



Independent Communications Authority of South Africa

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**LICENSING PROCESS FOR INDIVIDUAL COMMERCIAL FREE-TO-AIR
TELEVISION BROADCASTING SERVICE LICENCE AND A RADIO
FREQUENCY SPECTRUM LICENCE FOR 55% OF MULTIPLEXER 3
("MUX 3") FREQUENCIES.**

REASONS DOCUMENT

JULY 2019

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GLOSSARY OF TERMS, ABBREVIATIONS AND ACRONYMS

ABC	Audit Bureau of Circulation
AMPS	All Media and Product Survey conducted by the SAARF
Authority	Independent Communications Authority of South Africa
B-BBEE Act	Broad-based Black Economic Empowerment Act 53 of 2003
B-BBEE	Broad-based Black Economic Empowerment
Broadcasting Frequency Plan	The Final Terrestrial Broadcasting Frequency Plan, 2009 published under GN 1538 in <i>Government Gazette</i> 32728 of 18 November 2009
Broadcasting Act	Broadcasting Act 4 of 1999
CCC	Complaints and Compliance Committee established by the Authority in terms of section 17A of the ICASA Act
CIPC	Companies and Intellectual Property Commission
Content Regulations	South African Television Content Regulations published under GN 153 in <i>Government Gazette</i> 39844 of 23 March 2016
Companies Act	Companies Act 71 of 2008
the Constitution	the Constitution of the Republic of South Africa, 1996
ESOP	employee share ownership programme
the EC Act	Electronic Communications Act 36 of 2005, as amended means a "free-to-air service", which is a service which is broadcast and capable of being received without payment of subscription fees
FTA	
HDGs	Historically Disadvantaged Groups
HDIIs	Historically Disadvantaged Individuals
IBA	Independent Broadcasting Authority
IBA Act	Independent Broadcasting Authority Act 153 of 1993
I-BS	Individual Broadcasting Service

ICASA Act	Independent Communications Authority of South Africa Act 13 of 2000
ICT Sector Code	Information and Communication Technology Sector Code on B-BBEE in terms of Section 9 (1) of the B-BBEE Act published by the Minister of Trade & Industry under GN 485 in <i>Government Gazette</i> 35423 of 6 June 2012
ITA	Invitation to Apply for Individual Commercial Free-to-Air Television Broadcasting Service Licence and Radio Frequency Spectrum Licence for MUX3 Frequencies, published by the Authority on 28 February 2017 in the <i>Government Gazette</i> No. 40652 (General Notice 162 of 2017)
LSM	Living Standards Measure developed by the SAARF
the Minister	the Minister of Communications
MUX 3	Multiplexer 3 Radio Frequencies
Ownership and Control Discussion Document	Discussion Document on Ownership and Control published by the Authority under GN 1532 in <i>Government Gazette</i> 32719 of 17 November 2009
Ownership and Control Findings Document	Findings Document on the Review of Ownership and Control of Commercial Services and Limitations on Broadcasting, Electronic Communications Services and Electronic Communications Network Services, published by the Authority under GN 624 in <i>Government Gazette</i> 34601 of 15 September 2011
Performance period	The period of 126 hours per week measured between the hours of 05h00 and 23h00 each day
Position Paper	Position Paper on the Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences, published by the Authority on 13 January 2004
Processes and Procedures Regulations / PPR	Licensing Processes and Procedures Regulations 2010 (as amended):

- For Applications, Amendments, Renewals, Surrender and Transfer of Individual Licences and matters pertaining thereto; and
- applications for Special Temporary Authorisations published in *Government Gazette* No. 33293 under GN. 522 of 14 June 2010.

Reasons Document	this document setting out the Authority's decisions and reasons thereof in relation to the FTA licensing process, comprising Part I (General), Part II (Decisions)
SAARF	South African Advertising Research Foundation
SABC	South African Broadcasting Corporation Limited
Standard Terms and Conditions	the Standard Terms and Conditions for Individual Licences, published under GNR 523 of 14 June 2010 in <i>Government Gazette</i> 33294
TAMS	Television Audience Measurement Survey conducted by the SAARF

1. BACKGROUND

- 1.1. The Authority finds its origins in section 192 of the Constitution¹, which provides that national legislation must establish an independent authority to regulate broadcasting in the public interest, and to this end ensure fairness and a diversity of views broadly representing South African society.
- 1.2. In 1997, subsequent to the Authority's commitment in the Triple Inquiry Report ("**the Report**") of 1995 to establish a private television service which could compete fairly with the existing public and subscription services for audience and revenue², the Authority's predecessor, the IBA, published a Position Paper for the introduction of the first Free-To-Air Private (Commercial) television service in South Africa ("**the Private Television Position Paper**").
- 1.3. The Private Television Position Paper detailed the policy approach that the IBA aimed to follow in the licensing of free- to- air private television broadcasting services. The Private Television Position Paper was prepared in the context of the IBA Act, in terms of which the policy framework for private Free-To-Air television broadcasting services in South Africa was outlined.
- 1.4. In formulating the Private Television Position Paper, the Authority considered various aspects including the market's capacity to sustain a new entrant of a particular kind in light of the existing frequency usage and future requirements.
- 1.5. Accordingly, while the resulting policy framework focused on the proposed free-to air service, it also related to other broadcasters within the television industry in South Africa. It primarily took into consideration the impact that the policy would have on the public broadcaster in terms of its repositioning to achieve financial viability. The fundamental problem, which the Authority considered,

¹ The Constitution of the Republic of South Africa, 1996.

² Position Paper for the introduction of the first free-to-air private television service in South Africa, 12 May 1997

was the creation of an environment in which private broadcasters co-exist through fair competition and equity with the public broadcaster³.

- 1.6. Pursuant to the publication of the Position Paper, the Authority issued the first free-to air television broadcasting service licence to Mdi TV (now e.tv) in 1998.
- 1.7. On 19 July 2006, the EC Act came into force repealing the IBA Act as well as certain provisions of the Broadcasting Act. Many of the provisions of the IBA Act were re-enacted in Chapter 9 of the EC Act, which specifically deals with broadcasting services and the manner in which they are to be regulated.
- 1.8. Similarly, to the IBA Act, the EC Act provides for three broad categories of broadcasting services: public, commercial and community⁴. Commercial broadcasting is defined as "*a broadcasting service operating for profit or as part of a profit entity but excludes any public broadcasting service*"⁵. In terms of the EC Act, the broadcasting services operated by the SABC are public broadcasting services.
- 1.9. Section 5(3)(b) of the EC Act provides that an individual licence is required to provide either commercial or public broadcasting services of national and regional scope whether free-to-air or by subscription.

³ Ibid, p2

⁴ A "broadcasting service" is defined in the EC Act as –

"any service which consists of broadcasting and which service is conveyed by means of an electronic communications network but does not include –

- (a) a service which provides no more than data or text, whether with or without associated still images;
- (b) a service in which the provision of audio-visual material or audio material is incidental to the provision of that service, or
- (c) a service or a class of service, which the Authority may prescribe as not falling within this definition".

"Broadcasting" is, in turn, defined as –

"any form of unidirectional electronic communications intended for reception by –

- (a) the public;
- (b) sections of the public; or
- (c) subscribers to any broadcasting service, whether conveyed by means of radio frequency spectrum or any [ECN] or any combination thereof"

⁵ Section 1 of the EC Act.

1.10. When awarding individual licences, the Authority, in terms of the relevant licensing provisions of the EC Act⁶,:-

1.10.1. must invite applications for individual licences by publishing a notice in the Government Gazette;

1.10.2. is required to stipulate in the invitation, the percentage of equity ownership to be held by HDGs, which must not be less than 30% or such higher percentage prescribed by the Authority;

1.10.3. must invite interested parties to submit representations in relation to applications for individual licences within a particular period;

1.10.4. may conduct a public hearing in relation to any application submitted for an individual licence; and

1.10.5. after considering an application for an individual licence and any representations received in relation to that application, must notify the applicant of its decision, the reasons for its decision and any licence conditions that are applicable to a successful applicant, and publish that information in *the Government Gazette*.

2. PROCEDURE

2.1. On 28 February 2017, the Authority issued and published an Invitation to Apply (the "ITA") for the licensing of an Individual Commercial Free-To-Air Television Broadcasting Service Licence and a Radio Frequency Spectrum Licence for 55% of MUX 3 Frequencies.

2.2. The ITA was issued in terms of sections 9 and 31 of the EC Act which empower the Authority to invite applications for both individual and radio frequency spectrum licences. This process was undertaken following the similar licensing

⁶ Sections 9(2) and (5) of the EC Act.

process in the previous financial year which saw the Authority not issuing a licence or licences to any of the entities which submitted applications in terms of that process.

2.3. The above-mentioned provisions of the EC Act set out the procedure to be followed and factors to be considered when considering and evaluating applications for an individual (commercial broadcasting service) licence. The ITA, having regard to the provisions contemplated in the EC Act, also set out the procedural aspects of the application process as well as the evaluation criteria that would be utilised by the Authority.

2.4. According to the ITA, the applications were required to comply with the following requirements, among others:

2.4.1. each application had to be accompanied by a non-refundable application fee of R600 000.00⁷;

2.4.2. applicants were required to include a percentage of equity ownership held by persons from HDGs that is not less than 30%⁸;

2.4.3. applicants were required to take into account the limitations provided in terms of sections 52, 64, 65 and 66 of the EC Act, amongst others⁹; and

2.4.4. submit one original, 15 hard copies and 3 soft copies of the application¹⁰.

2.5. All applications had to be submitted in the format provided for in Schedule "A" of the ITA. The ITA further specified that "*Non-compliance with the provisions*

⁷ ITA, Schedule A, paragraph 15.

⁸ ITA, Schedule A, paragraph 21.2

⁹ ITA, Section 2, paragraph 8.6.

¹⁰ ITA, Schedule A, paragraph 3

of the EC Act, the applicable Regulations and/or this ITA will result in the rejection by the Authority of such non-compliant application”¹¹.

2.6. The original submission deadline was 11h00 on or before 31 August 2017¹². The closing date was later extended to 11h00 on 16 November 2017¹³ subsequent to requests citing the need more time for applicants to align their applications with the provisions of the EC Act and ITA.

2.7. The ITA required applicants to submit the following information in support of their application:

2.7.1. general information, including the name of the applicant and the proposed station name;

2.7.2. information on the applicant’s corporate status, including:

2.7.2.1. the applicant’s legal form, authorising resolutions, and any control rights in respect of the governance and management of the applicant¹⁴;

2.7.2.2. details of the applicant’s senior management, including whether any senior manager was an officer or employee of a political party, held shares in the applicant or had any other media interests, together with relevant supporting documents e.g. an authorising resolution, the applicant’s certificate of incorporation and memorandum of incorporation, and any shareholders’ agreement concluded between the applicant and its shareholders;¹⁵

¹¹ ITA, page 2.

¹² ITA, Schedule A, paragraph 18, Notice 162 published in Government Gazette 40652 of 28 February 2017.

¹³ ITA, Schedule A, paragraph 18, Notice 512 published in Government Gazette 40968 of 7 July 2017

¹⁴ ITA, Section 2, p 13.

¹⁵ ITA, Section 2, pp. 15-16.

- 2.7.2.3. information in relation to the applicant's staffing and personnel¹⁶;
- 2.7.2.4. information in relation to the applicant's general history and development strategy¹⁷;
- 2.7.2.5. details of external consultants and advisors who assisted the applicant¹⁸;
- 2.7.2.6. details of involvement of the applicant and its participants (including shareholders and senior management) in any of the activities listed below and the extent of the interest (accompanied by supporting documentation):
 - 2.7.2.6.1. advertising agencies;
 - 2.7.2.6.2. non-RSA broadcasting interests;
 - 2.7.2.6.3. newspapers (including holdings in a group having substantial control over one or more newspapers);
 - 2.7.2.6.4. other broadcasting interests (including radio, television, satellite and cable broadcasting, and allied activities); and
 - 2.7.2.6.5. other publicly funded bodies.
- 2.7.2.7. information indicating how the applicant complies with provisions of sections 52, 64, 65 and 66 of the EC Act.¹⁹;

¹⁶ ITA, Section 2, p 20.

¹⁷ ITA, Section 2, p 21-22.

¹⁸ ITA, Section 2, p.21.

¹⁹ ITA, Section 2, p 22.

2.7.3. programming information, including details of channel authorisation²⁰;

2.7.4. the manner in which complaints would be dealt with and the applicant's operations would comply with relevant codes²¹;

2.7.5. information on the demand, need and support for the proposed service, including:

2.7.5.1. the appeal of the programme service, evidence of demand, need and support for the proposed service (including primary market research), the size and composition of the expected audience along with research in this regard, local support for the proposed service in the proposed coverage area²²;

2.7.6. financial information such as:

2.7.6.1. the applicant's business plan;

2.7.6.2. projected financial statements, details of total funding requirements and the sources of such funds;

2.7.6.3. the applicant's fixed assets;

2.7.6.4. details of the applicant's issued share capital, proposed investors, voting rights, non-voting shares, lenders, means of raising capital, details of any loans; and

²⁰ ITA, Section 6, pp 32 – 33.

²¹ ITA, Section 5, p 31.

²² ITA, Section 4, p 29.

- 2.7.6.5. the applicant's bank facilities or other credit arrangements, any grants and donations awarded to the applicant, forecasted advertising revenue, and forecasted sponsorship income²³.
- 2.7.7. technical information, including the details of HDG equity stake.²⁴
- 2.8. The Authority convened workshops on the requirements of the ITA in all nine (9) provinces between 29 May 2017 and 8 June 2017 to give prospective applicants an opportunity to seek and get clarity on the procedural aspects and requirements of the ITA.
- 2.9. Following the workshops and engagements with interested parties, but before the previous deadline had elapsed, the Authority published two further notices in the Gazette on 7 July 2017. The aforementioned notices amended the ITA by the extension of the deadline to 16 November 2017, the replacement of the existing Schedule D with an amended version and the insertion of a new clause 13 of Schedule E.²⁵
- 2.10. The most significant change that resulted from the amended Schedule D was that the Authority specified that only one successful applicant would be awarded a licence upon conclusion of the entire licensing process.
- 2.11. The Authority received five applications from the entities listed below:
- 2.11.1. Laedza TV (Pty) Ltd ("**Laedza**")
 - 2.11.2. Tshwaranang Media (Pty) Ltd ("**Tshwaranang Media**");
 - 2.11.3. Kwesé Free TV (Pty) Ltd ("**Kwesé Free TV**")
 - 2.11.4. Infinity Media Networks (Pty) Ltd ("**Infinity Media**"); and

²³ ITA, Section 3, pp 23 – 28

²⁴ ITA, Section 7, pp 40-45 .

²⁵ General Notices 512 and 513, Government Gazette 40968, 7 July 2017.

2.11.5. Free To Air TV (Pty) Ltd ("**Free to Air TV**")

- 2.12. The application submitted by Laedza did not comply with various material requirements of the ITA. Such instances of non-compliance included the failure to provide proof of payment of the non-refundable application fee, failure to apply for the 55% of the MUX 3 Frequency (as required by the ITA), delivery of the application in unmarked envelopes, the application was not permanently bound *etcetera*.
- 2.13. The above defects were deemed by the Authority to constitute non-compliance with the stipulations of the ITA and the Licensing Regulations.
- 2.14. Regulation 8(3) of the Processes and Procedures Regulations provides that *"Where an application for a Licence does not comply with the requirements of the ITA, the Authority may—*
(a) reject the application;
(b) direct the applicant to furnish the required information within the specified period.
(c) on good cause shown by the applicant, condone the late filing of an application"
- 2.15. Regulation 8(4) of the Processes and Procedures Regulations provides that where the applicant fails to comply with regulation 8(3) (b), the Authority may reject the application.
- 2.16. In addition to the above, the Radio Frequency Spectrum Regulations, 2015²⁶ ("**Spectrum Regulations**") govern the procedure to be followed by the Authority in respect of applications for radio frequency spectrum licences (as is the case in this process).
- 2.17. Regulation 7 of the Spectrum Regulations states as follows:

²⁶ GN 279 of 30 March 2015: Notice regarding the Radio Frequency Spectrum Regulations (Government Gazette No. 38641).

"(1) the Authority will at all times publish an ITA where a radio frequency spectrum licence will be awarded/granted on a competitive basis and where it determines that there is insufficient spectrum available to accommodate demand in terms of section 31 (3) (a) of the EC Act.

(2) An ITA, in terms of sub regulation (1), will set out the following:

- a) The subject of the ITA;*
- b) The place for the submission of the application;*
- c) The application fee,*
- d) Any qualification criteria that are applicable;*
- e) The terms and conditions relating to the application;*
- f) The proposed licence terms and conditions;*
- g) The procedures for submission of the application;*
- h) The deadline for the submission of the application;*
- i) Conditions and procedures for the amendment of an application;*
- j) Conditions and procedures for the submission of supplementary information;*
- k) Conditions for the disqualification of an applicant from the application process;*
- l) The selection process;*
- m) The evaluation criteria;*
- n) The licensing method the Authority will use, including any of the following:*
 - i. Auction rules;*
 - ii. Beauty contest rules; or*

iii. *Any other licensing mechanism deemed appropriate by the Authority."*

- 2.18. Regulation 7(3) governs disqualification of applicants and sets out an extensive list of instances when applicants may be disqualified by the Authority. Regulation 7(3) provides that, *inter alia*:

An applicant shall be disqualified from the application process where such applicant:

"

- (a) *has submitted an application and is an affiliate of another applicant, or has an ownership or financial interest in another applicant within the same application process;*
- (b) *has been granted a radio frequency spectrum licence by the Authority within the designated range unless the licensee has less than the maximum bandwidth made available in line with these regulations in which case they will only be allowed to apply for additional spectrum which results in total assignment not exceeding the maximum bandwidth made available;*
- (c) *has submitted more than 1 (one) application to the Authority for the grant of a radio spectrum licence within the designated range;*
- (d) *has a minimum 30% (thirty percent) equity ownership held by persons from Historically Disadvantaged Groups; alternatively, in instances where an Applicant does not have such 30% equity ownership, must be a level 4 and above contributor (B-BBEE status) in terms of the Codes of Good Practice published in terms of section 9 (1) of the B-BBEE Act;*
- (e) *has submitted an application which contains false or misleading information;*
- (f) *is colluding or has attempted to collude with another applicant with the intention to distort or manipulate information;*
- (g) *has obtained or acquired confidential information relating to another applicant;*
- (h) *has failed to notify the authority of the changes referred to in the application forms;*

- (i) has failed to comply with the terms and conditions of the application as set out in the ITA; or
- (j) *has failed to comply with a request in terms of these regulations".*

2.19. Having regard to the circumstances, the Authority resolved to disqualify the Laedza application in terms of the provisions of the ITA read with regulation 8 and 7 of the Licensing Regulations and Spectrum Regulations (respectively).

2.20. On 13 March 2018, the Authority gave notice²⁷ that it had received four applications in response to the publication of the ITA. Such applications being from Kwesé Free TV, Tshwaranang Media, Free to Air and Infinity Media ("**the Applicants**"). The Authority also listed particulars of the applications in the schedule to the notice²⁸. As it is enjoined to do in terms of the provisions of section 9 of the EC Act, the Authority also invited interested parties to submit written representations on the applications. The closing date for the submission of such representations was stipulated as being within 21 working days of the date of publication of the notice, i.e. 16 April 2018 and responses thereto by the Applicants within 42 days of publication of the notice, i.e. 17 May 2018.

2.21. In response to the above notice, the Authority received three written representations in respect of the applications ("**the Representations**").

2.22. The Applicants provided their responses to the Representations to the Authority and submitted copies of the responses to the relevant entity that made the respective representations ("**the Responses**").

2.23. On 14 September 2018, the Authority requested additional information from the Applicants and the response date was set as 10 working days of the signature date.

²⁷ Published under Government Gazette No 41494 of 13 March 2018.

²⁸ *Ibid.*

2.24. Upon receipt of additional information, the Authority gave notice on 19 October 2018 that it had received additional information from the Applicants and also invited interested parties to submit written representations on the applications²⁹. The closing date for the submission of such representations was set as within 14 working days of the date of publication of the notice, i.e. 8 November 2018 and responses thereto by the Applicants within 21 days of publication of the notice.

2.25. The Authority did not receive any further written representations pursuant to the publication of the above notice regarding additional information which it had received. On 12 November 2018, the Authority gave notice³⁰ that it would be holding public hearings on 22 to 23 November 2018 in respect of the applications received pursuant to the ITA.

3. THE COMMITTEE

3.1. Acting in terms of section 17(1) of the ICASA Act, the Council of the Authority ("**Council**") established a committee in 2016 to consider the applications before it and conduct public hearings in respect thereof ("**the FTA Committee**").

3.2. The FTA Committee is chaired by Councillor Dimakatso Qocha and the Deputy Chairperson being Councillor Botlenyana Mokhele and comprises the following employees of the Authority:

- 3.2.1. Leah Maina;
- 3.2.2. Fikile Hlongwane;
- 3.2.3. Thabo Ndhlovu;
- 3.2.4. Mpho Mgwebi;
- 3.2.5. Busisiwe Mashigo;
- 3.2.6. Kgomotso Mokitle;
- 3.2.7. Resheditse Kgomo;

²⁹ GN 640 of 19 October 2019: Notice regarding the Radio Frequency Spectrum Regulations (Government Gazette No. 41989).

³⁰ Published in Government Gazette No 42031 of 12 November 2018.

- 3.2.8. Ruvengano Mandebvu;
 - 3.2.9. Lufuno Sigwavhulimu;
 - 3.2.10. David Ramaremela;
 - 3.2.11. Stanley Mufamadi;
 - 3.2.12. Davis Moshweunyane;
 - 3.2.13. Thandi Nkosi; and
 - 3.2.14. Xolani Makhoba
- 3.3. Council resolved that the FTA Committee was to consider all relevant information and representations, make appropriate findings of fact and make recommendations to Council regarding the applications received pursuant to the ITA.
- 3.4. The Authority also appointed Mkhabela Huntley Attorneys ("**MHA**") in terms of section 14A of the ICASA Act to assist the Authority with regard to the analysis of the legal aspects applicable to and arising from the respective applications received by the Authority.

4. PUBLIC HEARINGS

- 4.1. As already indicated, on 12 November 2018, the Authority gave notice of its intention to conduct hearings in terms of section 9(2) (e) of the EC Act. The public hearings were held at Irene Country Lodge in Centurion on 22 and 23 November 2018.
- 4.2. During the hearings, the Applicants were provided an opportunity to make oral representations in support of their respective applications. The Authority also questioned the Applicants on various aspects of their respective applications. Applicants that had made written representations in respect of particular applications were afforded an opportunity to make oral submissions on the applications concerned. In such instances, the relevant applicants could respond to such submissions.

4.3. Subsequent to the public hearings, the Authority on 28 November 2018 afforded the Applicants a further seven days to furnish further information to assist in clarifying certain aspects of their respective applications which had been canvassed by the Authority during the hearings or later arose from the Authority's analysis of the submissions made during the hearings.

4.4. The Authority requested the following further information:

4.4.1. **Tshwaranang Media**

4.4.1.1. In its application, Tshwaranang Media referred to a PWC Entertainment and Media Outlook study from 2016-2020 that verifies the assumptions made regarding its projections and key industry trends. At the public hearings, reference was made to the PWC study of 2017-2021. Tshwaranang Media was requested to confirm and provide the study on which the assumptions were based;

4.4.1.2. Clarification was sought regarding the stark decrease in the production content cost in year 5, as this was not provided in the business plan submitted by Tshwaranang Media with its application;

4.4.1.3. Clarification was sought regarding why access to working capital from Serobeng Health CC was not included in its cashflows, as well as clarification regarding the detailed terms surrounding the Serobeng working capital facility and submission of cashflows which would include the Serobeng facility;

4.4.1.4. Details were requested regarding the circulation numbers of African Times as well as details regarding its

footprint and also clarify how the applicant complies with section 66 of the EC Act;

4.4.1.5. Tshwaranang Media was requested to provide clarity on its target audience and market research report;

4.4.1.6. Provide proof of signatures of supporters pertaining to section 24.1.3 of Tshwaranang Media's application;

4.4.1.7. Clarification on how the Authority is to interpret the clauses incorporated in the Shareholders' Agreement which are suspended by operation of the suspensive condition contained in clause 2.1 read with 12 of the Shareholders' Agreement;

4.4.1.8. stamped identification documents in compliance with the ITA;

4.4.1.9. In the submission by Tshwaranang Media at the public hearings, it was indicated that the proof of signed petition can be provided on request. Accordingly, Tshwaranang Media was requested to provide proof of the signatures of supporters pertaining to section 24.1.3 of its application; and

4.4.1.10. clarification on the Tshwaranang Media's target audience and market research report of per its representations at the hearing³¹;

³¹ Transcript of the Public Hearings held on 23 November 2018.

4.4.2. **Kwesé Free TV –**

- 4.4.2.1. Explanation regarding the nature of Kwesé Free TV's shareholders loans (for example, who will provide them? Are they convertible or not? when will they be provided?) and how they will affect the current capital structure of Kwesé Free TV³²;
- 4.4.2.2. clarity was sought on whether clauses 22.1, 22.13, 22.16 and 30.6 of the Memorandum of Incorporation (MOI) established indirect control by a foreign entity, which would contravene section 64(1)(a) or constitute an interest exceeding the threshold prescribed by section 64(1)(b)³³;
- 4.4.2.3. a request was made for provision of signed affidavits indicating whether anyone in senior management of Kwesé are employees or office bearers of any political party;
- 4.4.2.4. a request was made for provision of the third-party Geopoll research survey report referred to in its application; and
- 4.4.2.5. clarification was sought regarding the *caveat* contained in the B-BEE verification report submitted with its application.

³² Transcripts of the Public Hearing held on 22 November 2018

³³ Transcript of the Public Hearing held on 22 November 2018

4.4.3. Infinity Media –

- 4.4.3.1. information was sought regarding how Infinity Media complies with section 64 and 66 (2) of the EC Act³⁴;
- 4.4.3.2. clarity was sought as to how the proposed service will cater for tastes and interests different from those catered for by existing broadcasting services;³⁵
- 4.4.3.3. information was sought to explain why Infinity Media did not provide its anticipated market share and expected audience size as required by the ITA³⁶; and
- 4.4.3.4. clarity was sought on how Infinity Media intends to comply with the South African Local Content Regulations³⁷.

4.4.4. Free To Air TV–

- 4.4.4.1. Provision of an overview of Free To Air TV's financial model³⁸;
- 4.4.4.2. clarity as to how is the rollout will be funded and how is it accounted for in the projections³⁹;
- 4.4.4.3. information pertaining to the revenue assumptions⁴⁰;

³⁴ Transcripts of the Public Hearing held on 22 November 2018

³⁵ Transcripts of the Public Hearing held on 22 November 2018

³⁶ Transcripts of the Public Hearing held on 22 November 2018

³⁷ Page 233 of the Transcripts of the Public Hearing held on 22 November 2018.

³⁸ Transcripts of the Public Hearing held on 22 November 2018

³⁹ Transcripts of the Public Hearing held on 22 November 2018

⁴⁰ Transcripts of the Public Hearing held on 22 November 2018

- 4.4.4.4. Provision of the accounting treatment for content acquisition and broadcasting rights⁴¹;
 - 4.4.4.5. provision of the assessment of impact on Income Statement, Balance Sheet and Cashflow Statement⁴²; and
 - 4.4.4.6. clarity regarding its funding contingency plans⁴³.
- 4.4.5. Tshwaranang Media provided the Authority with additional information on 7 December 2018.
- 4.4.6. Kwesé Free TV provided the Authority with additional information on 7 December 2018.
- 4.4.7. Infinity Media provided the Authority with some additional information on 29 November 2018.
- 4.4.8. Free To Air provided the Authority with additional information requested on 5 December 2018.

5. RELEVANT LEGISLATIVE CRITERIA AND CONSIDERATIONS

- 5.1. The performance of the Authority's licensing functions must be viewed in the context of section 192 of the Constitution, which provides that the Authority's mandate is to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.
- 5.2. In addition to the constitutional obligations borne by the Authority, its licensing and regulatory functions must be performed in manner that gives effect to the objectives specified in section 2 of the EC Act. The Authority regards the

⁴¹ Transcripts of the Public Hearing held on 22 November 2018

⁴² Transcripts of the Public Hearing held on 22 November 2018

⁴³ Transcripts of the Public Hearing held on 22 November 2018

following objects and principles set out in section 2 of the EC Act as particularly important in considering applications for individual commercial free to air television broadcasting service licences:

- 5.2.1. promoting an environment of open, fair, and non-discriminatory access to broadcasting services⁴⁴;
- 5.2.2. promoting broad-based black economic empowerment, with particular attention to the needs of women, opportunities for youth and challenges for persons with disabilities;⁴⁵
- 5.2.3. ensuring that broadcasting services, viewed collectively, are provided by persons or groups of persons from a diverse range of communities in South Africa⁴⁶;
- 5.2.4. promoting the development of commercial broadcasting services which are responsive to the needs of the public⁴⁷;
- 5.2.5. ensuring that broadcasting services, viewed collectively⁴⁸ –
 - 5.2.5.1. promote the provision and development of a diverse range of sound and television broadcasting services on a national, regional and local level, that cater for all language and cultural groups and provide entertainment, education and information;
 - 5.2.5.2. provide for regular news services, actuality programmes on matters of public interest, programmes on political issues of public interest and programmes on matters of

⁴⁴ Section 2(g) of the EC Act.

⁴⁵ Section 2(h) of the EC Act.

⁴⁶ Section 2(k) of the EC Act.

⁴⁷ Section 2 (r) of the EC Act.

⁴⁸ Section 2(s) of the EC Act

international, national, regional and local significance;
and

5.2.5.3. cater for a broad range of services and specifically for the programming needs of children, women, the youth and the disabled;

5.2.6. ensuring that commercial and community broadcasting licences, viewed collectively, are controlled by persons or groups of persons from a diverse range of communities in South Africa⁴⁹; and

5.2.7. ensuring that broadcasting services are effectively controlled by South Africans⁵⁰.

5.3. Coupled with the above, is another fundamental object of the EC Act is to promote and facilitate the achievement of the objects of the "related legislation" such as the Broadcasting Act⁵¹ which objects include the following:

5.3.1. to encourage ownership and control of broadcasting services through participation by persons from HDDs⁵²;

5.3.2. to ensure plurality of news, views and information and provide a wide range of entertainment and education programmes⁵³;

5.3.3. to ensure that commercial and community broadcasting licences, viewed collectively, are controlled by persons or groups of persons from a diverse range of communities in South Africa⁵⁴; and

⁴⁹ Section 2(v) of the EC Act.

⁵⁰ Section 2(w) of the EC Act.

⁵¹ Section 2(o) of the EC Act.

⁵² Section 2(c) of the Broadcasting Act

⁵³ Sections 2(d) and 3(5) of the Broadcasting Act

⁵⁴ Section 2(m) of the Broadcasting Act

- 5.3.4. to ensure that the broadcasting system is controlled by persons or groups of persons from a diverse range of communities in South Africa and within each element promotes ownership, control and management of broadcasting services by persons from HDG's⁵⁵.
- 5.4. In terms of the EC Act, when granting a licence the Authority is required to, *inter alia*: -
 - 5.4.1. ensure that broadcasting services, viewed collectively, are provided by persons or groups of persons from a diverse range of communities in South Africa⁵⁶; and
 - 5.4.2. promote broad-based black economic empowerment including the empowerment of women, the youth and people with disabilities in accordance with the requirements of the ICT Charter⁵⁷.
- 5.5. As discussed below, the Authority has also taken into account the relevant principles in the Generic Codes of Good Practice published under the B-BBEE Act and in the ICT Sector Code⁵⁸, in its evaluation of the applications received in the current licensing process.
- 5.6. Section 51 of the EC Act relates specifically to commercial broadcasting services and provides that, in considering the grant of a new commercial broadcasting licence, the Authority must, with due regard to the objects and principles as provided for in section 2 of the EC Act (referred to above), amongst other things, take into account:
 - 5.6.1. demand for the proposed broadcasting service within the proposed licence area⁵⁹;

⁵⁵Section 3(1)(c) of the Broadcasting Act

⁵⁶ Section 5(9) (a) of the EC Act

⁵⁷ Section 5(9) (b) of the EC Act

⁵⁸ ICT Sector Code for Black Economic Empowerment, 6 June 2012

⁵⁹ Section 51(a) of the EC Act.

- 5.6.2. the need for the proposed broadcasting service within such licence area, having regard to the broadcasting services already existing in that area⁶⁰;
- 5.6.3. the expected technical quality of the proposed broadcasting service, having regard to developments in broadcasting technology⁶¹;
- 5.6.4. capability, expertise and experience of the applicant⁶²;
- 5.6.5. financial means and business record of the applicant⁶³;
- 5.6.6. business record of persons in a position to control the operations of the licensee, either in an individual capacity or directly or indirectly in relation to management or corporate structure⁶⁴;
- 5.6.7. the applicant's record and the record of persons in a position to control the operations of the licensee in relation to situations requiring trust and candour⁶⁵;
- 5.6.8. whether the applicant is precluded in terms of section 64 of the EC Act (referred to below) from holding a broadcasting licence⁶⁶; and
- 5.6.9. whether the applicant or any person in a position to control the applicant has been convicted of an offence in terms of the EC Act or the related legislation⁶⁷.

⁶⁰ Section 51(b) of the EC Act.

⁶¹ Section 51(c) of the EC Act.

⁶² Section 51(d) of the EC Act.

⁶³ Section 51(e) of the EC Act.

⁶⁴ Section 51(f) of the EC Act.

⁶⁵ Section 51(g) of the EC Act.

⁶⁶ Section 51(h) of the EC Act.

⁶⁷ Section 51(i) of the EC Act.

5.7. Over and above these considerations, the Authority is required to consider whether an applicant complies with any other applicable requirements of the EC Act and related legislation such as:

5.7.1. whether the minimum percentage of equity held by HDGs in applicants for the commercial free to air television broadcasting services licence that formed the subject of the ITA was 30%.⁶⁸

5.7.2. Section 5(8) of the EC Act provides that every applicant for a licence in terms of the EC Act must demonstrate that the applicant or other person to whom a licence is to be awarded, in the case of –

5.7.2.1. a natural person is a citizen of the Republic of South Africa; or

5.7.2.2. a juristic person is registered under the laws of South Africa and has its principal place of business located in South Africa.

5.7.3. Section 52 of the EC Act provides that broadcasting service licences may not be awarded to any party, movement, organisation, body or alliance, which is of a party-political nature.

5.7.4. Section 64 of the EC Act deals with limitations on foreign control of broadcasting services, and provides as follows:

"(1) A foreigner may not, whether directly or indirectly—

(a) exercise control over a commercial broadcasting licensee; or

(b) Have a financial interest or an interest either in voting shares or paid-up capital in a commercial broadcasting licensee, exceeding twenty (20) percent.

(2) Not more than twenty (20) percent of the directors of a commercial broadcasting licensee may be foreigners"

⁶⁸ ITA, pp15-16.

5.8. "Control" as contemplated in section 64(1) (a) of the EC Act is not defined for the purposes of that section or, more generally, in section 1. Nevertheless, the Authority is of the view that that a 20% shareholding in a licence (whether direct or indirect) is deemed to be control of that licensee for the purposes of section 64, 65 and 66 of the EC Act. This interpretation was accepted by the court in the *KZN Talk Radio (Pty) Limited v Independent Communications Authority of South Africa*⁶⁹ case.

5.9. The EC Act defines "Financial interest" as: –

"an interest that may or may not have voting rights attached to it but which gives the person or entity an equity or debt interest directly through shares or other securities or indirectly through an agreement giving it –

(a) the power to control the licensee; or

(b) an effective say over the affairs of the licensee"

5.10. Sections 65 and 66 of the EC Act impose limitations on control of multiple commercial broadcasting services and on cross-media control of commercial broadcasting services, respectively.

5.11. Section 65(1) of the EC Act provides that no person may –

5.11.1. directly or indirectly "exercise control" over more than one commercial television broadcasting service licence;

5.11.2. be a director of a company which is, or of two or more companies which between them are, in a position to "exercise control" over more than one commercial broadcasting service licence in the commercial television broadcasting service;

5.11.3. be in a position to "exercise control" over a commercial broadcasting service licence in the commercial television broadcasting service and

⁶⁹ (41672/12) [2014] ZAGPJHC 396 (5 August 2014) at paras 30 to 33.

be a director of any company which is in a position to exercise control over any other commercial broadcasting service licence in the commercial television broadcasting service.

5.12. In terms of section 65(6) of the EC Act, the Authority may, on application by any person, on good cause shown and without departing from the objects and principles enunciated in section 2 of the EC Act, exempt that person from the provisions of subsection (1).

5.13. Section 66 of the EC Act deals with "cross-media" control and provides, amongst other things, that:

5.13.1. no person who controls a newspaper may acquire or retain "financial control" of both a commercial television broadcasting service licence and a commercial sound broadcasting service;

5.13.2. no person who is in a position to control a newspaper may be in a position to control either a commercial television broadcasting service licence or a commercial sound broadcasting service licence, in an area where the newspaper has an average ABC circulation of 20% of the total newspaper readership in the area, if the licence area of the commercial broadcasting service licence overlaps substantially with the circulation area of the newspaper concerned.

5.14. Section 66(4) of the EC Act provides that "substantial overlap" means an overlap by 50% or more.

5.15. Section 66(5) of the EC Act provides that a 20% shareholding in a commercial broadcasting service *"is considered as constituting control"*.

5.16. In terms of section 66(6) of the EC Act, the Authority may on good cause shown and without departing from the objects and principles enunciated in section 2 of the EC Act, exempt affected persons from any of the limitations imposed by section 66.

5.17. The Private Television Position Paper set out the policy considerations which the Authority will generally take into account in evaluating applications for commercial television broadcasting licences in terms of the criteria set out in section 51 of the EC Act and in light of the regulatory objectives in section 2 of the EC Act.

5.18. Paragraph 6.2 of the Private Television Position Paper states that the Authority has identified three programme areas to which it requires the new entrant in the private television service to make a contribution and these are News and Information, Children's programming and South African Drama⁷⁰. The rationale underpinning the Authority's position in relation to the identified programme areas is that they will ensure that the new entrant provides quality service to the benefit of viewers.

5.19. Paragraph 6.2.1 of the Private Television Position Paper states that local content regulation is essential in reflecting and developing the Country's national, regional and local and culture and character in its diversity. As a result, local content regulation and regulation of independent production contribute to the development of the South African television and film production industry⁷¹.

5.19.1. Paragraph 6.3 of the Private Television Position Paper states that the Authority will take provincial diversity into account in the context of promoting diversity in the range of sound broadcasting services

5.19.2. Paragraph 6.4 of the Private Television Position Paper states that the Authority will not specify the broadcast language of a commercial television broadcasting service but seeks to encourage inclusion of other South African languages.

5.20. As set out above, in evaluating applications, the Authority also takes account of the requirements of the ICASA South African Television Content Regulations,

⁷⁰ Position Paper, para 6.2, p10

⁷¹ Position Paper, para 6.2.1 p 11

2016 ("South African Content Regulations") dated 23 March 2016⁷². The applicable requirements pertaining to South African content in terms of the South African Content Regulations are set out in the ITA at clause 32 under the heading "Compliance with South African Content Regulations". In terms of the above clause 32, applicants were required to provide details of how the proposed service would comply with the provisions of the South African Content Regulations.

5.21. Regulation 5 of the South African Content Regulations sets out the prescripts which licensees must comply with in order to satisfy the stipulations of the South African Content Regulations. It provides that; –

5.21.1. A commercial television broadcasting licensee must ensure that after twenty-four (24) months of the gazetting of these regulations or such longer period as the Authority may determine, a minimum weekly average of 45% of its programming, measured over the period of a year, during the South African television performance period consists of South African television content (Regulation 5.1);

5.21.2. In complying with its obligations in terms of sub-regulation 5.1 above, a commercial television licensee must ensure that a minimum of⁷³:

- i. 20% of its drama programming consists of South African drama;
 - ii. 50% of its current affairs programming consists of South African current affairs;
 - iii. 30% of its documentary programming consists of South African documentary programming;
 - iv. 30% of its informal knowledge-building programming consists of South African informal knowledge building programming;
- and

⁷² Government Gazette 39844, GN 609 of 2016.

⁷³ Regulation 5.2.

- v. 25% of its children's programming consists of South African children's programming.

5.22. In determining the successful Applicant, the Authority considered the following evaluation criteria set out in the erratum notice in respect of the ITA⁷⁴:

Item	Criteria Description	Weight
	Phase 1: Pre- Qualification	
1.	Failure to comply with any of the requirements of the ITA, the provisions of the EC Act and/or relevant Regulations will render the application subject to disqualification.	
	A minimum of 30% equity ownership held by Historically Disadvantaged Groups (HDGs) is mandatory.	
	The minimum points required [are] 60. The licence will be awarded to the Applicant who scores the highest points.	
	Phase 2: Functionality	
2.	Market research: Demand, Need and Support of the proposed service	35
3.	Viability of the business plan and financial means of the Applicant	35
4.	Capability, expertise and experience of the Applicant and its employees in business in general and in broadcasting in particular	30
Total		100

6. INTERLOCUTORY DECISIONS

- 6.1. Three Applicants – Kwesé Free TV, Infinity Media and Free To Air TV requested confidentiality in terms of section 4D of the ICASA Act in relation to specific

⁷⁴ P6 of an erratum to Schedule D and paragraph 13 of Schedule E of the ITA, no 40968, 7 July 2017.

information they had each submitted to the Authority. In terms of section 4D, the request for confidentiality should be accompanied by a written statement explaining why the specific information should be treated as confidential. To this end, the Authority is required to make a determination as to whether or not confidentiality will be granted within 14 days of receiving the information and provide reasons to the person concerned in relation to its determination.

6.2. Section 4D(4) provides that when considering a request for confidentiality contemplated in section 4D(1), the Authority must treat the following information, as confidential information:

6.2.1. trade secrets of such person;

6.2.2. financial, commercial, scientific or technical information other than trade secrets, the disclosure of which is likely to cause harm to the commercial or financial interests of such person;

6.2.3. information, the disclosure of which could reasonably be expected to put the person at a disadvantage in contractual or other negotiations, or to prejudice the person in commercial competition;

6.2.4. the names of prospective employees; and

6.2.5. business plans of a licensee.

6.3. Where the Authority determines that a request for confidentiality cannot be granted, the entity requesting confidentiality must be given an opportunity to withdraw the information.

6.4. The Authority considered the requests for confidentiality received from the aforementioned parties in line with the above requirements and notified of the respective applicants of its decision in relation to each application.

- 6.5. In respect of Kwesé Free TV's request, the Authority decided to grant confidentiality on the following information:

Volume 2 Part B

- (a) Appendix 4.1.1 – 4.1.8: Senior management background: Includes the following information: - Paragraph: 4.2 Employee acceptance;
- (b) Appendix 4.2.1 – 4.2.8: Employee acceptance;
- (c) Appendix 9: Business Plan which includes information on financial plan, Operating expenses and advertising revenue; and
- (d) Appendix 31.1a -31.1d: Supplier's Letters of Support.

- 6.6. Nevertheless, the Authority decided to refuse Kwesé Free TV's request for confidentiality in respect of the following:

Volume 2:

- (a) Appendix 3.3a: Share certificates of Appendix 14: Funding Requirements and Sources;
- (b) Appendix 3.3c: BEE Verification report;
- (c) Appendix 3.3: Organogram of the Applicant's Shareholding Structure;
- (d) Appendix 5.4a: Draft Signal Distribution Agreement between Kwesé Free TV Pty (Ltd) and Sentech SOC Limited (Signal Distribution Agreement); and
- (e) Appendix 14.1: Shareholders Agreement.

- 6.7. In respect of Infinity Media's request, the Authority decided to grant confidentiality in respect of the following information:

Volume 3

- (a) Appendix 3.3: Share certificate of Afrotone Media Holdings (Pty) Ltd
- (b) Appendix 9: Business Plan;
- (c) Appendix 10.5- Projected Annual Operating Expenses;

- (d) Appendix 20– Part B: Statement of Revenue;
- (e) Appendix 10.5: Projected Operating Expenses;
- (f) Appendix 10.6: Balance Sheet; and
- (g) Appendix 17: Bank facility;
- (h) Appendix 14.1: Proposed Investors (Shareholders agreement);
- (i) Appendix 14.2: Proposed Investors (Voting/non-voting);
- (j) Appendix 20: Revenue from Sponsorship Co-Funding or Other Sources; and
- (k) Schedule j-2.1 & 2.2: Annual Financial Statements of the Applicant.

6.8. However, the Authority decided to refuse Infinity Media's request for confidentiality in respect of the following:

- (a) Appendix 3.1: Company Registration Document;
- (b) Appendix 3.3: Share certificate of Afrotone Media Holdings (Pty) Ltd;
- (c) Appendix 3.3: Shareholders Agreements, share certificates and tax clearance certificate;
- (d) Appendix 4.4: Shareholders agreement;
- (e) Appendix 5.4: sub-contractors' agreement – save for the names of sub-contractors and content providers;
- (f) Appendix 11: Financial requirements and sources;
- (g) Appendix 12.1: Fixed assets;
- (h) Appendix 12.2: Breakdown of signal distribution costs;
- (i) Appendix 15: Methods of raising Capital;
- (j) Appendix 16: Other loans;
- (k) Appendix 18: Grants and Donations; and
- (l) Schedule j-2.4: Letter of support from Sentech Soc Ltd.

6.9. In relation to the request for confidentiality submitted by Free To Air TV, the Authority decided to grant request for confidentiality on the following information:

Volume 2

- (a) Appendix 9: Summary of Business Plan;
- (b) Appendix 10: Pro Forma Financial Statements
- (c) Appendix 10.2: Financial Ratios;
- (d) Appendix 10.3- Projected Cash Flow Statement;
- (e) Appendix 10.4 – Projected Income Statement;
- (f) Appendix 10.5: Projected Operating Expenses;
- (g) Appendix 10.6: Balance Sheet;
- (h) Appendix 11.2 Funding Letter;
- (i) Appendix 17.1: Bank facility; and
- (j) Appendix 20: Revenue from Sponsorship.

6.10. The Authority decided to refuse Free To Air TV's request for confidentiality on the following information:

Volume 2

- (a) Appendix 12: Fixed Assets;
- (b) Appendix 13: Share Capital;
- (c) Appendix 14.1: Proposed investors including Shareholders Agreement;
- (d) Appendix 14.2 Voting Shareholders;
- (e) Appendix 15.1: Method of Raising Capital;
- (f) Appendix 15.2: Breakdown of signal distribution costs;
- (g) Appendix 16: Classes of share capital and voting rights;
- (h) Appendix 17.1: Shareholders Agreement; and
- (i) Appendix 18: Method of raising capital.

6.11. The Authority refused the abovementioned aspects of the requests for confidentiality lodged by Infinity Media, Free To Air TV and Kwesé on the basis that the information on which confidentiality was requested by the applicants, did not fall within the ambit of the categories of information stipulated by section 4D (4) of the ICASA Act.

6.12. The Authority was of the view that, *inter alia*, the information concerned constituted basic information, which was also central to public responses and discussions on the applications in terms of section 9 of the EC Act.

7. OVERVIEW OF THE APPLICATIONS

7.1. Tshwaranang Media:

7.1.1. Tshwaranang Media's application is for the provision of a multi-channel television service with its licence area designated as the Republic of South Africa.

7.1.2. The proposed channels will be called "Channel 1: T- News"; "Channel 2: T- Entertain"; "Channel 3: T- Sport"; "Channel 4: T- Movies" and "Channel 5: T- Success".

7.1.3. The shareholding of Tshwaranang Media is held in the following proportions:

- 7.1.3.1. African Equity Empowerment Investment Limited-49%,
- 7.1.3.2. Amit Jayantilal Makan - 0.3%,
- 7.1.3.3. The B-Square Foundation - 1.5%,
- 7.1.3.4. Bongonet Systems Pty Ltd-3%,
- 7.1.3.5. Fredelaine Elna Cindy Brand - 0.3%,
- 7.1.3.6. Harold E. Doley Jr - 0.3%,
- 7.1.3.7. Lola Amukelani Mashabane-0.3%,
- 7.1.3.8. Mama Africa Investments-2%,
- 7.1.3.9. Mohamed Wazeer Moosa-0.2%,
- 7.1.3.10. Modjadji Development Trust-2%,
- 7.1.3.11. Nkoko Sekete-8%,
- 7.1.3.12. Piet Rampedi-8%,
- 7.1.3.13. Properprice 171 (Pty) Ltd-7%,
- 7.1.3.14. Rondancia Claudia Nock-0.3%,
- 7.1.3.15. Sarah Mzungu-0.3%,
- 7.1.3.16. Siyolo Development Trust-2%,
- 7.1.3.17. Social Entrepreneurship Foundation-7.5%,
- 7.1.3.18. South Atlantic Arts and Culture Trust-2%,
- 7.1.3.19. The Doley Foundation-3%; and

7.1.3.20. United Royals & Kingdoms of South Africa Holdings
(Pty) Ltd- 3%⁷⁵.

7.2. Kwesé Free TV:

7.2.1. Kwesé Free TV's application was for the provision of a multi-channel television service with its licence area designated as the Republic of South Africa.

5.13.2. Kwesé Free TV proposes to offer a free to air service comprising a bouquet of channels inclusive of sport and general entertainment content using MUX 3⁷⁶.

7.2.3. The proposed channels will be called Kwesé Free Sports (HD); Kwesé Brave (SD); Kwesé Focus (SD); Kwesé Vibes (SD) and Kwesé Drama (SD)

7.2.4. The shareholding of Kwesé Free TV is as follows:

7.2.4.1. Royal Bafokeng Metix (Pty) Ltd 45%;

7.2.4.2. Mosong Equities (Pty) Ltd - 35%; and

7.2.4.3. Kwesé Media Econet SA (Pty) Ltd ("Econet SA") 20% ⁷⁷.

7.3. Infinity Media:

7.3.1. Infinity Media proposes to offer a multi-channel free-to-air service with its licence area designated as the Republic of South Africa. The multi-channel service will comprise eleven (11) channels, namely;

7.3.1.1. The ANN7 (News Channel);

7.3.1.2. IM TV Channel (General entertainment);

⁷⁵ Page 8 of the Tshwaranang Media's amended Shareholding Application.

⁷⁶ Page1 of the Kwese Free TV Application, Part A.

⁷⁷Ibid.

- 7.3.1.3. IM Rural Educational Channel (Agriculture, animal, husbandry, farming tips, agro-economics);
- 7.3.1.4. IM Music Channel;
- 7.3.1.5. IM Kids Channel;
- 7.3.1.6. IM Health Channel;
- 7.3.1.7. IM Movies Channel;
- 7.3.1.8. IM News isiZulu Language Channel;
- 7.3.1.9. IM News isiXhosa & Sesotho Language Channel;
- 7.3.1.10. IM Sports Channel (Local sporting events); and
- 7.3.1.11. IM Education Channel.

7.3.2. In terms of the application lodged by Infinity Media, Afrotone Media Holdings (Pty) Ltd holds 100% of the shareholding in Infinity Media. Afrotone Media Holdings (Pty) Ltd is in turn held as follows- Lodidox (Pty) Ltd - 90% and Super Projects Trading (Pty) Ltd – 10%⁷⁸.

7.4. Free To Air TV:

7.4.1. Free To Air TV intends to offer a multi-channel free-to-air service with its licence area designated as the Republic of South Africa ⁷⁹.

7.4.2. The proposed five (5) channels will be as follows: "Omama" "Babenze Kahle"; "Dololo"; "The 99" and "Kidz Afrika"⁸⁰

7.4.3. Free To Air TV's shareholding as follows:

- 7.4.3.1. Amos Mohulatsi 51%;
- 7.4.3.2. Lekoete Joseph Thabo 25%;
- 7.4.3.3. NAMEC Telecoms (Pty Ltd 15%

⁷⁸ Page 8 of the Infinity Application, Appendix 3.3. of Volume 1.

⁷⁹ Page 5 of the Free To Air TV Application, Volume 1.

⁸⁰ Page 3 of the Free To Air TV Application, Volume3.

7.4.3.4. Nadine Vasinta Kisten 9%⁸¹.

8. SUMMARY OF WRITTEN REPRESENTATIONS

The SABC's representations

- 8.1. The SABC's representations pertain to a single issue, which was reproduced verbatim and addressed to each respective applicant, namely that the award of additional MUX 3 capacity during the dual illumination period (i.e. the period during the migration from analogue to DTT but before analogue switch-off) would have the effect of hampering the "*seamless migration of incumbent broadcasters*" to DTT.
- 8.2. SABC contends that new players will not incur migration costs or fragmentation of audiences, the available advertising revenue will shrink, and the Authority has a duty to ensure the viability of the SABC and/or other existing broadcasting service licensees before any new licences are issued

The SOS: Support Public Broadcasting Coalition (SOS) and Media Monitoring Africa (MMA) Representations regarding Infinity Media

- 8.3. SOS and MMA contended that the Infinity Media application did not set out in detail the history of the effective acquisition of the shares in Infinity Media by Mr Manyi, the individual who effectively holds 90% of the shares in Infinity Media. However, media reports at the time made it clear that the transaction (valued at R300 million) was vendor financed by the Guptas.
- 8.4. SOS and MMA further submitted that the Authority needs to satisfy itself that the vendor-financed effective acquisition of Infinity Media by Mr Manyi has not resulted in a foreigner having a financial interest in Infinity Media exceeding 20% as this would be contrary to section 64(1)(b) of the EC Act.

⁸¹ Page 57 of Free To Air Application, Appendix 3.3 , Volume 1.

8.5. They averred that foreigners do in fact exercise control over Infinity Media, in violation of section 64(1)(a) of the EC Act in that five of the twelve individuals listed as the senior managers are foreigners, including key roles such as Editor, Production Head, Technical Head, Head of Sales and Marketing and Production and Quality Control. An editor would have significant control over programming decisions, and that these non-South African managers would have control over a significant proportion of operations, things that constituted examples of *de facto* control over a broadcasting licensee. To this end must satisfy itself that foreigners do not exercise *de jure or de facto* control over Infinity⁸²

8.6. They urged that the applicability of section 52 of the EC Act to the Infinity Media application and Mr Manyi's involvement in the party-political structures of the ruling party must be interrogated extensively⁸³.

Kwesé Free TV regarding Infinity Media

8.7. Kwesé Free TV contended that Infinity Media's application was deficient in the following ways:

8.7.1. the Equity shareholding in the Applicant seems to be incomplete based on clause 4 of the shareholders agreement in that Infinity Media's direct and indirect Shareholders Agreement between Lodidox Pty Ltd, Super Projects Trading (Pty) Ltd and Afrotone Media Holdings (Pty) Ltd provides that there shall be 1,000 ordinary shares. Of the 1,000 ordinary shares 450 were allocated to Lodidox Pty Ltd and 45 allocated to Super Projects Trading (45 shares). It is not clear if Oakbay Investments (Pty) Ltd and Mabengela Investments (Pty) Ltd have been allocated shares as there is no detailed information in this regard. A failure by the applicant to clarify this compromises the

⁸² Pp7-8 of the SOS and MMA Representation, para 4.4 ,16 April 2018.

⁸³ P 8 of the SOS and MMA Representation, para 4.5.3,

ability to verify that the ownership structure of Infinity Media meets the relevant legislative requirements as enunciated in the EC Act⁸⁴;

8.7.2. Kwešé Free TV further contended that the Infinity Media had failed to submit a B-BBEE verification report as required by the Invitation To Apply (ITA) and this was confirmed by the SERR SYNERGY (Pty) Ltd letter dated 31 October 2017.

8.7.3. Kwešé further contended that in the absence of this verification report, the Authority is unable to satisfy itself that HDI's will be given a stake in the Applicant as required by the relevant legislation;

8.7.4. In terms of circulation figures of the New Age publication, the Applicant needs to demonstrate compliance with Section 66 (2) of the EC Act.

8.7.5. In relation to research, Kwešé Free TV argues that the research report submitted by Infinity Media does not demonstrate "demand, need, and support" as required by the ITA. The research report submitted is based on the ANN7 News channel⁸⁵;

8.7.6. Kwešé Free TV stated that there is a lack of critical broadcast business experience within the positions of senior management. In terms of its application, Infinity Media plans to rely on the resources and experience of the erstwhile ANN7 – a News channel and the New Age - print human capital. Kwešé Free TV further contended that the skills acquired during the course of providing a channel to another licensed broadcaster and during the course of running a print media business are massively different to what is required to successfully operate a free-to-air broadcasting entity⁸⁶;

⁸⁴ Paragraphs 2-5 of the Kwešé Free TV Representations, unpaginated.

⁸⁵ Para 4. of the Kwešé Free TV Representations, unpaginated.

⁸⁶ Para 5. of the Kwešé Free TV Representations, unpaginated

- 8.7.7. the Infinity Media application failed to state whether the 11 proposed channels would be on standard or high definition⁸⁷;

Kwesé Free TV regarding Tshwaranang Media

- 8.8. Kwesé Free TV contended that:

- 8.8.1. Africa Equity Empowerment Investments (AEEI) seems to be in a position to control the strategic direction of Tshwaranang Media although not a shareholder;
- 8.8.2. Of the 21 shareholders of Tshwaranang Media only 9 have initialled and signed the amended Shareholders agreement thus rendering the Agreement defective;
- 8.8.3. Tshwaranang Media failed to submit a B-BBEE Verification Report as required by the ITA. In Kwesé's view, this compromises the ability of the Authority to verify whether HDI's have been allocated a stake in Tshwaranang Media per the legislative requirements;
- 8.8.4. Tshwaranang Media stated in its application that its equity ownership for youth and people with disabilities amount to 4%. This information could not be verified due to the lack of the B-BBEE Verification Report;
- 8.8.5. AEEI is the major shareholder and is already making provision for the sale of shares, thus demonstrating a lack of commitment in further participation in Tshwaranang Media;
- 8.8.6. All the directors appear to be from Sagarmatha. According to publicly available information, this organisation is under financial distress;

⁸⁷ Para 6 of the of the Kwese Free TV Representations, unpaginated.

- 8.8.7. The comment on page 135, volume 1 about the revenue through the sale of exclusive content does not seem to be applicable to the application and needed further clarification and context;
- 8.8.8. Extent of the role to be played by the international consultants referred to in the Tshwaranang Media application is not clear;
- 8.8.9. Tshwaranang Media submitted an organogram with 11 members of senior management but has only submitted 6 letters of acceptance of the allocated positions;
- 8.8.10. The Board of Directors and Senior Management of the Tshwaranang Media do not have broadcasting experience but would rely solely on international consultants who lack local industry experience;
- 8.8.11. Projecting revenues of R1bn in year 1 is indicative of lack of experience in relevant market trends. The current incumbent – e.tv took approximately 6-7 years to break even and was only competing against the SABC for free to air viewership. Furthermore, the competition for advertising revenue from merchants includes the pay TV sector, the internet platform, print media and community broadcasters;
- 8.8.12. Tshwaranang Media underestimated the start-up CAPEX, and OPEX costs; and
- 8.8.13. Tshwaranang Media failed to state whether the 5 proposed channels will be on Standard Definition or High Definition platform.

Kwesé Free TV regarding Free To Air TV

- 8.9. Kwesé Free TV contended that Free To Air TV's application was defective for the following reasons:

- 8.9.1. Free To Air TV failed to submit a B-BBEE Verification Report by an approved verification agency, as required by the ITA⁸⁸;
- 8.9.2. The Shareholders Agreement of Free To Air TV is defective in that not all shareholders and witnesses have duly signed Clause 35 of the agreement;
- 8.9.3. The application lacked clarity regarding who was controlling the company. There is a content supply agreement with African Network Television for the supply of three (3) fully compiled channels, making clause 2.3 a cause for concern;
- 8.9.4. There is a revenue model which seems to be in favour of the content supplier, African Network Television, raising questions about who is in control of the entity;
- 8.9.5. Free To Air TV has no equity shareholding by Youth;
- 8.9.6. in its application, Free To Air TV stated that funding would be secured through loans from outside parties however, no further details regarding the prospective lenders were provided including information against what collateral the proposed loans would be issued⁸⁹;
- 8.9.7. The "opening letter" of Free to Air TV stated that all costs and overheads would be fully underwritten by the Consortium's members. This statement did not correlate with section 15 of its application where Free to Air TV stated that it would look to a number of outside institutions for funding;
- 8.9.8. The Content offering set out in the Free To Air TV application is not aligned to the general South African audience for the following reasons:

⁸⁸ Para 2, of the Kwese Representation, 16 April 2016.

⁸⁹ Para 3, of the Kwese Representation, 16 April 2016.

- 8.9.8.1. Aiming one channel only at disenfranchised communities referred to as single black pregnant mothers. There were no further details on where and how such niche content would be sourced?
 - 8.9.8.2. Would such a proposal attract the required advertising revenue to sustain the business? and
 - 8.9.8.3. three channels set out in the application were compiled from a Mauritian entity.
- 8.9.9. The Channel Partnership Agreement between Africa Television Network and Free to Air TV had only been signed by the latter and thus it was, in Kwesé Free TV's view, not legally valid and binding. Kwesé Free TV further stated that in the past the Authority has disqualified applications where agreements were not signed;
- 8.9.10. Further, there was no agreement or contract of Channel Partnership Agreement or provision of channels between Free to Air TV and AfricaXP, nor was there any evidence of a relationship between African Network Television and AfricaXP provided by Free To Air TV;
- 8.9.11. Furthermore, the research was not geographically representative of MUX 3 coverage area, it only covered four (4) of the eight (8) provinces, of which 50% was in Gauteng. The research only focused on townships within the four (4) provinces and lastly research focused on specific segments for example single black and pregnant mothers;
- 8.9.12. The Kidz Afrika channel is targeted at children aged 4 – 17 yet the research to validate the channel was targeted at parents aged 18 – 34⁹⁰;

⁹⁰ Para 4, of the Kwese Representations, 16 April 2018.

8.9.13. There was no alignment between research undertaken on content offered;

8.9.14. It was not clear what the total number of services offered by Free To Air TV was. Five (5) services were proposed by Free To Air TV but Free To Air TV application only included a content supply arrangement for three (3) channels compiled by African Network Television.

8.9.15. Senior management of Free To Air TV did not have broadcasting experience except for one; and

8.9.16. Free to Air TV also failed to state whether the 5 proposed channels would be on a Standard Definition or High Definition platform.

The Infinity Media response to the SOS and Kwesé Representations

8.10. Infinity Media transmitted its response on or about 16 May 2018 wherein it addressed the matters raised in the SOS/MMA submission.

8.11. In response to the party-political entity objection raised by SOS/MMA, Infinity Media stated as follows:

"the fact that Mr. Manyi has previously held office as a public servant does not contravene the provisions of section 52 of the ECA or the Constitution because he was not a political office bearer. In addition, the application to ICASA is by... Infinity Media and not Mr. Manyi in his personal capacity";

8.12. Infinity Media further stated that *"Infinity Media's new owners are not connected to 'State Capture' and simply exercised their constitutional right of freedom to trade in purchasing the business";*

8.13. Regarding the objections pertaining to contravention of section 64, Infinity Media states *"the new structure of Infinity Media adhered to section 64(1) of the ECA and does not comprise of any foreign ownership";*

- 8.14. Infinity Media distanced itself from the links to the Guptas and stated that *"... the Gupta family does not form part of the new Infinity Media shareholding or leadership... SOS and MMA's accusations on the issue of state capture are all based on previous shareholders who are no longer affiliated to the business in any way."*;
- 8.15. In addition to the above submissions, Infinity Media further advised that Mr. Manyi had diluted his shareholding (in Afrotone) and introduced new shareholders whose details *"have been available to ICASA already"*.
- 8.16. In relation to the Kwesé Free TV Representations regarding its shareholding, Infinity Media referred Kwesé Free TV to its revised shareholding sent to the Authority which was still under consideration by the Authority. Infinity Media further confirmed that Oakbay and Mabengela had not been allocated any shares⁹¹.
- 8.17. In relation to the Kwesé representation regarding the Infinity Media failure to submit a B-BBEE verification report, Infinity Media responded by stating that the acquisitions were new for Afrotone Media Holdings (Pty) Ltd and it had subsequently acquired a B-BBEE level 1 certificate⁹².
- 8.18. Infinity Media further contended that that the circulation of the newspaper and its readership is miniscule in terms of the area coverage for the broadcasting licence and as such not contrary to nor is section 66(2) applicable to it. Furthermore, the newspaper does not subscribe to ABC⁹³.
- 8.19. In relation to Kwesé Free TV's representation regarding funding by Oakbay investments Pty Ltd ("Oakbay"), Infinity Media contended that its funding was not affected by Oakbay's financial standing as Infinity Media was no

⁹¹ Paras 2.1-2.2. of the Infinity Media Response to the Kwese Representations.

⁹² *Ibid* .

⁹³ Para 2.4 of the Infinity Media Response to the Kwese Representations.

longer associated with them and Infinity Media would accordingly secure funding on receipt of licence⁹⁴.

8.20. In relation to Kwesé Free TV's representation regarding failure by Infinity to demonstrate demand, need and support through its research report, Infinity Media contended that its research report established the need for all different channels applied for and is in line with the submission requirements⁹⁵.

8.21. As regards the submission of one letter of intent from content supplier, Infinity submitted that it was in contact with various content suppliers and the formal signed agreement would be completed upon receipt of the licence⁹⁶.

8.22. In terms of Kwesé Free TV's representation regarding insufficient detail regarding the channels on offer, Infinity Media contends that its application is reflective of sufficient detail of each channel, clearly defining the genre type of each channel⁹⁷.

8.23. In terms of Kwesé Free TV's representation regarding infinity's lack of business acumen and broadcasting experience, Infinity Media contends that the existing management within the company possess unparallel experience in business and the ability to deliver sufficient and quality production in any environment across the world. The company management are expert broadcasters with complete technical understanding of free to air operations⁹⁸.

⁹⁴ Para 2.5 of the Infinity Media Response to the Kwesé Representations.

⁹⁵ Para 4.1 of the Infinity Media Response to the Kwesé Free TV Representations

⁹⁶ Para 4.2 of the Infinity Media Response to the Kwesé Free TV Representations

⁹⁷ Para 4.4 of the Infinity Media Response to the Kwesé Free TV Representations

⁹⁸ Para 5.1-5.2 of the Infinity Media Response to the Kwesé Free TV Representations

8.24. All channels will be on standard definition as provided for in the application⁹⁹.

Tshwaranang Media Response to the Kwesé Free TV's Representations

8.25. Tshwaranang Media contended that whilst AEEI was its largest shareholder, it is governed by a Board of Directors, none of whom are from AEEI. Accordingly, AEEI was not in a position to control the strategic direction of Tshwaranang Media. AEEI is committed to providing a platform for development in the media sector and will therefore utilise its shareholding in Tshwaranang Media for the advancement of the goals as set forth by the Authority¹⁰⁰.

8.26. Tshwaranang Media also submitted that its shareholding was now distributed between 20 shareholders. The shareholding structure was amended as per the Change of Information Application submitted and made available on the Authority's website. The signatures and/or proxies were provided and explained in the Change of information Application ¹⁰¹.

8.27. In relation to the representations regarding the failure by Tshwaranang Media to submit the B-BBEE verification report required in terms of the ITA, Tshwaranang Media submitted that because at the time of lodging its application it was a new entity with no turnover as it had not begun trading, a verification certificate was not attainable. However, Tshwaranang Media attached an affidavit according to the applicable B-BBEE codes which is the only form of verification necessary for a new entity like Tshwaranang Media. Additionally, Tshwaranang Media contended that its current B-BBEE status could also be verified through its shareholders, such as AEEI, the majority shareholder and a JSE-listed company, which makes its empowerment information available publicly on their website. Tshwaranang Media stated that it was in the process of obtaining further B-BBEE verification and once received, it would be made

⁹⁹ Para 6.1 of the Infinity Media Response to the Kwesé Free TV Representations

¹⁰⁰ Para 2.1 of the Tshwaranang Media Response to the Kwese Representations.

¹⁰¹ Para 2.2 of the of the Tshwaranang Media Response to the Kwese Representations.

available on our website, and a copy thereof would be provided to the Authority¹⁰².

8.28. In relation to Kwesé Free TV representation that is the majority shareholder, AEEI, was already making provision for the sale of shares, Tshwaranang Media argued that the main purpose of forming a consortium was for a group of like-minded people representing broad sections of society, including media professionals, to bid for the licences in terms of the ITA. Thus, the commitment AEEI had given to Tshwaranang Media was conditional upon the successful award of the licences. This is why the provision for the sale of shares was made¹⁰³.

8.29. In relation to the Kwesé Free TV's representation that all the directors appear to be from Sagarmatha, Tshwaranang Media denied this and contended that only one non-executive director out of the five directors on the Board of Directors of Tshwaranang Media is also a director of Sagarmatha Technologies. Sagarmatha Technologies' financial position is unrelated to that of Tshwaranang Media¹⁰⁴.

8.30. Regarding the comment in their application pertaining to the sale of exclusive content, Tshwaranang Media contended that the comment was describing their integrated business model. Tshwaranang Media further submitted that the ITA does not state that revenue for FTA Applicants must be from advertising only, or that owned and original South African content produced cannot be licensed or distributed beyond South Africa. Tshwaranang Media plans to produce original content and distribute it. It is paramount for Tshwaranang Media to give local content partner producers, their narrative and advertisers/sponsors an opportunity to reach other African audiences¹⁰⁵.

¹⁰² Paras 2.3 of the Tshwaranang Media Response to the Kwesé Free TV Representations.

¹⁰³ Para 2. 5 of the Tshwaranang Media Response to the Kwesé Free TV Representations

¹⁰⁴ Para 3.1 of the Tshwaranang Media Response to the Kwesé Free TV Representations

¹⁰⁵ Para 4.1 of the Tshwaranang Media Response to the Kwese Representations.

8.31. In terms of the role to be played by the international consultants, Tshwaranang Media stated that the international consultants and partners identified in its application supported its Application pursuant to the ITA, and South Africa's migration from analogue to digital led by the Authority. Furthermore, the international consultants and partners were intended to serve in an advisory role and to share international experiences and best practices in ensuring the success of the Tshwaranang Media venture from a commercial, technical and content perspective. Accordingly, there was no intention to surrender any ownership to foreign partners. Thus, Tshwaranang Media is only 3.3% foreign owned through the Doley Foundation.¹⁰⁶

8.32. Tshwaranang Media further stated that out of 10 members of Senior Management identified, only the 11th position was vacant. Tshwaranang Media confirmed that it had six (6) letters of acceptance and email correspondence indicating acceptance of the other positions which can be made to the Authority¹⁰⁷

8.33. Tshwaranang Media stated that its Board of Directors *"...have the skills to run and govern the company with care, skill and diligence based on the diverse set of specific and general skills required to effectively manage a company"*¹⁰⁸. In this regard, Tshwaranang Media also provided a summary of the respective skillsets of each of its directors.

8.34. In relation to the representations regarding its projection of revenues of R1bn in year 1, Tshwaranang Media stated that revenues (not profit) set out in the application were based on a pricing strategy and the advertising capacity of the two channels which it would focus on in the first few years of operation. It further stated as follows:

¹⁰⁶ Para 4.2 of the Tshwaranang Media Response to the Kwese Representations.

¹⁰⁷ Para 5.1 of the Tshwaranang Media Response to the Kwesé Representations.

¹⁰⁸ Para 5.2. of the Tshwaranang Media Response to the Representations.

"For the record, TM projects a loss in year one. Based on the principle of prudence, we believe that revenues for year 1 are not unrealistic. Besides the competitive pricing strategy, it is based on a reasonable assumption that only 10% of the total advertising spots available would be sold. This despite the knowledge that terrestrial television advertising continues to dominate. Revenue projected from distribution, such as OTT, is also conservative and at a maximum of 15% of total projected revenue. We have indicated in the bid how we calculated the revenue and what the assumptions are based on. The projected audience growth is also based on the market research performed using robust research methodology, and our unique content plans for the two initial channels. Since our programming speaks to the market demand that is not being met by competitors, we believe we would be able to attract an audience that would be beneficial to the advertisers¹⁰⁹".

8.35. Regarding the representations that Tshwaranang Media had underestimated the Capex costs, it stated that its CAPEX estimates were based on quotes received from local suppliers including Inala Broadcast (who had previously technically supported SABC, Multichoice Africa, e.tv, e.tv Nigeria, Star TV Tanzania, Botswana TV, Namibian Broadcasting Corporation, Lesotho Broadcast Corporation, CNBC Africa, National Geographic etc). In addition, the estimated OPEX costs were based on market related salaries and, as indicated on the financials, Tshwaranang Media's content costs were based on its content mix and programming where quotes were sourced from third parties as indicated in Appendix 10.5 of its application¹¹⁰.

8.36. In terms of Tshwaranang Media's failure to indicate whether the proposed channels will be provided in high definition (HD) or standard definition (SD), Tshwaranang Media stated that in its application, it had requested the

¹⁰⁹ Para 5.3.1 of the Tshwaranang Media Response to the Kwesé **Free TV** Representations

¹¹⁰ Para 5.3.2 of the Tshwaranang Media Response to the Kwesé **Free TV** Representations

Authority to authorise 2 HD channels in the start-up phase, with 3 further HD channels to follow¹¹¹

Free To Air TV Response to the Kwesé Free TV and SABC Representations

8.37. Free To Air TV contended that:

8.37.1. It is an exempted micro-enterprise as contemplated by the B-BBEE legislation read with the Codes promulgated pursuant thereto. Accordingly, it had submitted a sworn affidavit as required;

8.37.2. The agreement with Africa Network Television and AfricaXP did not confer any control upon those parties. Furthermore, Appendices 3.3 and 3.4 of the Free To Air TV application set out how the Board of directors of Free To Air TV would be appointed and how it would exercise its decision making powers;

8.37.3. The proposed services would be delivered in high definition;

8.37.4. Amos Mohulatsi and Thabo Lekoete were both experienced individuals by virtue of their involvement with Greater Alexandra Media Network and producing five shows for Moja Love, respectively;

8.37.5. The funding requirements for the rollout and implementation of the project would cost an estimated R408 million, which amount would be underwritten by a financial institution as set out in the application;

8.37.6. The costs associated with the establishment and incorporation of Free To Air TV were underwritten by the shareholders;

8.37.7. The majority of the content offering proposed by Free To Air Tv would be local content and the decision to focus on niche markets (specifically those markets that had been disenfranchised to date) was a deliberate decision taken by Free To Air TV in response to the significant

¹¹¹ Page 7 of the Tshwaranang Media Response to the Kwesé **Free TV** Representations

fragmentation of the television viewing market as a result of the proliferation of services; and

8.37.8. In response to the representations made by the SABC, Free to Air TV urged the Authority to have regard to the advantages enjoyed by incumbents due to the delay in implementing DTT, missing the deadline for analogue switch-off as well as the delay in issuing the ITA.

SECTION B: FINDINGS, DECISIONS AND REASONS

8.38. In examining each application, the reasons document will analyse the relevant item to determine compliance with each of the criteria as set out in the EC Act, applicable regulations and ITA as follows:

8.38.1. General

8.38.2. Corporate status (includes Ownership & Control, Empowerment of HDGs, Management and Staffing)

8.38.3. Finance

8.38.4. Demand, Need and Support for the Proposed Service (includes Evidence of Need, Demand and Support for the Proposed Service, Support for the Proposed Service, Size and Composition of the Audience, Appeal of the Proposed Service)

8.38.5. Complaints and Codes of Operations

8.38.6. Programming (Proposed Service, Authorisation of Channels, Programming Supply Agreements, Compliance with South African content regulations, Promise of Performance)

8.38.7. Technical

TSHWARANANG MEDIA

9. INTRODUCTION

- 9.1. Tshwaranang Media is a private company (registration number 2017/298383/07) duly registered and incorporated in terms of the Companies Act. Its principal place of business is located in South Africa, as required in terms of section 5(8)(b) of the EC Act.
- 9.2. In its application, Tshwaranang Media proposes to offer 5 high definition programme channels comprising a mix of programmes such as news, sport, information, entertainment and movies ¹¹².

10. CORPORATE STATUS

- 10.1. Section 3 of the ITA required prospective applicants to describe their legal form and to provide all relevant founding documentation. In addition, applicants had to provide a resolution authorising the signatory to sign the application on their behalf.
- 10.2. Tshwaranang Media is a private for-profit company. As part of its application, Tshwaranang Media initially submitted an unsigned certificate of incorporation and MOI certified by a Commissioner of Oaths as its founding documents. Subsequently, Tshwaranang Media submitted the signed certificate of incorporation as required by the ITA. Additionally, Tshwaranang Media submitted a resolution authorising Mr Piet Rampedi to sign the application.

11. OWNERSHIP AND CONTROL

- 11.1. Section 3.2 of the ITA required applicants to provide information on ownership and control including details of the shareholder(s). Tshwaranang Media was also

¹¹² Page 8 of the Tshwaranang Media's Application

required by clause 8.6 of the ITA to demonstrate compliance with sections 52, 64, 65 and 66 of the EC Act.

11.2. Tshwaranang Media, in its Application submitted on 16 November 2017, presented the following shareholding structure¹¹³:

- (a) African Equity Empowerment Investment Limited-49%
- (b) Amit Jayantila Makan – 0.003%
- (c) B-Square – 1.5%
- (d) Bongonet Systems (Pty) Ltd - 3%
- (e) Dr. Danisa Baloyi- 0.5%
- (f) Nkoko Sekete - 8%
- (g) Piet Rampedi - 8%
- (h) Mahamed Wazeer Mosa - 0.003%
- (i) Modjadji Development Trust - 2%
- (j) Properprice 71 (Pty) Ltd - 7%
- (k) Rondancia Claudia Nock - 0.003%
- (l) Sarah Mzungu - 0.003%
- (m) Siyolo Development Trust - 8%
- (n) Social Entrepreneurship Foundation - 2%
- (o) South Atlantic Arts and Culture Trust - 2%
- (p) The Doley Foundation - 3%
- (q) United Royals & Kingdoms of South Africa Holdings (Pty) Ltd- 3%
- (r) Trailblazer Entertainment Network (Pty) Ltd - 5%
- (s) Mama Africa Investments 2%
- (t) Lola Amukelani Mashabane – 0.003%
- (u) Harold E. Doley Jr. – 0.003%
- (v) Fredelaine Elna Cindy Brand – 0.003%

11.3. On 15 December 2017, Tshwaranang Media submitted an amended shareholding structure in terms of Regulation 6 of the Processes and Procedure

¹¹³ Pp101-103 Tshwaranang's Application.

Regulations in terms of which the following parties are identified as being shareholders:

- (a) African Equity Empowerment Investment Limited-49%
- (b) Amit Jayantilal Makan - 0.3%
- (c) The B-Square Foundation - 1.5%
- (d) Bongonet Systems Pty Ltd-3%
- (e) Fredelaine Elna Cindy Brand - 0.3%
- (f) Harold E. Doley Jr - 0.3%
- (g) Lola Amukelani Mashane-0.3%
- (h) Mama Africa Investments-2%
- (i) Mahamed Wazeer Moosa-0.2%
- (j) Modjadji Development Trust-2%
- (k) Nkoko Sekete-8%
- (l) Piet Rampedi-8%
- (m) Properprice 171 (Pty) Ltd-7%
- (n) Rondancia Claudia Nock-0.3%
- (o) Sarah Mzungu-0.3%
- (p) Siyolo Development Trust-2%
- (q) Social Entrepreneurship Foundation-7.5%
- (r) South Atlantic Arts and Culture Trust-2%
- (s) The Doley Foundation-3%
- (t) United Royals & Kingdoms of South Africa Holdings (Pty) Ltd- 3%

11.4. In terms of the new shareholders agreement and the newly issued share certificates Ten TV and Dr Danisa Baloyi are no longer shareholders in Tshwaranang Media. The shares that were allocated to Ten TV and Dr Danisa Baloyi are now allocated to Social Entrepreneurship Foundation. Social Entrepreneurship Foundation originally had 2% and in terms of the amended shareholding structure it holds 7.5%.

11.5. The Authority considered the application received on 16 November 2017 against the amended shareholding of 15 December 2017 and was satisfied that the amended shareholding meets the requirements of Regulation 6 of the Processes and Procedure Regulations in that the amended shareholding was not going to:

unfairly prejudice other interested parties; impede the expeditious and proper consideration of the application or materially change the application. Against this backdrop, the Authority published the amended shareholding structure for public comment.

- 11.6. The Authority is satisfied that Tshwaranang Media complied with the ITA's requirements in respect of shareholding and corporate status.

Compliance with section 52 of the EC Act

- 11.7. Based on the information submitted by Tshwaranang Media, the Authority is satisfied that its application complies with clause 8.6.1 of the ITA and section 52 of the EC Act, which provides that no broadcasting service licence may be granted to any party, movement, organisation, body or alliance, which is of a party-political nature.

Compliance with section 64 of the EC Act

- 11.8. Tshwaranang Media indicated that at the time of submitting its application, it was compliant with section 64. However, Tshwaranang Media advised that it is at an advanced stage of discussions with broadcasters in Europe and the United States to be strategic equity and content partner, but that equity offered to foreign partners by the shareholders in the future will not exceed 20% as per the limitations of foreign ownership in section 64 of the EC Act.

- 11.9. Based on the information submitted by the Applicant and in particular clarity provided post the hearing, the Authority is satisfied that Tshwaranang Media does not have foreign ownership exceeding 20% as prescribed in terms of section 64 of the EC Act

Compliance with sections 65 and 66 of the EC Act

11.10. Tshwaranang Media stated that one of its shareholders Mr Piet Rampedi - who holds an 8% equity stake - is a director of Mohlakamotala media (Pty) Ltd which owns African Times - a weekly regional newspaper launched in august 2016.

11.11. Tshwaranang Media further indicated that African Times is 100% black owned and does not have audited results as it has only been operational for a little over a year. Tshwaranang Media indicated that the readership and circulation of African Times is significantly small amount across selected provinces

11.12. During the hearings, Tshwaranang Media indicated that African Times as a community paper which later expanded at regional level i.e. inland. It is published in Limpopo, Gauteng, Mpumalanga and North West and at its peak sold approximately 4000 copies, but this figure has dropped to around 3700 copies. Tshwaranang Media asserted that compared to other players in the market, it is of the view that there is no cross-media ownership.

11.13. After the public hearings, Tshwaranang Media confirmed that African Times prints 10 000 copies a week, distributed in the above mentioned four provinces. Of these, half are distributed in Limpopo and the remainder in the other three provinces. Tshwaranang Media further indicated that in its view, the terms of the rules on cross ownership involve one owner having a large stake in another media sector. African Times sells less than 4 000 copies and its owner Mr Piet Rampedi only holds a 6% equity shareholding in Tshwaranang Media and therefore there is no cross-media ownership.

11.14. On the basis of the information submitted and presented by Tshwaranang Media, the Authority is satisfied that it complies with the requirements of section 65 and 66 of the EC Act.

12. EMPOWERMENT OF HDGs

12.1. Section 2(iv) of the ITA required the applicant to specify the equity ownership of HDGs, which must not be less than 30%.

12.2. Tshwaranang Media indicated that HDGs are represented with a shareholding component of 96.99%. The Authority was able to confirm that Tshwaranang Media's HDG shareholding is 80.12% based on the following:

12.2.1. African Equity Empowerment Investment's B-BBEE certificate confirms that it has 73.72% black ownership interest.

12.2.2. Piet Rampedi is the CEO of Mohlakamotala Media and editor of African Times. African Times is a 100% black owned weekly regional newspaper. Piet Rampedi is a South African male of African descent. Piet Rampedi holds 8% shares in the Applicant;

12.2.3. Nkoko Sekete is a South African male of African descent. Nkoko Sekete holds 8% shares in the Applicant;

12.2.4. Bongonet Systems (Pty) Ltd is a wholly black owned company representing community media and television. It holds 4% shares in the Applicant;

12.2.5. Properprice Management Consulting is a company that runs African Television Network. Community Media, together with Bongonet Systems Community Media is an equity partner that facilitates the distribution of community television content. It holds 5% shares in the Applicant;

12.2.6. Tshwaranang Media has invited Mama Africa Investments (Pty) Ltd and B Square Foundation to take up 6% equity in the consortium. It holds 4% shares in the Applicant.

12.2.7. Tshwaranang Media has incorporated African Traditional Leaders into the consortium as a strategic and important mechanism to ensure that Tshwaranang Media promotes the understanding and education about African Culture. African Traditional Leaders holds 4% in the Applicant.

12.2.8. Doley Foundation is a non-profit corporation. The Doley Foundation was created, and is operated exclusively, for educational and historical preservation purposes. It holds 3% shares in the Applicant;

12.2.9. South Atlantic Arts and Culture Trust (SAACT) is an organization that is working in the areas of public and community engagement and each of programmes and projects it supports are the community engagement aspects. It holds 2% shares in the Applicant.

12.2.10. Modjadji Development Trust is a charitable trust and has been constituted for the purposes of benefiting HDGs in the Republic of South Africa. Modjadji Trust holds 2% in the Applicant;

12.2.11. Social Entrepreneurial Foundation is an organization formed specifically for the benefit BBBEE Empowerment, community development, education, prevention of HIV infection and provision of health care services. It holds 2% shares in the Transferee; and

12.2.12. Siyolo Development Trust is a charitable organisation for the benefit of HDG's in South Africa. It holds 2% shares in the Applicant.

12.3. Tshwaranang Media also made a commitment to maintaining HDGs at a minimum of 80% of its shareholding.

12.4. On the basis of the information submitted and presented by Tshwaranang Media in respect of its shareholding and the ownership structures of its several shareholders, the Authority is satisfied that the Tshwaranang Media's application is compliant with the ITA and the EC Act in terms of the 30% HDG requirement.

12.5. Management

12.5.1. Tshwaranang Media provided a detailed organogram indicating that its senior management will comprise of six (6) people as follows: CEO; Editor-in- Chief; Business Development; CFO; Programming and CLO. Tshwaranang Media also attached the profiles of all senior personnel.

12.5.2. All senior management have confirmed willingness to accept the posts. Tshwaranang Media duly attached letters for availability for positions in its organisation.

12.5.3. None of the senior management are political office bearers or employees of any political party. Tshwaranang Media attached six affidavits of its senior management.

12.5.4. The Authority is satisfied that Tshwaranang Media has complied with the requirements of the ITA with regard to management.

12.6. Staffing

12.6.1. Tshwaranang Media submitted an organogram of the proposed station's staff and proposed to have a staff complement of 190 full time staff of whom 90% will consist of black people with women occupying 50% of the positions. The new positions (positions that will occur after the applicant has started with its operations) will consist of trainees who will be mentored into technical and operational positions and then groomed for promotions. As a start-up Tshwaranang Media has to rely on recruiting skilled technical and managerial staff. Senior staff will be required to take part in training new recruits and will be incentivized to support succession planning. This process will facilitate in the transfer of skills and create new jobs¹¹⁴.

12.6.2. Tshwaranang Media indicated that staff will not be shared¹¹⁵

¹¹⁴ Tshwaranang's Written response, unpaginated

¹¹⁵ P99 Tshwaranang Application

12.7. Tshwaranang Media also submitted information and CVs regarding the qualifications and competency of its prospective staff¹¹⁶.

12.8. Based on the information provided by Tshwaranang Media, the Authority is satisfied with its credentials in relation to business acumen, capability, expertise and experience. As such, the Authority is satisfied that Tshwaranang Media possesses the requisite media experience consistent with the elements of the application to operate the proposed service. Accordingly, the Authority is satisfied that Tshwaranang Media meets the requirements of section 51(d) of the EC Act.

¹¹⁶ Pp294-310 of Tshwaranang Application.

13. FINANCE

13.1. Section 3 of the ITA required the Applicants to provide information on and attach proof of, amongst others, the Applicants' business plans, and pro forma financial statements and financial requirements and sources.

13.2. Business plan

13.2.1. Tshwaranang Media's business plan is based on the principle that there is a big gap in the provision of unique content and programming with respect to FTA television services. Its key target audience is youth that have access to a TV but are not loyal to any TV broadcaster. The age range is between 15-34 and are mostly found within the LSM 4-9 bracket.

13.2.2. Tshwaranang Media seeks to have five channels each showcasing unique categorized content within the following categories; news, entertainment, sports, movies and education.

13.2.3. Tshwaranang Media indicated that it would be funded through an initial R1 million which it will raise by way of share capital. The balance will be raised by way of third-party loans and/or shareholder loans. It submitted its financial projections and a 10-year cash-flow forecast indicating that it would have two revenue streams (i) traditional advertising revenue which will be its primary source of income; and (ii) future subscription revenue from Over the Top Technologies ("OTT"), data and Business to Business from licensing content and product placement.

13.2.4. However, the assumptions are not realistic throughout the forecast period. At later periods when the applicant is reaching full capacity of its offerings and advertising slots, the revenue projections become too aggressive compared to the PWC study. Revenues grow at a

consistently higher growth rate than industry expectations and in the Authority's view, PWC is a credible source.

13.2.5. Whereas the format submitted by Tshwaranang Media shows an appreciation of the broadcasting industry in line with the PWC report, the forecasts are not credible, and this is further highlighted by the aggressive revenue growth assumptions in later years. i.e. capturing approximately 27% of the market revenue in year 10 from an initial base of 2.2% in year 1.

13.2.6. On the foregoing basis, the Authority is not satisfied that Tshwaranang Media's business plan and the proposed model will be sustainable over the period indicated in its future plans.

13.3. Projected financial statements

13.3.1. Tshwaranang Media submitted financial information as required in terms of the ITA, including a detailed income statement, balance sheet and statement of cash flows projected over a period of ten (10) years.

13.3.2. Tshwaranang Media's aggressive revenue projections makes the overall profitability unreasonable over the forecast period as these are higher than industry expectations as per the PWC study. However, Tshwaranang Media showed basic appreciation for basic business rationale for start-ups -starting in a loss, moving through breakeven and ultimately profit.

13.3.3. In terms of the balance sheet, , the accelerated method of depreciation employed has the effect of increasing earnings in later periods of the investment horizon as it does not match revenues and expenses in the same period that they occur. This has the effect of suppressing earnings in early years and inflating them in later years for example it exaggerates what is expected by the Authority. The

Authority noted that whilst the accounting depreciation policy (and subsequent treatment) of the fixed assets falls within legislative framework (SARS), it exaggerates the operational efficiency of the business.

13.3.4. In terms of Tshwaranang Media's cash flow projections, the Authority is of the view that the deviation between cash from operations and earnings from the income statement is cause for concern as the shortfall requires working capital financing. In the Authority's assessment, this is where the Serobeng Health interest free loan would have been useful. At the public hearing, Tshwaranang Media conceded this and indicated that it has access to this loan from day one. Furthermore, the funding requirements of the business are understated for the growth they envisage.

13.3.5. In its written application (which was initially submitted), the applicant did not indicate whether it had immediate access to the loan from Serobeng Health. It merely indicated that it could access this loan facility should the need arise. Its cashflows therefore did not indicate it accessing this loan for working capital requirements. A material shortcoming in the Authority's view. Subsequently at the hearing, after being asked by the Authority on why Tshwaranang Media had left out the loan facility from its cashflow projections, it conceded that had it included the loan facility in its cashflow projections, it would have shown a healthier cash position more in line with the financing requirements needed for their aggressive growth projections.

13.3.6. After the public hearing, Tshwaranang Media addressed the concerns raised by the Authority and confirmed that it included the working capital from Serobeng as well as the working capital loan from AEEI. Tshwaranang Media further indicated that terms are R140 million in total over two years, interest free payable within 8 years

13.3.7. Tshwaranang Media's assumptions surrounding capital sourcing do not speak to economic reality as the financial requirements for the venture exceed what is readily stated by Tshwaranang Media. In this regard, in the Authority's view, Tshwaranang Media understated its financial requirements.

13.4. Funding

13.4.1. Tshwaranang Media has demonstrated access to the funding required to launch and operate the venture and the ability to raise capital. Sources of funding include the main source debt financing from equity owners and/or banks, AEEI being a public company and the shareholder in Tshwaranang Media with a 49% stake.

13.4.2. The Authority is satisfied that Tshwaranang Media has provided for sufficient funding to sustain the proposed operations.

14. DEMAND NEED AND SUPPORT

14.1. Section 51 (a) and (b) of the EC Act require the Authority to take into account, with due regard to section 2 of the EC Act, the need and demand for the proposed service. Accordingly, the ITA requires applicants to demonstrate the need and demand for the proposed service. In addition, section 4 of the ITA required Tshwaranang Media to submit copies of the primary market research conducted by it.

14.2. Tshwaranang Media defined its target audience as youth between the ages of 15 -34 in the LSM4 – 9 indicating that the youth are its future market taking into account that young people under the age of 35 make up 66% of the population as per Stats SA Mid-Year Estimates, 2017. In the Authority's view, while this is accurate, it refers to the total individual population of South Africa and not necessarily the population with access to TV. The base population used by Tshwaranang Media also includes children from 0 – 14 years who amount to 30% of the total population. The youth from 15 -34 years who are the

Applicant's target market actually contributes to 36.08% of SA's total population. When the youth population with access to TV is used, this percentage is actually lower at 51%. In the Authority's assessment, this poses a challenge as 49% of the adult FTA population seem not to have been specifically catered for by the Applicant's proposed offering.

- 14.3. Tshwaranang Media indicated that it intends to cater for tastes and interests different from existing broadcasting services through regional and local community-focused content. In the Authority's view and taking into account the coverage area (National scope), this will not cater for all races, ages and income groups.
- 14.4. In its application, Tshwaranang Media provided a copy of the market research which was conducted by Ipsos, an independent, global market and opinion research firm.
- 14.5. The research was conducted on a nationally representative sample of 3598 people across all 9 provinces, with the majority being in Gauteng with a confidence level of 95%. The sample included persons above the age of 15 years and was predominantly made up of black people.
- 14.6. The results of the Survey indicated the following: that 88% of South Africans have access to television; the majority (48%) of South Africans are interested in seeing more movies on television whilst 44% said there was already enough of this on TV. However, many of these respondents (45%) were DSTV subscribers; that 81 – 87% of South Africans with access to TV are interested in a new News channel with more focus on local community, 'ordinary people' and local celebrities; That 73 – 76% of South Africans with access to TV are interested in a new Sports channel focused on sports personalities interviews, upcoming sports teams, provincial sports interviews and emerging sports; and that 70 - 89% of South Africans with access to TV are interested in a new women-featured channel covering health, career and money, family matters, expert advice, as well as fashion and beauty issues.

14.7. Tshwaranang Media has gone to great lengths to calculate the expected sizes of the weekly audiences for each of its 5 channels. However, the figures for the audience estimates and population figures used to draw up these estimates seem to be contradictory and not based on reliable references. Tshwaranang Media submits that to do the calculations for the weekly audiences it has utilised the Television Audience Measurement Survey (TAMS), with specific reference to figures from population with access to TV, Youth watching TV and Youth gap.

14.8. The figures used on size and composition of audience¹¹⁷ seem to be contradictory to the figures from the summary of main findings of primary research. Tshwaranang Media also refers to 88% of the population with access to TV being 49.7 million whereas earlier on South Africans with access to TV were referred to as 24.9 million.

14.9. In the Authority's assessment, Tshwaranang Media's proposed service was not comprehensively informed by appropriate audience and market research. Tshwaranang Media therefore failed to demonstrate the link between demand and support of the proposed service.

14.10. Complaints and Codes

Tshwaranang Media submitted its complaints procedure, which sets out the steps to be followed to deal with any complaint. The Authority is satisfied that Tshwaranang Media has complied with the requirements of the ITA in this regard.

15. PROGRAMMING

15.1. Section 6 of the ITA required prospective applicants to outline, briefly in general terms, the approach and objectives of the proposed service, languages and the format and content to be provided. Further, such applicants had to provide

¹¹⁷ P236 of Tshwaranang Application.

programming agreements and demonstrate how the applicant intends to comply with the South African television content regulations as well as details of all channels that would need to be authorised.

- 15.2. Tshwaranang Media indicated that it will provide high definition channels containing a mix of programmes such as news, sport, variety entertainment channel, featuring scripted and unscripted content and variety knowledge development.
- 15.3. Tshwaranang Media further proposed to broadcast in languages reflecting provincial diversity. However, English will be the main language of broadcast during the first year of start-up. In the year of start-up, vernacular programming will only be offered on the news channel daily during Prime Time. From the beginning of year 2 to the end of year 4, Tshwaranang Media will broadcast in languages other than English with a start of 20% and increasing by 10% thereafter before reaching an average of 40% during the performance period. From year 5, Tshwaranang Media will increase this language average to 50%.
- 15.4. Regarding local content obligations, Tshwaranang Media undertook to comply with the Authority's local content obligations. To this end, Tshwaranang Media also undertook to broadcast a minimum weekly average of 50% South African television content. Tshwaranang Media further committed to broadcast Children's programming at 50% in the first year before increasing to 60% in the second year. Thereafter, there will be an increase of 10% each year until the 5th year; Current affairs programming will consist of 60% in the first year before increasing to 70% in the second year. Thereafter, there will be an increase up to 80% which will remain consistent until the 5th year and Drama programming will consist of 60% in the first year before increasing to 70% in the second year. Thereafter, there will be an increase to 80% which will remain consistent until the 5th year.¹¹⁸ In terms of these undertakings, the Authority is satisfied that this meets the requirements of the Local Content Regulations.

¹¹⁸ Tshwaranang application: pp 288

15.5. During the public hearings, Tshwaranang Media was requested to confirm as per the application that its focus will be on original news especially at community and Provincial level and whether this proposed approach will not result in it encroaching into community broadcasters' mandate. Tshwaranang Media indicated that its competitors only have offices in Cape Town, Durban and Johannesburg/ Pretoria. They only send a reporter or two to provinces such as Mpumalanga if there is a problem. The reporter will arrive in the province exclusively to cover the story with and take a flight back as soon as the broadcast is over. There is lack of consistent coverage of developments, stories of excellence, corruption from Limpopo, Mpumalanga, Northwest, Free State and Eastern Cape¹¹⁹.

15.6. In terms of channel authorization, in its original application, Tshwaranang Media indicated that it would like the Authority to authorize 2 HD channels in the start-up phase, with 3 further HD channels to follow. Furthermore, Tshwaranang Media submitted that it has engaged potential content partners, both to grow the local content industry and to access leading international content.

15.7. Although Tshwaranang Media has responded to the relevant provisions of the ITA related to programming, the Authority is not satisfied that the Tshwaranang Media's approach in terms of news offering is in line with the nature of the licence and coverage area and that it will not encroach into the community sector's mandate. Further, the Authority is not satisfied that the Tshwaranang Media adequately demonstrated the linkage between its programming and need, demand and support for the proposed service for the purposes of the ITA, read with sections 51(a) and (b) of the EC Act.

16. TECHNICAL

¹¹⁹ Transcript, pg 19.

16.1. Section 7 of the ITA required applicants to provide details on, amongst others, the company that would be responsible for signal distribution and information on equipment to be used for the proposed service, together with the relevant technical details.

16.2. Tshwaranang Media indicated that it intended to use Sentech as its signal distributor and submitted a letter from Sentech in this regard. Tshwaranang Media further indicated that it would be using the expertise and experience of its signal distributor for rolling out and maintaining the network.

16.3. At the public hearings, Tshwaranang Media confirmed that the proposed channels will be offered in High Definition (HD) despite the limited bandwidth provided by the 55% of Mux 3 frequencies. The total capacity (Data rate) of a MUX is approximately 37 Mbit/s¹²⁰ and the capacity for 55% of Mux 3 is 20.35 Mbit/s (55% OF 37 Mbit/s). Taking into consideration that South Africa has adopted DVB-T2 as the broadcasting standard and MPEG-4 (H.264/AVC) for the video source coding the required data rate for one programme are indicated in table 1¹²¹. Tshwaranang Media was further able to clarify how the 5 HD channels were determined, for 55% MUX 3, by indicating that 5HD will have an encoder which will be controlled by a statistical multiplexer which will manage the bandwidth of MUX 3 to allow 5 HD channels to be delivered¹²².

16.4. Tshwaranang Media indicated that it was aware of the Authority's transitional arrangement for the right of use of radio frequency spectrum in Annexure G until analogue switch off, wherein post analogue switch off the plan as set out in Annexure J of the latest version of the Terrestrial Broadcasting Frequency Plan (Annexure J) will be applicable for implementation.

¹²⁰ For fixed reception of a Single Frequency Network using DVB-T2

¹²¹ Taken from the study conducted by Deloitte on Second Digital Dividend on behalf of Department of Communications

¹²² Tshwaranang written response.

16.5. Based on the above, the Authority was satisfied that Tshwaranang Media has met the requirements in this regard.

17. DECISION

17.1. The Authority has decided not to grant Tshwaranang Media the individual commercial free to air television broadcasting service licence and Radio Frequency Spectrum Licence for 55% MUX3 Frequencies for the following reasons, each of which is regarded as constituting adequate reason for turning down the application:

17.1.1. The information provided by Tshwaranang Media in respect of its finances demonstrated that Tshwaranang Media does not appear to fully understand financial requirements to operate this venture. The Authority is not satisfied that the economic reality has been addressed as the financial requirements for the venture as per the Tshwaranang Media's assumptions, exceed what is readily stated by Tshwaranang Media. To this end, the Authority is of the view that Tshwaranang Media understated its financial requirements. Further, in the Authority's assessment, Tshwaranang Media's aggressive revenue projections makes its overall profitability unreasonable over the forecast period as these are higher than industry expectations as per the PWC study.

17.1.2. The accelerated method of depreciation employed by Tshwaranang Media in terms of its balance sheet has the effect of increasing earnings in later periods of the investment horizon as it does not match revenues and expenses in the same period that they occur. This has the effect of suppressing earnings in early years and inflating them in later years for example, it exaggerates what is expected by the Authority. In the Authority's view, whilst the accounting depreciation policy of the fixed assets falls within SARS legislative framework, it exaggerates the operational efficiency of the business.

17.1.3. The primary research that was presented by Tshwaranang Media was inadequate for the Authority to assess need and demand for the its proposed service within its own target audience. In the Authority's assessment, Tshwaranang Media's proposed service was not comprehensively informed by appropriate audience and market research. Accordingly, the Authority is of the view that Tshwaranang Media failed to demonstrate the linkage between demand and support of the proposed service.

17.1.4. Further, the Authority is not satisfied that Tshwaranang Media adequately demonstrated the link between its programming and need, demand and support for the proposed service for the purposes of the ITA, read with sections 51(a) and (b) of the EC Act.

KWESÉ FREE TV PTY LTD

18. INTRODUCTION

18.1. Kwesé Free TV (Pty) Ltd is a private company (registration number: 2017/24112/07) duly registered and incorporated in accordance with the company laws of South Africa.

18.2. Kwesé Free TV intends to offer a multi-channel free to air service comprising a bouquet of television channels including sport and general entertainment content utilising MUX 3. The 5 programme channels will comprise one High Definition and 4 Standard Definition¹²³

¹²³ Application, p1, Part 1.

19. CORPORATE STATUS

- 19.1. Section 6 of the ITA required the applicants to describe their legal form and to provide all relevant founding documentation. Further, the applicant had to provide a resolution authorizing the signatory to sign the application on its behalf.
- 19.2. The applicant intends to broadcast as Kwesé Free TV and submitted the certificate of incorporation and memorandum of incorporation as required the ITA. The shareholders agreement was duly submitted¹²⁴.
- 19.3. Kwesé Free TV submitted its MOI as well as a resolution authorising Mr Zolile Eugene Ntukwana as signatory, failing which any director of the Company was also authorised to submit its Application.

20. OWNERSHIP AND CONTROL

- 20.1. Section 3.2 of the ITA required applicants to provide information on ownership and control including details of the shareholder(s). Further, applicants were required by Section 8.6 of the ITA to demonstrate compliance with sections 52, 64, 65 and 66 of the EC Act.
- 20.2. Kwesé Free TV indicated that its direct and indirect shareholding structure is as follows¹²⁵:
 - 20.2.1. Royal Bafokeng Metix Limited 45% (100% owned by Royal Bafokeng Nation Development Trust)

¹²⁴ Application: page 000047 of Volume 3.

¹²⁵ Application: Appendix 6.1 page 000020 of Volume 1.

- 20.2.2. Mosong Equities (Pty) Ltd - 35% - (100% owned by Mosong Capital);
- 20.2.3. Kwesé Media Econet SA (Pty) Ltd ("**Econet SA**") - (100% owned by Econet Media Limited Mauritius ("**EML**") 20%
- 20.3. Kwesé Free TV's signed shareholder's agreement and submitted share certificates confirm that:
- 20.3.1. the above-mentioned are the parties to the agreement;
- 20.3.2. that as the date of signature, Kwesé is authorised to issue 1000 shares; and
- 20.3.3. that their individual ordinary shares are held as follows - 450 Royal Bafokeng, 350 Mosong and 200 Econet SA – and translate to the percentages reflected above.
- 20.4. Kwesé Free TV's application indicates that it shall be funded by means of shareholder loans in proportion to each shareholder's prospective shareholding per the requirements of the business plan and as agreed by the board.
- 20.5. Shareholder loans shall be at arm's length. No other loans, foreign financial assistance, grants or donations will be sought at this stage. A letter of commitment that the shareholders will fund Kwesé Free TV was duly attached.
- 20.6. On 27 February 2019 Kwesé Free TV lodged a notice and application for amendment of certain provisions of its shareholders' agreement MOI in accordance Regulation (6) of the PPR and Regulation 8 of the Spectrum Regulations. The amendments requested by Kwesé Free TV were as follows:
- Removal of clause 9 of Kwesé Free TV's Shareholders' Agreement. Clause 9 stated that the Shareholders of Kwesé Free TV's are to form a Finance Committee assigned with certain responsibilities such as determining

remuneration packages and providing guidance to the Board of Kwesé Free TV for best practice guidelines;

- Removal of the definition of Finance Committee, which meant a committee with delegated authority from the Board;
- Removal of clause 24.3 and 24.4 which relate to the powers given to the Shareholders to remove Directors;
- Removal of clause 24.5, which required a Shareholder to vote all its shares in favour of a resolution to appoint a nominated Director in terms of clause 24.1 of the Kwesé Free TV's Shareholders' Agreement;
- Amendment of the definition of Business Plan in the Shareholders' Agreement;
- Amendment of clause 22.12 of the Kwesé Free TV's MOI which required 65% of voting rights be exercised for an ordinary resolution. Clause 22.12 was amended to require 75% voting rights in terms of the Companies Act 71 of 2008 ("Companies Act");
- Amendment of clause 22.13 of Kwesé Free TV's MOI which required that special resolutions be adopted with the support of 100% of voting rights. Clause 22.13 was amended to require 50% voting rights for special resolutions in terms of the Companies Act;
- Addition of clause 5.6 to the Shareholders' Agreement stating that the Shareholders shall refrain from any oppressive or unfairly prejudicial conduct that may jeopardise the ICASA Licence;

20.7. The Authority approved the amendment application on the basis that the amendment does not constitute a material change to the application submitted by Kwesé Free TV; the amendment would not unfairly prejudice other interested parties as provided for in Regulation 6(1)(a) of the Regulations and the amendment would also not impede the expeditious and proper consideration of the application¹²⁶.

¹²⁶ Decision letter dated 1 March 2019.

- 20.8. The Authority is satisfied that Kwesé Free TV has complied with the ITA's requirements in respect of shareholding and corporate status.

Compliance with section 52 of the EC Act

- 20.9. Based on the information submitted by Kwesé Free TV, the Authority is satisfied that the application complies with clause 8.6.1 of the ITA and section 52 of the EC Act, which provides that no broadcasting service licence may be granted to any party, movement, organisation, body or alliance, which is of a party-political nature.

Compliance with section 64 of the EC Act

- 20.10. Kwesé Free TV indicated that at the time of submitting its application, it was compliant with section 64. At the hearings, Kwesé Free TV further indicated that EML indirectly holds 20% of the issued shares in Kwesé Free TV through its wholly owned subsidiary, Econet SA. Kwesé Free TV confirmed that the foreign shareholding will not exceed the limitation of 20% provided for in section 64(1) of the EC Act.

- 20.11. Based on the information submitted by Kwesé Free TV, the Authority is satisfied that it complies with section 64 of the EC Act.

Compliance with sections 65 and 66 of the EC Act

- 20.12. In relation to the requirements of section 65 and 66, Kwesé Free TV indicated that neither it nor its direct or indirect shareholders are licenced to provide

broadcasting services in South Africa. Further, Kwesé Free TV indicated that that neither it nor its shareholders have interest in Newspapers.

- 20.13. Based on the information provided by the Kwesé Free TV, the Authority is satisfied that it complies with sections 65 and 66 of the EC Act.

21. EMPOWERMENT OF HDGs

- 21.1. Section 2(iv) of the ITA required the applicant to indicate the shareholding held by HDGs, which must not be below 30% as provided by section 9(2)(b) of the EC Act. Kwesé Free TV in its application, indicated that HDGs are represented by the shareholding component of 45%. This equity ownership is informed by the 45% held by Royal Bafokeng Metix (Pty) Ltd which is in turn 100% owned by Royal Bafokeng Nation Development Trust and 35% shareholding held by Mosong Equities (Pty) Ltd which is 70% owned by Mosong Capital. The 45% black ownership of Royal Bafokeng Metix (Pty) Ltd is evidenced by a copy of the Royal Bafokeng Nation Development Trust which states that the beneficiaries are people, who comprise of members that acknowledge and abide by the laws, customs and traditions of the Royal Bafokeng Nation under the leadership of the Kgosi, who are apparently people of black origin. Further, the Applicant provided a B-BBEE certificate that shows that the Royal Bafokeng Metix (Pty) Ltd has 100% black ownership.

- 21.2. On the basis of the information submitted and presented by Kwesé Free TV in respect of its shareholding and the ownership structures of its several shareholders, the Authority is satisfied that the Kwesé Free TV's application is compliant with the ITA and the EC Act in terms of the 30% HDG requirement.

21.3. Management

- 21.3.1. Kwesé Free TV provided a detailed organogram indicating that its senior management will comprise of eight (8) members, whose positions will be as follows: General Manager; Human Resource

Manager; Channel Director; Finance Manager; Marketing Manager; Sales Manager; Operations Manager and Legal/ Regulatory Manager. Kwesé Free TV has attached the profiles of all senior personnel.

21.3.2. All senior management have confirmed willingness to accept the posts. Kwesé Free TV duly attached letters for availability for positions in Kwesé Free TV.

21.3.3. None of the senior management are political office bearers or employees of any political party. Kwesé Free TV attached six affidavits of its senior management declaring that they are not employees or office bearers of any political parties.

21.3.4. The Authority is satisfied that the Kwesé Free TV has complied with the requirements of the ITA with regard to management.

21.4. Staffing

21.4.1. Kwesé Free TV submitted a list of its current staff complement indicating a total of 55 full-time staff members.

21.4.2. Kwesé Free TV provided its current staff organizational chart indicating the reporting structure¹²⁷. It stated that no staff will be shared by Kwesé Free TV within a group operating structure or between the proposed television service and any existing broadcasting service.

21.4.3. The Authority is satisfied that Kwesé Free TV's management and staff possess the requisite experience and expertise to operate the proposed service.

¹²⁷ Application: page 000068 of Volume 1.

22. FINANCE

22.1. Section 3 of the ITA required applicants to provide information on and attach proof of, amongst others, the applicant's business plan, and pro forma financial statements and financial requirements and sources.

22.2. Business plan

Kwesé Free TV provided its business plan and financial statements spanning a period of ten years. Over this period, Kwesé Free TV indicated that its net advertising revenue was expected to rise. In this regard, the Authority accepted the Kwesé Free TV's request for its business plan to remain confidential hence none of that detail is reported on in this section.

22.3. Projected financial statements

22.3.1. Kwesé Free TV submitted financial information as required in terms of the ITA, including a very detailed income statement, balance sheet and cash flow statement.

22.3.2. The financial projections provided in the application covered a period of ten years. In this regard, the Authority accepted Kwesé Free TV's request for its financial information to remain confidential and does not report on that information here.

22.4. Funding

- 22.4.1. The information in this section was provided subject to confidentiality in terms of section 4D of the ICASA Act and the precise details thereof have been excluded from this document.
- 22.4.2. Kwesé Free TV indicated that it would finance the entity by means of a loan which would take the form of a share of equity and/or shareholder loans. A binding shareholders agreement to that effect was submitted in support of the application.
- 22.4.3. Based on the information provided by Kwesé Free TV, the Authority is satisfied that Kwesé Free TV shows a steady gross profit margin.
- 22.4.4. In short, the Authority is satisfied with the financial means and commercial viability of the proposed broadcasting service, as contemplated in section 51(e) of the EC Act.

23. DEMAND, NEED AND SUPPORT

- 23.1. Section 51 (a) and (b) of the EC Act requires Authority to consider the need and demand for the proposed service, having regard to broadcasting services already existing in the area. Accordingly, section 4 of the ITA provided that prospective applicants were to indicate the demand, need and support for the proposed service. One of the aspects that section 4 of the ITA required the applicant to demonstrate included submission of copies of the market research conducted by the applicant.
- 23.2. Kwesé Free TV defined its core target market as audiences aged between 15 to 45.
- 23.3. Kwesé Free TV conducted market research comprising of 1000 respondent of the adult TV viewing population (18+ years of age), used for the Primary research across the board. The research was conducted in 8 of the 9 provinces in South Africa by Geopoll, which is the world's largest mobile survey platform, conducting surveys through mobile phone via SMS. The exclusion of the

Northern Cape was due to it not being part of the licensed area (current MUX3 coverage). The margin of error on the survey was calculated at 3% on a 95% level.

- 23.4. The research findings indicated a strong preference towards the content genres packaged within Kwesé Free Sports, Kwesé Action, Kwesé Focus, Kwesé Stories and Kwesé Vibes. Kwesé Free TV indicated that its service offering will stand out from existing broadcasters' due to the unique selling proposition that is inherent in its offering.
- 23.5. Whilst the proposed services have been packaged in a way that will appeal to diverse demographic groups (age, gender), Kwesé Free Sports is positioned to cater to a primary target audience of male viewers and Kwesé Stories and Kwesé Vibes would be more skewed towards the female market. Kwesé Focus would provide a crossover appeal across gender and age groups.
- 23.6. Its primary research demonstrated support for the proposed service and a strong preference towards the content genres packaged within Kwesé Free Sports, Kwesé Action, Kwesé Focus, Kwesé Stories and Kwesé Vibes.
- 23.7. Additionally, Kwesé Free TV provided real examples of support based on content already broadcast or made available by Kwesé to South African audiences on existing platforms. The NBA Africa Game of which Econet SA holds rights, was broadcast on Kwesé Free Sport throughout Africa and on Soweto TV and SABC through a sub-licence agreement and attracted 1.6 million viewers on the Soweto TV and SABC platforms.
- 23.8. Kwesé Free TV projected a weekly audience size of 2.1 million viewers per week will be driven by the Kwesé Free Sports channel. Whilst the proposed services have been packaged in a way that will appeal to diverse demographic groups (i.e. age and gender. Kwesé Free TV stated that Income levels were

not a major factor as the proposed service is free to air¹²⁸), Kwesé Free Sports is positioned to cater for a primary target audience of male viewers and Kwesé Stories and Kwesé Vibes would be more skewed towards the female market. Kwesé Focus would provide a crossover appeal across gender and age groups.

- 23.9. The Authority is satisfied that that Kwesé Free TV has adequately demonstrated that there is a demand, need and support for its proposed service offering, informed by the market research.

23.10. Complaints and Codes of Operation

Kwesé Free TV submitted its complaints procedure, which sets out the steps to be followed to deal with any complaint. The Authority is satisfied that Kwesé Free TV has complied with the requirements of the ITA in this regard.

24. PROGRAMMING

- 24.1. Section 6 of the ITA required applicants to outline, briefly and in general terms, the approach and objectives of the proposed service, languages and the format and content to be provided, and to provide programming agreements and how applicants intend to comply with the South African television content regulations as well as details of all channels that would need to be authorised.
- 24.2. Kwesé Free TV indicated its programme offering would consist of five (5) channels targeting its core audience from 15 to 45 years old. As already set out above, the proposed channels include: Kwesé Free Sports (HD); Kwesé Brave (SD); Kwesé Focus (SD); Kwesé Vibes (SD) and Kwesé Drama
- 24.3. The principal language of broadcast will be English at launch. Kwesé Free TV further indicated that it intends to add a language mix from start-up and a gradual increase in language broadcast to reflect the demographics of South

¹²⁸ Section 21.2, page 27 of the Kwesé Free TV Application.

Africa. Each of Kwesé Free TV's proposed channels will be a full 24-hour service with its own tone, feel and spirit which will produce/commission original content over time to meet the required local content quotas by year 2 of operation. Programming on all channels will be speech-led.

21.4. At inception, the content will be sourced from existing EML suppliers to ensure that the launch target dates are met. Local content will be sourced by way of licensing and commissioning agreements and be increased steadily over time. It further indicated that it is already offering similar services within the African marketplace through its allied and/or related companies, and as such will be able to exploit existing content rights agreements for the South African offering.

24.5. Regarding local content obligations, in its original application, Kwesé Free TV indicated that it will not broadcast current affairs and news. At the hearings, Kwesé Free TV undertook to comply with all prescribed local content genres and referred to its channel strategy and target market segmentation slide wherein it indicated that the local content requirements will be met /achieved within 2 years of launch of its services.

24.6. After the public hearing and in response to the broadcast of traditional news (socio-political news), Kwesé Free TV confirmed that it has entered into an agreement with Primedia (Pty) Ltd, to provide this kind of news once the licence has been awarded and attached a letter confirming this¹²⁹.

24.7. Furthermore, in terms of channel authorization, Kwesé Free TV submitted programme supply agreements. The details of those agreements are not disclosed here on account of confidentiality granted over that information by the Authority.¹³⁰

¹²⁹ Kwesé Free TV written response

¹³⁰ Kwesé Free TV Licence Application: pp 115 - 121 (Confidential Bundle)

- 24.8. In the Authority's assessment, Kwesé Free TV complied with relevant provisions of the ITA related to programming.

25. TECHNICAL

- 25.1. Section 7 of the ITA required applicants to provide details on, amongst others, the company that would be responsible for signal distribution and information on equipment to be used for the proposed service, together with the relevant technical details.
- 25.2. Accordingly, Kwesé Free TV indicated that it intends to use Sentech as its signal distributor and submitted a letter from Sentech in this regard. Kwesé Free TV further indicated that its indirect shareholder, EML has relevant technical experience that it seeks to leverage.
- 25.3. Kwesé Free TV indicated that it was aware of the Authority's transitional arrangement for the right of use of radio frequency spectrum in Annexure G until analogue switch off, wherein post analogue switch off the plan as set out in Annexure J of the latest version of the Terrestrial Broadcasting Frequency Plan (Annexure J) will be applicable for implementation.
- 25.4. In the Authority's assessment, Kwesé Free TV has complied with the ITA requirements in this regard.

26. DECISION

- 26.1. The Authority has decided to grant Kwesé Free TV a licence contemplated in the ITA. The reasons for the Authority's decision are as follows:

- 26.1.1. On the basis of the information contained in the application submitted by Kwesé Free TV, the Authority has determined that, by virtue of its management and proposed employees, Kwesé Free TV is staffed by people with the necessary expertise, experience and capability in the broadcasting industry.
- 26.1.2. In determining whether to approve Kwesé Free TV's application, the Authority considered the provisions of section 51(a) and (b) of the EC Act which provisions enjoin it when considering the grant of a commercial broadcasting service licence to take into account (among others) the demand and need for the proposed broadcasting service offering having due regard to the existing commercial free to air television broadcasting service.
- 26.1.3. On the basis of the information contained in the Kwesé Free TV application, the Authority has decided that Kwesé Free TV was able to demonstrate the demand and need for the proposed broadcasting service offering having due regard to the existing commercial free to air television broadcasting services. In addition, Kwesé Free TV was able to demonstrate the linkage between the proposed service and the research conducted. Simply, Kwesé Free TV was able to show that the proposed service is informed by appropriate audience research.
- 26.1.4. The information supplied by Kwesé Free TV in respect of its finances demonstrated that its revenue projections are based on the market research conducted. The Authority is satisfied that, the numbers provided by Kwesé Free TV in relation to the anticipated costs in establishing the proposed broadcasting service are realistic and have not overlooked any major capital expenditure items or operational expenditure.
- 26.1.5. Kwesé Free TV's revenue growth assumptions mirror that of a growth company and are supported by the assumptions of the PWC study i.e. provision is made for declining revenue growth as it will become

progressively difficult to wrest market share of media industry spend. Kwesé Free TV not only placed reliance on its own projections and estimates, but also derived support from primary research conducted by third-party sources (PWC) and survey companies (Geopoll). In the Authority's view, PWC is a credible source

26.1.6. The format submitted showed an appreciation of the broadcasting industry with credible forecasts.

26.1.7. In the Authority's assessment, the assumptions are realistic, demonstrating an appreciation of operational requirements of the venture. Further, the assumptions are informed by economic reality. Accordingly, in the Authority's view, Kwesé Free TV understands the financial requirements for the venture.

26.1.8. The revenue projections make the overall profitability reasonable over the forecast period as they are in line with industry expectations (PWC study).

26.1.9. The cashflows from operations, investing and financing activities are realistic and have sufficient explanatory notes attached.

26.1.10. Kwesé Free TV indicated its sources of finance and ability to raise capital in the application. It is a self-funded venture from able investors with a proven track record. Kwesé Free TV also provided sufficient equity in relation to the proposed operations.

26.1.11. In the circumstances, the Authority is satisfied that Kwesé Free TV's business operations model is commercially viable and has reasonably good prospects of success.

26.1.12. In the Authority's assessment, Kwesé Free TV's application was the most viable of those received by the Authority pursuant to the ITA.

APPENDIX A: THE FTA REASONS DOCUMENT

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INFINITY MEDIA NETWORKS

27. INTRODUCTION

Infinity Media is a private company (registration number: 2011/003219/07) duly registered and incorporated in accordance with the company laws of the Republic of South Africa. As required by section 5(8)(b), it has its principal place of business and registered office situated in the Republic of South Africa.

28. CORPORATE STATUS

- 28.1. Section 3 of the ITA required prospective applicants to describe their legal form and to provide all relevant founding documentation such as (in the case of a private company) the certificate of incorporation, MOI and shareholder agreement. It also provided that applicants had to provide a resolution authorizing the signatory to sign the application on their behalf.
- 28.2. In its application, Infinity Media provided a resolution authorizing Gary Naidoo (one of its directors) with the power of substitution to sign all direct and indirect documents and agreements between Infinity Media and any third party, to oversee all processes and undertake all such acts as are necessary in respect of Infinity Media's application.

29. OWNERSHIP AND CONTROL

- 29.1. Section 3.2 of the ITA required applicants to provide information on ownership and control including details of the shareholder(s). Further, applicants were required by Section 11.6 of the ITA to demonstrate compliance with sections 52, 64, 65 and 66 of the EC Act.

29.2. Initially, in its original application, Infinity Media submitted the following shareholding structure in support of its application:¹³¹

29.2.1. Direct shareholding: 100% - Afrotone Media Holdings (Pty) Ltd ("Afrotone") – 910 shares;

29.2.2. The Shareholding in Afrotone was set out as follows:

29.2.2.1. Lodidox (Pty) Ltd - 90% - 450 shares (Mzwanele Manyi owns 100%); and

29.2.2.2. Super Projects Trading (Pty) Ltd – 10% - 50 shares (Gary Naidoo owns 50% and Abhinav Sahay owns 50%).

29.2.3. Infinity Media indicated that as of date of signature of the Shareholders Agreement, its authorised share capital was 1000 ordinary shares with no par value and it had issued 450 shares.

29.2.4. Furthermore, Infinity Media stated that it would obtain working capital from time to time in the following order:

29.2.4.1. Its own resources;

29.2.4.2. Banking and/or other external sources; and

29.2.4.3. To the extent Infinity Media is unable to obtain funding from the above sources, the shareholders shall be entitled but not obliged to lend and advance to Infinity

¹³¹ Application: Appendix 6.1 page 000020 of Volume 1.

Media such funds as Infinity Media may reasonably require from time to time.

29.2.5. All transfers of shares are precluded until the Purchase Consideration as set out in clause 7 of the Sale Shares Agreements entered into between Infinity Media and other parties is paid in full.

29.2.6. In terms of shareholders' guarantees, Infinity Media indicated that no shareholder would guarantee any of its obligations. Further, that no shareholder shall, without approval of the shareholder's in the annual general meeting, encumber, cede as security, pledge, or in any other matter offer his/her Shares as collateral to any other party for the purpose of raising or securing finance for such shareholder.

29.2.7. Infinity Media claimed that it is a South African entity and has no foreign investment present as evident in the Shareholders Agreement.

29.2.8. On 15 May 2018, Infinity Media notified the Authority of a shareholding change in Afrotone ("**Change Notice**").

29.2.9. The Change Notice recorded (by way of an attachment transmitted therewith containing a graphical representation of the amended shareholding structure of Afrotone) that the shareholding structure of Afrotone had been amended to reflect the ownership of Afrotone in the proportions set out below:

29.2.10. Where Lodidox had previously held 90% of the shareholding in Afrotone, it now holds 30%;

29.2.10.1. Golden Fence Construction (Pty) Limited¹³² – 30%;

¹³² Purportedly owned by one Sifiso E. Mtetwa.

29.2.10.2. Storky Consulting and Projects (Pty) Limited¹³³ – 30%; and

29.2.10.3. Mandela Legacy Media (Pty) Limited¹³⁴ – 10%.

29.2.11. Having considered the Change Notice, the Authority took a decision to reject amendment of the application on the basis that Infinity Media did not comply with Regulation 6 of the Processes and Procedure Regulations read with Regulation 8 of the Spectrum Regulations in that:

29.2.11.1. save for the Mandela Legacy acquisition on 30 April 2018, which was filed within 14 days as prescribed in Regulation 6 (1), the Change Notice was submitted out of time in respect of the shares acquired on 11 April 2018 by Golden Fence and Storky;

29.2.11.2. the change in shareholding constitutes a material change to the application submitted by Infinity Media;

29.2.11.3. the Authority did not find any justification as to how this material change would not unfairly prejudice other interested parties as provided for in Regulation 6(1) (a) of the Processes and Procedures Regulations; and

29.2.11.4. In the Authority's assessment, the amendment would also impede the expeditious and proper consideration of the application.

29.3. The decision of the Authority with respect to amendment application was communicated to Infinity Media on or about 10 October 2018.

¹³³ Purportedly owned by one Unati (sic) Mguye.

¹³⁴ Purportedly owned by one Zamaswazi Dlamini-Mandela

30. DECISION

- 30.1. Infinity Media did not meet the prequalification criteria prescribed by the ITA and as such the Authority came to a view, having considered Infinity Media's application that it was not compliant with the provisions of the EC Act regulating foreign control of broadcasting service licensees. Consequently, the Authority did not score Infinity Media on functionality.

FREE TO AIR TV

31. INTRODUCTION

Free to Air TV (Pty) Ltd is private company (registration number: 2009/023544/07) registered and incorporated in accordance with the company laws of the Republic of South Africa. Free To Air TV was initially known as "Opal Window Trading (Pty) Limited".

32. CORPORATE STATUS

- 32.1. Section 3 of the ITA required prospective applicants to describe their legal form and to provide all relevant founding documentation. In addition, applicants had to provide a resolution authorising a signatory to sign all documents submitted pursuant to the ITA on their behalf.
- 32.2. The certificate of incorporation and MOI were attached to the Free to Air TV application. The shareholders agreement of Free To Air TV was also submitted in accordance with the requirements of the ITA. However, at the time of submission by Free To Air TV, one of its shareholders had not signed the shareholders agreement. Free To Air TV authorized Mr. Amos Mohulatsi to act

for and on its behalf and¹³⁵ a duly signed resolution to this effect was attached to the application.¹³⁶

33. OWNERSHIP AND CONTROL

33.1. Section 3.2 of the ITA required prospective applicants to provide information on ownership and control including details of the shareholder(s). Furthermore, section 8.6 of the ITA required applicants to demonstrate compliance with sections 52, 64, 65 and of the EC Act.

33.2. In its submission, Free To Air TV indicated that its shareholding structure is as follows:¹³⁷

- 33.2.1.1. Amos Mohulatsi - 51%
- 33.2.1.2. Lekoete Joseph Thabo - 25%
- 33.2.1.3. NAMEC Telecoms (Pty Ltd ("NAMEC")) - 15%
- 33.2.1.4. Nadine Vasinta Kisten 9%

33.3. Having regard to the above information and the supporting documents lodged by Free To Air TV, the Authority is satisfied that Free To Air TV complied with the ITA's requirements in respect of shareholding and corporate status.

Compliance with section 52 of the EC Act

33.4. Based on the information submitted by Free to Air TV, the Authority is satisfied that the application of Free To Air TV complies with clause 8.6.1 of the ITA and section 52 of the EC Act, which provides that no broadcasting service licence may be granted to any party, movement, organisation, body or alliance, which is of a party-political nature.

¹³⁵ Application: page 55 of Volume 1.

¹³⁶ *Ibid*

¹³⁷ Application: Appendix 3.3 page 65 of Volume 1.

Compliance with section 64 of the EC Act

- 33.5. Based on the information submitted by Free To Air TV, the Authority is satisfied that Free To Air TV does not have foreign ownership and as such does not contravene the provisions of section 64 of the EC Act.

Compliance with sections 65 and 66 of the EC Act

- 33.6. Based on the information submitted by Free To Air TV, the Authority is satisfied that it complies with the requirements of section 65 and 66 of the EC Act.

34. EMPOWERMENT OF HDGs

- 34.1. Section 2(iv) of the ITA required applicants to specify the equity ownership of HDGs, which must not be less than 30%.

- 34.2. Free To Air TV stated that its equity ownership by HDGs is 100%. The shareholders of Free To Air TV consist of three HDI's namely Amos Mohulatsi, Lekoete Joseph Thabo and Nadine Vasinta Kisten, and NAMEC. The shareholding of NAMEC is as follows:

34.2.1. Lekoete Share Trust, whose beneficiaries are all HDI's (A Trust Deed to this effect was submitted)¹³⁸ - 39%;

34.2.2. Henry Goliath – a HDI – 32%;

34.2.3. Tony Booysen - a HDI - 19%; and

34.2.4. NAMEC NCP (*sic*) – 10%;¹³⁹

- 34.3. During the hearings Free to Air was requested to clarify why Mr Amos Mohulatsi - who according to the application is the majority shareholder - is according to

¹³⁸ Pages 106 to 134

¹³⁹ Registration Details for NAMEC NCP were not provided

the CIPC records the only director of Free To Air TV and whether he holds sole control of Free to Air TV.

34.4. In its subsequent written response dated 28 November 2018, Free to Air highlighted that Mr Mohulatsi is not the sole director and that it is in the process of updating its CIPC records to reflect the full list of board members. Nevertheless, the Authority is satisfied that this does not invalidate the appointments of the directors as they (and the board) are properly constituted and appointed by resolution in compliance with the requirements set out in section 68 of the Companies Act, 2008.

34.5. Free To Air TV indicated that it will be governed by the Shareholders' Agreement that sets out the rules for the appointment of directors and submitted supporting documentation in this regard. It further stated that all the shareholders are represented on the Board of Directors. Each shareholder has nominated either themselves or an executive officer of their organisation to be represented on the Board of Directors. Each of the nominated director/s has indicated their willingness to accept their appointment. Free to Air TV submitted the appointment and acceptance letters of Lekoete Joseph Thabo, Nadine Kisten and Tony Booysen.

34.6. In its presentation at the Public Hearing, Free To Air TV indicated that Greater Alex Media Network ("GAMN") is part of its shareholding.¹ Free To Air TV was asked as to which entities form part of GAMN and whether it holds the 51% of the shareholding in the Applicant. Free To Air TV indicated that:

(a) GAMN is not a shareholder of Free to Air and its association with the company is limited to its relation to Mr Mohulatsi. GAMN does not hold any interest nor does it enjoy any voting rights within the Applicant;

(b) As set out in the General History and Development Strategy- Appendix 6 of the application, GAMN sees its role as that of guiding community media brands within the Greater Alexandra Township and Neighbouring

Areas. GAMN believes that it needs to support its media partners' financial viability and sustainability.

34.7. Despite the Applicant's response, the relationship between GAMN and Free to Air remained unclear to the Authority.

34.8. In response to a request to clarify the composition of NAMEC NPO, Free to Air indicated that the NAMEC NPO is not a shareholder in Free to Air. Its association to the entity is limited to its relation to NAMEC Telecoms, its representative being Mr Booyesen and Mr Thabo. NAMEC NPO does not hold any direct interest nor does it enjoy any decision-making power in the Applicant.¹

34.9. The question posed by the Authority was not responded to satisfactorily. However, Free To Air TV indicated that 9% of its stake is owned by black women, 76% by black men and 15% by a 100% black owned entity. Accordingly, the Authority was satisfied that Free To Air TV was compliant with section 9(2)(b) of the EC Act.

34.10. Management

34.10.1. In its application, Free To Air TV indicated that its senior management is made up of the following:

- i. CEO;
- ii. COO;
- iii. CTO;
- iv. Head of Channel;
- v. HR Manager;
- vi. Marketing Manager; and
- vii. Production Manager.

34.10.2. Signed acceptance letters and CVs of the senior management were submitted.

34.10.3. Free To Air TV submitted affidavits deposed to by its senior manager stating that none of the senior management are political office bearers or employees of any political party.

34.10.4. The Authority is satisfied that Free To Air TV has complied with the requirements of the ITA with regard to management

34.11. Staffing

34.11.1. Free To Air TV provided a list of its proposed staff complement indicating a total of 49 full time members in year 1 increasing to 58 in year 5 and 99 by year 9¹⁴⁰.

34.11.2. Further, Free To Air TV indicated that there will be no shared staff and that subcontracting will be with Sentech only¹⁴¹

35. FINANCE

35.1. Section 3 of the ITA required the applicants to provide information on and attach proof of, amongst others, the applicant's business plan, and pro forma financial statements and financial requirements and sources.

35.2. Business plan

35.2.1. Free To Air TV provided its business plan and financial statements spanning a period of ten years. However, the Authority accepted Free To Air TV's request for its business plan to remain confidential hence none of that detail is reported on here.

¹⁴⁰ P222, Free to air application

¹⁴¹ ibid

- 35.2.2. In the Authority's assessment, the business plan submitted in support of the Free To Air TV application was not sufficiently comprehensive and was based on unreasonable assumptions.

35.3. Projected financial statements

- 35.3.1. Free To Air TV submitted financial information as required in terms of the ITA, including its income statement, balance sheet and cash flow statement.
- 35.3.2. The financial projections provided in the application covered a period of ten years. In this regard, the Authority accepted the Free To Air TV request for its financial information to remain confidential hence none of that detail is reported on here.

35.4. Funding (financial requirements, sources and financial plans)

- 35.4.1. Free To Air TV stated that it would be funded through both debt and a loan, the details whereof are confidential.
- 35.4.2. At the hearings, the Authority requested Free to Air TV to clarify whether it has a funding contingency plan in light of developments surrounding the proposed financier identified in the application. In its written response, Free To Air TV provided a new terms sheet from a new credit provider. The Authority notes that the agreement and funding terms of the new credit provider were identical to those of the initial financier. Additionally, the signature date of the agreement with the new credit provider, was identical to the date of signing with the initial financier.

35.4.3. Accordingly, the Authority was not satisfied that it was provided sufficient information to allow it to assess the validity of claims made by Free To Air TV regarding funding for its proposed service.

36. DEMAND, NEED AND SUPPORT

36.1. Section 51 (a) and (b) of the EC Act requires Authority to consider the need and demand for the proposed service, having regard to broadcasting services already existing in the area. Accordingly, section 4 of the ITA provided that prospective applicants were to indicate the demand, need and support for the proposed service. One of the aspects that section 4 of the ITA required the applicant to demonstrate included submission of copies of the market research conducted by the applicant.

36.2. In its application, Free to Air TV identified its target market as black parents between ages 18-34¹⁴². It also indicated its target market as children between the ages 4-14¹⁴³

36.3. Free To Air TV indicated that the research was conducted by Ask Africa. Free To Air TV further stated that Ask Africa has grown to be the largest independent South African market research company with fieldwork capabilities in 95% of Sub-Saharan Africa

36.4. In terms of a primary market research, Applicant indicated that its research was directed at three target markets as follows:

36.4.1. Market 1: black people between the ages of 18 and 34, living in Metropolitan areas within the Living Standard Measures (LSM) 5 to 7. The estimated national population is 4.182 million;

¹⁴² P2 Free to air TV, Vol 3.

¹⁴³ P2 Free to air TV, Vol 3.

- 36.4.2. Market 2: black women that are single mothers between the ages of 20 and 35 living in the township within the LSM 5 to 7. The estimated population size is 1.032 million people; and
- 36.4.3. Market 3: black people between the ages of 18 and 34, living in non-metropolitan areas that are parents. This target market is within LSM 5 to 7. The estimated population is 1.291 million.
- 36.4.4. The primary market research investigated the media usage patterns and lifestyle of the three target markets at a quantitative level, the viability of a commercial free to air television broadcast service delivering the proposed content offering. The findings reveal that:
- 36.4.5. Market 1 is heavy television consumers especially of the SABC channels and e.tv. The majority (87%) watch 3 to 4 hours of television every day. The most popular channels for this market are Soapies, films, music, news/current affairs, comedy, weather, sports news/coverage, tv serials, reality tv and educational tv;
- 36.4.6. Market 2 is heavy television consumers especially of the SABC channels and e.tv. The majority (82%) of this market watches 3 to 4 hours of television every day. The most popular television programme types for this market are Soapies, music, films, news/current affairs, comedy, tv serials, weather and reality tv; and
- 36.4.7. Market 3 is heavy television consumers especially of the SABC channels and e.tv. The majority watches 2 to 3 hours of television per week day, 4 to 5 on Saturdays and 3 to 4 on Sundays. The most popular television programmes for this market are films, soapies, news/current affairs, music, weather and comedy;
- 36.4.8. All three markets show high television viewership with SABC 1 being the preferred channel followed by SABC 2. Edutainment is very important to viewers across the board;

36.4.9. There is a need for content to assist viewers achieve their personal goals but that is also proudly South African with a respect of the differences in culture;

36.4.10. There is a need for a platform that fosters freedom of expression about any topic and should the proposed television channel be interactive in nature, it will do just that. The combination of English and other South African vernacular languages will be accepted in the market. Across the five channels, the research demonstrated that there was positive acceptance in each of their respective markets.¹⁴⁴

36.5. Free To Air TV also provided its expected weekly audience for each of its proposed channels i.e. Dololo – 961 860, Babenze Kahle – 1 003 680, The 99 Perspective - 961 860, oMama – 98 040, Kidz Afrika – 64 550. It indicates that its weekly reach will be 23% for Dololo, 24% for Babenze Kahle, 23% for The Perspective, 9.5 for oMama and 5% for Kidz Afrika.

36.6. At the hearing, Free To Air TV also indicated that there is currently no free to air television channel fully dedicated to providing the content it intends to provide in some or all of its proposed channels. Free To Air TV indicated that almost half of the audience is younger than 49 years and one-fifth younger than 35 years, and that it wishes to address this “*youthful demographic*”.

36.7. Free To Air TV was asked as to why it targeted the youthful demography of 18- 35 years given the fact that free to air services are intended to cover a broad audience base; and the discrepancy on page 2 of the application wherein the target market for Kidz Afrika is reflected as children yet on page 136 the target market is stated as black parents.

¹⁴⁴ Page 5-11 of volume 3: Application submitted on 16 November 2017.

37.4. Free To Air TV also indicated that it will not be broadcasting news and current affairs content on its proposed broadcasting service¹⁴⁸ and that English will be the primary language across all channels. However, vernacular will also be used in most of the programmes.¹⁴⁹

37.4.1. Free To Air TV duly submitted the following list of its proposed channels for authorisation:¹⁵⁰

- 37.4.1.1. oMama - 59.6%;
- 37.4.1.2. Babenze kahle 54.4%;
- 37.4.1.3. Dololo - 67.7%; and
- 37.4.1.4. The 99 Perspective - 55.9%.

37.5. Free To Air TV's commitment to language was demonstrated by inclusion of no less than 20% of the non-English official languages, through news, current affairs, religious and drama offerings

37.6. Regarding local content obligations, in its original application, Free to Air TV did not respond to the question.¹⁵¹ At the hearings, it was however still unclear how Free to Air TV intended to meet the specific local content quotas stipulated in the Local Content Regulations.

37.1. Accordingly, in the Authority's assessment, Free To Air TV was unable to link the proposed service to the current local content regulations.

38. TECHNICAL

38.1. Section 7 of the ITA required applicants to provide details on, amongst others, the company that would be responsible for signal distribution and information

¹⁴⁸ Free To Air Television Application: pp 35 Volume 4

¹⁴⁹ Free To Air Television Application: pp 36 – 38 Volume 4

¹⁵⁰ Free To Air Television Application: pp 39 – 40 Volume 4

¹⁵¹ Free To Air Television Application: pp 103 – 105 Volume 4

on equipment to be used for the proposed service, together with the relevant technical details.

38.2. Free to Air TV further indicated that it intends to use Sentech as its signal distributor and the letter of support was duly attached to the application. In terms of technical expertise and experience, Free to Air TV stated that it would be depending on its intended signal distributor and NAMEC – one of its shareholders and a technical partner. Sentech's signal distribution services will include:

- 38.2.1. Contribution Linking;
- 38.2.2. Network Access;
- 38.2.3. Service Information;
- 38.2.4. Distribution Linking; and
- 38.2.5. Distribution Network.

38.2.6. At the hearings, the Authority posed questions to Free To Air TV regarding whether Sentech would be disregarded in this process as the signal distributor responsible for the roll out of the network considering Free to Air TV's indication that NAMEC is more capable. In response to this line of questioning, Free To Air TV stated that it had already engaged Sentech especially in the DTT rollout where NAMEC is manufacturing set-top boxes based on ultra-smart set-top boxes, which is where it sees NAMEC playing a crucial role in broadcasting.

38.2.7. Free to Air TV indicated that it was aware of the Authority's transitional arrangement for the right of use of radio frequency spectrum in Annexure G until analogue switch off, wherein post analogue switch off the plan as set out in Annexure J of the latest version of the Terrestrial Broadcasting Frequency Plan (Annexure J) will be applicable for implementation

38.2.8. Based on the above, the Authority was satisfied Free To Air TV met the requirements in this regard.

39. DECISION

39.1. The Authority has decided not to grant Free To Air TV the licence contemplated in terms of the ITA for the following reasons:

39.1.1. The financial assumptions are overly optimistic throughout the forecast period. At later periods when Free To Air TV would be reaching full capacity in respect of its offerings and its advertising slots, the revenue projections set out in its application become too aggressive when compared to the PWC study. Simply stated, the revenues projected by Free To Air TV - grow at a consistently higher rate than what is traditionally seen or expected in the industry;

39.1.2. Whilst the application submitted by Free To Air TV showed an appreciation of the broadcasting industry as per the PWC report, the forecasts set out in the application were not credible as demonstrated by the aggressive revenue growth assumptions in later years.

39.1.3. In addition, the cashflow requirement assumptions appeared to be understated when compared to the funding requirements required to achieve the level of growth Free To Air TV envisages.


39.1.4. Free to Air's funding situation was brought into question during the evaluation of its application due to uncertainty with regards to its identified financier. Furthermore, an analysis of the submitted contingency funding documentation revealed material inconsistencies. Consequently, the Authority was unable to confirm the Free To Air TV's access to funding and determine the veracity of the submitted documents.

39.1.5. The primary research that was presented by Free To Air TV was inadequate for the Authority to measure need and demand for Free To Air TV's proposed service either within its own target audience or more generally.

40. CONCLUSION

40.1. In accordance with the licensing provisions of the EC Act, the applicable regulations and the ITA, the Authority has decided to grant Kwesé Free TV a free-to-air commercial television broadcasting service licence as well as a radio frequency spectrum licence (collectively "**the Licence**") as contemplated in the ITA.

40.2. The Authority granted the Licence to Kwesé pursuant to the reasons canvassed in detail above.



DR. KEABETSWE MODIMOENG

CHAIRPERSON (ACTING)

Date: 30 July 2019

