

GENERAL NOTICE

NOTICE [] OF 2016



ELECTRONIC COMMUNICATIONS ACT, 2005 (ACT NO. 36 OF 2005)

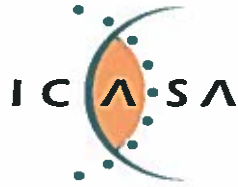
REASONS FOR DECISION

**LICENSING PROCESS FOR INDIVIDUAL COMMERCIAL SUBSCRIPTION
BROADCASTING SERVICES LICENCES**

1. The Independent Communications Authority of South Africa ("the Authority") hereby gives notice in terms of section 9(5) of the Electronic Communications Act, 2005, as amended, of the availability of the reasons document in respect to the licensing process for individual commercial subscription broadcasting services.
2. The reasons for the Authority's decision on the application are available on the Authority's website (www.icasa.org.za) and at the Authority's library in Sandton, Block D, Pinmill Farm, 164 Katherine Street during office hours.

A handwritten signature in black ink, appearing to read 'Rubben Mohlaloga', written over a horizontal line.

**RUBBEN MOHLALOGA
ACTING CHAIRPERSON**



Independent Communications Authority of South Africa
Pinmill Farm, 164 Katherine Street, Sandton
Private Bag X10002, Sandton, 2146

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

**LICENSING PROCESS FOR INDIVIDUAL COMMERCIAL SUBSCRIPTION BROADCASTING
SERVICE LICENCES**

REASONS FOR DECISION

AUGUST 2016

GLOSSARY OF TERMS, ABBREVIATIONS AND ACRONYMS

ABC	Audit Bureau of Circulation
Act	Electronic Communications Act 36 of 2005
Amendment Bill	the Electronic Communications Amendment Bill, 2013 which will amend the Act
AMPS	All Media and Product Survey conducted by the SAARF
Authority/ICASA	Independent Communications Authority of South Africa
BBBEE Act	Broad-Based Black Economic Empowerment Act 53 of 2003
BCCSA	the Broadcasting Complaints Commission of South Africa
BBBEE	Broad Base Black Economic Empowerment
Broadcasting Act	Broadcasting Act 4 of 1999
Close-TV	Close-TV Broadcast Network Holdings Proprietary Limited
Committee	Committee established by Council in terms of section 17 (1) of the ICASA Act
Content Regulations	ICASA South African Television Content Regulations published under General Notice 154 in <i>Government Gazette</i> 28454 of 31 January 2006
Council	The ICASA Council established in terms of section 5 of the ICASA Act
Digital Migration Policy	the Broadcasting Digital Migration Policy, 2008 published by the Minister under General Notice 958 in <i>Government Gazette</i> 31408 of 8

September 2008, as amended

DTT	Digital Terrestrial Television
ECNS	Electronic Communications Network Services, as defined in the Act
HDP	Historically Disadvantaged Person
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 published by the Minister of Trade & Industry in terms of the BBBEE Act under General Notice 485 in Government Gazette 35423 of 6 June 2012
IDC	Industrial Development Corporation
ITA	the Invitation to Apply for individual commercial subscription broadcasting service licence, published by the Authority under General Notice 93 in Government Gazette 34999 of 2 February 2012
Kagiso TV	Emerald Panther Investments 96 Proprietary Limited
LGBT	Lesbian, Gay, Bisexual and Transgender
LSM	Living Standards Measure developed by the SAARF

Mindset TV	Mindset Media Enterprises Proprietary Limited
the Minister	the Minister of Communications
MultiChoice	MultiChoice Africa Proprietary Limited
NAB	the National Association of Broadcasters
NEF	National Empowerment Fund
NERA	National Empowerment Rating Agency
Ownership and Control Discussion Document	Discussion Document on Ownership and Control published by the Authority under General Notice 1532 in Government Gazette 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 General Notice 624 in Government Gazette 34601 of 15 September 2011
Ownership and Control 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	Individual Licensing Processes and Procedures Regulations, 2010 published by the Authority under General Notice 522 in Government Gazette 33293 of 14 June 2010
Reasons Document	this document setting out the Authority's decisions and reasons in the subscription broadcasting service licensing process initiated by the publication of the ITA

SAARF	South African Advertising Research Foundation
SABC	South African Broadcasting Corporation SOC Limited
Sentech	Sentech SOC Limited
Siyaya TV	Siyaya Free To Air TV Proprietary Limited
STB	Set-Top Box
Subscription Broadcasting Services Discussion Document	Discussion Paper on the Inquiry into Subscription Broadcasting, published by the Authority on 23 April 2004
Subscription Broadcasting Services Position Paper	Position Paper on Subscription Broadcasting Services and Existing Commercial Sound Broadcasting Licences, published by the Authority on 1 June 2005
TV4U	TV4U Proprietary Limited
Zcoms	Zakheni Communications Strategies

A INTRODUCTION

1. This document sets out the reasons for the decisions of the Authority in relation to the applications for individual commercial subscription broadcasting service licences that were submitted to the Authority pursuant to the ITA dated 2 February 2012.
2. The background against which the licensing process was conducted is as follows:
 - 2.1 Section 192 of the Constitution of the Republic of South Africa, 1996 provides that “*National legislation must establish an independent authority to regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society*”. The Authority was established in terms of section 3 of the the ICASA Act.
 - 2.2 In 1995, the Authority’s predecessor-in-law, IBA, conducted a wide-ranging policy inquiry, known as the “Triple Inquiry”, which focused on: (1) the viability of the public broadcaster; (2) South African content rules for radio and television; and (3) cross-media rules prohibiting cross ownership of broadcasting and public interests. The Triple Inquiry Report was prepared in the context of the IBA Act in terms of which broadcasting services in South Africa were regulated at the time. As such, in the Triple Inquiry Report, the Authority made some general policy decisions with regards to the approach it would take towards terrestrial and non-terrestrial subscription broadcasters.
 - 2.3 In 2003, the Authority conducted a review of the policy framework for the ownership and control of commercial sound broadcasting services, which culminated in the publication of the Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences Position Paper on 13 January 2004 (the Position Paper). The Authority’s review was conducted and the Position Paper was prepared in the context of the IBA Act read with the Broadcasting Act.
 - 2.4 On 23 April 2004, the Authority published a Discussion Document on the Inquiry into Subscription Broadcasting (Subscription Broadcasting Services Discussion Document). The purpose of the Subscription Broadcasting Services Discussion Document was to generate comment from all stakeholders on the introduction of a regulatory framework for subscription broadcasting in South Africa. The Authority invited interested parties, stakeholders and the public to respond to the issues and questions raised in the Subscription Broadcasting Services Discussion Document by 14 June 2004. The Authority received 17 submissions and public hearings were held in August 2004. The Authority subsequently published its Position Paper on Subscription Broadcasting Services (Subscription

Broadcasting Services Position Paper), which set out the policy and regulatory framework in respect of subscription broadcasting in South Africa on 1 June 2005. In the **Subscription Broadcasting Position Paper**, the Authority indicated that, in its view, the regulation of subscription broadcasting services and the introduction of more subscription broadcasting services would result in a *“marked increase in investment opportunities in the broadcasting industry”*.¹

- 2.5 On 19 July 2006, the Act came into force. The Act repealed and replaced the IBA Act and certain provisions of the Broadcasting Act. Many of the provisions of the IBA Act were re-enacted in Chapter 9 of the Act.
- 2.6 In a similar manner to the IBA Act, the Act provides for three broad categories of broadcasting services: public, commercial and community. For the purposes of the Act, commercial broadcasting is defined as “a broadcasting service operating for profit or as part of a profit entity but excludes any public broadcasting service”. In terms of the Act, the broadcasting services operated by the South African Broadcasting Corporation SOC Limited (SABC) are public broadcasting services.
- 2.7 In terms of section 5(3)(b) of the Act, an individual licence is required to provide commercial broadcasting and public broadcasting services of national and regional scope whether provided free-to-air or by subscription. For the purposes of the Act, a subscription broadcasting service is defined as “a broadcasting service provided to a subscriber upon payment of a fee”.
- 2.8 The process to be followed by the Authority when awarding individual licences is as follows²-
- 2.8.1 The Authority must invite applications for individual licences by publishing a notice in the Government Gazette.
- 2.8.2 In the invitation, the Authority must stipulate the percentage of equity ownership to be held by HDPs, which must not be less than 30% or such higher percentage prescribed by the Authority.
- 2.8.3 The Authority must invite interested parties to submit representations in relation to applications for individual licences within a particular period.

¹ Subscription Broadcasting Service Position Paper, p 55.

² Sections 9(2) and (5) of the Act.

- 2.8.4 The Authority may conduct a public hearing in relation to any application for an individual licence.
- 2.8.5 After considering an application for an individual licence and any representations received in relation to that application, the Authority 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.
- 2.9 Following the publication of the Subscription Broadcasting Services Position Paper and prior to the commencement of the Act, the Authority commenced a licensing process in respect of commercial satellite and cable subscription broadcasting services. The Act came into effect before the closing date in respect of the applications and the Authority accordingly extended the closing date for applicants to give them an opportunity to amend their applications to take into account the provisions of the Act. Following this licensing process, the Authority issued licences to provide subscription broadcasting services, in November 2007 (i.e. after the commencement of the Act), to the following five licensees: MultiChoice Africa (Pty) Ltd (MultiChoice), On Digital Media (Pty) Ltd, e-SAT (Pty) Ltd, Telkom Media (Pty) Ltd (now Super 5 Media (Pty) Ltd), and Walking on Water Television (Pty) Ltd.
- 2.10 The Authority published the Individual Licensing Processes and Procedures Regulations, 2010 on 14 June 2010 (Processes and Procedures Regulations) which set out the procedural requirements that are applicable to the current subscription licensing process. The Processes and Procedures Regulations provide certain practical details in relation to the manner in which applications for individual licences must be submitted to the Authority. In particular, regulation 6(1) of the Processes and Procedures Regulations, provides that; *“Where information included in an application changes at any time after submission thereof but before the Authority makes a decision thereon, the applicant must, within 14 days of such change, notify the Authority and request that the application be amended.”* The Authority may then, in its discretion, either grant or refuse an applicant’s request to amend its application. The Authority may grant a request to amend an application where this would not unfairly prejudice other interested parties, impede the expeditious and proper consideration of the application, or materially change the application.
- 2.11 Further, regulation 8(1) to (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, in its discretion, either reject the application; direct the applicant to furnish the required information within the specified period (failing which, the Authority may, in its discretion,*

reject the application); or) on good cause shown by the applicant, condone the late filing of an application."

- 2.12 The Authority published a notice inviting interested persons to apply for Individual Commercial Subscription Broadcasting Service Licences under General Notice 93 in Government Gazette 34999 of 2 February 2012. The closing date for the submission of applications was 11h00 on 11 July 2012.³
- 2.13 On 7 December 2012, the Authority gave notice that, in response to the ITA, it had received five applications for individual commercial subscription broadcasting service licences and listed particulars of the applications in the schedule to the notice.⁴ The Authority also invited interested parties to submit written representations in relation to the applications. The closing date for the submission of such representations was set as within 30 working days of the date of publication of the notice, i.e. by 24 January 2013.
- 2.14 The dates for the public hearings in respect of licence applications, from 24 to 26 July 2013, were published by the Authority under General Notice 726 in Government Gazette 36646 of 9 July 2013.

B THE INVITATION TO APPLY

3. As stated above, on 2 February 2012, the Authority published an ITA for I-BS licences for the provision of commercial subscription broadcasting services in terms of sections 9(1) and (2), read with section 63(1), of the Act.
4. Applicants were required to comply with, amongst other things, the following:
- 4.1 the original, 15 hard copies and three soft copies of the completed application were submitted to the Authority before the closing time;⁵
- 4.2 had to be permanently bound, using either heat binding or spiral binding;⁶

³ ITA, Schedule A, para 19.

⁴ Published under GN 1018 in *Government Gazette* 35951 of 7 December 2012.

⁵ ITA, Schedule A, paras 2 and 3.

⁶ ITA, Schedule A, para 5.

- 4.3 had to have a cover page indicating the name of the applicant, the proposed name of the broadcasting service and year of application;⁷
- 4.4 the page(s) immediately following the cover page were required to be the contents page(s) which detail each section of the application and corresponding page numbers;⁸
- 4.5 pages including the appendices were required to be numbered sequentially starting with the page immediately following the contents page(s) as page 1 and ending with the last page of the application;⁹
- 4.6 each volume had to have a cover page which specified the number of the part or volume;¹⁰
- 4.7 had to be accompanied by a non-refundable application fee of R70 000.00, every application for the provision of a subscription television broadcasting service had to be accompanied by a non-refundable application fee of R100 000.00, and every application for the provision of a subscription composite (sound and television) broadcasting service had to be accompanied by a non-refundable application fee of R170 000.00;¹¹
- 4.8 had to include a percentage of equity ownership held by persons from historically disadvantaged groups of not less than 30%;¹²
- 4.9 were required to indicate how the broadcasting service would make use of digital technology to cater for the needs of people with disabilities;¹³ and
- 4.10 had to take into account the restrictions in terms of sections 64, 65 and 66 of Act, amongst others, relating to limitations on foreign control of commercial services, limitations on control of commercial broadcasting services and limitations on cross-media control of commercial broadcasting services.¹⁴
5. The ITA stated that "*Failure to comply with any of the . . . requirements will render the application liable for disqualification*".¹⁵

⁷ ITA, Schedule A, para 6.

⁸ ITA, Schedule A, para 7.

⁹ ITA, Schedule A, para 8.

¹⁰ ITA, Schedule A, para 9.

¹¹ ITA, Schedule A, paras 15 - 17.

¹² ITA, Schedule A, para 11.

¹³ ITA, Schedule A, para 13.

¹⁴ ITA, Schedule A, para 14.

¹⁵ ITA, Schedule A, para 20.

6. The information that was required to be included in an application submitted in response to the ITA was as follows:
- 6.1 general information, including the name of the applicant, the proposed station name, the nature of the service (e.g. sound, television or composite), whether the service would be multi- or single-channel and the main contact persons;¹⁶
- 6.2 information on the applicant's corporate status, including:
- 6.2.1 the applicant's legal form, authorising resolutions, and any control rights in respect of the governance and management of the applicant, together with relevant supporting documents e.g. the applicant's memorandum and articles of association or memorandum of incorporation;
- 6.2.2 details of the applicant's senior management, including whether any senior manager is an officer or employee of a political party, holds shares in the applicant or has any other media interests;
- 6.2.3 a full and complete business record of the applicant, including information as to whether the applicant has any other media interest, full details as to the management positions held during the past five years, and whether the person concerned has any particular experience relating to the management of a commercial subscription broadcasting service;
- 6.2.4 information in relation to the applicant's staffing and personnel;
- 6.2.5 information in relation to the applicant's general history and development strategy;
- 6.2.6 details of external consultants and advisors who assisted the applicant; and
- 6.2.7 information regarding the other activities of the applicant and its shareholders and senior management in: advertising agencies, non-South African broadcasting interests, newspapers, other broadcasting interests and other publicly funded bodies;¹⁷
- 6.3 financial information, including the applicant's business plan, projected financial statements, details of total funding requirements and the sources of such funds, the applicant's fixed

¹⁶ ITA, Section 1, pp 7 – 8.

¹⁷ ITA, Section 2, pp 9 – 14.

assets, details of the applicant's share capital, proposed investors, means of raising capital, details of any loans, the applicant's bank facilities or other credit arrangements, any grants and donations awarded to the applicant, forecasted subscription and advertising revenue, and forecasted sponsorship income;¹⁸

6.4 information on the demand, need and support for the proposed service, including 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, support for the proposed service;¹⁹

6.5 information in relation to the manner in which complaints would be dealt with and in which the applicant's operations would comply with relevant codes;²⁰

6.6 programming information (responses to which will form the basis of the applicant's "promise of performance", to be incorporated in the licence issued for the licence period), including details of the proposed programme service, the format and content, the target market (i.e. whether it is aimed at the general public or a niche market), authorisation of channels, programming supply agreements, and compliance with the ICASA South African Television Content Regulations²¹ (Content Regulations);²² and

6.7 technical information, including the details of the company responsible for the applicant's signal distribution, and the details of the configuration of the network.²³

C THE APPLICATIONS

7. The closing date for submission of applications was 11h00 on 11 July 2012. On 7 December 2012, the Authority published a notice in the Government Gazette setting out details of the following applications which were received in response to the ITA:

7.1 Close-TV Broadcast Network Holdings (Pty) Ltd (Close-TV)

7.2 Emerald Panther Investments 96 (Pty) Ltd (Kagiso TV)

¹⁸ ITA, Section 3, pp 14 – 19.

¹⁹ ITA, Section 4, pp 19 – 20.

²⁰ ITA, Section 5, p 21.

²¹ Published under GN 153 in *Government Gazette* 28454 of 31 January 2006.

²² ITA, Section 6, pp 22 – 23.

²³ ITA, Section 7, p 24.

- 7.3 Mindset Media Enterprises (Pty) Ltd (Mindset TV)
- 7.4 TV4U (Pty) Ltd (TV4U)
- 7.5 Siyaya Free To Air TV (Pty) Ltd (Siyaya TV)
8. In this notice, the Authority invited interested persons to submit written representations in respect of the applications within 30 working days of the date of publication of the notice, i.e. by 24 January 2013. The Authority received the following written representations: –
- 8.1 a written representation from Phukubje Pierce Masithela Attorneys, on behalf of Siyaya TV, in relation to the Kagiso TV application;
- 8.2 written representations from Kagiso TV in relation to the Mindset TV application, the Siyaya TV application, the TV4U application, and the Close-TV application; and
- 8.3 a written representation from the SABC in relation to the licensing process.
9. The applicants were given an opportunity to respond to these written representations in writing within 21 working days (i.e. by 22 February 2013).
10. The Authority has referred to the various written representations in the context of the relevant applications in its findings below, with the exception of the written representation received from the SABC. In its written representation, the SABC submitted as follows –
- 10.1 The SABC expressed concern regarding the viability of the subscription broadcasting service licensees that were licensed by the Authority in November 2007, especially in the context of the profitability of TopTV and the failure of the other licensees to launch their services.²⁴
- 10.2 The SABC noted that the Authority has not yet conducted a market review to determine if there are any changes within the broadcasting industry that might have yielded any results with respect to an increase in the diversity of services and viability within the market.²⁵

²⁴ SABC written representation, p 7, para 4.2.

²⁵ Ibid.

11. The Authority noted that the SABC's written representations did not relate to the applications received for this licensing process, as required in terms of section 9(2) of the Act, but were instead more general comments on the licensing of additional broadcasting services. The Authority thus decided not to address the written representations from the SABC in the context of this Reasons Document.
12. The Authority received three applications after the closing time of 11h00, as stipulated in the ITA. The late applications were submitted by Mindset TV, TV4U and Siyaya TV. The Authority has the power to condone late applications on good cause shown by the applicant and has the power to condone other formal defects in applications depending on whether doing so would promote the public interest in the circumstances of the case. On 24 July 2012, the Authority decided that all entities that did not comply with all the requirements of the ITA be requested to furnish written reasons why their applications should be considered and not be disqualified. Although the Close-TV and Kagiso TV applications were submitted before the closing time, in the Authority's assessment, the Kagiso TV application did not comply with all of the procedural requirements contained in the ITA.
13. On 25 July 2012, the Authority requested that Mindset TV, TV4U, Kagiso TV and Siyaya TV provide it with written reasons explaining why their respective applications should not be rejected for non-compliance with the procedural requirements of the ITA. Written reasons were required to be submitted to the Authority within 7 working days of the Authority's request.
14. Mindset TV, TV4U, Kagiso TV and Siyaya TV each submitted their written reasons to the Authority by 27 July 2012, explaining why their respective applications should not be rejected for non-compliance with the procedural requirements of the ITA.
15. On 27 August 2012, after considering the written reasons submitted by each of the applicants whose applications were received by the Authority after the closing time, and upon being satisfied that each applicant demonstrated good cause in respect of the late filing of their applications, the Authority decided in terms of regulation 8(3)(c) of the Processes and Procedures Regulations, to condone the late filing of those applications that were submitted after the closing time, but on the closing date. The Authority also provided each of the applicants that did not comply with the procedural requirements of the ITA an opportunity to remedy the defects in their applications and to furnish the required information within 7 working days, i.e. by 13 September 2012, failing which the Authority indicated that (in accordance with regulation 8(4) of the Processes and Procedures Regulations) it would reject the defective application.

16. Mindset TV, TV4U, Kagiso TV and Siyaya TV, each submitted the required information within the specified period, i.e. by 13 September 2012.

D THE HEARINGS

17. The Authority gave notice of its intention to convene public hearings in respect of the applications submitted in response to the ITA.²⁶ The hearings were held at the Authority's offices in Johannesburg from 24 to 26 July 2013.
18. The Authority exercised its power to conduct the hearings in terms of section 9(2)(e) of the Act. For that purpose, and acting in terms of section 17(1) of the ICASA Act, the Council established the Committee ("the Committee") to consider the applications received and conduct the hearings. The Council resolved that the Committee was to consider all relevant information and representations, make appropriate findings of fact, and make recommendations to the Council regarding the granting of licences.
19. The Authority appointed Zcoms in terms of section 14A of the ICASA Act to assist the Authority in the analysis of financial information, business plans, and market research submitted by the applicants with their respective applications.²⁷ Zcoms was represented at the public hearings by Mlamli Boozi and Thabisa Faye.
20. During the course of the public hearings, applicants were given an opportunity to make oral representations in support of their respective applications. The Authority also questioned the applicants on various aspects of their applications. Persons who 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 were allowed to respond to such submissions.
21. Subsequent to the hearings, the Authority requested the various applicants to furnish further information to assist in clarifying certain aspects of their respective applications. On 8 September 2013, the Authority sent letters to Kagiso TV, Siyaya TV, TV4U, and Close-TV requesting further information in terms of section 9(3) of the Act. This additional information was required to be submitted by 20 August 2013.

E ADDITIONAL INFORMATION SUBMITTED BY APPLICANTS

²⁶ Published under GN 769 in *Government Gazette* 36713 of 29 July 2013.

²⁷ Zcoms was appointed on 28 March 2013 following a competitive bidding process.

22. On 31 March 2014, the Committee had recommended to Council that none of the five (5) applicants met fully the requirements of the ITA, the Council after due consideration of the recommendation from the Committee, decided to grant but not issue the licenses to all five (5) applicants. The Council decided that the applicants be given further period to comply with ITA and thereafter be issued with licences.
23. The reason for the decision was that one operator who was functional dominated the subscription TV broadcasting. The rest of the licensees struggled to take off. The applicants were informed about the Authority's decision on 23 April 2014.
24. Based on the above, the Authority decided to request all applicants to submit information to support or clarify their applications. The Authority decided to limit its request to information, which supplement or clarify the applications.
25. The Authority was mindful that it has made decisions on these applications, therefore no information, which materially changes the applications, could be accepted, even if same was initiated by the applicants. Doing so would have been in contravention of regulation 6 of the Licensing Processes and Procedures Regulations, 2010, which only permit the applicant to notify the Authority of changes in the application before the Authority makes a decision.
26. As a result, the Authority rejected information from the applicants, which materially changed the application, e.g. shareholding changes and only considered information, which supplemented or clarified the application e.g. research, etc.
27. All applicants were requested to submit additional information within a period of three (3) months. The due date for submission of additional information was 24 July 2014.
28. On 21 October 2014, the Authority decided to issue Individual Commercial Subscription Broadcasting Service Licence to Siyaya TV and granted the extension to Kagiso TV, TV4U, Close-TV and Mindset TV to submit additional information by 31 December 2014. On 12 November 2014, the Authority sent letters to the applicants advising them of its decisions on their respective applications.
29. On 27 November 2014, 10 and 23 December 2014, the Authority received submissions from TV4U, Close TV and Kagiso TV, respectively on further information requested to finalise their licence application for Individual Commercial Subscription Broadcasting Service Licence.
30. On 16 February 2015, the Authority granted Kagiso TV and TV4U an extension to submit further information by 10 March 2015. On 11 February 2015, the Authority sent letters to TV4U and

Kagiso TV, respectively. Mindset TV was requested to submit further information by 27 February 2015.

31. On 26 May 2015, the Authority provided further extension of two (2) months to Kagiso TV, TV4U and Mindset TV to submit outstanding information. The Authority advised that in the event that Kagiso TV, TV4U and Mindset TV fails to meet any of the above requirements within 60 calendar days from 10 June 2015, no further extension will be provided and the Authority will refuse the applicants with the licence.
32. The due date for submission of additional information was 11 August 2015. The Authority duly received submissions from Kagiso TV, TV4U and Mindset TV on 07 August 2015, 24 July 2015 and 11 August 2015, respectively.

F RELEVANT CRITERIA AND CONSIDERATIONS

33. 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.
34. The Authority's licensing and regulatory functions must be performed in order to give effect to the objectives specified in section 2 of the Act. The Authority regards the following objects and principles set out in section 2 of the Act as particularly important in considering applications for subscription broadcasting services licences:
 - 34.1 promoting an environment of open, fair and non-discriminatory access to broadcasting services;
 - 34.2 promoting the empowerment of HDPs, including black people, with particular attention to the needs of women, opportunities for youth and challenges for people with disabilities;
 - 34.3 ensuring that broadcasting services, viewed collectively, are provided by persons or groups of persons from a diverse range of communities in South Africa;
 - 34.4 promoting the development of commercial broadcasting services which are responsive to the needs of the public;
 - 34.5 ensuring that broadcasting services, viewed collectively –

- 34.5.1 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;
- 34.5.2 provide for regular news services, actuality programmes on matters of public interest, programmes on political issues of public interest and programmes on matters of international, national, regional and local significance; and
- 34.5.3 provide for a broad range of services and specifically for the programming needs of children, women, the youth and the disabled;
- 34.6 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 Africa; and
- 34.7 ensuring that broadcasting services are effectively controlled by South Africans.
- 35. Another object of the Act is to promote and facilitate the achievement of the objects of the “related legislation,” which includes the Broadcasting Act. The objects of the latter Act include the following:
 - 35.1 to encourage ownership and control of broadcasting services through participation by persons from historically disadvantaged groups;
 - 35.2 to ensure plurality of news, views and information and provide a wide range of entertainment and education programmes;
 - 35.3 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 Africa; and
 - 35.4 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 historically disadvantaged groups.

36. In terms of section 5(9) of the Act, when granting a licence, the Authority is required to –
- 36.1 ensure that broadcasting services, viewed collectively, are provided by persons or groups of persons from a diverse range of communities in South Africa; and
 - 36.2 promote the empowerment of HDPs including women, the youth and people with disabilities in accordance with the requirements of the ICT Charter (which has now been replaced by the ICT Sector Code).
37. The Authority has also had regard to certain relevant principles of the ICT Sector Code, a sector-specific code which details the manner in which BEE must be measured for businesses operating in the ICT sector,²⁸ in its evaluation of the applications received in the current licensing process.²⁹
38. Against this background, section 51 of the 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 enunciated in section 2 of the Act (referred to above), amongst other things, take into account the following factors:
- 38.1 the demand for the proposed broadcasting service within the proposed licence area;
 - 38.2 the need for the proposed broadcasting service within such licence area, having regard to the broadcasting services already existing in that area;
 - 38.3 the expected technical quality of the proposed broadcasting service, having regard to developments in broadcasting technology;
 - 38.4 the capability, expertise and experience of the applicant;
 - 38.5 the financial means and business record of the applicant;
 - 38.6 the business record of persons in a position to control the operations of the licensee, in an

²⁸ This ICT Sector Code must be used to measure the levels of BEE in businesses operating in the ICT sector as from 6 June 2012.

²⁹ The Minister of Trade & Industry published revised general Codes of Good Practice under the BBBEE Act on 11 October 2013. There is a transitional period of 12 months during which businesses that are measured under the general Codes may apply either the previous version of the Codes or the revised version of the Codes to measure their BEE scores. The DTI has indicated that it intends to align the various sector codes with the revised general Codes of Good Practice. Until the sector codes, including the ICT Sector Code, are amended, they will apply in their current form.

individual capacity or directly or indirectly either in relation to management or corporate structure;

38.7 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 candour;

38.8 whether the applicant is precluded in terms of section 64 of the Act (referred to below) from holding a broadcasting licence; and

38.9 whether the applicant or any person in a position to control the applicant has been convicted of an offence in terms of the Act or the related legislation.

39. In addition to these considerations, the Authority also has to consider whether an applicant complies with the other requirements of the Act and related legislation. In this regard:

39.1 A minimum percentage of equity in an applicant for an individual licence must be held by HDPs. The minimum level is set either in the relevant ITA or as prescribed by the Authority. In the context of the present licensing process, the ITA stipulated that the minimum percentage of equity, which had to be held by HDPs in applicants for the commercial broadcasting services licences that were the subject of the ITA, was 30%.

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

39.2.1 a natural person, is a citizen of the Republic of South Africa; or

39.2.2 a juristic person, is, or will be, registered under the laws of South Africa and has or will have its principal place of business located in South Africa.

39.3 Section 52 of the 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.

39.4 In terms of section 60(4) of the Act, subscription broadcasting services may draw their revenues from subscriptions, advertising and sponsorship, but advertising or sponsorship, or a combination of advertising and sponsorship, may not be the largest source of annual revenue for a subscription broadcasting service.

39.5 Section 64 of the 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) per cent.
- (2) Not more than twenty (20) per cent of the directors of a commercial broadcasting licensee may be foreigners”.

39.6 “Control” as used in section 64(1)(a) of the Act is not defined for the purposes of that section or, more generally, in section 1 of the Act.

39.7 “Financial interest” is defined for the purposes of the Act 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”.

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

39.9 Section 65(1) of the Act provides that no person may –

39.9.1 directly or indirectly exercise control over more than one commercial broadcasting service licence in the television broadcasting service; or

39.9.2 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 television broadcasting service; or

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

39.10 “Control” is not defined for the purposes of section 65 of the Act.

39.11 In terms of section 65(6) of the 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 Act, exempt that person from the restrictions on controlling more than one television broadcasting service licence imposed by section 65.

39.12 Section 66 of the Act deals with “cross-media” control and provides, amongst other things, that:

39.12.1 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;

39.12.2 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.

39.13 Section 66(4) of the Act provides that “substantial overlap” means an overlap by 50% or more.

39.14 Section 66(5) of the Act provides that a 20% shareholding in a commercial broadcasting service “is considered as constituting control”.

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

40. In evaluating applications, the Authority also takes account of the requirements of the Content Regulations. The Content Regulations provide that terrestrial or cable subscription broadcasting licensees must ensure that a minimum weekly average of 10% during the South African television performance period, measured over the period of a year, consists of South African television content. ³⁰ Regulation 5.2 of the Content Regulations provides that, in complying with the content requirements, a terrestrial or cable subscription broadcasting licensee must ensure that a minimum of 2% of its South African television content programming consists of South African drama programming. A satellite subscription television broadcasting licensee must ensure that a minimum of 10% of its channel acquisition budget is spent on

³⁰ Regulation 5.1 of the Content Regulations.

channels with South African television content that are compiled and uplinked from South Africa.³¹ New licensees are required to comply with the Content Regulations from the outset of their operations.

³¹ Regulation 5.4 of the Content Regulations.

G GENERAL FINDINGS

41. The Authority has made the following general findings in relation to the licensing process for I-BS licences for commercial subscription broadcasting services. These findings do not apply to all applicants:
- 41.1 Certain applicants submitted their applications on the closing date, but after the closing time (i.e. after 11h00). The Processes and Procedures Regulations provide that where an application for a licence is submitted late, the Authority has the discretion to condone the late filing of the applications on good cause shown. The Authority was satisfied that each of the applicants who submitted their applications late demonstrated good cause for the late filing of their applications and the Authority was accordingly prepared to condone the late submission of these applications.
- 41.2 Certain applicants failed to familiarise themselves with the procedural requirements that are applicable to licensing processes. For example, as discussed above, a number of applicants failed to submit complete applications that complied substantially with the procedural requirements stipulated in the ITA. The Processes and Procedures Regulations provide that where an application for a licence does not comply with the requirements of the ITA, the Authority has the discretion to reject the application, or to direct the applicant to furnish the required information within the specified period failing which the Authority may reject the application. In this licensing process, the Authority exercised its discretion to direct the applicants to furnish the required information within a specified period.
42. Three applicants requested that certain information be treated as confidential information, while a fourth applicant marked certain of its information as confidential. In this regard, section 4d of the ICASA Act provides that, when a person submits information to the Authority, that person may request that the information be treated as confidential information. A written statement explaining why the specific information should be treated as confidential, should accompany the request for confidentiality. The Authority is then 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. Where the Authority determines that a request for confidentiality cannot be acceded to, the person who submitted the information must be given an opportunity to withdraw it. Certain information *must* be treated as confidential information, where the person submitting the information requests it. This is information that is: trade secrets; 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; 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; the names of prospective employees; and business plans of a licensee. The Authority considered the requests for confidentiality that were made during the current licensing process in line with these requirements and notified the applicants who made the requests of its decisions.

43. The reasons for the Authority's decisions as given in this document are intended to provide an overview of the grounds on which the Authority made its decision in relation to each of the applicants. In this regard, the Authority took into account whether (and, if so, to what extent) each applicant complied with the applicable requirements set out in the ITA, the Act, the Subscription Broadcasting Services Position Paper and the Content Regulations. Ultimately, the Authority had to make an assessment, in the context of these statutory and policy factors, as to whether the applicants for the subscription broadcasting services licences satisfied the applicable requirements. The Authority was further required to make an assessment as to whether the applicants' applications raised any issues of material concern for the Authority.

H FINDINGS, DECISIONS AND REASONS

44. Close-T Broadcast Network Holdings (Pty) Ltd (Close TV)

44.1 Introduction

44.1.1 The Authority received an application in terms of the ITA from Close TV for an individual I-BS licence.

44.1.2 The applicant indicated that it intends operating a service under the name "Close-TV".³²

44.1.3 The applicant indicated that it intends to provide a multi-channel television subscription broadcasting service on a national scale.³³

44.1.4 The Authority received written submissions on the application from Kagiso TV. However, during the public hearings, the applicant indicated that it had not received the written submissions made by Kagiso TV. The Authority considered the matter and indicated that it was satisfied that Kagiso TV had submitted its written representations to the applicant using the telefax number provided by the applicant as the contact

³² Close TV application: p 4.

³³ Ibid.

number for receiving representations. The Authority decided to adjourn the public hearings briefly, in order to offer the applicant an opportunity to address the representations made by Kagiso TV. The applicant duly responded to Kagiso TV's written submissions during the public hearings. The Authority has considered Kagiso TV's submissions and the applicant's responses to the various submissions and, where relevant reference is made to Kagiso TV's submissions and the applicant's responses to those submissions in this Reasons Document.

44.2 Corporate structure

44.2.1 The applicant is a private company registered and incorporated in South Africa with registration number 2012/013849/07.³⁴ The applicant submitted its founding documents with its application, including its certificate of incorporation and its memorandum of incorporation, as required by section 2 of the ITA.³⁵ On this basis, the Authority is satisfied that the applicant is a juristic person duly registered and incorporated in South Africa. The applicant also submitted a resolution authorising Mia Groenewald to sign the application on behalf of the applicant and authorising Warren Lee Whitcher to represent it at the public hearings.³⁶

44.2.2 The applicant initially provided a shareholders' agreement in which only Mia Groenewald and Amy Wendy Rosslind were reflected to be shareholders, with each holding 50% of the shares in the applicant.³⁷ However, after the public hearings, the applicant submitted a revised shareholders' agreement.³⁸ In its application, the applicant indicated that its shareholding structure, after an equity investment by Media Corner (Pty) Ltd (Media Corner), is as follows:³⁹

Mia Groenewald	25.50%
Amy Rosslind	25.50%
Media Corner	49%

44.2.3 The applicant also submitted a copy of the share subscription agreement for Media Corner's acquisition of a 49% equity stake in the applicant, for a consideration of R48.2 million, to the Authority after the public hearings.⁴⁰

³⁴ Close TV application: p 6.

³⁵ Close TV application: Appendix 6.2, pp 7-14.

³⁶ Close TV application: Appendix 6.3, pp 17-18.

³⁷ Close TV application: pp 100-114.

³⁸ Close TV post-hearing submission, 20 August 2012.

³⁹ Close TV application: Appendix 6.4, p 19.

⁴⁰ Close TV, post-hearing submission, 20 August 2012.

44.2.4 The applicant submitted the following information in respect of each of its shareholders

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44.2.4.1 Mia Groenewald is a white, female South African;

44.2.4.2 Amy Rosslind is a coloured, female South African;

44.2.4.3 Media Corner is a Dakile family TV production business, which was incorporated in 2005. The two main shareholders of Media Corner are Ms Nonhlanhla Dakile who holds 49% of the shares in Media Corner, and Mr Nhlanhla Dakile who owns 51% of the shares in Media Corner. ⁴¹

44.2.5 The applicant originally submitted further information which reflected the voting rights held by each shareholder as follows: ⁴²

Mia Groenewald	42.4%
Amy Rosslind	42.4%
Media Corner	15.2%

44.2.6 However, after the public hearings and in terms of the revised shareholders' agreement submitted by the applicant, each shareholder would hold voting rights according to their percentage equity ownership and not as described in paragraph 44.2.5 above. In terms of the shareholders' agreement, control of the operations of the business of the applicant is given by ownership of 51% of the voting rights for passing ordinary resolutions, and ownership of 75% of the voting rights of the applicant for the purposes of passing special resolutions. ⁴³ At present, no one shareholder holds the requisite 51% of voting rights required to control the operations of the applicant, in the manner provided for in the shareholders' agreement.

44.2.7 The Authority is satisfied that the applicant complied with the requirements of the ITA in respect of shareholding and, in particular, with the requirements contained in section 2, paragraph 6 of the ITA.

⁴¹ Public hearing transcript, 25 July 2013, p 21.

⁴² Close TV application: Appendix 6.4, pp 19-20.

⁴³ Close TV application: Appendix 7.6.1, p 31.

44.3 Empowerment of HDPs

44.3.1 The applicant submitted that it had met the 30% equity ownership requirement set by the ITA, and that the percentage of equity ownership held by HDPs is 74.5%, while women hold 51% of its shares. ⁴⁴ The applicant also submitted details of both its direct and indirect shareholders and, accordingly, provided details of the manner in which such equity ownership was calculated. ⁴⁵

44.3.2 In its written submissions, Kagiso TV indicated that it was concerned about the applicant's shareholding and, in particular, its commitment to BEE. ⁴⁶ However, the Authority is satisfied that the applicant met the equity requirements for HDPs set in the ITA, given that 74.5% of the shares in the applicant are owned by black persons, and 51% of the shares in the applicant are owned by women. ⁴⁷

44.3.3 The Authority is satisfied that the applicant complied with the requirements set out in section 5(9)(b) and 9(2) of the Act as well as section 2, paragraph 6 of the ITA and that the applicant provided details of the means by which such equity ownership was calculated, as required in terms of the ITA.

44.4 Section 64 of the Act

44.4.1 The directors of the applicant are indicated to be: Mia Groenewald, Warren-Lee Whitcher, and Atchuthanadan (Mergan) Nadaraja Moodley. The applicant indicated that all shareholders owning or controlling 15% or more of the voting rights of the applicant will be entitled, but not obliged, to appoint one director to the board in the capacity of non-executive director. The remaining three non-executive directors will be elected by way of a majority vote by no less than 85% of all voting shareholders. ⁴⁸

44.4.2 Based on the information provided by the applicant, the applicant does not currently have any direct or indirect foreign shareholders or any foreign directors. The applicant's proposed funding arrangement further does not include any foreign direct or indirect investment.

44.4.3 As such, the Authority is satisfied that the applicant complies with the requirements of

⁴⁴ Close TV application: Appendix 6.4, pp 19-20.

⁴⁵ Public hearing transcript, 25 July 2013, p 21.

⁴⁶ Kagiso TV written representation, para 3.

⁴⁷ Public hearing transcript, 25 July 2013, p 18.

⁴⁸ Close TV application: Appendix 7.6.1, p 31.

section 64 of the Act.

44.5 Section 65 of the Act

The applicant indicated that neither it nor its shareholders hold any interest in other broadcasting services (including radio, television, satellite and cable broadcasting, and allied activities).⁴⁹ The Authority is satisfied that the applicant does not contravene section 65 of the Act.

44.6 Section 66 of the Act

The applicant indicated that neither it nor its shareholders, nor any of its directors, hold any interest in any newspaper (including holdings in a group having substantial control over one or more newspaper).⁵⁰ On this basis, the Authority is satisfied that the applicant does not contravene section 66 of the Act.

44.7 Management and human resources

44.7.1 The applicant's proposed senior management comprises the following individuals: Mia Groenewald (director of operations), Warren-Lee Whitcher (director of corporate services and strategy), Amy Wendy Rosslind (non-executive director) and Atchuthanadan (Mergan) Nadaraja Moodley (chief executive officer).⁵¹ The applicant also indicated that it had identified suitable candidates for the positions of marketing director, head of content and chief financial officer, but that these positions were yet to be offered.⁵² The applicant provided the curricula vitae for, and the relevant experience of, each of these members of senior management.⁵³

44.7.2 Based on the Authority's analysis of the submitted curricula vitae, the Authority is satisfied that the applicant's proposed senior management has the requisite experience and capabilities to operate the proposed service in accordance with the requirements set out in section 51(d) of the Act and section 2, paragraph 7.1 of the ITA.

44.7.3 Based on the information provided, the Authority is satisfied that the applicant complied with the requirements set out in section 51(d), (f), (g), (h), (i) and section 52 of the Act as

⁴⁹ Close TV application: p 49.

⁵⁰ Close TV application: p 49.

⁵¹ Close TV application: Appendix 7.2, pp 24-28.

⁵² Close TV application: Appendix 7.3, p 29.

⁵³ Close TV application: Appendix 7.7, pp 33-36.

well as section 2, paragraph 7 of the ITA.

44.7.4 The applicant provided the Authority with a staff organisational chart reflecting 30 full-time employees and no part-time staff.⁵⁴ The applicant also indicated that the following operations would be outsourced: specialist engineering and technology skills, legal and regulatory counsel, channel suppliers and advertising.⁵⁵

44.7.5 In its written submission on Close TV's application, Kagiso TV submitted that it was concerned about the applicant's lack of emphasis on subscriber management support.⁵⁶ In its application, the applicant had indicated that subscriber and customer relationship management and call centre operations would be outsourced.⁵⁷ The applicant further indicated that it has collaborated with Globecast SA as its technology partner. Globecast SA has in place multiple platforms on multiple satellites, with multiple subscriber management and conditional access services and the decision as to which subscriber management and conditional access to use would be decided after the licence was awarded.⁵⁸

44.7.6 The Authority is satisfied that the applicant has complied with the requirements of section 2, paragraph 8 of the ITA.

44.8 Finance

44.8.1 Business plan

44.8.1.1 In its application, the applicant indicated that it intended launching a lifestyle subscription broadcasting television service on a satellite (direct-to-home) platform, aimed at the lesbian, gay, bisexual and transgender (LGBT) community of South Africa.⁵⁹ However, during the public hearings, the applicant stated that its target audience included the lesbian, gay, bisexual, transgender, queer, intersex, and asexual community.⁶⁰ During the public hearings, the applicant clarified that this broader definition does not change its target market, and that it is a reclassification of the same group of people.⁶¹

⁵⁴ Close TV application: Appendix 8.1, p 38.

⁵⁵ Close TV application: Appendix 8.4, pp 40-41.

⁵⁶ Kagiso TV written representation, p 7, para 6.

⁵⁷ Close TV application: Appendix 8.4, pp 40-41.

⁵⁸ Public hearing transcript, 25 July 2013, p 27.

⁵⁹ Close TV application: p 66.

⁶⁰ Public hearing transcript, 25 July 2013, p 19.

⁶¹ Public hearing transcript, 25 July 2013, pp 41 -42.

- 44.8.1.2 The applicant proposed providing its service as an integrated broadcast model, incorporating a satellite distribution broadcast signal and a return path channel from the subscriber's decoder, with the aid of USB or Ethernet connectivity built into the applicant's decoder. ⁶² The applicant also proposed launching an online portal which would include interactive features such as video on demand, user generated content uploads allowing audiences to share content on social media platforms, and various other added services to be provided by the applicant. ⁶³
- 44.8.1.3 The applicant submitted in its application that some of the key factors guiding the decision to service this market (in this case the LGBT community) are as summarised below: ⁶⁴
- 44.8.1.3.1 the applicant stated that the LGBT community in South Africa comprises approximately 5 million individuals which translates into more than 900 000 television households (when considering those individuals falling within the LSM 5 threshold and higher);
- 44.8.1.3.2 the applicant stated that its target market has never received a broadcast service aimed directly at its personal viewing requirements and interests, and that the market research conducted by the applicant indicated a willingness by its target audience to consume such a service by a margin of more than 75%. ⁶⁵ The applicant also submitted that there would be no direct competition from existing pay TV broadcasters;
- 44.8.1.3.3 according to the applicant, the LGBT community represents a lucrative and attractive niche target market within the advertising industry which would result in advertising revenue for the applicant; and
- 44.8.1.3.4 the applicant stated that it has the ability to access and secure exclusive distribution rights to international LGBT-themed content, consistent with global content quality standards, through a content partnership arrangement with Out TV Network (based in Canada, United States of America and the Netherlands).
- 44.8.1.4 The applicant indicated that the go-to-market subscription fee of R99 per month

⁶² Close TV application: p 57.

⁶³ Ibid.

⁶⁴ Close TV application: pp 57-58.

⁶⁵ Close TV application: pp 57, 62-63.

was selected based on in-depth market research into the viewing habits of pay-TV subscribers. ⁶⁶ In this regard, the applicant submitted that its primary revenue stream would be its subscription fees together with its advertising revenue, while content distribution revenue would form additional revenue streams. ⁶⁷

44.8.1.5 The applicant indicated that it expected a cumulative subscriber growth of 236 470 subscribers in the first 8 years of operation, with a subscriber uptake of 38 102 in the first year of operation. ⁶⁸

44.8.1.6 In the Authority's assessment, while the applicant proposed a unique value proposition, particularly as it sought to target an "unserved" niche market, the Authority had concerns regarding the quality and validity of the market research data utilised by the applicant, including the estimated population size of its target market (being more than 5 million individuals). As a result, because expected revenue for the applicant's proposed business was based on subscription fees and advertising revenue, both of which depend on the number of subscribers a licensee has acquired, the Authority was concerned about the viability of the applicant's business plan.

44.8.2 Financial projections and cash flow analysis

44.8.2.1 The information provided by the applicant showed that the applicant would experience a net loss during the first two years of its operations, and thereafter it would make profit. ⁶⁹

44.8.2.2 The applicant submitted that interest on shareholder loans would only be paid in the applicant's first 7 years of operation and that it would meet its other debt obligations. ⁷⁰

44.8.2.3 Due to limited information, the Authority could not assess the applicant's liquidity. However, the applicant submitted that it would acquire current assets from its third year of operation with no liabilities indicated for the first 8 years. ⁷¹ The applicant

⁶⁶ Close TV application: p 66.

⁶⁷ Close TV application: pp 68-69

⁶⁸ Close TV application: p 68 and Appendix 22.1, p 124.

⁶⁹ Close TV application: Appendix 13.2, p 86.

⁷⁰ Close TV application: Appendix 14, p 94.

⁷¹ Close TV application: p 90.

also submitted a list of assets it would acquire in its first year of operation, while new assets would be acquired by year 6.⁷²

44.8.2.4 The applicant indicated that its peak funding requirement would be R120.4 million.⁷³ However, the applicant indicated during the public hearings that, due to foreign exchange adjustments between the time of submitting the application and the date of the public hearings, its funding requirements had increased from R120.4 million to R135 million.⁷⁴ Based on its original application, the applicant's projected cash flow statement indicated that the applicant would make use of interest-bearing borrowings (R72.254 million) and equity funding (R48.169 million) to fund its business operations.⁷⁵

44.8.3 Funding and methods of raising capital

44.8.3.1 In its application, the applicant submitted that its business would be financed by way of equity (40%) and debt (60%) financing.⁷⁶

44.8.3.2 The applicant submitted that equity funding would be raised by way of a private placement of 49 million shares in favour of Media Corner for consideration of R48.2 million.⁷⁷ The applicant submitted further that it would raise the balance of its funding by way of debt financing.⁷⁸ The applicant indicated that Media Corner would fund this acquisition through a bank loan. In this regard, the applicant submitted a letter from Nedbank Limited which indicated that Nedbank was willing to assist Media Corner with the necessary funding should the need for such funding arise.⁷⁹ In the Authority's assessment, the proof of funding provided by the applicant was insufficient as it was merely a letter expressing that Media Corner was in good standing with Nedbank and that Nedbank was "favourable to assisting with necessary funding should [the applicant] be successful with its licence application".⁸⁰ In the Authority's assessment, the letter from Nedbank was not a funding guarantee for the total amount that would be required by the applicant, but rather indicated that Nedbank would be "favourable" to providing the funding to Media

⁷² Close TV application: Appendix 15, p 96.

⁷³ Close TV application, p 78.

⁷⁴ Public hearing transcript, 25 July 2013, p 35.

⁷⁵ Close TV application: Appendix 13.1, p 84.

⁷⁶ Close TV application: p 92.

⁷⁷ Close TV application: p 117.

⁷⁸ Ibid.

⁷⁹ Post-hearing submissions, letter from Nedbank, submitted on 20 August 2013.

⁸⁰ Ibid.

Corner, only in the event that the licence is issued to the applicant.⁸¹ In other words, if, after conducting a due diligence of the applicant, Nedbank decided not to provide Media Corner with the proposed funding, it is likely that the applicant would have insufficient funds to commence its operations.

- 44.8.3.3 The applicant indicated further that it had appointed Theko Capital to raise the balance of funding from commercial banks and development financial institutions.⁸² This letter indicates that Theko Capital was “in discussions with some of the leading financial institutions”, but did not confirm that the applicant would be able to obtain the balance of the funding. In the Authority’s assessment, the applicant did not provide adequate proof for the balance of the funding required by the applicant and, in the Authority’s assessment, the applicant would have been dependent on funds raised through the issuance of shares to Media Corner as indicated by the applicant’s revised shareholders’ agreement.⁸³ In other words, the Authority was not satisfied that the applicant would have been able to source the required debt funding for the proposed venture from financial institutions.

44.9 Demand, need and support

- 44.9.1 The applicant indicated that South Africa has a thriving and socially active LGBT community, a small and but well-supported LGBT film industry and a relatively developed LGBT-orientated lifestyle industry (hotels, bars and nightclubs), especially in Cape Town which has been voted the LGBT travel capital of the world for the last three years. The applicant submitted that this indicates that Close TV, which focuses on the LGBT community, will be a viable business venture.⁸⁴
- 44.9.2 Against this background, the applicant submitted that there is an absence of LGBT-friendly content within South Africa’s mainstream broadcasting industry, either on pay TV or free-to-air platforms and, as such, the needs of the LGBT community in South Africa have been overlooked. The applicant’s intention was that the proposed service would appeal to this niche market.⁸⁵ The applicant submitted that, by providing premium international content, conceptualized and designed around the lifestyle habits of the modern global LGBT community, coupled with socially relevant and captivating locally produced content, produced around specific needs of this community, it would serve the viewing preference of

⁸¹ Post-hearing submissions, letter from Nedbank, submitted on 20 August 2013.

⁸² Post-hearing submissions, letter from Theko Capital, submitted on 20 August 2013

⁸³ Post-hearing submissions, shareholders’ agreement, submitted on 20 August 2013.

⁸⁴ Close TV application: pp 62 and 129.

⁸⁵ Close TV application: p50.

the South African LGBT community.⁸⁶

- 44.9.3 The applicant included the A.B.N.S.A Gay Consumer Profile of 2008 and the Lunchbox Media Consumer Profile of 2012 in its application, as market-related research, forming part of its evidence of need, demand and support of its proposed service.⁸⁷ In this regard, the applicant submitted that it had conducted a tailored market research survey of more than 22 000 respondents in its target market, during 2008 and 2012.⁸⁸ During the public hearings the applicant indicated that it had asked respondents three questions: (1) are you an existing pay-TV subscriber?, (2) would you subscribe to an extra LGBT satellite TV service?, and (3) what would you pay per channel on the service? The applicant submitted that 78% of respondents indicated that they would subscribe to an extra LGBT satellite TV service.⁸⁹
- 44.9.4 The applicant submitted that its market research revealed that the South African LGBT population is estimated 5 million individuals and that a significant percentage of the community is urbanised, well-educated and employed, with the most densely populated age group band in this community being 18-45 years.⁹⁰ Based on this market research, the applicant indicated that the nature of its proposed programming was intended to have crossover appeal to certain few key demographics, most notably, men and women in the LGBT community between the ages of 18-45 with an income level above LSM 5 and higher.⁹¹
- 44.9.5 The applicant submitted further that existing broadcasters would not launch this kind of service, which is targeted specifically at the LGBT community, on mainstream television and that the applicant would accordingly be uniquely placed to provide the service.⁹² The applicant submitted that, if the applicant were not granted a subscription broadcasting service licence, the LGBT community would continue to go unserved and the lucrative commercial appeal contained within this market would continue to go untapped.⁹³
- 44.9.6 In its written submission, Kagiso TV questioned the applicant's lack of research in relation to its target audience, as well as the lack of nuance displayed in not identifying racial, language and class differences that exist in these communities.⁹⁴ Kagiso TV further questioned the methodology used by the applicant to conduct the market research and the

⁸⁶ Close TV application: pp 66 and 128.

⁸⁷ Close TV application: Appendix 25, pp 132-146.

⁸⁸ Public hearing transcript, 25 July 2013, p 38.

⁸⁹ *Ibid.*

⁹⁰ Close TV application: pp 64-65.

⁹¹ Close TV application: p 128.

⁹² Close TV application: pp 129-130.

⁹³ Close TV application: p 130.

⁹⁴ Kagiso TV, written representation, p 2, para 2.3 and p 5, para 4.

statements made by the applicant relating to the size of the South African LGBT community.

⁹⁵ In other words, the contention made by Kagiso TV was that the method used by the applicant skewed the results in favour of a particular section of the LGBT community that has access to resources such as the internet, and that it was therefore not representative of the proposed target market. ⁹⁶ Kagiso TV also submitted that the applicant proposed that it would source international content, but the applicant failed to indicate how this content would appeal to its South African audience, as the applicant, in its research, never considered this issue. ⁹⁷

44.9.7 After considering the information submitted by the applicant, the Authority could not establish how the applicant came to any of its conclusions in quantifying sustainable demand and support for the proposed service to justify the award of a subscription broadcasting licence. In the Authority's assessment, while the applicant demonstrated that its service offering would provide diversity in the market and indicated a potential need for its proposed service, the applicant's market research was not comprehensive and this made any substantive analysis difficult. For example, the focus of both studies was the lifestyle of the LGBT community with specific interest in their consumption habits, purchasing patterns and motivations. However, in the Authority's assessment, both studies relied upon by the applicant show no relation between the demand and need for Close TV services and the LGBT community; instead, both studies appeared to focus solely on the consumer habits of the LGBT community. In the Authority's assessment, the studies also do not demonstrate the size of the market, which would actually be interested in the applicant's proposed offering. In other words, the market research only asked respondents whether they would be interested in a service catering to the needs of the LGBT community, but does not assess demand or need for the applicant's proposed offering. In the Authority's assessment, this is particularly relevant given that the LGBT community, in itself, is a diverse audience, which would likely have different interests, demands and needs. As such, in the Authority's assessment, neither study provided by the applicant could be relied upon as evidence of need and demand for the proposed service to be offered by the applicant.

44.9.8 Despite the concerns raised above, the applicant submitted that it estimated that the total subscriber uptake after year 8 would be 236 472 subscribers, i.e. almost half of the total LGBT community, which represents approximately 27.5% of the overall target market within LSM 5 and higher. ⁹⁸ In this regard, the applicant forecast subscriber uptake to be an additional 3155 subscribers per month and approximately 38 102 households by the end of the first year

⁹⁵ Kagiso TV, written representation, p 5, para 4.2.

⁹⁶ Kagiso TV, written representation, p 5, para 4.3.

⁹⁷ Kagiso TV, written representation, pp 5-6.

⁹⁸ Close TV application: Appendix 26, p 150.

of operations.

44.9.9 The applicant submitted further that its market research feedback indicated that 78% of its potential audience supported its proposed service and also indicated that there was a willingness to pay a monthly subscription fee of more than R95 for this service.⁹⁹ However, as indicated above, in the Authority's assessment, the market research conducted by the applicant was insufficient, particularly as the applicant did not state from where it sourced this information, how it reached its conclusions and provided no evidence to corroborate its assumptions. In summary, the Authority is not satisfied that the applicant demonstrated sufficient demand, need and support for its proposed service offering.

44.10 Complaints and codes of operations

44.10.1 The applicant indicated that it would provide to its subscribers and other parties an opportunity to submit complaints and comments regarding the service directly to the applicant, and/or to other external regulatory bodies.¹⁰⁰ The applicant submitted further that it sought to embrace an overall strategy of customer service, supported by the customer service operations through a call centre service, a customer service centre and its website.¹⁰¹

44.10.2 The Applicant indicated that it would train employees to receive and respond to complaints and comments in order to support the call-centre service and customer service centre.¹⁰² In addition, the applicant intended on having an internal complaints officer to consider complaints relating to broadcasting, material and regulatory issues.¹⁰³

44.10.3 The applicant indicated that compliance with legislation, licence conditions and regulations would be the responsibility of its regulatory compliance officer.¹⁰⁴ The applicant further stated that compliance with content-related legislation and licensing conditions would be the responsibility of the head of content.¹⁰⁵ In this regard, the applicant submitted that the regulatory compliance officer and the appointed media attorneys would guide the applicant in terms of various pieces of legislation and updates

⁹⁹ Close TV application: p 151.

¹⁰⁰ Close TV application: p 152.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Close TV application: p 154.

¹⁰⁵ Ibid.

to ensure compliance.¹⁰⁶ The applicant also indicated that subscriber management and advertising would be the task of the marketing director and the director of operations.

¹⁰⁷

44.10.4 The applicant indicated that it would subscribe to the National Association of Broadcasters (NAB), as well as the Broadcasting Complaints Commission of South Africa (BCCSA).¹⁰⁸

44.11 Programming

44.11.1 The applicant submitted that it would source, package and distribute a bouquet of three or four channels that would be established using LGBT-themed programming. This programming would include fashion, travel, home décor and improvement, news and gossip, magazine-style shows, technology and business, general lifestyle, talk shows, drama series, sitcoms, comedy, reality TV, culture and education, documentaries and movies.¹⁰⁹

44.11.2 However, as discussed in further detail above, in the Authority's assessment, the applicant's market research did not consider what type of programming its intended audience wished to view. The applicant appeared to base its research on the LGBT community's lifestyle as opposed to the LGBT community's need for the particular service that the applicant proposed to provide and as a result, the Authority could not ascertain the basis for the proposed service offering.

44.11.3 The applicant indicated that the general format of content would include:¹¹⁰

44.11.3.1 30 or 60 minute general entertainment and lifestyle shows;

44.11.3.2 60 or 90 minute feature and library movies;

44.11.3.3 30, 45 or 60 minute documentaries, and cultural and educational programming;

44.11.3.4 5, 10 or 15 minute feature, lifestyle and general entertainment promos and bumpers; and

44.11.3.5 ad hoc features, announcements and specialised programming.

¹⁰⁶ Close TV application: p 155.

¹⁰⁷ Ibid.

¹⁰⁸ Close TV application: p 156.

¹⁰⁹ Close TV application: p 158.

¹¹⁰ Ibid.

44.11.4 The applicant submitted confirmation that it was in the process of finalising exclusive content licence rights with the following content providers:

44.11.4.1 Out TV Canada and affiliates within the United States of America; ¹¹¹

44.11.4.2 Out TV Netherlands and affiliates within Europe; and

44.11.4.3 Out In Africa Film Festival and Libraries and other existing LGBT content owners. ¹¹²

44.11.5 While the applicant included memoranda of understanding with its potential programme suppliers in its application, there was no firm commitment shown or contracts signed with any of the proposed content providers. ¹¹³

44.11.6 The applicant submitted further that it intended on engaging local production houses for conceptualization and format creation for original, locally commissioned and produced content. ¹¹⁴

44.12 Compliance with the Content Regulations

44.12.1 The applicant undertook to comply with Content Regulations. However, its application indicated that in its first year of operation, the applicant's local content target was indicated to be 9%, which does not comply with the 10% local content requirement stipulated in the Content Regulations. The applicant indicated that it would be willing to comply with the Content Regulations from its second year of operation onwards. ¹¹⁵ During the public hearings, however, the applicant indicated that it would be in a position to meet the 10% local content requirement from its first year of operation. ¹¹⁶

44.12.2 While the Authority did consider the applicant's assertion during the public hearings that the applicant would be in a position to meet the 10% local content requirement, based on the information provided in its application, the Authority is not satisfied that the applicant took adequate steps to ensure compliance with the 10% local content requirement, particularly in its first year of operation. The Authority is further of the view that the applicant would have needed to take steps to revise its submitted financial projections and proposed programming

¹¹¹ Close TV application: Appendix 29.1, p 160.

¹¹² Close TV application: Appendix 29.2, p 162.

¹¹³ Close-T application: p 166

¹¹⁴ Close TV application: p 166.

¹¹⁵ Close TV application: p 180.

¹¹⁶ Public hearing transcript, 25 July 2013, p 38.

schedule, none of which were done.

44.13 Technical

- 44.13.1 The applicant indicated that it would use Globecast as its preferred signal distributor.¹¹⁷ The applicant submitted that Globecast is a global provider of transmission services for broadcast delivery on the DTH satellite platform, and that Globecast currently holds 596 MHz of spectrum in the Ku uplink band in South Africa used for satellite uplinks.¹¹⁸
- 44.13.2 The applicant submitted that the configuration of its proposed network and delivery of the broadcasting service would be achieved utilising a satellite radio network, and that the service will offer a satellite bouquet providing up to five video channels.¹¹⁹
- 44.13.3 The applicant indicated that it intended making use of transponder capacity on the Intelsat New Dawn satellite on the FSS Ku band to deliver encrypted television channels with a Conditional Access System (CAS) to its subscribers' set top boxes.¹²⁰ The applicant indicated further that all channels would be coded using an MPEG4 compression algorithm and DVB - S2 modulation.¹²¹
- 44.13.4 Globecast currently holds an individual electronic communications network service (ECNS) licence, and also currently holds a spectrum licence on the Ku band that it utilises for uplink feeds. The Authority notes that international conventions impose the Ku band downlink, which is reliant upon commercial agreements between the applicant and its satellite operator, Intelsat. However, the applicant did not indicate whether it or Globecast had such a commercial agreement in place with Intelsat.
- 44.13.5 In its written submission, Kagiso TV expressed its concerns regarding the lack of clarity with respect to the applicant's satellite operator, particularly given that the satellite operator would provide the necessary transponder capacity.¹²² However, the applicant indicated that New Dawn satellite, which is operated by IntelSat, would provide the necessary transponder capacity.¹²³ The Authority is satisfied with the applicant's response in this regard.
- 44.13.6 Based on the information provided by the applicant, the Authority is satisfied that the

¹¹⁷ Close TV application: p 167.

¹¹⁸ Close TV application: p 181.

¹¹⁹ Close TV application: p 183.

¹²⁰ Close TV application: p 203.

¹²¹ Close TV application: p 191.

¹²² Kagiso TV written representation, para 7.

¹²³ Close TV application: p 185.