**SUBMISSION BY e.tv (PTY) LTD ON THE DRAFT REGULATIONS ON SOUTH AFRICAN TELEVISION CONTENT**

## INTRODUCTION

- On 18 June 2015, the Independent Communications Authority of South Africa ("ICASA") published the following two documents in the *Government Gazette*:

    - the Draft Regulations on South African Television Content ("the draft regulations"), for public comment; and

    - a position paper entitled *"Review of Regulation on South African Local Content: Television and Radio"* ("the position paper").

- Acting in terms of section 4B of the Independent Communications Authority of South Africa Act 13 of 2000, ICASA invited interested parties to make written submissions on the draft regulations by 14 August 2015. This date was subsequently extended to 31 August 2015. e.tv hereby makes these submissions and requests the opportunity to participate in oral hearings, should these be held.

- e.tv recognises the need for local content quotas, as well as quotas in respect of programmes which are independent television productions. It is broadly in support

of the draft regulations published by ICASA. The limited submissions that follow are therefore intended primarily to –

- ensure that ICASA's intentions are accurately reflected in certain regulations, which might at present be open to misinterpretation; and

- remedy certain constitutional defects in the draft regulations.

- Since it began broadcasting, e.tv has been required – by the conditions attached to its broadcasting service licence ("e.tv's licence") – to match or exceed the quotas to which draft regulations 5(1) and 7(1) refer:

  - Clause 3.2 of Schedule 2 to e.tv's licence provides that it *"shall ensure that forty five percent (45%) of broadcast time shall consist of local television content … measured over a year"*; and

  - Clause 6.4 of the same schedule states that *"[a]ll programming, other than news and current affairs, shall be commissioned out to the independent production sector."*

- In addition, e.tv's licence places certain obligations on it regarding support for and the development of independent producers. In particular, clause 7.2 of Schedule 1 to e.tv's licence provides that it –

*"shall endeavour to participate in the development of the broadcasting industry by, among other things:*

- *supporting independent contractors from historically disadvantaged groups;*
- *supporting industry development initiatives; and*
- *promoting the development of independent producers."*

- Central to e.tv's ability to comply with these somewhat onerous licence conditions has been the regulatory space it has been afforded to discharge its licence obligations in a flexible manner. Put simply, e.tv has been allowed to use its judgment – as a commercial free-to-air broadcaster – how best to discharge these licence obligations.

- In what follows, we deal with the following six issues in turn:

  - First, the right to freedom of expression and what it means for the regulation of local content quotas and the flexibility afforded to licensees to discharge their obligations;

  - Second, concerns regarding the wording of draft regulations 5(2) and 8(1) insofar as incentive channels are concerned;

  - Third, concerns regarding the content and wording of draft regulations 7(1) and 7(2);

- Fourth, timelines for the bringing into force of new local content regulations ("the timing issues");

- Fifth, concerns on the new requirement to provide audited monitoring reports; and

- Finally, concerns regarding the way in which draft regulation 10 – entitled *"Formulas (Format Factors)"* – deals with the scoring of repeats ("the repeats issue").

**THE RIGHT TO FREEDOM OF EXPRESSION**

- In considering the comments that follow, it is important to bear in mind that the regulations must be very carefully drawn to avoid breaching the right to freedom of expression.

- As ICASA is well aware, the right to freedom of expression – which is contained in section 16(1) of the Constitution – provides as follows:

> *"Everyone has the right to freedom of expression, which includes –*
> - *freedom of the press and other media;*
> - *freedom to receive or impart information or ideas;*
> - *freedom of artistic creativity; and*
> - *academic freedom and freedom of scientific research."*

- It is not only the substance of information or ideas that is protected by section 16(1), but also the form in which they are expressed and received. As the European Court of Human Rights explained in *News Verlags GmbH & Co KG v Austria*, in considering the reach of Article 10 of the European Convention on Human Rights:

> *"The Court recalls that it is not for the Court, or for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. Article 10 protects not only the substance of ideas and information but also the form in which they are conveyed"*.

- The UK Supreme Court shares this understanding of the right to freedom of expression. As it explained in *Rhodes v OPO and Another*:

> *"A right to convey information to the public carries with it a right to choose the language in which it is expressed in order to convey the information most effectively."*

- This decision relied on an earlier judgment – *In re Guardian News and Media Ltd* – in which the UK Supreme Court considered the purpose served by the right to choose the form in which material is published:

> *"[E]ditors know best how to present material in a way that will interest the readers of their particular publication and so help them to absorb the information. A requirement to report it in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten*

*the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive."*

- Not only do the draft regulations place restrictions on the content of television programmes that licensees may broadcast, but they also place restrictions on the very form that such content may take. In this way, restrictions are placed on the content and form of television programmes that viewers are able to watch.

- For those who can afford pay-TV services, these restrictions have a limited impact. This is in large part because of the inexplicably limited extent of the local content obligations sought to be imposed on subscription broadcast licensees in terms of draft regulation 6.

- However, for those who are wholly or largely dependant on free-to-air broadcasts, the draft regulations have significant implications:

    - Draft regulation 7(1) requires broadcasters to ensure that the independent television productions that they are required to broadcast *"are spread evenly between, South African arts programming, South African drama, South African documentary, South African knowledge-building, South African children's and South African educational programming"*. This is a content and form restriction. In contrast, draft regulation 5(3) places local content quotas on the types of programming that a licensee may have already chosen to broadcast.

- Draft regulation 7(2) requires half of a licensee's annual independently produced programmes budget to be spent on *"previously marginalised local African languages and/or programmes commissioned from regions outside the Durban, Cape Town and Johannesburg Metropolitan cities."* Again, this is a content and form restriction.

- It is clear that the expression concerned not only falls within section 16(1) of the Constitution, but that the proposed regulation of this expression involves a limitation of this right. As the Constitutional Court explained in *Print Media South Africa v Minister of Home Affairs*:

> *"Because freedom of expression, unlike some other rights, does not require regulation to give it effect, regulating the right amounts to limiting it. The upper limit of regulation may be set at an absolute ban, which extinguishes the right totally. Regulation to a lesser degree constitutes infringement to a smaller extent, but infringement nonetheless."*

- Such limitations are permitted if they satisfy the provisions of section 36(1) of the Constitution. Thus the central question which needs to be asked is whether the proposed local content requirements, which limit the right to freedom of expression in section 16(1), are *"reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom"*.

- It is trite that the primary burden to establish that any limitation of a constitutional right is justified is placed on the state. In essence, this involves a proportionality analysis. As the Constitutional Court explained in *Phillips*:

> *"The justification exercise involves an assessment of proportionality. As O'Regan J and Cameron AJ wrote:*
>
> > *'The approach to limitation is, therefore, to determine the proportionality between the extent of the limitation of the right considering the nature and importance of the infringed right, on the one hand, and the purpose, importance and effect of the infringing provision, taking into account the availability of less restrictive means available to achieve that purpose.'"*

- This means that the regulations must be very carefully drawn to avoid falling foul of the Constitution and being rendered invalid. The language used must be sufficiently precise, and the impact on broadcasters and the public must be proportionate to the aims sought to be achieved.

- In the remainder of this section, we give a high-level overview of the potential difficulties caused in this regard by certain of the draft regulations. We then deal more specifically with each of the draft regulations concerned, and propose amendments to cure the defects identified.

    - For purposes of this part of the e.tv's written submissions, we have assumed that the genre spread requirement will require an equal number of independently-produced South African documentaries, dramas, as well as arts, knowledge-building, children's and educational programmes. This is a classic form restriction that presupposes the availability of such

programmes, the willingness and capacity of the independent television producing sector to deliver, and viewer demand for such programming. Absent this, the limitation of the right is not reasonable or justifiable.

- On the question of language, e.tv is of the view that all official languages other than English and Afrikaans – particularly in the context of broadcasting – have been (and often continue to be) marginalised. Yet the use of the term *"previously marginalised local African languages"* suggests a subset of the other nine official languages. If this interpretation is correct, then the language restriction may be seen to be somewhat arbitrary, and therefore both unreasonable and unjustifiable.

- In addition, some of these nine languages may offer better opportunities than others for sustainable development in the commercial television broadcasting sector. The public broadcaster, with its particular statutory mandate and status as a beneficiary of public resources, has a particular role to play in respect of those languages that don't offer such commercial opportunities.

- The language and genre spread requirements may work together in ways that undermine the choices and self-identified needs of the viewing public. Consider the following example. One consequence of these requirements is that viewers may be offered more documentary and educational

programmes in languages such as Tshivenda and/or Xitsonga when in reality they prefer to watch local dramas and current affairs programmes in a mix of English, isiZulu, isiXhosa and/or Sesotho. If they can, they may well vote with their feet, and migrate to pay-TV.

- In respect of geographic spread, the draft regulations seem oblivious to the commercial reality that not only is the independent television producing sector as a whole in need of nurturing, but its growth – in particular amongst previously disadvantaged black South Africans – is more likely to be sustainable in the urban centres of Johannesburg, Cape Town and Durban. It is one thing to require content that focuses beyond the urban centres; it is quite another to require programmes to be commissioned from areas with less economic development and consequently many fewer production houses.

- Even measured against the stated purpose of the proposed regulations, some of the draft regulations appear to go too far. This purpose is set out in draft regulation 2, which provides as follows:

> *"The purpose of these regulations is to develop, protect and promote national and provincial identity, culture and character. In achieving this, these regulations will seek to promote programming which:*
>
> - *is produced under South African control;*
> - *is identifiably South African, and recognises the diversity of all cultural backgrounds in South African society;*

- *will develop a television industry which is owned and controlled by South Africans;*
- *will establish a vibrant, dynamic, creative and economically productive South African film and television industry."*

- Having taken the relevant principles into account, as well as the stated purpose of the proposed regulations, e.tv submits that the imposition of quotas – on its own – is constitutionally defensible. However, the same cannot be said for the manner in which some of the draft regulations seek to prescribe to broadcasters how to discharge their quota obligations. Put simply, provisions such as draft regulations 7(1) and 7(2) simply go too far, without appropriate justification. On this basis alone, they are unconstitutional.

**DRAFT REGULATIONS 5(2) AND 8(1)**

- Under the heading *"Commercial Television Broadcasting Licensees"*, draft regulation 5(2) provides as follows:

> *"A new broadcast service licensee and any incentive channels must ensure that a minimum weekly average starting at 20% after launch of their services, increasing by 10% on an annual basis until reaching the minimum weekly average of 45% measured over the period of a year, during the South African television performance period consists of South African television content."*

- Read on its own, the language of draft regulation 5(2) is potentially ambiguous.

- It could be interpreted to mean that either the local content requirements apply per incentive channel, or they apply per bouquet of incentive channels. Given the lack of a definition in the draft regulations, it is also unclear what is meant by an *"incentive channel"*.

- Draft regulation 5(2) is to be read together with the following general provision in draft regulation 8(1):

  > *"South African Local Content requirements will apply per bouquet and not per channel approach for <u>any new digital broadcast service licensees and incentive channels</u>."*

- There is a slight difference in the language used in the two provisions, with draft regulation 5(2) referring to *"[a] new broadcast service licensee and any incentive channels"*, and draft regulation 8(2) referring to "*any new digital broadcast service licensees and incentive channels"*. The latter construction could be interpreted to mean that the reference is to incentive channels of new digital broadcast service licensees (and not existing terrestrial television broadcast service licensees (such as e.tv)).

- However, it is clear from the position paper that ICASA intended to propose a per bouquet approach in respect of existing terrestrial television broadcast service licensees' digital incentive channels. In this regard, paragraph 3.7.1.23(b) of the position paper reads as follows:

> *"In relation to any new broadcast service licensees and new incentive channels, a per bouquet rather than per channel approach will be put in place to allow licensees flexibility to meet South African content requirements across all authorised services and thus, for example, allow them to vary South African content requirements across individual channels. Whereby a licensee has only one channel, the percentage set for the bouquet will apply."*

- In addition, the position paper expressly notes that ICASA *"has decided to apply the principle of technological neutrality"*, meaning that *"local content obligations will now be similar across the same services offered and not be differentiated per platform."* On the basis of this decision, e.tv submits that a free-to-air broadcaster's local content obligations should apply with equal force to its digital incentive channels and any other additional digital channels.

- In respect of all its additional digital channels, including but not limited to its incentive channels, e.tv will only be able to discharge its local content obligations if a per bouquet approach is permitted. This is because some of its channels will be deemed to have no local content, whereas other incentive channels will likely be comprised of 100% local content. (An important channel such as eAfrica+, which showcases original African stories and features African music, dramas and Nollywood movies, will be deemed to have no local content.)

- In order to avoid any confusion, and to place beyond doubt ICASA's intention in this regard, e.tv proposes the following amendments:

- Regulation 5(2):

> *"Subject to regulation 8(1), a* ***[A]*** *new broadcast service licensee and any additional digital channels broadcast by an existing terrestrial television broadcast service licensee, including incentive channels, must ensure that a minimum weekly average starting at 20% after launch of their services, increasing by 10% on an annual basis until reaching the minimum weekly average of 45% measured over the period of a year, during the South African television performance period consists of South African television content."*

- Regulation 8(1):

> *"South African Local Content requirements will apply per bouquet and not per channel approach for any new digital broadcast service licensees and any incentive channels broadcast by an existing terrestrial television broadcast service licensee."*

**DRAFT REGULATION 7**

- Under the heading *"Independent Television Production"*, draft regulation 7 deals with three related requirements:

  - First, the quota of South African television content programming that must consist of programmes which are *"independent television productions"*, which is set at a 40% minimum;

- Second, the requirement that such programmes must be *"spread evenly between, South African arts programming, South African drama, South African documentary, South African knowledge-building, South African children's and South African educational programming"*; and

- Third, the requirement that 50% *"of annual independently produced programmes budget is spent on previously marginalised local African languages and/or programmes commissioned from regions outside the Durban, Cape Town and Johannesburg Metropolitan cities."*

- e.tv has no concern with the first requirement (on its own). As already indicated, e.tv's licence provides that the licensee *"shall ensure that forty five percent (45%) of broadcast time shall consist of local television content … measured over a year"*. Since it began broadcasting, e.tv has managed – and indeed been happy – to comply with this requirement.

- However, as the section dealing with freedom of expression notes, the second and third requirements raise constitutional concerns. A further and particular concern would arise were these requirements to apply to all of e.tv's programmes which are independent television productions, given its licence condition that *"[a]ll programming, other than news and current affairs, … be commissioned out to the independent production sector."*

- In addition, the unclear wording of the second and third requirements could mean that they are so vague as to violate the rule of law. In *Dawood*, the Constitutional Court held that *"[i]t is an important principle of the rule of law that rules be stated in a clear and accessible manner."* Similarly, in *Hyundai*, it noted that *"the Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them."*

- This applies with equal effect to the promulgation of subordinate legislation. In considering the validity of regulations made under the Medicines Act, the Court held as follows in *Affordable Medicines Trust*:

> *"The doctrine of vagueness is founded on the rule of law, which … is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly."*

- Draft regulation 7(1) is vague in the sense that it is unclear what is meant by the term *"spread evenly"*. It is also unclear whether the 40% requirement applies to a broadcaster's local content requirements under the draft regulations, or under its licence conditions.

- With this in mind, as well as the constitutional concerns identified above, e.tv proposes that draft regulation 7(1) be amended to give effect to the following:

- The reference to a minimum of 40% of a licensee's local content programming should be amended such that the reference is to that licensee's local content requirements under the regulations; and

- The genre spread requirements should refer to a spread that is objectively justifiable, taking into account the nature of the licensee, and the needs and choices of its viewers.

- In the result, e.tv proposes that draft regulation 7(1) be amended to read as follows:

> *"**[A]** Public, commercial, community and subscription television broadcasting licensees must ensure that a minimum of 40% of their South African television content programming required by these regulations consists of programmes which are independent television productions and the independent television productions are spread **[evenly]** between, South African arts programming, South African drama, South African documentary, South African knowledge-building, South African children's and South African educational programming. The spread of programmes across genres must be objectively justifiable, taking into account the nature of the licensee, and the needs and choices of its viewers."*

- Given the freedom of expression concerns raised earlier in these submissions, as well as the inherent vagueness of various terms, e.tv is of the view that draft regulation 7(2) cannot be saved. In the result, it should be deleted in its entirety.

**TIMING ISSUES**

- Draft regulation 13 provides that the proposed regulations are to *"commence upon publication in the [G]overnment [G]azette."* Given the reference to a period of 18 months in draft regulation 5(1), as well as the reference to *"after launch of their services"* in draft regulation 5(2), e.tv has no concerns regarding its obligations under draft regulation 5 – both in relation to its current channel, and any future incentive channels.

- But draft regulation 7, read together with draft regulation 9 (dealing with contraventions and penalties), provides real cause for concern. This is because there is no time period within which a licensee is afforded the opportunity to comply. Given the substantive concerns we have raised in respect of draft regulation 7, as well as the uncertainty regarding the date upon which the regulations will be brought into force, we submit that this ought to be remedied by the inclusion of an express period that is directly linked to the switch-on date for digital migration.

- In the result, e.tv recommends that a new regulation 7(2) be included to read as follows:

> *"The requirements in sub regulation (1) come into force 18 months after the switch-on date of the digital terrestrial television signal, as determined in accordance with the Broadcasting Digital Migration Policy for South Africa."*

**AUDITED MONITORING REPORTS**

- In draft regulation 8(3), ICASA has included a new provision requiring that the monitoring reports submitted to ICASA by broadcasters are audited. e.tv is concerned that if this requirement entails the appointment of independent auditors it would add cost and complexity to broadcasters' annual financial audit. We submit that it is the function of ICASA to check and "audit" the monitoring reports of broadcasters and that it would be unduly burdensome to put additional requirements on broadcasters to have their reports audited.

**THE REPEATS ISSUE**

- Having considered draft regulation 10(8), e.tv is concerned that ICASA has not addressed its previous submissions regarding the scoring of repeats in respect of new digital channels (including incentive channels). In what follows, we explain the problem raised previously, and demonstrate that it persists under the draft regulations.

- According to regulation 8.7 of the ICASA South African Television Content Regulations ("the Local Content Regulations"), which is also entitled *"Formulas (Format Factors)"*, the repeats score is –

> *"(a) for first repeat of a South African programme = 50%;*
> *(b) for a South African programme originally screened on another South African television channel = 50%;*
> *(c) for a rebroadcast of the week's episodes = 50%; and*

*(d) any further repeats of the programme shall not count towards compliance with the South African content quota."*

- Draft regulation 10(8) repeats the content of this provision word for word. In explaining why new digital channels should be exempt from any restrictions on repeats, our previous submission provided as follows:

*"33 The Local Content Regulations penalize broadcasters for carrying repeats by determining that after the third repeat, the programme is not considered to be local content. For new digital only channels, this provision will be impossible to comply with.*

*34 On day one of the migration to digital, the new digital channels will start broadcasting and will have already incurred significant costs, but there will be no audience as consumers would not yet have the necessary STBs to watch the digital channels. If all goes well, consumers will, hopefully, rapidly obtain the STBs and start watching the new channels, allowing broadcasters to begin to monetize them. But even in the most optimistic forecasts, it will take three to five years (and possibly even longer) before there is a significant audience on the DTT platform. This means that, for broadcasters, the first three years' programming investment will effectively be sunk costs, offering no prospect of a commercial return.*

*35 In this environment it would be devastating for the FTA broadcasters if the new digital only channels are prevented from utilising their archives and repeating local content because of the repeat restrictions which determine that repeats are foreign content. In addition, as stated above, repeat programming is an integral part of the multi-channel broadcasting business model around the world, whether on pay- TV or FTA."*

- e.tv therefore recommended that regulation 8.7 be amended so that it does not apply to additional digital channels, including digital incentive channels, which are broadcast by an individual FTA commercial television broadcasting service licensee.

- We stand by our previously-made submissions in this regard, as they apply with equal force to draft regulation 10(8). In the result, we recommend that the definition of repeat in draft regulation 1 be amended to read as follows:

> *"'Repeat' means television programming that is not a first broadcast by a South African television licensee and has been broadcast by another South African television licensee, but does not apply to television programming on any additional digital channel, including any incentive channel, which is broadcast by a commercial television broadcasting licensee".*

**CONCLUSION**

- e.tv trusts that these submissions will assist ICASA in finalising the draft regulations. Should any further assistance and/or clarity be required, please do not hesitate to contact us.

**[ENDS]**