

LEGAL NOTICE NO. 129 OF 2016

THE ELECTRONIC COMMUNICATIONS ACT, 2013

(Act No. 09 of 2013)

THE ELECTRONIC COMMUNICATIONS (FACILITIES SHARING) REGULATIONS, 2016

(Under Section 24)

In exercise of the powers conferred by Section 24 of the Electronic Communications Act, 2013, the Minister for Information, Communications and Technology makes the following Regulations –

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PART I
PRELIMINARY PROVISIONS

Citation and commencement

1. (1) These Regulations may be cited as the Electronic Communications (Facilities Sharing) Regulations, 2016.

(2) These Regulations shall come into force on the date of publication.

Interpretation

2. In these Regulations, unless the context otherwise requires –
“Act” means the Electronic Communications Act, 2013;

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“collocation” means the physical space at which more than one licensee install their electronic communications facilities along with, on the same floor or in the same premises as other licensees’ electronic communications facilities, and in some cases, interconnects to other licensees’

“essential facility” means infrastructure or resources that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide competitive services to end users;

“facilities” means infrastructures amenable to sharing without an attendant risk of lessening of competition and includes, but is not limited to –

- (a) rights of way;
- (b) masts;
- (c) poles;
- (d) antenna mast and tower structures;
- (e) ducts;
- (f) trenches;
- (g) space in buildings;
- (h) electric power (public or private source); and
- (i) any other infrastructure as may be added by the Commission from time to time;

“facilities provider” means a licensee who is requested to lease its facilities in terms of sections 47 and 48 of the Act and any licensee currently providing facilities including a provider carrier;

“facilities seeker” means any licensee requesting facilities, including an applicant for a licence and a requesting carrier; and

“facilities sharing” means facilities leasing and sharing, collocation and infrastructure sharing;

“reference offer” means a document setting out the standards of services and facilities that the facilities provider proposes to offer or its offering;

“standard price list” means a document listing standard price list specifications for facilities and services offered by the facilities provider;

“international telecommunications union” means the United Nations specialised agency for information and communications technologies – ICTs.

Purpose

3. The purpose of these Regulations is to –
 - (a) Facilitate the conclusion sharing agreements by stipulating –
 - (i) agreement principles;
 - (ii) time frames and procedures to be followed by parties; and
 - (iii) the procedures for the submission review and filing of agreements;
 - (b) provide for the requirements for the sharing of facilities;
 - (c) ensure that the incidence of unnecessary duplication of infrastructure is minimised or completely avoided;
 - (d) protect the environment by reducing the proliferation of infrastructure and facilities installations;
 - (e) promote fair competition through equal access being granted to the installation and facilities of operators on mutually agreed terms;
 - (f) provide for the mandatory sharing of essential facilities in terms of Section 24(2)(g) of the Act;
 - (g) encourage operators to pursue a cost-oriented policy with the added effect of a reduction in the tariffs chargeable to consumers; and
 - (h) provide for dispute resolution processes and the time frames for lodging disputes.

PART II

FACILITIES SHARING

Requests for access to facilities

4. (1) A request for electronic communications facilities shall be made to the Commission in writing and shall include –
 - (a) the date of the request;
 - (b) the technical requirements of electronic communications facilities seekers and physical parameters;
 - (c) the location of the facilities it requests access to, where applicable; and
 - (d) the type of electronic communications facilities that are requested.

- (2) A facilities provider shall respond to a request to lease facilities within thirty (30) days of receipt of the request stating –
- (a) its minimum requirements for entering into the facilities sharing agreement; or
 - (b) its reasons why the request for facilities sharing cannot be accommodated, which reasons shall be limited to the consideration that –
 - (i) based on the information provided, facilities sharing would threaten the integrity of the providing carrier's network;
 - (ii) it is not technically feasible, as can be demonstrated by the facilities provider to the Commission, or
 - (iii) it would prevent the providing carrier from fulfilling its own reasonably anticipated requirements for use of the land or facility.
- (3) The parties shall finalise the facilities sharing agreement within three (3) months from the date of request provided that the parties may agree on a longer period, which period shall not exceed sixty (60) days.

Exclusive services and essential facilities

5. (1) For the purpose of this section, "the Corporation" means the Swaziland Post and Telecommunications Corporation established in terms of The Swaziland Post and Telecommunications Corporation Act, 1983.
- (2) The Commission shall from time to time, in terms of 24(2)(b), publish a list of essential facilities to which cost-based access shall be provided upon request.
- (3) The Commission may, where necessary, publish a framework for providing cost-based access.
- (4) The national electronic communications backbone infrastructure established, controlled, maintained and exclusively operated by the Corporation in terms of Section 53(1) of the Act, is declared an essential facility.
- (5) The international gateway exclusively provided by the Corporation in terms of Section 53(1) of the Act is declared an essential facility.
- (6) A facilities seeker is required to use the services described in sub regulations (4) and (5) provided that the Corporation in terms of sub regulation (7) provides suitable technology capacity to enable licensees to comply with their obligations.
- (7) Where the Corporation does not provide suitable services or technology capacity, the facilities seeker shall make a written demand that the Corporation provide such technology or services within sixty (60) days of receipt of the written demand, failing which the facilities seeker is entitled to make alternative arrangements.
- (8) Where the Corporation makes the relevant technological capacity of service available, the Corporation shall notify the facilities seekers who shall be obliged to utilise the Corporation's infrastructure within six (6) months of receipt of such notification.

Technical feasibility

6. (1) A request is technically feasible if it meets the following minimum requirements -

- (a) the network meets the technical parameters of the requesting party's network at the time that the request is made; and
 - (b) offering facilities to the facilities seeker will not have a negative effect on the facilities provider's physical network, network elements or capacity.
- (2) Any dispute relating to the technical feasibility shall be determined by the Commission on a case by case basis.

PART III

PRINCIPLES FOR FACILITIES SHARING, COLLOCATION AND INFRASTRUCTURE SHARING

Reference Offer and Standard Price List

7. (1) A facilities provider and a provider of essential facilities shall lodge with the Commission for its approval, a Reference Offer and Standard Price List, or their revision, which sets out the standard of services that the provider proposes to offer or is offering.
- (2) The Reference Offer and Standard Practice List, which shall be lodged with the Commission within three (3) months from the commencement date of these regulations, or the date of being declared an essential facilities provider, as applicable, shall be the basis for the negotiation of an infrastructure sharing and collocation service arrangement.
- (3) The Reference Offer and Standard Practice List, lodged with the Commission shall state the period or the term for which it is to be in force.
- (4) The term shall not begin until approval is given by the Commission and shall not operate simultaneously with any previously approved facilities provider's Reference Offer for the same service.
- (5) The facilities provider shall provide the specified service in the terms and conditions specified in the schedule and at the charges approved by the Commission and shall not depart therefrom without prior written approval of the proposed changes by the Commission.

Quality of service and standards

8. (1) The parties to a facilities sharing agreement shall ensure that their agreement –
- (a) contains the technical standards of both parties; and
 - (b) complies with all relevant international standards and recommendations of the International Telecommunications Union and any other standards prescribed by the Commission or other regulatory authorities in Swaziland.
- (2) Where the sharing of an infrastructure such as rights of way and electric power is precedent upon securing the necessary approval of a granting authority, such approval should be obtained before the sharing arrangement can be finalised.

Service level parameters

9. A facilities sharing agreement shall contain service levels and provide reasonable remedies and penalties for any failure to meet those service levels.

Confidentiality

10. A facilities sharing agreement may not contain a provision that prevents the public disclosure of the agreement by the Commission or by either of the parties.

Non discrimination

11. (1) The parties to a facilities sharing agreement shall not unfairly discriminate in the negotiation, conclusion and implementation of such agreement.
- (2) A request from a facilities seeker, including a request for additional facilities in terms of an already concluded facilities sharing agreement, shall be dealt with in the order in which they are received.
- (3) A facilities provider shall apply similar terms and conditions, including those relating to charges, in comparable circumstances to telecommunication facility seekers requiring equivalent services.

Transparency

12. (1) Billing and settlement procedure shall be made transparent by the facilities provider.
- (2) Where the provision of one service or facility is dependent in practice on the provision of another service or facility, this relationship shall be clearly identified.
- (3) Equipment and charges shall be sufficiently unbundled so that a facilities seeker does not have to use or pay for anything it does not require for the requested facilities leasing.

Electronic communications facilities sharing information

13. (1) Any party to a facilities sharing agreement may publish on its website and shall, on request and within ten (10) days, provide to the other party information that is in its possession or control relating to technical information that will assist the parties in planning, establishing or maintaining their electronic communications network, but not limited to –
- (a) the technical specifications of the electronic communications network;
- (b) physical infrastructure associated with the facilities leasing; and
- (c) any material changes to facilities sharing arrangements that may affect the electronic communications sharing arrangements or plans of an electronic communications facilities seeker or the services such party provides or intends to provide by means of that facilities sharing arrangement.

General penalty

14. Any facility sharing party who contravenes any provisions of these Regulations commits an offence and shall be liable to a fine of not exceeding five thousand Emalangeni (E5000.00).

PART IV

GENERAL PROVISIONS

Dispute Resolution

15. (1) Where the period of negotiations lapses and the agreement is not concluded or a dispute arises between the parties under the facilities sharing agreement, an aggrieved party may lodge a dispute and petition the Commission to arbitrate on any open issues.

(2) An aggrieved party shall submit a complaint to the Commission with all relevant documentation concerning –

- (a) unresolved issues;
- (b) the position of each of the parties with respect to the issues; and
- (c) any other issue discussed and resolved by the parties.

(3) The respondent shall respond to the complaint within twenty-one (21) days from date of receipt of the petition.

(4) The Commission may ask for additional information related to unresolved issues from the parties where it deems fit.

(5) Where any party refuses or fails to respond within twenty-one (21) days from the date of request for additional information by the Commission, the Commission may, within fourteen (14) days, resolve each issue set forth in the petition, if any, by imposing appropriate conditions for complying with the terms and conditions of the agreement and ensure that such resolution and conditions meet the requirements of these Regulations.

Appeals

16. (1) Where a party is not satisfied with the decision of the Commission, that party may appeal to the communications appeals board within thirty (30) days from the date of the decision, that party shall be deemed to be satisfied with the decision of the Commission.

Transitional provisions

17. (1) Any facilities sharing agreement concluded prior to the commencement of these regulations shall be lodged with the Commission in terms of Section 24 of the Act.

(2) Before submitting an agreement to the Commission in terms of this regulation, the parties shall review the facilities sharing agreement and amend it, as may be required, to ensure compliance with these regulations and the Act.

(3) A facilities provider shall comply with sub regulation (1) and (2) three (3) months from the date of commencement of these regulations.

SCHEDULE

TERMS AND CONDITIONS OF ELECTRONIC COMMUNICATIONS FACILITIES SHARING AGREEMENTS BETWEEN A FACILITIES PROVIDER AND FACILITIES SEEKER

A facilities sharing agreement shall deal with the following matters, except where a matter is not relevant to the facilities sharing services in question –

- (a) definition of terms and abbreviations;
- (b) the technical scope of electronic communications facilities sharing which includes:
 - (i) a description of the purpose of the electronic communications facilities leasing;

- (ii) a description of the facilities proposed to be leased;
 - (iii) a description of the technical specifications of the facilities;
 - (iv) mechanisms for changes to the purpose, technical scope and specifications of the facilities being leased; and
 - (v) a description of the location of electronic communication facilities.
- (c) Infrastructure sharing and collocation, which includes –
- (i) availability;
 - (ii) infrastructure sharing and collocation procedures;
 - (iii) security procedures and requirements;
 - (iv) supplementary services required, such as power supply; and
 - (v) physical access to facilities.
- (d) Billing and settlement which includes –
- (i) billing procedures;
 - (ii) payment terms and conditions; and
 - (iii) billing disputes procedures.
- (e) charges, setting out –
- (i) detailed charges per electronic communications facility or setoff electronic communications facilities leased; and
 - (ii) mechanisms for review of charges.
- (f) quality of service and service levels, covering –
- (i) services levels and quality of service obligations;
 - (ii) penalties;
 - (iii) testing and maintenance;
 - (iv) fault reporting and repair;
 - (v) service level disputes; and
 - (vi) network protection and safety measures.
- (g) approval from all relevant authorities;
- (h) date of coming into operation of agreement;
- (i) termination of agreement covering –
- (i) grounds of termination; and

- (ii) termination procedures.

- (j) dispute resolution and arbitration procedures including contractual dispute resolution procedures.

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MINISTER FOR INFORMATION, COMMUNICATIONS AND TECHNOLOGY