

Malaysian Access Forum Berhad

Working Draft Heads of Access Code

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Article A Introduction

Section A.1 Objectives of the Code

[Set out the objectives of the code – what does the code hope to achieve]

- A.1.1 **Authority to Develop the Code.** This Voluntary Access Code (“the Code”) is developed by the Malaysian Access Forum Berhad (“MAFB”) pursuant to a written request dated [insert date] from the Malaysian Communications and Multimedia Commission (“the Commission”) to prepare a voluntary industry code for the communications industry.
- A.1.2 **Aim of Code.** The aim of the Code is to set an acceptable and workable process to facilitate the provision of access by Access providers in a easy and clear manner to all qualified Access Seekers, and to modify and remove any ambiguities that may arisen under the previous interconnect arrangements or under the MSA.
- A.1.3 **Mandatory Requirement to provide Access under SAO.** Access Providers have to note the over-riding obligation placed on them by the Standard Access Obligations¹ (“SAO”), which makes the provision of Access to network facilities and network services in the Access List **mandatory**, contravention of which may invite a RM 500,000 fine or imprisonment for a term not exceeding 5 years. [It has to be clearly understood that the Code is merely the vehicle to be used by APs and ASs to organize themselves under the access regime, to give effect to the SAO. Where previously differing processes and methodology were in place, now under the Code aims to provide a single set of rules to govern the provision and obtaining of access.
- A.1.4 The Code provides for Model Terms and conditions in compliance with the SAO with respect to access sought by Access Seekers to network facilities and network services on the Access List.
- A.1.5 These Model Terms are designed in a such a manner that it will be comprehensive enough to cover all the possible scenarios likely to be faced by the parties to an access arrangement, thus enabling parties to adopt the required set of Model Terms applicable to the type of access that they require with minimal negotiations and reducing it into an Access Agreement. [One clear advantage is that there will only be a single Model Terms as opposed to different ARDs maintained by each Access Provider.]
- A.1.5 **Compliance with the CMA.** In particular, the MAFB is cognizant of the fact that for the Code to be registered by the Commission, the Code has to be consistent with the objects of the CMA and any other relevant instruments created thereunder. In addition there is an overriding requirement for the Code to be in line with the National Policy Objectives² for the Communications and multimedia Industry which, inter alia, are :
- (a) to establish Malaysia as a major global centre and hub for communications and multimedia information and content services ;
 - (b) to regulate for the long term benefit of the end user;
 - (c) to ensure an equitable provision of affordable services over ubiquitous national infrastructure;
 - (d) to facilitate the efficient allocation of resources.
 - (e) to promote a high level of consumer confidence in service delivery from the Communications Industry

¹ Section 149 CMA 1998

² Section 3(2) CMA 1998

Section A.2 Legislative Background

- A.2.1 **Access Regime under CMA.** Chapter 3 of Part VI of the Communications and Multimedia Act 1998 ("CMA") establishes a access regime which ensures that all network facilities providers, network service providers, application service providers and content application service provider can gain access to network facilities and network services on reasonable terms and conditions.
- A.2.2 **Mandatory Standard on Access.** Following the issuance of the Ministerial Direction to the Commission to Determine a Mandatory Standard on Access ("MSA"), the MCMC issued the Mandatory Standard on Access ("MSA")³ as Commission Determination No. 2 of 2003 on 14 August 2003, which deals with access to network facilities and network services included in the Access List⁴ in accordance with the objects of the CMA and in line with the national policy objectives.
- A.2.3 **Access List.** Pursuant to its powers under Section 145 of the CMA, the Commission determined a list of facilities and services to be included in the Access List in order that Access Providers may provide network facilities, network services and other facilities and/or services which facilitate the provision of network services, application service including content application service to Access Seekers. The Commission is currently undertaking a review of the Access List to add additional items to the Access List
- A.2.4 **General Access Regime.** The MAFB has been tasked to prepare the Code which when registered by the Commission, will form part of the CMA Access Regime which then consist of:
- (i) This Access Code
 - (ii) Commission Determination on the Mandatory Standard on Access Pricing⁵ and any amendments thereto ;
 - (iii) Access Agreements negotiated in accordance with the Standard Access Obligation's⁶ and registered by the Commission ;
 - (iv) Access Undertakings^{7,8}, if any registered by the Commission.

Section A.3 Commencement of Code

- A.3.1 The Code will come into force upon registration⁸ by the Commission.
- A.3.2 Upon registration, the Code will supercede and replace the MSA and will govern all aspects of provision and seeking of access to network facilities and network services.
- A.3.3 The MAFB targets the commencement date to be no later than 1st June 2005

³ Commission Determination No 2 of 2003

⁴ Commission Determination No. ...2003

⁵ Commission Determination No 1 of 2003

⁶ Section 149 CMA 1998

⁷ Section 155 CMA 1998

⁸ Section 95.2 CMA 1998

Section A.4 Scope and Application of Code

- A.4.1 **Access List Items.** The Code only deals with Access to network facilities and network services included in the Access List.
- A.4.2 **Non-Access List Items.** Parties to an Access Agreement may adopt the provisions of the Code (where relevant) when negotiating any other wholesale access arrangement for network facilities or network services that are not listed in the Access List.
- A.4.3 **New Access List Items.** The Access List is currently being reviewed by the Commission and new items of network facilities and network services are expected to be added to the Access List. The Code will endeavour to cover all such proposed new access items. If and when new items are added to the Access List, the MAFB will ensure that specific conditions relating to such new access item are developed and added to the Code.
- A.4.4 **Code Subjects.** A Licensee (as defined in the CMA) and who acts in one or more of the following capacities will be subject to the Code :
- (a) network facilities providers, in their capacity as Access Providers or Access Seekers ;
 - (b) network service providers, in their capacity as Access Providers or Access Seekers ;
 - (c) application service providers in their capacity as Access Seekers ;
 - (d) content application service providers in their capacity as Access Seekers ;
- A.4.5 **Non-Discrimination.** Consistent with the approach of the access regime established by the CMA, the Code confers the same rights and applies the same obligations on persons listed above, and as between a particular class of persons (e.g. NFP or ASP), making no distinction between large or small providers or between established providers and those who are new entrants.
- A.4.6 **Wholesale Relationships.** The Code applies only to wholesale relationships between Operators in relation to access to network facilities and network service.
- A.4.7 **Voluntary Nature of the Code.** Subject always to the powers of the Commission⁹ to issue directions to a Code Subject to comply with the Code, Compliance with the Code is **not** mandatory¹⁰, but the MAFB desires that all Code Subjects comply with the provisions of the Code so that the Code can retain its potency as an effective self regulatory instrument. In any event, compliance with a registered voluntary industry code is a defence against any prosecution or action whether in court or otherwise taken against a person who is subject to the code regarding a matter dealt with in that code¹¹.

[Q : Notwithstanding the above, the MAFB is considering making the Code binding on all Access Seekers and Access Providers regardless whether they are members of the MAFB or not. Is there merit in making the Code binding in such a manner ? What if we make the Code binding on Members of MAFB only - then what would non-member AP use to provide access ? On the current state of play, defacto all the major APs are members, and hence any AS who wants access will automatically be using the Code. There is the odd chance that some minor APs (NFP or NSP) who is not a member but still subject to the SAO. Can such a non-member AP still be compelled to use the Code. What will be the sanctions on non-members for non compliance ?]

- A.4.8 **Code Departures.** [The expectation of the MAFB is that the code should be strictly followed by all Code Subjects. Any departures from the terms contained in the Code is strongly discouraged but if it is inevitable, it shall be permitted, subject to the parties

⁹ Section 99 CMA 1998

¹⁰ Section 97 CMA 1998

¹¹ Section 98(2) CMA 1998

following the process set out in a Code Departure Memorandum (as per Article L.1 Departure from Model Terms).]

[Effectively the model terms amount to a unilateral offer by Access Provider, and if only one party wants to differ than it is not to be permitted and the model terms by default form the terms of the access agreement.]

Section A.5 Status of the Code versus MSA and ARD

- A.5.1 **Status of MSA.** The Commission intends the MSA to operate as an *interim measure* until the Code is developed by the MAF and registered by the Commission. The Commission will review the MSA at the time the Code is registered to determine whether the MSA should remain in place to complement the provisions of the Code published by the MAFB.¹²
- A.5.2 The MAFB will recommend that the applicability of the MSA be suspended and kept in abeyance as soon as the Code is registered by the Commission. Only in the event that the Code fails to fulfill the need of the Industry to wards Access, will the MSA be revived and brought into action, replacing the Code in its entirety or in part. Notwithstanding this, the MAFB will ensure that the Code stays current and relevant at all times, to avert a situation where the Commission has to intervene to determine the adequacy of the Code for the Industry.
- A.5.3 **Status of ARD.** Since the individual ARDs published by all the Access Providers is a product of the MSA, they too shall be suspended and cease to have any legal effect after the Code is registered by the Commission. The status of the Access Agreements that were signed under the MSA(or ARD), will dealt **with in Section....of this** Code.
- A.5.4 **Status of Code.** The Code (with its Model Terms) will take the place of the ARD, and will constitute a “standing offer” to all Access Seekers for the provision of access by an Access Provider based upon the Code and Model Terms.

Section A.6 Structure/Content of Code

- A.6.1 **Code Structure.** The Code structure will explain how the various elements of the Code are set out and the nomenclature used to refer to various articles, sections, subsections and paragraphs.
- A.6.2 **Contents of the Code.** This section will set out in summary form the function of each Section/part of the Code and what aspect of access it deals with.

Section A.7 Structure of Access Agreement

A.7.1 **Structure of Access Agreement.** The Access Agreement will comprise of the following :

- (a) general conditions (that applies to all the access list items);
- (b) special conditions (that will apply specifically to a particular access list item);
- (c) the T & I manual (incorporated as part of the Access Agreement)
- (d) the O & M manual (incorporated as part of the Access Agreement);

¹² See Section 2.1.5 of the Report on Public Inquiry on Mandatory Standard on Access dated 30 July 2003

and any other terms and conditions that the Parties mutually agree to incorporate in the Access Agreement (subject to Code Departures regulated by Section A.4.8)

A.7.2 The Code envisages that each access arrangement will be managed under a separate Access Agreement, regardless of whether the parties to an Access Agreement are both Access seekers and at the same time Access Providers. (Which means that each Access Seeker will have its own Access Agreement even if the same seeker is also an Access Provider). [This arrangement will allow for greater flexibility in managing each access arrangement independently of others. Thus if one agreement is terminated, than the others may still continue if parties so intend.

A.7.3 [Consider whether the Access agreements between the same parties should be made co-dependent on each other. There is no requirement under the CMA to do this, but for commercial reasons, there may be some merit to keep the inter-dependence.]

Section A.8 Definitions and Abbreviations

[Sets out the definitions and abbreviations used in the Code]

Article B General Principles of Access & Interconnection

Section B.1. Standard Access Obligations (“SAO”)

- B.1.1 **Standard Access Obligations.** [Sets out the SAO as prescribed in Section 149 of the CMA]
- B.1.2 **Mandatory Requirement to provide Access under SAO.** Access Providers have to note the over-riding obligation placed on them by the SAO, which makes the provision of Access to network facilities and network services in the Access List mandatory, contravention of which may invite a RM 500,000 fine or imprisonment for a term not exceeding 5 years. This provision will apply to all Access Providers, regardless of whether such Access is granted under the MSA or the Code. Therefore refusal to grant access¹³ has to be on good grounds.
- B.1.2 **Reasonableness of Conduct.**[Deals with the criteria of reasonableness of request and provision by both the Seeker and Provider . The Code will deal with what constitutes unreasonable request by the Access Seeker and grounds for refusal by the Access Provider.]
- B.1.3 **Equitable and non-discriminatory conduct.** [The Code will set out the meaning of non-discrimination in the context of the Code and how it should be dealt with under the Code.
- B.1.4 **Examples** of the application of the non-discriminatory principle to the various sections of the Code.
- B.1.5 **Exceeding SAO Obligations.** Nothing in the Code will prevent an Access Provider from providing access on terms superior to that provided in this Code, for example relating to QoS levels, service levels, timelines etc. [Subject to Code Departure provisions set out in Section L.2]. In other words the obligations stipulated in the Code are the minimum requirements to be adhered to by an Access Provider.

¹³ See Section E.1 below

Article C Categorisation of Access List Items

Section C.1 Introduction

The purpose of Article C is to establish categories of access services that will be useful for –

- (a) describing the nature of the obligations of access providers in the provision of access;
- (b) describing the nature of the entitlement of access seekers in receiving access; and
- (c) structuring the special conditions that might apply in access agreements that involve access services in each category

Section C.2 Essential differences between categories

The primary split that is proposed is between those access services that are, in effect, network services, and those that involve the sharing of facilities.

In broad terms, the access service categories may be described as follows:

- **Conveyance of traffic.** Access Services that are Network Services involve the conveyance of traffic by an Access Provider for an Access Seeker. This conveyance may take the form of completing calls or the form of provision of nominated transmission capacity between network points. The entitlements of Access Seekers are not in any sense contingent or limited by scarcity value.
- **Provision or sharing of network or other facilities.** Access Services that are in the Facilities category involve the provision or sharing of network or other facilities. The facilities may take the form of network elements, such as local loops, or may be platforms and civil works which house and/or support network elements, such as ducts, towers and exchange buildings. The entitlements of Access Seekers are determined by the availability of the resources and facilities involved, and will be contingent because of scarcity. Access Seekers' claims to access may need to be prioritised in some way because of such scarcity.

In addition to the above, both categories of Access Services can involve the provision of ancillary services, such as the provision of data to enable customer billing, or the provision of escort and security services at the Access Provider's premises. These are not Access Services in themselves, and do not appear on the Access List. Nevertheless they are important ancillary services that may be required to ensure that the provision of the primary Access Service is effective.

Section C.3 Summary of categories

Figure C.2.1 below sets out in summary form the proposed structure of the categories of access service, together with a division of the existing and possible future access services into the categories.

FIGURE C.2.1: ACCESS SERVICES AND SERVICE CATEGORIES

Access Service Category	<i>Description</i>	Access Service Sub-category	<i>Description</i>	Access Service (Allocation)
Network Services	Services associated with the conveyance of traffic	Conveyance	Services associated with the origination, termination or transit of traffic for the access seeker	Fixed origination
				Fixed termination
				Mobile origination
				Mobile termination
				Mobile origination (3G)
				Mobile termination (3G)
				3G-2G Inter-operator roaming
				Public mobile origination and termination service
				Equal access (fixed)
				Interconnect link service
				Internet access call origination service
				Network signalling service (Note 1)
		Number portability service (Note 2)		
		Capacity	Services associated with the provision of nominated transmission capacity to the access seeker	Private circuit completion circuit
				Domestic network transmission service
MVNO				
				Digital terrestrial TV broadcasting service (Note 3)

Access Service Category	<i>Description</i>	Access Service Sub-category	<i>Description</i>	Access Service (Allocation)
Facilities	Access to complete facilities, or the sharing of facility space, volume or capacity	Network Elements	Access to switching, transmission and signalling network elements of the access provider's network	Access to network elements (Note 4)
		Other Facilities	Access to platforms, civil works and other facilities of the access provider	Access to network elements (Note 5)
Ancillary Services	Services ancillary to the provision of network services and facilities	Ancillary services		Included in the description of Access List services (Note 6)

Notes (1): The aspects of the Network Signalling Service subject to the access regime have yet to be determined. The service is included in this category on the assumption that it will involve third-party or outsourced signalling on behalf of the access seeker.

(2): The aspects of Number Portability subject to the access regime have yet to be determined. The service is included in the is category on the assumption that the NP service will involve the re-conveyance to calls to ported numbers to their new network locations.

(3): The aspects of the Digital Terrestrial TV Broadcasting Service subject to the access regime have yet to be determined. The service is included in this category on the assumption that it will involve transmission capacity services similar to circuit services.

(4): Access to network elements in this sub-category include access to unbundled local loops and to sub-loops.

(5): Access to network elements in this sub-category include access to ducts, towers, poles and masts.

Section C.4 Common and Special Conditions in Access Agreements

Figure 2 below sets out the types of model terms that are common to each category of Access Service and those that are special to particular categories. For the purposes of this analysis, it is assumed that 'Common Conditions', even if they do not universally apply, are common when they do apply.

FIGURE 2: COMMON AND SPECIAL MODEL TERMS AND CONDITIONS IN ACCESS AGREEMENTS

No.	Issue	Network Services		Facilities		Ancillary	Comments
		Conveyance	Capacity	Network Elements	Other Facilities		
1	Definitions / key terms	Yes	Yes	Yes	Yes	Yes	Common
2	Scope and purpose of access	Yes	Yes	Yes	Yes	Yes	Common
3	Access architecture	Yes	Yes	Yes	Yes	N/A	The specification of the access architecture will be specific to each Access Service – not just to each category.
4	Establishment of POI	Yes	Yes	Yes	N/A	N/A	Special for each of the three sub-categories that requires this condition.
5	Location of POI	Yes	Yes	Yes	N/A	N/A	Special for each of the three sub-categories that requires this condition.
6	Procedure for determining availability of capacity at POI	Yes	Yes	Yes	N/A	N/A	Special for each of the three sub-categories that requires this condition.
7	Preparation of site to receive Access Seeker's equipment	Yes	Yes	Yes	Yes	N/A	Common
8	Cost of site preparation – who bears the cost	Yes	Yes	Yes	Yes	N/A	Common
9	Right of Access Seeker to transfer site	Yes	Yes	Yes	Yes	N/A	Common

No.	Issue	Network Services		Facilities		Ancillary	Comments
		Conveyance	Capacity	Network Elements	Other Facilities		
	costs to others						
10	De-commissioning of POI and POP	Yes	Yes	Yes	N/A	N/A	Common
11	Minimisation of impact of decommissioning of POI and POP	Yes	Yes	Yes	N/A	N/A	Common
12	Technical specification – CLI, Addressing and Signalling, etc	Yes	Yes	No	N/A	N/A	Common
13	Forecasts	Yes	Yes	No	No	N/A	Common general process, but different details.
14	Access Seeker Service Ordering	Yes	Yes	No	No	N/A	Common process, but different information requirements. In the case of escort and security requirements, the request for access is not an order, but must comply with a specific procedure.
15	Provisioning	Yes	Yes	Yes	Yes	N/A	Common
16	Facility Ordering Procedures	N/A	N/A	Yes	Yes	N/A	Some network element access arrangements have special pre-conditions – eg. line testing in the case of ULL
17	Infrastructure sharing	N/A	N/A	Yes	Yes	N/A	Common
18	Co-location	Yes	Yes	Yes	Yes	N/A	Common
19	Periodic network	Yes	Yes	Yes	Yes	N/A	Common

No.	Issue	Network Services		Facilities		Ancillary	Comments
		Conveyance	Capacity	Network Elements	Other Facilities		
	planning report						
20	Procedures for determining available capacity	Yes	Yes	Yes	Yes	N/A	Special conditions for each of Network Services and Facilities Access. Some procedures (eg. ULL) may be very specific to that Access Service.
21	Procedures for allocating capacity amongst Access Seekers	Yes	Yes	Yes	Yes	N/A	Although prioritisation arrangements may be needed for all categories, the clauses will not be common. Special conditions will apply for network Services and Facilities Access.
22	Network conditioning	Yes	Yes	Yes	Yes	N/A	Common
23	Traffic measurement and routing	Yes	Yes	N/A	N/A	N/A	Common
24	Trouble Reporting	Yes	Yes	Yes	Yes	Yes	Common. Precisely what is reported and the escalation procedures may vary from category to category, however.
25	System protection and safety	Yes	Yes	Yes	Yes	Yes	Common
26	Operation and maintenance responsibilities	Yes	Yes	Yes	Yes	Yes	Common
27	Planned maintenance notifications	Yes	Yes	Yes	Yes	Yes	Common
28	Emergency maintenance	Yes	Yes	Yes	Yes	Yes	Common

No.	Issue	Network Services		Facilities		Ancillary	Comments
		Conveyance	Capacity	Network Elements	Other Facilities		
29	Ancillary services by Access Provider	N/A	N/A	N/A	N/A	Yes	Common
30	Relationship management	Yes	Yes	Yes	Yes	Yes	Common
31	Providing and handling of information	Yes	Yes	Yes	Yes	Yes	Common
32	Billing and payment	Yes	Yes	Yes	Yes	Yes	Common
33	Term of agreement	Yes	Yes	Yes	Yes	Yes	Common
34	Suspension of agreement	Yes	Yes	Yes	Yes	Yes	Common
35	Termination – Causes and consequences	Yes	Yes	Yes	Yes	Yes	Common
36	Dispute resolution	Yes	Yes	Yes	Yes	Yes	Common. Additional special conditions will apply to billing (see above) that will affect dispute resolution of billing disputes.
37	Intellectual property	Yes	Yes	Yes	Yes	Yes	Common
38	Confidentiality	Yes	Yes	Yes	Yes	Yes	Common
39	Assignment of rights under agreement	Yes	Yes	Yes	Yes	Yes	Common
40	Modification of agreement in defined circumstances	Yes	Yes	Yes	Yes	Yes	Common

No.	Issue	Network Services		Facilities		Ancillary	Comments
		Conveyance	Capacity	Network Elements	Other Facilities		
41	Cost and expense of preparing agreement	Yes	Yes	Yes	Yes	Yes	Common
42	Applicable law	Yes	Yes	Yes	Yes	Yes	Common

Article D Eligibility Criteria to submit Access Request

[Sets out the eligibility criteria for licensees to make a request to Access Providers for access]

Section D1 Eligibility Criteria

D.1.1 **Eligibility under Standard Access Obligations**¹⁴. The SAO provides the starting point for determining the eligibility criteria for an applicant who is seeking access to network facilities and network services. Section 149 CMA 1998 provides that :

“...a network facilities provider and a network service provider **shall** provide access to their network facilities and network services listed in the Access List to any other –

- (a) network facilities provider ; or
- (b) network service provider ; or
- (c) applications service provider ; or
- (d) content applications service provider,

who makes a written request to such network facilities provider or network services provider on reasonable terms and conditions...”.

D.1.2 **Requirement to Provide Access to All Access Seekers**. Consistent with the government’s desire to promote competition in the communication industry, in particular in the services segment, The CMA does not stipulate that the Access Seeker must hold a full and unlimited ASP, NFP or NSP licences before it can obtain access from an Access Provider to any of the Access List items. Similarly subject to Section D.1.3 below, this Code also does not make any distinctions nor will it discriminate against any of the Licensees who seek Access in accordance with the provisions of this Code. [By way of example, an ASP(I) licensee (without a NFP or NSP Individual licences) or an ASP(I) licensee with a limited NFP(I) and NSP licence, will be able to obtain access to network facilities or network services under Code, regardless if it has a full suite of licences.

D.1.3 **Limitations in Access Seeker’s Licence**. An Access Seeker is not eligible to request for access from an Access Provider to the network facilities and network services listed in the Access List where the requested network facilities or network services are to be used in connection with an activity or activities for which the Access Seeker is not licenced to provide. [For example where the Licence is limited by geographical limitation to only a specific area and/or areas in Malaysia].

¹⁴ Section 149 CMA 1998

Article E Request for Access

This Article E is intended to provide a process for requests to be made for access which is efficient and meets the needs of both Access Seekers and Access Providers. Before an official request is made, it is appropriate that a preliminary request be made which provides an indication to the Access Seeker of the ability of the Access Provider to meet the official request, at the same time minimises the cost to the Access Provider to process all official request for access.

Section E.1 Information Package

In order to ensure that prospective access seekers are able to submit request for access to the appropriate officer in the organisation which provides access, access providers must maintain an information package containing the following information:

- (a) the name and address of the Access Provider and contact details of its Proper Officer;
- (b) details of those Access List items which the Access Provider is able to offer access to;
- (c) Specify the geographical name of the location (e.g. Subang Jaya) and the applicable postcode (e.g. 47500) in respect of:
 - (i) points of interconnection or points of presence;
 - (ii) co-location points (including virtual co-location points)
 - (iii) in-span interconnection points
 - (iv) infrastructure facilities where space is available
- (d) a summary of the Access Provider's ordering and provisioning arrangements for installing Equipment and arrangements for accessing such Equipment;
- (e) an indication of the time and major milestones likely to be required to enable access to Eligible Facilities to be supplied to the Access Seeker, including any credit assessments which may be conducted and the types of security that may be required;
- (f) Financial Security Requirements which the Access Provider may require from the Access Seeker.

The Information Package must be made publicly available to any holder of a licence under the CMA, or prominently and clearly identified on the access provider's web site under the heading "Interconnection and Access" set out on the home page of the access provider's web site.

Section E.2 Preliminary Request for Access

This is the first step in the request process. It is intended to enable an Access Seeker to determine which Access Provider it should make the official request for access. It is not intended to provide detail information to an Access Seeker or Access Provider but is to minimise the cost of attending to a formal request for Access.

The submission of a preliminary request for Access by an access seeker is to be in accordance with Form E.2.1. Form E.2.1 requires the access seeker to specify its needs – e.g. Access Seeker X requires mobile termination services to be provided at location YY.

All preliminary requests are to be responded by the access provider within five (5) business days, in accordance with Form E.2.2. The response merely requires that the access provider state whether it is able to meet the request of the access seeker at that location.

The response by the access provider (if it is a refusal) if disagreed by the access seeker amounts to a Type 3 Dispute, and is subject to Section I.5.4 of Article I to this Code.

A non-response by an access provider is deemed a rejection, which entitles the access seeker to refer the matter to Adjudication as set out in Section I.5.4 of Article I to this Code.

Responses by Access Providers are non-binding but may be used as evidence against the access provider in any Adjudication Process.

Section E.3 Official Request for Access

Once the access seeker has received a preliminary response in Form E.2.2 accepting its access request, then the following process shall be applicable.

1. Type of information to be provided

All access seekers must provide the following information to access providers:

- (a) Corporate information including names of shareholders;
- (b) Creditworthiness information comprising paid up share capital, banking details, the latest audited accounts (if none available – a statement signed by the auditor of the company certifying its solvency);
- (c) Technical Information
- (d) Preliminary Forecasts
- (e) The Request for Service Date
- (f) Specifying the access list item that access seeker requires access to be provided by the access provider.
- (g) A statement that access seekers are either agreeable that the access agreement be based on the terms set out in Articles F and G of this Code. If however the access seeker wishes to enter into negotiations on the terms of the agreement (i.e. a departure from the model terms set out in Articles F and G of this Code), the Access Seeker must specify those clauses that it wishes to depart from, the reasons for the departure, and the alternative provision which they propose in its place. This is to enable the Access Provider to carefully consider the request.

The Official Request for Access is to be made in accordance with Form E.3.1 and must be duly signed by a senior management of the access seeker.

The detailed description of the terms used above is to be set out.

[Question: Are there any other information which access providers need access seekers to furnish in order for access providers to decide whether to agree to enter into an access agreement or not?]

The access provider may request the attendance of the access seeker to discuss matters arising from the submission of the Official Request for Access.

2. Response to Official Request for Access

The Access Provider must respond to the Official Request for Access within thirty (30) days from the date of receipt of the Official Request for Access (Form E.3.1). The response by the access provider must be in Form E.3.2.

If the response is that the access provider:

- (a) agrees to grant access – to specify a date when the detailed access agreement can be executed which shall not be later than 30 days after the date of Form E.3.2.
- (b) rejects the request for access – to specify in writing the reasons for rejecting the access seeker's official request for access.
- (c) agrees to the request to negotiate – to complete and submit Form E.3.2 (Negotiation) to the access seeker.

3. Grounds for rejecting Official Request for Access

The following are the only grounds to reject an Official Request for Access:

- (a) not technically feasible
- (b) insufficient capacity
- (c) reasonable belief that access seeker is not credit-worthy.

4. Right to withdraw Official Request for Access

The following proposed procedure sets out the rights of an Access Seeker to withdraw an Official Request for Access:

- 1. No later than the fifth (5th) Business Day following the date of the Access Request, the Access Seeker may withdraw the Access Request and if so withdraws, then the Access Seeker must inform the Access Provider in writing of its decision before the expiry of the sixth (6th) Business Day.
- 2. If Access Provider does not receive such written notice by the sixth (6th) Business Day following the date of the Access Request, then the Access Request shall remain valid and subsisting, notwithstanding such withdrawal by the Access Seeker.
- 3. If the withdrawal is effective, then Access Provider shall not be obliged to nor under any liability to fulfil the Access Request.
- 4. No Access Request may be withdrawn after the expiry of the fifth (5th) Business Day, and if an Access Seeker does do so, such withdrawal will not be effective unless agreed to by Access Provider (whether on terms or otherwise).

Section E.4 Negotiation for Access Agreement

1. Introduction

The following negotiation process and timelines shall be applicable to any negotiation between an Access Seeker and Access Provider in respect of an Access Agreement.

All negotiations shall be conducted in good faith. For the purposes of determining “good faith” the provisions in subsection 5.4.17 of the MSA shall be adopted.

2. Commencement of Negotiation

- 2.1 Negotiations shall commence within 30 days after receipt of the Request for Access where the access seeker request for negotiation.

3. Duration of Negotiations

- 3.1 All negotiations shall be concluded within one-hundred and twenty (120) days from the date Access Provider receives a written request to commence negotiations, and in default it shall commence from the date of Form B.3.2 issued to the Access Seeker.

4. Initial Meeting

- 4.1 The designated representatives of Access Provider and Access Seekers as specified in the appropriate Forms shall meet on the date and time at the venue specified by Access Provider, and shall:
 - (a) agree the target ready for service date(s);

- (b) agree a timetable for the negotiations, including milestones and dates for subsequent meetings, required to meet the agreed target ready for service date;
- (c) agree the negotiating procedures, including:
 - (i) the calling and chairing meetings;
 - (ii) the party responsible for keeping minutes of meetings;
 - (iii) clearly defined pathways and timetables for escalation within each party of matters not agreed in meetings;
 - (iv) procedures for consulting and including in the negotiating process relevant experts from the staff of each of the parties; and
 - (v) procedures for preparing and exchanging position papers;
- (d) review the information requested and provided to date and identify information yet to be provided by each party;
- (e) identify what technical investigations, if any, need to be made and by whom such investigations should be made.
- (f) if applicable, resolve the objection of the rejected representative if the party to whom an Objection Notice has been given still wishes to have that person included in its negotiating team.

5. Right of Objection

- 5.1 Either party may object to the person or persons nominated by the other party to attend and/or lead any negotiations.
- 5.2 If a party wishes to object to such person or persons, then that party must as soon as reasonably practicable but not less than [five (5) Business Days] prior to the date of the initial meeting submit an objection in writing ("**Objection Notice**") to the other party:
 - (a) identifying the person or persons which the party objects to; and
 - (b) stating that the objection to a person nominated by the other party on the ground that the participation of such person would adversely affect the legitimate business activities of the objecting party (which must be reasonably held).
- 5.3 Upon receipt of an Objection Notice, the recipient shall ensure that the person objected to does not attend the initial meeting. Unless the objection is resolved at the initial meeting, such objected person shall not attend any of the negotiations between the parties.

6. Failure to reach agreement

- 6.1 If the parties are unable to reach agreement by the time limited for so doing, then both parties may agree to extend the time to complete the negotiations, but such extension shall not be more than 30 days; if after the extended period agreement cannot be reached, then either party may seek the resolution of such failure pursuant to the Adjudication Process set out in Section I.5.2 of Article I to this Code.

Section E.5 Use of information provided

Neither access seeker nor access provider shall use, disclose, manipulate or build statistical data sets from the information furnished to the other pursuant to this Article E.

Both parties by agreeing to this Code undertake to each other to abide by and honour this obligation. A breach of this obligation and undertaking entitles the innocent party to seek remedies both in court and with the MCMC, including suspending the provision of access.

Section E.6 Method to determine what information ought to be submitted when new items are put on the access list

The list of information to be supplied by access seekers is dependent on the type of items placed on the Access List. Hence this process specifies the method by which such list of information is to be determined.

When a new item is specified to the Access List then the Forum shall within 30 days or the next available board meeting (whichever is the earlier) agree to appoint a working committee comprising (a) a representative of access providers and (b) a representative of access seekers, from the members of the Forum, and the administrator to the Forum.

The representative of the access seekers shall be a person who holds a valid application service provider license issued by the Commission and not any other licenses, and shall be a member of the Forum. If there is no member of the Forum who only holds an ASP License, then the Chairman of the Forum may appoint such other person to be a member of the working group so long as such person can fairly represent the interest of application service providers in Malaysia.

The working group shall meet and discuss the types of information needed to be provided by access seekers if they seek access to the new items specified on the Access List. The working group shall report its decision to the Forum no later than 45 days after being constituted.

If the Forum agrees to the new list of information in accordance with its memorandum and articles of association, the Forum shall issue an Amendment Notice to the Code specifying the additions to this Article E.

Section E.7 Policies

All access providers shall develop and maintain the following policies:

- (a) Queuing Policy;
A queuing policy sets out how an access provider will deal with multiple requests for access by access seekers (including for its own needs). This should generally be a first come first serve rule, and determine basis for determining what is "first".
- (b) Capacity Policy
A capacity policy sets out how an access provider will deal with capacity allocation amongst various access seekers and itself.
- (c) Allocation Policy
A policy setting out how access provider intends to allocate matters between various access seekers.
- (d) **[Question: Are there any other relevant policies which ought to be developed?]**

All policies developed and maintained shall be published by the access provider on its web site clearly marked and easily discoverable.

Article F Model Terms – General Conditions

These model terms apply to all access agreements regardless of the type of access requested or provided.

The model terms in Article F are set out in such a manner as to enable a member to copy Section F.2 and paste it in a new document as the recitals, and Section F.3 copied as to the clauses to the Access Agreement.

Section F.1 Application

The following is intended to provide assistance to users of the Code on how Sections F.2 and F.3 of Article F is to be applied.

The creation of the access agreement is dependent on the type of access service requested. If the access service is

Section F.2 Recitals

The following are the generic recitals to be used in all access agreements. They may be supplemented by additional recitals as the parties think fit. Such additional recitals are not considered as a departure from the Access Code and need not be included in the **Justification Memorandum**.

WHEREAS

(A) The parties acknowledge that it is a fundamental principle of access and interconnection that any customer of a service provider must be able to contact any customer of any other service provider whether they be on Malaysian networks or overseas.

(B) Access Seeker has pursuant to the Information Package provided by the Access Provider submitted a Request for Access dated [*insert date*] [insert reference no: if any], which has been accepted to by the Access Provider.

(C) The Access Provider is agreeable to the provision of the Access Service as defined and set out in this Access Agreement (including the supply of ancillary services) to the Access Seeker in accordance with the following terms, which are [in accordance with/not in accordance with*] the Model Terms set out in the Access Code [date:] and [version no:]

IT IS AGREED THAT:

Notes: * delete whichever is not applicable

Section F.3 General Conditions

[This sets out the general conditions applicable to all forms of access requirements, which members can cut and paste into an agreement form]. If clause is not applicable to a type of access simply delete the clause but retain its number and state against the number the words "There is no clause XX"

1. Definitions / key terms

1.1 This sets out the definitions of the terms used throughout the access agreement, including rules of construction and interpretation of the provisions of the agreement.

1.2 Date of coming into force:

The agreement shall come into force on the date when it is registered by the Commission.

1.3 Conditions Precedent to submission:

The following conditions precedent must be satisfied before submission is made by the access provider to the Commission:

- (a) provision of a bank guarantee as a security deposit which shall be equal to 2 months of the estimated charges;
- (b) provision of evidence that all necessary insurances are in place;
- (c) **[Question: Should there be any other requirement?]**

1.4 Structure of the Agreement

This provides a description of how the agreement is structured to ease its implementation.

The agreement comprises:

- (a) General Terms and Conditions
- (b) Special Terms and Conditions
- (c) Schedules to the General Terms and Conditions (whose numeric references reflect the clause number)
- (d) Elements of the Access Code which are incorporated by reference
- (e) Various forms to be used from time to time.

1.5 Representations and warranties

The following representations are made by the parties to each other:

- (a) that they both are duly licensed under the CMA;
- (b) that their licenses are as at the date of the Agreement, are valid and subsisting and that there is no breach of any of the conditions in these licenses;
- (c) that they have complied with all directions, determinations or decisions issued by the MCMC to them;
- (d) that each of them has the power to enter into, exercise each of their rights and perform and comply with each of their obligations under this Agreement;
- (e) that their entry into, exercise of each of their rights and/or performance of or compliance with each of their obligations under this Agreement do not and will not violate, or exceed any power or restriction granted or imposed by (i) any law, regulation, authorisation, directive or order which each of them is subject, (ii) each of their constitutive documents, or (iii) any agreement or arrangement to which each of them is a party or which is binding on each of them or each of their assets;

2. Scope and purpose of access

2.1 This Agreement is intended to apply only to the provision of the agreed Access Services as described and listed in Schedule 2.1 by the Access Provider to the Access Seeker and may not be construed as conferring benefits on third persons.

2.2 In supplying the agreed services, the Access Provider must treat the Access Seeker on a non-discriminatory basis as required by the Standard Access Obligations including but not limited to, if requested by the Access Seeker:

- (a) taking all reasonable steps to ensure that the technical and operational quality of the Access Service supplied to the Access Seeker is equivalent to that which the Access Provider provides to itself; and (b) taking all reasonable steps to ensure that the Access Seeker receives, in relation to the Access Services supplied and Ancillary Services provided to the Access Seeker, fault detection, handling and rectification of a technical and operational quality and timing that is equivalent to that which the Access Provider

provides to itself; (c) taking all reasonable steps to ensure that: (i) the technical and operational quality and timing of the Access Services is equivalent to that which Access Provider provides to itself; and (ii) complies with the relevant standards or determinations in respect of access as may be in force from time to time ; and

2.3 (a) The non-discrimination principles referred to in clause 2.2 are intended to promote the long term interests of end users of network services and applications services, in accordance with section 4 CMA 1998.

(b) The non-discrimination principles in clause 2.2 are intended to be implemented in a way which will promote competition in markets for Access List items having regard to (amongst other things) the extent to which relevant things will remove obstacles to end-users of Access List items and to achieve the other objectives contained in section 4 CMA 1998.

(c) The non-discrimination principles in clause 2.2 should not limit an Access Seeker's ability to request superior or lesser relevant aspects of the supply of the Access Service than an Access Provider provides to itself, provided always that the Access Provider will not be required to accept such a request, and the charges shall be reflective of this.

2.4 The Access Provider agrees to provide and the Access Seeker agrees to acquire the Agreed Services in accordance with this Agreement.

2.5 Each Party is responsible to provide, install, test, make operational and maintain all Network Facilities on its side of the POI used in the provision or acquisition of an Access Service unless otherwise agreed.

2.6 Entry to 3rd party premises

If entry to 3rd party premises is needed in order for the access provider to be able to provide the access service to the access seeker, and such 3rd party premises is owned by, tenanted or leased to the access seeker, then in such circumstances the access seeker shall provide the access provider with the necessary permission to enter the said 3rd party premises and shall do all that is necessary to ensure that such permission is obtained as quickly as possible.

The processes and procedures are set out in Section H.10 of Article H of the Code.

3 Access architecture

The access architecture in respect of the Access List item which is to be provided by the Access Provider is set out in Schedule 3

4 Establishment and maintenance of POI/POP

Subject to Special Conditions (if any):

4.1 For the term of this Agreement, POIs/POPs are to be established for the provision of the Access Service at the locations specified in Schedule 4, but is subject to an annual review.

4.2 For duration of agreement access provider to keep its network connected to and/or provide the Access Services to the access seeker in accordance with the terms of this agreement and the Code.

5 Location of POI/POP

Subject to Special Conditions (if any)

For the duration of the Access Agreement, the Access Provider shall make available to the Access Seeker the POI/POP as set out in Schedule 5. Any amendment to Schedule 5 shall be subject to the agreement of the other party which shall not be unreasonably withheld.

6 Procedure for determining availability of capacity at POI/POP

Subject to Special Conditions (if any)

The procedures set out in Section H.7 and Section H.8 of Article H to this Code shall be complied by the parties.

7 Preparation of site to receive Access Seeker's equipment

7.1 Location which is to receive access seeker's equipment in order for the access service to be provided must be prepared. This preparation is to be undertaken by Access Provider, with close cooperation and assistance from access seeker.

7.2 Delays to completion date may affect Ready for Service ("RFS") Date given by Access Seeker.

7.3 Extension of time to be permitted on specific grounds e.g. events outside the control of the access provider, and includes delays by the access seeker.

7.4 If no extension of time and RFS Date delayed, some form of compensation ought to be payable such as a waiver of the need to provide security deposits to access provider.

7.5 Approval from local authorities and MCMC must be obtained by access seeker. Access provider to give access seeker all relevant and necessary information. Work starts on approvals being obtained (if necessary).

8 Cost of site preparation – who bears the cost

8.1 The one-off cost shall be calculated in accordance with the methodology set out in Section K.3 of Article K to this Code.

8.2 The Access Seeker shall bear this one-off cost and shall pay the same to the access provider within 60 days of an invoice being raised. Such invoice shall set out the elements by which the computation set out in Section K.3 of this Code is undertaken.

9 Right of Access Seeker to transfer site costs to others

9.1 The charges imposed by the Access Provider in accordance with Clause 8 above, shall be recoverable by the Access Seeker from any other access seeker of the Access Provider who benefits from the location which was modified.

9.2 Process of how costs are transferred to subsequent access seekers and recovered accordingly.

Suggestion: Access Provider shall notify the 1st Access Seeker accordingly and provide the name and details of the subsequent access seeker, to whom the 1st Access Seeker can issue a proportion of the original invoice being 50% of the original invoice. If subsequent access seeker refuses to pay then Access Provider obliged on request from the 1st Access Seeker to levy an invoice to the subsequent access seeker.

10 De-commissioning of POI and POP

[The provisions in article 5.10 of the MSA are suggested to be adopted]

11 Minimisation of impact of decommissioning of POI and POP

[The provisions in article 5.10 of the MSA are suggested to be adopted]

12 Technical specification – CLI, Addressing and Signalling, etc

[The provisions in article 5.16.7 to 5.16.8 of the MSA are suggested to be adopted – details to be set out]

13 Forecasts & Advance Notification Orders

Subject to Special Conditions (if any)

13.1 Forecasts

Access Seeker must provide forecast of its anticipated capacity and traffic levels covering the period of the agreement. The purpose of the forecast is to provide the access provider with an indication of what may be expected. The forecasts are non-binding but provide useful planning information. Failure to meet forecasts by access seekers do not impose a penalty because access providers are not expected to spend money to meet the forecasts.

Forecasting procedures are as set out in Section H.2 of Article H to the Code.

13.2 Advance Notification Orders (ANO)

13.2.1 The purpose of ANOs is to provide access providers with a more reliable and accurate short term forecast, which arises because of the possible exposure to access seekers in terms of financial penalty.

13.2.2 The access seeker is to provide Advance Notification Orders for 12 monthly periods during the term of the access agreement. Contents of the ANO are set out in Schedule 13.2. which contains, *inter alia*, their forecast needs and the RFS dates for that year. This is to ensure greater accuracy of the forecast, including when the access seeker needs the Access Service to be provided by the access provider. The provision of an ANO is subject to revisions during the 12 month period, i.e. in month 4 and month 8 from the date of submission.

13.2.3 Access Providers will rely on ANO to undertaken detail planning of network, placing orders for equipment to meet the ANO, so as to ensure that the timescales of the anticipated orders can be met when the actual order is placed.

13.2.4 Essentially the ANO is a committed order by the access seeker subject to permissible variations to the ANO up to [20%] (which does not accrue any penalty to access seeker), but above [20%] then access seeker is subject to penalty. The penalty formula is to be designed whereby the access seeker is to be penalised for its over-ambitious estimation, after mitigation by the access provider.

14 Access Seeker Service Ordering

14.1 Access seekers must submit Confirmed Access Orders (CAO) bi-monthly. The details of the CAO and the processes to be complied with are as per Section H.3 of Article H to the Code.

It is a necessary for Access Providers to inform the Access Seekers when the Access Service will be available. This is especially so if ANO and CAO are within the tolerable differences. If cumulative CAO exceeds cumulative ANO, then access provider can decline to provide in Access Service in excess of ANO, but if choose to provide will advise access seeker of time and date when access service will be available before proceeding with the CAO.

14.2 Differences between CAO and ANO.
The differences between CAO and ANO rolled over every 4 monthly but at the end of the year if ANO is more than CAO by more than 30% then the provisions in clause 13.2 shall be applicable.

If ANO is less than CAO, there should be no effect since access provider is not affected by under estimation except that it may not have been able to provide the Access Service.

14.3 Advance Payments
Within 14 days of submitting a CAO, access seeker must make a prepayment equal to [10%] of the estimated charges. If access seeker subsequently cancels CAO, then [10%] prepayment liable to be forfeited.

[Question: Is 10% appropriate and fair?]

15 Provisioning

[The provisions in the MSA are suggested to be adopted]

16 Facility Ordering Procedures

Subject to Special Conditions (if any)

If facilities are part of the Access Services then the following processes are applicable in respect of the access seeker placing an order for these facilities.

The process are as set out in Section H.3.1 (Ordering of Facilities) to the Code.

The special pre-conditions of different access services on the access list are set out in Schedule 16.

17 Infrastructure sharing

This is only applicable to facilities access – either as network elements or infrastructure facilities e.g. towers, ducts, poles, if Special Conditions in Section G.2 of Article G of the Code applies.

18 Co-location

18.1 Types of co-location

Access Provider is to offer the following types of co-location (a) physical, (b) virtual at designated locations. Details of which are in Schedule 18.1, but subject to annual review.

18.2 The procedure and processes for requesting and providing co-location is set out in Section H.6 of Article H to the Code.

19 Periodic network planning

19.1 Responsibility to undertake network planning and to inform affected parties by access provider's network plans so as to mitigate effects of any changes. Information to be provided annually. [**Check the T&I Manual for processes?**]

19.2 Network changes – the provisions of article 5.11 MSA is proposed to be applied.

19.3 Space Reservation – access providers may reserve space to meet its legitimate needs, but such reservation must be notified to the access seeker. If no notification is made, then access provider cannot reserve space and if does so then may be construed as a breach. It is also proposed that articles 5.13.7 to 5.13.10 of the MSA be adopted.

20 Procedures for determining available capacity

Subject to Special Conditions (if any)

The procedures for determining available capacity is as set out in Section H.7 of Article H to the Code.

21 Procedures for allocating capacity amongst Access Seekers

Subject to Special Conditions (if any)

The procedures for allocating available capacity is as set out in Section H.8 of Article H to the Code.

22 Network conditioning

[It is proposed that the provisions in article 5.8 MSA be adopted]

23 Traffic measurement and routing

Subject to Special Conditions (if any)

[The reporting of this information may already be contained in the T&I and O&M Manuals – the clause is to reflect that obligation/process]

24 Trouble Reporting

General duty to investigate own network before reporting fault to access provider, unless Special Conditions apply. The Special Conditions apply in respect of different types of access services which an access seeker has sought.

Cost of investigation if found not to be access provider's network borne by access seeker. Cost must be reasonable and fair. If not agreeable, can submit to adjudication to determine fairness and reasonableness of cost being charged.

25 System protection and safety

[It is proposed that the provisions in Article 5.16 MSA be adopted]

[In addition parties to comply with Article J (Standards) of the Code]

26 Operation and maintenance responsibilities

[It is proposed that the provisions in Article 5.15 (except 5.15.14 to 5.15.16) MSA be adopted.

In addition the following be set out:

- (i) The O&M activity not to interfere or adversely affect the Access Service;
- (ii) Each party responsible for monitoring its own network if relevant
- (iii) Access to POI/POP to maintain respective party's equipment ect.]

27 Planned maintenance notifications

[It is proposed that the provisions in Article 5.15.14 to 5.15.15 MSA be adopted]

[Access providers to submit their annual planned maintenance programme on anniversary of access agreement]

28 Emergency maintenance

[It is proposed that the provisions in Article 5.15.16 MSA be adopted]

29 Ancillary services by Access Provider

29.1 Scope of Ancillary Services

The scope and charges of the ancillary services provided by an access provider are set out in Schedule 29.1 (including those identified in article 5.13.15 – 5.13.18 MSA to be adopted]

29.2 Invoicing

Access Provider must invoice access seeker for the Ancillary Services Charges on a bi-monthly basis. The invoice must contain the details of the charges and any supporting documents (e.g. invoices issued by third party utility providers – Tenaga Nasional Berhad).

29.3 Payment

Ancillary Service Charges shall be paid within [30] days from the invoice unless challenged by the access seeker. If challenged then access seeker initiates adjudication process in Section I.4 (Billing Disputes) of Article I of the Code.

30 Relationship management

The parties shall establish and inform the other party of their duly designated officers to whom all queries and issues are to be addressed. Any changes thereto will only be effective on notification. The details of the scope, responsibility and roles of these officers are set out in Section H.14 (Relationship Management Procedure) of Article H to this Code.

31 Providing and handling of information

All information to be provided and handled by either party in order to implement the access agreement shall be in accordance with Section H.13 (Information Exchange) of Article H to this Code.

32 Billing and payment

32.1 Bills and Charges

All items which are to be charged to an access seeker pursuant to the agreement shall be invoiced on a monthly basis for access services utilised for the month before. The invoice shall contain the details set out in Schedule 32.1. Invoice can be issued electronically and if so issued the electronic version must be in a form where the risk of alteration is minimal.

32.2 Payment

Access seeker is obliged to pay the invoices within 31 days from the date of issue of invoice. Payment can be by electronic fund transfer. Payee's account details are specified in invoice details in Schedule 32.1.

32.3 Billing disputes

If invoice disputed by access seeker, then the adjudication process set out in Article I of the Code shall be applicable.

32.4 Billing errors

Billing errors are to be handled in accordance with the following process:
The Access Seeker must notify Access Provider, within ten (10) days from the date of the Invoice, of all errors in the Invoice, which the Access Seeker discovers. If it is confirmed by Access Provider (within 10 days) that the error exist, Access Provider will make the necessary adjustments to correct that error in the Invoice and issue a Corrected Invoice.

If Access Provider fails to correct the error within the 10 days, then a dispute is said to have arisen and the Access Seeker may initiate the Adjudication Process in Article I of the Code.

32.5 Grounds for disputing bills.

[Question: Should we specify the grounds for disputing bills or leave it open? The interviews so far identify that we do not need complex processes handling this as most often the billing errors are corrected once it is pointed out.

Recommendation: Do not specify as it is working efficiently right now.]

33 Term of agreement

33.1 Sets out the duration of the agreement. In most cases the duration is for a minimum of 3 years up to a maximum of 5 years.

33.2 Renewal is by way of a fresh access agreement being entered without the need for the submission of a Request for Access. The process for renewal is simpler and less formal.

[Question: Should this be allowed or the formal process be used?]

33.3 Force majeure

The term is suspended because of force majeure unless force majeure last for a longer period than specified. The fair period should be [3] months? Force majeure is a term which is to be defined.

34 Suspension of agreement

34.1 Right to suspend.

Access Services may be suspended in the following circumstances:

- (i) the Access Seeker's network facilities materially and adversely affect the normal operation of Access Provider's Network or are a material threat to the safety of any individual;
- (ii) the Access Seeker's network facilities or the supply of a network service poses an imminent threat to the life or the property of Access Provider, its employees or contractors;
- (iii) the Access Seeker's network facilities cause material physical or technical harm to any network facilities of Access Provider;
- (iv) where the Access Seeker has failed to pay Invoices to the Access Provider for a period of 180 days; or
- (v) where a Force Majeure event occurs; or
- (vi) where the Access Seeker requests for such suspension.

[Question: Are there any other reason to suspend?]

34.2 Process to suspend.

The process to suspend requires the Access Provider to give the Access Seeker prior warning (usually about 30 days prior warning) and copy the notice to the MCMC so that they are kept aware and informed.

On the expiry of the 30 day period, the Access Service may be suspended. Time to suspend 0001 hours of the 31st day of the notice, not sooner.

34.3 Effect of suspension

- (a) Access Service no longer to be provided;
- (b) period of suspension counted in respect of overall term of agreement;
- (c) access provider not liable to access seeker for any losses that access seeker may have suffered.

34.4 Reactivation

Once the event of suspension has passed, the access provider may reactivate the Access Service by giving 14 days notice (called the "Reactivation Notice"), and the activation shall be at 0001 hours of the 15th day or as specified in the Reactivation Notice.

35 Termination – Causes and consequences

35.1 Events leading to termination

This specifies the terminating events – and comprises the following:

- (a) by the giving of notice to terminate. The period of the notice must not be less than [60] days after the next Advance Notification Order period in clause 13.2 *ante*);

Illustration: If access agreement is signed on 1 January 2004, and the next year starts on 1 January 2005, the next ANO is April, so the notice must expire by 30 June 2005.

- (b) commits a substantial and material breach and fails to remedy the breach after being given 90 days to remedy. If still fails to remedy then innocent party can terminate by giving another 90 days notice.

- (c) if either party is placed into liquidation or receiver appointed;

- (d) if the Access Service is no longer to be provided, withdrawn or superseded or replaced by the Access Provider then in such a case, Access Provider must give 180 days notice (to be called a "Service Discontinuance Notice") and publish such notice in the 3 daily newspapers (comprising English, Malay and a vernacular press). Upon receipt of this Service Discontinuance Notice, Access Seeker may challenge its genuineness in accordance with Article I of the Code.

[Question: Are there any other reason which should be allowed to terminate the access agreement?]

35.2 Cessation

Agreement ceases upon the expiry of the term, unless renewed in accordance with Clause 33.2.

35.3 Consequences of termination or cessation

The following are the consequence of termination or cessation:

- (a) all assistance to be given to maintain an unbroken service equivalent to the Access Service for a maximum duration of 180 days, from the date of termination, on payment in advance of the charges;
- (b) Return any equipment, documentation, software which belongs to the other party;
- (c) allow the other party access to take away its equipment etc if located in the first party's premises;
- (d) all outstanding charges for the Access Service shall be paid;
- (e) all amounts due on termination (as computed in accordance with Clause 35.4) shall be paid;

If the innocent party is the Access Seeker then the Access Seeker may off-set the amount in (d) above against any amount due to the Access Seeker from the Access Provider, and recover from the Access Provider the difference (if any).

35.4 Effect of termination

35.4.1 If termination is due to the fault of either party, then the innocent party shall be compensated for all costs and expenses reasonably incurred in order to obtain alternative Access Services, including the difference (if any) between the charges it would have had incurred if the agreement was not terminated and the charges it now incurs because of such termination, and loss of profit or business because of the loss of the Access Service (if any), PROVIDED ALWAYS the innocent party has taken all steps to effectively mitigate the losses, a failure of which results in the losses suffered being ineligible for recovery.

[Question: Should we exclude consequential losses from being recovered totally or partially?]

35.4.2 If Access Seeker terminates early

In this case, the effect is that the Access Seeker has to pay to the Access Provider the amount of charges calculated using the ANO which is issued in accordance with Clause 13.2. less any payments made.

Illustration: If an access agreement is for 3 years, and in Year 2 the Access Seeker submits its ANO in January, the time by which he can terminate is June (which is 2 months after the next ANO). This avoids the Access Seeker from issuing the April ANO and thus mitigates the Access Provider incurring the future costs). So the calculation would reduce the ANO for the year by the amounts paid and the costs avoided.

[Question: How should this be calculated so that its fair to both Access Providers and Seekers?]

36 Dispute resolution

All disputes arising out of or in connection with the access agreement shall be resolved in accordance with the procedures set out in Article I of the Access Code (as may be modified from time to time).

37 Intellectual property

37.1 Grant of rights to Access Seeker

In the provision of the Access Services there may be the need to provide documents, software, specifications etc to enable the provision of the services to the end-customer. These items are subject to and have intellectual property rights. Consequently these IPRs must be recognised, and access providers must be able to grant these rights to access seekers, either as owner or licensee (with rights to sublicense).

[This can also be made mutually applicable if an access provider requires such rights from access seeker in order to fulfil and perform its obligations under the access agreement by providing the Access Service]

37.2 IP Infringement Indemnity

Parties are to indemnify either party from IP infringement suits if that party uses any IPR granted by this Agreement which use is in accordance with the terms of this Agreement.

38 Confidentiality & Data Protection

38.1 Confidentiality

The information supplied under this Agreement is to be maintained as and treated with confidence. No disclosure to be permitted whether within the organisation or outside. Effect of disclosure – injunctive relief, damages from court without the need to pursue Article I (Adjudication Process) first. Allowable disclosure – this is to enable those disclosures which must be permitted because it is a requirement of law.

38.2 Data Protection

Call traffic records which are recorded and exchanged contain details about firms or persons making calls and call handling. The issue is one of maintaining privacy of the information and particularly its use. In the absence of a Personal Data Protection Law, defined rules on how this is to be handled and treated is to be provided. Essentially the parties agree to abide by and follow the processes and procedures set out Articles 2.1 to 2.3 of Part 2 of the Consumer Code dated October 2003 (as may be amended from time to time). Compliance with the consumer code provides two benefits (a) the process is kept uniform and (b) it minimises licensees from breaching the license condition requiring compliance with the consumer code.

39 Assignment of rights under agreement

No assignment of access agreement without prior consent of the other party, which consent shall not be unreasonably withheld. However the concept of permitted assignments is introduced.

A permitted assignment is one which the agreement sets out when the agreement can be assigned without the need for prior consent from the original party to the agreement to another new party. (Legally speaking this is a novation of the agreement). This permitted assignment is applicable in one circumstance only assignment within the group if the

purpose is to enable reorganisation of the group as a whole, and if the new entity is licensed by the MCMC and acknowledges that it is responsible from hereon after.

[Question: Should permitted assignments be allowed?]

40 Modification of agreement in defined circumstances

Modifications made to Access Code will automatically modify the access agreement. The modifications relate to Article H (T&I and O&M Processes and Procedures), Article I (Adjudication Process), and Article J (Standards). Other modifications of the Code do not affect the access agreement. This allows for the access agreement to be sufficiently flexible to cater for improvements in processes and standards.

41 Cost and expense of preparing agreement

Each party shall bear their own cost of preparing and negotiating this agreement, except that access seekers shall pay the stamp duty imposed on the agreement.

42 Changes in Law & Applicable law

42.1 Changes in Law: [Provision to cater for how changes in law are to be addressed]

42.2 Applicable Law: The law governing the agreement shall be the law as administered in the Federal Territory of Kuala Lumpur, Malaysia. This is to provide consistency because of the different state laws which may affect the agreement particularly where Sabah and Sarawak are involved because they incorporate certain aspects of English law into their laws by virtue of the Civil Law Act. Hence this description avoids possible conflicts in applicable laws.

43 Miscellaneous

43.1 Return of bank guarantee

The bank guarantee to be returned on expiry of the agreement.

[Question: Are there any other miscellaneous provisions to be included?]

44 Special Conditions

The Special Conditions attached to the Access Agreement shall form part of the access Agreement, and shall supersede or supplement (as the case may be) of these general conditions.

Article G Model Terms – Special Conditions

This sets out the proposed model special conditions. Each Section sets out the various special conditions applicable to the a particular Access Service to be provided by an Access Provider. The contents of this Article G are merely indicative of the detail and is meant as a discussion. It is by no means final. The final version will be provided when the definitive Access Code is supplied. Members of the Working Group are requested to provide their input as to those provisions which ought to be included as special conditions for a particular Access Service.

Section G.1 Introduction

1. [Purpose of the special conditions applicable to different types of access requirements]

2. [Method of developing new special conditions for new items]

Section G.2 SC for Infrastructure Facilities

[Access to physical infrastructure without any network components. *Illustration:* ducts, common trenches, towers only, poles.]

The terms of such access in addition to the Model Terms in Article F are to be specified (if any)]

Section G.3 SC for Network Elements

[Set out meaning of “Network Elements” as determined by MCMC in their revision to the Access List.]

The terms of such access in addition to the Model Terms in Article F are to be specified (if any)]

Section G.4 SC for Equal Access

[The provisions in Article 5.12 of MSA shall be applicable.]

[Description of the Access Service being provided for this list item]

Section G.5.1 SC for Fixed Origination

[Description of the Access Service being provided for this list item]

[The subsections listed below are examples of the special conditions which may be relevant to a particular access service]

1. Establishment and maintenance of POI

[Details to be discussed and provided]

2. Location of POI

[Details to be discussed and provided]

- 3. Procedure for determining availability of capacity at POI**
[Details to be discussed and provided]
- 4. Forecasts for provision of this Access Service**
- 5. Facility Ordering Procedure**
- 6. Procedure for determining available capacity (general)**
- 7. Procedure for allocating capacity amongst different access seekers**
- 8. Trouble Reporting**

[Other special conditions]

Section G.5.2 SC for Fixed Termination

[Description of the Access Service being provided for this list item]

- 1. Establishment and maintenance of POI**
[Details to be discussed and provided]

Section G.6 SC for Mobile Origination

[Description of the Access Service being provided for this list item]

- 1. Establishment and maintenance of POI**
- 2. Location of POI**
- 3. Procedure for determining availability of capacity at POI**
- 4. Forecasts for provision of this Access Service**

5. **Facility Ordering Procedure**
6. **Procedure for determining available capacity (general)**
7. **Procedure for allocating capacity amongst different access seekers**
8. **Trouble Reporting**

[Other special conditions]

Section G.6.2 SC for Mobile Termination

[Description of the Access Service being provided for this list item]

1. **Establishment and maintenance of POI**
[Details to be discussed and provided]

Section G.7 SC for Internet Access Service Origination

[Description of the Access Service being provided for this list item]

1. **Establishment and maintenance of POI**
2. **Location of POI**
3. **Procedure for determining availability of capacity at POI**
4. **Forecasts for provision of this Access Service**
5. **Facility Ordering Procedure**
6. **Procedure for determining available capacity (general)**
7. **Procedure for allocating capacity amongst different access seekers**

8. Trouble Reporting

[Other special conditions]

Section G.8 SC for [Other Access Type 7]

Article H T&I and O&M Processes and Procedures

[NOTE: To all MAFB members:

This Article H will reflect the manuals which the operators are currently developing so as not to duplicate work. What will be provided for in the Code is one version of the manuals which all parties are agreeable with the provision that departures would be permitted if agreeable by both Access Provider and Access Seeker.

In addition a provision will be set out that existing manuals will still be enforce regardless of the provisions of this Article H unless parties choose to abide by Article H.]

Section H.1 Introduction

[This article sets out the processes and procedures which are to be adhered to and as referred to by the model terms. The model terms will make a reference to the specific Section and parties are to comply with this process. Should the process need modification then it is merely necessary to change a particular section in the Code rather than all of the Access agreements. This allows the processes to become more efficient as parties gain better experience in handling access related matters.] – The industry is currently working on their T&I and O&M manuals, which we intend to adopt and include into the Code, with little or no modification.]

Section H.2 Forecasting Procedure

Section H.3 Ordering Procedure

Introduction

- 1. Facility Ordering**
- 2. Conveyance Ordering**

Section H.4 Procedure to expediate specific orders

Section H.5 Coordination of migration of customers

Section H.6 Co-location

[NB: Include caging provisions from the MSA]

Section H.7 Procedure for determining available capacity (physical infra & co-lo)

[NB: Should have one procedure at access request stage and during the agreement stage]

Section H.8 Procedure for allocating capacity amongst seekers (physical infra & co-lo)

Section H.9 Procedure for ensuring access to and security of facilities which are the subject matter of access arrangement

[This covers supervised entry]

Section H.10 Physical access to 3rd party premises

[AS obliged to get permission from 3rd party if AP is to get access to that physical premises to complete the set up of the access provision.

Set out time to notify AP, and other processes]

Section H.11 Traffic Measurement & Routing

[Sets out the measurement procedures and reporting procedures]

Section H.12 Testing – Procedures to minimise disruption

Section H.13 Fault and Failure Reporting

[This covers procedures for trouble reporting, notification periods, response time and other details]

Section H.13 Information Exchange

[Sets out the format of information to be exchanged, the types of information and the details to be contained in the

Section H.15 Relationship Management Procedure

[Introduces the article]

1. Inter- partes relationship

[Set out the process of establishing the relationship management between AP and AS only]

Article I Dispute Resolution

Section I.1 Introduction

This Dispute Resolution process is intended to provide an efficient means to address disputes which arise before an access agreement is concluded as well as after its conclusion. The process is meant to be uniform and applicable to all types of disputes which arises in respect of seeking and implementing access arrangements. However it is recognised that certain access disputes may require unique ways to be resolve and these are identified as departures from the common process.

The benefit of having a common process, with departures, enables the industry participants to become familiar with the process, thereby enabling it to be effective.

Section I.2 Applicability

The Dispute Resolution Process set out in Sections I.3 to I.5 of this Article I, shall be applicable in respect of the following disputes or disagreements:

- (a) where Access Seeker and Access Provider are unable to arrive at an access agreement after completing 120 days of negotiation as set out in Section E.3 of Article E (*ante*); or
- (b) differences, dispute, controversy or claim of any kind or nature arising under or in connection with Access Agreement (including disputes as to the creation, validity, interpretation, breach or termination of Access Agreement);
- (c) disagreements with any refusal or rejection made by an Access Provider to an Access Seeker;
- (d) any technical disagreements arising during the implementation of the Access Agreements;
- (e) where any Member considers that any benefit it could reasonably have expected to accrue to it under the Access Code is being nullified or impaired as a result of the application of any measure by another Member;
- (f) such other disputes or disagreements which arise in respect of the application of the Access Code;

This list of disputes may be added, modified or restricted from time to time in accordance with Article M.

For the purposes of this Article the word “**Dispute**” shall refer to the various disputes or disagreements which are set out above.

Section I.3 Dispute Escalation Process

The following dispute escalation process shall be applicable to all Disputes, except as specifically set out in Sections I.5 (Specific Dispute Types).

- (e) If a Dispute arises, then upon the written request of either the Access Seeker or Access Provider, each of them will designate a senior business executive (other than the any executive or representative who was involved in matters leading up to the Dispute) whose task will be to meet for the purpose of endeavouring to resolve the Dispute.

- (f) The designated executives will meet as often as the Parties reasonably deem necessary in order to gather and furnish to the other all information with respect to the matter in issue which the Parties believe to be appropriate and germane in connection with its resolution.
- (g) Such designated executives will discuss the Dispute and will negotiate in good faith in an effort to resolve the Dispute without the necessity of any formal proceedings.
- (h) The specific format for such discussions will be left to the discretion of the designated executives but may include the preparation of agreed upon statements of fact or written statements of position furnished to the other Party.
- (i) The formal proceedings for the resolution of the Dispute under Section I.4 (Adjudication Process) may only be commenced until the earlier to occur of:
 - (i) a good faith mutual conclusion by the designated executives that amicable resolution through continued negotiation of the matter in issue does not appear likely; or
 - (ii) the thirtieth (30th) day after the initial request to negotiate the Dispute.

Section I.4 Adjudication Process

This process shall be applicable upon the exhaustion of Dispute Escalation Process set out in Section I.3 above.

1. Reference to Adjudication Panel

If the parties to the Dispute fail to arrive at a negotiated settlement or resolution of the Dispute within the time limited for doing so as set out in Section I.3 of Article I (above), then either party may refer the Dispute to the Adjudication Panel set out in this Section I.4 of Article I.

A reference to the Adjudication Panel shall be made by the issuance of a notice (“**Dispute Notice**”) specifying the nature of the Dispute and the reason for disagreement.

All Disputes shall be resolved by a single Adjudicator sitting alone.

2. Qualifications of Adjudicators

All Adjudicators shall :

- (a) be appropriately qualified to be able to appreciate the nature of the Dispute that is referred to them;
- (b) not have been employed, retained or engaged by either of the parties to the Dispute in the last 18 months;
- (c) not have been convicted of any serious offence (other than traffic offences), or adjudicated bankrupt;
- (d) [Q. Are there any specific qualifications that members think should be specified?]

3. Appointment of Single Adjudicator

If the Dispute is to be resolved by a single adjudicator, then the parties shall within 28 days of the Dispute Notice, meet to agree on a joint appointment of the sole Adjudicator. If the parties are unable to do so, then at the expiry of the 28 day period, the respondent shall within 14 days submit in writing to the claimant a list of possible adjudicators to be selected by the claimant. The list of adjudicators shall contain sufficient details to enable the claimant to choose the adjudicator.

The claimant shall within 14 days from receipt of the list inform the respondent and MAFB in writing of the choice of adjudicator, and advise the adjudicator of his or her appointment.

Upon appointment the adjudicator shall with despatch initiate the adjudication proceedings following the Rules of the Kuala Lumpur Regional Centre for Arbitration.

4. Decision of Adjudicator and Appeal

- 4.1 All decisions of the Adjudicator shall be in writing, with reasons, and shall be final and binding on the parties to the Dispute.
- 4.2 The parties shall as quickly as possible comply with and give effect to the decision of the Adjudicator. If the parties fail to do so, then either party may commence legal proceedings to enforce the decision of the adjudicator in a court of relevant jurisdiction.
- 4.3 Should either party feel aggrieved by the decision of the Adjudicator, either party may appeal against the decision of the Adjudicator by referring the Decision to the Commission for resolution pursuant to section 151 and Chapter 7 of Part V of the CMA.
- 4.4 The Commission will decide the appeal if it is satisfied that the:
- i) the appeal is not trivial, frivolous or vexatious; and
 - ii) resolution of the dispute would promote the objects in the CMA.

5. Venue for Adjudication

Any such adjudication shall be held at the Kuala Lumpur Regional Centre for Arbitration using the facilities and systems available at that Centre or at such other venue as may be specified by the adjudicator and agreed by the parties hereto.

6. Language

The proceedings shall be conducted in the English or Malay Language, except that witnesses may give evidence in their own languages. In the event that the language is neither English nor Malay, then the party whose witness gives evidence such other language shall bear the cost of the translator.

7. Procedural Matters

The following procedural rules shall be applicable in addition to the procedural rules adopted by the Regional Centre.

- 7.1 **Oral Evidence:** All oral evidence of witnesses shall be to be reduced into writing.
- 7.2 **Interlocutory Relief:** Notwithstanding anything in this clause, a party at any time may commence court proceedings in relation to any dispute or claim arising under or in connection with this Agreement where that party seeks interlocutory relief in relation to intellectual property, confidential information or restraint pending publication of the arbitrators' award.
- 7.3 **Pre-emption rights:** The Adjudicator may exercise the pre-emption rights to determine the adjudication against the party who has failed to comply with any direction made by the Adjudicator including refusing to attend despite being requested to do so.
- 7.3 **Costs:** The parties' costs of, incidental to and arising from the reference of any matter, dispute or claim to adjudication inclusive of any reasonable legal costs irrespective of the outcome of the adjudication shall be decided by the adjudicator as costs of the adjudication.

8. Non-Suspension

The reference of any Dispute to Adjudication and/or the continuance of any Adjudication proceedings consequent thereto shall in no way operate as a waiver or suspension of the obligations of the parties to perform their respective obligations under their respective Access Agreements (if any).

Section I.5 Specific Dispute Types

I.5.1 Definitions

The following words shall have the respective meanings assigned thereto as set out below:

Type 1 Dispute	is a dispute arising because an Access Seeker and Access Provider were unable to arrive at an access agreement within the time limited by Section E.3 of Article E of this Code.
Type 2 Dispute	is a dispute relating to technical matters affecting the provision of access under the terms of an Access Agreement.
Type 3 Dispute	is a dispute relating to the genuineness of any rejection made, whether an Access Agreement exist or not between the parties.
Type 4 Dispute	is a dispute relating to billing matters arising from an access agreement between the parties (Billing Dispute)

I.5.2 Applicable Process for Type 1 Dispute (Negotiation Dispute)

If a Type 1 Dispute arises then the process specified in Section I.3 of Article I (Negotiation in Good Faith) shall NOT be applicable. Instead the parties may initiate the Adjudication Process set out in Section I.4 of Article I above, wherein the Adjudicator may either accept or reject either party's proposed set of provisions or substitute his own set of provisions. The Adjudicator shall in undertaking the selection or substitution adhere to the following principles:

- (a) the selection must be reasonably fair to both access seeker and access provider;
- (b) the selection must enable the National Policy Objectives to be achieved;
- (c) the selection must promote competition but not reduce the incentive to invest;
- (d) the selection must be non-discriminatory in respect of other access seekers which have access agreements with that access provider.

I.5.3 Applicable Process for Type 2 Dispute (Technical Dispute)

If a Dispute Type 2 arises, then instead of utilising the Adjudication Process set out in Section I.4 above, the parties shall engage a technical expert to act as an expert to determine the appropriate technical solution to be implemented. The cost of the technical expert shall be shared equally by the parties; or in the alternative refer the technical dispute to the Technical Forum in order that an appropriate resolution benefiting the industry as a whole can be made. The decision by the Technical Forum shall be binding on the parties and shall be implemented as quickly as possible.

I.5.4 Applicable Process for Type 3 Dispute (Genuineness Dispute)

If a Type 3 Dispute arises, then the following process shall be applied in lieu of the Dispute Escalation Process set out in Section I.3 of Article I (Dispute Escalation Process).

- (a) If an Access Seeker disagrees or questions the genuineness of the rejection by the Access Provider in respect of requests made by an Access Seeker whether pursuant to an Access Agreement or in respect of an Access Request, then the Access Seeker may issue a **Form I.5.4 (Disagreement Notice)**.
- (b) The parties shall meet to agree to the selection of an independent person to verify the genuineness of the rejection. If the parties within 14 days are unable to agree to the appointment of such an independent expert, then the recipient of the Disagreement Notice shall submit a list of possible experts to the sender of the Disagreement Notice, for the sender of the Disagreement Notice to select the

expert. If the recipient fails to furnish such a list then the sender of the Disagreement Notice may initiate the Adjudication Process as set out in Section I.4 of Article I (Adjudication Process), and the cost of the Adjudication Process shall be borne by the recipient regardless of the outcome of the Adjudication Process.

- (c) Upon selection of the independent expert, the parties shall as soon as practicable meet with the independent expert to define the dispute. The independent expert's role is to verify the genuineness of the rejection by the Access Provider to the requests of the Access Seeker.
- (d) If the report by the independent expert is that the rejection is not genuine, then the Access Provider shall immediately comply with the Access Seeker's original request, publish in the local newspaper an apology to the Access Seeker and bear the cost of the independent expert in undertaking the verification.
- (e) If the report by the independent expert is that the rejection is genuine, then the Access Seeker shall immediately make a public apology to the Access Provider and bear the cost of the independent expert in undertaking the verification.
- (f) The parties agree to give the independent expert all necessary assistance and access to the facilities which are owned, operated, leased or tenanted by the parties, as may be requested by the independent expert from time to time.
- (g) At not time shall the independent expert disclose the details of the verification, and shall keep those details confidential for a period of three (3) years thereafter.

I.5.5 Applicable Process for Type 4 Dispute (Billing Dispute)

If a Type 4 Dispute arises, then the following process shall be applied in addition to the Dispute Escalation Process set out in Section I.3 of Article I (Dispute Escalation Process).

If the Type 4 Dispute (Billing Dispute) is referred to the Adjudication Panel, then in such circumstances, the access seeker shall deposit the amount in dispute with an escrow agent or with a bank the terms of release is dependent on the outcome of the adjudication. All interests accrued to the deposited sum shall be payable to the party in whose favour the decision is made.

[Question: Should this be provided for or merely utilise the existing generic process?]

Article J Standards

This Article K is intended to set out the applicable standards in respect of access including quality of service standards which Access Providers are required to comply with. The parties are free to negotiate higher standards than as set out below.

These quality of service standards are applicable for the prices set out in the Mandatory Standard on Access Pricing (Determination No. 1 of 2003) and cannot be reduced.

Section J.1 Technical Standards

General reference to ITU or ETSI non-proprietary standards in respect of [signaling, Network Termination Points, etc etc] which members are to comply, and compliance is with latest standard (as may be varied from time to time). In the event of conflict between ITU and ETSI comply with ITU.

Section J.2 QoS Standards applicable to all forms of access

The quality of service which Access Providers will provide to the Access Seeker is as set out below. These quality of service levels are the standard offerings based on the Mandatory Standard on Access and the Mandatory Quality of Service Standard. It shall be deemed to be incorporated into any Access Agreement executed by the parties. However if an Access Seeker requests for higher or lower quality of service levels than as provided for below, then this may be revised accordingly and set out in the Access Agreement as an appropriate schedule.

Network Quality %	Threshold	Remarks
1.0 Successful Call	94%	
1.1 Answered Call		Number of calls that successfully seized trunk group and are answered.
1.2 Busy Call		Number of calls that successfully seized trunk group and are terminated after connection due to "terminating subscriber busy".
1.3 No Answer Call		Number of calls that successfully seized trunk group and are rejected because either the called device did not answer or the calling party went on-hook during ringing.
1.4. Call Abandon		Indicate the unallocated numbers and incomplete dialling from calling party.
Call Establishment Rate (1.1 + 1.2 + 1.3)	85%	Expressed as the sum of Answered, Busy and No Answer Call that indicate the calls are successfully seize the circuits to the total of call attempt.
2.0 Unsuccessful Call	6%	

Network Quality %	Threshold	Remarks
2.1 Network Congestion	3%	
Internal Congestion (ICONG)	1%	Number of calls offered to a trunk group that successfully overflowed or are rejected in the own switch. (Internal congestion of originating POI and interconnect route congestion that is due to insufficient capacity to support the current traffic).
External Congestion (OCONG)	2%	Number of calls that, after a trunk group is seized, are rejected upon receiving a backward signal indicating far end congestion occurred within the terminating POI and the subsequent terminating Network.
2.2 Network Fault	3%	
External Technical Irregularities/Error (ETI)	2%	Calls that being successfully connected through the Network are rejected upon detection of technical irregularities or faults in the far end radio subsystem in the other Network Element.
Internal Technical Irregularities/Error (ITI)	1%	Calls that being successfully connected through the Network are rejected upon detection of technical irregularities in the originating Network

Section J.3 Specific QoS Standards

The following quality of service standards are applicable to specific types of activities or services as identified below. These quality of service standards are set out by the Commission in the respective Determinations as identified in the respective Sub-Sections below.

These quality of service levels identified herein is an undertaking by the Access Provider that the provision of an access service to the Access Seeker will enable the Access Seeker, to whom the Determinations identified below are applicable, to meet those mandated quality standards.

For the purposes of clarity, the definitions of terms as used below shall have the same meaning as set out in the respective Determinations.

J.3.1 Public Switched Telephone Network Service

The quality of service standards set out in Determination No. 1 of 2002 shall be applicable in respect of public switched telephone network service quality as may be varied or substituted from time to time. All Access Providers shall ensure that the access services provided to the Access Seekers will enable the Access Seekers to meet the quality of service standards set out in the Determination No. 1 of 2002 (as may be varied from time to time).

J.3.2 Public Cellular Service

The quality of service standards set out in Determination No. 2 of 2002 shall be applicable in respect of public cellular service quality as may be varied or substituted from time to time. All Access Providers shall ensure that the access services provided to the Access Seekers will enable the Access Seekers to meet the quality of service standards set out in the Determination No. 2 of 2002 (as may be varied from time to time).

J.3.3 Dial-Up Internet Access Service

The quality of service standards set out in paragraph 12 of Determination No. 3 of 2002 (standards on internet dial up performance) shall be applicable in respect of dial-up internet access service quality. All Access Providers shall ensure that the access services provided to Access Seekers will enable the Access Seekers to meet the quality of service standards set out in paragraph 12 of Determination No. 3 of 2002 (as may be varied from time to time).

J.3.4 Public Payphone

The quality of service standards set out in Determination No. 3 of 2003 shall be applicable in respect of public payphone service quality as may be varied or substituted from time to time. All Access Providers shall ensure that the access services provided to the Access Seekers will enable the Access Seekers to meet the quality of service standards set out in the Determination No. 3 of 2003 (as may be varied from time to time).

J.3.5 Digital Leased Lines

The quality of service standards set out in Determination No. 4 of 2003 shall be applicable in respect of all digital leased lines provided by NSP. All Access Providers (who hold an NSP license) shall ensure that the access services provided to the Access Seekers will meet the quality of service standards set out in the Determination No. 4 of 2003 (as may be varied from time to time).

J.3.6 Broadband Service

The quality of service standards set out in Determination No. 5 of 2003 shall be applicable in respect of only wired broadband services provided by a licensee. All Access Providers who provide access services to an Access Seeker shall ensure that these access services provided meet the quality of service standards set out in the Determination No. 5 of 2003 (as may be varied from time to time).

Section J.4 Conflict Resolution

J.4.1 ITU

If there is a conflict between ITU or ETSI non-proprietary standard and QoS or standards in the Technical Code, then such conflict shall be resolved by the following process:

[set out the process]

J.4.2 Between Section J.2 and Section J.3

Should any conflict between the standards set out in Section J.2 and Section J.3 below arise, then the standards set out in Section J.3 shall prevail as those standards are issued as Determinations by the Commission.

Where a member identifies such a conflict, such member shall inform the Forum and request that the Forum seek clarification from the Commission to resolve the conflict for future references. Such resolution may result in an amendment to this Code.

Section J.5 Transition

Once any of the standards are change, members must comply but would need time to do so because they need to make sure their equipment etc meets those standards. It cannot be done immediately but not too long either. Therefore this transition provision will set out the time period for compliance at a maximum of **[6]** months.

Section J.6 Provision of Undertaking

In accordance with section 110(1) CMA, a licensee may provide an undertaking in respect of higher quality of service levels than as specified in this Code, including higher charges. The undertaking shall provide the terms and conditions for giving the undertaking and the model terms applicable to the quality of service levels identifying the differences from the Model Terms in Articles G and H of this Code.

Article K Prices & Cost Methodology

This Article K is intended to set out the applicable prices for access as provided for in the Mandatory Standard on Access Prices (Determination No. 1 of 2003) as may be varied from time to time; the prices for non-regulated items (i.e. non-access list items) which are ancillary to a service or facility access, and the design of a methodology that allows for the fair recovery of one-off cost incurred by an Access Provider to meet the request of the Access Seeker.

Section K.1 Access Prices

All Access Providers shall price the access list items in accordance with the provisions of the Mandatory Standard on Access Prices (Determination No. 1 of 2003) as may be varied from time to time.

Section K.2 Non-regulated Prices

K.2.1 Definitions

For the purposes of this Article K the following words shall have the definitions as set out:

[set out definitions to be used. Particular emphasis to be given to access terms definitions so that there is consistency]

K.2.2 Provision of Ancillary Service by Access Providers

Should any access list item require Ancillary Service to be provided by the Access Providers or its authorised third parties or employees or utility company, to enable the access obligations to be performed as set out in the Access Agreement, then the cost of such Ancillary Service shall be chargeable to and payable by the Access Seeker.

The cost shall be determined by mutual agreement and shall be subject to verification by the Access Seeker or its auditor (the cost of such verification shall be borne by the Access Seeker). The cost shall be identified as a unit rate (where possible) and shall be set out in the Access Agreement.

K.2.3 Provision of Ancillary Service by Access Seekers

Should any access list item require Ancillary Service to be provided to the Access Provider by an Access Seeker or its authorised third parties or employees or utility company, to enable the access obligations to be performed as set out in the Access Agreement, then the cost of such Ancillary Service shall be chargeable to and payable by the Access Provider.

The cost shall be determined by mutual agreement and shall be subject to verification by the Access Provider or its auditor (the cost of such verification shall be borne by the Access Provider). The cost shall be identified as a unit rate (where possible) and shall be set out in the Access Agreement.

Section K.3 One-Off Cost Recovery

[For discussion first – no recommendation being made by us]

[This sets out what are the heads of costs (or cost items) which are to be taken into account when this cost is put to the access seeker. No values are specified against each cost item. Procedure to address what happens if parties do not agree to the cost assessment. Finality of decisions.

1. Identify relevant cost items
 - a. Fixed costs (or capital expenditure?)
 - b. Recurrent costs
 - c. Conditioning costs
 - d. Maintenance costs
 - e. Other costs
2. For each cost item, identify nature of costs incurred by Access Provider
 - a. Costs incurred for installation of specific (i.e. Access Seeker-specific) asset/equipment
 - b. Costs incurred for installation of 'customised' asset/equipment
 - c. Costs incurred for installation of general (i.e. non-specific) asset/equipment
3. Specify method of determining cost-recovery charges:
 - a. Assessment of risk-adjusted costs
 - b. Calculation of usage (i.e. rental) component of charges, where appropriate
 - c. Calculation of cost-based component of charges, where appropriate

[Comment: Distinction between customized and general asset/equipment is to inform whether risk adjusted costs are to be recovered by way usage and/or cost-based charges (e.g. annual lease); or by both way of a combination of both usage and cost-based charges. May need a definition of 'specific asset' as an asset with no or close to zero alternative use; 'customised asset' as an asset with significant alternative use.]

4. Dispute resolution process for cost assessment would be as per Article I of the Code.]

Article L. Code Compliance

Section L.1 Introduction

- L.1.1 [Although by its very nature the Code is stated to be voluntary, the MAFB has resolved that the Code shall be binding on all members of the Forum. The MAFB requires that all members apply the Code provisions in its entirety without exception, so that there can be certainty in the application of the Code. [The Code is also aimed at creating a level playing field in the access arena, and hence allowing deviations will create a lot of uncertainty]
- L.1.2 The MAFB feels that too many departures to the Code will create the same scenario as the one currently existing under the different ARDs and Access Agreements. For an Industry Code to have efficacy, there has to be certainty at all times, and the Code has to be regarded as if it is the Mandatory Standard in its application.
- L.1.3 [Each Licensee will ensure that there are internal compliance policies and procedures within their respective organizations to give effect to the Code and the Access Agreement obligations.]

Section L.2 Departure from Model Terms

- L.2.1 Notwithstanding the above, should any licensee choose to depart from utilising any part of the provisions of this Access Code, then both parties are required to submit a memorandum in the Form set out in Appendix J.6 hereto setting out:
- (a) the provisions which are different from the Model Terms;
 - (b) the reasons why the model terms were changed;
 - (c) [other reasons/justification]

[The rationale is to require departures from the model terms to be subjected to rigorous and cogent justification so that it is incumbent on parties to carefully consider their actions. However, Access Providers are at liberty to provide excess on terms that exceed or more favourable to that set out in this Code]

[A copy of the memorandum is to be sent to MAFB because it will enable MAFB to determine if the Model Terms ought to be changed based on the new provisions and they can on their own initiate the Modification Process in Article E.]

[The effect of the Modification is that future access agreements will contain such provisions.]

[This way the likelihood of departures and therefore non-compliance with the code will be reduced.

[Reference to Article M.4 – modification]

Section L.3 Compliance Monitoring

- L.3.1 [Sets out the monitoring process for MAFB to ensure that all Licensees comply with the Code. A formal process will be set out, but MAFB feels that an informal or incidental monitoring will be the norm. MAFB does not envisage standing over the shoulders of the Licensees to ensure that every part of the Code and the Access Agreement is complied with – that will be the task of the Parties to the Access Agreement. Regardless MAFB may retain an oversight role with regard to compliance to the Code]

L.3.2 [Compliance monitoring will be an on-going process, even without a formal procedure, compliance issues will surface on a continuous basis on these occasions, where a disgruntled Party may lodge a complaint to the MAFB or initiate the dispute resolution procedures as set out in the Code :

- (a) each time a new Access Request is made by the Access Seeker ;
- (b) when interpretational issues are raised by either party ;
- (c) when negotiating the Access Agreement ;
- (d) in the course of providing Access (relating to on-going obligations in provisioning, and performance issues).

Apart from the above, the MAF may formally request information from the relevant operator on any matter concerning access covered under the Code.

Article M Code Administration

Section M.1 Introduction

- M.1.1 The MAFB will administer this Voluntary Access Code (and all other Sub-codes or amendments thereto) developed by the MAFB and registered with the Commission.
- M.1.2 Since the Code is a collective product of all the members of the MAF, those subscribing to it have expressly undertaken a commitment and collective responsibility to ensure that the Code is applied in an fair and equitable manner, and to uphold the principles of self regulation as permitted by the CMA.

Section M.2 Transitional Requirements

[Deals with status of existing registered access agreements under the Code.]

- M.2.1 The new access agreements under the MSA between the Licensees, were transitioned, concluded and registered with the Commission in **May of 2004**.
- M.2.2 [The Code is expected to be registered in May 2005, by which time only part of the term of the current access agreements will have expired. Considering that another round of re-negotiations within a year may not be practicable or even wasteful, the MAFB will consider the following options in dealing with these access agreements after the Code comes into force :
- (a) Allow the current access agreements to run its course until they expire as per the current access agreement. This will be offered on an optional basis to the Parties to elect if they want to stay on the current agreements or to move over to the new Model Terms under the Code. (The issue will be, if the MSA is suspended from the time this Code is registered, can the access agreements be considered stand alone instruments that can survive without the MSA ?)]
 - (b) Alternatively, can the MSA be permitted to remain effective until the last of the current access agreements expire ? The issue is, will there be confusion in the market in a dual code system created by the MSA and the MAFB's Code ?
 - (c) All members may be mandated to review the current access agreements and bring them in line with the new Industry Code, say within a six month period after the Code is registered.
 - (d) New Access Seekers will apply for Access under the Code from the date it is registered.
 - (e) All renewals and extensions of the current Access Agreements will be under the Code.

Section M.3 Clarifications of Code Items

- M.3.1 **Interpretation of the Code.** It is anticipated that in the course of implementing the Code, Licensees will encounter interpretational and other issues with the Code. The MAFB as the industry forum charged with developing and managing the Code (which in fact is a member's effort), will be best suited to provide guidance or clarification on the Code.
- M.3.2 [**Minimizing Dispute.** Although there is a dispute resolution procedure within the Code, it is unlikely that each and every problem will be suitable for reference to the dispute

- resolution procedure. Sometimes it may only be an interpretational problem that can be easily resolved by the MAF through its clarification process.]
- M.3.3 [Is there a risk in MAFB undertaking Clarifications ?
- (a) **Risk of Deregistration.** Consider the risk of the Commission viewing the clarification process as showing up the inadequacies of the Code (if any), and thus causing the Code to be deregistered. It is an extreme measure, but may be invoked if there are far too many clarifications. If that were to happen, then the MSA (in its revised form) may be resurrected by the Commission to take the place of the Code. Thereafter the existence of the MAF will be in question.]
 - (b) **[Would Clarification amount to Legal Opinions ?** If MAFB takes on this role of providing clarifications in the form of interpretation of the Code, there is a possibility that such clarification may be deemed to be legal advice. Should all issues be left to the parties to be resolved by themselves or through the dispute resolution processes ?]
- M.3.4. [**Clarification Process.** Sets out the process by which Code Items are to be clarified, including the type of issues that can be forwarded to the MAF for clarification. It will contain the timelines for the various activities including responses from the MAF. MAF will not consider matters if they are already subject of a dispute resolution procedure.]
- M.3.5 [**Decisions Pursuant to Clarifications.** Decisions of the MAF will be embodied in an explanatory memorandum issued by the MAFB. All decisions will be published in the MAFB website (subject to confidentiality considerations), so that a database of issues and decisions can be maintained as precedents.
- M.3.6 [**Clarification Committee in MAFB.** There will be constituted a committee to deal with the various requests for clarification, drawn from a pool of members maintained by the MAFB.
- M.3.7 [**Effect of clarification** – If a clarification decision is handed down by the MAFB, it could also trigger a Code change (in accordance with Section M.4 below), if the criteria for such change is met.

Section M.4 Modifications and Amendments of Code Items

- M.4.1 **Rationale.** The Code is a living document. Whilst it maintains a certain amount of certainty, it is also subject to modifications and amendments (“Code Modifications”) as dictated by the needs of the industry. Such modifications can come about through :
- (a) outcomes of Clarification decisions as set out in Section M 3,
 - (b) initiated by members, or
 - (c) initiated by the MAFB board
- M.4.2 [**Code Modification Process.** Sets out the process by which Code Items are modified or amended including a standard form to initiate the process. It will spell out who can initiate such Code Modifications. There will a stringent process to determine if a Code Modifications should be recommended by the Code Modification Panel.]
- M.4.3 [**Effect of Code Modifications.** Sets out the effect on existing Access Agreements, but following the general principle is that existing arrangements should not be altered or varied retrospectively by subsequent Code Modifications]

M.4.4 **The Code Modifications Panel (“Panel”)**. This section will set and the process by which the panel is constituted and formed to hear a clarification or modification request,:

- (a) the purpose of the Panel ;
- (b) the membership of the Panel;
- (b) appointment of technical experts and their qualifications ;
- (b) the powers of the Panel ;

M.4.5 **Decisions of Panel**. How decisions are made and the effect of the decisions on prospective access agreements or previous access agreements. Decisions are effectively a change from date of decision onwards on all access agreements.

- M.4.6 **Standard Forms**
- (a) To initiate the Code Modifications process
 - (b) To deliver the decision

Section M.5 Removal of items from Access List – Effect on the Code

M.5.1 **Rationale**. It is likely that during the validity of the Code, certain Access List items may be removed, varied or replaced by Commission. This section deals with processes that may be invoked to deal with such changes, since the Code only deals network facilities and network services on the Access List.

M.5.2 **Process**. [Parties can choose to let existing access agreement continue or can re-negotiate it immediately. However must migrate to new agreement (non-access agreement) at first available opportunity. Non-access list items should not form part of the Access Agreement but can be included as a schedule or appendix to Access Agreements.

The process will take into account : [non-exhaustive list]

- (a) effect of removal on the Parties from the Access Agreement;
- (b) number of Access Seekers affected by the removal, and uniform application of the process to all affected;
- (c) notice to be given to the Access Seekers ;
- (d) availability of alternative network facility or network service.
- (e) whether the Access Provider provides for itself the same removed access list items.

Article N Major Code Review

[The purpose of this Section is to outline the circumstances under which the Code may be reviewed by the MAFB. To maintain the efficacy of the Code, periodic reviews are necessary after a pre-determined period, or when there exists circumstances that affects the access regime warranting a review .]

N.1 General Review

N.1.1 The Code will be subjected to a major review once every three (3) years. MAFB shall undertake a major review of this Code on the 3rd anniversary of either the registration date of the Code by the Commission or the commencement date of the Code.

N.2 Specific Review

Apart from periodic reviews, the MAFB may review the Code, and make amendments, modifications on the occurrence of one or more of the following events (non-exhaustive) :

N.2.1 Upon a direction¹⁵ or determination or declaration of the Minister.

N.2.2 Upon a direction¹⁶ or determination of the Commission.

N.2.3 Upon revocation of the current Code by the Commission¹⁷.

N.2.4 Upon the removal of a network Service or network facility from the Access List.

N.2.5 Where a matter has arisen during the dispute resolution procedure or during code clarification, which may alter an existing general principle on access.

N.2.6 Technological changes that which affect current general principle on access .

N.3 Request for Review by Members of MAF

N.3.1 **Request for Review.** Apart from the initiative of the MAFB Board, requests for amendments or review to any part of the Code may be entertained from other members of the MAF. Such requests will have to be submitted in writing using the prescribed form, specifying :

- (a) the provision(s) of the Code that such Member seeks to have amended or modified;
- (b) full justification for proposing the amendment or modification, with appropriate technical data to support the request;

N.3.2 **Assessment of Request for Review.** In assessing a request for review, the MAFB will take into account the following matters :

- (a) whether a review/modification is justified based on the data submitted by the requester, and if it will benefit all the members as a whole ;

¹⁵ Section 7 CMA 1998

¹⁶ Section 51 CMA 1998

¹⁷ Section 101 CMA 1998

- (b) whether such a review can be deferred for the next periodic review;
- (c) whether the proposed modification will be acceptable to the Commission.
- (d) the effect of the review on existing Access Agreements.

N.4 Review Process

N.4.1 [This section will set the review process to be followed by the MAF which will, inter alia include :

- (a) Notice to Members to announce the proposed review (with sufficient details for assessment by members)
- (b) Timelines for responses and comment on the review by Members
- (c) Internal review by the MAFB Board
- (d) Acceptance or rejection of the proposed amendment. If accepted, the Code will be amended pursuant to Section M4 above.]

N.5 Consequential Amendments to Existing Access Agreements

[This section will set out the process for dealing with the consequential amendments to existing Access Agreements. The Parties may be given the liberty to mutually agree to adopt the amendments (which will preserve the sanctity of contracts), at least for the term of the current Access Agreement. Renewals will then be subject to the Amended Code.]

Appendices

The following are the appendices referred to in the Access Code.