



## **SUBMISSION BY SENTECH LIMITED**

ON THE

**INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA'S DISCUSSION  
PAPER ON THE FRAMEWORK FOR BROADCASTING TRANSMISSION SERVICES**

**PUBLISHED UNDER NOTICE 346 IN *GOVERNMENT GAZETTE* 34371 ON 15 JUNE  
2011**

**13 SEPTEMBER 2011**

## 1. Introduction

- 1.1 Sentech thanks the Independent Communications Authority of South Africa (“ICASA”) for the opportunity to make a submission on the Discussion Paper on the Regulatory Framework for Broadcast Transmission Services issued by the regulator on 15 June 2011 (Notice 346 of 2011 published in Government Gazette no 34371) (“Discussion paper”). Sentech further indicates its willingness to participate in any hearings that the regulator may hold on the matters raised in the Discussion Paper.
- 1.2 Sentech trusts that its comments will be of assistance to ICASA 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 ICASA in determining appropriate pro-competitive remedies, if these are indeed required.
- 1.3 Many of the issues dealt with in the Discussion Paper have been raised by stakeholders in a range of other forums and Sentech welcomes the fact that ICASA has initiated this process. Policy and regularity clarity on these matters is critical to both broadcasters and signal distributors in order to create an enabling environment for growth in the sector.
- 1.4 Sentech is in agreement with the EC Act that Broadcasting Signal Distribution is 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;*
- 1.5 The access network as defined in the discussion document is purely a component of the Broadcasting Signal Distribution Network.
- 1.6 Sentech would like to inform ICASA that prior to the publication of this Discussion Paper, Sentech contracted Deloitte to review its operations with the final objective of modelling and generating a tariff structure that is cost reflective as well as

sustainable from an investment and product perspective. The intention is for the exercise to be completed no later than the end of the calendar year 2011.

## 2 History

- 2.1 As noted in the Discussion Paper, Sentech is the primary signal distributor to free to air broadcasters in South Africa. It is a state owned entity created in order to facilitate universal access to broadcasting services and promote fair competition among broadcasters. 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 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. Sentech was established as a state owned entity, in recognition of the need to further objectives such as ensuring universal service to broadcasting content. This approach is similar to that adopted in other countries where transmission facilities were vertically integrated into the public broadcaster.
- 2.2 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.
- 2.3 Section 33(1)(a) of the IBA Act recognised three categories of signal distributor:
- 2.3.1 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".<sup>1</sup>
- 2.3.2 Category 2: Selective carriers - signal distributors that were permitted to provide such services on a selective and preferential basis.
- 2.3.3 Category 3: Self providers - broadcasting licensees who were licensed to

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<sup>1</sup> IBA Act, section 37(a).

provide their own signal distribution services.<sup>2</sup>

- 2.4 As noted in the Discussion Paper, the then IBA granted Orbicom (Pty) Ltd ("Orbicom") a category 2 signal distribution licence and a number of community radio stations have category 3 licences.
- 2.5 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.
- 2.6 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.
- 2.7 It seems from the Minister's draft amendments to the Broadcasting Digital Migration Policy issued under *Government Gazette* No 31408 on 8 September 2008<sup>3</sup> ("**Draft Policy**") that it is Government's policy that Sentech provide services on a non-preferential and non-discriminatory basis. Whilst not wanting to comment on the Draft Policy in this forum Sentech notes that Government and ICASA seem to be engaged in parallel and possibly conflicting processes. The fact that Government's policy on the migration to digital terrestrial television ("DTT") is still in a state of flux further goes to show that regulatory intervention in the DTT market is premature and, at this stage, the costs of regulatory intervention will far outweigh any benefits that may be achieved particularly as Government is also addressing the issue.
- 2.8 Although the common carrier concept in relation to broadcasting signal distribution was retained under the ECA, Sentech was not specifically designated as the common carrier and ICASA has not licensed any entity as such. It should be highlighted however that the specific requirements relating to broadcasting signal distribution are in some ways an anomaly 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, for example, telecommunications focused

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<sup>2</sup> 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).

<sup>3</sup> Published under notice No. 670 in *Government Gazette* No. 64568 on 19 August 2011.

ECNS licensees.

- 2.9 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 customers.<sup>4</sup> It was intended to promote access to public facilities and enable universal service in line with fair competition principles. 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 Act to impose pro-competitive mechanisms and licence conditions on entities that are found to hold significant market power further potentially render the provisions relating to a common carrier unnecessary.
- 2.10 Sentech would also like to note that the market for 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.

### 3 Principles

- 3.1 As a public entity, Sentech is committed to assisting in furthering the objectives of all relevant country policies and laws in order to promote “open, fair and non-discriminatory access to broadcasting services” in South Africa (Sec 2(g) ECA).
- 3.2 As the country's major broadcast signal distributor, and as a public entity charged with the responsibility of ensuring that national assets are efficiently utilised to further public interest objectives, Sentech is particularly mindful of the intentions underlying its founding legislation and the laws relating to broadcasting and electronic communications. This submission has been crafted in consideration of these mandates. The following objects outlined in the ECA are particularly relevant to the current ICASA inquiry:
- 3.2.1 The creation of a technologically neutral licensing framework (S2(b))
- 3.2.2 Universal access to electronic communications networks and services by all

<sup>4</sup> 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>).

- South Africans (S2(c))
- 3.2.3 Encouraging of investment, including strategic infrastructure investment, and innovation in the communications sector (S2(d))
- 3.2.4 Efficient use of spectrum(S2(e))
- 3.2.5 Promotion of competition within the ICT sector (S2(f))
- 3.2.6 Promoting an environment of open, fair and non-discriminatory access to broadcasting services and electronic communications networks and services (S2(g))
- 3.2.7 Ensuring the provision of a range of quality electronic communications services at reasonable prices, and to promote the interests of consumers with regard to the price, quality and the variety of services available (S2(m) & (n))
- 3.2.8 Facilitating the provision of a diverse range of sound and television broadcasting services on a national, regional and local level (S2(s)(i))
- 3.2.9 Promotion of stability in the ICT sector (S2(z)), and
- 3.2.10 Providing access to broadcasting signal distribution (S2(x)).
- 3.3 Sentech is further committed to other relevant government policies and principles. These include:
  - 3.3.1 The need for it as a state owned entity to fulfil its mandate efficiently and cost effectively, and the related requirement for it to be financially self sustainable.
  - 3.3.2 The need for it to not only abide by but actively promote principles of fair competition, in the interests of the public; and
  - 3.3.3 Policies and laws protecting consumers and therefore, for example, ensuring transparent cost oriented pricing and fair and open contracting practices. Although Sentech does not deal directly with consumers, and its tariff structures and contracts do not directly impact on costs for access to citizens (given that it distributes for free to air broadcasters), the Company is committed to abiding by these principles in relating to its clients (broadcasters). In this way we hope to promote the viability of the sector as a whole.

3.4 In essence, Sentech recognises the key role it plays in furthering government's aim of promoting fair competition in broadcasting and therefore facilitating access by all South Africans to a diverse range of broadcasting content and services. In this regard, Sentech submits that its special mandate as a public entity extends to a requirement to provide coverage even in areas where it is economically inefficient to provide coverage and in areas where the network will never be fully utilised.

#### 4 Approach

4.1 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.

4.2 Firstly 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. The Company sees this inquiry as assisting in this and as 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.

4.3 Sentech is furthermore cognisant of the importance of being customer focused, and is committed to meeting customer needs.

4.4 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.

4.5 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.

4.6 In recognition of this, and aware of the need to continually evaluate its operations in terms of best practice, Sentech itself - prior to the publication of this Discussion Paper - contracted Deloitte to review its operations with the final objective of modelling and generating a tariff structure that is cost reflective as well as sustainable from an investment and product perspective. It is reviewing this based on international best practice and in comparison with similar organisations

internationally to ensure that its tariffs are clearly linked to operational costs, and that it operates as efficiently as possible whilst remaining a sustainable enterprise. The intention is for the exercise to be completed no later than the end of the calendar year 2011.

4.7 Sentech, together with Deloitte, has already consulted widely with the broadcasters so that their requirements can be accommodated in the model being developed.

4.8 Sentech has taken note of criticisms of its operations by stakeholders - some of which are mentioned in the Discussion Paper. These range from allegations of unfair terms to poor quality of service. Sentech does not want to dwell on these issues or deal with each of these issues raised in the Paper. The company notes however that Government as the shareholder the entity itself conducted a review of Sentech's performance. The new leadership and management is currently involved in effecting a turnaround programme in line with the agreements with Government and also the review of tariffs and operations is being conducted in line with this.

## 5 General Issues

5.1 The Discussion Paper focuses on many of the critical areas relating to competition issues in broadcasting transmission. As noted earlier, stakeholders have raised many of these matters in other forums and Sentech sees the ICASA process as an important means to resolve questions raised in these forums. The holding of this inquiry is in line with the Authority's pledge during the process of finalising the Digital Terrestrial Television Regulations to separately address issues raised about signal distribution in an inquiry in terms of Section 67 of the EC Act.

5.2 Sentech is, as stated above, committed to working with ICASA and broadcasters to ensure clarity on all stakeholders' roles and responsibilities in this regard and facilitate the development of an appropriate regulatory framework.

5.3 In line with this commitment, Sentech believes it is important to raise the following general points. In so doing, the Company hopes to ensure that any regulatory



framework developed as a result of this process holistically addresses issues relating to broadcasting transmission and thus promotes the requisite clarity and certainty essential to furthering the objectives underpinning legislation.

#### 5.4 Different tariffs for different sectors

Firstly, it is important to note that the Discussion Paper does not in any way deal with issues raised primarily by community broadcasters regarding interpretation of Section 62(3) of the Act. As the regulator is aware, this section of the law (and similar provisions included in the repealed IBA Act) has been the subject of much debate over the years. Sentech believes that this omission is a significant oversight in the Discussion Paper. It is imperative in developing a regulatory framework for transmission tariffs that ICASA finally resolve this matter. In summary:

- 5.4.1 Community radio broadcasters have argued that Sentech is required in terms of sub-section 62(3)(b) to offer reduced tariffs for the sector. The relevant clause states that a common carrier must in determining its tariffs duly take into account "*the different categories of broadcasting service licences ..... and the nature and technical parameters of the service provided to each broadcasting licensee with a view to ensuring that the different tariffs are appropriate to and commensurate with the various broadcasting services to which they relate*".
- 5.4.2 Sentech has stated that a differential tariff structure would be contrary to the requirements of Section 62(3)(a) which require that a common carrier must provide broadcasting signal distribution on "*an equitable, reasonable, non-preferential and non-discriminatory basis*".
- 5.4.3 As noted above, the current review being undertaken by Sentech of its tariffs includes an analysis of whether or not the current pricing structure is fair for all licensees in terms of the costs of the associated services provided. It includes a review of the overall tariff structure and how it is applied to individual licensees. The end result of this will be a transparent tariff structure linked to the costs of providing services. This is in line with the principles of fair competition. If the regulator finds that Sentech has to in effect subsidise the tariffs for any particular sector, such a subsidy would need to be reflected, and, in line with cost-based accounting principles, the costs of this subsidy

would need to be deflected through increasing other tariffs. The subsidy would need to be reflected in such increased tariffs to justify these. So, for example, if Sentech itself was required in terms of the law to reduce the cost-based tariffs for community broadcasters, the regulator would need to agree that the costs of such subsidy can be included in calculating the tariffs for private and/or public broadcasters. In making such determination, ICASA would need to consult with those affected (commercial and public broadcasters). As these licensees already provide funds to the Universal Service and Access Fund and/or the Media Development and Diversity Agency, they might be reluctant to agree to what amounts to an additional levy.

5.4.4 Given the complexities of this issue, and the fact that it relates directly to Sentech's tariff structure, it is important that ICASA finally provide clarity on interpretation of Section 62(3) of the ECA in the process of this current inquiry.

## 5.5 **Competition in signal distribution**

5.5.1 Sentech's history inevitably results in it being a major stakeholder in broadcasting transmission. Its role as a national state owned entity providing access to signal distribution infrastructure for all broadcasters is a result of the decision by the state to intervene to promote the development of a diverse, vibrant and viable broadcasting sector, universal access to a range of relevant content and fair competition in the public interest.

5.5.2 In many ways the current Section 67 process is aimed at furthering the goals associated with this by addressing abuse (if any) or perceptions of abuse of this position by Sentech. As noted in the Discussion Paper, in considering whether or not Sentech is a significant market power (SMP) and in deciding on whether or not any regulatory interventions are necessary, the regulator needs to consider whether or not such intervention is justifiable and proportionate and if the benefits of such intervention outweigh the costs of implementation of these.

5.5.3 In considering this, it is important to take into account and fully understand all factors that have contributed towards the current structure of the broadcasting signal distribution sector. This is essential in basing any decisions on a forward-looking assessment of the market in line with Section 67(6)(ii) of the ECA.

- 5.5.4 In this regard, Sentech notes that the Discussion Paper does not fully capture the history of the sector. In particular, it is argued that the Paper does not comprehensively deal with the fact that the legislative and policy framework specifically provides for the introduction of other signal distributors, or previous regulatory interventions in this regard.
- 5.5.5 As noted previously, the IBA Act and the EC Act both made provision for the introduction of other signal distribution licensees (what used to be called Category 2 and Category 3 signal distributors). Government's White Paper on signal distribution furthermore specifically instructed the regulator to open up the market and stated that *"(m)arket inefficiencies in the business of signal distribution will be minimised to the greatest practicable extent, and the South African distribution environment will be opened up to competition by the year 2000".*<sup>56</sup>
- 5.5.6 The Discussion Paper seems to be predicated on a view that barriers to entry limit the implementation of this. However, given the fact that the regulator has not since the adoption of the White Paper invited applications for other transmission services in line with Government's policy, or ever tested the market since that date, this conclusion seems premature. While Sentech does not dispute the fact that it would be very difficult for any entity to replicate its infrastructure and provide a comparable national service, it cannot be concluded from this that other providers could compete at a regional and/or local level.
- 5.5.7 History seems to confirm this view - at least in relation to radio transmission services. In 1995 the then IBA developed a regulatory framework for the licensing of Category 2 and 3 signal distributors.<sup>7</sup> As noted in the Paper, many community radio stations have opted to provide their own signal distribution in line with these provisions. The Paper however does not mention that the then IBA also invited applications for Category 2 licences around this time. Three applications were received - from Broadcom, Telemedia and B&I Engineering.

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<sup>5</sup> White Paper on Broadcasting, chapter 6, paragraph 6.1 )

<sup>6</sup> The Minister of Communications has indicated that the Department will review the White Paper on Broadcasting and related legislation. The process had not commenced at the time of finalising this submission, but the Ministry has indicated that it envisages that the process will be finalised during the first half of 2012

<sup>7</sup> Independent Broadcasting Authority, Regulations regarding procedures in relation to applications for the granting, issuing, renewal, amendment and transfer of broadcasting signal distribution licences, Government Gazette 16628, 25 August 1995 (as amended by Government Gazette 18463, 21 November 1997)

The regulator however refused all of these applications in 1999.<sup>8</sup>

## 5.6 Migration to DTT

5.6.1 Section 3.3 of the Discussion Paper deals with digital terrestrial television migration. It sets out government's policies on the migration process, and related regulatory decisions.

5.6.2 The Paper however does not mention at all the fact that Regulation 9 of ICASA's rules sets a number of requirements regarding signal distribution - including allowing the regulator to intervene in the appointment of a signal distributor by a broadcasting licensee and, under specific circumstances, itself essentially manage such appointment and determine the terms and conditions of such service.

5.6.3 While Sentech is aware that government's policy is currently under review, and that ICASA may amend its regulations to accommodate changes in government policy, it is of the view that the implications of Regulation 9 (or any new related Regulation) on the framework for broadcasting transmission regulation needs to be considered during this current process.

5.6.4 The fact that the Digital Migration Regulations are to be amended and the Minister has announced Government's intention to review the broadcasting market also goes to show that there is still much uncertainty in the "DTT market" and intervention in the market is premature.

5.6.5 Sentech is furthermore cognizant of the fact that due to the ongoing digital migration of television services, the market for television in South Africa is changing at a fundamental level, moving from five (5) terrestrial channels as noted in the Discussion Document, to potentially in excess of thirty five (35) within the next twenty four months (24) months, with the first set of these increased number of television services being offered to the public at the launch of the DTT performance period during the first half of calendar year 2012 (i.e. less than twelve months from the date of submission of this document). Furthermore, Sentech appreciates that the digital television

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<sup>8</sup> Independent Broadcasting Authority, Outcome of the applications received for signal distribution licences, Government Gazette, Vol 407, no 20105, 21 May 2009, accessed from [http://us-cdn.creamermedia.co.za/assets/articles/attachments/11116\\_notice1089.pdf](http://us-cdn.creamermedia.co.za/assets/articles/attachments/11116_notice1089.pdf)

infrastructure currently being constructed will also have a significant impact on radio broadcasting and radio reception, in particularly increasing the number of nationally available radio services from the current two (2<sup>9</sup>) for all households, to at least eighteen (18) for the more than 10 million households who will be able to receive digital television. In this regard, the work that Deloitte has been mandated to do by Sentech will in particular generate a tariff model for digital television services.

5.6.6 Following from the above, Sentech is of the view that it is premature therefore to evaluate competition in respect of MTS for digital television broadcasting. The dynamics of the digital environment are significantly different from the analogue environment and Sentech submits that the complexity of operating in the digital terrestrial space has yet to be fully appreciated. The market for MTS for digital terrestrial television broadcasting in particular should be allowed to develop before a proper forward looking assessment to be made.

5.6.7 To provide more clarity on this issue, Sentech submits that any analysis or conclusion based on the current nature (e.g. number or current technical quality) of terrestrial television services becomes null and void as soon as the performance period starts and in particular, as soon as analogue switch-off happens. Sentech cannot assume any other date for the latter than the pronounced date of December 2013, and as a result, all related work, including but not limited to analysis and additional regulations, will become completely null and void in less than two and a half years. One example of such analysis in the Discussion Paper is the analysis of the markets for satellite and terrestrial broadcasting, which differentiates these markets based on number of channels and the technical quality of the mode of broadcasting (analogue versus digital). Sentech submits that with DTT, the entire section of this analysis goes flat, and in fact, the conclusions made by the Authority will most likely be reversed. Sentech has noted many other such examples, and whilst these may not be fully documented in Sentech's response, they will certainly be fully explained if ever Sentech is invited to public hearings.

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<sup>9</sup> RSG and SAFM are the only nationally available (covering more than 77% of the population) radio services in the country. The rest of the radio services are regional in practice.

## 5.7 **Contracts**

5.7.1 Sentech will like to inform ICASA that it does not have “evergreen” contracts with any Broadcaster.

5.7.2 All Sentech Customer Contracts are for a fixed initial period after which they are automatically renewed for a specific period at a time (usually 12 months) subject to the ICASA license being in place.

5.7.3 During the automatic renewal period the Customer may terminate the contract by giving Sentech notice – term of notice will be stipulated in the contract.

5.7.4 Terminations during the initial period will attract a cancellation fee.

## 5.8 **General**

5.8.1 The Paper includes some inaccuracies related to, for example, technical aspects of transmission and the management of the frequency spectrum. For example, sections which outline the Authority's initial views on barriers to entry appear to be generic as they seem to be derived from findings by the UK Office of Communications (Ofcom) outlined in a paper on broadcasting transmission issued in 2004<sup>10</sup>. They therefore do not take into account the significant differences factors such as terrain, land size, population density between the UK and South Africa have on the transmission requirements in the two countries. .

5.8.2 Sentech is noting that there are such errors in the Paper, but does not want to dwell on these but they will be addressed in the relevant sections of this submission. The Company as noted previously is committed to assisting the regulator to develop the most appropriate regulatory regime to further the public interest objectives of broadcasting policy. It is more fruitful therefore to focus on the substantive issues raised than query what amount to technicalities. In the example provided in 5.6.1 therefore, while Sentech might query individual suggestions by ICASA on factors contributing to what are termed barriers to entry by new players, this does not negate the fact that it

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<sup>10</sup> Ofcom (Office of Communications), 'Broadcasting Transmission Services: a review of the market', 11 November 2004, accessed from [http://stakeholders.ofcom.org.uk/binaries/consultations/bcast\\_trans\\_serv/summary/bts-statement.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/bcast_trans_serv/summary/bts-statement.pdf)

would be difficult for a new player to provide a comparable national network to that built up by Sentech given high associated set up costs and, in relation particularly to television, the fact that the major licensed free to air broadcasters are national (e-tv and SABC channels) and required to cover set percentages of the population as a means of ensuring universal access .

Should the Authority require any clarity or elaboration on what is contained in this document the Authority is requested to contact Mr Thato Toko on 011 691 7220 or [tokot@sentech.co.za](mailto:tokot@sentech.co.za)

### Questions for Stakeholders from Chapter 3

**6 Question 1: Do you agree with the Authority's characterisation of the Broadcasting Market in South Africa? Please provide any additional information that can be used by the Authority in order to understand in more detail the structure of the market.**

Sentech is in broad agreement with the Authority's characterisation of the Broadcasting Transmission Services ("BTS") Market in South Africa<sup>11</sup>.

In order to assist the Authority to a better understanding of the BTS Market, Sentech has provided some additional information and points of clarification below.

#### 6.1 Sentech's public service mandate

6.1.1 The authors of the Discussion Paper have not fully appreciated Sentech's role as a state owned entity. Whilst the Discussion Paper makes mention of the "advantages" that Sentech may enjoy with access to government funding it does not take into account that, as a state owned entity, Sentech is essentially a delivery arm of Government and, as such, has a significant and onerous public service mandate.

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<sup>11</sup> There is a typographical error in the Question 1 which refers to the "Broadcasting Market" and not the "Broadcasting Transmission Services Market" which is the subject matter of the Discussion Paper.

- 6.1.2 Sentech's mandate, as is set out in its Corporate Plan 2011-2014 (annexed hereto as **Annexure A**), is to *"provide affordable and sustainable broadcasting and broadband infrastructure network services to the majority of South Africans. As an enabling enterprise, Sentech's strategy is informed by and aligned to Government's Medium Term Strategy Focus goals"*.
- 6.1.3 Sentech's Corporate Plan is also to align its business operations with the strategic goals adopted by Cabinet for the electoral mandate period 2009 - 2014. Cabinet's strategic goals are:
- 6.1.3.1 Enable the maximisation of investment in the ICT sector
  - 6.1.3.2 Ensure that ICT infrastructure is robust, reliable, affordable and secured to meet the needs of the country and its people
  - 6.1.3.3 Create new competitive business opportunities for the growth of the ICT Industry
  - 6.1.3.4 Accelerate the socio-economic development of South Africans by increasing access to, as well as the uptake and usage of, ICTs through partnerships with business and civil society and three spheres of Government
  - 6.1.3.5 Accelerate the socio-economic development of South Africans by increasing access to, as well as the uptake and usage of, ICTs through partnerships with business and civil society and three spheres of Government
  - 6.1.3.6 Contribute towards building a developmental state including improvement of public services and strengthening democratic institutions
  - 6.1.3.7 Enhance the role of ICT state owned enterprises as the delivery arms of government and support the Regulator
  - 6.1.3.8 Contribute to the global ICT Agenda prioritising Africa's development
  - 6.1.3.9 Facilitate the building of an inclusive Information Society to improve the quality of life.
- 6.1.4 Sentech's shareholder is the Department of Communications. Sentech's mandate is driven by the Department of Communications, the Department's



priorities and programmes. The outcomes from meeting its shareholder's mandate is not profit, rather Sentech has identified the following desired outcomes –

- 6.1.4.1 Sustainable access to communications services available to all, in particular, e-Services for underserved areas;
- 6.1.4.2 A vibrant, diversified and open access multichannel and multimedia content industry;
- 6.1.4.3 Increased growth and sustainability of ICT SMMEs; and
- 6.1.4.4 Improved performance of SOE's in delivering government priorities.

6.2 In 2011, Sentech has adopted a new mission which is aligned with its public service mandate and its shareholder's priorities. Its new mission statement is –

*“To enable affordable universal access to communication services in the context of South Africa's socio-political imperatives as a developmental state”*

6.3 As stated in Sentech's Corporate Plan, Sentech believes that this new vision will focus Sentech's operations toward fulfilling its public service mandate affordably and sustainably.

6.4 It is noteworthy that most (if not all) of the incumbent broadcasters have self-provisioning rights and have held these rights for many years. Sentech of the view that many of these broadcasters have not exercised their rights because they have found that it is more efficient and cost effective to use Sentech and not because Sentech has in any way abused its dominance in the market or prevented entry into the market.

6.5 Sentech may well be in a “privileged position” when it comes to receiving government funding which is a factor considered in respect of each of the markets defined. This is however not balanced by an acknowledgement of the public service mandate that Sentech is obliged to fulfil. Sentech is expected to continually expand access to public broadcasting services to underserved (mainly rural) areas. For this purpose Sentech is continually building new high- site broadcast infrastructure at very high capital cost. Recently completed examples are Elands Heights and Entshatsongo in the Eastern Cape. New broadcast

infrastructure will in the near future be established at the following new sites: Ngqeleni, Cofimvaba, Qokama, Holy Cross and Burgersfort. These new sites are often only used by a few public broadcasting services to expand coverage in terms of their universal coverage obligation.

6.6 The funding that Sentech receives project specific and is aimed at achieving various government objectives – such as the migration to DTT and universal access to broadcasting signals. Aside from project specific funding, Sentech is required to fund itself and does not rely on government funding for its day to day operations. Sentech is required to show a return on its assets and to remain sustainable from its own resources.

6.7 In terms of Section 7(2) of the Sentech Act as amended the “*Company shall borrow money only with the approval of the Minister granted with the concurrence of the Minister of Finance*”.

6.8 In terms of the Public Financial Management Act (PFMA) Sentech is a Schedule 3b entity and its finances are regulated by the PFMA.

6.9 **“BTS” and “broadcasting signal distribution”**

6.9.1 On page 20 of the Discussion Paper the following is stated –

*As discussed in the introductory section, the focus of this review is on broadcasting transmission services, which the Authority defines as the transmission of content to end users once the content has been delivered to the Access or Signal Distribution network. For terrestrial networks the access network begins at the transmission site or mast. For satellite networks, the Authority considers that the access network begins from the satellite ground station. The different types of broadcasting transmission will be discussed in greater detail below.*

6.9.2 Whilst Sentech appreciates that it is the Authority's intention to deal only with the access network part of BTS it nevertheless wishes to alert the Authority to the fact that the Discussion Paper incorrectly equates the access network with a signal distribution network. This is inconsistent with the provisions of the Electronic Communications Act, 2005, (“**ECA**”) which defines broadcasting signal distribution as follows –

*“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.*

6.9.3 Broadcasting signal distribution (as defined in the ECA) is an end to end service which is provided over the contribution network, feeder network, trunk network and the access network. In the DTT environment, the function of signal distribution includes network multiplexing<sup>12</sup> at the head end of the network. The network multiplexing at the head end of the network is inextricably linked to the distribution of the signal on the access part of the network. This has not been taken into account in the Discussion Paper which focuses on the access part of the MTS function.

#### 6.10 **Single provider of signal distribution**

Sentech accepts the statement in the final sentence on page 23 of the Discussion Paper that it is likely in the future to become difficult to allow broadcasting service licensees operating on the digital terrestrial television (“DTT”) platform to enter into their own commercial arrangements with electronic communications network service (“ECNS”) licensees who provide signal distribution services. It is for this reason that Sentech has been and remains of the view that the signal distributor (who will also independently operate and maintain the network multiplexers for multiplexes 1 and 2 and any other in the future) should hold the frequency licence for the multiplex and broadcasters should be allocated capacity and not frequencies.

#### 6.11 **Choice of provider**

6.11.1 For the sake of clarity, Sentech points out that broadcasters do not necessarily choose their ECNS provider based on that provider's existing network. It is often the case that a broadcast licensee is granted a licence in a particular area using a particular frequency and it is then incumbent upon the signal distributor to roll out the network to the areas to be covered by the broadcaster according to the broadcaster's technical specifications.

6.11.2 The degree of digitalisation will not be a factor in the choice of provider once broadcasting services have migrated as all broadcasts will be transmitted

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<sup>12</sup> This is distinct from channel multiplexing which is performed by the broadcasters themselves

digitally.

#### 6.12 **Control of masts**

The Discussion Paper states that Sentech controls “an estimated” 1200 sites. This estimation is incorrect and Sentech suspects that the number of sites specified is actually a reference to the number of transmitters controlled by Sentech. Any conclusions made by the authors of the Discussion Paper based on the incorrect figure must be revisited. Sentech broadcasts from 244 sites (which may contain a number of transmitters). Sentech owns 193 of the mentioned sites and the remaining 21% of the sites that are utilised by Sentech; infrastructure is leased from third parties namely Telkom, MTN, Vodacom and Cell C. There are approximately 420 Self-Help broadcasting stations. These are not owned or operated by Sentech.

#### 6.13 **Coverage**

6.13.1 It is Sentech's aim to accelerate the implementation of the DTT infrastructure rollout, targeting 92% of the population coverage by December 2013. This aim is based on Sentech's public service mandate and the roll out obligations that it anticipates will be imposed on it if appointed as the signal distributor by migrating broadcasters. In achieving the roll out target Sentech will be obliged to roll out terrestrial network elements in areas where it is not economically feasible to do so and where the network will never be fully utilised.

6.13.2 Regulation 10(1) of the Digital Migration Regulations, 2010<sup>13</sup> (the “**Digital Migration Regulations**”) Government Gazette No. 32956, imposes the obligation of coverage targets to ECNS licensees and not BS licensees.

6.13.3 The Digital Migration Regulations only anticipate the allocation of capacity to existing broadcasters on multiplex 1 and 2.

#### 6.14 **Unbundled services and quality of service**

On page 31 of the Discussion Paper it is stated that broadcasters are discouraged from seeking to unbundle MTS services. This is incorrect even though it is worth mentioning that an operator that provides an end to end service is better able to control quality of service as it is in control of all the network

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<sup>13</sup> Notice No. R. 97 of 2010 published in Government Gazette No 32956 on 15 February 2010.

elements.

## 6.15 The distinction between signal distribution and facilities leasing

6.15.1 The Discussion Paper does not sufficiently distinguish between the two distinct markets for broadcasting transmission services and facilities leasing.

6.15.2 The statement on page 12 of the Discussion Paper that ICASA is of the view that “*broadcasting transmission services are facilities as contemplated in the ECA*” is incorrect. Leasing facilities such as sites, antenna, fixed links and other apparatus is completely distinct from offering a service over a network which is an interoperating system of facilities that is operated and maintained by an ECNS licensee.

6.15.3 It is Sentech’s submission, elaborated upon further below, that ICASA should -

6.15.3.1 first increase awareness of the provisions of the facilities leasing regulations;

6.15.3.2 second assess whether, given the size of the market<sup>14</sup>, the minimal effect price control or transparency measures will have on viewers, it is cost effective to impose and administer pro-competitive remedies particularly when those remedies will be imposed on a state owned entity whose mandate from government is not to maximise profits but rather to offer a sustainable, affordable service;

6.15.3.3 Third, and only in the event that the facilities leasing regulations do not alleviate any negative consequences of “inefficient competition” (to the extent that they actually exist), then impose pro-competitive measures on the broadcasting transmission market.

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<sup>14</sup> The market for signal distribution services is very small given the limited number of broadcasters.

**7 Question 2: Do you agree that retail and wholesale leased lines provided for broadcasting transmission conveyance should be considered in a separate market review by the Authority at some point in the future? If not, please provide a detailed response and rationale for your view.**

- 7.1 Sentech is of the view that a study into leased lines provided for broadcasting transmission conveyance should be conducted as part of this review. MTS is an end-to-end service and in order to properly assess the value chain, the leased line portion of the network ought to be a consideration.
- 7.2 In the DTT environment, the leased line portion of the signal distribution will increasingly become a significant cost in providing DTT signal distribution.
- 7.3 There are a variety of suppliers of leased lines and Sentech does indeed provide some of its own leased lines. Nevertheless, Telkom is dominant in the lease line market.

**8 Question 3: Has the Authority correctly characterised the broadcasting value chain in South Africa? If not, please provide additional information.**

- 8.1 The Authority has to a large degree correctly characterised the broadcasting value chain in South Africa but as pointed in paragraph 6.1 above "signal distribution" is a term that applies to the entire value chain and not just to the access network portion thereof. Sentech would like to submit however that the value chain in respect of providing MTS for digital terrestrial television broadcasting is considerably more complex than what is portrayed in the Discussion Document. As a result, Sentech submits that any analysis that is based on the view of the broadcast value chain as depicted in the Discussion Paper will fall short within a few months when the country begins the performance period for digital terrestrial television services and in no less than three years when the country moves fully and completely into digital terrestrial television broadcasting.
- 8.2 Sentech acknowledges that it is possible for an entity to enter the signal distribution value chain at multiple points and Sentech is developing a revised tariff structure that will take account of this more fully. It should also be noted broadcasters may wish to self-provide where it is economical for them to do so which means that Sentech will then be the provider of choice where it is

uneconomical. This must be taken into account when considering whether to impose pro-competitive remedies on Sentech.

8.3 The Authority does not fully take into account the onerous obligations that may be imposed on signal distributors if they are appointed to provide signal distribution services to incumbent broadcasting licensees pursuant to the Digital Migration Regulations, 2010 (the "**Digital Migration Regulations**").

8.4 The roll out of DTT infrastructure is being treated as a special project falling outside the normal operational activities of the company. Sentech requested R918 million to meeting operating expenses arising from the running of digital transmission during the performance period and to the specific benefit of broadcasters but to date Sentech has been allocated just R330 million. Sentech is already engaged with the National Treasury on if and how to charge for DTT signal distribution.

<p>9 <b>Question 4: Has the Authority correctly characterised the potential competitive dynamics of alternative distribution platforms in South Africa?</b></p>
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9.1 International experience suggests that broadcasting services are increasingly becoming wired services. Sentech suggests that further consideration be given to the potential impact of wired technologies such as fibre optic transmission both in the contributing access networks between broadcast studios and network head-end systems and also in the linking networks between the head-end systems and transmitter sites.

9.2 In addition, Sentech suggests that further inquiries should be made on the uptake of mobile television. Also, with regard to mobile television, Sentech notes that the electronic communications networks required to distribute mobile television services have been deployed by ECNS licensees other than Sentech.

9.3 Sentech is of the view that the market will likely change if the draft policy, Government Gazette No. 34538: Amendment of Broadcasting Digital Migration Policy, is taken into consideration. The draft policy suggests that more community broadcasters should be licensed in multiplex 1 and 2.

9.4 It seems that no licensees providing ECNS to mobile television broadcasters provided information to the Authority on the extent of the mobile television

network infrastructure and the projected growth in demand for ECNS for mobile television.

**10 Question 5: How do the transmission requirements of broadcasters differ, depending on the geographic footprint of the licence?**

- 10.1 Sentech's public mandate is to build a signal distribution network that will reach all South Africans.
- 10.2 The cost associated with deploying infrastructure in areas where it is uneconomical to provide services have to be spread across the entire network. This has financial implications affecting competition and tariff structuring especially in areas with lesser or more dispersed populations.
- 10.3 Focusing on the specific question, Sentech submits that particularly with digital transmission, there is a much larger set of variables available to broadcasters with respect to meeting the different coverage and capacity requirements. In particular, Sentech submits that the footprint alone does not determine the transmission requirements and transmission requirements are dependent on a number of factors. In digital terrestrial television in particular, other factors that influence broadcasters' transmission requirements include the balance between the number and type (standard definition versus high definition) services they seek to provide. Furthermore, looking at the overall broadcasting environment, transmission requirements of broadcasters will differ depending on whether a broadcaster offers radio or television services. Finally, broadcasters' transmission requirements will also be dependent on the extent of the need by the broadcaster to support of mobility (active versus nomadic). Sentech submits that any analysis that is based on an assumption that broadcast transmission requirements are solely dependent on geographic footprint will be inadequate.

**11 Question 6: Do you agree that the type of sites required by broadcasters will differ according to the geographic footprint of their licence? The larger the footprint of the licence, the greater the likelihood that broadcasters will need to transmit from purpose built transmission sites.**



- 11.1 The Authority is not specific on its definition of a “purpose built transmission site”.
- 11.2 In any case, as stated above, it is simplistic to reduce transmission requirements only to the size of the footprint of a broadcaster. In addition, it is also too simplistic, when considering the current state of digital broadcasting technologies, to reduce the dependency of the size of a coverage area to just the type of transmission site.
- 11.3 In the first instance, in addition to footprint requirements, there are differences in television and radio transmission, transmission in support of mobile, nomadic and fixed services and the number and types of services offered by a broadcaster. For example some radio broadcasters may have access to a wider range of transmission sites (for example on high buildings).
- 11.4 Also as stated above, in digital (terrestrial) transmission, there are many more variables that are not based on types of facilities and as a result, Sentech does not support in isolation, the Authority’s statement that “the larger the footprint of the licence, the greater the likelihood that broadcasters will need to transmit from purpose built transmission sites”. For example, two broadcasters sharing the same site, the same head-end multiplexors, the same linking service and the same transmitters operating at the same power levels could have vastly different geographic footprints and different numbers and types of services purely on the basis of their (i.e. broadcasters’) different choices of configurable transmission parameters.
- 11.5 Sentech submits that this level of flexibility is purely provided by digital broadcasting technologies and implores on the Authority to allow the market to develop before embarking on interventions that rely either on fading technologies (analogue terrestrial) or the unknown.

<p>12 <b>Question 7: [Left intentionally blank]</b></p>
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Sentech could not find a question 7 in the Discussion Paper.

#### Questions for Stakeholders from Chapter 4

**13 Question 8: Do you agree that the appropriate wholesale broadcasting transmission service is a Managed Transmission Service? If not, please provide information on an alternative product definition.**

13.1 Sentech has no objection to the wholesale BTS being termed a “managed transmission service” (or “MTS”) provided that signal distribution is not treated as only a part of the service. As Sentech understands it, the signal distribution service (as defined in the ECA) is the equivalent of MTS and/or BTS.

13.2 The Authority's proposed definition of a Managed Transmission Service (MTS) is contained in Chapter Three. In this section, the Authority defines an MTS essentially as an end to end service (managing the transmission of content from the broadcaster to the listener or viewer and taking responsibility for all aspects of such transmission including the quality of the signal received)

13.3 The definition of an MTS as contained in the Discussion Paper is similar to that suggested by Ofcom in its 2004 paper on broadcasting transmission. Ofcom used the term to distinguish between two different wholesale services - MTS and access to the facilities owned by a broadcasting signal distributor. For ease of reference and regulatory clarity it is suggested that ICASA in any final determinations on this issue rather utilise the terms in the legislation - i.e. broadcasting signal distribution (an end to end service in term of the Act) and facilities leasing.

13.4 In this regard, Sentech submits that a BTS is an ECNS (which is a system of facilities) and not a “facility” in terms of the Act. Sentech further implores ICASA to reflect on the implications of taking a view that an ECNS is a facility, particularly with regard to other ECNS' that provide telecommunications services.

**14 Question 9: Do you agree with the list of retail markets that have been identified by the Authority?**

- 14.1 Sentech agrees with the separation of the retail market for radio services from the retail market for television services.
- 14.2 Sentech however does not agree with the definitions and separation of retail markets for television services based on the argument put forward in the Discussion Paper. In particular,
- 14.2.1 Section 7.1 of the Broadcast Digital Migration Policy of 2008, states that geographic areas that will be difficult to reach by terrestrial means will be covered by satellite means. Thus, the policy document in particular anticipates that satellite transmission will be used to deliver free-to-air services. This is in contradiction to the statement on page 36 of the Discussion Paper that says "Satellite services are available by subscription".
- 14.2.2 The Discussion Paper further states that end users differentiate between satellite services and terrestrial services on the basis of "the quality of the terrestrial transmissions". Sentech submits that in fact, digital terrestrial transmission that will be launched within a few months will deliver equivalent quality of transmission to digital satellite transmission.
- 14.2.3 Finally, the number and types of channels that will be delivered on digital terrestrial transmission services are still to be determined and in fact, depend on the Authority. In the short term, at the launch of the performance period, these channels will be more than six (6) times the number of channels available on analogue terrestrial transmission. It is well within the Authority's authority to ensure that the number of channels available on the terrestrial network exceed those currently available on satellite networks after analogue switch off.
- 14.3 Whilst Sentech accepts that it is useful to examine audience numbers in order to delineate markets, Sentech has difficulty with defining the audience as a "retail market" particularly as MTS is an end to end service which broadcasters acquire at a retail level.

**15 Question 10: Do you agree with the list of wholesale markets for MTS that have been identified by the Authority?**

15.1 Sentech notes that in using the term “wholesale” that the Authority is using the term as defined in the ECA which does not necessarily mean that the services are repackaged or resold. However, for reasons that follow from those stated above, Sentech does not agree with the separation of wholesale market for the provision of MTS for satellite broadcasting against the MTS for the purpose of providing terrestrial broadcasting transmission services.

15.2 Sentech also notes that the Digital Migration Regulations allow for radio transmission on multiplex 1 and 2<sup>15</sup>.

**16 Question 11: Do you agree that MTS for satellite and for Terrestrial are in separate markets?**

No, for the reasons already stated above.

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<sup>15</sup> Regulation 11 of the Digital Migration Regulations

**17 Question 12: Do you agree that MTS for Radio and MTS for Television are in separate markets?**

17.1 Sentech is of the view that the reasons provided in the discussion document are not sufficient to fully support a conclusion that the MTS for radio and MTS for television are in separate markets. The reasons include the following:

17.1.1 The definition of MTS for radio and television services has been narrowly defined to consider only the access network between a transmitter site and end users. As previously stated, Sentech has a different view based on the definition of signal distribution in the Act.

17.1.2 When using the definition of MTS as contained in the Act, then Sentech submits that the vast majority of the costs are incurred in common infrastructure and sub-components, including but not the access network between a broadcaster site and a head-end (for example, in DTT, both radio and television services are received by a network head-end multiplexor as a single combined stream over a single leased line service) and the linking network between the network head-end and a transmitter site.

17.1.3 There is no proof given that there is considerable and substantially different skills sets required in operations to manage the access network between a transmitter site and end-users.

17.1.4 Considering that the MTS provider for mobile television services provided by E.tv and Multichoice is not Sentech, there is no proof given that neither the Orbicom nor ODM are likely to be providers of MTS for Radio because of coverage problems and/or costs. To the contrary, the development of mobile television broadcasting (and not streaming) services in the last year does indeed demonstrate that MTS for broadcasting services can be built from the ground by a different MTS provider other than Sentech. Sentech submits what is at play is not the opportunity or market structure but rather choices made by potential providers of MTS'.

17.1.5 Finally Sentech notes that in fact, there are only two radio services that cover more than 70% of the South African population and that can therefore be

regarded as having national scope<sup>16</sup>. Sentech submits therefore that it is not clear that the current provider of MTS for mobile television cannot provide services for the vast majority of radio broadcasters, particularly using the same maintenance workforce.

**18 Question 13: Do you agree that MTS for local radio broadcasting is in a separate market to MTS for national and/or regional radio broadcasting (i.e. non- local radio broadcasting?)**

18.1 Sentech is not clear on the Authority's definition of local, national and/or regional radio broadcasting, and in particular, it is not clear whether the assumed definitions are drawn from any Act or Regulation or they are simply a reflection of geographic and/or population coverage.

18.2 Sentech submits that there are a number of public radio services (SABC) that are not defined as Community broadcast services but that have equivalent geographic and/or population coverage to some Community broadcast services.

18.3 Whilst Sentech has specific views on the MTS markets for Public, Commercial and Community radio broadcasting services, Sentech is unable to provide further answers to the question raised until there is clarity from the Authority on its definitions.

**19 Question 14: Do you agree that MTS for Analogue and Digital broadcasting should be considered in the same market?**

19.1 It is premature to make this determination. Initially the market will be restricted to the incumbent television broadcasters but the market will change significantly if and when more television broadcasters can be accommodated on the existing or future multiplexes. The Discussion Paper does not give consideration to the effect that potential new entrants could have on the market. As it is, the Minister of Communications has announced that his department is to publish a white

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<sup>16</sup> Based on Sentech's data, RSG and SAFM are the only two radio services with population coverage in excess of 70%. RSG, SAFM and Radio2000 are the only services with population coverage in excess of 50%.

paper for discussion on the licensing of more broadcasting service licensees<sup>31</sup><sup>17</sup>.

The Minister has stated that this process will be completed in 2013. The Minister has also published draft amendments to the Broadcasting Digital Migration Policy issued under *Government Gazette* No 31408 on 8 September 2008<sup>18</sup> which suggests that Government will use the opportunity brought by DTT to facilitate the development of community TV and that community TV should be accommodated in existing DTT multiplexes. Sentech will undoubtedly play a role in this but its exact role is not known as yet although the Minister has suggested that Sentech act as a common carrier. What is clear is that the structure and dynamics of the "DTT market" is far from clear and Sentech suggests that it would be prudent to delay defining and intervening in the DTT market until Government has finalised its policy and Sentech's role is clarified,

- 19.2 To a certain degree Sentech will be able to use the same sites and will benefit from some economies of scale. Sentech does not however control all of its sites and may need to conclude new co-location agreements for additional infrastructure.
- 19.3 The analogue market is stagnant and will cease to exist at the end of the dual illumination period and Sentech submits that it is premature to formulate pro-competitive in respect of DTT. The standard for digital terrestrial broadcasting is still evolving and it would be premature to place MTS for analogue and digital in the same market.
- 19.4 Insofar as maintenance and support of the infrastructure is concerned, Sentech technicians will require specialised training and Sentech may not benefit from economies of scale to quite the extent assumed by the Authority.
- 19.5 Whilst the radio broadcasting market is understood, Sentech is of the view that it is too early to appreciate all the complexities of the DTT market.

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<sup>17</sup> The Star, 5 September 2011

<sup>18</sup> Published under notice No. 670 in *Government Gazette* No. 64568 on 19 August 2011.

**20 Question 15: Do respondents agree that the geographic markets for all markets defined for MTS on the terrestrial network are national in scope?**

20.1 Noting the issues already raised in the answer to Question 13 above, Sentech further notes that it is unable to follow the arguments presented in the Discussion Paper to enable the Authority to come to the view that "all the product markets identified for MTS on the terrestrial network are national in scope".

**21 Question 16: Do respondents have any views on the correct geographic market definition for satellite broadcasting services? Should it be defined as national or transnational?**

21.1 It is correct that it is possible for broadcasters to limit broadcasting content to the borders of South Africa and whether in fact they do so will depend on the licensing rights attached to the content.

21.2 Sentech's mandate from government is to provide a national service and it is the broadcasters who decide whether or not to restrict the content to within South Africa's borders. Currently neither of the free-to-air broadcasters allow their content to be viewed outside the boarders of South Africa.

21.3 Should the practice change the market should then be defined as transnational.

**22 Question 17: Do respondents have any views on why any other licensee that owns high sites (apart from Sentech) would not wish to provide wholesale broadcasting transmission services?**

22.1 Undeniably there are high barriers to entry and exit into the various markets identified by the Authority although this is considerably ameliorated by the fact that any licensee (or person exempted from licensing) can require that Sentech lease facilities to it in terms of Facilities Leasing Regulations 2010.

22.2 There are licensees who have the resources to provide wholesale BTS and yet they do not do so, due, *inter alia*, to the high barriers of entry and relatively low



return on investment.

22.3 Orbicom (Pty) Ltd (“**Orbicom**”) has signal distribution expertise but it confines the provision of its services to its affiliate companies. Sentech does not believe that its activities constrain Orbicom or any other broadcast licensee that holds and ECN licence. Orbicom leases 61 sites from Sentech

22.4 Sentech can only speculate as to the reasons for other operators not entering the various markets defined. A detailed study by the Authority is required to establish a true sense of why other high site facility operators have not actively pursued this environment.

### Questions for Stakeholders from Chapter 5

#### 23 **Question 18: Do you agree with the initial views of the Authority that Sentech has SMP in the market for MTS for national terrestrial television broadcasting?**

23.1 Sentech accepts that its market share exceeds 45% and that, using the test for dominance as contained in the Competition Act, 1998, it is therefore dominant in the market. As such and based on its dominance alone, Sentech acknowledges that it has Significant Market Power (“**SMP**”) in this market.

23.2 However, it also does not automatically follow that because Sentech has SMP that there is ineffective competition in the market. Procedurally in terms of section 67(4), it is only once a finding has been made there that there is ineffective competition (which includes, but is not limited to, an enquiry into relative market share which can be something different to SMP if the market share is less than 45%<sup>19</sup>) that the enquiry regarding SMP should be embarked upon. The following statement (with Sentech's emphasis added) at paragraph 5.2 is incorrect in law -

*“The Authority considers Sentech has Significant Market Power in this market. As a result this market has been found not to be effectively*

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<sup>19</sup> In terms of the Competition Act a firm that has a market share of between 35% and 45% is presumed to be dominant unless it can show it does not have market power.

*competitive.*<sup>20</sup>

- 23.3 Although the Authority has expressed views on the various factors to be taken into account in determining competitiveness as required by section 67(4) it does not appear to have based its conclusion that there is ineffective competition on these observations but has put the cart before the horse by assuming that because Sentech has SMP there must be ineffective competition.
- 23.4 With regard to the Authority's consideration of the overall size of each of the market participants, Sentech wishes to point out that in stating that Sentech has 1200 sites, the Authority seems to have incorrectly included self-help stations and low power sites. In addition, in the absence of Orbicom's revenues there does not seem to be any purpose in considering Sentech's revenues alone.
- 23.5 With regard to the Authority's consideration of technological advantages, it is correct that Sentech is investing in DTT infrastructure and that it is receiving Government funding for this. However, Sentech is investing in the infrastructure as it owned by Government and the migration of television broadcasters to MUX1 and 2 is a Government imperative.
- 23.6 In fact, it is noteworthy that the Discussion Paper does not fully consider the provisions of the Digital Migration Regulations, 2010 (the "**Digital Migration Regulations**") insofar as they relate to signal distributors (as defined in the ECA) appointed by migrating broadcasting television licensees-
- 23.6.1 in terms of regulation 9 of the Digital Migration Regulations each incumbent broadcasting licensee must seek to conclude a commercial agreement with an ECNS licensee to provide signal distributions services<sup>21</sup>. An agreement concluded between an incumbent broadcasting licensee and the ECNS licensee selected to provide signal distribution must be submitted to the Authority prior to commencement of the performance period together with –
- 23.6.1.1 a roll out plan in line with coverage targets specified in regulation 10;
- 23.6.1.2 a technical plan consistent with the broadcast frequency plan; and
- 23.6.1.3 a tariff structure for signal distribution.

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<sup>20</sup> At paragraph 5.2 (Assessment of market power in the market for MTS for terrestrial television broadcasting (analogue and digital))

<sup>21</sup> "Signal distribution services" are not defined in the Digital Migration Regulations and must therefore bear the definition assigned to the term in the ECA.

- 23.6.2 regulation 9(8) provides that, during the dual illumination period, if a signal distributor receives any government subsidy intended to subsidise the signal distribution costs incurred by any incumbent broadcast service licensee the signal distributor must reduce the tariffs charged to the incumbent broadcasting service licensee or licensees by the amount of the subsidy and must, in appropriate circumstances provide signal distribution services free of charge.
- 23.7 The potential for adverse consequences arising from ineffective competition, to the extent that it exists, is also constrained by the provisions of regulation 10 of the Digital Migration Regulations which requires that the signal distributor be obliged to ensure that the broadcast service licensees' coverage targets are met. The ECNS signal distributor must submit quarterly reports on quality of service including progress in meeting required technical standards and keep records on interference.
- 23.8 Regulations thus already exist which impose pro-competitive obligations on signal distributors who are to provide signal distribution services to migrating television broadcasters. Sentech therefore questions the need for further pro-competitive regulation or setting of tariffs given what is contained in the Digital Migration Regulations as the exercise would ultimately amount to a duplication of efforts.
- 23.9 In addition, the analogue and DTT tariff structures are likely to be structured differently and a direct comparison will be difficult. It is too early to form a firm view as to whether the overall charge to the broadcasters for DTT will be lower than the total analogue costs. Sentech is committed to a new tariff methodology that will be robust and transparent and reflect the true costs and the current value of assets. It is also anticipated that the new tariff structure will provide for the infrastructure to be maintained and replaced in the future without additional funding from Government. The latter point is a key financial principle, in order for Sentech to remain a self-sustainable organisation it will have to self-provide for future replacement.

**24 Question 19: Do you agree with the initial views of the Authority that Sentech has SMP in the market for MTS for the purpose of national terrestrial radio broadcasting (non-local)?**

24.1 Sentech accepts that its market share exceeds 45% and that, using the test for dominance as contained in the Competition Act, 1998, it is therefore dominant in the market. As such and based on its dominance alone, Sentech acknowledges that it has SMP in this market.

24.2 Again, as stated above in response to question 18, it does not follow that because Sentech has SMP that the market is not effectively competitive. Again, the conclusion that the competition is ineffective in the market seems to be based on the fact that Sentech has SMP and not an assessment of the various section 67(6) factors.

**25 Question 20: Do you agree with the initial views of the Authority that Sentech has SMP in the market for MTS for the purpose of national terrestrial radio broadcasting (local)?**

25.1 Sentech accepts that its market share exceeds 45% and that, using the test for dominance as contained in the Competition Act, 1998, it is therefore dominant in the market. As such and based on its dominance alone, Sentech acknowledges that it has SMP in this market.

25.2 Again, it does not follow that because Sentech has SMP in this market the market is ineffectively competitive and the following statement regarding MTS for national terrestrial radio broadcasting is therefore incorrect –

*“The Authority considers that Sentech has SMP in this market based on its market share and therefore the market has been found to be ineffectively competitive.”<sup>22</sup>*

25.3 Sentech suggests that in order to properly assess the effectiveness of competition in this market a more detailed enquiry should be conducted on the

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<sup>22</sup> At paragraph 5.4 (Assessment of market power in the market for MTS for radio broadcasting (local terrestrial))

scope of usage of other BTS providers by local broadcasters and the extent to which local broadcasters self-provide.

**26 Question 21: Do you agree with the initial views of the Authority that the market for MTS for the purpose of satellite broadcasting is effectively competitive and falls outside of its jurisdiction due to its trans-national nature?**

Yes.

**27 Question 22: Do you have any data regarding the market, other than that used by the Authority to make its initial views?**

No. Sentech has provided all relevant information to the Authority.

### Questions on Transparency

**22 Question 23: Do the existing Facilities Leasing Regulations adequately address the potential challenges with respect to entering into a Master Service Agreement with Sentech?<sup>23</sup>**

22.1 It appears from this question on transparency that the Authority has conflated two distinct markets namely –

22.1.1 the market for access to network elements (i.e. intra-platform competition);  
and

22.1.2 the market for managed transmission services which is an end to end service (i.e. inter platform competition)

22.2 The Facilities Leasing Regulation deal with the lease of parts of the network which would enable a broadcaster to either self-provide or combine the network

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<sup>23</sup> There are two questions numbered 22

elements leased with network elements provided by other infrastructure providers. A Master Services Agreement is an agreement that provides the provision for a full suite of managed services.

22.3 Sentech submits that these markets should be addressed separately In this regard; Sentech refers the Authority to Cullen International SA *Study on the Regulation of Broadcasting issues under the New Regulation Framework* (2006) prepared for the European Commission. A copy of the study is included with this document. In summary the authors state that regulators (where there is market failure and SMP has been established) should first look to see whether there is a real prospect of intra-platform competition and then impose access remedies. Only if there is no real prospect of intra-platform competition only then should regulators then regulate the market for managed transmission services.

22.4 Sentech is also of the view that the Facilities Leasing Regulations are sufficient to regulate the market for facilities. It doubts that the costs of any further attempt to regulate access to facilities will outweigh the benefits particularly as the benefits to consumers are indirect and limited and there is little scope for service differentiation between operators for the broadcasting signals. Greater competition in access to facilities will be facilitated by promoting greater awareness among broadcasters of the provisions of the Facilities Leasing Regulations.

<p>23 <b>Question 24: Are any amendments to the regulations needed to better cater for the potential consequences of SMP in the defined markets, or are separate regulations needed? (Please explain)?</b></p>
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23.1 No. As stated above, Sentech is of the view that the regulations are adequate and agrees with the Authority that there greater awareness of the provisions of the Facilities leasing Regulations is needed.

23.2 In addition, signal distribution services (as defined in the ECA) are provided under an ECNS licence and providers of ECNS are all subject to the same facilities leasing provisions.

24 **Question 25: Is access an appropriate remedy in light of structural concerns with the market (high sunk costs, no possibly of a new entrant in the short term, etc?)**

Sentech is of the view that access to facilities is a more appropriate remedy and that the MTS market should only be regulated if there is no prospect of competition.

25 **Question 26: Is the proposed Transparency Obligation appropriate, proportionate and justifiable?**

It is not entirely clear to Sentech whether the Reference Offer that the Authority proposes is a Reference Offer for access to facilities or a Reference Offer for MTS as the terminology is used interchangeably. Nonetheless, Sentech is more than amenable to work with the Authority to formulate a reference offer for access to elements of the network as it supports the overall objective of the transparency obligation

26 **Question 27: If the obligation is adopted, should the Authority provide a Model RO, or should the obligation rest on the SMP Operator to initiate the RO?**

26.1 Sentech would prefer to initiate the Reference Offer although it is more than prepared to consult with the Authority in preparing the document. As stated above, Sentech is currently in the process of developing a pricing model that will be:

26.1.1 robust, transparent and linked to Annual Financial Statements with reference to the annual financial statements

26.1.2 cost reflective

26.1.3 benchmarked to ascertain the integrity of the tariffs

26.2 The new tariff structure and the migration to DTT may indicate that there should be a change in the business operating model. Together with stakeholder requirements this may inform input to the reference offer

**27 Question 28: What is the most efficient and effective way to make an RO available to all affected operators to use as they enter into negotiations with the SMP Operator (i.e. website, Library, etc?)**

Sentech believes that the most effective way to make the RO available is on its website.

**28 Question 29: Should existing agreements be amended to bring them into line with the terms of the published RO? If not, how should existing agreements be treated?**

28.1 Existing agreements are based on broadcasters' particular requirements and are in many instances the product of extensive negotiating, financial modelling and forecasts made at the time the agreements were concluded. Sentech's planning and network roll out plans are based on the content of these agreements. Amending all the existing agreements would be extremely disruptive and unfairly prejudicial to Sentech.

28.2 In any event, many of the existing agreements will have to be renegotiated to accommodate the migration from analogue to digital broadcasting.



**Questions on Non-Discrimination**

**29 Question 30: Is the proposed Non-Discrimination Obligation appropriate, proportionate and justifiable? Please explain your views?**

Sentech has no difficulty with the imposition of non-discrimination obligations in respect of either quality or pricing as it is not its practice to unfairly discriminate on either quality or price.

**30 Question 31: Are there other areas in addition to pricing and QoS whether there are concerns relating to non-discrimination?**

No, however many community broadcasters have requested a preferential tariffs. Sentech would value an active engagement with the Authority and other industry participants on the accommodation and principles relating to tariffs for community broadcasters.

**31 Question 32: Should existing agreements be amended; and, if so, how?**

Sentech is of the view that existing agreements do not need to be amended. The reference offer can be utilised when concluding signal distribution agreements in terms of the Digital Migration Regulations.

## Questions for on Price Control Obligation

### 32 Question 33: Is the proposed Pricing Obligation appropriate, proportionate and justifiable?

32.1.1 At paragraph 6.2 of the Discussion Paper, the Authority identifies the following potential consequences of “market power”<sup>24</sup> in the provision of MTS on terrestrial networks—

32.1.1.1 inefficient and excessive pricing of MTS;

32.1.1.2 provisions of MTS at an inferior level of quality; and/or

32.1.1.3 delays in providing MTS within reasonable time frames

32.1.2 Sentech notes that whilst the Authority has made findings in 3 of the markets, there is inefficient competition and nothing to suggest that any of the consequences have in fact occurred despite Sentech's historical position as a dominant provider of signal distribution services. For this reason, Sentech is of the view that light touch regulation is appropriate.

32.1.3 To address any concerns regarding the negative effects of inefficient competition, Sentech is prepared to engage with the Authority to prepare a tariff model which take the following principles into account -

32.1.3.1 Sentech's sustainability and public service mandate;

32.1.3.2 product accounting separation;

32.1.3.3 fairness i.e. no cross subsidisation between products; and

32.1.3.4 non-discriminatory pricing

32.2 Sentech is prepared to engage with the Authority to prepare a cost model and to suggest a cost model to the Authority for its consideration. This process should

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<sup>24</sup> More correctly these should be potential consequences of ineffective competition

not however be a duplication of the procedures set out in the Digital Migration Regulations.

- 32.3 Sentech is of the view that, at this stage and in the absence of a thorough cost modelling, it is too early during the migration process to impose a principle that pricing in the digital transmission era cannot be higher than existing contracted prices for analogue.

**33 Question 34: Do you agree with the 'light touch' approach that the Authority proposes relating to cost orientation?**

- 33.1 Yes. Sentech will support a model that will allow for realistic costs of provision that does not exclude it from making flexible pricing decisions where objectively justified.
- 33.2 If a cost model is in place, it should not be necessary for the Authority to have a process to deal with appeals against "excessive prices" – this will amount to price control. Certainly, if such a process is to be allowed where Sentech is concerned then it should be allowed in respect of providers of ECNS or facilities.
- 33.3 The tariff model will take into consideration costs include pass-through costs and depreciation, assets and return on assets.

**34 Question 35: Do you believe that a Regulatory Accounting obligation would be proportionate to the harm that the remedy seeks to address?**

- 34.1 A requirement that regulatory accounts be submitted seems excessive given the size of the market. The number of broadcasters is a relatively small market. Viewers of broadcasting services will only benefit indirectly (and Sentech, submits, minimally) from a requirement to file regulatory accounts. The cost of administering a requirement that Sentech file regulatory accounts will outweigh the benefits.
- 34.2 Sentech is confident that its new tariff model will provide comfort that Sentech is not abusing its position in the market and given that the model will be both robust and transparent the Authority will not deem in necessary to impose such an obligation.

**35 Question 36: Should existing agreements be considered for amendment with respect to price? Please provide justification in support of your view?**

Yes as Sentech is busy designing a new tariff model of each of its products that will be fair, non-discriminatory, provide for accounting separation; be cost reflective, compliant with legislation, and benchmarked to global standards

## Definitions and acronyms

The following definitions and acronyms are used in this document –

“**BTS**” means broadcasting transmission services;

“**ECA**” or “**EC Act**” means the Electronic Communications Act, 36 of 2005;

“**Draft Policy**” means the *Minister's Broadcasting Digital Migration Policy issued under Government Gazette No 31408 on 8 September 2008* (Notice No. 670 in 2011 published *Government Gazette* No. 64568 on 19 August 2011).

“**Digital Migration Regulations**” means the Digital Migration Regulations, 2010 (Notice No. R. 97 of 2010 published in *Government Gazette* No 32956 on 15 February 2010);

“**Discussion Paper**” means the Discussion Paper on the Regulatory Framework for Broadcast Transmission Services issued by the regulator on 15 June 2011 (Notice 346 of 2011 published in *Government Gazette* No 34371);

“**DTT**” means digital terrestrial television;

“**ECNS**” means electronic communications network service licence;

“**IBA Act**” means Independent Broadcasting Authority Act, 153 of 1993;

“**ICASA**” or the “**Authority**” or the “**Regulator**” means the Independent Communications Authority of South Africa;

“**Minister**” means the Minister of Communications;

“**MTS**” means managed transmission service;

“**Ofcom**” means United Kingdom Office of Communications;

“**Orbicom**” means Oribcom (Pty) Ltd;

“**SABC**” means South African Broadcasting Corporation;

“**Sentech**” or the “**Company**” means Sentech Limited;

“**Sentech Act**” means Sentech Act, 63 of 1996

“**SMME**” means small to medium enterprise;

“**SMP**” means significant market power;

“**SOE**” means state owned enterprise;