



19 February 2015

Independent Communications Authority of South Africa

Per email: marketreview2014@icasa.org.za

To whom it may concern,

ISPA SUBMISSIONS ON REFERENCE INTERCONNECT OFFERS SUBMITTED TO THE AUTHORITY
BY VODACOM AND TELKOM IN TERMS OF THE CALL TERMINATION REGULATIONS 2014

Introduction

1. ISPA refers to the Authority's invitation to comment on the Reference Interconnect Offers ("RIOs") submitted by Vodacom (Pty) Ltd ("Vodacom") and Telkom SA SOC Ltd ("Telkom") in terms of the Call Termination Regulations, 2014 ("2014 CTRs").

Thank you

2. ISPA and its members – noting that they have not previously been consulted in this manner – wish to extend their appreciation to the Authority for the invitation and opportunity to make submissions.

ISPA's submissions on the draft Call Termination Regulations, 2014

3. ISPA made comprehensive submissions regarding the behavioural remedies proposed in the draft Call Termination Regulations, 2014 ("the draft 2014 CTRs").
4. In the absence of the publication of an explanatory document relating to the 2014 CTRs, ISPA is unable to assess the Authority's response to these submissions, but notes that they do not appear to have been adopted in the final regulations.
5. Nevertheless, the submissions on the draft 2014 CTRs form the context for this submission and are accordingly set out below:

Reference Interconnect Offers

17. *ISPA has noted the provisions in the Draft Regulations relating to the obligation on Telkom, Vodacom and MTN to submit updated Reference Interconnect Offers (RIOs) to the Authority for approval within 45 days of the date of publication of final regulations.*

ISPA Management Committee:

Ant Brooks*, Graham Beneke, Guy Halse, Jenny King, Siyabonga Madyibi,
Duncan Martin, Mohammad Patel, Mike Silber, Elaine Zinn* (*ex officio)

18. ISPA members continue to experience the following difficulties in obtaining interconnection with certain incumbents:

18.1. Differing approaches to bank guarantee / security deposit requirements;

18.2. Differing approaches to minimum monthly guarantees / floor volumes;

18.3. Differing approaches to the service licensing required for interconnection; and

18.4. Refusal to interconnect at a financially and technically feasible point of interconnection.

19. Annexure A to this submission¹ sets out the differing approaches referred to above and the challenges faced by interconnection seekers in this regard.

20. ISPA notes the following:

20.1. There is no difficulty in principle with a requirement for a security deposit or bank guarantee on normal commercial terms, provided that this is set at a value which is relative to the actual risk to be covered. It is evident from Annexure A that four of the five major licensees reflected adopt an approach where the value of a security deposit or bank guarantee is determined with reference to prior or projected traffic volumes. Given that this is the practise of four of the five major licensees as well as the majority of other licensees, it should be regarded as an industry norm reflecting reasonable conduct in negotiating the conclusion of an interconnection agreement.

20.2. The Explanatory Note explicitly recognises the “need to standardise the practice of bank guarantees or prepayment option”². It is clear that the norm against which standardisation must take place is that already used by the majority of interconnecting licensees: a bank guarantee or security deposit the value of which is determined with reference to traffic volumes.

20.3. ISPA has not and will not support an obligation in an interconnection agreement committing an interconnection seeker to a minimum monthly guarantee based on a Rand amount and asserts that to insist on such an obligation as a pre-condition for interconnection is simply an unjustifiable barrier to interconnection. That this is the case in an environment characterised by falling wholesale call termination rates should be beyond debate. In support of this assertion it is clear from Annexure A that four of the five major licensees do not require any such commitment and that this should be regarded as an industry norm reflecting reasonable conduct in negotiating the conclusion of an interconnection agreement.

¹ Included as Annexure A to this submission

² Explanatory Note draft 2014 CTRs para 3.6.4.1.

20.4. *The Explanatory Note confirms that the Authority has determined that the obligation imposed on Telkom, Vodacom and MTN in the Call Termination Regulations 2010/11 to publish a RIO - in part designed to seek standardisation of floor volumes - remains necessary³. Again it is clear against which norm such standardisation should occur when considering that ISPA is aware of only one licensee which imposes such a requirement based on a Rand value. The Explanatory Notes also sets out the Authority's expectation that the upfront costs of providing interconnection have decreased with increased adoption of IP-based interconnection. ISPA agrees with this view as also the obligation imposed on Telkom, Vodacom and MTN to offer interconnection using IP-based protocols⁴, which should further decrease the costs of interconnection and reduce the risks to which an interconnection provider may be exposed.*

20.5. *Of the five licensees reflected in Annexure A, it is, to the best of ISPA's knowledge, only Vodacom which requires an electronic communications network service (ECNS) licence to be held by an interconnection seeker before it will entertain entering into an interconnection agreement. This is notwithstanding the wording of section 37 of the ECA and the Authority's own statement that the market definitions for mobile and fixed termination markets "refer to the 'logical network layer' as discussed in GG 33121, meaning that termination services are offered by I-ECS licensees"⁵.*

20.6. *In GG 33121 the position of the Authority is clear⁶:*

"In this context, the word 'network' does not refer to a physical communication facility or to a system that can only be provided by an ECNS provider. Rather it refers to the logical 'network layer', which may be built on top of the physical communication facilities offered by ECNS and ECS licensees. The ECNS or ECS provider uses this network layer to provide electronic communications to its customers. In particular, the provider issues numbers to each of its individual customers, which are dialled when calling those customers".

21. *In order to address these issues - and noting that the Authority's determination that it will continue to use behavioural remedies to address identified market failures⁷ - ISPA requests that the Authority stipulate in Annexure B ("Minimum content of a Reference Interconnection Offer") that:*

21.1. *A bank guarantee or security deposit must be calculated against prior or projected traffic over a three month period.*

³ Explanatory Note para 3.6.4.1.

⁴ Draft regulation 7(5)(a)(iv). ISPA requests that the Authority consider extending this requirement to all licensees.

⁵ Explanatory Note para 3.2

⁶ Explanatory Note for the draft Call Termination Regulations April 2010 GG 33121 para 1.15.2

⁷ Explanatory Note para 3.6.1

- 21.2. *Floor volume commitments based on Rand values are prohibited as being neither fair nor reasonable*⁸.
- 21.3. *A RIO should specify that an individual electronic communications service (IECS) licence is sufficient to found a right to request interconnection under Chapter 7 of the ECA and a corresponding obligation on the part of the interconnection provider to provide interconnection subject to the feasibility thereof*⁹.

The Vodacom RIO

6. ISPA's reading of the Vodacom RIO is that Vodacom's requires that an applicant hold an Electronic Communications Network Service ("ECNS") licence.
- 6.1. The RIO is not specific in clause 2.2 regarding the category of licence that is required to be submitted as part of the application for interconnection.
- 6.2. However, only the terms "electronic communications network" and "electronic communications network service" are defined in the RIO, both with reference to the definitions of these terms in the ECA. There is no definition of or reference to the term "electronic communications service" in the RIO.
- 6.3. The RIO makes reference throughout to the electronic communications networks of both Vodacom and the entity requesting interconnection. Clause 5.4.1, for example, refers to "Calls Originating on the Electronic Communications Network used by the Entity Requesting Interconnection and Terminating on Vodacom".
7. As set out above, the Authority has already made a determination in this regard:
- "In this context, the word 'network' does not refer to a physical communication facility or to a system that can only be provided by an ECNS provider. Rather it refers to the logical 'network layer', which may be built on top of the physical communication facilities offered by ECNS and ECS licensees. The ECNS or ECS provider uses this network layer to provide electronic communications to its customers. In particular, the provider issues numbers to each of its individual customers, which are dialled when calling those customers".*¹⁰
8. ISPA submits that – to the extent that the Vodacom RIO conflicts with the Authority's position – this must be addressed throughout the Vodacom RIO. Clause 2.2 should specify in detail the licence types

⁸ ISPA notes that there is no reference to floor volume commitments in Annexure B to the Draft Regulations but submits that it would be preferable to have an explicit statement that these are not regarded as fair and reasonable.

⁹ This could also be specified in the body of the final regulations.

¹⁰ Explanatory Note to the draft Call Termination Regulations April 2010 GG 33121 para 1.15.2

which will be accepted by Vodacom as a sufficient basis for interconnection and the RIO should be amended to ensure that it provides for interconnection by an ECS licensee.

1.1. Application of this RIO

This RIO is limited to wholesale termination services on the network used by Vodacom of voice calls originating in the Territory.

9. ISPA has two submissions relating to this clause.
10. Firstly, the Authority is aware that the formulation of this clause – and others like it in the RIO - is contentious when having regard to the calls made by ISPA for clarity on the scope of application of the 2014 CTRs, with particular reference to MTN's decision to differentiate terminations rates charged for locally- and internationally-originated calls respectively.
11. ISPA's understanding in this regard is that the 2014 CTRs are explicitly limited to the wholesale voice call termination markets and in no way seek to regulate the market for origination of calls. The question of where a voice call may have been originated is of no consequence in determining whether the regulated rates apply as between two interconnected licensees.
12. ISPA has made comprehensive submissions to the Authority in this regard and understands that there is a separate process under way in terms of which the Authority will provide notice of its position regarding the scope of application of the 2014 CTRs. The Vodacom RIO should comply with such position.
13. Secondly, it appears from the formulation of this clause and others in the agreement that it is Vodacom's intention that two separate interconnection agreements would need to be entered into: the Vodacom RIO in respect of fixed and mobile calls terminating onto the Vodacom network as well as an interconnection agreement for the termination of traffic onto the network of the interconnection partner.
14. ISPA is not aware of the rationale of this substantial deviation from the existing Vodacom RIO but submits that it is impractical and inefficient. In effect the proposed RIO seeks to regulate the majority of the technical aspects of interconnection, leaving the applicant to provide a complementary version which will have to deal with the same aspects (as this are required by the Interconnection Regulations 2010) as well as matters peculiar to the applicant.
15. The degree of inefficiency and delay imported by this proposed arrangement – including the requirement that the Authority assess both interconnect agreements – requires some justification. While Vodacom may argue that it is limiting the scope of the RIO to the scope of application of the 2014 CTRs ISPA is unable to identify the prejudice to Vodacom of providing a RIO which caters for

the requirements of both interconnect partners. As indicated below, Vodacom has also shown that it is happy to insert matters beyond the scope of the RIO requirements in the 2014 CTRs.

16. Finally as regards clause 1.1, ISPA notes that Vodacom has elected to include its wholesale fixed termination services in the RIO, notwithstanding that it is not obliged to do so.

1.2.8 "Information" for purposes of this RIO includes, without limitation, any technical, commercial, scientific information, know-how, trade secrets, processes, machinery, technical specifications and data in whatever form relating to interconnection, communicated to or acquired by the receiving party during the course of negotiations or the receiving party's association with the disclosing party;

17. ISPA submits that this definition should be limited by explicit reference to information which the parties may be under statutory or regulatory duty to make public.

4.1.1 Vodacom shall, in its determination of economic feasibility, determine if any request for interconnection

- contributes to the efficient use of the existing transmission capacity of the Electronic Communications Network used by Vodacom;*
- does not result in additional requirements for capacity above or in excess of its budgeted spend; and*
- does not cause material adverse financial consequences to Vodacom due to overloading of the Electronic Communications Network.*

4.1.2 In the event that Vodacom ascertains that the provision of the interconnection service is not economically feasible, Vodacom may, in order to render the service economically feasible, impose a floor charge of R100, 000.00 (one hundred thousand Rand) per month. Interconnection Fees in respect of any Accounting Period shall only be paid to the extent that such Fees exceed the Floor Charge, if imposed, for such Accounting Period.

18. As set out above, ISPA has not and will not support an obligation in an interconnection agreement committing an interconnection seeker to a minimum monthly guarantee based on a Rand amount and asserts that to insist on such an obligation as a pre-condition for interconnection is an unjustifiable barrier to interconnection.
19. That this is the case in an environment characterised by falling wholesale call termination rates should be beyond debate.

20. ISPA submits that:

20.1. The floor volume required by Vodacom is arbitrary, bears no relationship to the service provided and has not been justified. That Vodacom maintains that this has remained the cost to them of interconnecting is indefensible given the shift to IP interconnection and interconnection at IXPs.

20.2. The R100 000 floor volume commitment required by Vodacom used to relate to 112 359 minutes per month when the mobile termination rate was R0.89. Now it relates to 500 000 minutes per month. In essence Vodacom is arguing that the its determination of economic feasibility of interconnection is based on a volume of minutes close to 500% greater than was the case five years ago.

20.3. The floor volume is in direct breach of the 2014 CTRs in that it increases the cost of terminating a call on the Vodacom network to levels substantially above the maxima set out in the Call Termination Regulations. A new interconnect partner who terminates 100 000 minutes in a month onto the Vodacom network in respect of mobile calls is paying an effective termination rate of R1.00 per minute.

20.4. The floor volume makes no allowance for a new entrant to ramp up traffic volumes. Rather it requires that a new licensee will – in order to receive the regulated rate for the service being provided – immediately be able to terminate 500 000 minutes of traffic per month.

20.5. The floor volume does not take into account the bidirectional nature of traffic over a point of interconnect. Revenue due to the interconnect partner should be offset against that due to Vodacom in assessing economic feasibility.

21. In the circumstances ISPA regards this requirement as being anti-competitive, an opaque barrier to interconnection with Vodacom and non-compliant with the Interconnection Regulations 2010 insofar as the amount set is arbitrary and not unbundled.

22. The industry practise across incumbents is not to require such a commitment: only Vodacom seeks to do so. ISPA is unaware as to whether the Authority has sought to interrogate Vodacom's contention that R100 000 per month represents – now as it did in 2010 – the cost to Vodacom of maintaining interconnection. That this contention can be sustained is unlikely in the absence of other incumbents not seeking to secure perceived risk in this manner. In the circumstances the amount appears arbitrary.

23. ISPA submits that the Vodacom RIO should reflect the industry norm in this regard and that clause 4.1.2 should be deleted.

4.1.3.2 *Dependent on the outcome of the credit vetting, Vodacom may require a bank guarantee, the value of which shall be R1, 000, 000.00 (one million Rand) or 3 (three) month's forecast traffic terminating on the Electronic Communications Network used by Vodacom, whichever is greater;*

4.1.3.3 *A bank guarantee, the value of which shall be R1, 000, 000.00 (one million Rand) or 3 (three) month's forecast traffic terminating on the Electronic Communications Network used by Vodacom, whichever is greater, shall be required in the following circumstances:*

- *civil judgements granted against the entity requesting interconnection or its Directors or Managing Members;*
- *where available, a poor credit rating in the name of the entity seeking interconnection, its holding company or majority shareholder;*
- *if the entity requesting interconnection is not a public or private company; and*
- *if either the entity requesting interconnection, its holding company or majority shareholder, has a trading record for a period of less than 2 (two) years from the date of formal request for interconnection.*

24. ISPA submits that the value of R1 million for a bank guarantee is arbitrary, unjustified and unreasonable. As such it is in breach of the Authority's own position in this regard as set out in the Explanatory Notes to the Call Termination Regulations 2010.
25. ISPA refers to Annexure A and submits that the Vodacom RIO should reflect the industry norm regarding bank guarantees and that this should be set with reference to projected traffic subject to amendment in line with variances to such projections. It would further represent a better balance between the risks to Vodacom and the need to promote interconnection if any guarantee requirement was triggered only in the event of default in any payment obligation and that the requirement for the guarantee would be reviewed after a period of one year assuming no payment defaults.
26. ISPA submits further that security deposits should be set against a forecast of both the amount of traffic terminating onto Vodacom's network and the amount of traffic terminating onto the network of its interconnect partner.
27. In conclusion ISPA submits that the Authority, in its consideration of the RIO, must take into account that the RIO is being filed with it in compliance with a pro-competitive remedy imposed by the Authority with the express intent of enabling new entrants to obtain interconnection. The imposition of inflexible and arbitrary floor charges and bank guarantee requirements as conditions precedent for interconnection runs contrary to this intent and should not be countenanced.

The Telkom RIO

28. ISPA notes that this document is dated 17 February 2011 and understands that this was drafted under the previous call termination regulatory regime. ISPA is confused as to:
- 28.1. Whether or not this document should not have been previously submitted to the Authority for review under the Call Termination Regulations, 2010;
 - 28.2. The purpose of the document being submitted when it has not been amended to bring it into line with the 2014 CTRs. It is clear that in certain respects this document is not compliant with the 2014 CTRs.
29. ISPA refers to its submissions above in respect of the service licensing to be held by an applicant for interconnection and notes that the Telkom RIO is also vague in this regard and refers to interconnection of “electronic communications networks”, as that term is defined in section 1 of the ECA. Once again this is at odds with the Authority’s stated interpretation.
30. Regulation 5(a)(iv) of the 2014 CTRs requires, *inter alia*, for Telkom to offer IP-based interconnection, notwithstanding which ISPA notes that the RIO submitted by Telkom deals only with TDM-based interconnection.
31. Clause 1.5 of Annexure B to the 2014 CTRs states that points of interconnection include “public internet exchange points at which the licensee has a presence”. ISPA is aware that Telkom has facilities and a presence at a number of IXPs, including Teraco and JINX and CINX. ISPA submits that Telkom must provide interconnection services at these locations.
32. ISPA notes that the proposed Telkom RIO does not cater for the provision of point of interconnection links (“POILs”) other than to state that each party is required to get to the POIs listed (i.e. Telkom's sites). In practice, since Telkom does not allow access to terminate one's own infrastructure at those sites, this means that one has to procure the POILs from Telkom at an unspecified cost. In the event that Telkom is not required by the Authority to provide interconnection services where it has a presence at an IXP, it must be required to set out pricing for POILs and the procedure to be followed for obtaining these at Telkom designated sites.
33. ISPA submits that this is in breach of annex B clause 1.5 of the regulations which obliges the inclusion of public internet exchange points for POIs.

Conclusion

34. ISPA requests that the Authority provide it with reasons for any decisions it takes in respect of the RIOs as submitted by Vodacom and Telkom.
35. In the event that the Authority engages in any further processes regarding these or other RIOs, ISPA records its wish to be involved.

Regards

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Annexure A – Approaches to security deposits, floor volumes and licensing requirements in the context of interconnection agreements

	Telkom	Vodacom	MTN	Neotel	Cell C
Security Deposits / Bank Guarantees	Yes, at Telkom's instance. Set at aggregate value of highest amount payable by the licensee over any three month period in the previous year. Offers prepaid model in which case above not applicable.	Yes, condition precedent. Set at R1 000 000 subject to credit vetting.	Yes, at the instance of either party. Set at aggregate value of fees and charges for previous three months.	Yes, at instance of Neotel. Set at greater of R200 000 or aggregate value of payments over three months.	Yes, condition precedent. Internal formula for calculation which is reasonable. Will be revoked after one year if no payment breaches.
Floor Volumes / Minimum Monthly Guarantees	No	Yes. R100 000 per month	No	No	No
Minimum Licensing Required	ECS	ECNS	ECS	ECS	ECS