, protocol conversion, access to a database or a managed data network service, shall contain a condition that the service in question be provided by means of telecommunication facilities (a) until 7 May 2002 provided by Telkom or made available to Telkom as contemplated in section 44; and (b) after 7 May 2002, provided by Telkom and the second national operator or any of them until a date to be fixed by the Minister by notice in the Gazette.'

entrants who are dependant on it for their facilities.<sup>14</sup> Monopoly incumbents often engage in anti-competitive practices by restricting access to their networks and facilities. In a context where the incumbent also competes in a dependent segment such as Vans it could typically favour its own subsidiary above other competitors, thus discriminating in favour of its own subsidiary.

An incumbent would typically use one or more of the following anti-competitive practices:

- it would refuse to interconnect or provide facilities with the new entrant on the basis of technical or commercial grounds, or
- it would delay negotiations between the parties as much as possible, or
- it would agree to interconnect only at points of interconnection determined by it thus increasing the costs to the new entrant, or
- it would demand high prices for terminating the new entrant's traffic onto its networks, or
- it would provide inferior technical solutions, which would affect the quality of service to the new entrant's subscribers.

In the context of facilities leasing, the incumbent would typically, on the basis of technical or legal arguments, refuse to provide facilities at all or timeously. 'It is the supply of facilities that they have found delays that have affected their network rollout and service quality. There is only one source of supply for those facilities (ie Telkom).'<sup>15</sup> Often it would refuse to make service level commitments or require service providers to lease bundled services with a lack of transparency in its charging structures, thereby charging more than what would be charged in an unbundled service. Unbundling allows a new entrant to purchase particular interconnection functions and pay for each of them separately.<sup>16</sup> This is particularly relevant where entrants, in order to be competitive, aim to provide enhanced services in addition to their basic communications services.

An example of a manner in which an incumbent discontinued the supply of telecommunication facilities and services, is in the case of *Satellite Data Networks (Pty) Ltd v Telkom SA Ltd*,<sup>17</sup> where the Court ordered that the Respondent to restore all telecommunication facilities and services (which included all the Respondent's remote exchange equipment, associated equipment to enable client connections, the Applicant's national backbone services, the Applicant's client's circuits and the Applicant's normal telephony services including telephone and telefax services) which existed as at 22 February 2000 to the Applicant with immediate effect pending the final determination of the relief.

A monopoly or dominant service provider could abuse its position and thus prevent effective competition from developing in the telecommunications industry, as can be seen in the following example. The South African Vans

<sup>14</sup> Telkom has also been issued with a Vans licence in terms of s 40(1)(a) of the Telecommunications Act which provides:

'Telkom shall be deemed to be the holder of a licence to provide, subject to subsection (3), the value-added network services provided by it immediately before the date of commencement of this Act: Provided that as at the date of commencement of this Act Telkom shall be deemed to have applied to the Minister for a licence in terms of this Act in respect of each such service, and the Minister shall, after the provisions of section 36(6), (7), (8) and (9) have been complied with, in relation to the terms and conditions of the licence, grant the application and issue such licence to Telkom with a period of validity of 25 years from the date of commencement of this Act.'

<sup>15</sup> Regulatory Statement on Interconnection and Facilities Leasing (Regulatory Statement) in GN 1337/1999 GG 20229 dated 18 June 1999 42.

<sup>16</sup> 'The purpose of unbundling policies is to lower economic and technical barriers to competitive entry.' *Telecommunications Regulations Handbook* (note 8 above) 3-40.

<sup>17</sup> *Satellite Data Networks (Pty) Ltd v Telkom SA Ltd* (WLD, 24 February 2000, case no 2000/1776, unreported).

Association (SAVA) on 20 August 1999 lodged a section 53 complaint with Icasa on behalf of its members, alleging that Telkom was engaging in anti-competitive behaviour. The complaint took the form of a request that Icasa direct Telkom under section 53 to cease and refrain from taking the following actions: (1) stating or in any way implying to the customers and prospective customers of service providers other than Telkom, that other service providers are providing services illegally; (2) stating or in any way implying to the customers and prospective customers of other service providers that Icasa was investigating the legality of the provision of services by other service providers; (3) stating or in any way implying to the customers and prospective customers of other service providers that Telkom was investigating the legality of the provision of services by other service providers; (4) stating or in any way implying to the customers and prospective customers of other services providers that Telkom had an exclusive right to provide the services provided by other service providers; (5) refusing or threatening to refuse to provide telecommunications facilities to any other service provider who did not confirm or agree to confirm in writing certain of Telkom's interpretations of the Act regarding the extent of its exclusive right to provide certain services and facilities. Icasa made its determination known on 10 September 1999. Icasa directed Telkom to immediately cease and refrain from making statements to Vans customers regarding the legal status of Vans operators; implying that other Vans operators are under investigation and that their services will be terminated; and issuing threats to terminate the existing facilities and services of Vans operators.<sup>18</sup>

Icasa furthermore on 10 September 1999 issued a notice in terms of section 100 of the Telecommunications Act read in conjunction with regulation 1(a) of regulation R 346 of 6 March 1998 that it would investigate and adjudicate the alleged failure of Telkom to comply with conditions 9.1 and 9.2 of its PSTS licence and conditions 8.1 and 8.2 of its Vans licence. Icasa did not investigate however and so this matter was taken to the High Court again in the matter of AT&T Global Network Services SA (Pty) Ltd and Others v Telkom SA Limited and Others.<sup>19</sup> The applicants applied for an order interdicting the first respondent, pending the final determination of an action by Icasa, from refusing or threatening to refuse to provide to the applicants existing and new telecommunications facilities.

The Court on the jurisdiction issue came to the following conclusion 'I agree with Telkom's submission that this Court does not have jurisdiction to entertain this application' Prior to Icasa's determination. A second point in limine raised was the defence of *res judicata*. Telkom contended that the issues before the Court had been decided by Icasa, when it refused to grant the additional relief sought from it by SAVA. The Court concluded on this issue that:

Icasa declined to decide this issue and said that they will do so after having

<sup>18</sup> Condition 9.1 of Telkom PSTS licence (note 12 above) provides:

"The Licensee shall not show undue preference to, or exercise undue discrimination against, particular persons or persons of any class or description in respect of (a) the provision of any telecommunication services (including, without limitation, maintenance services) in accordance with any obligations imposed by this Licence; (b) the connection of Approved Equipment to the Public Switched Telecommunication Network; (c) the granting of permission to connect any Operator's telecommunication system with the Public Switched Telecommunication Network in accordance with section 43 of the Act and the guidelines contemplated thereunder; and (d) the quality and terms of any Interconnection Services provided by the Licensee to an Operator under any agreement between them."

Condition 9.2 of Telkom PSTS licence (note 12 above) provides:

"The Licensee may be deemed to have shown undue preference or undue discrimination as described in condition 9.1 if the Authority determines that it unfairly favours to a material extent any business carried on by it so as to place at a significant competitive disadvantage persons lawfully competing with that business."

<sup>19</sup> TPD, 16 November 1999, case no 27624/1999, unreported.

investigated the issue. The matter has not been rendered *res judicata* and in my view the second point in *limine* must be dismissed.

Telkom took Icasa's decision of 10 September 1999 on review to the High Court<sup>20</sup> and the Court set aside Icasa's determination of 10 September 1999. The Court concluded that Telkom had not received the procedurally fair administrative action to which it was entitled under the Constitution of 1996 and hence this was grounds enough on review to set aside the decision. The Court therefore came to the further conclusion that it need not consider any other grounds of review. The Court furthermore ordered Icasa to dispose of the complaints within six months of the date of the court order. The matter was referred back to Icasa for consideration and on 6 & 7 June 2000 Icasa delivered its draft judgment in the matter. Icasa's draft judgment was made final by a resolution of the Council of Icasa on 26 June 2000.<sup>21</sup> Icasa ruled in favour of SAVA and made a number of orders. Icasa held that in terms of section 44(3) it was the only party lawfully mandated to consider the reasonableness of requests made in terms of this section. Furthermore, the respondent (Telkom) could not refuse to provide facilities to licensed providers simply on its own suspicion of illegality. In addition Icasa held that where a reasonable suspicion of illegality exists, the respondent should amongst other things not withhold facilities without the written consent of Icasa. Icasa's decisions of 6&7 June and its judgment of 26 June 2000 was then taken on review by Telkom, however the parties reached an agreement that the correct procedures had not been followed. This agreement was made an order of court and the review was set aside.<sup>22</sup>

The case of *Transnet Limited v Telkom SA Limited*,<sup>23</sup> was heard on 14 November 2002 and on 11 April 2003. At the 14 November 2002 hearing the Court ordered that, pending the outcome of the interdict application,

the respondent (Telkom) shall forthwith restore all telecommunication facilities and services to the applicant that it has interrupted or discontinued. The respondent is interdicted from discontinuing or interrupting any telecommunication facilities and services currently provided by the respondent to the applicant (including, but not limited to primary rate ISDN lines).

At the 11 April 2003 hearing the Court ordered:

that respondent is interdicted from discontinuing the provision of any and all telecommunication facilities and services currently provided by the respondent to the applicant, including but not limited to primary rate ISDN lines. This order shall operate with immediate effect and shall remain effective pending the final determination of the dispute between the respondent and the applicant concerning the legality of the use of the relevant telecommunication facilities and services by the Independent Communications Authority of South Africa.

<sup>20</sup> *Telkom Ltd v M Mayimela-Hashatse NO, SATRA, SAVA* (TPD, 17 April 2000, case no 27451/1999, unreported).

<sup>21</sup> Council Resolution SCM 260600 dated 26 June 2000. The Council resolved to adopt the draft judgment as being the judgment of Icasa and regarded the said judgment as being final in as far as the matter is concerned.

<sup>22</sup> *Telkom SA Ltd v H Dikgale NO, Icasa, SAVA* (TPD, 20 March 2001, case no 19341/2000, unreported). SAVA has also recently referred the issue of Telkom's refusal to give access to value added network operators access to facilities as amounting to anti-competitive behaviour to the Competition Commission. This matter is still pending.

<sup>23</sup> TPD, case no 31876/2002, unreported.

### 3. HOW SHOULD INTERCONNECTION AND FACILITIES LEASING BE REGULATED?

The following section analyses the role of regulators and the challenge in trying to find the balance between regulating to create and sustain a competitive telecommunications sector and allowing commercial negotiations between the parties. 'Today there is a consensus among telecommunications experts and policy makers that decisive and informed guidance by regulators is required to pave the way for effective interconnection arrangements.'<sup>24</sup> Regulation seeks to pre-empt typical anti-competitive behaviour by inter alia obliging parties to interconnect and lease facilities, providing guidelines on the contents of agreements setting, time frames for concluding agreements, providing dispute resolution mechanisms and circumstances in which price regulation for dominant operators may be imposed. Throughout the world, the various regulatory authorities have adopted a number of different approaches to interconnection issues.<sup>25</sup>

Some countries (eg Canada, Japan and the US) emphasise the ex ante approach. The regulator deals with interconnection matters in great detail (with input from industry), setting down precise guidelines and leaving little to be negotiated between the parties ... At the other end of the spectrum there are countries like New Zealand, Malaysia, Poland and Chile whose laws simply stipulate an obligation on the part of the incumbent to offer interconnection and leave the terms to emerge entirely from negotiations between interconnecting parties. ... Between the two extremes there are institutional arrangements that leave the terms of interconnection to be negotiated between the parties in accordance with general regulatory principles but give the regulator the responsibility for intervening if and when the parties reach an impasse. This is the case in Australia, Chile now, Hong Kong, Sweden and the UK.<sup>26</sup>

It remains to be seen whether these models are wholly appropriate for South Africa. In parts of the world where regional economic development has taken place, regional interconnection and facilities leasing regulatory models have been developed as guidelines for nation states and to promote consistency in the regulation of access to telecommunications.<sup>27</sup>

The globalisation of telecommunications and the interconnection of networks between countries have resulted in countries entering into bi-lateral or multi-lateral undertakings in respect of telecommunication issues such as interconnection. South Africa is a member of the World Trade Organisation (WTO) and is a party to all relevant telecommunications agreements, including those provisions on interconnection.<sup>28</sup>

<sup>24</sup> *Telecommunications Regulation Handbook* (note 8 above) 3-1.

<sup>25</sup> ITU Regulatory Colloquium No 4 *Interconnection: Regulatory issues* Briefing Report 4 June 1995 90 sets out in a table format the 'Methods of decision making on interconnection policy: international experience'.

<sup>26</sup> *Interconnection: Regulatory issues* Briefing Report (note 24 above) 91-2.

<sup>27</sup> While regulation of interconnection is mainly a national responsibility, the European Commission is also playing a role in its evolution by means of Directives that are then adapted by each of the country members. For example, European Union Directive 1997/33/EC on Interconnection in Telecommunications and European Union Directive 2002/19/EC on Access to, and Interconnection of, electronic communications networks and associated facilities.

<sup>28</sup> *Telecommunications Regulation Handbook* (note 8 above) 3-5. For further information on the WTO see [http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm#schedules](http://www.wto.org/english/docs_e/legal_e/legal_e.htm#schedules) accessed on 12 February 2004.

These rules were included in the Reference Paper, an informal text containing regulatory principles negotiated among WTO Members. The Reference Paper became legally binding on WTO Members that attached it as part of their ‘additional commitments’ in their GATS Schedule of Commitments on telecommunications market access.<sup>29</sup>

Another interconnect service which has been regulated is number portability, as this service is extremely important to the effectiveness of competition. Without number portability, customers can expect to change their telephone numbers each time they change carriers.<sup>30</sup> The question is who owns the telephone number — the user or the operator? The costs associated with number portability are quite substantial and may include: one-off costs of building number portability capability into the infrastructure; customer transfer costs associated with moving a customer to a competing network; and call by call costs associated with routing the call to the network to which the customer is connected.<sup>31</sup> The Telecommunications Act has provided that number portability will be regulated. The Telecommunications Act has stipulated that Icasa shall prescribe a numbering plan for use in respect of telecommunication services and measures to ensure that number portability shall be introduced in 2005 including the creation of a national number portability database and cost allocation and cost recovery among licensees.<sup>32</sup>

#### **4. THE REGULATORY FRAMEWORK OF INTERCONNECTION AND FACILITIES LEASING IN SOUTH AFRICA**

The provisions of sections 43 and 44 of the Telecommunications Act, together with regulations made thereunder, regulate interconnection and facilities leasing in South Africa. The regulatory framework anticipates that parties will agree on the terms and conditions of interconnection and facilities leasing through commercial negotiations. However, it seeks to assist new entrants in these negotiations by obliging the incumbent, Telkom to interconnect and provide facilities, by providing guidelines on the contents of agreements and by establishing a system of redress to the regulator in the event of a failure to agree or in the event of a breach of the agreement.<sup>33</sup>

Section 43 of the Telecommunications Act regulates interconnection and section 44 regulates facilities leasing. While interconnection and facilities leasing are two different types of access, the regulatory frameworks governing obligations are similar. Hence section 44 incorporates by reference certain sub-sections of section 43. In the sections below, the regulatory aspects of interconnect and facilities leasing are dealt with together due to the similarity of the regulatory governance.

<sup>29</sup> *Telecommunications Regulation Handbook* (note 8 above) 3-5.

<sup>30</sup> Study Report ‘Interconnect: An overview prepared by Pricewaterhousecoopers’ (1999) 66.

<sup>31</sup> *Ibid* 66.

<sup>32</sup> s 89(1) of the Telecommunications Act substituted by s 30(a) of the Telecommunications Amendment Act.

<sup>33</sup> ss 43, 44 and 100 of the Telecommunications Act and the Interconnection and Facilities Leasing Guidelines in GN 1259 GG 20993 dated 15 March 2000 and GN 1260 GG 20993 dated 15 March 2000, the Supplementary Facilities Leasing Guidelines GN 1215 GG 23613 dated 9 July 2002 and the Supplementary Interconnection Guidelines in GN 3457 GG 24203 dated 19 December 2002, collectively referred to as the Guidelines.



## 4.1 Section 43(1): Interconnection

Section 43(1) was substituted in its entirety by the Telecommunications Amendment Act.<sup>34</sup> Prior to its amendment, section 43(1)(a) provided that Telkom shall, when requested by any other person providing a telecommunication service, interconnect its telecommunication system to the telecommunication system of that person unless such request is unreasonable. Section 43(1)(b) stipulated that with effect from a date to be fixed by the Minister by notice in the Gazette, every other person who provides a telecommunication service shall, when requested by any other such person, interconnect its telecommunication system to the telecommunication system of such other person unless such request is unreasonable. Section 43(1)(c) provided that for the purposes of paragraphs (a) and (b), a request contemplated in those paragraphs is not unreasonable where Icasa determines that the requested interconnection is technically feasible and will promote increased public use of telecommunication services or more efficient use of telecommunication facilities.

The amended section 43(1)(a) provides that any public switched telecommunication service licensee shall, when requested by any other person providing telecommunications services, interconnect its telecommunication systems to the telecommunication systems of the other person, in accordance with the terms and conditions of an interconnection agreement entered into between the parties, unless such request is unreasonable. This amendment took into account that Telkom no longer had exclusivity to provide PSTS. A request for interconnection is not unreasonable<sup>35</sup> where Icasa determines that the requested interconnection is technically feasible and will promote the efficient use of the public switched telecommunication network and can be implemented on a reciprocal basis between the parties.<sup>36</sup> The old test was whether the requested interconnection was reasonable, ie ‘technically feasible’, and would ‘promote increased public use of telecommunication services or more efficient use of telecommunication facilities’. It also required the promotion of public use of telecommunications facilities generally and not specific types of telecommunications facilities. The new test provides that the request must promote the efficient use of the public switched telecommunication network. The amendment is probably narrower and more difficult test to comply with — it requires the requestor to promote the increased use of a specific type of telecommunications facilities, namely public switched telecommunications facilities; however the new provision has not yet been interpreted by Icasa.

The second change introduced by the Telecommunications Amendment Act was the introduction of the reciprocity requirement. The amended section 43(1) states that a request for interconnection will not be unreasonable if implementable on a reciprocal basis between the parties. It is not clear what is meant by ‘reciprocal basis’ and no definition is provided in the Telecommunications Amendment Act. Reciprocity could imply that parties interconnect on the same or even similar terms.<sup>37</sup> However, service providers depending on when they have entered the

<sup>34</sup> s 43 (1) substituted by s 18(a) of the Telecommunications Amendment Act.

<sup>35</sup> The Telecommunications Act does not stipulate whose burden it is to provide reasonableness or unreasonableness, but one can assume that it is the person who claims unreasonableness.

<sup>36</sup> s 43(1)(b) of the Telecommunications Act.

<sup>37</sup> The opposite of reciprocity would imply a one-sided approach.

market would vary in the rollout of their operations and networks. In addition, there are different types of providers such as mobile operators and under-served area operators providing different services on networks with quite different characteristics. Hence in those circumstances it would be challenging for a relatively new service provider or different type of operator to provide interconnection on the 'same' basis as the incumbent service provider. Thus reciprocity, it is arguable, should be interpreted in the context of existing or continuing non-level playing fields until such time as the playing fields are indeed level.

## 4.2 Facilities Leasing — section 44(1)-(2)

Section 44(1) of the Telecommunications Act, prior to its deletion by the Telecommunications Amendment Act provided for the leasing of facilities between Telkom, Transnet Ltd (Transnet) and Eskom Ltd (Eskom). The deleted provisions provided for Transnet, and Eskom when requested by Telkom to lease or otherwise make available to Telkom any of their telecommunications facilities on terms and conditions to be negotiated and agreed between the parties, and approved by Icasa, until a date to be fixed by the Minister.<sup>38</sup> The same would apply if Transnet or Eskom requested Telkom to make its telecommunications facilities available.<sup>39</sup> The only basis, upon which a party can reject a request, is if there is no spare capacity on its own facilities. The only basis upon which Telkom could make a request for the facilities is if its facilities are inadequate and it cannot itself obtain the necessary additional facilities economically, technically and timeously or if the use of the facilities will in any manner facilitate the provision by Telkom of services. Section 44(1) was deleted in its entirety in the Telecommunications Amendment Act.

Section 44(2) as amended provides that Telkom and any other provider of a PSTS shall, when requested by any other person providing a telecommunication service, lease or otherwise make available telecommunication facilities to such other person pursuant to an agreement to be entered into between the parties, unless such request is unreasonable.<sup>40</sup> The provisions of section 43(1)(b)(i) and (ii), (c) and (e) shall apply, with the necessary changes, in relation to any request and agreement contemplated in subsection (2).<sup>41</sup> Should the parties dispute the reasonableness of the request for facilities leasing this has to be referred to Icasa for its decision.<sup>42</sup> Once again the test of reasonableness as set out in the interconnection provisions must be applied, except that the third leg of the test that of reciprocity is not applicable in the case of facilities leasing. Since facilities leasing is a unidirectional undertaking, the exclusion of the reciprocity leg of the test is consistent, as there could be no reciprocal leasing of facilities.

<sup>38</sup> s 44(1) of the Telecommunications Act was deleted by s 19(a) of the Telecommunications Amendment Act.

<sup>39</sup> s 44(1)(d) of the Telecommunications Act.

<sup>40</sup> s 44(2) of the Telecommunications Act.

<sup>41</sup> s 44(3) of the Telecommunications Act.

<sup>42</sup> s 43(1)(d)(ii) of the Telecommunications Act.

### 4.3 Agreements to be lodged with Authority – sections 43(2) and 44(4)

In the event of the parties concluding an agreement for interconnection or facilities leasing, this must be lodged with Icasa. The Telecommunications Act stipulates that the purpose of the lodging of the agreement is for Icasa to determine whether the agreement is consistent with the Guidelines prescribed by Icasa.<sup>43</sup> The parties do not need to lodge the agreement with Icasa if they have been exempted by the regulations.

### 4.4 Authority to prescribe Guidelines – sections 43(3) and 44(5) and (6)

Section 43(3) requires Icasa to prescribe guidelines relating to the form and content of interconnection agreements dealing with among others; the time period within which interconnection pursuant to the agreement must be carried out, the quality or level of service to be provided; and the fees and charges payable for such interconnection. The interconnection agreement must be in writing. The interconnection agreement must furthermore, provide for all of the issues set out in the Telecommunications Act as well as those set out in the Guidelines. The remainder of the issues are left to the parties to negotiate.

Similarly, section 44(5) requires Icasa to prescribe guidelines relating to the form and content of agreements for the leasing or other manner in which telecommunication facilities are made available. The Telecommunications Amendment Act included an additional provision that stipulated that the Guidelines as contemplated in paragraph (a) may relate to resale<sup>44</sup> (including the basis for determining wholesale and retail tariffs) and the manner in which telecommunication facilities are made available.<sup>45</sup>

### 4.5 Provision of facilities other than from Telkom – section 44(7)

Section 44(7) provides

- (a) In the application of section 43(1)(d)(iii) and (4)(b) in relation to making the telecommunication facilities of a public switched telecommunication service licensee available to another person and where the Authority is satisfied that the holder of a public switched telecommunication service licence is unwilling or unable to make suitable facilities available to that person within a reasonable period of time, the Authority may, instead of proposing terms and conditions as contemplated in section 43(4)(b), authorise that person to provide or obtain any necessary telecommunication facilities other than from such holder on conditions determined by the Authority, notwithstanding the provisions of sections 38(2),<sup>46</sup> 40(2)<sup>47</sup> and 41(2)(a)<sup>48</sup> and this section;

<sup>43</sup> s 43(2) of the Telecommunications Act.

<sup>44</sup> s 1 of the Telecommunications Act: 'Resale means the provision of any public switched telecommunication service by means of telecommunication facilities which are obtained by the public switched telecommunication service licensee or under-serviced area licensee in order to sell such services to its customer, and "reseller" shall be construed accordingly.'

<sup>45</sup> s 44(5)(b) of the Telecommunications Act.

<sup>46</sup> s 38(2) of the Telecommunications Act: 'A licence issued to a person other than Telkom authorising the provision of a national long-distance telecommunication service shall contain a condition requiring the telecommunication system in question to be interconnected, in terms of section 43, to the telecommunication system of Telkom or any other person providing a public switched telecommunication service.'

<sup>47</sup> s 40(2) of the Telecommunications Act:

'A licence to provide any value-added network services, including, but not limited to, electronic data interchange, electronic mail,

- (b) Subject to section 32A(2)<sup>49</sup> and (4)<sup>50</sup> notwithstanding the guidelines contemplated in subsection (5), no public switched telecommunication service licensee shall be required to unbundle its local loop for the period of two years referred to in section 32A(2)(a) and (4).<sup>51</sup>

The request to obtain facilities other than from Telkom has been heard before Icasa. For example, Citec (Pty) Ltd (Citec) brought an application on 22 March 2000 requesting Icasa to authorise it to obtain the requested satellite facilities other than from Telkom, in terms of section 44(7). Citec brought a further application on 4 April 2000 to Icasa, requesting Icasa to authorise it to obtain the requested wireless facilities other than from Telkom, also in terms of section 44(7). Icasa held a hearing on 15 December 2000 in respect of both applications. By agreement, the parties withdrew the application of 24 March 2000 as it was still the subject of ongoing negotiations between them. The hearing thus only proceeded on the issue of the request pertaining to the satellite facilities. Icasa concluded that, despite the fact that Telkom had refused to negotiate previously, the section 44(7) application by Citec was premature and directed the parties to return to negotiate a facilities leasing agreement in terms of section 44(3) and (4) of the Act and in the event that the parties are unwilling or unable to negotiate or agree on any terms and conditions within the period of three months, they shall thereafter submit the issue to the Authority in terms of section 44(3) and therefore section 43(1)(e)(ii),<sup>52</sup>

#### 4.6 Request for Facilities Leasing or to interconnect – section 43(4)

The parties have to notify Icasa of any request to interconnect or for facilities leasing.<sup>53</sup> If the reasonableness of such request is disputed, the parties shall refer the dispute to Icasa for its decision.<sup>54</sup> If the parties are unwilling or unable to negotiate or agree on terms and conditions within the period or extended period (as allowed by Icasa) then all outstanding issues shall be submitted to Icasa for resolution.<sup>55</sup>

Since Icasa is tasked with making a determination as to the reasonableness of the request in the case of an interconnection request, it make take into consideration

protocol conversion, access to a database or a managed data network service, shall contain a condition that the service in question be provided by means of telecommunication facilities (a) until 7 May 2002 provided by Telkom or made available to Telkom as contemplated in section 44; and (b) after 7 May 2002, provided by Telkom and the second national operator or any of them until a date to be fixed by the Minister by notice in the Gazette.<sup>56</sup>

s 40(2) was substituted by s 15(a) of the Telecommunications Amendment Act.

<sup>49</sup> s 41(2) of the Telecommunications Act: '(a) A private telecommunication network shall not be provided by means of telecommunication facilities other than facilities made available by Telkom or any other person providing a public switched telecommunication network service as contemplated in section 46(1), except as provided in paragraph (b). (b) The provisions of paragraph (a) shall not apply in respect of (i) a private telecommunication network provided by means of a telecommunication system situated on a single piece of land or contiguous pieces of land owned by the same person; or (ii) any private telecommunication network maintained by Transnet or Eskom.'

<sup>50</sup> s 32A(2) of the Telecommunications Act: '(a) For a period of two years after the date of commencement of the public switched telecommunication service licence the second national operator may use Telkom's facilities on a resale basis in accordance with agreements concluded between the parties for the purposes of providing public switched telecommunication services. (b) The agreements contemplated in paragraph (a) become effective within 60 days of the issuing of the public switched telecommunication service licence to the second national operator.'

<sup>51</sup> s 32A(4) of the Telecommunications Act: '(a) Where the Authority receives, a request contemplated in subsection (3), it shall, within 30 days of that request, determine the terms and conditions of the agreement in a manner consistent with this Act. (b) Where the Authority makes a determination in terms of paragraph (a), the determination shall be binding on the parties and shall form part of the agreement between the parties. (c) The agreement contemplated in paragraph (b) shall lapse two years after the date of its conclusion.'

<sup>52</sup> s 44(7) of the Telecommunications substituted by s 19(d) of the Telecommunications Amendment Act.

<sup>53</sup> *Citec (Pty) Ltd and Telkom SA Ltd*, heard before Icasa on 15 December 2000 4.

<sup>54</sup> s 43(1)(d)(i) of the Telecommunications Act. s 43(1) was substituted by s 18(a) of the Telecommunications Amendment Act.

<sup>55</sup> s 43(1)(d)(ii) of the Telecommunications Act.

<sup>56</sup> s 43(1)(d)(iii) of the Telecommunications Act.

the factors referred to in section 43(1)(b) and any other relevant factor.<sup>56</sup> The amendment to this section gives Icasa a wider discretion in making its determination as to the reasonableness of the request as it can take any other factors into account. In the case of facilities leasing, where the reasonableness of the request is disputed, the factor of reciprocity is not measured.

There is no time period within which Icasa has to determine and resolve disputes and this negatively impacts on the parties negotiating powers and prevents a quick resolution of the matter. ‘Regulators must resolve disputes in a decisive and timely manner or competition and sector development will be retarded.’<sup>57</sup> The WBS case is an example of a telecommunications seeker being frustrated in the delay in its inability to interconnect, with resultant loss of profits.<sup>58</sup>

#### **4.7 Authority may impose terms and conditions – section 43(5)(b)**

Where Icasa determines that any terms and conditions are not consistent with the Guidelines, it may direct the parties to renegotiate and agree on new terms and conditions within such period as Icasa may specify. Icasa may itself propose terms and conditions consistent with the Guidelines and which subject to renegotiation shall be agreed by the parties within such period as Icasa may determine.<sup>59</sup> This provision applies to both interconnection and facilities leasing agreements.<sup>60</sup>

#### **4.8 Enforceability of terms and conditions – section 43(6)**

In the event of Icasa declaring terms and conditions to be applicable under section 43(4)(b), then it shall be enforceable between the parties. Terms and conditions determined under section 43(4)(c) to be inconsistent with the Guidelines, shall not be enforceable between the parties. This provision applies to both interconnection and facilities leasing agreements.

#### **4.9 Negotiations not precluded if licence not awarded as yet – section 43(8)**

Should a party not be issued with a licence authorising it to provide any telecommunications service, this does not preclude the parties from negotiating an interconnection or facilities leasing agreement.

<sup>56</sup> § 43(1)(b) of the Telecommunications Act.<sup>4</sup>

<sup>57</sup> *Telecommunications Regulations Handbook* (note 8 above) 3-21.

<sup>58</sup> The dispute mechanism in the guidelines and the Telecommunications Act, also does not give the person who lodges the dispute satisfaction that the dispute would be resolved quickly and the resultant decision adhered to. s 100(3) of the Telecommunications Act provides: ‘Where the Authority, after investigation, finds that the licensee concerned has been responsible for a failure or contravention contemplated in subsection (1), the Authority may -

(a) direct the licensee to desist from any further failure or contravention;

(b) direct the licensee to pay the prescribed fine;

(c) direct the licensee to take such remedial and other steps as may be determined by the Authority;

(d) where the licensee has repeatedly been guilty of such failure or contraventions, in terms of this section, revoke his or her licence.’

<sup>59</sup> § 43(5)(b) of the Telecommunications Act.

<sup>60</sup> § 44(6) of the Telecommunications Act.

#### 4.10 Period of interconnection agreement – section 43(10)

Prior to its amendment the Telecommunications Act did not regulate the duration of interconnection agreements that parties could conclude and left that to the parties to determine. However, the Telecommunications Amendment Act has now provided that the parties to an interconnection agreement have the right to renegotiate the terms of their interconnection agreements after five years.<sup>61</sup> The rationale put forward for the insertion of this clause was ‘(to) ensure that no party is locked into an inefficient or unfair long term interconnection agreement, a situation that will ultimately prejudice consumer rights.’<sup>62</sup> In the case of facilities leasing there is no prescribed period for an agreement between the parties, nor a similar right to renegotiate the terms of their facilities leasing agreement after five years.

#### 4.11 Interconnection rates to be made public – section 43(11)

Interconnection rates and any agreement with regard thereto shall be made public.<sup>63</sup>

### 5. INTERCONNECTION AND FACILITIES LEASING GUIDELINES

#### 5.1 Background

On 19 August 1998, Icasa issued a notice in terms of section 27 of the Telecommunications Act inviting representations in respect of the form and content of interconnection and facilities leasing agreements. Icasa invited the public to also make representations and comments at public hearings, which were held on 13 and 14 November 1998. After the hearings Icasa published draft interconnection and facilities leasing Guidelines (draft Guidelines).<sup>64</sup> The draft Guidelines reiterated the provisions of the Telecommunications Act and provided that prior to the third anniversary date (7 May 2000) the Ministerial guidelines<sup>65</sup> would prevail where applicable over Icasa’s Guidelines in respect of interconnection with Telkom. The draft Guidelines when made final, were to replace the Ministerial guidelines in their entirety from 7 May 2000 onwards.

Icasa also published its Regulatory Statement on Interconnection and Facilities Leasing.<sup>66</sup> The aim of the Regulatory Statement was to provide insight and guidance to the industry as to Icasa’s views on interconnection and facilities leasing.

<sup>61</sup> s 43(10) of the Telecommunications Act: ‘(a) Five years after the date on which an interconnection agreement is concluded a party to that agreement may request the other party or parties to promptly negotiate in good faith to modify or amend some or all of the terms of such agreement. (b) Subsections (1) to (6) and the regulations promulgated under this section shall apply, with the necessary changes, in relation to any proposed modification or amendment of any term or condition contemplated in paragraph (a).’ s 43(10) was inserted by s18(d) of the Telecommunications Amendment Act.

<sup>62</sup> Telecommunications Amendment Bill GN 829/2001 GG 22630 dated 29 August 2001 s 18(e).

<sup>63</sup> s 43(10) of the Telecommunications Act. s 43(10) was inserted by s 18(d) of the Telecommunications Amendment Act.

<sup>64</sup> GN 168/1999 GG 19764 dated 12 February 1999.

<sup>65</sup> s 443 of the Telecommunications Act required the Minister of Communications (the Minister) to issue guidelines in respect of Telkom within 12 months of the commencement of the Telecommunications Act. The Minister issued these guidelines referred to as the ministerial guidelines in GN 771/1997 GG 17984 dated 7 May 1997. The ministerial guidelines were to lapse in favour of the interconnection guidelines prescribed by the Authority on or after 7 May 2000: s 1(c) GN 771/1997 GG 17984 dated 7 May 1997.

<sup>66</sup> Note 16 above.

<sup>67</sup> GN 1259/2000 GG 20993 dated 15 March 2000.

The Minister approved and published the final Guidelines issued by Icasa on 15 March 2000 the Interconnection Guidelines<sup>67</sup> and Facilities Leasing Guidelines (“the 2000 Interconnection Guidelines” and “the 2000 Facilities Leasing Guidelines” respectively)<sup>68</sup>

Subsequently, there have been amendments to the interconnection and facilities leasing Guidelines as a result of the changes in the industry and technology. The Minister approved and published supplementary Facilities Leasing Guidelines<sup>69</sup> and supplementary Interconnection Guidelines in 2002 (“the 2002 Interconnection Guidelines” and “the 2002 Facilities Leasing Guidelines” respectively).<sup>70</sup> The following section analyses the 2000 and 2002 Guidelines in more detail.

## 5.2 Analysis of Interconnection Guidelines and Supplementary Interconnection Guidelines

In general, the interconnection Guidelines deal with the contents of interconnection agreements, principles governing requests and negotiations for interconnection, principles governing the provision of interconnection, quality of service, and declarations of Major Operators and Essential Services.

### 5.2.1 Major operators and Essential Services

A ‘Major Operator’ is defined in the 2000 Interconnection Guidelines<sup>71</sup> as an operator that controls at least 35 percent of the telecommunications market in which it operates, unless it can show that it does not have market power. Furthermore an operator may be deemed to be a Major Operator if it has the ability to materially affect the terms of participation (having regard to price and supply) in the telecommunications market for basic telecommunication services as a result of control over Essential Services or use of its position in the market. Icasa can declare an operator a Major Operator by notice in the Government Gazette, where, in its opinion, this would promote the objects of the Telecommunications Act.<sup>72</sup>

Icasa has declared Telkom to hold at least 35 percent of the relevant telecommunications markets for Essential Services, and so to be a Major Operator for the provision of interconnection.<sup>73</sup> A Major Operator need not have control over the entire telecommunications market, but may be a Major Operator in one aspect of the telecommunications market.

The 2002 Interconnection Guidelines have provided for a process in terms of which a party may be included in the category of a Major Operator and for a process for a Major Operator to be excluded from the category of a Major Operator.<sup>74</sup> Any person may make a written request to Icasa to have a licensee

<sup>68</sup> GN 1260/2000 GG 20993 dated 15 March 2000.

<sup>69</sup> GN 1215/2002 GG 23613 dated 9 July 2002.

<sup>70</sup> GN 3457/2002 GG 24203 dated 19 December 2002.

<sup>71</sup> Guideline 1.1 of the 2000 Interconnection Guidelines.

<sup>72</sup> *Ibid.*

<sup>73</sup> Guideline 2.2.2 of the 2002 Interconnection Guidelines.

<sup>74</sup> At the date of writing this chapter, Cell C has lodged a request with Icasa to have Vodacom and MTN declared Major Operators but these proceedings have been withdrawn by Icasa. Cell C’s application can be found in GN 1987/2003 GG 25212 dated 14 July 2003. Icasa published in GN 1780/2003 GG 25139 dated 25 June 2003 an invitation to interested parties to submit comments. However, this notice has been withdrawn in GN 1858/2003 GG 25174 dated 25 June 2003.

declared a Major Operator. The request must be accompanied by supporting documentation, establishing a reasonable basis for such a request,<sup>75</sup> indicating that (a) a licensee's share of the relevant telecommunication market is at least 35 percent; or (b) an industry change that requires reclassification of an Essential Service has occurred, necessitating that such licensee, should be reclassified as a Major Operator.<sup>76</sup> Icasa shall then consider the request and undertake a process that involves publishing the request in the Government Gazette, seeking public comment and conducting any hearings. Based on its findings, Icasa may declare a licensee to be a Major Operator in one or more of the telecommunication markets.<sup>77</sup> The implications of being a Major Operator are that all charges imposed by a Major Operator for Essential Services for interconnection to any requesting Public Operator<sup>78</sup> must be no greater than the Major Operator's fully allocated costs of providing such services, calculated according to the accounting separation principles set out in the Major Operator's Chart of Accounts/Cost Allocation Manual, including a reasonable cost of capital.<sup>79</sup> After a particular date<sup>80</sup> the Major Operator must provide such services at the long run incremental cost (LRIC). Sentech Ltd (Sentech) brought an application<sup>81</sup> to have the supplementary interconnection Guidelines declared invalid. In Sentech's founding application, it alleged that in the draft Guidelines it was declared to be a public operator for the purposes of interconnection.<sup>82</sup> However when the final Guidelines were published, Sentech was excluded from the definition of public operator.<sup>83</sup> Sentech on 14 July 2003 withdraw its court application.

### 5.2.2 Contents of agreements

Guideline 3 of the 2000 Interconnection Guidelines stipulates that an interconnection agreement must<sup>84</sup> address each of the matters set out in guideline 3.1, unless not relevant to the form of interconnection that has been requested.<sup>85</sup> The matters that are listed range from the scope and specification of interconnection, charges for interconnection, provision of Point of Interconnection (POI) and interconnection capacity, information handling and confidentiality. An interconnection agreement shall also contain all the terms and conditions of the agreement between the parties relating to interconnection matters, and no amendments, alterations, additions, variations or consensual cancellations will be of any force or effect unless they are reduced to writing, signed by both parties and approved by Icasa.<sup>86</sup>

<sup>75</sup> Guideline 2.4.1 of the 2002 Interconnection Guidelines.

<sup>76</sup> Guideline 2.4 of the 2002 Interconnection Guidelines.

<sup>77</sup> Guidelines 2.4.2 and 2.4.3 of the 2002 Interconnection Guidelines.

<sup>78</sup> Guideline 1.6.1 of the 2002 Interconnection Guidelines: "Public operator" means a provider of a public switched telecommunication service or a mobile cellular telecommunication service, or an under-served area telecommunication service."

<sup>79</sup> Note 78 above guideline 3.2.

<sup>80</sup> The 2002 Interconnection Guidelines provide at 3.1 that they will apply only for a transitional period of 2 years, implying that LRIC must be introduced thereafter.

<sup>81</sup> *Sentech v Icasa, Minister of Communications, Telkom SA Ltd* (TPD. 13 June 2003, case no 16316/03, unreported).

<sup>82</sup> *Ibid* 21: "Thus in the draft guidelines, Sentech was declared to be a public operator for the purposes of interconnection. The significance of being included in the definition of public operator is that only public operators are entitled to Essential Services for interconnection from interconnection providers such as Telkom at (1) cost based charges, as were provided for in section 3 of the draft guidelines, and (2) ultimately, long run incremental cost (LRIC) based charges, as provided for in section 11 of the 2000 guidelines."

<sup>83</sup> Note 88 above 24.

<sup>84</sup> Note the use of the word 'must'.

<sup>85</sup> Guideline 3.1 of the 2000 Guidelines.

<sup>86</sup> Note 68 above guideline 3.2.



### ***5.2.3 Interconnection agreements not to preclude rights***

An interconnection agreement must not:

- (a) seek to preclude or frustrate the exercise of any statutory powers or prevent any person from seeking the exercise of statutory powers;
- (b) impose any penalty, obligation or disadvantage on a person for seeking the exercise of any statutory powers;
- (c) prohibit a person from providing an interconnection service, which that person is lawfully able to provide;
- (d) frustrate the provision of a telecommunication service by a person, which that person is lawfully able to provide.<sup>87</sup>

Furthermore a service acquired as part of interconnection may not be used for any unlawful purpose.<sup>88</sup> Guideline 5.3 stipulates that an interconnection seeker may at any time request that an interconnection provider vary any term or condition of an interconnection agreement.<sup>89</sup> An interconnection provider may refuse that request but if it does so this will be a dispute for the purposes of section 43 of the Telecommunications Act.

### ***5.2.4 Requests for interconnection and good faith negotiations***

An interconnection provider must provide interconnection information to an interconnection seeker who requests reasonable interconnection information.<sup>90</sup> An interconnection provider need not provide interconnection information if Icas determines that it is not to be provided. Guideline 6.2 implores the parties to an interconnection agreement to negotiate in good faith and use their reasonable endeavours to resolve all disputes relating to the form of interconnection.<sup>91</sup>

### ***5.2.5 Maintenance of any to any connectivity***

The Guidelines have stipulated that the aim of an interconnection agreement must be to promote the increased public use of telecommunication services or the more efficient use of telecommunication facilities, and to this end the operators are obligated to ensure that the connectivity of the networks is maintained.<sup>92</sup> Guideline 7.1 stipulates that the terms of each interconnection agreement must facilitate interconnection in a manner that promotes any to any connectivity including by ensuring that:

- (a) a customer of an interconnection seeker or interconnection provider is able to call, from any terminal device, a customer of any other interconnection seeker and/or interconnection provider on a non-discriminatory basis; and
- (b) the transmission of calls across and within telecommunication systems

<sup>87</sup> Note 68 above guideline 5.1.

<sup>88</sup> Note 68 above guideline 5.2.

<sup>89</sup> Note 68 above guideline 5.3.

<sup>90</sup> Note 68 above guideline 6.1.

<sup>91</sup> Note 68 above guideline 6.2.

<sup>92</sup> Guideline 7 of the 2000 Interconnection Guidelines.

should be seamless to both the calling and the called parties.<sup>93</sup>

The Guidelines stipulate that an interconnection provider may only terminate an agreement on the following grounds:

- a fundamental breach of the interconnection agreement has occurred, or
- vis major, or
- liquidation, deregistration or insolvency of one of the parties.

Guideline 7.2(b) of the 2000 Interconnection Guidelines provides that the interconnection provider must give reasonable written notice of its intention to terminate specifying the grounds of termination, in the case of breach, requiring that the breach be remedied for service providers within not less than three months and in the case of public operators or private operators not less than three months. Furthermore, the interconnection seeker must have been given the opportunity to remedy the breach and have failed to do so. However, an interconnection provider of an Essential Service may not terminate an interconnection agreement without Icasa's consent.<sup>94</sup>

An interconnection agreement must not allow the suspension of interconnection except where this is necessary to address material degradation of telecommunications systems or services or other material threats to the maintenance of the interconnection.<sup>95</sup> Furthermore an interconnection agreement must establish termination and suspension procedures that minimise any adverse affect of that termination or suspension on customers.<sup>96</sup>

### **5.2.6 Non-discrimination principles**

An interconnection provider must treat the interconnection seeker, the telecommunications service of the interconnection seeker and the customer of the interconnection seeker in a non-discriminatory manner.<sup>97</sup> This includes providing the service on a no less favourable basis than the treatment that the interconnection provider affords to its subsidiaries, affiliates or other similarly situated telecommunications service providers or operators.<sup>98</sup>

### **5.2.7 Quality of service**

An interconnection agreement must contain service levels that reflect good interconnection practice and provide reasonable remedies for any failure to meet those services levels.<sup>99</sup> Furthermore, the parties must comply with all relevant standards of the International Telecommunications Union and such other technical standards as Icasa may prescribe from time to time.<sup>100</sup> In the event of the

<sup>93</sup> Guideline 7.1 of the 2000 Interconnection Guidelines.

<sup>94</sup> Guideline 7.3 of the 2000 Interconnection Guidelines.

<sup>95</sup> Guideline 7.4 of the 2000 Interconnection Guidelines.

<sup>96</sup> Guideline 7.5 of the 2000 Interconnection Guidelines.

<sup>97</sup> Note 68 above guideline 8.

<sup>98</sup> Note 68 above guideline 8.1(a), (b) and (c).

<sup>99</sup> Note 68 above guideline 9.1

<sup>100</sup> Note 68 above guideline 9.2

parties failing to reach an agreement with regard to the quality or level of service, this will be determined by Icasa.<sup>101</sup>

### 5.2.8 Interconnection charging structure

The 2000 Interconnection Guidelines stipulate that:

Charges for interconnection must be structured to match the pattern of underlying costs incurred and to distinguish and separately price the following aspects of interconnection:

- fixed once off charges for the establishment and implementation of physical interconnection;
- periodic rental charges for use of facilities, equipment and resources including interconnection capacity; and
- variable charges for telecommunications services and supplementary services.<sup>102</sup>

Furthermore the charges for interconnection must not exceed retail charges for the provision of equivalent services. Where a Major Operator provides Essential Services, it must provide those Essential Services to any requesting Public Operator at LRIC. LRIC is calculated on the basis of relevant forward looking economic costs calculated for an efficient telecommunication service provider and including a reasonable cost of capital.<sup>103</sup> Major Operators providing Essential Services must provide Essential Services to Service Providers at no more than the Major Operators' best retail prices less avoidable costs provided that this price is not less than LRIC of the Major Operator.<sup>104</sup> Major Operators may charge Service Providers no more than the fully allocated costs of the Major Operator for establishing a POI.<sup>105</sup> Major operators may charge Private Operators<sup>106</sup> no more than the retail charge for the provision of an equivalent service.

The 2002 Interconnection Guidelines included transitional obligations of interconnection providers, for a two year period prior to the application of the LRIC pricing regime.<sup>108</sup>

All charges imposed by a Major Operator for Essential Services for interconnection to any requesting Public Operator (as this is defined in the 2002 Interconnection Guidelines<sup>109</sup>) must be no greater than the Major Operator's fully allocated costs (FAC) of providing such services, calculated according to the

<sup>101</sup> Note 68 above guideline 9.3

<sup>102</sup> Note 68 above guideline 10, which provides for Interconnection Charging Structure, and guideline 11, which provides for Interconnection Charges.

<sup>103</sup> Note 68 above guideline 11.2.

<sup>104</sup> Note 68 above guideline 11.3.

<sup>105</sup> Guideline 11.4 of the 2000 Interconnection Guidelines.

<sup>106</sup> Guideline 1: "Private Operator" means a provider of a private telecommunication network."

Guideline 11.5 of the 2000 Interconnection Guidelines.

<sup>108</sup> Guideline 3.1 of the 2002 Interconnection Guidelines: "...This clause shall be effective upon publication in the Gazette and shall only apply for a period of no more than two years from its effective date. Upon the first anniversary of the effective date of this clause, the Authority shall publish a notice in the Gazette seeking public comment on the progress of the transition to the LRIC pricing regime. Upon consideration of the comments filed in response to such notice and evidence produced at any hearing that the Authority may conduct, the Authority may order the termination of this clause and the effectiveness of the LRIC regime prior to the second anniversary of the effective date of this clause."

<sup>109</sup> "Public Operator" is defined in guideline 1.6.1 of the 2002 Interconnection Guidelines, as "means a provider of a public switched telecommunications service or a mobile cellular telecommunications service, or an under-served area telecommunication service". This definition replaced the definition of Public Operator in the 2000 Interconnection Guidelines.

accounting separation principles set out in the Major Operator's COA/CAM, including a reasonable cost of capital. The costs used in calculating the amount which a Major Operator may charge for providing Essential Services can include the costs which are determined on a current cost accounting basis as set forth in the relevant section of the Major Operator's COA/CAM and may include 'common costs' associated with such services. The sum of the allocation of common costs for all Essential Services shall equal the total common costs associated with the relevant accounts from the Major Operator's COA/CAM. 'Common costs' are defined as the costs necessarily incurred in the provision of some or all of the telecommunication services provided by a Major Operator, which cannot be attributed directly to any of those services<sup>110</sup>. The calculation is fairly complex, and deals also with 'avoidable costs' (ie the costs that can be attributed to sales, marketing, advertising, public relations, customer service, billing, collection, and other costs associated with offering those services by the Major Operator to customers who are not telecommunication licensees, and which can be avoided when such services are provided to telecommunication licensees)<sup>111</sup>, and opportunity costs (ie the revenues that a Major Operator would have received for the sale of telecommunication services in the absence of competition from telecommunication service providers that purchase Essential Services.)

The interconnection charging structure imposed by Icasa needs to take cognisance of the country's development, the competitiveness in the industry and the efficiency with which the operators operate and attracting further investment into the sector. There have been a number of different charging models that have been applied in other jurisdictions. However, each model makes certain assumptions, which may not necessarily be appropriate to South Africa. The question still remains as to whether this temporary model will meet the requirements of the South African market and assist in the transition to the LRIC model, given the convergence of technology and competing requirements of operators.

In April 2004, in terms of an amendment to sections 43 and 44 of the Telecommunications Act<sup>112</sup>, those operators licensed under the Act in terms of sections 32B, 32C, 36, 37, 38, 39 and 40A (which includes Sentech, the SNO, the mobile operators and Vans) have all been declared to be Public Operators for purposes of the Interconnection Guidelines. Public operators are obliged to make telecommunications facilities available to interconnection seekers in accordance with the provisions of the charging mechanism set out in the 2002 Interconnection Guidelines.

The provisions of the 2000 Interconnection Guidelines and the 2002 Interconnection Guidelines discussed above highlight the framework within which Icasa has determined that interconnection charges should be calculated, amended and accounted for, and any dispute regarding interconnection charges are to be determined by Icasa.

<sup>110</sup> Guideline 1.3 of the 2002 Interconnection Guidelines.

<sup>111</sup> Guideline 1.1 of the 2002 Interconnection Guidelines.

<sup>112</sup> GN439/2004, GG 26224 dated 1 April 2004.

### ***5.2.9 Efficient provisioning***

The forecasting, ordering and provisioning of interconnection must be efficient and occur within reasonable time frames and must not include any unnecessary or inefficient steps.<sup>113</sup> Furthermore the facilities or systems required for interconnection shall be provided in sufficient capacity to enable the efficient transfer of signals between interconnected telecommunication systems.<sup>114</sup> The Guidelines also stipulate that an interconnection seeker's request for interconnection should be given reasonable priority over the customer orders of the interconnection provider.<sup>115</sup>

### ***5.2.10 Requests for interconnection***

An interconnection agreement must be entered into as soon as practicable but in any event not later than three months after the interconnection provider has received a request for interconnection.<sup>116</sup> This period may however be extended by such time as allowed by Icasa in any particular case.<sup>117</sup>

### ***5.2.11 Requests for new services and system change***

Where an interconnection seeker requests interconnection, it must make the request in writing and provide the interconnection provider with information in relation to the form of interconnection, the approximate date the interconnection is required, and an estimate of the capacity required.<sup>118</sup> All requests for new interconnection need to be filed with Icasa.<sup>119</sup> The interconnection provider must inform the interconnection seeker in writing within 15 calendar days of the provision of the information; whether it is able to supply that form of interconnection and whether it will be able to do so within the time frames required by the interconnection seeker. In the event that the interconnection provider is unable to meet the time frames required, the interconnection provider must specify the date by which interconnection can be established. In the event that the interconnection provider is able to provide interconnection then it must ensure that the system conditioning and providing procedures required to provide that interconnection are undertaken within the time required by the interconnection seeker. In addition a Major Operator that is an interconnection provider must provide six months notice to interconnection seekers of planned changes to its telecommunications system that may materially impact the telecommunication services on the telecommunication systems of the interconnection seeker.

### ***5.2.12 Establishment and location of Points of Interconnection***

The Guidelines provide that when a service provider, referred to in the

<sup>113</sup> Guideline 12.1 of the 2000 Interconnection Guidelines: this provision does not set out what the unnecessary or inefficient steps are.

<sup>114</sup> Guideline 2.2 of the 2000 Interconnection Guidelines.

<sup>115</sup> Guideline 12.3 of the 2000 Interconnection Guidelines.

<sup>116</sup> Guideline 13.1 of the 2000 Interconnection Guidelines.

<sup>117</sup> Ibid.

<sup>118</sup> Guideline 14.1 of the 2000 Interconnection Guidelines.

<sup>119</sup> Guideline 14.2 of the 2000 Interconnection Guidelines.

interconnection Guidelines as an interconnecting operator<sup>120</sup> requests interconnection with the Major Operator's network, the point of interconnection (POIs) must be established and located at any technically feasible point in a Major Operator's network system.<sup>121</sup> Furthermore, POIs must be established as soon as practicable following a request or conclusion of an interconnection agreement, and in any case not later than 45 days from conclusion of an interconnection agreement.<sup>122</sup> Where interconnection occurs between operators each operator must bear its own port, network management system and switch costs to support the POI and the parties shall share the cost of the interconnection capacity.<sup>123</sup>

Where a party seeking interconnection from a Major Operator requests that facilities be co-located with the facilities of the Major Operator, such co-location shall be provided unless it is not technically feasible:

The definition of technically feasible interconnection points is not static. Telecommunications networks continue to evolve. As new technologies, such as those based on the Internet Protocol and digital subscriber loops, are rolled out, it is becoming technically feasible to interconnect networks at different points. Therefore, interconnection agreements and regulatory directives should not prescribe limitations on the points of interconnection that will be permitted. It should be open to interconnecting operators to propose interconnection at different points as networks evolve.<sup>124</sup>

In those instances in which a Major Operator demonstrates that it is unable to establish the interconnection at the location requested, an alternative location near to the requested site must be identified by the Major Operator.<sup>125</sup>

### **5.2.13 Caller line identity (CLI)**

CLI and all necessary signalling data shall be passed between interconnecting parties in accordance with accepted international standards and all requirements issued by Icasa.<sup>126</sup>

### **5.2.14 Inter-operator working group**

The parties to an interconnection agreement will form appropriate working groups to discuss matters relating to interconnection and to endeavour to amicably resolve any disputes that may arise.<sup>127</sup> The first meeting of such a working group will be facilitated by Icasa and thereafter be under the rotating chairmanship of the members of the working groups.<sup>128</sup>

<sup>120</sup> Note 68 above guideline 1: "Interconnection seeker" means a provider of a telecommunication service who has interconnected or has requested that it be able to interconnect its telecommunication system to the telecommunication system of an Interconnection Provider.

<sup>121</sup> Note 68 above guideline 15.

<sup>122</sup> Note 68 above guideline 15.2.

<sup>123</sup> Note 68 above guideline 15.4.

<sup>124</sup> *Telecommunications Regulation Handbook* (note 8 above) 3-38.

<sup>125</sup> Guideline 15.5 of the 2000 Interconnection Guidelines.

<sup>126</sup> Guideline 16 of the 2000 Interconnection Guidelines.

<sup>127</sup> Guideline 17 of the 2000 Interconnection Guidelines.

<sup>128</sup> An alternative to an inter-operator working group is an industry technical committee. The use of the industry technical committee has proved to be successful in Canada where the Canadian Interconnection Steering Committee (CISC) and its sub committees

### 5.2.15 Confidentiality

All confidential information provided in relation to interconnection must be kept confidential<sup>129</sup> and should only be disclosed to employees, agents or advisers who need to know that information for the purposes of the provisioning of interconnection or advising thereon.<sup>130</sup> Furthermore, confidential information may not be disclosed to any person involved in the development or provision of retail services of the other party or its subsidiaries or affiliates.<sup>131</sup> For purposes of the public interest, the Guidelines have stipulated that the confidentiality provisions of an interconnection agreement must not prevent or frustrate the public disclosure of any interconnection agreement by Icasa.<sup>132</sup>

### 5.2.16 Transparency of agreements

Where a Major Operator has entered into an interconnection agreement for a particular interconnection service, the operator shall make that agreement publicly available.<sup>133</sup> In the event that an operator requests that parts of an interconnection agreement not be made publicly available, Icasa will make a determination as to the nature of the confidential information and may exempt the operator from making such information publicly available.

## 5.3 Analysis of Facilities Leasing Guidelines and Supplementary Facilities Leasing Guidelines

### 5.3.1 Background

On 15 March 2000, the Minister approved and published the Facilities Leasing Guidelines.<sup>134</sup> In 2002, Icasa proposed supplementary Facilities Leasing Guidelines. The Facilities Leasing Guidelines are very similar to the Interconnection Guidelines and the following section highlights some of the differences and amendments that have been affected to the Facilities Leasing Guidelines.

### 5.3.2 Major Operator

The 2002 Facilities Leasing Guidelines have declared Telkom to be a Major Operator, and the telecommunications facilities of Telkom to be Essential Facilities.<sup>135</sup> At the time, Icasa made the following observation: ‘Independently, Icasa is of the opinion that declaring such telecommunications facilities as essential facilities will promote the objects of the Telecommunications Act as amended.’<sup>136</sup>

included participation from interested industry firms, as well as representatives of the regulator. *Telecommunications Regulations Handbook* (note 8 above) 3-20.

<sup>129</sup> Guideline 18.1(b); except where the disclosure is authorised in writing by the other party, authorised or required by law or lodged with Icasa in terms of s 43(2) of the Telecommunications Act.

<sup>130</sup> Guideline 18.1 of the 2000 Interconnection Guidelines.

<sup>131</sup> Guideline 18.2 of the 2000 Interconnection Guidelines.

<sup>132</sup> Guideline 18.3 of the 2000 Interconnection Guidelines.

<sup>133</sup> Guideline 19 of the 2000 Interconnection Guidelines.

<sup>134</sup> Note 69 above.

<sup>135</sup> Guideline 2.3 of the 2000 Facilities Leasing Guidelines.

<sup>136</sup> *Ibid.*

### 5.3.3 Facilities charging structure

The 2000 Facilities Leasing Guidelines have provided that the charges for the provision of facilities shall be structured to distinguish and separately price the following aspects:

- (a) the establishment and implementation (if any) of the physical facilities, including testing;
- (b) rental charges for use of facilities, equipment and resources; and
- (c) variable charges for ancillary and supplementary services.<sup>137</sup>

Similarly to the Interconnection Guidelines, the charges must be transparent and sufficiently unbundled so that the party seeking facilities does not have to pay for system components or facilities that it does not require.<sup>138</sup> Guideline 12 of the 2000 Facilities Leasing Guidelines shall apply to the charges for all telecommunication facilities leased by a facilities provider to a facilities acquirer that have not otherwise been declared by Icasa to be an Essential Facility that is provided by a Major Operator.<sup>139</sup> In other words, the charging structure for all Public Operators must be based on the same principles.

### 5.3.4 Charging for making facilities available

The 2002 Facilities Guidelines have amended guideline 13 of the 2000 Guidelines, which provided for facilities leasing charges. A transitional period of 2 years (unless extended by Icasa) was introduced to permit the orderly transition to the LRIC pricing regime.<sup>140</sup> The new provisions provide for a cost based method of charging for essential facilities and this method does not allow the inclusion of any costs for which the recovery is already provided through other cost recovery mechanisms.<sup>141</sup>

The 2002 Facilities Guidelines have stipulated that in providing a group of Essential Facilities, certain common costs will be allowed if they are efficiently incurred, meaning that they can not be attributed directly to the provision of individual Essential Facilities (in the same manner as is the case with interconnection charging under the Interconnection Guidelines). The sum of the allocation of common costs for all essential facilities and services must be equal the total common costs associated with the relevant accounts from the COA/CAM. In the calculation of the economic costs of an essential facility, avoidable costs<sup>142</sup>, opportunity costs<sup>143</sup> and revenues to subsidise other services<sup>144</sup> must be excluded from the calculation. The supplementary facilities Guidelines also stipulate that the essential facility rates shall be structured consistently with the manner in which the costs of providing the essential facilities are incurred.<sup>145</sup> The complex model also

<sup>137</sup> Guideline 12.1 of the 2000 Facilities Leasing Guidelines.

<sup>138</sup> Guideline 12.2 of the 2000 Facilities Leasing Guidelines.

<sup>139</sup> Guideline 3.10 of the 2000 Facilities Leasing Guidelines.

<sup>140</sup> Guideline 4.1 of the 2002 Facilities Leasing Guidelines.

<sup>141</sup> Guideline 4.9 of the 2002 Facilities Leasing Guidelines.

<sup>142</sup> Guideline 4.5(b)(i) of the 2002 Facilities Leasing Guidelines: 'Avoidable costs are the costs of marketing, billing, collection and other costs associated with offering retail telecommunications services to subscribers who are not telecommunications service providers'

<sup>143</sup> Guideline 4.5(b)(ii) 'Opportunity costs include the revenues that a Major Operator would have received for the sale of telecommunications services, in the absence of competition from public operators that purchase essential facilities.'

<sup>144</sup> Guideline 4.5(b)(iii) of the 2002 Facilities Leasing Guidelines: 'Revenues to subsidise other services include revenues associated with essential facilities or telecommunications services offerings other than the essential facility for which a rate is being established.'

<sup>145</sup> Guideline 4.7 of the 2002 Facilities Leasing Guidelines.



deals with the number of units (eg shared local loops) that the Major Operator uses or provides. With respect to Essential Facilities that a Major Operator offers on a usage-sensitive basis, the number of units is defined as the unit of measurement of the usage (eg minutes of use- or call-related database queries) of the Essential Facilities.<sup>146</sup>

In April 2004, in terms of an amendment to sections 43 and 44 of the Telecommunications Act<sup>147</sup>, those operators licensed under the Act in terms of sections 32B, 32C, 36, 37, 38, 39 and 40A (which includes Sentech, the SNO, the mobile operators and Vans) have all been declared to be Public Operators for purposes of the Facilities Leasing Guidelines. Public operators are obliged to make telecommunications facilities available to facilities acquirers in accordance with the provisions of the charging mechanism set out in the 2002 Facilities Leasing Guidelines.

### ***5.3.5 Second National Operator (SNO)***

A significant amendment to the 2000 Facilities Leasing provisions is an amendment that makes the provisions consistent with the two-year period during which Telkom and the SNO may share infrastructure. Any facilities leasing agreement reached between Telkom and the SNO, shall lapse after a period of two years under the 2002 Facilities Leasing Guidelines.

These Guidelines and the Facilities Leasing Guidelines are without prejudice to the rights granted to the second network operator under section 32A of the Telecommunications Act. Pursuant to section 32A(2)(a) and section 32A(4)(c) of the Telecommunications Act, any Facilities Leasing agreements entered into by the second network operator with Telkom relating to resale for the purpose of providing public switched telecommunication services shall lapse two years after the date of their conclusion. The term of any Facilities Leasing agreements entered into pursuant to section 44 of the Telecommunications Act by the second network operator and Telkom relating to Facilities Leasing shall be governed by the terms and conditions of such Facilities Leasing agreements and applicable law.<sup>148</sup>

### ***5.3.6 Obligations of facilities provider***

A request for any Essential Facilities is deemed to be reasonable when those Facilities are provided by a Major Operator unless Icasa determines otherwise, in an instance where the reasonableness is disputed and such dispute is referred to Icasa.<sup>149</sup> The Essential Facilities of a Major Operator include:

- (a) shared access to the local loop by SNO in terms of section 32A(2)(a) of the Telecommunications Act;
- (b) switching facilities;

<sup>146</sup> Ibid.

<sup>147</sup> GN439/2004, GG 26224 dated 1 April 2004.

<sup>148</sup> Guideline 2.2 of the 2002 Facilities Leasing Guidelines.

<sup>149</sup> Guideline 3.3 of the 2002 Facilities Leasing Guidelines.

<sup>150</sup> Guideline 3.3 of the 2002 Facilities Leasing Guidelines.

<sup>151</sup> Guideline 3.5 of the 2002 Facilities Leasing Guidelines.

- (c) collocation space and facilities where such space exists, allowing for reasonable expansion by the Major Operator in determining space availability;
- (d) transmission facilities connecting two or more local exchanges within a local exchange area;
- (e) rights of way, way leaves or servitudes to the extent permissible under the Major Operator's rights-due regard shall be given to s 32B (5) (d) and (e) of the Act; and
- (f) space on or within poles, ducts, cable trays, manhole, hand holds and conduits owned or controlled by the Major Operator and where such space exists allowing for reasonable expansion by the Major Operator in determining space availability. Any services that are ancillary and necessary for the provision of the above shall be provided.<sup>150</sup>

In terms of the Interconnection Guidelines, a request for interconnection with an Essential Service is not deemed to be reasonable unless certain criteria are met, whereas in the facilities leasing provisions, a request for an Essential Facility is deemed reasonable. However, a facilities provider need not make telecommunications facilities that are Essential Facilities available where the facilities provider does not also make such telecommunications facilities available to itself or an affiliate or uses such telecommunication facilities in offering its own competing service.<sup>151</sup> The 2002 Facilities Leasing Guidelines apply to all facilities providers and facilities acquirers and sets out additional rights and obligations when concluding facilities leasing agreements. The 2002 Facilities Leasing Guidelines should be read in conjunction with the 2000 Facilities Leasing Guidelines as together they form a single regulatory framework for facilities leasing under section 44 of the Telecommunications Act.

## Conclusion

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Interconnection and facilities leasing allows industry participants to offer their customers an enhanced service through the sharing of networks and infrastructure. This approach to providing services also reduces the infrastructure investment required while enhancing the productivity of telecommunications networks. These benefits can only accrue if the telecommunications market is structured to promote such co-operation in interconnection between competing industry players. In environments where a monopoly or duopoly exists, established industry players would not feel obliged to entertain such cooperative arrangements since their market dominance does not require them to cooperate with other parties. This state of affairs does not promote improved services and the efficient allocation of resources, which is ultimately to the detriment of the consumer. To counteract this detrimental state of affairs, a degree of industry regulation is desirable. However, regulation needs to maintain a balance between promoting desirable socio-economic outcomes and action, which may be construed as

interfering with the commercial relationships between industry players. Industry should be provided with clear guidelines that incentivise competing industry players to cooperate without reducing their level of competitive intensity since this ultimately also provides benefits to the consumer.

South Africa is currently confronted with the scenario outlined above and needs to carefully manage its regulatory environment to meet these challenges. In addition, the regulation of the industry takes place within the context of South Africa's existing trade regime governed by agreements with inter alia the World Trade Organisation and the International Telecommunications Union. New international standards across networks as well as technological advancements require an ongoing review of the applicability of the regulatory regime. In this regard, South Africa is following in the footsteps of a number of developed and developing countries that have confronted this challenge and attempted to create an industry environment to suit the requirements of all its stakeholders.

To date, South Africa has incorporated references to interconnection and facilities leasing in its existing legislation. However, the development of more detailed regulations and the manner of their implementation will ultimately determine their ability to influence the behaviour of industry players to meet the objectives of the legislation. Without such explicit regulatory guidance, the benefits emanating from structured cooperation between industry players will not accrue and the dominant operator will continue to utilise its market dominance to limit the reach of its competitors and ultimately limit the options available to consumers.

Therefore, in order for government to achieve its mandate of 'access to telecommunications for the achievement of economic and social goals ...' as well as '... affordable communications' through the development of a competitive telecommunications industry, it needs to ensure that its regulatory mechanisms in interconnection and facilities leasing, are adhered to and are continually updated to keep abreast of new commercial and technology developments.

