

EASTERN CARIBBEAN TELECOMMUNICATIONS AUTHORITY

Recommendation of the Eastern Caribbean Telecommunications Authority (ECTEL)

To the National Telecommunications Regulatory Commission to consult on a Draft Access to Facilities Regulations

CONSULTATION DOCUMENT

1. The National Telecommunications Regulatory Commission is in receipt of a submission from ECTEL containing ECTEL's Consultative Document for the Draft Access to Facilities Regulations.
2. The Consultative Document is attached.
3. The initial comments period will run from the 3rd March 2009 to the 24th March 2009.
4. The comment on comments period will run from the 27th March 2009 to the 10th April 2009.
5. Following the Comment on comments period ECTEL will finalize and submit the draft regulations to the ECTEL Council of Ministers for its recommendation for adoption in the ECTEL Member States.
6. All responses to this Consultative Document should be written and sent by post, fax or email to:-
The Managing Director
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P.O. Box 1886
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Facsimile: 1 758 458 1698
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All comments should be clearly marked "Comments on Draft Access to Facilities Regulations Consultation Document".

Disclaimer

This consultative document does not constitute legal, commercial or technical advice. The consultation is without prejudice to the legal position of ECTEL's duties to provide advice and recommendations to the Ministers with responsibility for telecommunications and the National Telecommunications Regulatory Commissions.

RATIONALE

As new competitors have attempted to gain entry into the ECTEL market in recent times, the issue of access to telecommunications networks has taken on a degree of urgency. The Draft Access to Facilities Regulations has been developed by ECTEL in recognition of a need to strengthen and clarify the rules relating to sharing telecommunications infrastructure in ECTEL Contracting States.

The traditional approach to the regulation of access is to include these rules in interconnection regulations. This approach is logical since in many cases, negotiations over access will go hand in hand with negotiations about interconnection at the point at which a new competitor attempts to enter the market. Although ECTEL's Interconnection Regulations contained certain rules on access to facilities, it became apparent that additional rules were necessary, possibly because the rules on access tended to be subsumed within the wider interconnection framework, and NTRCs were unsure about their application. ECTEL's view is that this situation could potentially result in uncertainty in access disputes and cause delay in market entry for bona fide competitors.

The new regulations are aimed at clarifying the powers of the NTRCs with respect to regulating access and imposing simple but issue specific rules on the question of negotiating infrastructure sharing agreements. The regulations, once promulgated, are intended to be read together with the revised Interconnection Regulations and new draft Interconnection Code once published.

Consultation Procedure and Timetable

This ECTEL submission includes a request to the Commission to conduct a national consultation in [Member State] on the draft revised Telecommunications (Access to Facilities) Regulations in accordance with the timetable outlined on the cover page.

Council of Minister's Approval

It is the intention of ECTEL to finalize these Regulations after taking into account all comments received in this consultation process. The Telecommunications (Access to Facilities) Regulations will then be recommended for adoption in the ECTEL Member States when approved by the Council of Ministers.

Explanatory Memorandum

DRAFT TELECOMMUNICATIONS (ACCESS TO FACILITIES) REGULATIONS

These Explanatory Notes relate to the Telecommunications (Access to Facilities) Regulations. These notes have been prepared to assist the reader and do not constitute part of the Regulations. Additionally, the notes are not nor are they meant to be a comprehensive description of the Regulations and where a clause does not appear to require comment none will be supplied.

Regulation 4 -Application of the Regulations

Although the Telecommunications Acts in Contracting States defines ‘facilities’ quite broadly, the regulations have been specifically drafted to specify some of the various elements which could constitute a telecommunications ‘facility’ or part of a ‘network.’ This approach has been taken deliberately to reduce the likelihood of having the Commission make a determination whether a particular type of element fell within the statutory definition.

The regulations apply to all types of networks, as well as to all telecoms providers. It also applies to both requests for access and infrastructure sharing agreements. The cumulative result of this provision is that the NTRC will have jurisdiction over any physical element of a telecommunications network, and over all providers with respect to those elements.

Regulation 5 – Powers of the Commission

This provision establishes the jurisdiction of the Commission to determine rates and to review infrastructure sharing agreements and requests for access. All agreements relating to the subject of access have to be submitted for approval by the Commission.

Regulation 6 – Obligations to provide access

This provision is drafted broadly to impose a clear obligation to provide access to a network. In the context of telecommunications law, the ability to connect various networks is a crucial element of promoting competition and market entry. Critically, the regulations permit denial of access for two reasons only, namely an unavailability of space or for reasonable technical grounds. The phrase ‘reasonable technical grounds’ is deliberately left undefined, as the circumstances which could constitute this situation are theoretically infinite. Additionally, changes in technology could potentially render any definition obsolete within a short space of time.

Regulation 7 – Prices for Access

Similar to the obligations for interconnection, prices for access to and use of facilities should be as transparent as possible, and must be cost based. This section attempts to encapsulate this legislative requirement and goes a step further by empowering the Commission to request publication of prices in appropriate circumstances, to promote transparency and encourage speedy conclusion of negotiations for access.

Regulation 8 – Negotiating Access

The process for negotiating access is fairly similar to the process involved in negotiating interconnection. Although parties can negotiate access agreements at any time, nothing in the regulations prevents them from negotiating these terms at the point of interconnection, in which case, the agreement reviewed by the Commission will be an interconnection agreement with a facilities sharing component. Alternatively, parties can negotiate access sharing agreements later if they wish, or separately, but the Commission has the power to approve them once negotiated. Generally, negotiations have to be completed within 60 days. Disputes over access have to be completed by the Commission within 60 days of referral. The time-limits reflect the need to promote a sense of urgency in dealing with this matter, given its importance to competition.

Regulation 9 – Co-location

In any telecommunications competitive environment, the ability to direct parties to co-locate their networks is critically important since without the ability to co-locate, competitors may not be able to enter the market. The reasons for this are several. For example, a competitor may be denied the opportunity to erect towers in optimal locations because planning permission for additional towers may be denied due to concerns over public health or safety, or other reasons. In this case, co-location would enable a legitimate competitor that could not erect its own towers to provide service by sharing the infrastructure of another provider. Provided the first competitor is properly compensated for the use of his facility, co-location enables a fair and equitable means to facilitate competition where it might be prevented for reasons which are legitimate public policy concerns, but which are non-telecommunications related. The provisions provide some guidance on a range of matters the Commission is required to have regard to before making a determination on co-location.

Regulation 10 – Obligations of Dominant operators

Dominant operators may control several markets, or one market. But it may be absolutely necessary from a regulatory point of view, to require dominant operators in particular to provide special access to their networks, since it may not be economically feasible to replicate their network or to find alternative means from a technical point of view to provide certain kinds of services. It is usual therefore to develop special rules for dominant operators where access is concerned. The provisions simply empower the Commission to require the dominant operator to give access where certain essential

facilities are involved, and to provide the same kind of access to a facility for a competitor that it enjoys. The dominant operator also cannot refuse the installation of certain types of equipment if that type of equipment is normally required to provide a telecoms related service. However, dominant operators are not obligated to construct new buildings or provide additional personnel to look after the equipment of other operators.

Regulation 11 – Guidelines and Procedures

The regulation simply empowers the Commission to issue rules and procedures on the matter of access. These rules and procedures will be contained in an Interconnection Code to be published by the Commission at a later date.

[MEMBER STATE]

TELECOMMUNICATIONS (ACCESS TO FACILITIES) REGULATIONS 200[-]

ARRANGEMENT OF REGULATIONS

REGULATIONS

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[MEMBER STATE]

STATUTORY RULES AND ORDERS No. [-] of 200[-]

(Gazette No....of 200[-])

REGULATIONS

Made by the Minister under section [-] of the Telecommunications Act, 200[-] (Act No. [-] of 200[-]).

Citation

1. These Regulations may be cited as the Telecommunications (Access to Facilities) Regulations, 200[-].

Commencement

2. These Regulations shall come into force on the date of its publication in the Gazette.

Interpretation

3. (1) In these Regulations:

“**Act**” means the Telecommunications Act No. [-] of 200[-];

“**Commission**” means the National Telecommunications Regulatory Commission;

“**infrastructure sharing agreement**” means an agreement between two public network operators setting out their respective rights and obligations with respect to providing access to and sharing of their telecommunications networks and facilities including towers, sites and underground facilities;

“**telecommunications code**” means a document published by the Commission setting out rules, guidelines and procedures on telecommunications related matters, including access to facilities and co-location.

(2) Unless otherwise specified, terms used in these Regulations shall have the meanings assigned to them under the Act.

Application

4. (1) These Regulations apply to all telecommunications networks and facilities and any physical component of a telecommunications network, other than terminal equipment, including towers, sites, underground facilities, wires, lines, terrestrial and submarine cables, wave guides, optics or other equipment or object connected therewith, used for the purpose of telecommunications, as well as any post, pole,

tower, standard, bracket, stay, strut, insulator, pipe, conduit, or similar thing used for carrying, suspending, supporting or protecting the structure.

(2) These Regulations apply to all telecommunications providers with respect to the operation of all telecommunications networks and the provision of all telecommunications services and to:

- (i) agreements for sharing of, and or
- (ii) requests for access to

such telecommunications networks and facilities.

Powers of the Commission

5. (1) The Commission may regulate the rates, terms and conditions for access to any facility or telecommunications network, such rates, terms and conditions to be just and reasonable and it may adopt procedures necessary and appropriate to resolve disputes concerning such rates, terms and conditions.

(2) Subject to the right of public network operators to conclude the terms and conditions of access to facilities in a proposed interconnection agreement, every infrastructure sharing agreement shall be submitted to the Commission for its approval.

Obligation to provide access

6. (1) Every public network operator shall offer to provide and provide access to facilities that it owns or controls, on a non-discriminatory and equitable basis, including with respect to charges, location, and other commercial matters.

(2) A public network operator may deny access only where it can demonstrate to the satisfaction of the Commission that:

- (a) there is insufficient capacity in such facility, taking into account its reasonably anticipated requirements; or
- (b) for reasonable technical grounds.

(3) Where the provision of access to any facility as required by these Regulations is not technically feasible, the Commission may, acting on the recommendation of ECTEL, make such orders or issue such directions to a public network operator as it deems appropriate, to facilitate alternative access arrangements, including, but not limited to –

- (a) virtual co-location,
- (b) conditioning additional equipment space,
- (c) optimizing the use of existing space; or
- (d) finding adjacent space.

Prices for access

7. (1) Prices for access to and use of different facilities may vary according to the facilities involved, but must be just, reasonable and based on the costs of the owner of such facilities.
- (2) Every public network operator shall make available, upon request, prices for access to and use of facilities that it owns in a manner that is:
 - (a) clear and unambiguous; and
 - (b) disaggregated such that the telecommunications provider requesting access shall only have to pay for access to those facilities or parts of the network it requires to provide the services involved.
- (3) The Commission may require a public network operator to publish the prices for access on the operator's website and or in an appropriate publicly available document.

Negotiating access

8. (1) A public network operator may at any time, make an application to another operator for access to facilities that it owns or controls.
- (2) Upon receipt of a request, an operator must promptly provide the terms and conditions for such access.
- (3) The party offering access and the party requesting access shall promptly upon receipt of the request, commence negotiations in good faith with the objective of concluding an infrastructure sharing agreement.
- (4) Where the parties to a proposed infrastructure sharing agreement are unable to agree on the terms thereof within sixty (60) days from the date of the application under subsection (1) either party may request the Commission to resolve the matter, in accordance with such procedures as the Commission, acting on ECTEL's recommendation, may adopt.
- (5) Any decision by the Commission pursuant to sub-regulation (4) shall be binding on the parties.
- (6) A decision by the Commission on the matter shall be made within sixty (60) days from the date of the referral to the Commission.
- (7) Notwithstanding subsections (1) – (6), a party offering access and a party requesting access may conclude such arrangements at the time of negotiating interconnection.

Co-Location

9. (1) The Commission may direct an operator to provide co-location or other forms of infrastructure sharing on the basis of commercially negotiated rates and other terms and conditions.
- (2) Where operators are unable to reach an agreement regarding compensation for co-location or other forms of infrastructure sharing, the Commission shall impose rates based on costs, where appropriate.
- (3) Where the Commission makes a decision to impose co-location or other forms of infrastructure sharing, the Commission may take into account –
- (a) the need to promote and safeguard competition, including the ease of market entry;
 - (b) the costs of duplicating the facilities or utility installations, including the technical or economic viability of installing other facilities;
 - (c) the environmental implications of deploying separate types of facilities by multiple operators;
 - (d) the reasonably anticipated requirements of the operator;
 - (e) issues relating to public health and safety, security, reliability or difficulties of a technical or engineering nature;
 - (f) the initial investment of the owner of the facilities involved; and
 - (g) any other matters it deems appropriate.

Obligations of dominant operators

10. (1) The Commission, acting on the recommendation of ECTEL, shall have the authority to direct a dominant operator to –
- (a) allow another operator to co-locate its facilities in buildings housing any switches at which the operator is required to permit interconnection in accordance with these Regulations or the Telecommunications (Interconnection) Regulations, at any satellite earth station, at any radio tower, at any telecommunications equipment rooms in commercial or residential buildings or at such other locations as the Commission may determine;
 - (b) provide equipment space, power, site maintenance and security (subject to taking reasonable security precautions in connection with affording such other operator access to its own facilities) at each such site; and
 - (c) afford such other operator access to its co-located facilities on a basis no less favourable than the operator affords to itself.
- (2) A dominant operator may not restrict the type of co-located facilities in accordance with subsection (1)(a) provided it is a type of telecommunications equipment customarily located in such locations.

(3) A dominant operator is not required to construct additional buildings to accommodate requests for co-location or provide co-location for the staff or personnel of another operator except as such operator may occasionally require, from time to time, to service or repair its co-located equipment.

Publication of code

- 11.** The Commission, acting on the recommendation of ECTEL -
- (a) may establish rules in a relevant telecommunications code to give purpose and effect to these Regulations, setting out such guidelines, procedures, standards and other requirements as the Commission may issue or specify;
 - (b) shall publish the code, or parts thereof, in the Gazette and on its website;
 - (c) may amend, add to or replace the code at any time.

Made this [-] day of [-], 200[-]

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Minister for Telecommunications