

PRESENTATION ON DRAFT DIGITAL TERRESTRIAL TELEVISION (“DTT”) REGULATIONS



Public Hearings

21 August 2012

Contents

- A. Preamble
- B. Objections & Proposed Amendments
 - 1. Definitions
 - 2. Purpose of the Regulations
 - 3. Framework for Digital Migration
 - 4. Multiplex Allocation - Multiplex 2
- C. Conclusion

Preamble

As WOWtv, we hereby place on record our absolute displeasure at the blatant disregard by the Authority of the fact that Mnet is a connected person to Dstv/MultiChoice and that these Draft Regulations cannot ignore such a glaring fact without unfairly prejudicing other existing subscription television broadcasters such as WOWtv.

Ever since the Draft DTT Regulations have been made available for comment, the Authority seems to be using our commentary to tighten its pre-determined position of affording certain broadcast licensees digital terrestrial capability over others. We are not convinced that the Authority is soliciting our representations in order to give them due consideration but rather to ensure that 'all possible loop-holes' in the Draft DTT Regulations are closed to secure the premeditated decision to exclude certain broadcast licensees in the current Draft DTT Regulations.

Preamble...

Our Government, through the Broadcasting Digital Migration Policy, is committed to creating a policy environment to ensure that the migration process is not biased towards the incumbent broadcasters but rather actively facilitates and develops a competitive environment.

In the Broadcasting Digital Migration Policy document released in February 2012, Minister Dina Pule reiterates the importance of competition in the industry when she says in the Executive Summary of the Policy,

“Although the digital migration process focuses on incumbent broadcasters, especially the free to air services, government continues to be committed to increasing diversity of ownership and content of the broadcasting sector and facilitating the development of a dynamic, competitive environment”.

“Competition is needed to achieve a range of national policy imperatives including consumer choice, economic empowerment, promote domestic and foreign investments”.

Subparagraph j) of paragraph 1.2.3 of the Policy further entrenches our Government’s position:

j) promote fair competition in the television broadcasting industry;

Preamble...

The Electronic Communications Act, 2005 , is very clear and direct with regard to competition as it gives due attention and emphasis on matters of competition. For this reason, creating a fair competitive environment is one of the key objects of the EC Act, 2005.

Section 2 (f) and (g) of the Electronic Communications Act, 2005 stipulates the objects of the Act as follows:

- (f) promote competition within the ICT sector;
- (g) promote an environment of open, fair and non-discriminatory access to broadcasting services, electronic communications networks and to electronic communications services.

Chapter 10 of The Electronic Communications Act, 2005 is set aside to deal with and curb activities that might lead to :-

- Section 67(1)(a) undue preference, or
- Section 67(1)(b) undue discrimination against , any other licensee.

The Regulations

Definitions

The term, 'existing broadcasting services' is not included under definitions in the Draft DTT Regulations.

This is despite the term 'existing broadcasting services' being referred to in the Broadcasting Digital Migration Policy objectives under paragraph 1.2.3

The Broadcasting Digital Migration Policy document highlights the fact that the national radio frequency spectrum is a scarce resource and seeks then to create maximum efficiencies in its utilisation by both the 'existing broadcasting services' and by future broadcasting services.

Once again, the Broadcasting Digital Migration Policy document does not even make a suggestion that preference should be given to terrestrial broadcasters because it seeks to move into a technology neutral future where broadcasters are not classified according to the platforms they use but according to the broadcast licenses they have been issued with.

Definitions...

We propose that the term 'existing broadcast services' be included in the Draft DTT Regulations Definitions in keeping with the Broadcasting Digital Migration Policy.

It is worth bringing to the attention of the Authority that under 'Definitions', M-net, an existing subscription television broadcast licensee which competes against all other providers of existing broadcast services such as WOWtv, has received a specific and exclusive mention.

Besides the technology employed by M-net in deploying its broadcast, it remains a subscription television broadcaster and concessions and incentives extended to them by these Draft DTT Regulations ought to be viewed against the fact that M-net is not the only existing subscription television broadcaster in South Africa but has competition. For this reason, these Draft DTT Regulations need to address the manner in which the Authority has considered issues of competition as long as M-net is afforded exclusive provisions.

Definitions...

It is a well known fact that M-Net is a sister company/ a related party/ a connected person to Dstv/ Multi-Choice, which is a dominant player in the South African subscription television industry .

WOWtv submits that in all cases where M-Net is mentioned in the Draft DTT Regulations, the Authority should give due consideration to the fact that an equivalent concession is indirectly being made for Dstv/ Multi-Choice, the dominant satellite subscription television broadcaster. This, therefore warrants that all existing subscription television broadcasting licensees be considered on the same terms for the Regulations not to be unduly preferring one operator over others.

It is, however, evident that the Draft DTT Regulations repeatedly ignore the critical fact that M-Net and Dstv/ Multi-Choice are related persons and as a result, the Authority could be challenged as propagating undue discrimination which substantially lessens competition within the subscription broadcasting space.

By overlooking the M-Net/ Dstv/Multi-Choice relationship, these Draft DTT Regulations are in direct contravention of Section 67(1) of the EC Act, of 2005.

Purpose of the Regulations



As detailed in the preamble, the Electronic Communications Act, 2005 regards 'Competition' as one of the key tenants upon which the EC Act is founded.

The competition envisaged by the EC Act, 2005 is one that is fair, non discriminatory and equitable.

Since these Regulations fall within the ambit of the EC Act, 2005, it follows therefore that all industry Regulations, such as the DTT Regulations have to comply with the same principles and commit to promoting 'Competition'.

In keeping with the spirit of the EC Act, 2005 and the Broadcasting Digital Migration Policy, WOWtv submits that Section 2 of the Regulations, under the subject 'Purpose of the Regulations', include the words 'fair and equitable'.

The fact that the Draft DTT Regulations are completely silent with regards to matters of competition is on its own shocking.

Purpose of the Regulations



WOWtv proposes an amendment Section 2 of the Draft DTT Regulations as follows :-

Sub-section 2(b) should be modified to include the words 'fair and equitable' and read as follows:

'prescribe **fair and equitable** conditions for the assignment of channel capacity in Multiplex 1 Multiplex 2 and Multiplex 3 for the purposes of digital migration and the creation of a platform for digital terrestrial television'

Sub-section 2(e) should be modified to include the words 'fair and equitable' and read as follows:

'Make provision for **fair and equitable** conditions on the assignment of capacity in any additional Multiplex (Multiplex 'n') for the purposes of providing Digital Terrestrial Television during and/ or after migration.

Framework for Digital Migration

Following the submission that these Regulations should include the definition of 'existing broadcast services' under its Definitions, WOWtv submits that the provisions of Section 3 under the subject 'Framework for Digital Migration' should consequently include reference to providers of 'existing broadcast services'.

Such an inclusion should be in the form of a new sub-section reading as follows:

"Providers of existing broadcast services shall not be required to dual illuminate during the performance period but must ensure that they are able to launch their digital terrestrial television by the start of the performance period".

Consequently, Section 3(7) should be amended to read as follows:

"During the dual illumination period, only providers of the existing broadcast services, existing television channels and any digital incentive channels shall broadcast in Multiplex 1 or Multiplex 2, as authorised".

Multiplex Allocation - Multiplex 2



In the Draft DTT Regulations, the allocation of Multiplex 2 capacity is highly prejudicial as it does not include all providers of existing broadcast services due to the Regulations allocating capacity only to the dominant Dstv/ Multi-Choice through M-Net, a subscription television broadcasting licensee.

WOWtv submits that, in order for the Authority to avoid the compromising position of being seen to be unduly preferring one licensee over others and to prevent being seen as unduly discriminating against other licensees, Multiplex 2 capacity should be allocated in a fair and equitable manner which takes into account the uncompetitive landscape the Authority should be re-dressing.

Once again, we wish to bring to the attention of the Authority that M-Net is a connected/related entity to Dstv/ Multi-Choice, a provider of exiting broadcast services. The Authority seems to be completely ignoring this very well know fact in the drafting/ revision of the Digital Terrestrial Television Regulations. Let us place this on record once again, allocating multiplex capacity to M-Net is indirectly allocating capacity to Dstv/ Multi-Choice which is grossly prejudicial unless all other providers of existing broadcast services are afforded the Same opportunity.

Multiplex Allocation - Multiplex 2



The fact that M-Net delivers its signal via terrestrial means should not mislead anyone, especially the Authority, from the truth that M-Net is a subscription television broadcaster just like WOWtv.

We submit that the same conditions must apply to all providers of existing broadcast services and equal allocation of capacity must be applied regardless of the platform of technology they use to broadcast.

Under Chapter 10 of the Electronic Communications Act, 2005, the Authority is required by law to be an independent body to arbitrate and regulate on any uncompetitive conduct amongst licensees. However, for the Authority to be perceived as creating an environment where the Authority itself might stand accused of breaching the very legislation it is meant to protect and enforce, is deeply regrettable.

It is for this reason that we officially request the Authority to concede that M-Net and Dstv/ Multi-Choice are connected/ related parties and that allocating capacity to M-Net should trigger warning signals in terms of the responsibility the Authority is charged with, to develop and maintain a competitive environment for the industry.

Multiplex Allocation - Multiplex 2



One begins to wonder what the purpose of regulating the communications industry is if the previously advantaged, continue being given an advantage, through regulations which highly favour them whilst the previously disadvantaged continue to be unfairly disadvantaged, through the same regulations by the very body established to supposedly correct and redress the evils of the pre-democracy regime.

Who must then benefit from these DTT Regulations 2012, the broadcasters who continue to dominate and monopolize the market ever since the apartheid regime or all providers of existing broadcast services must benefit?

We therefore submit that the Authority should allocate Multiplex 2 capacity as follows:

- 40% to e-tv;
- 10% to M-Net (Dstv/ Multi-Choice);
- 10% to Walking On Water Television;
- 10% to Top-tv; and
- 30% set aside for future use

Conclusion

Shining a spotlight on '**Matters of Competition**' is the epicenter of the WOWtv submission, reminding the Authority that it is, by law, charged to encourage competition amongst industry players.

We wish to remind the Authority that it is, by law, charged with the responsibility of promoting a competitive environment amongst all industry players and protecting its independence

The current Draft DTT Regulations cast a blind eye to the relationship between M-net and Dstv/ Multi-Choice and therefore render the Authority biased towards these broadcasters and more so, guilty of defeating the transformational objectives of our Government.

Despite the policy position articulated by the Minister of Communications and the direct statutory provisions charging the digital migration process to facilitate a competitive environment, the Authority seems determined to ignore such positions and bulldoze biased regulations that contradict the spirit of the legal framework. This is highly regrettable and can only frustrate and delay the entire digital migration process as the Authority is opening itself to possible legal challenges.



THANK YOU