



Suruhanjaya Komunikasi dan Multimedia Malaysia
Malaysian Communications and Multimedia Commission

**GUIDELINES ON
NOMINATED FACILITIES PROVIDER
(MCMC/G/05/06)**

2 February 2006

Notice:

The information contained in this document is intended as a guide only. For this reason it should not be relied on as legal advice or regarded as a substitute for legal advice in individual cases. Parties should still refer to the legislative provisions contained in the law.

Malaysian Communications and Multimedia Commission
63000 CYBERJAYA
Selangor Darul Ehsan
Tel: +60 3-8688 8000
Fax: +60 3-8688 1000
Website: www.mcmc.gov.my

GUIDELINES ON NOMINATED FACILITIES PROVIDER

TABLE OF CONTENTS

Section	Page
1. Objective	3
2. Introduction	3
3. Legislative Context	3
4. Policy Context	7
5. Eligibility	8
6. Application	8
7. Other Requirements	9
8. Complete Application	10
9. Effective Date and Revision	10
Forms and Annexure A	12

GUIDELINES ON NOMINATED FACILITIES PROVIDER

1. Objective

The Malaysian Communications and Multimedia Commission ("the Commission") has prepared this guideline in order to clarify the way in which S.130 of the *Communications and Multimedia Act 1998* ("the Act") relating to Nominated Facilities Provider will be implemented. This guideline should be read in conjunction with the Act and its related subsidiary legislation.

2. Introduction

- 2.1 Section 130 of the Act states that the Minister may determine, on recommendation of the Commission, that a licensed network facilities provider, other than the actual owner of the network facility in question, be the Nominated Facilities Provider ("NomFP") for the purposes of the Act, provided such nomination would not impede its objects or efficient administration.
- 2.2 This guideline sets out the rationale, scope of application and considerations that will guide any decision relating to the determination of a NomFP. The intention of the guideline is to provide an insight into the Commission's approach in implementing Section 130 and in so doing, guide prospective applicants who seek its benefit.

3. Legislative Context

- 3.1 The term "Nominated Facilities Provider" is defined in Section 6 of the Act as:

"6. "nominated facilities provider" means a person, other than the owner of the network facilities, declared by the Minister to be a nominated facilities provider;"

- 3.2 Meanwhile, Section 130 of the Act states:

"130. (1) The Minister may, on the recommendation of the Commission, determine that a licensed network facilities provider, other than the owner of any

network facilities, be a nominated facilities provider for the network facilities for the purposes of this Act, if the Minister is satisfied that the nomination will not impede –

(a) the achievement of the objects of this Act; and

(b) the administration of this Act.

(2) Upon the determination of the nominated facilities provider under subsection (1), the owner shall then be deemed to be exempted from the provisions of this Chapter."

3.3 The objects of the Act are outlined in Section 3 namely:

"3. (1) The objects of this Act are –

(a) to promote national policy objectives for the communications and multimedia industry;

(b) to establish a licensing and regulatory framework in support of national policy objectives for the communications and multimedia industry;

(c) to establish the powers and functions for the Malaysian Communications and Multimedia Commission; and

(d) to establish powers and procedures for the administration of this Act.

(2) The national policy objectives for the communications and multimedia industry are -

(a) to establish Malaysia as a major global centre and hub for communications and multimedia information and content services;

(b) to promote a civil society where information-based services will provide the basis of continuing enhancements to quality of work and life;

- (c) *to grow and nurture local information resources and cultural representation that facilitate the national identity and global diversity;*
- (d) *to regulate for the long-term benefit of the end user;*
- (e) *to promote a high level of consumer confidence in service delivery from the industry;*
- (f) *to ensure an equitable provision of affordable services over ubiquitous national infrastructure;*
- (g) *to create a robust applications environment for end users;*
- (h) *to facilitate the efficient allocation of resources such as skilled labour, capital, knowledge and national assets;*
- (i) *to promote the development of capabilities and skills within Malaysia's convergence industries; and*
- (j) *to ensure information security and network reliability and integrity."*

3.4 From the foregoing, the Commission makes the following conclusions:

3.4.1 the power to determine a NomFP is at the discretion of the Minister;

3.4.2 the discretion is to be exercised only on the recommendation of the Commission;

3.4.3 the Minister must be satisfied that the nomination will not impede the achievement of the objects of the Act or its administration;

3.4.4 the nomination shall be via a Ministerial Determination in accordance with the provisions of Section 10 of the Act; and

3.4.5 the NomFP must be a licensed network facility provider.

- 3.5 Paragraph 73 of the Explanatory Statement to the Act in the meantime provides further guidance on the use and implementation of Section 130. Paragraph 73 states:

"73. Part VI of the Act allows the Minister to declare that a licensed network facilities provider, other than the owner of any network facilities, is the nominated facilities provider for the network facilities for the purposes of the Act if such nomination will not impede the objects or the efficient administration of the Act. This provision will enable infrastructure ordinarily used by its owner for non-public purposes to be used by a nominated network facilities provider to provide services to the public thereby promoting the efficient use of resources. This provision will also allow for the financing arrangements which may otherwise require the financier to be licensed under the Act."

- 3.5 From Paragraph 73 the Commission further concludes that that the network in question must be one which is currently being used for private purposes and not for use by the general public. Notwithstanding the same, the Commission may also consider networks used by the general public for nomination if it does not impede the achievement of the objects of the Act nor its administration.
- 3.6 Paragraph 73 also suggests a 'financing arrangement' scenario where the NomFP arrangement could be used to negate the need to licence financiers e.g. where the network in question becomes the property of a financial institution. The Commission takes the view that in this specific scenario, the guiding principle shall be that the financier has no primary commercial interest in network facility service provisioning; therefore a NomFP could be declared to undertake the provisioning of the network facility service to the general public in the place of said financial institution.
- 3.7 Implicit of course in the above analysis is the fact that the licensed network facility provider to be designated NomFP agrees or consents to be so designated.
- 3.8 It should also be noted that the Ministerial Determination through which the nomination is effected is itself subject to the specific requirements of Section 10 of this Act; in particular, the determination shall be consistent with the objects of the Act (see Paragraph 3.3 above) and the provisions relevant to

the particular matter or activity i.e. Section 130. Such Determinations may be modified, varied or revoked at any time by the Minister in the same manner the original determination was made i.e. on the recommendation of the Commission.

4. Policy Context

- 4.1 The Commission considers the primary function of Section 130 of the Act is to facilitate the efficient use of available resources.
- 4.2 In achieving the above, the Commission is mindful of considerations contained in Part VI of the Act specifically, and the licensing framework in general. In particular, the Commission is mindful of the potential use of NomFP as a means to circumvent market entry controls under Part VI and the licensing framework in general.
- 4.3 Given the foregoing, the Commission has concluded that the NomFP arrangement shall only be available in respect of network facilities which are already in existence where the network's true or actual purpose is evident or obvious. Its application to networks which are not yet in existence throws into question the true purpose of the network (commercial or private use) and should therefore be avoided.
- 4.4 The Commission has also concluded that the NomFP arrangement shall only be available in respect of network facilities which fall under the Individual licence category and not Class as this would allow the Commission greater control and oversight over issues such as the ability, competence and financial standing of the prospective network facilities provider to be designated NomFP. The framework provided by the Individual licence category facilitates the required level of control and oversight. Furthermore, it is also expected that only network facilities of this nature shall be considered vital and/or significant enough to require the NomFP arrangement.
- 4.5 It follows from the above that a prospective NomFP must also be an NFP Individual licence holder with the necessary authorisation to undertake the provision of the network facility in question.
- 4.6 The Commission's recommendations to the Minister pursuant to a NomFP Determination will necessarily be based on a fairly intensive need for information surrounding a proposed NomFP arrangement. This information is necessary to assess the

impact of the NomFP arrangement on industry, the objects of the Act as well as its administration. To this end, this Guideline outlines the information requirements necessary in order for the Commission to make an informed recommendation to the Minister.

5. Eligibility

- 5.1 To be eligible for application, the following elements must be present:
- a. the network in question must be one which is currently being used for private purposes and not for use by the general public. However, the Commission may also consider networks used for public purposes where it does not impede the achievement of the objects of the Act nor its administration;
 - b. the network in question must already be in existence;
 - c. the network in question must be one which falls under the Individual licence category;
 - d. the network facility provider to be designated NomFP agrees or consents to be so designated; and
 - e. the network facility provider to be designated NomFP must be an NFP Individual licence holder with the necessary authorisation to undertake the provision of the network facility in question.

6. Application

- 6.1 Both the owner of the network facility subject of the nomination or the licensed network facilities provider who is to be designated as NomFP can apply to the Commission under Section 130.
- 6.2 All applications under Section 130 of the Act shall be made in writing to the Commission.
- 6.3 Applications must be addressed to:

The Chairman
Malaysian Communications and Multimedia Commission
63000 Cyberjaya
Selangor

- 6.4 All applications under Section 130 shall be considered on a case by case basis with each application scrutinised on its own specific merits.

7. Other Requirements

7.1 Documentation

7.1.1 The NomFP application must be evidenced by duly executed contractual documents which embody the NomFP arrangement between the parties. The Commission requires that said documents be lodged at the time of application. For the avoidance of doubt, the operation of such contractual documents can be made conditional upon final determination by the Minister to address the possibility of an application being unsuccessful due to inconsistencies with the objects of the Act or its efficient administration.

7.1.2 In addition, the contractual documentation lodged must clarify or otherwise outline the details relating to the following matters:

- a. the type of network facilities;
- b. location of network facilities;
- c. technical details of network facilities;
- d. rights and obligations of the parties in respect of the network facilities;
- e. maintenance arrangement/agreement;
- f. period of the arrangement/agreement;
- g. details of consequences of termination or expiration of the arrangement;
- h. provisions for handover of the network facilities in situations where the original owner no longer owns

the land on which the network facilities are situated i.e. in cases of property developments where network facilities are located in common areas which are subsequently handed over to the local authority); and

- i. the penalty and damages applicable for breach of said arrangement/agreement

7.1.3 Any additions or amendments to the documents described in Paragraph 7.1.1 must also be lodged with the Commission as soon as possible.

7.2 Forms

In addition to the contractual documents referred to in Paragraph 7.1.1, the Commission also requires that an application under Section 130 of the Act to be accompanied by duly completed Forms as provided in **Annexure A** of this Guideline.

8. Complete Application

8.1 Only complete applications will be considered by the Commission for recommendation to the Minister. The Commission considers a complete application to be one that has all of the following items:

- a. an official application in writing to the Chairman of the Commission;
- b. duly executed contractual documents of the NomFP arrangement with details relating to the matters outlined in Paragraph 7.1.2; and
- c. duly completed forms as provided in Annexure A of this Guideline.

9. Effective Date and Revision

9.1 These guidelines shall come into effect on 6 February 2006 and shall continue to be effective until modified, varied or revoked by the Commission.

9.2 These guidelines are intended to be used as a guide only and do not prevail over any legislative provisions contained in the law.

9.3 MCMC CONTACT

For any queries and further information, please contact:

Licensing Department
Malaysian Communications and Multimedia Commission
63000 CYBERJAYA
Selangor Darul Ehsan

Tel No: +60 3-8688 8000
Fax No: +60 3-8688 1002

ANNEXURE A

FORMS



Suruhanjaya Komunikasi dan Multimedia Malaysia
Malaysian Communications and Multimedia Commission

APPLICATION FORM FOR NOMINATED FACILITY PROVIDER

Details of Owner of Network Facilities

Organization Name Company No			
Registered Office			Postcode
Principle Place of Business			Postcode
Telephone No		Fax No	
E-mail			

Contact Person			
Designation			
Address if different From above			Postcode
Telephone No		Fax No	
E-mail			

ACTIVITIES UNDER THE NETWORK FACILITIES PROVIDER (INDIVIDUAL) LICENCE	
(a)	earth stations
(b)	fixed links and cables
(c)	public payphone facilities(*)
(d)	radiocommunications transmitters and links
(e)	satellite control stations
(f)	satellite hubs
(g)	submarine cable landing centre
(h)	switching centre (*)
(i)	towers, poles, ducts and pits used in conjunction with other network facilities; or
(j)	such other network facilities which are not exempt under the Act or not subject to a class licence under Part IV of these Regulations or not listed in this subregulation. (*)
(*) amended by Licensing (Amendment) Regulations 2005 PU(A) 145	

Network Facilities Owned

Facilities		Location
Wired Network Infrastructure	Wireless Infrastructure	
i.		
ii.		
iii.		
iv.		
v.		

Additional Details:

<p>WIRED NETWORK INFRASTRUCTURE</p> <p>1) <input type="checkbox"/> Optical fiber network</p> <p>2) <input type="checkbox"/> Cable landing station</p> <p> i) <input type="checkbox"/> Common room for MDF, cable termination or PABX</p> <p> ii) <input type="checkbox"/> Duct fibre and duct fibre</p> <p>3) <input type="checkbox"/> Public switched and cellular telephony networks</p> <p> i) <input type="checkbox"/> Data networks</p> <p>4) <input type="checkbox"/> Lightwave apparatus</p> <p>5) <input type="checkbox"/> Cabling and accessories primarily utilizing the following propagation methods:</p> <p> i) <input type="checkbox"/> Waveguide type cable</p> <p> ii) <input type="checkbox"/> Optical-based cable</p> <p> iii) <input type="checkbox"/> Other cables including copper and aluminium</p> <p>6) <input type="checkbox"/> Others (Please specify)</p> <p> i) _____</p> <p> ii) _____</p> <p> iii) _____</p>	<p>WIRELESS INFRASTRUCTURE</p> <p>1) <input type="checkbox"/> Rooftop tower</p> <p>2) <input type="checkbox"/> Stand alone tower less than 30 meters ht</p> <p>3) <input type="checkbox"/> Stand alone tower less than 100 meters ht</p> <p>4) <input type="checkbox"/> Stand alone tower more than 100 meters ht</p> <p>5) <input type="checkbox"/> Telephone poles</p> <p>6) <input type="checkbox"/> Rooftop for base station</p> <p>7) <input type="checkbox"/> Hill station</p> <p>8) <input type="checkbox"/> VSAT</p> <p>9) <input type="checkbox"/> Earth station</p> <p>10) <input type="checkbox"/> Others (Please specify)</p> <p> i) _____</p> <p> ii) _____</p> <p> iii) _____</p>
<p>LOCATION :</p> <ul style="list-style-type: none"> • State • District • Lot Number • Other relevant information 	<p>PURPOSE FOR THE SETTING UP OF THE NETWORK FACILITIES AND ITS CURRENT USE</p>

<p>DETAILS OF AGREEMENT BETWEEN OWNER OF NETWORK FACILITIES AND THE LICENSED NETWORK FACILITY PROVIDER</p> <p>COPY OF AGREEMENT ATTACHED</p>	<ul style="list-style-type: none">a) <input type="checkbox"/> Period of agreement & name of parties (include relevant details)b) <input type="checkbox"/> Type of network facilities & locationc) <input type="checkbox"/> Terms and condition of the Agreement.d) <input type="checkbox"/> Tenancy Agreement with owner of the land (if applicable)e) <input type="checkbox"/> Telephone access and such other matters as may be relevant.
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DETAILS OF OWNER OF NETWORK FACILITIES			
Name and position (Director level) of person authorizing this application			
Name			
Position			
Name and address of parent organization (if applicable)			
Name			
Address			Postcode
Telephone No		Fax No	
E-mail			

Information about ownership of Applicants company (please tick the appropriate line)

<input type="checkbox"/>	Owned by an individual	<input type="checkbox"/>	Part of an academic institution
<input type="checkbox"/>	Owned by a private company/partnership	<input type="checkbox"/>	Part of learned/technical institution
<input type="checkbox"/>	Owned by a public body/nationalized industry	<input type="checkbox"/>	Owned by public limited company
<input type="checkbox"/>	Others: _____ (Please describe)		

Details of shareholders

--

Main activities of your company

--

Main activities of the parent company

--

Ultimate beneficial shareholder (if any)

--

DETAILS ON STAFFS

Technical Manager or Principle for organization

Name	
Qualification	
Relevant Experience	

Quality Manager for organization

Name	
Qualification	
Relevant Experience	

Total number of people employed by your organization _____

Number of technical staff/lecturers/examiners based at other branches (if applicable)

Location of branches	No of technical staff/lecturers/examiners

DECLARATION

I declare that the information given in this form is correct to the best of my knowledge and belief.

Signed _____ Date _____