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## GOVERNMENT NOTICE

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### DEPARTMENT OF COMMUNICATIONS

No. 246

27 February 2008

ELECTRONIC COMMUNICATIONS ACT, 2005 (ACT No. 36 of 2005)

### GUIDELINES FOR RAPID DEPLOYMENT OF ELECTRONIC COMMUNICATIONS FACILITIES

The Minister of Communications in consultation with the Minister of Provincial and Local Government, the Minister of Environmental Affairs and Tourism, the Authority and other relevant institutions has, under section 21 of the Electronic Communications Act, 2005 (Act No. 36 of 2005), made the Guidelines in the Schedule.

#### SCHEDULE

#### PREAMBLE

**RECOGNISING** the government's national policy to ensure rapid development of robust, reliable and affordable ICT infrastructure that enables the provision of enhanced broadband services necessary to stimulate economic growth and meet the increasing communications needs of the people of South Africa;

**RECOGNISING** the role of ICT in socio-economic development and its contribution to meeting the Millennium Development Goals and the commitments made at the World Summit on the Information Society;

**ACKNOWLEDGING** the Department of Communications' mandate to develop ICT policies and legislation that support the development of an ICT sector that creates conditions for accelerated and shared growth of the South African economy;

**ACKNOWLEDGING** the government's responsibility to meet the country and public's ever increasing requirements for international connectivity that is adequate, secure, stable and affordable;

**DESIROUS** to provide for the rapid and comprehensive approval of cable landing authorisations for international submarine cables ;

**CONSIDERING** that the government has decided to use its strategic economic and geographic position with respect to international submarine cables to advance the principles and objectives of the New Partnership for Africa's Development (NEPAD);

**COGNISANT** of the fact that the government has decided that, as part of the objective to reduce the cost of communications in South Africa and Africa in general has to invest and increase their presence in the sub-marine cable space globally;

**RECOGNISING** that international gateways and international submarine cables are critical infrastructure with national security implications that require special governmental attention; and

**TAKING** into consideration the increasing interest and plans to land new international submarine cables in South Africa and the government's policy objective and responsibility to encourage, promote and support increased ownership and control of electronic communications facilities by Africans.

**NOW, THEREFORE** in furtherance of the objects of the Act, the Minister hereby issues these Guidelines pursuant to section 21 of the Act and the Minister's authority in exercising his or her functions as representative of the Republic in international fora, including with respect to the Republic's obligations in terms of bilateral and multilateral agreements and international treaties, protocols and conventions.

## 1. DEFINITIONS.

**In these Guidelines a word or expression to which a meaning has been assigned in the Act has the meaning so assigned and, unless the context indicates otherwise –**

" the Act" means the Electronic Communications Act, 2005 (No. 36 of 2005);

"Authorisation" means an authorisation issued by the Minister to connect international submarine cables to international submarine cable systems in the Republic;

"Authority" means the Independent Communications Authority of South Africa;

"cable landing station" means an electronic communications facility, including where applicable collocation space, monitoring equipment, space on or within ducts, cable trays, conduits and beach joints that houses the electronics and is used to connect an international submarine cable to land-based electronic communications facilities and includes all associated support systems, sub-systems and services, ancillary to such international submarine cables and electronic communications facility;

"ICT" means information and communications technology;

"International submarine cable" means any marine-based fiber optic cable operated outside the Republic;

"joint application" means an application filed pursuant to these guidelines where the parties to the application comprise more than one electronic communications network service licensee;

"Regulations" means regulations made by the Authority;

"Republic" means the Republic of South Africa, its possessions, air space and territorial waters;

"South African" means, in the case of: (i) a natural person, is a citizen of the Republic; or (ii) a juristic person, is or will be registered under the laws of the Republic and has or will have its principle place of business located within the Republic.

"international submarine cable" means the domestic wet segment of a fibre-optic cable, including the fibres and circuits therein that extends from the point of interconnection to an international submarine cable, through the territorial waters of the Republic and terminates or otherwise interconnects to a land-based point of interconnection in a cable landing station; and

"international submarine cable system" means the international submarine cables and all associated cable landing stations including any land-based electronic communications facilities used to interconnect a land-based electronic communications network to the cable landing stations regardless whether such electronic communications facilities are collocated or otherwise housed in the cable landing station but excludes international submarine cables and land-based electronic communications networks.

## **2. GENERAL PROVISIONS.**

(1) An international submarine cable, a cable landing station or an international submarine cable system may only be landed or operated in the Republic with the written Authorisation issued by the Minister in accordance with these Guidelines.

(2) An Authorisation issued pursuant to these Guidelines may not be transferred and an ownership interest in an international submarine cable system that was relied upon to meet the qualification criteria set out in guideline 3 may not be relinquished, sold or assigned, without the prior approval of the Minister.

(3) Coastal provinces have jurisdiction over the seabed from the coast out to three (3) nautical miles as well as over the land where cables emerge from the sea. The Republic has jurisdiction over the seabed within its territorial waters extending up to twelve (12) nautical miles from the coast as well as sovereignty over the exclusive economic zone which extends to either 200 nautical miles or to the edge of the continental shelf.

(5) The Minister in consultation and concurrence with the Minister of the Department of Environmental Affairs and Tourism hereby declares that the landing of international submarine cables and the construction of international submarine cable systems in the Republic constitute activities that will affect more than one province and once connected to the international global communications network will traverse international boundaries; having implications for national environmental policy and the Republic's national security. Accordingly, pursuant to section 24C(2) of the National Environmental Management Act 107 of 1998, the Department of Environmental Affairs and Tourism must serve as the competent authority responsible for the grant of the requisite environmental authorisation required pursuant to Listing Notice No. 387 of 21 April 2006.

### **3. QUALIFICATION CRITERIA FOR GRANTING OF AUTHORISATIONS.**

(1) To qualify for an Authorisation, the applicant must, at the time of filing and throughout the term of the Authorisation, be an individual electronic communications network service licensee registered in terms of South African law.

(2) South African entities must, at the time of filing and throughout the term of the authorisation have in respect of the international submarine cable that the applicant wishes to connect to South Africa, a combined equity ownership interest, on its own or jointly with other African entities as authorized by the Minister, that is equal to or greater than 51%.

(3) In any case where an individual electronic communications network service licensee will own less than a 51% equity interest in the international submarine cable system, it may join with one or more other individual electronic communications network service licensees and file a joint application, such that the total equity ownership interests in the international submarine cable system held by the joint applicants is equal to or exceeds 51%.

(4) Applications submitted by persons not meeting the criteria set out in these Guidelines will not be approved.

### **4. CONTENT OF APPLICATION FOR AUTHORISATIONS.**

(1) An application for an Authorisation must contain

(a) a general project overview and a description of the international submarine cable, including the full capacity and the capacity that will be initially deployed and made available for use;

(b) in the case of an individual being part of the application, the name, address, telephone number(s), website (if any) and e-mail address of the applicant;

(c) in the case of a company, the company name, company number, address of the registered office and contact details, including e-mail address of the officer responsible for the application;

(d) in the case of a partnership, the name of the partnership, address of the principal place of business and contact details, including e-mail address of the partner responsible for the application;

(e) identification of the individual electronic communications network service licence held by the applicant or in the case of joint applicants, the individual electronic communications network service licence held by each joint applicant, if applicable;

(f) a list of the owners of the international submarine cable and the international submarine cable system, including their respective voting and ownership interests together with the percentage of capacity that each owner will control;

(g) Where the owners of the international submarine cable are to be connected to the South African entity, have ownership interest in other international submarine cable(s), a description of the ownership interests and their respective voting interests be indicated.

Where applicants are not the cable operator they shall also include a copy of their agreements with the international submarine cable operator(s);

(h) a certification that the applicant accepts and will abide by the conditions specified in guideline 7 of these Guidelines;

(i) a certification that the applicant has not entered into any agreement or other arrangement that would be in violation of section 43(10) of the Act;

(j) demonstration that the applicant has acquired adequate insurance for risk to which the applicant is exposed, including but not limited to public liability, personal injury, property damage, vessel collision liability and indemnity liability insurance sufficient to cover the scope of anticipated construction and installation of the international submarine cable system; and

(k) any other information that may be requested to enable the Minister to act expeditiously on the application or conduct consultations necessary to secure other permits, authorisations or approvals required by other organs of state to facilitate the rapid deployment of the proposed international submarine cable system.

(2) Where a joint application is tendered for Authorisation to land or operate an international submarine cable, the application must contain the information referred to in guideline 4(1)(b) to (k). Joint applicants must also provide a copy of their agreements in terms of the submarine cable system as an attachment to their application.

(3) Applications requesting approval to transfer an Authorisation, including transfers of control and to relinquish ownership interests that were relied upon to meet the minimum ownership qualification criterion set out in guideline 4 must contain –

(a) the information referred to in guideline 4(1)(b) to (e) for both the transferor and transferee and the information referred to in guideline 4(1)(f) to (k) for the transferee;

(b) a copy of the Authorisation at issue; and

(c) a brief narrative of the means by which the transfer or relinquishment is to be undertaken, including expected date of consummation and information demonstrating that upon consummation the qualification criteria set out in guideline 4 will be satisfied.

(4) Where a transfer of an Authorisation is approved, the transferee must notify the Minister not later than thirty (30) days after either consummation of the transfer or a decision not to consummate is made.

## **5. PROCESSING APPLICATIONS.**

(1) Applications for Authorisations to land or operate an international submarine cable must be complete, including all attachments and filed in accordance with the provisions of these guidelines.

(2) Applications may either be electronically filed at any time with the Department of Communications, or be submitted to the Department during working hours.

(3) Application forms (as may be updated and modified from time-to-time) will be made available on the Department of Communications' website along with instructions for filing.

(4) There will be a cost-based application or processing fee imposed in respect of applications for Authorisations under these Guidelines.

(5) A separate application must be filed with respect to each international submarine cable for which an Authorisation is requested, or for which modification or amendment of a previous Authorisation is requested.

An international submarine cable system may include more than one international submarine cable and cable landing station provided they are operated as a single system.

(6) Applications must be signed by an officer (in the case of a company), partner (in the case of a partnership) or individual (in the case of an individual) that is responsible for the application. In the case of joint applications, the same must sign on behalf of their respective organizations for each joint application. Joint applicants may appoint one party to act as proxy for purposes of complying with this requirement.

(7) Applications, including all documents and exhibits and international submarine cable landing Authorisations must be kept by the Department of Communications, and must, unless otherwise ordered by the Minister, be open to public inspection. Applicants may request confidential treatment of commercially sensitive information or other materials reasonably justifying confidentiality by appropriately labeling the relevant documents and providing the basis for the requested confidentiality.

(8) The Minister must publish the application in the *Gazette*. Interested persons may submit written comments on the application within fourteen (14) days of its publication. At the conclusion of the public comment process and any consultation contemplated in pursuant to guideline 6, the Minister will make a decision with regard to the requested Authorisation or request that the applicant make modifications to its proposals to take into account the written comments, prior to issuing the Authorisation.

(9) All applicants are responsible for the continuing accuracy of information provided pursuant to these guidelines. If at any time while an application is being considered by the Minister, the information is no longer accurate, applicants must notify the Department of Communications within thirty (30) days after the information is no longer accurate and amend the application to update the information.

(10) In the case of joint applications, the Minister must issue a single Authorisation listing each joint applicant as a party.

## **6. OTHER PERMITS, AUTHORISATIONS AND APPROVALS.**

(1) Applicants for international submarine cable system authorisations are subject to all other applicable laws. Before filing their applications applicants must determine whether they are required to obtain any permits, authorisations, approvals or other governmental authority. If any such permit, authorisation, approval or other governmental authority is required, the applicant must identify in their applications the applicable permit, authorisation, approval or authority, the law under which such permit, authorisation, approval or authority is required and the governmental entity responsible for issuance.

(2) The Minister will issue Authorisations in respect of applications filed in accordance with these Guidelines after consultation with the Ministers responsible for Environmental Affairs and Tourism, National security, the Authority and, as applicable, other governmental entities as may be required or deemed appropriate to ensure that all such necessary permits, authorisations and approvals are obtained expeditiously so as to allow for the rapid deployment and provisioning of the international submarine cable system.

(3) Authorisation issued by the Minister pursuant to these Guidelines must be taken into consideration by the competent authority charged with issuing an environmental authorization in connection with the landing of an

international submarine cable in South Africa, pursuant to section 24(2)(a) of the National Environmental Management Act 107 of 1998.

(4) To expedite the consultation process and assist the Minister in helping the applicant to expeditiously obtain any necessary permit, authorisation or approval for rapid deployment and provisioning of the international submarine cable system, applicants must include as attachments to their applications a complete copy of their application for environmental impact assessment, which at a minimum must contain the following documents:

(a) identification and ownership of the international submarine cables that the international submarine cable will connect, including maps showing the proposed path the international submarine cable will take and technical specifications, including the depth the international submarine cable wet segment will be buried;

(b) applicant's plans for burying dry segment cables from the low tide mark to the cable landing station and for beach restoration after construction; and

(c) a description of the cable landing stations where the international submarine cable will land, including a map showing the geographic coordinates for each landing station and any beach joint if different from the coordinates of the cable station, the distance of the cable landing station and beach joint, if applicable, from the waterfront, the space to be made available for collocation and interconnecting land-based electronic communications networks and associated support systems, sub-systems and services, ancillary to such international submarine cable system.

(5) The Minister may request any other information regarding the international submarine cable under any applicable law in the Republic.

## **7. AUTHORISATION CONDITIONS.**

(1) The grant of an Authorisation is subject to compliance with the Act, all other laws of the Republic and all bilateral and multilateral agreements, treaties, protocols and conventions relating to communications to which the Republic is or may hereafter become a party.

(2) The Authorisation holder, or in the case of joint Authorisation holders, the Authorisation holders collectively, must maintain *de jure* and *de facto* control of the international submarine cable system.

(3) The Authorisation holder must comply with the requirements of these Guidelines.

## **8. APPLICATION OF THESE GUIDELINES.**

(1) These Guidelines apply to all electronic communications network service licensees intending to construct, own, operate or provide electronic



communications network services using an international submarine cable system.

(2) To avoid unnecessary delay in obtaining environmental authorizations and any other permits or approvals required under applicable law, electronic communications network service licensees planning to participate in the construction or operation of an international submarine cable system on the date of the coming into force of these Guidelines should file their application for Authorisation as soon as practicable. Applications should be filed expeditiously in order to ensure sufficient time for the Minister to assess the qualification criteria set forth guideline 3 and to engage in the consultations processes pursuant to guideline 6.

(3) Given the historical ownership structure of the international submarine cable SAT-3/WASC/SAFE, the Minister finds that application of the ownership criteria established in guideline (3)(2) would result in a disruption to international commerce and undermine the purposes of section 21 of the ECA. The Minister therefore exempts the international submarine cable SAT-3/WASC/SAFE from the ownership requirements established in guideline (3)(2) herein. Provided however, that the ownership criteria set forth guideline (3)(3), applicable to the domestic international submarine cable system connecting to SAT-3/WASC/SAFE, shall continue to apply. Telkom SA will not need to obtain an authorization in terms of the current operation of its international submarine cable system, excepting circumstances occurring in guideline (8)(4) below.

(4) Any new international submarine cable proposing to connect to the SAT-3/WASC/SAFE international submarine cable must comply with these Guidelines, except in terms of guideline (3)(2) herein.

## **9. DISPUTE RESOLUTION.**

Disputes that arise between authorisation holders and landowners in terms of the deployment of an international submarine cable or cable landing station must be referred to the Complaints and Compliance Committee in accordance with section 17C of the ICASA Act.

## **10. ENFORCEMENT OF GUIDELINES.**

(1) The Minister may withdraw an Authorisation if the holder fails to comply with the conditions of the Authorisation or ceases to qualify for the Authorisation.

(2) Failure to comply with these Guidelines constitutes non-compliance as contemplated in section 17F (5) of the ICASA Act.

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