

Independent Communications Authority of South Africa
350 Witch-Hazel Avenue
Eco-Park Estate
Centurion
0144

14 March 2019

Attention: Ms. Violet Molete
Per email: vmolete@icasa.org.za

Dear Ms Molete.

KWESÉ FREE TV SUBMISSION ON DRAFT SPORTS BROADCASTING SERVICES AMENDMENT REGULATIONS, 2018

1. INTRODUCTION

- 1.1. On 14 December 2018, the Independent Communications Authority of South Africa ("ICASA or the Authority") published in terms of Government Gazette No. 42115 the Draft Sports Broadcasting Services Amendment Regulations ("Draft Regulations") that sought to effect amendments to the Sports Broadcasting Services Regulations ("the Regulations, 2010") promulgated in 2010.
- 1.2. KweSé Free TV is a recent entrant into the African free to air television services market having launched its sports focused free to air channel, KweSé Free Sports (KFS) in Ghana, Kenya, Lesotho, Malawi, Nigeria, Rwanda, Zambia, Uganda, Tanzania and Namibia during 2016/2017. In selecting the African territories for the launch of its pay television services, KweSé Free TV would like to expand its free to air service offering into the South African market as soon as it becomes feasible for it to do so.

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**Directors: K.K.D. Kobue; G.D. Marumo; R.M. Mashishi; J.N. Scott and
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087 238 0251

Company Registration No: 2017/241112/07

- 1.3. To this end, Kwese Free TV SA has applied for a Free to Air Commercial license, and at the time of finalising this submission, it was awaiting the decision of the Authority on its application.
- 1.4. Interested parties were invited to lodge written representations with the Authority by no later than 04 February 2019. The Authority decided to extend the period within which to lodge written representations in respect of the draft regulations to 15 March 2019. Kwesé Free TV welcomes the Authority's continuing efforts to ensure that sporting events of national importance are accessible to the majority of the South African public and within this context support the initiative.
- 1.5. Kwesé Free TV further records that it would welcome an opportunity to make oral submissions to the Authority on these Draft Regulations, if public hearings are to be held as part of the consultative and participative process to be undertaken by the Authority in respect of the draft regulations.
- 1.6. Therefore, Kwesé Free TV makes the following comments in order to assist the Authority in arriving at a fair, equitable and reasonable decision regarding the final product of the draft regulation.

2) KWESÉ FREE TV COMMENTS

2.1 AD AMENDMENTS OF DEFINITIONS; In draft regulation (f) the Authority states that it seeks to insert the definition of "National Sporting Representative". The Regulations of 2010 do not define "National Sporting Representative". It is therefore assumed that that the Authority wants to insert the definition after that of "National Sporting Events".

2.2 AD AMENDMENT OF REGULATION 4; The Authority is enjoined by Section 2 (r) of the Electronic Communications Authority Act No. 36 of 2005, as amended to:

"Promote the development of public, commercial and community broadcasting services which are responsive to the needs of the public"

The Authority proposes inserting the fifth objective under Regulation 2 of the Regulation to read as follows:

"(e) Reach a wider audience and to strike a balance between audience and revenue."



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Kwesé Free TV notes that the draft regulation only focused on Commercial Broadcasting Services and Subscription Broadcasting Services, but seem to ignore the ability of community television services in ensuring wider access or audience of sports especially the Minority and Developmental Sporting Events. Furthermore, it would appear that the Authority does not take into account digital broadcasting services, which is developing as a serious means of broadcasting. This observation does not in any way suggest that Commercial and Subscription Broadcasting Services should be exempted from broadcasting or offering the same. However, it would be prudent for the Authority to consider the broadcasting services, viewed collectively, in terms of the wider reach that they should have.

- 2.3 AD AMENDMENT OF REGULATION 5; On 14 December 2012, the Authority published the Digital Migration Regulations that allocated broadcasting frequency spectrum in Multiplex 1 for SABC (85%) and Community Television Broadcasters (15%) and Multiplex 2 for M-Net (40%) and E.TV (50%). On 22 August 2014, the Authority published the Promotion of Diversity and Competition on Digital Terrestrial Television Regulations, which regulations allocated broadcasting frequency spectrum in Multiplex 3 for new Commercial Subscription Television Broadcasting Television Licensees (45%) and for new Commercial Free-to-Air Television Broadcasting Service entrants.

Draft Regulation 5 proposes to make it compulsory for a free-to-air licensee to “broadcast on full live” Group A National Sporting Events, to enter into sub-licensing agreements in respect of Group B National Sporting Events and to jointly broadcast at least two of Group C Minority and developmental Sporting Events. It should be accepted that a Commercial free-to-air licensee may elect not to bid for Group A National Sporting Event, therefore not being obliged, or in a position to enter into sub-licensing of Group B. These are assessments that must take into account the commercial imperatives that affect the ability of a licensee to bid for broadcasting rights to any event.

In contrast, should the Commercial free-to-air licensee elect to bid and enter into sub-licensing agreement with subscription broadcasting licensee for the sporting rights under Group A and B, respectively, and further broadcast at least two of Group C Minority and Developmental sporting events, the licensee may not have the requisite radio frequency spectrum capacity to accommodate or broadcast these sporting events. This scenario is not applicable to subscription broadcasting licensees who do not have channel capacity constraints.

It is Kwese Free TV’s submission that, taking into consideration the submission under Amendment of Regulation 4 above, the Authority may consider imposing obligations

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on community television broadcasting licensees to offer or broadcast some of the Minority and Developmental sporting events listed in Group C of the draft regulation.

- 2.4 AD AMENDMENT OF REGULATION 6; Commercial negotiations and agreements are by nature time sensitive and we would like to get clarity from the Authority on what informed the 5 days period within which a broadcasting licensee is required to inform other broadcasting services of its success or failure to acquire sporting rights. Kwesé Free TV is also concerned about the financial implications for non-compliance with regulation 6.2 of the draft regulation. Furthermore, Kwesé Free TV is concerned that compliance with draft regulation 6.2 would be impossible given the long list of the sporting events listed under Groups A, B and C of the draft regulation.

3) **Further Comments on Substantive issues**

- 3.1 It is Kwesé Free TV's observation that international rightsholders may not take kindly to be dictated to by local regulations on how to sell their rights, and to whom. For an example, half of the FIFA World Cup tournament carried on FTA, versus the full tournament of 64 games, was seen as a pragmatic solution for the tournament in Russia in 2018. If an FTA broadcaster is required to carry all 64 matches, this may be impractical. Another example is that of the summer Olympics, which, due to the high volume of content (around 20 feeds per day for 8-10 hours per day), would be impossible for the FTA players to carry in total.
- 3.2 Most of the rights held by international rights holders are not negotiated, but are sold under tender. The proposed amendments mean that only FTA broadcasters should be asked to participate in bidding or the A list events, and subscription broadcasters would have to wait for their turn only after that. This, as stated in 3.1 above, may not be acceptable to the international rightsholders of the events listed in the Group A list.
- 3.3 Generally, the exclusive rights offered to subscription broadcasters enable the rightsholders to sell their rights at a higher price than what the FTA and Public broadcasters would be able to afford. It is therefore expected that these rights holders will be resistant to efforts that will lead to them being compelled to sell their rights to the FTA broadcasters.



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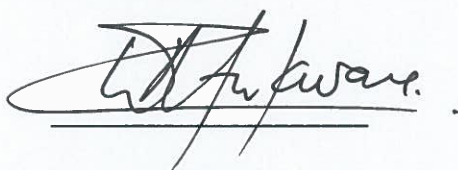
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- 3.4 Reference to the IAAF in the Group A list appears to be very generic. There are a number of sub-events that the IAAF manages or stages. It is assumed that the Authority is referring to the World Championships instead of all the types of athletic meetings hosted by the IAAF. If that is the case, it is recommended that the Authority specifies it as such.
- 3.5 Kwesé Free TV further notes that the FIFA World Cup Qualifying soccer matches for the National Senior Women's Soccer team (Banyana Banyana) are not included in the Group A list. It is recommended that these be included, at the least, for the women's team's home games.
- 4.6 It is also noted that under the Group B list, item h) is listed just as "Knockout (soccer)", without specifying the relevant tournament. This is too vague and can be interpreted ambiguously. It is submitted that either the Authority removes this reference, or specify what it relates to.
- 4.7 In Clause 5.3.2, the Draft Regulations state that with respect to sporting codes listed Group C, FTA and subscription broadcasters must broadcast at least 2 of the listed sporting codes. It is crucial for the Authority to clarify if an event in this context refers to one match, one tournament or one season, as the case may be. This impacts the extent to which a broadcaster may bid for the rights.

5) Conclusion

Once again, we wish to thank the Authority for the opportunity to share our views and re-iterate our preparedness to participate in this process further. If required, we are happy to make oral presentation to the Authority on any matter raised herewith.

Yours faithfully



Zolile Ntukwana

Group Executive: Regulatory

*For and on behalf of Kwesé Free TV Proprietary Limited

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