

eMEDIA INVESTMENTS COMMENTS AND SUBMISSIONS ON THE DRAFT NATIONAL RADIO FREQUENCY PLAN, 2021

Introduction

1. eMedia Investments (Pty) Ltd (“eMedia”) thanks the Independent Communications Authority of South Africa (“ICASA” or “the Authority”) for the opportunity to comment on the Draft National Radio Frequency Plan, 2021 (“the Draft Frequency Plan”).
2. eMedia wishes to participate in any public hearings convened in relation to the Draft Frequency Plan and notes that the Authority intends to hold such hearings in September 2021. For reasons set out below, eMedia maintains that these hearings are premature and should they be held, may ultimately delay the process of finalising the Frequency Plan and may result in litigation.
3. Insofar as the hearings are concerned, as and when they are held, eMedia reserves the right to supplement these submissions at the hearings should it deem it necessary to do so. There are various technological developments currently taking place which, together with the pending litigation and discussions between various interested parties, may impact the finalisation of the Frequency Pan.

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4. eMedia (Pty) Ltd is a South African media group with holdings in a variety of broadcasting, content and production businesses including, e.tv (South Africa’s only commercial free-to-air television broadcasting service licensee), Openview (a free-to-air satellite multi-channel television broadcaster) and eNCA (South Africa’s most watched 24-hour news channel).
5. e.tv holds an individual commercial (free-to-air) broadcasting licence and a radio frequency spectrum licence dated 17 December 2008. This entitles e.tv to broadcast the e.tv free-to-air channel. Its activities are highly regulated in terms of its broadcasting licence, which also imposes public interest obligations on it. The e.tv channel is broadcast as an analogue channel using radio frequency allocated to e.tv in terms of its radio frequency licence.

Accordingly, any amendment to the National Frequency Plan would have a direct impact on e.tv.

The Current Litigation

6. The Draft Frequency Plan comes at a time when e.tv and others are currently engaged in on-going litigation with the Authority regarding the auction for the licensing of the International Mobile Telecommunications (IMT) for the provision of mobile broadband wireless access services in the IMT700, IMT800, IMT2600 and IMT3500 spectrum frequency bands.
7. Insofar as the litigation referred to above is concerned, there are currently two matters pending in which the Authority and the Minister of Communications are respondents (“the litigation”). In one of these matters, e.tv as one of the applicants is seeking to review the Authority’s decision to auction certain spectrum including that which is currently licensed to broadcasters and which the Authority has indicated will immediately become available to the successful bidders (“the e.tv review”). The e.tv review is pending and the Authority has not yet filed its answering affidavit. Clearly, the outcome of this litigation will have a material impact on the Draft Frequency Plan as it may provide clarity in relation to which frequencies are to remain with or be allocated to broadcasting services and which frequencies are to remain with or be allocated to telecommunications companies.
8. Taking account of the current litigation, as well as the impact of the delay in digital migration discussed more fully below, and given the on-going discussions between, inter alia, the parties to the litigation regarding the possible resolution of the litigation as well as how the litigation should proceed should this be necessary, it is e.tv’s submission that the publication of the Draft Frequency Plan is premature.
9. For these reasons, e.tv is of the view that the Authority should suspend these proceedings until the litigation is finalised or settled, and clarity is reached as to when, realistically, the migration to DTT will be finalised so that the vast majority of the population have the means to receive free-to-air television. This can only occur when at least 90% of the population have the necessary equipment to receive and view the free-to-air channels digitally. This will fulfil the mandate of universal access. It is only then that a rational and proper decision can be taken regarding the Draft Frequency Plan which will govern the allocation of

frequency in the years to come. To do otherwise, may result in further legal proceedings (thereby further delaying the adoption of a Frequency Plan) and/or the Authority having to revisit the Frequency Plan in the not-too-distant future. Either of these options serves no-one's interests.

10. It is accordingly suggested that these proceedings be suspended till an appropriate time bearing in mind what has been set out above and that parties be invited to either submit or amend existing submissions prior to any hearings taking place whenever that may take place in the future.
11. In the event that the Authority decides, notwithstanding these submissions, that the hearings and process must proceed, e.tv makes the following submissions (subject to its right to amplify these submissions).

The Impact of the Delay in Digital Migration

12. e.tv is the holder of a Radio Frequency Spectrum Licence dated 17 December 2008 and an Individual Broadcasting Service Licence (the amended version was signed on 31 December 2010). In terms of these licences, e.tv was allocated a certain amount of radio frequency spectrum for the provision of analogue television broadcasting.
13. Digital migration requires the "switch-off" of all analogue transmitters which will be followed by a period of digital migration to move the broadcasters to the frequency bands below 694Mhz. The Authority is aware that the process of digital migration has been delayed by several years and beset with numerous challenges. The process of digital migration commenced some 14 years ago in 2006. Originally, the deadline for the analogue switch-off was to be 2015. This deadline (together with numerous later deadlines) was missed, and the digitisation process is still far from complete.
14. e.tv submits that "Broadcasting" as a primary service in the 694-790 MHz and 709-862 MHz bands cannot and should not be removed due to the delay in digital migration process which poses a significant risk to the protection of free-to-air broadcasting. Nor can broadcasters share these frequencies with telecommunication companies as this will cause undue interference with the ability to broadcast.

15. Currently, more than 60% of e.tv's viewers access e.tv's programmes through its analogue services. Unless and until adequate provision has been made for these viewers to continue to receive these free-to-air broadcasts (such as through the provision of set-top boxes or alternative means), any switch-off of the analogue service is not only premature but will be unlawful and unconstitutional. The switching off of analogue services at this stage and in the near future will result in a very large number of South Africans, including indigent South Africans, being cut-off from being able to receive television broadcasts which include important news, matters of public interest and public service announcements. This will deny them access to a mode of media which is free and through which a vast number of these persons rely on as the only means to obtaining news. It is also contrary to the important principle of universal access.
16. The hallmark of success for digital migration is set out in the Amendment of Broadcasting Digital Migration Policy published on 18 March 2015 by the then Minister Muthambi, which provides that:

“Universal access, the availability and accessibility of broadcasting services to all citizens are a key component of digital migration.”

17. The promise and principle of universal access to broadcasting services set out in the policy precept is at risk of failure on account of, *inter alia*, not accounting for new and developing technologies; the failure to rollout set-top boxes in a timely manner or at all; and the stated desire to auction spectrum on a long-term basis to telephony companies. All of these impact how frequency is to be allocated in any new frequency plan. Moreover, unless these fundamental issues are addressed in a meaningful way, universal access to broadcasting services will diminish and, in the near future, cease. This will impact the rights of the poorest South Africans to receive free-to-air broadcasting services and a premature migration would threaten the viability of free-to-air broadcasters. The sometimes suggested solution of sharing frequency is unworkable (for reasons explained fully in e.tv's affidavits in the litigation) and will only result in further litigation and delays.
18. Moreover, any changes in the frequency plan should consider and allow for changes in technology which will impact the future of, *inter alia*, free-to-air broadcasting in South Africa. The fact of the matter is that the future of broadcasting may not be realised on DTT but other developing technologies such as 5G. This needs to be investigated and understood

fully to assess how spectrum should be allocated in any future plan. In this regard, it is submitted that the Authority should investigate and understand the absolute use and effectiveness of spectrum in the 5G world and assess whether broadcasters should have access to a portion of the 700 MHz spectrum and co-exist with telecommunication companies using these spectrum bands.

19. It is the opportunity created by technological advancements that requires a reconsideration of the most efficient use of spectrum in South Africa for the years to come which will permit for technological advancements and changes. The Authority should not turn a blind eye to these technological changes in an ever-changing environment.
20. The irony of the delays in the auction of spectrum (which will impact any future spectrum plan) and the rollout of DTT, has placed South Africa at the forefront of allowing it to embrace cutting edge technology that allows for broadcasting and IMT services to co-exist, resulting in the possibility of sharing of the spectrum without the necessity of one of the mediums having primacy as is suggested in the draft frequency plan. In this regard, the Draft Frequency Plan may very well be out of date even before it is adopted. To achieve the goal set out above will involve retaining some spectrum between 700 MHz and 850MHz for the purposes of free-to-air broadcasting. In the circumstances, e.tv is of the view that broadcasters should not be excluded from using this spectrum.
21. Given the slow rate of progress of DTT penetration in South Africa, the refusal to accept that it will be possible for 5G technology to broadcast in the same areas as IMT (and hence replace DTT), will result in the Authority taking a step backwards in circumstances in which it now has the opportunity to become a world leader. If the spectrum between 700 MHz and 850MHz is handed to the telecommunication companies through the proposed auctions (which, as set out above, are being challenged), this will irreversibly change and threaten the existence of free-to-air broadcasting. The manner in which these changes will take place will be expanded upon at the hearing of this matter.
22. Additionally, South Africa cannot afford for the spectrum earmarked for the WOAN in the 700 MHz to 850 MHz band to be used exclusively by the telecommunication companies. Once again, considered alongside the various attempts to auction spectrum currently occupied by the broadcasters and the attempt to remove broadcasters from certain frequencies as set out in the draft frequency plan, e.tv submits that the auction of the WOAN

is also premature and will have the effect of prejudicing broadcasters as against telecommunication companies. This will permanently skew the field in favour of the telecommunication companies and create an environment of unfair competition which is contrary to one of the objects in the Electronic Communications Act (“ECA”). Telecommunications companies with greater resources will increasingly have the ability to encroach into the domain of broadcasters and threaten their continued existence. The mandate of the Authority is to ensure that this does not happen.

23. In these circumstances, any changes to the frequency plan and/or the auction of further spectrum for the WOAN, needs to consider the ever-changing needs of broadcasters as well as developing technologies. It is essential that broadcasters are protected given the universal access obligations and are not made secondary to telecommunications companies. There is no rational reason to favour mobile telephony over broadcasting services in this regard. As stated above, members of the public who, in many instances, have no other access to news and vital information other than through free-to-air broadcasting, need to be catered for as part of the universal access principle. This is recognised and supported in the Broadcasting Act. To prefer mobile telephony over broadcasters would have the effect of denying a large portion of the population access to, for example, the provision of educational programming, programming which strengthens the spiritual and moral fibre of society, the accessibility to the plurality of news, views and information, and access to a wide-range of entertaining and educational programmes as required by the Broadcasting Act.
24. E.tv has always supported the digital migration process. However, it has been alarmed at the various measures currently being taken by the Authority which will have the consequence of forcing e.tv off its analogue spectrum prematurely and unlawfully. This, amongst other things, is the source of the pending litigation. In this regard, the Draft Frequency Plan ignores the reality that currently, more than 60% of e.tv’s viewers access e.tv’s programmes through its analogue services. e.tv has 28 analogue transmitters in the bands 694-709 MHz
25. e.tv submits that unless and until adequate provision has been made for its analogue viewers to continue to receive these free-to-air broadcasts (such as through the provision of set-top boxes or other suitable forms of equipment) any switch-off of the analogue service

will be unlawful and unconstitutional. Accordingly, the Draft Frequency Plan cannot be adopted in its current form. This is dealt with more fully below.

26. E.tv points out that Section 16 of the Constitution guarantees the right to freedom of expression, which encompasses not only the right to free speech, but also the **right to receive information**. To migrate e.tv off spectrum, which is currently allocated to it prematurely, and deny its audiences access to its channel, will be unconstitutional given the right to receive information. Such a decision will be open to constitutional challenges. Importantly, the Constitutional Court has emphasised the important role played by the media in giving effect to the public's rights in terms of section 16 of the Constitution and has held that:

“The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the rights to freedom of information are respected. ...”

27. Should the government implement the analogue-switch-off before sufficient arrangements have been made for viewers to be able to access free-to-air television, this will violate the requirements of section 16 of the Constitution and be unlawful. This is so for many reasons, including the following:

- 27.1. Firstly, to implement analogue switch-off before viewers have been provided with an alternative means of accessing free to air television would be at odds with Section 16 of the Constitution and the right to receive information as it would have the effect of depriving a significant segment of the South African population of their ability to receive free television broadcasting.

- 27.2. Second, the government and the courts have recognised the importance of set-top boxes and/or similar type of equipment (which would also apply to alternative means of achieving the same objective) and their critical role in the providing access to the poorest of South Africa's population as part of the digital migration process. Without such equipment available, there is no assurance that indigent South Africans will be able to access free-to-air television.

28. Indeed, the Government itself (including ICASA) has repeatedly committed to the provision of set-top boxes before the analogue switch off takes place. The assurance that indigent South Africans will be able to access free-to-air television whether by way of set-top boxes or a more viable mechanism, remains critical to the ability of indigent South Africans to receive free-to-air television.
29. In the 2008 Broadcasting Digital Migration Policy, the Minister of Communications acknowledged as a “key policy decision” that “as a means to achieve universal service and access in digital terrestrial broadcasting, basic STBs will be made affordable” and ICASA undertook that “access to public broadcasting services by all South Africans, regardless of their economic status, remains a fundamental principle that should continue to be upheld in the digital broadcasting era”. The Policy records further:

“2.1.4 Government has decided, as a matter of policy, to consider finding means of making the STBs affordable and available to the poorest TV-owning households. This support by government should be seen as part of its commitment to bridging the digital divide in South Africa.

Accordingly, for South Africa, the STBs will have special features which enable access to government services for all citizens, especially those who thus far have had limited or no access. Digital broadcasting also enables the provision of services in a multiplicity of languages, thus increasing access to information which in line with Government's Information Society vision, is an important tool for societal and economic development. This is essential to meet our poverty reduction goals.”

30. While this policy has been amended over time, one thing has always remained the same: the Government's commitment to providing a means for the poorest in society to access free-to-air television (and has in fact strengthened from a proposed subsidy to a commitment that set-top boxes will be provided at no charge to those who qualify). In the 2012 amendment, the “Universal Service and Access Fund” was introduced, and the Government's commitment was recorded as follows:

2.1.4 Government has decided, as a matter of policy, to consider finding the means to make STBs affordable and available to the poorest TV-owning households. This support by Government should be seen as part of its commitment to bridging the

digital divide in South Africa. The Government has therefore decided, as mandated by section 88 (1) (a) of the Electronics Communications Act (ECA), to subsidise poor TV households through the Universal Service and Access Fund (USAF). In supporting the South African bid to host the Square Kilometre Array (SKA), government will also subsidise affected communities using satellite technology. The government will also consider extending the incentive schemes to households that can only experience free-to-air digital services via DTH platform, to ensure close to 100% coverage, which include the following signal distribution realities:

a) Self help Stations;

b) Low Power Stations;

c) Northern CAPE Astronomy Geographic Advantage Act 21 of 2007; and

d) Areas that may be deemed difficult or uneconomical.”

31. The 2012 Digital Migration Regulations established the Digital Television Content Advisory Group (“DTCAG”) and provided that the DTCAG will “advise the Authority on the most effective way to ensure the supply of digital television content to encourage end-users to acquire set-top boxes in order to begin viewing digital television services”.
32. The 2015 amendments to the Broadcasting Digital Migration Policy record further: “2.1.3 Universal access, the availability and accessibility of broadcasting services to all citizens are a key component of successful digital migration. In order for households to continue to receive television services on their current analogue TV sets after the analogue signal is switched-off, set-top boxes (STBs), which convert the digital signals into analogue signals, are required. The total TV-owning households in South Africa are estimated at 13 million, of which approximately 65 per cent rely exclusively on free-to-air broadcasting services”.
33. Consistent with these policy instruments, the Government has repeatedly made public promises that it will provide free set top boxes to enable those who cannot afford to purchase them to access free-to-air programming via digital broadcasting.
34. This simply underscores the unlawfulness of any attempt at prematurely compelling the broadcasters to vacate this portion of spectrum.

35. In addition, the premature deprivation of frequency currently available to free-to-air broadcasters, which will have the effect of denying a large proportion of the population access to free-to-air television, is contrary to the principle of universal access. To deprive broadcasters of access to frequency in this way without compensation, and for the Draft Frequency Plan to allocate spectrum currently occupied by broadcasters to telecommunications companies so that this spectrum can be auctioned before there has been a full migration, is premature and irrational. It seems that this is being driven by the need to access funds from the auction, which is an improper purpose for the adoption of the Draft Frequency Plan in its current form. Free to air broadcasters cannot compete with telecommunication companies in any such auction. This may lead to an uncompetitive environment in circumstances in which the telecommunication companies are increasingly competing with broadcasters in relation to the provision of content. This is contrary to the objects of the ECA.
36. The reality is that the only time there can be migration and hence a possible reallocation or auction of frequency, is when 90% of the South African population have the requisite equipment to access digital television.
37. We draw your attention to the following issues which may further delay the completion of the digital migration process:
 - 37.1. Firstly, transmitters cannot be switched off without sufficient intervention in the coverage area of the identified transmitters. This is so because there are insufficient DTT decoders available for purchase and they are also not affordable for indigent viewers. This is confirmed by the fact that approximately 63% of television viewers in South Africa still receive their signal through terrestrial analogue broadcasting;
 - 37.2. Secondly, it does not appear that any careful planning or thought has been given about how specific geographical areas and affected households will receive television signal after the proposed analogue switch-off;
 - 37.3. Thirdly, it is practically impossible to achieve nationwide analogue transmitter switch-off within the proposed timeframes. There are currently 4.5 million television households who have not yet migrated to digital. Sentech, as part of the switch-off plan, is currently doing 200 installations per day. Accordingly, there is no realistic

possibility that installations of this magnitude can be achieved in such a short space of time.

- 37.4. Fourthly, there is currently a worldwide shortage of chip-sets to manufacture decoders. On account of the latest market conditions, there is a 52-week lead time to make an order. Despite the demand, set top boxes cannot be manufactured at the rate that is required.
38. The Government has undertaken to provide set-top boxes to 5 million households which are not otherwise able to access free-to-air broadcasting. Unless this commitment has been fulfilled, the Government cannot proceed with analogue switch-off.
39. In addition to the switch-off requiring adequate compliance by the Government with its stated undertakings to provide set-top boxes to the broader public; the switch off also cannot be implemented unless and until the Minister has determined the switch-off date "*after a process of engagement with the affected parties has been concluded*". Given that e.tv is the incumbent in respect of the relevant spectrum, it would clearly have a material interest in such process. So too would the public more broadly, and a variety of other public interest bodies and stakeholders who are likely to be impacted.
40. In the circumstances, the Draft Frequency Plan should not be finalised until such time as the aforesaid process (together with the litigation discussed further above) is completed. It bears repeating that if mobile network operators are permitted to use the spectrum allocated to analogue broadcasters, this will result in unlawful deprivation as it will result in interference.
41. Accordingly, the amendment of the National Radio Frequency Plan is wholly premature until such time as the digital migration process has been completed and the litigation is finalised.

Removal of "Broadcasting" as a primary service in the bands 694-790 and 709-862 MHz

42. The Draft Frequency Plan proposed by the Authority proposes the deletion of "Broadcasting" as a primary service in the bands 694-790 MHz and 790-862 MHz. e.tv submits that by removing "Broadcasting" as a primary service in these bands would result in broadcasters no longer being able to operate in those bands, even before the digital migration process has been completed. This would have considerable consequences for

e.tv and the SABC (which are currently still using these frequency bands) as it would mean that, (i) they would be broadcasting in those bands illegally; and (ii) they would no longer have protection against interference from IMT services.

43. It is not clear why the Authority wishes to remove “Broadcasting” as a primary service in those bands at all, or at least until after the digital migration process has been completed. The International Telecommunication Union’s (ITU) Region 1 allocation recognises broadcasting as a primary service. Accordingly, broadcasting ought to remain a primary service in these bands.
44. Furthermore, to amend the National Frequency Plan by removing broadcasting services from the bands still currently being used by broadcasters would not be in line with Section 30(2)(b) of the Electronic Communications Act 36 of 2005, which provides that:

“In controlling, planning, administering, managing and assigning the use of the radio frequency spectrum, the Authority must... 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 ICASA.”
45. In light of the above, and in line with the ECA, e.tv respectfully submits that “Broadcasting” cannot and should not be removed from the 694-709 MHz and 709-862 MHz bands. The delay in the completion of the digital migration process means that there is no clear date yet in which the process, including the digital-to-digital restacking will be completed.
46. It is submitted that denying broadcasters full access to frequency currently occupied by them would be an unlawful and irrational eviction from spectrum they must occupy to fulfil their mandate and licence conditions. It would only be appropriate to deny them this right of occupation when all systems are in place which permit the orderly migration necessary to finalise DTT. This can only happen when such frequencies allocated for DTT are able to function seamlessly with sufficient Mux’s in place to allow broadcasters to operate in a multi-channel environment, and all steps have been taken by Sentech from an infrastructural point of view to allow this to happen. The removal of e.tv’s right to broadcast in the frequency bands currently occupied by them on the basis that they will be required to move to the DTT frequencies which may not be fully operational is akin to the eviction of a tenant by a landlord, on the promise that a new property is being constructed for them which is far from

complete. The tenant would simply have nowhere to live until such time as the new property had been fully constructed. We submit that until such time as alternative spectrum is available and ready for broadcasters to use (ie. the digital to digital re-stacking has been completed and the Mux's are already for full and proper use) then the National Frequency Plan cannot be amended.

47. e.tv submits that any attempt to switch-off the analogue transmitters prematurely will be unlawful and unconstitutional until such time as every indigent household has been successful migrated. Accordingly, the Draft Frequency Plan cannot remove "Broadcasting" as a primary service in these bands.
48. Finally, e.tv points out that any amendment to the Frequency Plan may require an amendment to individual licences granted in terms of the ECA in which event the procedures in terms of section 9 of the ECA will need to be followed.

Conclusion

49. In view of what is set out above, the process of amending the Frequency Plan should be suspended. If it is not, any amendment to the Frequency Plan ought not to implement any changes which removes broadcasters from any frequency they are currently entitled to occupy until the Digital Migration process is complete such that 90% of the population are able to access free-to-air services and have the necessary equipment to do so. Further, any amendment needs to account for how new technologies may impact the plan so that these are catered for as part of the current process. Finally, the plan ought not to be finalised or implemented pending the outcome of the litigation whether through the courts or by settlement.
50. We thank the Authority for this opportunity to participate in the process and make this submission on the Draft Frequency Plan and will engage further with the Authority at the public hearings in due course.

eMedia Investments

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