



OPTICAL FIBER CABLE WHOLESALE TARIFF REGULATORY PROCEDURES 2019

ATRA – PROCEDURE – 003

Afghanistan Telecommunications Regulatory
Authority (ATRA)

ISLAMIC REPUBLIC OF AFGHANISTAN

June __, 2019

Table of Contents

1	PART I: PRELIMINARY.....	1
1.1	Preamble.....	1
1.2	Purpose.....	1
1.3	Scope of Application.....	1
1.4	Terms and Definition.....	1
2	PART II: PRICE CAP APPLICATION AND MANAGEMENT.....	2
2.1	Price Cap Formula or Basis.....	2
2.2	Price Cap Model.....	2
2.3	Request for Information.....	2
2.4	Request for Confidential Treatment of Information.....	3
2.5	Standards Governing Grant of Confidentiality Treatment.....	3
2.6	Standards Governing Confidentiality.....	4
2.7	Denial of Confidential Treatment.....	4
2.8	Review of ATRA’s Decision Regarding Confidentiality.....	4
2.9	Procedures Governing Reconsideration.....	5
2.10	Judicial Review of ATRA Decision on Reconsideration Request.....	5
2.11	Dispute Resolution.....	5
2.12	Publication of Tariff.....	6
2.13	Review of Price Cap.....	6
2.14	Approval of Price Cap.....	6
3	PART III: INVOICING AMONG PARTIES.....	7
3.1	Payment.....	7
4	PART VII: FINAL PROVISIONS.....	8
4.1	Application.....	8
5	ANNEX I: TERMS AND DEFINITIONS.....	9

1 PART I: PRELIMINARY

1.1 Preamble

The Telecom Law of the Islamic Republic of Afghanistan (“Afghanistan”), pursuant to Chapter 2, Article 2; Chapter 6, Articles 19 & 20; and Chapter 7, Articles 21 & 22 gives the Afghanistan Telecommunications Regulatory Authority (ATRA) the responsibility to regulate the telecom sector of Afghanistan. Article 22 of the Telecommunications Law obligates ATRA to institute and maintain appropriate measures for the purpose of preventing Service Providers from engaging in anti-competitive practices, including the identification of telecommunications markets, determining dominance and abuse of dominance in the OFC markets and responding to anti-competitive agreements.

1.2 Purpose

These Regulatory Procedures are designed to set out the principles and procedures which ATRA will follow in reviewing the competitive conditions within the OFC market in Afghanistan. These Regulatory Procedures contain guidelines explaining the obligations resulting from the implementation by ATRA of the applicable competition-related provisions of the Telecom Law, how to fulfill them, and the procedures that ATRA will apply in connection therewith.

1.3 Scope of Application

These Regulatory Procedures apply to all licensed OFC Service Providers leasing or selling capacity, active and inactive optical fiber infrastructure to other Service Providers.

1.4 Terms and Definition

Terms and definitions used in these Regulatory Procedures are contained in ANNEX I, the Telecom Law or related regulatory procedures. For ease of doubt, in the event of a conflict between definitions provided in these Regulatory Procedures and the Telecom Law, the definitions in the Telecom Law will apply.

2 PART II: PRICE CAP APPLICATION AND MANAGEMENT

2.1 Price Cap Formula or Basis

The formula which ATRA shall use to calculate price caps shall take into consideration the following cost components:

- a) Amortization of total investment in its OFC infrastructure (including debt, equity, license fee, taxes);
- b) Cost of capital (Weighted Average Cost of Capital);
- c) License fees payable to ATRA;
- d) Cost of investment;
- e) Operating and Maintenance (O&M)
- f) Licensed Operators' Running Costs
- g) Other costs (accounting, auditing, legal support, technical engineering, etc.);
- h) Training, consulting and engineering services;
- i) Annual license fee, defined by ATRA;
- j) Contribution by Licensed Operators to the Telecommunications Development Fund (TDF);
- k) Costs resulting from obligations relating to environmental and social impact mitigation and monitoring, if any;

2.2 Price Cap Model and Price Cap Values

- 2.2.1 A suitable Price Cap Model for wholesale OFC services in Afghanistan shall be developed by ATRA, taking into account the parameters indicated in section 2.1 and careful analysis of market data after the introduction of competition.
- 2.2.2 A copy of the Price Cap Model used, among other factors, to assist ATRA in determining the Price Caps may be reviewed at ATRA's offices.
- 2.2.3 As the private optical fiber operators have yet to launch commercial services, ATRA does not prescribe price cap values at this stage and gives freedom to market forces to determine tariff and terms and conditions for various services like selling /leasing duct, dark fiber, lease lines or other services.

2.3 Request for Information

- 2.3.1 All information submitted to ATRA by a Service Provider with pursuant to the Telecom Law, these Regulatory Procedures, or any rules, decisions, orders, notices or guidelines issued by ATRA, must be accurate, complete and responsive to ATRA's request.
- 2.3.2 Service Providers must respond promptly and completely to any request from ATRA for information, and in any event within a period which is no longer than twenty-one (21) days from the date of the request unless ATRA directs otherwise.
- 2.3.3 Any failure by a Service Provider to comply with any ATRA's information request, and any destruction, disposal, falsification or concealment of requested documents or

information, constitutes a contravention of these Regulatory Procedures for which ATRA may take enforcement action under these Regulatory Procedures or the Telecom Law.

2.4 Request for Confidential Treatment of Information

The clauses below relate to request for confidential treatment of information and are in pursuant to the Telecom Law, the Confidentiality, Dispute, and Compliance Regulatory Procedures, these Regulatory Procedures or other related rules, decisions, orders, notices or guidelines.

- 2.4.1 A Service Provider submitting information to ATRA, pursuant to the requirements of the Telecom Law, the Confidentiality, Dispute, and Compliance Regulatory Procedures, these Regulatory Procedures or other related rules, decisions, orders, notices or guidelines may request that the information submitted be treated as confidential. All information for which a Service Provider is seeking confidential treatment must be provided separately from the documents which do not contain confidential information and be clearly marked “Confidential”. ATRA may not accept requests to treat all information submitted as “Confidential” if all such information does not warrant confidentiality hereunder. The Party requesting Confidentiality should take reasonable measures to minimize the amount of information for which they request Confidentiality treatment.
- 2.4.2 In the absence of a properly supported Confidentiality request, all information submitted to ATRA shall be deemed to be appropriate for disclosure in pursuant to the Telecom Law, the Confidentiality, Dispute, and Compliance Regulatory Procedures, these Regulatory Procedures, other related rules, decisions, orders, notices or guidelines.

2.5 Standards Governing Grant of Confidentiality Treatment

- 2.5.1 In deciding whether to grant a request for confidential treatment, ATRA will consider the following factors:
- a) Whether the information for which the Requesting Party requests Confidentiality treatment contains commercially sensitive information (including information that is subject to a pre-existing non-disclosure agreement with a third party); or
 - b) Whether the disclosure of the information would have or would be likely to have a material adverse impact on the Requesting Party; or
 - c) Whether the disclosure of the information is, on balance, required in the public interest; or,
 - d) Any combination of the above factors.
- 2.5.2 ATRA generally considers information to be commercially sensitive if:
- a) The Requesting Party has demonstrated that disclosure would cause harm to the Service Provider, including by providing an inappropriate commercial benefit to the Service Provider’s competitors or if substantially similar information about the Service Provider’s competitors is not publicly available; or
 - b) The information describes the Requesting Party’s business procedures, technical or financial matters, information proprietary to the Service Provider, and practices, plans or its assessment of market conditions or similar matters are likely to be commercially sensitive.

2.6 Standards Governing Confidentiality

- 2.6.1 All information for which ATRA grants a request to treat as confidential under ATRA's Confidentiality, Dispute, and Compliance Regulatory Procedures:
- a) Must be provided by the Requesting Party only to ATRA, which may consider the information for purposes of resolving any matter under these Regulatory Procedures or any related rules, decisions, orders or notices issued by ATRA, but which shall restrict access and disclosure to ATRA personnel or contractors involved in resolution of the matter;
 - b) Will be excluded from all documents which are either provided to the other Parties, or refrain from publishing, or be made publicly available; and
 - c) Will be protected by ATRA personnel or contractors against improper disclosure or use, to the extent reasonably possible.

2.7 Denial of Confidential Treatment

- 2.7.1 If a request for confidential treatment is rejected by ATRA, it will provide written reasons for its decision.
- 2.7.2 If the Requesting Party fails to take either of the actions described in sub-sections 2.4.1, 2.4.2, and 2.5 of these Regulatory Procedures within the specified period, ATRA will deem the Requesting Party to have withdrawn its request for confidential treatment of the information. In this case ATRA may consider, and where it deems appropriate, disclose the information provided.
- 2.7.3 This section 2.7 shall not affect the general obligation on Service Providers or other parties to interconnection proceedings to provide complete and accurate information to ATRA
- 2.7.4 ATRA may, in its sole discretion, make a preliminary decision on a request for Confidentiality treatment, after which the Requesting Party may provide additional information to assist ATRA in issuing a final decision.

2.8 Review of ATRA's Decision Regarding Confidentiality

2.8.1 Right to Review

- 2.8.1.1 Any Requesting Party that has a confidentiality request rejected pursuant to Section 2.3 may:
- a) Submit a request to ATRA for reconsideration ("the Reconsideration Request") within fourteen (14) days of receipt by the Requesting Party of the statement of reasons for the rejection;
 - b) Submit a revised confidentiality request, that takes account of ATRA's determination (including by reducing the scope of the confidentiality request) within fourteen (14) days of receipt by the Requesting Party of the statement of reasons for the rejection;
 - c) In the event that a Reconsideration Request is submitted and ATRA does not change its rejection of confidential treatment following the Reconsideration Request, the Requesting Party may file for Judicial Review against ATRA's decision within sixty (60) days of receipt of ATRA's denial decision; or

- d) In the event that a Reconsideration Request is not submitted, file for a Judicial Review within sixty (60) days of receipt by the Requesting Party of ATRA's denial for Confidentiality, ATRA's decision shall stand.
- 2.8.1.2 When filing a Judicial Review, the Requesting Party shall copy ATRA on all correspondence and materials relevant to the Judicial Review.
- 2.8.1.3 ATRA will take reasonable steps to notify all relevant parties in the event it receives a Reconsideration Request or on becoming aware that a decision is under Judicial Review.
- 2.8.1.4 A Party may file for a Judicial Review of any matter that is the subject of a Reconsideration Request. In such a case, the Party must immediately notify ATRA in writing of the Judicial Review at which time the Reconsideration Request shall be stayed pending a final determination under the Judicial Review.
- 2.8.1.5 ATRA will not publicly disclose, and will protect pursuant to Section 2.6 herein, all information provided by a Service Provider pursuant to a request for confidentiality under Section 2.4.1, 2.4.2, and 2.5 herein until such time as the deadline for the submission of a Reconsideration Request and any subsequent Judicial Review has passed under this Section 2.8 such that ATRA's decision with respect to such confidentiality request is final pursuant to Section 2.8.1.4 herein and no longer subject to reconsideration or judicial review.

2.9 Procedures Governing Reconsideration

- 2.9.1 Service Providers and other Parties entitled to relief under these Regulatory Procedures are expected to present all relevant facts and arguments to ATRA before it renders its decision in response to a Confidentiality request. A Party may not present new facts, or raise new arguments in a Reconsideration Request unless the Party, for reasons which are acceptable to ATRA:
- 2.9.1.1 Could not have presented the facts or raised the arguments before ATRA rendered its decision; or
- 2.9.1.2 Could not have anticipated the importance of the facts or arguments prior to seeing ATRA's statement of reasons for the rejection,
- 2.9.2 ATRA will issue its decision on the Reconsideration Request within thirty (30) days of the date of filing the Reconsideration Request

2.10 Judicial Review of ATRA Decision on Reconsideration Request

- 2.10.1 A Service Provider may not ask ATRA to reconsider any decision issued in response to a Reconsideration Request. However,
- 2.10.2 The Requesting Party may file for a Judicial Review in court of the decision of ATRA issued in response to a Reconsideration Request within sixty (60) days of the decision.

2.11 Dispute Resolution

In the event of any Dispute arising between the Parties or ATRA relating to or arising out of these Regulatory Procedures on Price Caps, including but not limited to the implementation, execution, interpretation, rectification, termination or cancellation of this Agreement, the Parties

shall use their reasonable endeavors to resolve such Disputes. In the event that all efforts among the Parties fail to materialize in a settlement of said Dispute, one or both Parties shall have the right to invoke ATRA's Confidentiality, Dispute, and Compliance Regulatory Procedures.

2.12 Publication of Tariff

This provision shall be applied pursuant to Chapter 6, Article 19 of the Telecom Law of the Islamic Republic of Afghanistan.

2.13 Review of Price Cap

2.13.1 This Price Cap regime shall remain in force until:

2.13.2 A new Price Cap is published by ATRA; or

2.13.3 A material change occurs in the Telecom Law, these Regulatory Procedures or other relevant laws.

2.13.4 This Price Cap regime may be reviewed or amended in order to comply with applicable laws and regulations after a public consultation process. ATRA reserves the rights to impose the provisions and obligations of this Price Cap regime.

2.14 Approval of Price Cap

2.14.1 This provision shall be applied pursuant to Chapter 6, Article 19 of the Telecom Law of the Islamic Republic of Afghanistan.

3 PART III: INVOICING AMONG PARTIES

3.1 Payment

- 3.1.1 Subject to the provisions stated below, all charges are due and payable by the Due Date. If the Billed Party initiates a Billing Dispute with respect to an amount due under an invoice, but such Billing Dispute is not resolved before the Due Date; and the amount subject to Dispute is less than or equal to a Tolerable Discrepancy, then the total amount of the invoice is due and payable on the Due Date. If the Billed Party initiates a Billing Dispute with respect to an amount due under an invoice, but such Billing Dispute is not resolved before the Due Date; and the amount subject to dispute is more than a misstatement or Tolerable Discrepancy, then the balance amount of the invoice that is not subject to the Billing Dispute is due and payable on the Due Date.
- 3.1.2 Notwithstanding any pending Billing Dispute, if either Party defaults in the payment when due of any sum payable by that Party under this agreement its liability shall be increased to include interest on such sum from the Due Date until the date of actual payment (both before and after judgment) at the annual rate which is five (5) percentage points above the base rate of Afghanistan Central Bank during such period. All such interest shall be calculated on the basis of the actual number of days elapsed, over a Calendar Year and compounded at monthly rates. All applicable Taxes and Surcharges, Government royalties and fees will be included in the charges. The Billed Party shall be liable for those charges.

4 PART VII: FINAL PROVISIONS

4.1 Application

- 4.1.1 These Regulatory Procedures shall be known as the Optical Fiber Cable Wholesale Tariff Regulatory Procedures (Procedure 003) of 2019, and shall come into effect based on asymmetric enforcement dates as follows:
- a) These Regulatory Procedures shall come into effect and enforced on the incumbent Operator six (6) calendar months as of the date on which they are adopted by ATRA; and
 - b) shall come into effect and enforced on all other OFC Operators exhibiting Significant Market Power (SMP) twelve (12) calendar months as of the date on which they are adopted by ATRA.
- 4.1.2 Application of the Price Cap model in section 2.2 shall be deferred until:
- a) ATRA verifies that reliable market information for the cost components in section 2.1 is available regarding wholesale OFC services, or
 - b) ATRA assesses that the introduction of competition in wholesale OFC services does not result in substantial price decreases.

5 ANNEX I: TERMS AND DEFINITIONS

“access” means the making available of telecommunications facilities and equipment, or services or both facilities and services by one Service Provider to another Service Provider, for the purpose of providing interconnection, and includes access to network elements and associated facilities, access to physical infrastructure including buildings, ducts and masts, and access to network software systems including operational support systems;

“Dominant Service Provider” means a Service Provider designated to have significant market power or otherwise to be dominant in one or more telecommunications service markets pursuant to the Telecom Law

“Interconnection” means the physical and logical linking of telecommunications networks used by the same or a different Service Provider in order to allow the users of one Service Provider to communicate with users of the same or another Service Provider, or to access the facilities and/or services of another Service Provider. For the purposes of the Telecom Law and Regulatory Procedures, the term interconnection includes ‘access’, meaning the making available of telecommunications facilities or services by one Service Provider to another for the purpose of providing telecommunications services;

“Interconnection Dispute” means a dispute between two or more parties who are Service Providers, regarding the reasonableness of a request for interconnection under these Regulatory Procedures.

“Service Provider” means a person or entity under permit or license by ATRA that provides a telecommunications service to the public or that owns or operates a telecommunications network used to provide telecommunications services to the public;

“Significant Market Power” means a position of economic strength, acting either individually or jointly with others, permitting a Service Provider to act to an appreciable extent independently of customers or competitors, or otherwise constituting a position of dominance in one or more identified telecommunications service markets; and

“System” All equipment and software which, an Operator uses to provide his telecommunications services.