



Discussion Document on the Market Inquiry into Signal Distribution Services in South Africa

18 July 2022

(Without information included in the Form to Request for
Confidentiality in terms of Section 4D of the ICASA Act)

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1. Introduction

- 1.1. SENTECH thanks the Independent Communications Authority of South Africa (ICASA) (“Authority”) for the opportunity to make a submission on the *Discussion Document on the Market Inquiry into Signal Distribution Services in South Africa* (“*Discussion Document*”) as published in Government Gazette No. 46255 on 22 April 2022. SENTECH seeks the opportunity to make oral presentation on the Market Inquiry.
- 1.2. Many of the issues dealt with in the *Discussion Document* have been raised by stakeholders in a range of other forums and SENTECH welcomes the fact that the Authority has initiated this process. Policy and regularity clarity on these matters is critical to broadcasters, content providers and Electronic Communications Network Service (ECNS) licensees in order to create an enabling environment for growth in the sector.
- 1.3. SENTECH subscribes to the definition prescribed by the Electronic Communications Act (ECA) with respect to Broadcasting Signal Distribution being an end-to-end service:

“broadcasting signal distribution” means the process whereby the output signal of a broadcasting service is taken from the point of origin, being the point where such signal is made available in its final content format, from where it is conveyed, to any broadcast target area, by means of electronic communications and includes multi-channel distribution;
- 1.4. The access network as defined in the *Discussion Document* is purely a component of the Broadcasting Signal Distribution Network.
- 1.5. SENTECH would like to bring to the attention of the Authority that the framework the *Discussion Document* is based on has seen very little changes in the last 20 or so years and does not take into consideration the impact of digital transformation on service provisioning and how services are consumed. The framework does not balance the regulations “*applying to traditional broadcasters, video-on-demand providers and video-sharing platforms in light of new developments in the area of convergence between the internet and traditional media*”¹.
- 1.6. SENTECH would appreciate an opportunity to make oral presentation, in support of the company’s submission.

2. Current Broadcast Environment

- 2.1. Since inception of the Digital terrestrial television (DTT) network, broadcasters have moved from their original network as follows:

¹ <https://en.unesco.org/creativity/policy-monitoring-platform/audiovisual-media-services-eu>

- Multiplex 1 originally included 183 sites and will only now broadcast on 99 sites, at the request of the SABC;
- Multiplex 2 originally included 100 sites and will only now broadcast on 14 sites at the request of e.tv and M-NET;
- As the Authority is aware, e.tv is yet to conclude an agreement in terms of sub-regulation 9(2) of the Digital Migration Regulations.

- 2.2. The broadcast environment over the course of time have evolved from traditional terrestrial service provisioning with new IP-based technologies for broadcast enabling consumer choice to content, platforms and on demand viewing patterns.
- 2.3. The graph below, *Figure 1*, as obtained by AC Nielson summarises the advertising revenue for Free-to-Air Television (FTA) over a ten (10) year period. The trend of the graph illustrates the impact of streaming services on advertising revenue for FTA broadcasters, since the former's introduction around 2016.
- 2.4. Furthermore, advertising spend was additionally impacted by the country's environmental economic factors, such as economic decline and Covid-19 regulations. All these factors should be considered barrier of entry for FTA traditional broadcasters dependent on advertising revenue for their operations.

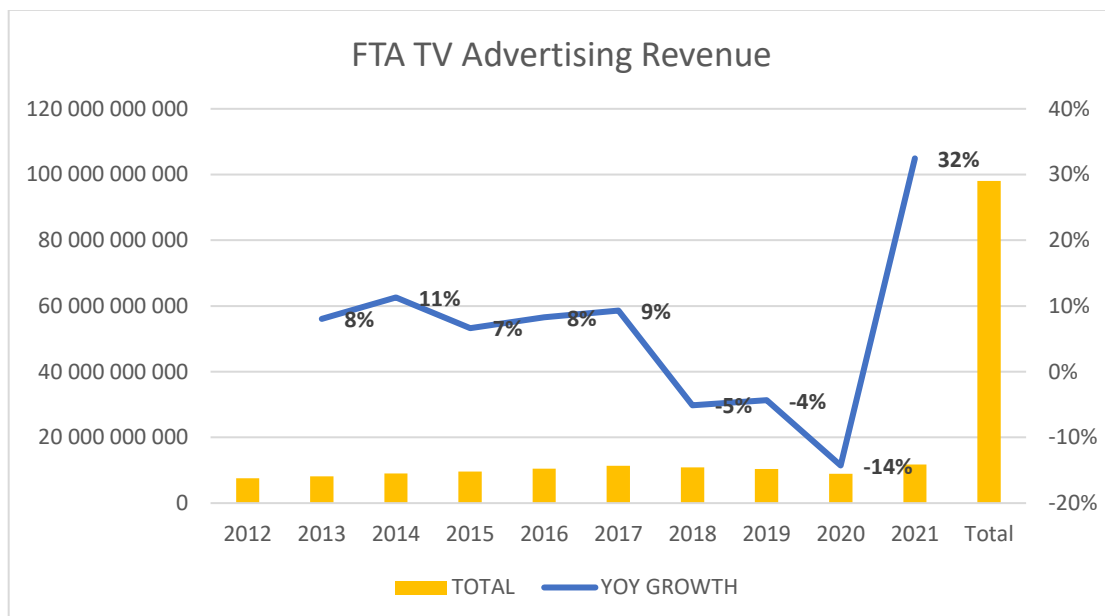


Figure 1: FTA TV Advertising Revenue

- 2.5. As demonstrated in 2.2, a similar study was conducted by AC Neilson for radio broadcasting whereby the same trends within the radio broadcast environment experienced, especially since more consumers have the ability to stream content in both fixed and mobile modes.
- 2.6. The graph below, *Figure 2*, shows the same advertising revenue trends as those shown in traditional television environment.

- 2.7. SENTECH urges the Authority to take cognisance of the entire broadcast environment as a whole in its deliberations when looking at market definitions and the manner in which broadcasting in its entirety have evolved over the past decade.

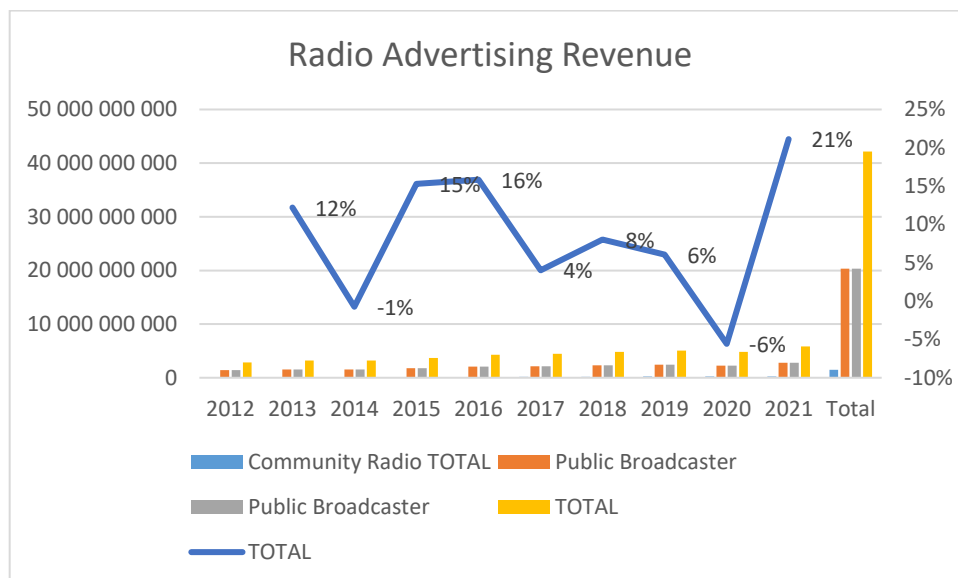


Figure 2: Radio TV Advertising Revenue

3. Justification for the Withdrawal of the Discussion Document

- 3.1. SENTECH respects the Authority's independence to regulate the broadcasting industry as stated in Section 192 of The Constitution of the Republic. The company, additionally, respects the Authority's rights to undertake the proposed inquiry in terms of Section 4B of the ICASA Act, with the intention to determine if there is a need for regulatory intervention in terms of Section 67 of the ECA.
- 3.2. SENTECH submits that, in pursuance of the objectives set out in section 2(b) and (x) of the ECA, as well as the mandate contained in section 3(4) of the ECA, that there are reasons, justifying the withdrawal of the *Discussion Document* namely.: 1) Draft White paper on Audio and Audiovisual Content Services Policy Framework; 2) Digital Sound Broadcasting Regulations; 3) Broadcasting Digital Migration Policy; 4) Digital Migration Regulations; 5) Promotion of Diversity and Competition on Digital Terrestrial Television Regulations; 6) Terrestrial Broadcasting Frequency Plan 2013; 7) Restacking process; 8) State-Owned Entity Rationalisation Process; and 9) Facilities Leasing Regulations.

3.2.1. Draft White paper on Audio and Audiovisual Content Services Policy Framework

The Authority is obligated, in terms of Section 3(4) of the ECA, to “consider policies by the Minister in terms of subsection (1) and policy directions issued by the Minister in terms of subsection (2)”. The Minister, through the publication of the *Draft the White Paper on Audio and Audiovisual Content Services Policy Framework: A New Vision for South Africa 2020* for public consultation clearly indicated the intention to make Policy. The Ministry has

received public submissions and held a number of public workshops and hosted an online Colloquium on 16 February 2022.

During the Department's Annual Performance Plan 2021/22 presentation to the Portfolio Committee on Communications held on 22 March 2022, feedback was provided that subsequent to public consultations, the Draft White Paper on the Audio and Audio-visual Content Services Policy has been revised. Taking into consideration that the *Draft White Paper on the Audio and Audio-visual Content Services Policy* proposes legislation amendments, it is reasonable to assume that the feedback related to the *Electronic Communications Amendment Bill* submitted to Minister will contain changes affecting the broadcasting industry.

SENTECH argues that the outcome anticipated by the changes proposed by the *Draft White Paper on the Audio and Audio-visual Content Services Policy* makes the Discussion Document in its current form unnecessary. For example, the policy process seeks to:

- To introduce transformative framework that will overthrow the “current broadcasting distribution ecosystem and [change the] way that viewers consume audio and audio-visual content”
- Address the challenge that the country's broadcasting legal framework has changed so little in the last 25 years that it is not in synch with the digital transformative nature of the digital economy.
- Introduce a framework recognising that convergence and technology neutrality implies telecommunication and broadcasting industries provide crucial infrastructure for audio and audio-visual content services (AAVCS).

*“audio and audiovisual content service” means a service where the principal purpose of the service or a dissociable section thereof is devoted to providing audio and/or audiovisual programming to inform, entertain and educate the public and is **distributed over electronic communications networks** under the editorial responsibility of a recognised natural or juristic person.*

- Introduce a framework that will encourage that the “[s]carce terrestrial radio frequency spectrum [is] licensed through a competitive licensing process” to ECNS licensees
- Introduce a regulatory framework that recognises “three broad types of AAVCS using electronic communication networks” namely: “linear broadcasting services, non-linear on-demand content services and video sharing platform services (VSPS)”

The *Draft White Paper on the Audio and Audio-visual Content Services Policy* recognises that the two (2) multiplex DTT environment is an interim approach and the 2008

Broadcasting Policy did not accommodate for digital broadcasting beyond ASO. In terms of Section 3(2) of the ECA the *Draft White Paper on the Audio and Audio-visual Content Services Policy*, it is intimated that the Minister will issue a policy direction for the following, *inter alia*:

- *The regulator must conduct an inquiry to put in place the licensing framework for DTT post ASO and to determine the capacity required on DTT Multiplexes by the existing broadcasting service licensees after the ASO and the implementation of the seven-multiplex plan.*
- *It should also consider the availability of public, community and commercial audio broadcasting services on audio bouquets carried on the DTT platform.*
- *A key characteristic of Community Television is that it is local and is services a specific geographic community or community of interest.*
- *Therefore, the regulator must investigate alternatives to carriage on national/provincial DTT multiplexes that will allow for community TV to remain local, such as the potential to create local television DTT Muxes using radio frequency spectrum currently used by analogue Television broadcasting services in 174 - 223MHz and 238 - 267MHz [band], when those services are migrated to DTT in the 470 -694MHz band.*

SENTECH argues that there is reasonable justification for the Authority to withdraw the Discussion Document based on the scope of the *Draft White Paper on the Audio and Audio-visual Content Services Policy*.

3.2.2. Digital Sound Broadcasting Regulations

The *Discussion Documents* reads as if the Authority is single-minded on the need to introduce regulations in terms of Section 67 of the ECA. Regarding terrestrial audio services, there is no acknowledgement by the Authority of the *Digital Sound Broadcasting Services Regulations* (DSB) published on 23 April 2021, Government Gazette No. 44469. The Authority's assumptions in the *Discussion Document* failed to acknowledge that the DSB creates a framework for digital terrestrial audio services and has identified two (2) markets for terrestrial digital sound broadcasting, namely: primary and secondary markets. The *Discussion Document* fails to acknowledge the regulatory framework introduced by the DSB regarding a competitive process for the introduction of a multi-channel distributor as a multiplex operator.

With respect to spectrum requirements, the Discussion Document does not acknowledge that there are no terrestrial audio services in the band 214 – 240 MHz and the band will be freed from analogue terrestrial television services by ASO. Issues of simulcast as defined in the DSB are generally not applicable in the FM band as broadcasters have the option to

dual illuminate on the same frequency channel already assigned and licensed. SENTECH posits that the Authority's exclusion of the DSB implies that any conclusion on digital terrestrial audio services will likely be distorted.

Additionally, there is no mention of the Discussion Document on the Optimization of the Frequency Modulation Sound Broadcasting ("FM Document"), Government Gazette No. 46152 as published on 31 March 2022. The FM Document is the result of the ATU Project on the optimization of the GE84 Plan for Africa in collaboration with the ITU BR. The purpose of the optimisation is quoted below: :

"The main purpose of the optimization is to achieve an efficient use of the VHF 87.5-108 MHz ("FM") band for analogue sound broadcasting and to allocate new frequencies for assignment to meet the increasing need for additional frequencies in African countries".

3.2.3. Broadcasting Digital Migration Policy

The *Discussion Documents* does not fully acknowledge nor appreciate the scope of the Broadcasting Digital Migration Policy (BDM) especially when the broadcasting digital migration was identified as a national priority project and funded accordingly. The BDM clearly indicated the migration as a short-term project, initially planned for three (3) years. The policy intervention is limited to the digital migration period. Commercial broadcasters referred to in the BDM were given the option to self-provide but chose to be carried on the state funded network by SENTECH on a "non-preferential and non-discriminatory basis".

The Authority's assumptions on digital terrestrial broadcasting services ignore the fact that maintenance of the DTT network during dual illumination is not funded by the State and all network refresh requirements have been at the cost of SENTECH since commercialisation only happens after ASO. Only dual illumination costs are funded until ASO. SENTECH accepts the rationale for the *Discussion Document* in the light of the complaints by some broadcasters regarding the cost of signal distribution in the digital era.

3.2.4. Digital Migration Regulations

The *Discussion Documents* does not acknowledge the *Digital Migration Regulations (DMR)*, Government Gazette No. 36000 of 14 December 2012, despite the DMR being the only existing framework for capacity allocation on the two (2) multiplex plan in compliance with Annexure G of the Terrestrial Broadcasting Frequency Plan 2013 (TBFP 2013), Government Gazette No. 36321 of 2 April 2013 (TBFP 2013). The DMR seeks to:

- *Regulate the digital migration of the existing television channels;*

- *Prescribe the conditions for the assignment of channel capacity in Multiplex 1 and Multiplex 2 for the purposes of the digital migration and the creation of a platform for DTT;*
- *Prescribe the procedure for the authorisation of digital incentive channels; and*
- *Set the time frames which the terrestrial television broadcasting services licensees must provide for dual illumination.*

The Authority in the *Discussion Document*, with respect to DTT, does not acknowledge that regulation 10 of DMR imposes the obligation of coverage stated in sub-regulation 10(1) to the ECNS licensee/s. In the *Discussion Document* the Authority is not accurate in its assumption regarding analogue and digital terrestrial television services being commercially available simultaneously. Sub-regulations 3(6) and 9(8) contradict this assumption.

Additionally, the Authority is aware that sub-regulation 9(10) protects the rights of broadcasters with ECNS licences to self-provide, a matter the Discussion Document does not acknowledge, nor appreciate. Sub-regulation 11(2) contradicts some of the assumptions made by the Authority regarding the availability of radio services (national, regional or local) in terms of access to spectrum. Sub-regulation 11(2) reads:

*A terrestrial television broadcasting service licensee may provide data services and, **subject to agreement with the relevant channel provider, radio channels** using the capacity allocated to it in Multiplex 1 or Multiplex 2, as the case may be, “for the purpose of enhancing service to end-users: provided that any data services and radio channels may not utilise more than fifteen percent (15%) collectively of the capacity allocated to the licensee.*

Empowered by the DMR, any broadcaster provided multiplex capacity in terms of the DMR has the opportunity to make radio services, own or sanctioned, available regionally or nationally via the digital television platforms. It is important to note that the DMR does not limit the provision of radio services to DTT, additional services are currently included on the DTH platform. SENTECH is concerned that some of the incorrect assumptions and regulatory exclusions influenced the effectiveness of the assessments in the *Discussion Document*.

3.2.5. Promotion of Diversity and Competition on Digital Terrestrial Television Regulations

The *Discussion Documents* indicates that the purpose of the process “*is to assess the state of competition in the provision of signal distribution services*”. What is conspicuously missing from the assessment is the review of the previously published ITA, including those introduced in terms of the *Promotion of Diversity and Competition on Digital Terrestrial*

Television Regulations (PDCDTTR) published in Government Gazette No 37929 of 22 August 2014 (Promotion of Diversity and Competition Regulations).

SENTECH posits, in principle of fair assessment, that the Authority should have included in the *Discussion Document* outcomes or challenges linked with previous ITAs such as: 1) ITA for individual Commercial Free to Air Television Broadcasting Service Licence, Government Gazette No. 37953 of 29 August 2014; 2) ITA Multiplexer 3 (Mux 3) Radio Frequency Spectrum Licence To Provide Commercial Television Broadcasting Services Government Gazette No. 39191 of 10 September 2015; 3) ITA for Multiplexer 3 (MUX 3) radio frequency spectrum licence for 45% of MUX 3 capacity for provision of commercial subscription television broadcasting services, Government Gazette No. 41799 of 26 July 2018; 4) ITA for pre-registration for Digital Community Television Broadcasting Service and Radio Frequency Spectrum Licences on multiplex 1 (Mux 1) frequencies, Government Gazette No. 43088 of 12 March 2020.

3.2.6. Terrestrial Broadcasting Frequency Plan 2013

The *Discussion Documents* erroneously does not acknowledge the importance of the TBFP 2013 with respect to the Authority's powers to introduce competition in broadcasting (audio and audio-visual) and ECNS services. The Authority exercised such powers when drafting and gazetting the DSB, by introducing a competitive method for the licencing of the multi-channel operator (multiplex operator). Additionally, it is important to concede that the introduction of terrestrial digital sound broadcasting policy and regulatory frameworks has been mainly driven by the broadcasting industry through lobbying. Therefore, the cost of the introduction of terrestrial digital sound broadcasting will not be carried by the State.

As indicated previously, the terrestrial television migration is a government initiated and funded programme meant to encourage the introduction of additional terrestrial broadcasting services. The programme caters for the introduction of two (2) multiplexes shared between the following broadcasters: 1) SABC and Community broadcasters; and 2) e.tv and M-NET, supported by the Authority through the introduction of the DMR. The DBM and DMR are both temporary and transitional policy and regulatory instruments supported by Annexure G of the TBFP 2013. Annexure J of the TBFP 2013 introduces a second migration of DTT services to below 694 MHz, a programme not supported by the State.

It is therefore difficult to appreciate how the Authority contemplates competition for the “*wholesale market for the provision of...digital managed transmission services for terrestrial radio broadcasting*” at the time SENTECH is required to facilitate the restacking process whilst undertaking the ASO programme. The *Discussion Document* fails to recognise that the State funded DTT network will not be fully commercialised as a consequence of the

reduced coverage demand by broadcasters compared to the national network deployed by SENTECH. Consequently, SENTECH will be unable to recover the majority of the cost of maintaining the DTT network. Annexure J of the TBFP 2013 introduces a seven (7) multiplex plan, currently being operationalised through the restacking process in the absence of a regulatory framework supporting the plan. As indicated previously, SENTECH argues that the inquiry should delve deeper into the market structure and cost of content distribution which is worsened by the escalating costs of signal distribution. Therefore SENTECH believes that the Inquiry should be framed appropriately.

3.2.7. State-Owned Entities Rationalisation

In 2017 Cabinet announced the creation, by way of Rationalisation process, of a new State-Owned Entity (SOE) through the merger of SENTECH, Broadband Infraco and some business units of SITA. Rationalisation aims to streamline state resources and create efficiencies by reducing duplications through merging entities with similar and overlapping mandates. In line with the principles of the National Development Plan (NDP) Policy, the State Digital Infrastructure Company (SDIC) will be a vehicle identified as a progressive interventionist tool.

SDIC's mandate will complement private sector investment in connectivity by accelerating digital infrastructure to underserved, unserved and rural areas through public funding in compliance with Strategic Infrastructure Project 15 (SIP 15). The introduction of SDIC as an interventionist tool by the Minister complies with the communications enabling legislation. The enabling legislation, ECA, empowers the gazetting of a policy direction to "initiate and facilitate intervention by Government to ensure strategic ICT infrastructure investment"².

The Authority must be aware that the rationalisation process, which includes legislative processes, is expected to be completed within the current financial year, 2022/23. On the basis of this legislative process, SENTECH argues that the *Discussion Document* comes at an inopportune time.

On 2 June 2021 the DCDT provided the following updates to the Portfolio Committee of Communication on the SDIC:

- *Alignment of SOCs at all spheres of Government in order to achieve the developmental objectives and aspirations of South Africa.*
- *The PRC [Policy Review Committee] calls for continued in-depth micro assessment of SOCs to assist the merging of many entities.*

² Section 3((1A)(a) ECA

- *Alignment/Rationalization of ICT SOCs in order to achieve the developmental objectives and aspirations of South Africa.*
- *As part of the required consultations, the Department developed and submitted to the Office of the Chief State Law Advisor (OCSLA) a draft business case and bill for the merger of BBI and SENTECH in order to get a legal opinion and certification.*
- *The legal opinion necessitated the following parallel processes which the department then embarked on:*
 - **Legislative Process:** *The Department enlisted the services [of] the Government Technical Advisory Centre (GTAC), which assisted in enhancing the relevant policy imperatives and principles for both the SDIC business cases.*
 - *As part of section 38 (1) (m) of the PFMA, the department submitted the enhanced business case to the National Treasury and the DPSA for consent. The intention is to finalize the business case by the end of first quarter (30 June 2021).*
 - *The drafting of the bill will commence in the second quarter.*
- **The New Company's Act:** *The received legal opinion further opined that "it is legally permissible to merge SENTECH and BBI invoking the provisions of section 113 of the new Companies Act" as long as:*
 - *The solvency and liquidity requirements of these two entities are satisfied in accordance with section 4 of the new Companies Act;*
 - *In such circumstances, and where the provisions of section 113(1) are met, the proposed merger must also meet the requirements of section 113(2), requiring a written agreement to be concluded between the two entities, setting out the terms and means of effecting the merger;*
- *Section 113(4) also requires that the Board of each of the merging entities consider whether upon implementation of the agreement each proposed merged company would satisfy the liquidity and solvency test; and if the Board reasonably believes that each proposed merged company would satisfy the solvency and liquidity test, it may submit the agreement for consideration at the shareholders meeting of the merging company in accordance with section 115.*
- *The shareholder conversion for BBI has been key to ensuring the BBI meets the solvency and liquidity requirements of section 113. This has since been resolved and the Minister in a position to request the Boards to start with the cooperation agreement and take the process forward. The entities are expected to start with this process by the beginning of the second quarter.*

- *The department and both the entities has also started with the enhancement of the back section of the business case which encompasses the formation of the implementation strategy and corporatisation of the new entity³.*

SENTECH argues that in terms of Section 3(1)(h) of the ECA there is a justifiable expectation that the Authority should not proceed with the *Discussion Document* in the middle of the finalisation of the restructuring and merger of SENTECH and BBI to create a new entity SDIC.

3.2.8. Facilities Leasing Regulations

SENTECH is concerned that the Authority did not consider the impact of *Facilities Leasing* (Government Gazette No. 33252 of 31 May 2010, as amended) on the composition of the value chain, in as far as signal distribution is concerned. Kerron Edmunson succinctly states the purpose of facilities-leasing as following:

- 1) *For the lessor: a source of annuity income which is not regulated; a competitive advantage; a capital asset that generates revenue.*
- 2) *For the lessee: a reduction in capex; the appearance to the consumer of national, provincial or municipal coverage; flexibility in choice of technology.*
- 3) *For the State: a reduction in environmental harm, an increase in competition at the service level, a reduction in costs to produce services leading to a reduction in charges to consumers⁴.*

In “assess[ing] the state of competition in the provision of signal distribution services” the Authority must consider *Facilities Leasing Regulations* and the *Findings Document On The Regulatory Framework On Electronic Communications Infrastructure Sharing* (Government Gazette 30 No. 39870 of 30 March 2016, especially with respect to infrastructure incorrectly identified as a barrier to entry. SENTECH requests the Authority to note the following conclusion and way forward from the *Findings Document On The Regulatory Framework On Electronic Communications Infrastructure Sharing*:

6.1. The Authority embarked on the consultative process on the Regulatory Framework on infrastructure sharing with a view that the sharing of electronic communications infrastructure will result in the realisation of the above-mentioned objectives, in particular, that the practice will encourage service-based competition

³ DCDT Presentation to Portfolio Committee on Communications 2 June 2021.

⁴ [Facilities-leasing - Electronic communications equipment & facilities \(golegal.co.za\)](http://golegal.co.za)

in the downstream retail markets as it will result in the reduction of input costs for incumbents and new entrants.

6.2. Stakeholders went to great lengths to address infrastructure sharing matters, including how the Authority could improve the regulation of the practi[c]e, inter alia, by strengthening the existing Facilities Leasing Regulations.

6.3. Based on the submissions of the stakeholders the Authority concludes that the ECA and the Facilities Leasing Regulations effectively cater for infrastructure sharing. In this regard, the Authority intends to actively monitor and enforce implementation of the Facilities Leasing Regulations and applicable provisions of the ECA to promote and facilitate infrastructure sharing. The Authority will also assess whether there is a need to review and or augment the current Facilities Leasing Regulations to deal with, inter alia, local loop unbundling.

4. History

- 4.1. As noted in the Discussion Document, SENTECH is an I-ECNS licensee providing primary signal distribution services to free to air (FTA) broadcasters in South Africa. SENTECH is a state-owned entity initially created to facilitate universal access to broadcasting services based on commercially viability basis and promote fair competition among broadcasters. This is due to the fact that SENTECH is a PFMA schedule 3B entity which is not funded by the State. Prior to its establishment through the SENTECH Act, 63 of 1996 (the “SENTECH Act”), signal distribution infrastructure and facilities were under the control of the South African Broadcasting Corporation (“SABC”). In line with new policies, influenced by the Triple Inquiry Report, to promote a vibrant and diverse broadcasting industry, government decided to remove signal distribution from the SABC and therefore facilitate equitable access to transmission facilities by new commercial and community broadcasters.
- 4.2. SENTECH was established as a state-owned entity, in recognition of the need to further objectives such as ensuring universal service to broadcasting content. Historically, this approach, is similar to that adopted in other countries where transmission facilities were vertically integrated into the public broadcaster.
- 4.3. After its separation from the SABC, SENTECH was granted a broadcasting signal distribution licence under the now repealed Independent Broadcasting Authority Act 153 of 1993 (the “IBA Act”). The company was recognised as the common carrier in terms of this legislation - and required to provide services to all broadcasters on request in recognition of the public assets controlled by it and its access to transmission high sites.
- 4.4. Section 33(1)(a) of the IBA Act recognised three categories of signal distributor:

- 4.4.1. Category 1: Common Carrier – signal distributors that were required to provide signal distribution services “upon (broadcasters) request on an equitable, reasonable, non-preferential and non-discriminatory basis”⁵.
- 4.4.2. Category 2: Selective carriers - signal distributors that were permitted to provide such services on a selective and preferential basis.
- 4.4.3. Category 3: Self providers - broadcasting licensees who were licensed to provide their own signal distribution services⁶.
- 4.5. The then IBA granted Orbicom (Pty) Ltd (“Orbicom”) a category 2 signal distribution licence and a number of community radio stations had category 3 licences.
- 4.6. In July 2006, the Electronic Communications Act 36 of 2005 (the “ECA” or “EC Act”) was promulgated, and the IBA Act repealed. The primary objective of the ECA is to promote a fair regulatory environment across the electronic communications sector in recognition of convergence of technologies.
- 4.7. In terms of the ECA, SENTECH was awarded an individual Electronic Communications Network Services (“ECNS”) licence pursuant to the conversion process contained in Chapter 15 of the ECA. This licence category is technology neutral and replaces the previous broadcasting signal distribution licence.
- 4.8. The common carrier concept in relation to broadcasting signal distribution is retained under the ECA and the Authority has been given the right to designate any ECNS licensee providing signal distribution services as such. Though SENTECH is still specifically designated as the common carrier, the Authority is yet to license another entity as a common carrier.
- 4.9. However, it should be highlighted that the specific requirements relating to broadcasting signal distribution are in some ways anomalous in the legislation. The intention of the ECA was to ensure that all licensees in a particular category are treated similarly in recognition of the need for technology neutral regulation. There are, however, no specific requirements for telecommunications focused ECNS licensees, for example.
- 4.10. The notion of common carriage in South African law was based on an American concept aimed at guaranteeing that no customer seeking service on reasonable terms should be unlawfully denied access or discriminated against relative to other customers⁷. It was intended to promote access to public facilities and enable universal service in line with fair competition principles.

⁵ IBA Act, section 37(a).

⁶ See also: IBA, Application procedures for broadcasting signal distribution licences regulations, *Government Gazette* 16628, 25 August 1995 (as amended by *Government Gazette* 18463, 21 November 1997).

⁷ Eli M Noam, “Beyond liberalisation II: the impending doom of common carriage”, *Telecommunications Policy* (1994), (Columbia University, <http://www.columbia.edu/dlc/wp/citi/citinoam11.html>).

- 4.11. SENTECH submits that the requirements in the ECA relating to facilities leasing and essential facilities, it could be argued, therefore duplicate and replace those linked to a broadcast signal distributor common carrier. In addition, the powers given to the regulator under Section 67 of the ECA to impose pro-competitive mechanisms and licence conditions on entities that are found to abuse their significant market power in markets and market segments where there is ineffective competition further potentially render the provisions relating to a common carrier unnecessary.
- 4.12. SENTECH would also like to note that the market for managed transmission service (MTS) (which is an end-to-end service) is distinct from the market for access to facilities (which are access to parts of a service or infrastructure). The Discussion Paper does not clearly distinguish between these two markets and ought to do so.

5. Approach

- 5.1. Before responding to the individual questions raised in the Discussion Paper, it is important to frame these by outlining Sentech's broad approach to the issues raised.
- 5.2. It is important to emphasise that SENTECH is committed to ensuring that it is run efficiently and effectively and that its tariffs are cost oriented and similar to those that would apply in a more competitive environment. Subject to what has been set out in paragraph 2 above, SENTECH is of the view that this inquiry would assist and is an opportunity to address perceptions that it is not applying these principles and/or is in any way exploiting a dominant position in the market.
- 5.3. SENTECH is furthermore cognisant of the importance of being customer-focused, and is committed to meeting customer needs.
- 5.4. The above principles are critical in facilitating the ongoing development of a vibrant, diverse and viable broadcasting sector responsive to audience needs in line with South African policy objectives within the context on increasing competition from services offered through IP-based networks.
- 5.5. The promotion of investment and innovation in the sector as a whole is further critical to SENTECH's own growth and will assist the Company to better deliver on its obligations, including promoting universal service and access.

6. Scope of the Inquiry

- 6.1. The purpose of the Market Inquiry is indicated by the Authority as following:

The purpose of this Inquiry is to assess the state of competition in the provision of signal distribution services in South Africa and determine whether or not there are markets or market segments within the signal distribution services value chain

which may warrant regulation in terms of section 67(4) of the Electronic Communications Act, 2005 (Act No. 36 of 2005) (“ECA”)⁸.

- 6.2. SENTECH is concerned that the Authority’s approach extends beyond the scope as indicated in section 1.1 of the Market Inquiry. The company’s interpretation is that the Findings Document of the Market Inquiry can only indicate whether the Authority will institute a regulatory process in terms of section 67(4) of the ECA.

67(4) The Authority must, following an inquiry, prescribe regulations defining the relevant markets and market segments and impose appropriate and sufficient pro-competitive licence conditions on licensees where there is ineffective competition, and if any licensee has significant market power in such markets or market segments. The regulations must, among other things—

- (a) define relevant wholesale and retail markets or market segments;*
- (b) determine whether there is effective competition in those relevant markets and market segments;*
- (c) determine which, if any, licensees have significant market power in those markets and market segments where there is ineffective competition;*
- (d) impose appropriate pro-competitive licence conditions on those licensees having significant market power to remedy the market failure;*
- (e) set out a schedule in terms of which the Authority will undertake periodic review of the markets and market segments, taking into account subsection (9) and the determination in respect of the effectiveness of competition and application of pro-competitive measures in those markets; and*
- (f) provide for monitoring and investigation of anti-competitive behaviour in the relevant market and market segments.*

- 6.3. Additionally, the Authority must be cognizant of the obligation required by section 4(4) of the ECA in terms of regulation making.

4(4) The Authority must, not less than 30 days before any regulation is made, publish such regulation in the Gazette, together with a notice—

- (a) declaring the Authority’s intention to make that regulation; and*

⁸ Discussion Document on the Market Inquiry into Signal Distribution Services in South Africa (“Market Inquiry”) as published in Government Gazette No. 46255 on 22 April 2022

(b) inviting interested parties to make written representations on the regulation.

- 6.4. It is therefore, SENTECH's understanding that the Discussion Document cannot make pronouncements relating to issues that must be addressed through process indicated in section 67(4) of the ECA.

7. Conclusion

- 7.1. SENTECH thanks the Independent Communications Authority of South Africa ("Authority") for the opportunity to make a submission on the *Discussion Document on the Market Inquiry into Signal Distribution Services in South Africa*.
- 7.2. SENTECH trusts that its comments will be of assistance to the Authority in understanding the broadcasting market in general, and the various components of market that form the subject of this discussion document. SENTECH furthermore trusts that its comments will assist the Authority in determining appropriate pro-competitive remedies, if these are indeed required.