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## GENERAL NOTICE

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### NOTICE 132 OF 2010



#### **Independent Communications Authority of South Africa**

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#### **INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA**

### **GENERAL NOTICE – REASONS DOCUMENT ON DIGITAL MIGRATION**

#### **I Introduction**

1. The Republic of South Africa is obliged, in the context of the global transition from analogue television broadcasting to digital broadcasting, to effect the migration of existing terrestrial television services from analogue to digital broadcasting modes. Amongst the benefits which will be realised through the migration of the existing terrestrial television services to digital is the release of the "digital dividend", being those frequencies previously utilised for the purposes of analogue broadcasting, on the basis that the digital technology utilises the radio frequency spectrum in a more efficient manner than analogue technology and that the frequency allocation required for digital broadcasting is significantly less than that required for analogue. The availability of the digital dividend will, in turn, allow for the introduction of further services utilising the released radio frequency spectrum, including both electronic communications (telecommunications) and broadcasting services.
2. The Independent Communications Authority of South Africa ("the Authority") is the regulatory body tasked with managing the radio frequency spectrum in South Africa, in accordance with the applicable standards and requirements of the International Telecommunications Union ("ITU"), as agreed to and adopted by the Republic. The Authority is, as such, the body responsible for managing the process whereby existing analogue terrestrial television services are migrated to digital. In making provision for the digital migration process, the Authority has acted in terms of its powers in terms of the Electronic Communications Act 36 of 2005 ("the ECA"), the Broadcasting Act 4 of 1999 and the Independent Communications Authority of South Africa Act 13 of 2000 ("the ICASA Act") and has sought to promote relevant regulatory objectives, as provided

for in the legislation.

3. The Authority has now finalised and adopted the Digital Migration Regulations, 2010 (previously called the Digital Terrestrial Television Regulations) in relation to the process to be followed for digital migration. These Digital Migration Regulations deal primarily with the manner in which the digital migration of existing analogue terrestrial television services presently being broadcast in South Africa and utilising radio frequency spectrum for this purpose is to be achieved. The Regulations deal also with certain ancillary issues.
4. The Digital Migration Regulations are specifically aimed at providing a framework that will ensure the smooth migration of existing services and the digital migration of these services takes place within the required time periods.
5. In this Digital Migration reasons document the Authority has set out the basis for certain policy determinations it has made in relation to the digital migration process in the context of the representations and submissions it has received from various interested parties and the Broadcasting Digital Migration Policy for South Africa ("the Ministerial Policy") published by the Minister of Communications ("the Minister") in September 2008. While the Authority has not addressed each and every one of the submissions made by interested parties on the digital migration process and the draft regulations which were published for public comment, the Authority has sought to set out its position in relation to the material issues raised. The Authority has adopted and published this Reasons document also with the intention of giving clarity to participants in the communications sector, particularly with regard to the steps which the Authority intends to take in relation to matters which have not been dealt with in the Digital Migration Regulations. In taking account of some of the submissions received from interested parties, where the Authority considered those submissions to have merit, the Authority has amended the previous draft of the Digital Migration Regulations, on which interested parties were invited to comment.

## **II Procedures followed**

6. In accordance with her powers in terms of section 3(1) of the ECA, to make policies, the erstwhile Minister, Dr Ivy Matsepe-Casaburri adopted the Ministerial Policy, which was published under **GN 958 in Government Gazette 31408 of 8 September 2008**. In terms of section 3(4) of the ECA, the Authority is required, when exercising its powers and performing its duties, to "consider policies made by the Minister".



7. The Authority published the First Draft Broadcasting Digital Migration Framework Regulations ("the First Draft Regulations") on 3 October 2008 under **GN 1240 in Government Gazette 31490**. The Authority invited interested parties to submit written representations on the First Draft Regulations by 7 November 2008.
8. The Authority convened public hearings on 28 November and 1 December 2008 at which interested parties who had requested an opportunity to participate were afforded an opportunity to make representations in support of their written submissions on the First Draft Regulations.
9. Following the hearings, the Authority published the Second Draft Digital Terrestrial Television Regulations ("the Second Draft Regulations") under **GN 344 in Government Gazette 32083 of 31 March 2009**. Comments on the Second Draft Regulations were required to be submitted by 30 April 2009.
10. On 3 July 2009, the Authority published a final version of the Digital Terrestrial Television Regulations, 2009 ("the DTT Regulations") and the Position Paper on Digital Terrestrial Television under **GN R720 in Government Gazette No. 32377 of 3 July 2009**.
11. In September 2009, the Authority withdrew the DTT Regulations and the Position Paper for further public consultation. The Authority then revised the DTT Regulations and published the revised Third Draft DTT Regulations for public comment under **GN R896 in Government Gazette 32559 of 4 September 2009**. The Authority also issued an Explanatory Memorandum to clarify the reasons behind the withdrawal of the DTT Regulations and the republication of the Third Draft DTT Regulations for further public comment.
12. Following the republication of the Third Draft DTT Regulations for further public consultation, the Authority received twenty submissions from interested industry players and members of the general public. The Authority then convened public hearings in relation to the Third Draft DTT Regulations on 29 and 30 October 2009.
13. Following the most recent round of public consultations, the Authority has taken into consideration the submissions received from interested parties and has published the revised final Digital Migration Regulations, 2010.

### III The Ministerial Policy

14. As set out above, the Ministerial Policy was published in September 2008. The Authority is required to take the policies made by the Minister into consideration in the performance of its regulatory functions but is not bound by any such policy.
15. The Minister's policy determinations in relation to the digital migration of television services in South Africa, as set out in the Ministerial Policy, included that –
  - 15.1 there would be a three year period of dual illumination commencing on 1 November 2008 (when the digital broadcast signal would be switched on) and ending on 1 November 2011 (when the analogue broadcast signal would be switched off);
  - 15.2 national broadcasting signal distribution coverage should be achieved in a phased manner so as to reach 50% of the population by 2008, 80% by 2010 and close to 100% by 2011, enabling analogue switch-off. Areas that are difficult to reach should be covered by satellite means;
  - 15.3 during dual illumination, two multiplexes should be reserved for incumbent broadcasters, designated for public and commercial broadcasting services;
  - 15.4 the network of frequencies designated for public broadcasting should be co-assigned and managed by Sentech Limited ("Sentech") as the common carrier on a non-preferential and non-discriminatory basis;
  - 15.5 Sentech should also provide broadcasting signal distribution to commercial broadcasters, which should be provided on a non-preferential and non-discriminatory basis;
  - 15.6 the public broadcaster (the South African Broadcasting Corporation Limited ("the SABC")) on its own or in partnership, should cater for three public regional television channels as well as channels prioritising education, health, youth, sports, small, medium and micro enterprises, parliamentary and government and interactive service needs;
  - 15.7 regional television services should be required to provide an open window for community television broadcasting for a minimum period to be determined;

- 15.8 during the dual illumination period, community television broadcasting services should be accommodated on the public national frequency network;
- 15.9 two metropolitan networks of frequencies designated for the provision of mobile broadcasting services should be operated by a single network operator with the possibility of achieving national coverage in future;
- 15.10 approximately eight standard definition digital channels will be created per radio frequency currently assigned to one analogue channel;
- 15.11 DVB-T is the national standard for broadcasting digital terrestrial television ("DTT") in South Africa, DVB-is the national standard for broadcasting digital satellite television in South Africa and MPEG-4 is the compression standard for the DTT roll-out in South Africa. Existing direct-to-home services should continue to use the MPEG-2 standard with the option of migrating to MPEG-4 when commercially viable;
- 15.12 the set top boxes ("STBs") to be used to receive DTT services will be enabled to receive services from different platforms and operators to allow different service providers to gain access to the same consumers and for consumers to be able to change service providers. STBs will have standardised operating systems prioritising security features, interoperability and inter-connectability. STBs will be made affordable and will be sourced from South African manufacturers and government will consider finding means of making the STBs available to the poorest television-owning households. STBs will also have special features (including a return path capability) to enable access to e-government services for citizens and will include features such as closed captioning to meet the needs of disabled citizens;
- 15.13 Digital Content Generation Hubs ("DCGHs") aimed at generating content for digital broadcasting will be established to contribute to the development of the creative industries and job creation. A special skills development programme will be established to support the growth of the creative industries;
- 15.14 the Authority should ensure that universal access to public broadcasting services is sought to be achieved and the "must carry" requirements must be retained;
- 15.15 digital broadcasting should be used as a means to develop and disseminate local content in all eleven official languages;

- 15.16 the manner in which requirements are imposed in relation to minimum levels of South African content is suited to a single channel analogue environment and the Authority should review the existing content quotas to reflect the multi-channel digital environment;
- 15.17 competition should be promoted within the limits of the available spectrum in order to ensure a smooth migration to digital broadcasting in the country and to provide a multiplicity of sustainable services to benefit both the public and broadcasters; and
- 15.18 a body known as the Digital Dzonga is established comprising representatives from the public, government, industry, organised labour and consumer groups and aimed at consumer education and awareness, stakeholder liaison including the Authority and STB manufacturers, and monitoring.

#### **IV Submissions received from interested parties**

- 16. The Authority received submissions from interested persons on a range of issues in relation to the digital migration process, DTT more generally and other regulatory matters on which the Authority was urged to take action. As indicated above, the Authority has not sought in this Digital Migration Reasons Document to respond to each and every one of the submissions received from interested parties but has set out the basis for its policy determinations in relation to the most significant matters raised. In addition, the Authority has set out its intended approach in relation to those matters which have not been dealt with in the Digital Migration Regulations, where the Authority is of the view that such matters are more appropriately dealt with in further regulatory processes and regulations.
- 17. The interested parties who made submissions on the Third Draft DTT Regulations were as follows:
  - 17.1 Avusa Media Limited ("Avusa");
  - 17.2 Electronic Media Network Limited ("M-Net");
  - 17.3 e.tv (Proprietary) Limited ("e.tv");

- 17.4 Professor Guy Berger;
- 17.5 the GSM Association;
- 17.6 Kagiso Media Limited ("Kagiso");
- 17.7 Media Development and Diversity Agency ("MDDA");
- 17.8 Media Institute of Southern Africa – South Africa ("MISA-SA");
- 17.9 Media Monitoring Africa ("MMA");
- 17.10 Nafcoc Broadcasting Consortium (Proprietary) Limited ("Nafcoc");
- 17.11 Neotel (Proprietary) Limited ("Neotel");
- 17.12 On Digital Media (Proprietary) Limited ("ODM");
- 17.13 Save our SABC Coalition ("SOS");
- 17.14 Sentech;
- 17.15 SmallWorld CC ("Smallworld");
- 17.16 the South African Broadcasting Corporation Limited ("SABC");
- 17.17 South African SKA Project Office ("SKA");
- 17.18 Super 5 Media (Proprietary) Limited ("Super 5");
- 17.19 Telkom SA Limited ("Telkom"); and
- 17.20 Walking on Water Television (Proprietary) Limited ("WOW").

18. Many of these parties had made representations in relation to previous drafts of the regulations as well. For the most part, these submissions were similar to the submissions which were made by these parties in the context of the most recent public participation process. Reference has not been made in this Reasons Document to

submissions received in the context of previous public participation processes as the Authority is of the view that the major submissions were addressed in the context of the most recent process.

19. In broad terms, the most significant concerns raised by interested parties in relation to the Third Draft Regulations related to –
- 19.1 competition issues, including the restriction of the regulations to the incumbent broadcasters, the necessity for an inquiry and regulatory intervention with regard to the tariffs charged for signal distribution and the regulation of dominant operators;
  - 19.2 considerations of black economic empowerment ("BEE");
  - 19.3 the period for which dual illumination (i.e. simulcast broadcasting in both analogue and digital formats) should be required;
  - 19.4 the granting of rights to the existing terrestrial broadcasters to broadcast new digital incentive channels and the processes and criteria to be employed by the Authority in considering whether to grant such rights;
  - 19.5 the allocation of a third multiplex to M-Net and the proposed hard-switchover process to be conducted by M-Net;
  - 19.6 the roll-out targets for the migrated DTT services;
  - 19.7 the appointment of providers of signal distribution services to provide digital transmission services and the types of activities to be performed by the provider of signal distribution services on the one hand and the broadcaster, on the other hand;
  - 19.8 community broadcasting services and regional services;
  - 19.9 radio frequency spectrum licensing;
  - 19.10 the requirements of public service broadcasting;
  - 19.11 local content;

- 19.12 diversity of languages;
- 19.13 the accommodation of sound broadcasting services; and
- 19.14 the composition and role of the Joint Spectrum Advisory Committee ("JSAC").

## **V The Authority's Approach**

- 20. The Authority's approach and the basis for those positions in the context of the issues raised by the interested parties are set out below. The concerns raised and submissions made by interested parties have been addressed in this Reasons Document in line with the broad themes outlined above.

### **21. Competition considerations**

- 21.1 The major issue, in relation to which the Authority received submissions regarding the digital migration process to be followed in South Africa, was that of competition and the necessity (1) to foster competition in the DTT market and (2) to regulate those operators who are perceived to be dominant and operating in markets characterised by ineffective competition.

#### *Introducing further competition in the DTT market*

- 21.2 Regarding the first of the two competition issues raised, the Third Draft DTT Regulations provided that, for the period defined as the performance period during which dual illumination is required and the transition from analogue to digital is to be achieved, the only broadcasters who would be accommodated on the three multiplexes referred to in the Regulations ("the Multiplexes"), would be those broadcasters who, at the present time, provide analogue terrestrial services. These are: the SABC, e.tv, M-Net and TBN. Many of the interested parties who made representations on the Third Draft DTT Regulations submitted that provision should be made for other broadcasters also to be accommodated on the Multiplexes. Certain parties (including Avusa, Kagiso and Nafcoc) were of the view that wholly new entrants (i.e. newly licensed entities) should be entitled to obtain capacity on the Multiplexes and that the existing broadcasters who have been allocated capacity on the Multiplexes should be required to contract with



new, black-owned content providers in order to foster them as new entrants into the DTT broadcasting market. MISA-SA submitted that community broadcasters should also be accommodated on the Multiplexes. (The issue of community broadcasting services is addressed below.) Certain of the newly licensed subscription broadcasting services (ODM, Super 5 and WOW) together with Professor Guy Berger submitted, on the other hand, that the newly licensed subscription services should be accommodated on the Multiplexes and that *all* licensed broadcasters should be afforded an opportunity to introduce services on the DTT platform from the start of the dual illumination period (i.e. the commencement of the transition to digital). ODM submitted that the principle of technological neutrality and the fact that the licences held by the newly licensed subscription broadcasting services do not restrict the manner in which those services are provided to any one platform, means that there is no impediment to such broadcasters being accommodated from the outset on the DTT platform. Various submissions were made to the effect that, if the Authority waits until the end of the performance period (by which time analogue switch-off should have occurred) to introduce new digital services, the existing broadcasting services will have further entrenched themselves in the market and the ability of other operators to compete effectively will be hampered. However, submissions were also made by the newly licensed broadcasting services (Super 5) indicating their opposition to the unmanaged liberalization of the subscription broadcasting services market and the licensing of further services to compete in this market in the absence of a comprehensive licensing framework for DTT and that only those services which are already licensed (i.e. the existing terrestrial broadcasting services and the newly licensed subscription broadcasting services) should be granted capacity on the Multiplexes. The Authority also received submissions from e.tv in which it was argued that (1) any broadcasters not broadcasting terrestrially at the commencement of the Regulations should not be permitted to commence broadcasting on the DTT platform through the digital migration process, (2) new operators (particularly in the free-to-air market) should not be licensed and (3) the uses to which the digital dividend realized from the migration of analogue services should not be dealt with in the context of regulations dealing with digital migration.

## 21.3

As set out above, the Ministerial Policy stated that competition should be promoted within the limits of the available spectrum, first, to ensure a smooth digital migration process and, secondly, to provide a range of different but sustainable services to benefit both the public and the broadcasters.

- 21.4 Consistent with the Ministerial policy, the Authority has decided to confine the Digital Migration process to two multiplexes. This means that M-Net will no longer be required to conduct a hard switch-over within a period of twelve (12) months as initially proposed in the third Draft Regulations. The Authority has set aside 10% capacity in Multiplex 2 to allow other interested entities to conduct test broadcast ahead of the introduction of competition, at the end of the performance period.
- 21.5 The Authority has not adopted the recommendations referred to above regarding the need for the broadcaster to accommodate new "black-owned" channels and content providers in order to meet BEE objectives in the broadcasting sector. This is addressed in further detail below.

*The imposition of pro-competitive conditions*

- 21.6 Certain existing broadcasters made submissions regarding the necessity for the Authority to impose requirements on certain entities licensed in terms of the ECA in order to create a fair competitive environment. In this regard, e.tv and Nafcoc submitted that the tariffs charged by Sentech for signal distribution should be regulated, that the Authority should conduct an inquiry into tariffs for the period subsequent to the performance period and that regulations dealing with digital migration should include a mechanism mandating that such an inquiry into tariffs be conducted. (e.tv also submitted that the Authority should provide specifically in the regulations that Sentech is required to provide digital transmission services free of charge during the performance period. This issue is dealt with in further detail below.) e.tv submitted that the Authority is not obliged to conduct any such inquiry into Sentech's tariffs in the context of section 67 of the ECA, which sets out particular processes to be followed in relation to the manner in which the Authority may deal with competition matters, on the basis that the Authority has the general power, in terms of section 4B(1)(a) of the Independent Communications Authority Act of South Africa 13 of 2000 ("the ICASA Act"), to conduct such an inquiry.
- 21.7 The Authority intends to conduct an inquiry into the broadcasting sector and, in particular, the role of Sentech, in the context of section 67 of the ECA during the course of the 2010/2011 financial year. This is a key project for the Authority. Although the Authority accepts that it has the power to conduct an inquiry in terms of section 4B(1)(a) of the ICASA Act and is not restricted only to

conducting inquiries in terms of section 67 of the ECA, little purpose would be served if such an inquiry were to be conducted outside of the processes provided for in section 67. It is clear that what is ultimately sought by e.tv (which has asked that the Authority "prescribe" the tariffs to be charged by Sentech) is the regulation of Sentech's wholesale tariffs. This could potentially be through the imposition of: price controls, a prohibition on discrimination, a requirement to publish tariffs and terms and conditions for the provision of services, an obligation in relation to accounting separation or requirements in relation to accounting methods. In terms of section 67(7)(h) of the ECA, a condition imposing such price controls may be imposed as a pro-competitive condition on a licensee. In terms of sections 67(7)(c) to (g), the other measures identified above may also be imposed as pro-competitive conditions on a licensee. In order for the Authority to impose pro-competitive terms and conditions of the nature described in section 67(7) of the ECA (including in relation to price controls), on licensees, it must do so in accordance with regulations prescribed in terms of section 67(4), and section 67(4)(c) in particular. The fact that the legislature has provided for a particular process to be followed before certain requirements are imposed on licensees, means that the Authority may only impose such requirements in accordance with the stipulated processes.

- 21.8 Section 67 of the ECA requires that a series of antecedent steps be taken before pro-competitive terms and conditions may be imposed on a licensee:
- 21.8.1 In terms of section 67(4), such pro-competitive terms and conditions may only be imposed on those licensees who have significant market power ("SMP") in a market or market segment which is determined by the Authority to have ineffective competition.
- 21.8.2 The Authority is required in terms of section 67(4)(a), to publish regulations identifying markets and market segments which have ineffective competition (taking into account the factors set out in sections 67(6)(a) and (b)). The effectiveness of competition in relevant markets or market segments must be assessed in accordance with the methodology to be prescribed by the Authority in terms of section 67(4)(b).
- 21.8.3 Having identified relevant markets or market segments which have ineffective competition, the Authority may declare particular licensees operating in that market or market segment to have SMP and set out the pro-competitive conditions to be applied to each such licensee, in terms

of section 67(4)(d).

- 21.9 In short, the Authority cannot impose terms and conditions on a licensee such as Sentech which amount to pro-competitive conditions in terms of the ECA, without following the process required by section 67 of the ECA. As such, in order for price controls or other pro-competitive regulatory requirements to be imposed on Sentech, the market in which Sentech operates would have to be identified as a market characterised by ineffective competition and the Authority would have had to determine that Sentech has SMP. If the Authority were to impose such pro-competitive conditions on a licensee such as Sentech without following the processes required by section 67, the Authority would be acting outside the scope of its powers. In exercising its powers in terms of section 67 of the ECA in relation to Sentech or any other operator, it will be necessary for the Authority to conduct a public process or public processes in accordance with its general powers in terms of section 4B(1)(a) of the ICASA Act but, if the Authority were to conduct such an inquiry without also following the section 67 processes, the Authority would be restricted in its ability subsequent to the inquiry to perform any regulatory intervention in relation to Sentech and would not be able to act on its findings (given that pro-competitive conditions can only be imposed in accordance with section 67 of the ECA).
- 21.10 The Authority appreciates the arguments which have been raised by e.tv with regard to the fact that, in the need to appoint a provider of signal distribution services before the commencement of the performance period, e.tv's choice and bargaining power in negotiating tariffs with Sentech is restricted and that, given that Sentech is, practically speaking, the only suitable provider of signal distribution services (at least at the present time), it is necessary to ensure that Sentech's tariffs are in line with those which would be levied in a competitive market. As set out above, the Authority intends to conduct the appropriate processes in accordance with section 67 of the ECA to establish whether any regulatory intervention is required.
- 21.11 The Authority has included, in the Digital Migration Regulations, for the sake of clarity, a provision that, in the event that the tariffs charged by an electronic communications network services ("ECNS") licensee appointed by a broadcaster to provide signal distribution services are subject to regulation by the Authority pursuant to section 67 of the ECA, any agreement between such an ECNS licensee and the broadcaster with which it has contracted will be modified. As such, in the event that pro-competitive conditions in relation to tariffs are

ultimately imposed on Sentech, any agreement between Sentech and e.tv (or any other party) for the provision of digital signal distribution services will be amended to reflect the tariffs which may be levied by Sentech in light of the relevant pro-competitive condition.

21.12 e.tv also made representations with regard to requirements that should be imposed on the SABC limiting the SABC's commercial activities on the DTT platform to improve the SABC's performance in delivering on its public service mandate and to ensure that the SABC does not compete unfairly with e.tv, which provides a commercial free-to-air broadcasting service. The measures that e.tv proposed should be adopted included: imposing advertising restrictions on the SABC in relation to the advertising carried on its public service channels, establishing a rigorous process for the authorisation of any digital incentive channels to be broadcast by the SABC and curtailing the SABC's ability to launch new commercial channels. The SABC's response was that the digital migration process is not the appropriate process in which to deal with such matters, that the SABC has not been declared dominant in the markets in which it operates and that any determination regarding any market distortion caused by the SABC's commercial activities would have to be made in accordance with the relevant provisions of section 67 of the ECA.

21.13 To the extent that conditions are imposed on any licensee to remedy a market failure and to facilitate competition, where a market is not effectively competitive, these requirements are required, in terms of the ECA, to be imposed in the context of the processes set out in section 67 of the ECA. As set out above, the Authority intends to conduct an inquiry in the context of section 67 into the broadcasting sector and will address, in due course, the commercial broadcasting market segment and the extent to which it may be regarded as competitive and whether any regulatory intervention is required in this regard. The Authority is not in a position (even if it were desirable to do so) to impose pro-competitive measures on any licensee in the Digital Migration Regulations, without first having met the requirements of section 67. At the same time, the Authority is required to ensure that the SABC is subject to appropriate requirements to ensure that it fulfils its public service mandate and meets the requirements of its Charter, as set out in Chapter IV of the Broadcasting Act 4 of 1999. The Authority has sought to reinforce in the Digital Migration Regulations the necessity for the SABC to meet its public service mandate through (1) the processes which it is required to follow and criteria which it must meet when applying for authorisation to broadcast a new public service digital incentive

channel and (2) the requirement that it maintain a 3:1 ratio of public service to commercial service channels and that three quarters of its allocated capacity be used for the provision of public service [programming / channels]. The Authority is of the view that it cannot prohibit the SABC from providing any further public commercial channels (within the applicable ratio) given that the Broadcasting Act provides that the SABC has a commercial division and allows the SABC to broadcast such public commercial channels. The Authority considers that the question as to the public value which will be added by a digital incentive channel proposed by the SABC and the possibility of any adverse impacts (i.e. anti-competitive effects) on the commercial television broadcasting services will be considered during the course of the authorisation process for digital incentive channels. The question as to whether advertising restrictions should be imposed in relation to the SABC's digital channels for the purpose of facilitating competition in the commercial broadcasting market in which e.tv competes with the SABC for advertising revenue, will be considered in due course in the context of the section 67 process to be conducted by the Authority.

## 22. BEE

22.1 Nafcoc and Kagiso submitted that the Third Draft DTT Regulations did not adequately take account of BEE considerations. One of the proposals put forward by Nafcoc and Kagiso to remedy this was that e.tv and M-Net should each be allocated a full multiplex subject to them supporting new "black-owned" content suppliers (channels) and broadcasters on the unallocated 40% and 50% of Multiplex 2 and Multiplex 3, respectively. These new broadcasters or content providers should then be migrated to their own DTT multiplexes or other platforms at the appropriate time, releasing the capacity in the multiplexes back to e.tv or M-Net. e.tv was not in favour of this proposal on the basis that "must carry" requirements should be and are currently dealt with separately, and are not applicable to e.tv. Kagiso submitted that BEE and HDI considerations should be relevant criteria to be taken into account in considering the authorisation of a digital incentive channel. This issue is addressed below in relation to the authorisation process for digital incentive channels.

22.2 In respect of Nafcoc's proposal, the Authority is of the view that providing for capacity to be allocated to non-licensed entities with the aim of ultimately migrating them to their own platforms may be contrary to the interests of entities which are already licensed, including the newly licensed subscription



broadcasting services, who are also seeking access to the DTT platform, and community television services. Before the Authority takes a decision to license further subscription or free-to-air broadcasters, it will be necessary to undertake a process to investigate the viability of doing so. As such, the Authority does not believe that adopting Nafcoc's proposal is the best means to take account of BEE.

- 22.3 In terms of the Broad-based Black Economic Empowerment Act 53 of 2003 ("the BEE Act"), the Authority, as an organ of state, is required to apply the Codes of Practice published under the BEE Act in considering whether to grant a licence or authorisation, and the applicants for individual subscription broadcasting licences were required to comply with the 30% minimum shareholding requirement by historically disadvantaged persons ("HDPs"), in terms of section 9(2)(b) of the ECA. The Authority took these considerations into account. The Authority will likewise take these considerations into account in any future licensing process which may ultimately be conducted. The Authority is also considering, in the context of the policy formulation process which has been initiated with the publication of the Ownership and Control Discussion Paper, under GN 1532 in *Government Gazette* 32719 on 17 November 2009, appropriate requirements in relation to ownership by HDPs and the other aspects of BEE which should be imposed on broadcasting service licensees (including the existing terrestrial broadcasting services which will be applying for authorisation to broadcast digital incentive channels and which have been allocated capacity in the Multiplexes). The Authority is of the view that it is preferable to deal with the BEE requirements with which the broadcasting service licensees must comply in the context of that process rather than in the context of the digital migration process, to allow for the airing of all relevant issues.

23. Period for dual illumination

- 23.1 In terms of the Ministerial Policy, the period during which all analogue services in South Africa would be progressively migrated to digital was intended to commence on 1 November 2008 and end on 1 November 2011, being the analogue switch-off date. As such, the dual illumination period was intended to commence less than three months after the date on which the Ministerial Policy was published.
- 23.2 In the Third Draft DTT Regulations, the Authority introduced the concept of the



“performance period” during which the existing terrestrial broadcasters (with the exception of M-Net) are *required* to dual illuminate their existing analogue channels. This period was to commence on 1 April 2010 and end on 30 March 2012. The Authority’s intention was to distinguish between the dual illumination period set by the Cabinet i.e. the period from 1 November 2008 to 1 November 2011, and the actual period during which the broadcasters would be required to dual illuminate. The Authority recognised that the period during which dual illumination is *required* could not have commenced on a date prior to the date on which the regulations dealing with digital migration came into effect.

- 23.3 Various submissions were made by interested parties regarding the date on which dual illumination should commence, the period for which dual illumination should be required and the date for analogue switch-off. In this regard, Nafcoc submitted that the length of the dual illumination period should be reduced, arguing that this would result in cost-savings, would encourage consumers to migrate and would allow for further competition to be introduced earlier, on the basis that broadcasters other than the existing terrestrial broadcasters are precluded from applying for capacity in the Multiplexes provided for in the Third Draft DTT Regulations until the end of the dual illumination period. Sentech submitted that the Authority should align the dual illumination period with the period set by the Cabinet to take account of the fact that some digital services commenced on 30 October 2008 in accordance with Cabinet’s decision, and that the commencement date of the “performance period” should refer to the date on which digital services are launched commercially rather than the actual date on which dual illumination began. Neotel argued similarly that the introduction of the performance period should not override Cabinet’s decision to terminate analogue broadcasting transmission by 1 November 2011 and submitted that moving the switch-off date to later than 1 November 2011 would be detrimental to providers of ICT services other than broadcasting services which need access on an urgent basis to the 790 – 862 MHz band occupied by the analogue broadcasting services. e.tv submitted that a start date in April 2010 was not likely to be feasible for the commencement of digital broadcasting services and submitted that the performance period should begin “on the date on which DTT services are made generally available to the public” and end “two years after the commencement date or when all analogue broadcasting signals cease, whichever is the later”.
- 23.4 The Authority has decided that a fixed period of dual illumination (i.e. a fixed date by which the digital broadcast signal must be switched on, even though it may

not be available to the whole of the broadcasters' existing analogue coverage areas, and a fixed date by which the analogue signal must be switched off) is necessary for certainty and to ensure that the existing broadcasting services and providers of signal distribution services use all reasonable efforts to migrate quickly so as to ensure the realisation of the digital dividend as soon as possible. The Authority does not believe that these objectives would be met if the end date of the dual illumination period were to be left up to the broadcasters' election. The Authority has imposed the requirement to migrate and to dual illuminate for a specific period only on those broadcasters which occupy strategic spectrum and which, in the Authority's view, are in a position to migrate. As such, for example, the Authority has not imposed such requirements on community broadcasters who are not presently in a financial position which would allow them to dual illuminate.

## 23.5

In determining the period for which the existing terrestrial broadcasters *are required* to dual illuminate their existing analogue channels, the Authority has had to take a number of considerations into account. The first of these is the Cabinet decision that the dual illumination period should run from 1 November 2008 until 1 November 2011. As indicated above, the proposed start date for the dual illumination period was, in fact, less than three months after the date on which the Ministerial Policy was published. The Authority was not in a position to finalise the necessary regulations providing for digital migration before the proposed commencement of the dual illumination period. Although certain digital services did commence by the start date set by Cabinet, the period set in the Regulations is the period during which dual illumination (i.e. the commencement of digital services) *is required*. In determining a reasonable start date for this period of required dual illumination, the Authority was obliged to take the Ministerial Policy and the Cabinet's decision into account but was not bound by that decision and was not required to give effect to it, where it had good reasons for not doing so. As set out above, the Authority did not adopt the dual illumination period as set by Cabinet as the period for which the existing broadcasters were *required* to dual illuminate their services in the Third Draft DTT Regulations, as this would have meant that the requirement would have applied with retrospective effect. A further factor which the Authority has had to take into account is that of the availability of STBs, which are required for digital services to be generally available to the public. There would be little purpose in the broadcasters (in the case of the existing free-to-air broadcasters) commencing with the provision of digital services when the public is not yet able to receive them. Setting the start date for the digital switch-on before STBs are

generally available would frustrate one of the purposes of the dual illumination period, which is to alert consumers to the requirement to obtain a STB in order to continue to receive television services after digital switch-off and to allow them a reasonable period within which to acquire this equipment prior to switch-off. As such, the Authority has liaised with the Department of Communications ("the Department"), which is driving (and funding in part) the STB manufacturing and distribution process, regarding the date by which STBs will be available. Given the delays which have been experienced by the Department in this process and the likelihood that STBs will not be widely available before the previously proposed start date of the performance period, the performance period during which the existing broadcasters are required to dual illuminate will now commence on a date to be set by the Authority by notice in the *Government Gazette*. The Authority will give notice of the commencement date no less than 60 days prior to that date, taking into consideration the state of readiness of other key players including the Department of Communications which is driving the rollout of STB's to address universal access to DTT. The Authority considers 60 days to be a reasonable period to enable the industry to prepare adequately for the public offering of DTT services. The performance period will end 36 months after the commencement date. In setting the performance period, the Authority has sought to balance the requirement to achieve analogue switch-off within a relatively short space of time given the many alternative uses to which the affected radio frequencies may be put, with the requirement to afford the existing terrestrial broadcasters and their signal distribution service providers, as well as consumers, an adequate and realistic opportunity to take the steps necessary to achieve smooth digital migration.

#### 24. Digital incentive channels

- 24.1 Digital incentive channels are new channels which the existing terrestrial broadcasters may be authorised to provide, in addition to their existing analogue channels. As provided for in previous drafts of the Digital Migration Regulations, including the Third Draft DTT Regulations, broadcasters are required to make application for authorisation to provide a new channel, new digital incentive channels can only be authorised during the performance period and broadcasters can utilise the capacity allocated to them in a particular multiplex to broadcast their existing television channels together with any digital incentive channels that they were authorised to provide.

- 24.2 Nafcoc submitted that the regulations dealing with digital migration should not provide for digital incentive channels, as conceptualised in the Third Draft DTT Regulations. Instead, Nafcoc submitted, broadcasters should be authorised to utilise additional capacity in the Multiplexes through the ordinary licensing procedures which should be open to all broadcasters rather than the existing terrestrial broadcasters alone on the basis that awarding the existing broadcasters new perpetual broadcasting rights would have a negative impact on competition and BEE. Avusa submitted similarly that new licensees and test licensees should be able to apply to broadcast digital incentive channels. Kagiso argued that broadcasters other than the existing terrestrial broadcasters should be permitted to dual illuminate should they wish to do so. Sentech submitted that digital incentive channels should be authorised only for the duration of the performance period. e.tv submitted that the authorisation of digital incentive channels does not amount to the granting of new broadcast rights but allow the incumbents to "maintain their existing market share" in circumstances where the Authority would not generally license new broadcasters.
- 24.3 Nafcoc submitted that the awarding of new broadcast rights is not equivalent to the costs incurred by the broadcasters in converting from analogue to digital or for dual illumination. Nafcoc submitted further that digital incentive channels should only be awarded to the existing broadcasters if they supported new entrants into the broadcasting market who provide channels and content to the broadcaster in question and on the basis of BEE considerations (on which the broadcaster should be required to report on an annual basis). e.tv submitted, on the other hand, that the existing broadcasters (of which e.tv is one) should not be required to make channel capacity available to new channel providers and that such issues should be dealt with in the context of regulations dealing with "must-carry" obligations.
- 24.4 Avusa and SOS submitted that the objective behind digital incentive channels should be to incentivise the broadcasting of new content so as to encourage consumers to switch to digital. ODM submitted that all licensed broadcasters should be allowed onto the DTT platform as this would make more services available to consumers and so incentivise them to buy STBs.
- 24.5 Avusa, Kagiso and Super 5 submitted that the Authority needed to clarify what was intended subsequent to the performance period with regard to the allocation of capacity in the Multiplexes to broadcasters and the authorisation of further channels. e.tv submitted that the existing terrestrial broadcasters (of which e.tv

is one) should not be precluded from applying for further capacity in the multiplexes, subsequent to the performance period, in addition to that allocated to them. The SABC commented that the possibility of the capacity allocated to the public broadcaster being increased in future should be specifically addressed in the regulations dealing with digital migration.

24.6 Nafcoc submitted that e.tv and M-Net should not simply be required to follow an administrative process to obtain the Authority's authorisation to broadcast a digital incentive channel, which is different from that which is required to be followed by prospective new entrants. M-Net submitted that subscription broadcasters should be required to follow the process set out in the Subscription Broadcasting Regulations, 2006 rather than the authorisation process provided for in the Third Draft DTT Regulations. MMA and SOS submitted that the criteria specified in the Third Draft DTT Regulations were inadequate to enable the Authority to evaluate whether a digital incentive channel should be added to the SABC's public service division. MMA recommended the adoption of a public value test along the lines of that contained in the Charter of the British Broadcasting Corporation. SOS submitted that the Authority should not authorise the SABC to provide further public commercial channels as it has not been shown that such channels cross-subsidise the SABC's public service channels and should only allow the SABC to broadcast further public service channels. e.tv submitted that the public value test, as contained in previous drafts of the digital migration regulations with regard to the criteria to being met and process to be followed by the SABC to obtain authorisation to broadcast a digital incentive channel, should be reinstated. e.tv submitted further that the SABC should be required to demonstrate why a new public service channel is necessary and how it will be differentiated from its commercial offerings and that the information which was required to be provided by the commercial broadcasters in terms of the Third Draft DTT Regulations should be required to be provided by the SABC as well. Avusa, e.tv, Prof. Guy Berger, MMA, the SABC and Super 5 each submitted that a public process should be followed in relation to all applications to authorise a digital incentive channel, for both public and commercial (private) broadcasting services.

24.7 The Authority has determined that affording the existing terrestrial broadcasters the right to apply to broadcast further channels is an appropriate mechanism to compensate the broadcasters for the costs of digital migration and dual illumination as well as to facilitate a wider range of programming and services in addition to those presently provided by the existing broadcasters, to encourage



consumers to purchase STBs to access the programming in question. In this regard, the costs incurred by the existing broadcasters include: the further resources which will need to be invested in technology and infrastructure within the relatively short time period within which digital migration is required to enable a digital broadcast signal to be made available (any subsidy which may be given to Sentech to subsidise the costs of dual illumination will relate only to transmission costs and will not include these further (significant) costs) and the costs incurred in marketing the digital channels and informing consumers of the need to obtain a STB. The Authority considers that the value of the spectrum which will be released through the migration of the existing analogue services justifies incentivising the existing broadcasters with the possibility of additional broadcasting rights for the successful completion of the digital migration process. In addition, in the case of the SABC, the right to broadcast additional channels will allow for an expansion of the SABC's public service programming in compliance with the SABC's obligations in terms of its Charter ("the Charter"), as contained in Chapter IV of the Broadcasting Act.

- 24.8 The Authority has decided that TBN will be permitted to make application to broadcast one additional digital incentive channel given that TBN is required to dual illuminate throughout the performance period.

As set out above, the Digital Migration Regulations concentrate on the transition of existing terrestrial services from analogue to digital, where the terrestrial services are currently occupying strategic spectrum in the transmission of their analogue services. In the interest of mitigating various competing national policy interests the Authority has acceded to the calls for the introduction of competition in the pay TV market.

- 24.9 Given that the authorisation of new digital incentive channels involves the right to use valuable radio frequency spectrum (being capacity in a multiplex), the Authority has determined that the public has an interest in the allocations, whether the broadcaster provides a public, commercial or community broadcasting service. As such, the Authority has provided in the Digital Migration Regulations for a public process to be followed where any incumbent broadcaster makes application for authorisation to broadcast a digital incentive channel. This will allow interested parties, including potential competitors for the capacity, to comment on the claims made in support of an application for authorisation and will assist the Authority in testing the claims made. The Authority has provided that all applications for authorisation to broadcast a new

digital incentive channel will be subject to a public value test, being a test as to whether the channel will be of value to the public and will not have an adverse impact (i.e. anti-competitive effect) on the market in which the broadcaster operates. This will include the consideration of whether a proposed channel will contribute to diversity. The Authority has also provided that interested parties will have an opportunity to make representations as to the criteria which should be taken into account by the Authority for the purposes of determining whether a particular channel will be of value to the public. All commercial broadcasters will be required to demonstrate how a proposed channel will contribute to the achievement of the objectives in section 2 of the ECA, while the SABC will also in each instance be required to demonstrate how a proposed channel will contribute to it meeting its objectives in terms of the Charter as well as to the achievement of the objectives in section 2 of the ECA. In this regard, sections 2(e), (h), (r), (s), (t) and (u) are particularly relevant. The Authority is of the view that these criteria will facilitate discussion on the extent to which the public value test is met and that it is not necessary or appropriate for the Authority to prescribe exact requirements with which applications for authorisation to broadcast digital incentive channels must comply. The information which a broadcaster is required to submit with its application for authorisation to broadcast a digital incentive channel has been aligned in the Digital Migration Regulations to the criteria which the broadcasters are required to meet.

- 24.10 The Authority agrees with the submissions that BEE should in each instance be a consideration where the Authority considers an application to authorise a digital incentive channel. The extent to which a particular channel will contribute to empowerment (as provided for in section 2(h) of the ECA) will be one of the considerations which will be taken into account by the Authority in the context of the public value test in considering the value to the public of a particular channel. However, the Authority has decided that it is not necessary to include specific BEE requirements (such as a requirement that digital incentive channels or the programming to be packaged on such channels must be procured from "black-owned" content providers) and criteria to be met by broadcasters seeking authorisation to broadcast digital incentive channels. The Authority is of the view that such an approach would be overly prescriptive and that a degree of flexibility should be afforded to the broadcasters in relation to the measures to be adopted to increase BEE in their organisations. This is consistent with the approach taken in the BEE Act and the Codes (to which the Authority is required to give effect when determining qualification criteria for the issuing of authorisations in terms of section 10(a) of the BEE Act) whereby enterprises (including enterprises



such as the broadcasters) should aim to reach certain targets in relation to each of the seven elements of BEE for the purposes of increasing their BEE levels. The Authority will, as such, take into account the BEE levels of a broadcaster as a whole, and will also consider the extent to which a particular digital incentive channel may contribute to BEE objectives in applying the public value test. The extent to which the addition of a particular digital incentive channel will itself contribute to empowerment will, however, be considered by the Authority as a relevant factor in the authorisation process rather than any specific BEE criteria being imposed as absolute requirements to be complied with by broadcasters in order to be granted authorisation in respect of a new digital incentive channel.

- 24.11 Given that limited spectrum is available for dual illumination of the existing services of the terrestrial broadcasters, the Authority has decided to confine the broadcasting of digital television to the Standard Definition Television (SDTV) mode; the transition to High Definition Television (HDTV) will take place at the end of the performance period, when there is sufficient capacity for high definition channels. HDTV will therefore be introduced as part of the digital dividend review. The Authority has decided not to limit the number of channels which may be broadcast in each Multiplex so as to encourage technological innovation and the efficient utilisation of the radio frequency spectrum in the use of the allocated capacity.
- 24.12 The Authority has determined that subscription broadcasting services must follow the procedures set out in the Digital Migration Regulations to broadcast a digital incentive channel rather than the authorisation procedures in the Subscription Broadcasting Regulations. The authorisation procedures in the Subscription Broadcasting Regulations are aimed primarily at subscription broadcasting on the satellite and cable platforms where capacity in the multiplexes is less scarce than in the DTT multiplexes. In the interests of ensuring that scarce radio frequency spectrum is allocated in the public interest, the Authority has deemed it appropriate for M-Net (being the only terrestrial subscription broadcasting service) to follow the more comprehensive processes set out in the Digital Migration Regulations.
- 24.13 In recognition of the fact that capacity on the Multiplexes is valuable and that it could potentially be utilised by other broadcasters, the Authority will only authorise the existing broadcasters to provide digital incentive channels within their allocated capacity in the relevant Multiplexes, during the performance period. If, at the end of the performance period, the broadcaster is not utilising all

of the capacity allocated to it in the Multiplex in question, the remaining capacity will be forfeited and the Authority may conduct a competitive process with regard to the allocation of capacity in the Multiplexes and may authorise other broadcasters to provide services utilising the capacity in question. As such, in order to be authorised to utilise their allocated capacity for additional digital incentive channels, the broadcasters will have to act quickly to come up with appropriate new channel offerings, which meet the criteria specified in the Digital Migration Regulations. The Authority anticipates that the availability of new programming will incentivise consumers to switch to digital in order to access the programming.

25. Multiplex 3

- 25.1 The Ministerial Policy provides for the creation of two multiplexes for the provision of DTT services and the digital migration of existing analogue television services, as does the ITU's Regional Radio Conference, 2006 (RRC 06). The initial First Draft Regulations reflected this policy, but the Digital Terrestrial Television Regulations consulted on the creation of a third multiplex, referred to in the draft regulations as the MULTIPLEX 3. Further consultation with stakeholders was necessary as the proposal on the creation of the third multiplex did not form part of the draft Digital Migration Framework regulations in October 2008. The idea around the creation of a third multiplex arose during the public hearings which were held in November 2008, although the idea was first mooted in the discussion paper prepared by the Digital Migration Working Group, which was published by the Minister in 2008, it was ultimately not carried through into the Ministerial Policy. The main reasons that a third multiplex was proposed were on the basis of concerns about the feasibility of e.tv and M-Net sharing a single multiplex, as was initially proposed in the First Draft Regulations. e.tv and M-Net had submitted that sharing a multiplex will not be in either party's interest given that they were using different providers of signal distribution services: e.tv was contracted to Sentech, which allowed consumers to use the same antenna to receive both SABC and e.tv and M-Net used Orbicom, which, like M-Net, is a subsidiary of Naspers.
- 25.2 The Authority wanted to explore the possibility of creating a third multiplex subject to M-Net conducting a hard switchover of its existing services i.e. migrating its services within a very short period of time, on the basis that it is easier for a subscription, conditional access service than for a free-to-air service

to conduct a hard switchover. A hard switchover would have the benefit of allowing the Authority to commence the process towards the release of the 790 MHz - 862 MHz band which has been earmarked for mobile communications services in terms of the RRC 06 and the World Radio Conference 2007, hence the Third Draft DTT Regulations retained the requirement for a hard switchover by M-Net but allocated only 50% of the capacity in Multiplex 3 to M-Net.

25.3 The comments received by the Authority with regard to the third multiplex and the requirement for hard switchover included submissions –

25.3.1 from Super 5, that M-Net should not be incentivised for migrating from analogue to digital and should not be protected by the Authority, and from the SABC, MMA, ODM and WOW that M-Net did not need to be incentivised to perform the hard switchover of its existing channels as hard switchover makes business sense for M-Net given that it would save on transmission fees, digital STBs are cheaper than analogue STBs and many of the costs of a hard migration would be incurred in any event ;

25.3.2 from Nafcoc, that the R750 million estimated by M-Net as the cost of a hard switchover is, in fact, the cost of building a new DTT pay television business rather than the cost of the hard switchover;

25.3.3 from M-Net, that the costs of the hard switchover are not related simply to the purchase of new STBs but also to new digital network infrastructure, digital head ends and combiners, conditional access, satellite distribution infrastructure, re-establishment of coverage for self-help sites, implementation of pay-TV business systems, network coverage planning, environmental impact assessments, interference mitigation analysis, decommissioning of existing analogue network and self-help sites, analogue network operating costs for twelve months, communications and marketing to subscribers and call centre and support services;

25.3.4 from the SABC, MMA, ODM and WOW, that M-Net should not be granted the right to use 50% of Multiplex 3 given that: it is a niche subscription broadcaster, the basis for the existence of the M-Net and CSN channels has been superseded by the fact that MultiChoice (Proprietary) Limited ("MultiChoice"), which is a related entity of M-Net, holds a subscription broadcasting licence on which both channels are available and it should not be given any of the available resources

as this gives M-Net an unfair advantage over e.tv and other newly licensed broadcasters;

- 25.3.5 from Super 5, that an invitation to apply ("ITA") should be issued to licensed broadcasters to participate on the DTT platform;
- 25.3.6 from M-Net, that it requires all the capacity in one of the multiplexes to justify hard switchover from a commercial perspective, that the Authority cannot compel M-Net to effect a hard switchover and that M-Net would not perform the hard switchover unless all the capacity in Multiplex 3 was restored to it. Alternatively, M-Net proposed that it migrate in the ordinary course without the hard switchover; and
- 25.3.7 from Super 5, that M-Net should continue to utilize the spectrum currently allocated for its analogue services while the Authority finalises plans regarding the allocation and management of the "subscription" multiplex.
- 25.4 Several parties referred to the fact that M-Net and MultiChoice, which provides the DStv satellite subscription broadcasting service, are related companies and that M-Net should simply be required to migrate its subscribers (who are relatively few in number) to MultiChoice's DTH service. This suggestion, while attractive, does not recognise the historic context in which the M-Net and MultiChoice services have been provided. In terms of the previous regulatory framework, M-Net and MultiChoice provided wholly distinct subscription broadcasting services and, when taking account of the broadcasting rights previously accorded to each of these entities in terms of the IBA Act, once the ECA came into effect, the Authority could not simply regard M-Net and MultiChoice as a single broadcasting service on the basis that they are related entities. Similarly, the Authority cannot simply ignore the fact that M-Net has existing rights to provide a terrestrial broadcasting service and to utilise particular radio frequencies. To a large extent, the Authority is required to work within the existing structure which was created on the basis of previous government policy decisions, while still seeking to ensure that opportunities for effective competition and enhanced consumer choice are created.
- 25.5 In relation to the manner in which the third multiplex would be created, the SABC submitted that further clarity was required regarding the process to be followed by the Authority and M-Net. M-Net submitted that Multiplex 3 should be

designed by M-Net rather than the Authority, although the "identification of frequencies to be used to create Multiplex 3 and the identification of those frequencies that M-Net would release at the end of the hard switchover, would have to be submitted to the Authority for interrogation by its frequency and network planning experts in order to ensure that M-Net's proposals will result in the most efficient use of spectrum". M-Net submitted further that the Authority is not required to follow a public process in this regard as the Authority is permitted to "make this assessment in the interest of orderly and efficient radio frequency spectrum management" on the basis of sections 2(e) and 30 of the ECA. M-Net submitted that all that would be required is the amendment of its radio frequency licence and that M-Net would make application in due course for the amendment of its radio frequency licence.

- 25.6 While the Third Draft DTT Regulations proposed the creation of Multiplex 3, the Authority has decided not to continue with this provision.. Although the proposal around Multiplex 3 sought to facilitate the introduction of competition in the Pay DTT market, the Authority has taken note of the divergent views regarding the introduction of Multiplex 3. In particular, the Authority has taken note of different views regarding the extent to which M-Net should be incentivised to achieve the hard switch-over. In light of the representations, the Authority has concluded that more time would have been required to arrive at a suitable empirical determination on the extent to which M-Net should be incentivised. The Authority has as a result deferred all matters pertaining to competition to a separate regulatory process dealing with the review of the Digital Dividend. This opportunity would allow the Authority to also deal with a range of other radio frequency spectrum needs.

26. Roll-out targets

- 26.1 As set out above, the Ministerial Policy envisages that (1) the digital services should reach 50% of the population by the end of 2008, 80% by the end of 2010 and close to 100% by the end of 2011, enabling analogue switch-off, and (2) hard-to-reach areas should be covered by satellite rather than DTT. In the Third Draft DTT Regulations, the Authority had provided that the providers of signal distribution services appointed by the existing terrestrial broadcasters were required to ensure that the digital broadcast signal reached: 50% of the population by the end of the 2009/10 financial year, 65% by the end of the 2010/2011 financial year and 95% at the end of the 2011/2012 financial year.

- 26.2 e.tv submitted that these roll-out targets should be revised to bring them in line with the coverage targets contained in e.tv's broadcasting service licence. The SABC and Sentech also recommended that the targets be revised on the basis that Sentech is not in a position to achieve 95% roll-out and a requirement in this regard will affect the financial viability of the broadcasters. e.tv, the SABC and Sentech submitted that the final roll-out target should be left at 80% and the broadcasters should be able to determine the best means to achieve universal (i.e. 100%) coverage through, for example, DTT or satellite transmission.
- 26.3 The Authority has decided to revise the roll-out targets for coverage of DTT services to be in line with the coverage targets contained in the existing licences of certain affected broadcasters. The Authority has also revised the time frames within which these roll-out targets are to be achieved to align with the new start date of the performance period. As such, the Authority has provided in the Digital Migration Regulations that the signal distribution service providers appointed by the existing broadcasters in terms of the Regulations are required to ensure 80% coverage of DTT services within 24 months of the commencement of the performance period, during which the broadcasters will dual illuminate their services. 90% within 36 months. The Authority has decided not to provide specifically for the manner in which the broadcasters should seek to achieve universal coverage of their broadcasting services and has left this to the discretion of the broadcasters and their signal distribution service providers.

27. Digital signal distribution services and the appointment of providers

- 27.1 The multichannel environment for which digital broadcasting allows has raised questions regarding the appropriate role to be played by the entities which provide signal distribution services to the broadcasters. Under the previous regulatory system and during the period in which terrestrial television services were transmitted as analogue services, the broadcasting service licensees had the right to decide on who they would appoint to provide signal distribution services. Such broadcasting service licensees were also permitted to self-provide their own signal distribution services. In terms of the ECA, a provider of signal distribution services must be licensed to provide electronic communications network services ("ECNS") (i.e. signal distribution services are a sub-category of ECNS).



- 27.2 As discussed above, e.tv made extensive submissions regarding the manner in which Sentech's tariffs should be regulated, so as to ensure that e.tv is not required to pay inflated and uncompetitive fees for signal distribution. This issue has been addressed above. e.tv also submitted that Sentech is supposed to be subsidised by government during the dual illumination period for the provision of signal distribution services. Sentech indicated that it has requested funding from government for the dual illumination period. Super 5 submitted that, if digital signal distribution is to be subsidised during the dual illumination period, the rationale for this should be explained.
- 27.3 e.tv proposed that the digital migration regulations provide, in the absence of a formal undertaking from the Minister that the costs of digital signal distribution would be subsidised during the dual illumination period, that Sentech is required to provide digital broadcasting signal distribution free of charge. e.tv submitted that the Authority has the power, on the basis of its general regulation-making power in terms of section 4(3)(j) of the ICASA Act to include such a provision in the regulations dealing with digital migration. e.tv argued that, if no provision is specifically made in the regulations for the fact that digital transmission will be provided for free during the dual illumination period, e.tv should not be compelled to launch any new services prior to a 100% subsidy for digital transmission and a strategy for the roll-out of STBs being put in place. As set out above, e.tv also submitted that the Authority should provide, in the regulations, that a tariff inquiry into the tariffs charged by ECNS licensees for signal distribution services would be initiated within a specified period of time following which the Authority would prescribe the tariffs to be charged by the ECNS licensees following the performance period (during which digital transmission services would be provided for free). e.tv submitted further that the existing broadcasters should not be required to conclude an agreement for signal distribution services with an ECNS licensee for the period subsequent to the performance period until the aforementioned inquiry has been finalised and the relevant tariffs prescribed.
- 27.4 The basis for e.tv's submissions is that, practically speaking, e.tv is restricted to engaging Sentech to provide it with signal distribution services if it is to conclude a digital transmission agreement prior to the commencement of the performance period. e.tv submitted that, in the absence of any suitable competing provider of signal distribution services and in the absence of any regulation of Sentech's tariffs, e.tv would simply have to accept Sentech's tariffs for signal distribution and would lose any bargaining power in its negotiations with Sentech.



- 27.5 The SABC submitted that the time period within which broadcasters are required to submit their agreements with ECNS licensees should not be limited, that the agreements should merely be required to be submitted after they are concluded and that the Authority should encourage the conclusion of agreements within 120 days. Sentech submitted that the period within which transmission agreements are required to be submitted to the Authority should be extended to 90 days with the possibility of extension. Sentech also submitted that the Authority should not interfere in the commercial arrangements between ECNS licensees and broadcasters regarding the provision of digital signal distribution services and that the Authority does not have the power to intervene to appoint a signal distributor. Sentech submitted further that the inclusion of provisions in relation to signal distribution may be premature given that the regulatory framework in terms of which Sentech is regulated may change (on the basis of the Public Service Broadcasting Position Paper published by the Minister in 2009). Sentech was also of the view that the digital migration regulations should not provide for the unilateral termination of a transmission agreement by a broadcaster.
- 27.6 In future, it is likely to become difficult to allow broadcasting service licensees operating on the DTT platform to enter into their own commercial arrangements with ECNS licensees who provide signal distribution services. This is because a single multiplex, which must be transmitted by a single provider of signal distribution services, may be allocated to two or more different broadcasting service licensees. The Authority intends to examine this issue to determine the most appropriate regulatory intervention. In the meantime, for the purpose of the digital migration process, the Authority has decided to allow the existing broadcasters (with the exception of TBN) to choose and appoint their own providers of signal distribution services. The Authority will intervene in this appointment process only in instances where the broadcasters are not able to appoint their preferred providers of signal distribution services prior to the commencement of the performance period or where the Authority is of the view that the proposed provider will not be in a position to meet the roll-out targets stipulated in the Digital Migration Regulations. The broadcasters are required to submit the transmission agreements concluded with ECNS licensees to the Authority, to enable the Authority to perform an oversight role.
- 27.7 As set out above, during 2010 the Authority will initiate a process in terms of section 67 of the ECA to consider whether pro-competitive conditions should be imposed on licensees operating in the broadcasting sector, including, possibly Sentech. This may include the imposition of price controls and the regulation of

Sentech's tariffs. This process will be concluded prior to the end of the performance period. If the tariffs levied by any ECNS licensee are ultimately subject to price controls in terms of section 67 of the ECA, that ECNS licensee would be required to charge its customers the regulated tariffs regardless of the tariffs stipulated in its transmission agreements on the basis that the parties cannot contract out of applicable regulatory requirements. (The Authority has included a specific provision in this regard in regulation 9 of the Digital Migration Regulations for the sake of clarity.) The ECNS licensee would also be required to comply with any further requirements which may be imposed on it pursuant to the section 67 process. As such, the Authority expects the existing broadcasters to conclude and submit to the Authority their agreements with relevant ECNS licensees for the provision of digital signal distribution services, prior to the commencement of the performance period. The broadcasting service licensees are expected to conclude agreements covering the performance period to provide for, amongst other things, the manner in which the roll-out of digital services in line with the requirements set in the Digital Migration Regulations is to be achieved. The Authority has not imposed any requirements in relation to the duration of such agreements.

27.8 On the basis that Sentech may receive a government subsidy to cover the costs of dual illumination during the performance period, a requirement has been included in the Digital Migration Regulations that any such subsidy which is received by an ECNS licensee which provides signal distribution services must be applied in the reduction of the tariffs levied on the broadcasters utilising those services and, where applicable, digital signal distribution services in respect of the broadcasters' existing analogue channels (i.e. the channels that are dual illuminated) should be provided free-of-charge. However, broadcasters whose dual illumination costs will be subsidised (through any subsidy granted to Sentech) must nevertheless conclude a transmission agreement with an ECNS licensee given that the parties must provide contractually for matters other than the applicable fees alone.

27.9 The Authority has included a provision in the Digital Migration Regulations that broadcasters may cancel their agreements with ECNS licensees on six months' notice to the ECNS licensee and the Authority where they are granted the right to self-provide signal distribution services. This provision has been included to ensure that broadcasters will not be locked into a contract with a particular provider of signal distribution services, once the broadcaster is in a position to choose another provider and to balance the fact that, at present, broadcasters

have a limited choice of appropriate providers of signal distribution services.

- 27.10 The Authority has specified that the transmission agreements between broadcasters and the ECNS licensees appointed to provide signal distribution services must be concluded and submitted to the Authority prior to the commencement of the performance period. Leaving the period for the conclusion and submission of such agreements open-ended, as certain parties have suggested, may derail the analogue switch-on date and frustrate the purposes behind the performance period.
- 27.11 The Authority also received submissions in relation to the respective roles of the broadcaster, on the one hand, and the provider of signal distribution services on the other. The manner in which the Third Draft DTT Regulations was drafted suggested that the ECNS licensees appointed by the broadcasters would be responsible for multiplexing. e.tv, the SABC and Super 5 submitted that signal distribution does not extend to multiplexing and coding, which affects matters such as the quality of the channel, the provision of an Electronic Programme Guide and associate data for channels and editorial control over content, and which is the responsibility of the broadcaster rather than the provider of signal distribution services. It was submitted that it is unnecessary for the Authority to regulate the process of multiplex operation and that this should be left to the broadcaster. Sentech disagreed with these submissions and made representations to the effect that the digital migration regulations should make it clear that the broadcaster will provide content and that the ECNS licensee will be responsible for statistical multiplexing.
- 27.12 The Authority has decided that the question as to who will assume responsibility for multiplexing will be left to the broadcasters on the basis that multiplexing is not, in and of itself, a licensable activity in terms of the ECA and, certainly, does not constitute ECNS.

28. Community and regional broadcasting services

- 28.1 The Authority received several submissions in relation to community broadcasting. As set out above, the Ministerial Policy envisaged that community television services would be accommodated initially on the public broadcasting multiplex and that the regional public services should be required to provide an open window for community television broadcasting services. In this regard, the

Third Draft DTT Regulations provided that 10% of the capacity in Multiplex 1 was reserved for TBN.

- 28.2 MISA-SA submitted that at least 30% of Multiplex 1 should be set aside for community broadcasting purposes while MDDA submitted that the 10% allocation in the Draft DTT Regulations to community broadcasting services was inadequate. SOS submitted similarly that community television and its future needs had not been adequately dealt with in the Third Draft DTT Regulations. MDDA submitted that community broadcasters other than TBN alone should also be catered for; Avusa made specific reference to Soweto Community Television in this regard. MMA submitted that the rationale for the allocation of 10% of Multiplex 1 to TBN was not clear and that capacity in Multiplex 3 should rather be allocated for this purpose.
- 28.3 The SABC submitted that TBN should not be permitted to broadcast nationally and that its service should be restricted to its current licence and coverage area. The SABC submitted further that TBN should ideally be accommodated on a low power multiplex using QPSK modulation in the Eastern Cape rather than on Multiplex 1 or that the allocation of capacity in Multiplex 1 should only be temporary or that TBN should be accommodated on spare capacity in Multiplex 2. These submissions were made on the basis that requiring the SABC to accommodate TBN in Multiplex 1 would require the use of capacity that would otherwise be available for a further national public channel and is an inefficient use of the radio frequency spectrum. Telkom requested that the Authority clarify whether TBN would be permitted to broadcast nationally or whether the 10% of Multiplex 1 which was allocated to TBN was allocated for use in the Eastern Cape alone and should also be used by future community broadcasters in other parts of the country, as allocating 10% of Multiplex 1 to TBN would be an inefficient use of the spectrum if TBN did not intend to broadcast nationally.
- 28.4 The accommodation of TBN on Multiplex 1 is intended to be on a temporary basis until such time as further spectrum becomes available for community television broadcasting purposes. As set out above, the Authority intends to investigate using part of the frequencies released by M-Net following the hard switchover for community broadcasting purposes, including the TBN service and other existing and future community television services. The Authority has now provided in the Digital Migration Regulations that the allocation of capacity to TBN is only for the duration of the performance period, although the Authority may extend this if needs be. The Authority has not provided, at this point, for the

migration of other existing community broadcasting services, including Soweto TV. This is on the basis that those licensees have indicated to the Authority that they are not currently in a position to migrate and that this is not feasible at the present time owing to the costs which would be incurred.

- 28.5 The Authority is particularly concerned with the migration of TBN given that the radio frequencies presently occupied by TBN in the Eastern Cape are strategic frequencies which must be vacated to avoid interference with the digital signal.
- 28.6 The Authority has also clarified in the Digital Migration Regulations that TBN will only be permitted to broadcast its digital service in its existing licence area of the Eastern Cape. As such, its existing coverage area will not be expanded through the digital migration process. As such, any frequencies which may in future be allocated to TBN for digital broadcasting purposes (in any future multiplex created by the Authority) may potentially also be utilised by other community broadcasters in other areas of the country.
- 28.7 In relation to the regional services which were intended to be launched by the SABC, e.tv submitted that the digital migration regulations should set a fixed time period within which the regional channels should be launched to avoid a situation where the SABC is authorised to broadcast further digital incentive channels but does not ever commence broadcasting the SABC 4 and 5 regional channels. e.tv submitted that the SABC should be required to launch SABC 4 and 5 no later than the date of launch of any other digital incentive channel. The SABC submitted that the licences granted to the SABC were granted subject to funding from parliament and that the issue of the SABC 4 and 5 regional channels should not be dealt with in the context of regulations dealing with digital migration.
- 28.8 The Authority intends to accommodate regional services once the digital dividend has been released. The Authority has not yet issued licences in respect of SABC 4 or 5 to the SABC, as the decision to award licences to the SABC in respect of these channels was premised on adequate funding being made available by government. This has not yet occurred. As such, the SABC has no obligation at the present time to broadcast those channels on analogue. The question as to whether the SABC should be permitted to broadcast further digital incentive channels in Multiplex 1 without first launching the regional channels, will be considered in the process for the authorisation of any digital incentive channels in the context of the public value test and the requirements of the SABC Charter. The process which is currently underway for the review of the regulatory

framework within which the public broadcasting service operates, is also likely to affect the requirements with which the SABC must comply in fulfilling its public service mandate.

29. Radio frequency spectrum licensing

- 29.1 Sentech submitted that, in terms of section 31 of the ECA, it is necessary for the radio frequencies which are assigned to the broadcasting services also to be assigned to the entity which provides signal distribution services. Sentech submitted that frequencies should be assigned to the ECNS licensee providing broadcast signal distribution services on a primary basis and to the broadcaster on a secondary basis, taking into account the investment made by the ECNS licensee. Sentech argued that any concerns on the Authority's part that co-assignment will limit the options of the broadcaster if it wants to self-provide or seek the services of another ECNS licensee are not reasonable or rational given that failure to co-assign the frequencies to Sentech will result in it contravening the ECA. Sentech proposed that any radio frequency spectrum licence held to Sentech in respect of any co-assigned frequencies could be made subject to the condition either that it will expire on the date that the radio frequency spectrum licence issued to the broadcaster expires or on the date that the Authority is notified of the discontinuation of Sentech's contractual arrangement with the relevant broadcaster. Sentech submitted that the requirement that it hold a licence to provide signal distribution services to broadcasting service licensees on the radio frequencies assigned to those broadcasters is not removed by the transitional provisions of the ECA in terms of which any previous unlicensed use of radio frequency spectrum continues to be authorised in terms of the ECA. This is on the basis that Sentech did not have a historical right to use the frequencies which will be used for DTT transmission and that these frequencies are not subject to the same transmission parameters as the analogue frequencies in relation to which Sentech previously provided signal distribution services to the SABC and e.tv.



- 29.2 Section 31(1) of the ECA, which provides for radio frequency spectrum licensing, provides as follows –

"Subject to subsections (5) and (6), no person may transmit any signal by radio or use radio apparatus to receive any signal by radio except under and in accordance with a radio frequency spectrum licence granted by the Authority to such person in terms of [the ECA]" (emphasis added).

In the past, the frequencies used for broadcasting purposes have been assigned only to the broadcaster. This is despite the fact that the broadcaster is generally not the entity performing the physical transmission via radio signals of the broadcast signal. This is on the basis that the broadcaster has the right to provide its broadcasting service on a particular frequency and is required to comply with a range of programming and other obligations in light of the fact that the radio frequency spectrum is a scarce resource and that there are a finite number of frequencies available for broadcasting (i.e. it is not possible simply to allow any person who wishes to do so, to commence broadcasting using radio frequency spectrum). The authority has attempted to address this issue by declaring the ECNS providing signal distribution to be an agent of the broadcasters. Effectively this means that any ECNS providing the signal is deemed to be in compliance with the prescription of section 31(1).

- 29.3 The SABC submitted that the licensing model in terms of which the existing terrestrial broadcasters are licensed needs to be reviewed in the context of the multi-channel environment to which the broadcasters are moving before licence conditions can be imposed on broadcasters.

- 29.4 The Authority recognises that it is necessary to amend the broadcasting service licences of the existing terrestrial broadcasters who will be migrating their services to take account of the fact that they will be operating in a multi-channel environment. The existing broadcasting service licences held by the broadcasters are specific to a single channel, analogue environment. In addition, it is necessary for the Authority to amend the radio frequency spectrum licences issued to the existing broadcasters given that, during the performance period they will be utilising both their existing frequencies and the capacity allocated to them in the DTT multiplexes, in terms of the Digital Migration Regulations. The Authority will commence the necessary processes for the amendment of the licences held by the broadcasters in accordance with its powers in terms of the ECA but has provided in the Digital Migration Regulations for transitional provisions pending the finalisation of the licence amendment processes. As

such, the broadcasters' existing broadcasting service and radio frequency spectrum licences are deemed to authorise them to provide services and utilise capacity in the relevant DTT multiplexes, on the basis provided for in the Digital Migration Regulations.

30. Local content

30.1 Amongst the submissions which the Authority received on the Third Draft DTT Regulations were submissions regarding the local content obligations with which the broadcasting services broadcasting on the DTT platform are required to comply. In this regard, Avusa and the SOS submitted that broadcasting service licensees should continue to comply with the ICASA South African Television Content Regulations, 2006 published under General Notice 154 in *Government Gazette* 28454 of 31 January 2006 ("the Local Content Regulations"). These Local Content Regulations were made in terms of the Independent Broadcasting Authority Act 153 of 1993 ("the IBA Act"), which was repealed by the ECA with effect from 19 July 2006. The Local Content Regulations have remained in effect subsequent to the repeal of the IBA Act by virtue of section 95(2) of the ECA. Avusa submitted further that the digital migration regulations should require the existing broadcasting licensees to enter into agreements or partnerships with local and independent producers of television content. The SABC submitted that the Local Content Regulations are not relevant in the context of a multi-channel environment. MMA was of the view that a further provision should be included in the digital migration regulations specifically providing that the existing monitoring, compliance and reporting requirements as stipulated in the licence conditions and Local Content Regulations, which are applicable to the existing terrestrial broadcasters will continue to be applicable. The MMA also submitted that the Authority should monitor compliance by, for example, evaluating the broadcasters' programming schedules.

30.2 Although the Local Content Regulations were published in terms of the IBA Act, they remain in effect in accordance with the transitional provisions of the ECA. The Local Content Regulations now fall to be construed in accordance with the ECA, and broadcasters are required to comply with them, except to the extent that they are inconsistent with the ECA. The Local Content Regulations impose requirements on (1) public and community television broadcasting service licensees (in regulation 3), (2) commercial free-to-air television broadcasting service licensees, including the commercial services provided by the SABC (in

regulation 4) and (3) terrestrial, cable and satellite subscription television broadcasting service licensees (in regulation 5). The Local Content Regulations impose minimum requirements in relation to the percentage of programming which must be South African television content and the genre and nature of the South African programming which must be broadcast. Where a public or community television broadcasting service licensee provides a broadcasting service consisting of more than one channel, the minimum local content requirements imposed on such licensees are applicable in respect of each channel broadcast by the licensee (regulation 3.2). The Local Content Regulations do not currently make provision for a situation where a commercial free-to-air television broadcasting service licensee broadcasts more than one channel. In relation to commercial subscription terrestrial and cable television broadcasting service licensees, the Local Content Regulations provide that their local content obligations may be met through the broadcasting of South African local content programming either on dedicated channels or across the broadcaster's bouquet of channels (regulation 5.2). The Authority may also, in lieu of the requirement to broadcast a particular percentage of local programming, direct a terrestrial or cable subscription broadcaster annually to spend a specified amount of money or a specified minimum percentage of its gross revenue on local content programming (regulation 5.3).

- 30.3 The Authority intends to review the Local Content Regulations to provide more specifically for the obligations with which broadcasters are required to comply in a multi-channel environment. This will necessarily involve a comprehensive public process during which all interested parties will have an opportunity to make representations in relation to the policy approach to be adopted by the Authority. Of course, during the performance period during which there will be dual illumination of the existing channels broadcast by the SABC, e.tv, M-Net and Trinity Broadcast Network ("TBN") the existing channels will be broadcast in both analogue and digital formats and the manner in which the broadcasters will be required to comply with their local content obligations must take account of the fact that the existing terrestrial television channels will be broadcast in a transitional period (i.e. the existing analogue environment in which the local content programming obligations have been imposed continues to exist at the present time). In the meantime, subject to what is stated below, until the Authority has completed the process for the review of the Local Content Regulations, the existing terrestrial broadcasters are required to comply with the Local Content Regulations as presently drafted. A provision has been included in the Digital Migration Regulations in this regard. The Local Content

Regulations should be read as providing (similarly to the obligations which are imposed on public and community television broadcasters) that the specified minimum percentages of local programming provided for in regulation 4, should apply to each channel broadcast by a commercial free-to-air broadcaster.

- 30.4 The Authority recognises that the broadcasters may wish to include digital incentive channels, during the performance period, which comprise one particular type of programming. For example, a broadcaster may wish to include a dedicated sports channel or a channel broadcasting educational or children's programming exclusively, as mooted in the Ministerial Policy (paragraph 6.1.6). The Authority does not wish to preclude broadcasters from doing so where the addition of such channels would be to the public benefit. As such, the Authority has included a transitional provision in the Digital Migration Regulations which will apply until such time as the Local Content Regulations are reviewed and replaced, in terms of which an existing terrestrial broadcaster may apply to be exempted from the local content requirements imposed in terms of the Local Content Regulations in respect of a particular channel. This provision will be relevant to the SABC, e.tv and TBN which are required, in terms of the Local Content Regulations, to broadcast particular genres of South African programming on each channel. Given that M-Net (as a commercial subscription terrestrial broadcasting service) may comply with local content requirements across its bouquet of channels, it will not need to be exempted from the requirements of the Local Content Regulations in respect of a particular channel to be added to its bouquet. Should the SABC, e.tv or TBN intend to introduce a digital incentive channel to which the Local Content Regulations could not reasonably be applied, due to the nature of the programming to be packaged on the channel, the application for exemption should be made at the same time as the application for authorisation of the channel in accordance with the procedures set out in the Digital Migration Regulations.

31. Language diversity

- 31.1 The Third Draft DTT Regulations provided that the SABC was required to broadcast in each of the official languages of the Republic, across its bouquet. The SABC and Professor Guy Berger submitted that all broadcasters should be required to contribute to language diversity. Professor Berger submitted further that obligations should be included in the digital migration regulations requiring broadcasters to provide simulcast sound tracks for local content programming. e.tv submitted that only the SABC should be subject to requirements to

broadcast in all the official languages in accordance with the requirements of section 10 of the Broadcasting Act.

- 31.2 As part of its review of the existing Local Content Regulations, the Authority intends to consider the most appropriate means to facilitate diversity of languages in the television broadcast sector in the digital broadcasting, multichannel environment. At present, the broadcasters must continue to comply with the language requirements specified in their existing licences for their existing channels (which will continue to be broadcast on analogue during the performance period). In addition, where the SABC makes application for authorisation to broadcast a digital incentive channel, one of the factors which will be taken into account by the Authority is the extent to which the addition of the channel will contribute to the SABC meeting the requirements of sections 10(1)(a), (b) and (c) of the Broadcasting Act.

32. Sound broadcasting services

- 32.1 With regard to sound broadcasting services, the SABC submitted that it should be permitted to broadcast its public sound broadcasting services on Multiplex 1 and that these services could be accommodated within the 15% of its allocated capacity which may be used for the provision of broadcasting services. Professor Guy Berger submitted similarly that restricting sound broadcasting only to test services was an unnecessary restriction. e.tv submitted that radio services other than the SABC's public radio stations should also be permitted to be broadcast on the multiplexes
- 32.2 The Authority has decided that any sound broadcasting services can be carried on the multiplexes subject to an agreement between the broadcasters. It is not possible for the Authority to provide that all the existing radio stations may be broadcast on the DTT multiplexes until after the performance period, given the number of radio services which are available and the need for the DTT multiplexes to be utilised primarily for the provision of digital television services.

33. JSAC

- 33.1 Previous drafts of the digital migration regulations made provision for the establishment of a Joint Spectrum Advisory Committee ("JSAC") representing the broadcasting services which are subject to digital migration. In their comments in relation to the First Draft Regulations some industry players, especially providers of electronic communications services, submitted that they should also be represented on the JSAC given that they too have an interest in a smooth migration process. In the context of the Third Draft DTT Regulations, the GSM Association submitted that the composition of the JSAC focuses solely on broadcasting interests, which will not serve the interest of ensuring that the digital dividend spectrum is made available for other services, and submitted that the JSAC should also monitor the efforts of the broadcasting community and ensure that best efforts in relation to digital migration are being made. ODM submitted similarly that all interested and affected parties (including the newly licensed subscription broadcasters) should be entitled to be represented on the JSAC. Mr Guy Berger submitted that the JSAC should be expanded to include a representative from the Digital Dzonga (established in terms of the Ministerial Policy) and representatives of the telecommunications companies who have a strong interest in spectrum usage.
- 33.2 The sole purpose for the establishment of the JSAC is to allow an opportunity for those entities which are required to migrate from analogue to digital to make submissions and recommendations to the Authority regarding the digital migration process. As set out above, the question as to how the digital dividend will be used will be addressed in further comprehensive public processes to be conducted by the Authority and will not be dealt with by the JSAC. In addition, there are sufficient processes in terms of the ECA and ICASA Act which provide for the monitoring of compliance with applicable regulatory requirements and licence conditions that make it unnecessary for compliance monitoring to be dealt with by the JSAC. As such, the Authority does not regard it as necessary for any persons other than those who are required to migrate their existing television services in terms of the Digital Migration Regulations and the ECNS licensees involved in the digital migration process, to be represented on the JSAC.



34. Other issues in the Ministerial Policy

- 34.1 The Authority has decided not to include the applicable standards for DTT services in the Digital Migration Regulations. The South African Bureau of Standards has already published DVB-T as the South African National Standard for DTT (SANS 300744: 2005), and DVB-S has been published as the South African National Standard for Digital Satellite (SANS 300421: 2007). With regard to the technical standards for STBs, the Authority will determine at a later stage whether it is necessary to prescribe a compulsory standard for South Africa in terms of the ECA.
- 34.2 The Authority has decided not to make provision in the Digital Migration Regulations for the manner in which e-government services are to be made available. As set out above, the Ministerial Policy indicates that STBs will include features allowing for the provision of such services. However, although the socio-economic rationale for the provision of e-government services is clear, it seems that the manner in which such services must be provided is primarily something to be dealt with by government, which is driving the STB process. Further Ministerial policy determinations will inform the Authority's regulatory approach to e-government services.

**VI CONCLUSION**

35. The finalisation of the Digital Migration Regulations paves the way for industry to commence the process towards analogue switch-off and the provision of commercial DTT services and for the necessary public processes in respect of the digital dividend to be initiated with the aim of introducing further competition in both the broadcasting and electronic communications markets. The Authority remains committed to engaging with stakeholders on better and innovative ways to release the digital dividend, which will lay the required foundation for the introduction of competition in both the pay and free-to-air markets.
36. The fact that the Digital Migration Regulations are largely confined to the dual illumination period the Authority has taken a decision to link the introduction of competition with the Digital Dividend Review process, which will commence at the end of the performance period. The Authority is of the view that, by incentivising the existing terrestrial broadcasting services, for their costs of migration, the Authority will be in a position to realise the digital dividend sooner to benefit the whole of the broadcasting and communications sectors. Related to this, the Authority will continue with current work to introduce a competition framework for broadcasting, in terms of section 67 of the ECA, as well as consider the necessity to review the current local content regulations. The advent of the new multichannel environment will inform the extent to which local content should be regulated, going forward. As part of facilitating a successful migration process, and should it be necessary, the Authority will make policy or legislative recommendations to the Minister. Going into the future, it may be necessary to consider some legislative amendments to introduce a new DTT licensing environment to enable the smooth functioning of a multichannel environment.

**PARIS MASHILE****CHAIRPERSON OF COUNCIL****INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA**

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