



MINISTRY
COMMUNICATIONS AND DIGITAL TECHNOLOGIES
REPUBLIC OF SOUTH AFRICA

Private Bag X860, Pretoria, 0001, Tel: +27 12 427 8270 Fax: +27 12 427 8115
Private Bag X 9151, Cape Town, 8000 Tel: +27 21 469 5223 Fax: +27 21 462
1646 URL: <http://www.dcdt.gov.za>

Mr Mothibi Ramusi
The Chairperson
Independent Communications Authority of South Africa (ICASA)
Private Bag X10
Highveld Park
0169

Email: chairperson@icasa.org.za

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Dear Chairperson

COMMENTS ON DIGITAL TERRESTRIAL TELEVISION REGULATIONS 2025

I received your letter of 7 July 2025 enclosing a copy of the draft Digital Terrestrial Television Regulations, 2025 (draft Regulations) which were published in the Gazette for general comment on 7 July 2025. As the executive with responsibility for the sector, it is vital that I am satisfied that secondary as well as primary legislation and associated legal instruments are clear, relevant, and justified. This is the foundation for this submission.

Process for passing regulations

At the outset, I would like to address a procedural point.

Your letter suggests that in sending the draft Regulations to my office at the same time as gazetting them for comment by other stakeholders the Authority is complying with section 4(5) of the ECA. However, we differ on the interpretation of that section, and the approach taken by the Authority is also out of step with the approach taken over many years to date, which the Authority's records will show.

Section 4(4) of the ECA provides that, "*The Authority must, not less than 30 days before any regulation is made, publish such regulation in the Gazette, together with a notice –*

- (a) declaring the Authority's intention to make that regulation; and*
- (b) inviting interested parties to make written representations on the regulation."*

Section 4(5) provides that, "*The Authority must, not less than 30 days prior to making regulations, inform the Minister in writing of its intention and provide the Minister with a copy of the proposed regulations."*

- i. If it was the intention of the legislature that the Minister would simply be able to participate in a public comment process along with everyone else, then there would be no need for section 4(5) as section 4(4) would be adequate. This is clearly not the case, as the legislature does not include superfluous provisions for no reason.
- ii. The phrase “*making of regulations*” is not defined whereas “*prescribed*” is defined. The definition clearly anticipates that “prescribed” regulations will have been passed in final form following the legislated process, which requires a 2-stage consultation process.
- iii. It must therefore be the case that prior to making regulations in final form, ICASA must not only provide them to the Minister but must also consult on them more broadly. If the two periods referenced in each of these obligations were to run concurrently the provisions would be nonsensical.
- iv. While section 4(7) applies to section 4(4), it does not apply to section 4(5). Therefore, regardless of whether or not draft regulations are considered by the Authority to require that they are made without delay, or whether there are amendments to be made, the provisions of subsection (5) still stand. A copy of the regulations in draft form must, notwithstanding the provisions of section 4(7), be provided to the Minister at least 30 days prior to making the draft regulations final.

I do not intend to address this point further, save to say that regulations should, in future, be provided to this office in accordance with practice and the provisions of law, at least 30 days prior to their publication for comment by stakeholders.

ICASA obligations in relation to research and recommendations

The Authority is obliged, under the ECA and ICASA Act, to undertake research. In addition, either as a result of that research or otherwise ICASA may make recommendations to the Minister:

- a. on policy matters in accordance with the objects of the ECA (section 3(9)); and
- b. on policy matters and amendments to the ICASA Act and the underlying statutes which accord with the objects of the ICASA Act and the underlying statutes to promote development in the broadcasting, electronic transactions, postal and electronic communications sectors under the ICASA Act (section 4(3)(a)).

In a matter as important as this one, in order to give effect to the objects of the ECA and having regard to the Authority’s limited discretion under the ICASA Act, it would have been appreciated had the Authority made recommendations to this office some time ago to support the rationale for preparing these Regulations.

General comments on the draft Regulations

There are numerous references to legal instruments within the draft Regulation that are incorrect. This is a basic mistake which can be rectified with proper editing.

The draft appears to be a cut and paste of the Digital Migration Regulations of 2012, with minor changes. Those Regulations were intended to apply until analogue switch-off (ASO), whereas these draft Regulations are stated to apply only from ASO. This means that references to ‘analogue’ and the retention of numerous clauses that apply only up to ASO are irrelevant and should be omitted.

Several other regulations are affected by these draft Regulations, including the Mobile Television Regulations, 2010. They are not mentioned but it seems that they should be as removing the requirement in light of the streaming permitted and taking place over mobile networks would free up spectrum – unless the Authority can advise me why this should not be addressed.

The draft Regulation does not deal with licensing of the multiplex itself although it refers to “allocation of capacity” on each multiplex. While the position adopted in the draft Regulation may be appropriate during the ASO period, this area can and should be considered ‘open for business’, meaning that third parties can also provide signal distribution services, as the 2012 Regulation anticipates by reference to an ITA. To that end, there should be incentives to encourage market entry such as proposals regarding licensing of multiplexes to ECNS licensees (see below).

I am advised that the state-owned ‘common carrier’, namely Sentech SOC Ltd (Sentech), has recently been the subject of an inquiry specifically into its dominant position in signal distribution. The Authority has consulted on remedies, and it would seem that introducing the possibility of competition was not only considered in the current 2012 Regulations but is again included as a possibility in the draft Regulations. Presumably in its consideration of remedies, the Authority will also be considering obligations on Sentech to share infrastructure, declare its high sites to be essential facilities, and ensure that any new entrant is able to access playout facilities or other facilities that are capable of being shared to enable competition? This is the sort of incentive that might be attractive.

In other countries like the United Kingdom, once allocated, the broadcasters can manage the capacity on muxes themselves, including selling it. The draft Regulation is silent on this. It is understandable in a pre-ASO environment that more control is necessary, but it is not generally the case in a post-ASO environment. As the draft Regulations provide that they apply post-ASO, I am advised that the position could have been reconsidered and aligned with best practice in order to ensure the most efficient and effective use of spectrum and the best way to enable entry to the market to stimulate competition. I would be interested to know if the Authority undertook any research before deciding on its approach?

The position on channel authorisation also appears to be more appropriate in a pre-digital environment. What consideration was given to the need for this procedure in a post-digital, multichannel environment, specifically in relation to hearings?

Section 30(2)(b) obliges the Authority to “*take into account modes of transmission and efficient utilisation of the radio frequency spectrum, including allowing shared use of radio frequency spectrum when interference can be eliminated or reduced to acceptable levels as determined by the Authority*”. How does the Authority plan to do this when “capacity” is shared between broadcasting service licensees on a multiplex? The Regulation is silent on this point. This point obviously applies in relation to the comments made on the efficient use of spectrum elsewhere in this submission.

The Explanatory Memorandum does not seem to be a robust instrument of administrative justice. As you will know, it should be the basis on which the reasons for the decision by the Authority to issue the draft Regulation in this form, are explained. It is concerning that there is an apparent disconnect between the content of the draft Regulation and the Explanatory Memorandum. In order to ensure that litigation is kept to a minimum and that regulations are passed expeditiously and without challenge, I am advised that it would be appropriate to revise the Memorandum.

In order to save time and simplify the process of reviewing changes proposed by the department, these changes and several comments on specific matters are marked up on the draft Regulation.

I trust this is of assistance and look forward to your response.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

Solly Malatsi, MP
Minister of Communications & Digital Technologies