



eMEDIA INVESTMENTS PRESENTATION
ON THE SUPPLEMENTARY DISCUSSION DOCUMENT ON THE SIGNAL
DISTRIBUTION SERVICES MARKET INQUIRY IN SOUTH AFRICA

5 JUNE 2024

THE TEAM

- Khalik Sherrif : Chief Executive Officer
- Antonio Lee : Chief Operating Officer
- Junior Qwabe : Chief Technology Officer
- Pippa Rafferty : Executive: Legal & Regulatory Affairs
- Oscar Machaba : Compliance Manager
- Dan Rosengarten : Rosengarten & Feinberg
- Lynn Mansfield: External Advisor

SENTECH???

- Relevant or irrelevant?
- The cost of diminishing relevance.
- Distribution costs on a broadcasters SOCI.
- What the numbers say?

SENTECH???

- Analogue cost per household –

<u>Year</u>	<u>Analogue households</u>	<u>Cost per household</u>
2024	4,426,442	R 27.92
2019	7,149,563	R 18.86
2014	8,808,673	R 12.44

- DTT versus DTH cost per household

<u>Potential DTT cost per household</u>	<u>DTH Cost per household</u>
R 97.00	R 20.96

THE INQUIRY

- According to the Authority, the 2021 Signal Distribution Services Market Inquiry (“**Inquiry**”) consisted of four phases –
 - Phase 1 – information gathering through the distribution of a questionnaire. Process to be finalised within nine weeks, being mid-November 2021.
 - Phase 2 – based on questionnaire, the Authority to issue a Discussion Document.
 - Phase 3 – public hearings on the Discussion Document.
 - Phase 4 – Findings Document to be issued within **90 days** from the conclusion of the Inquiry (“**Findings Document**”).
- Notwithstanding the time periods stipulated regarding phase 1, the Authority only published the Discussion Document on 22 April 2022 – five months late (“**2022 Discussion Document**”).
- Phase 3 hearings were held four months later, on 26 August 2022.
- 90 day period for making a finding as undertaken by the Authority expired in November 2022.
- Despite its own undertaking, no Findings Document was issued; nor has it been issued.
- Had the Authority lived up to its own undertaking as well as its legislative obligation, the market would have already been regulated.

THE INQUIRY

- Rather it took a further **17 months** before the Authority took its next step by issuing the Supplementary Discussion Document (“**Supplementary Discussion Document**”).
- Had the Authority lived up to its own promise and legal obligations, it would not have to waste public resources by extending the Inquiry as it has now done. It is likely that had the Authority not inexplicably delayed the process, the market would have been regulated by now.
- This is unacceptable conduct and is a dereliction of duties by the Authority.
- The effect of this delay is to favour one licensee which has been found to dominate the signal distribution market –i.e., Sentech, over other licensees which have to rely on Sentech for signal distribution services.
- These licensees include e.tv which can only broadcast its free-to-air (“**FTA**”) signals terrestrially. It has no other options available to it such as utilising other platforms including internet reliant platforms.
- This has prejudiced e.tv and other FTA broadcasters.

THE INQUIRY

- In the Supplementary Discussion Document, the Authority seeks further information from stakeholders.
- There is no good reason for requiring this further information. Nothing has changed since the inquiry commenced in 2021.
- As e.tv needs to broadcast terrestrially, the growth of new technologies does not assist it. Accordingly, the assessment of dominance cannot consider such new technologies.
- Many of the questions posed in the Supplementary Discussion Document replicate those posed in the 2022 Discussion Document. There is no reason for the Authority issuing the Supplementary Discussion Document rather than a findings document based on the information it already has.
- This delay has enabled Sentech, which the Authority recognised as having Significant Market Power (“SMP”) to continue operating without regulation.
- This has prejudiced free-to-air broadcasters including e.tv.

THE INQUIRY

- Many of the findings in the Supplementary Discussion Document mirror those in the 2022 Discussion Document, including –
 - Sentech is dominant in the digital terrestrial signal distribution market in television with 100% market share.
 - Sentech has significant market power (“SMP”)
 - For these reasons, broadcasters do not have countervailing bargaining power.
- Accordingly, there is no reason for the Supplementary Discussion Document even if there are new technologies.
- Rather, the Authority should deliver its findings document in relation to the Inquiry urgently and without further delay.

LEGISLATIVE OBLIGATIONS

- Section 67(4) of the ECA obliges the Authority to prescribe regulations defining the relevant markets and market segments so that, where necessary, pro-competitive conditions may be imposed on licensees having SMP where there is ineffective competition.
- In order to prescribe such regulations, an assessment of the relevant markets or market segments is required to determine if any licensee has SMP.
- In the 19 years since the ECA was promulgated, the Authority has failed to impose regulations on Sentech despite already finding in 2011 that Sentech had SMP and Sentech acknowledging this at the time. The Authority has also ignored its obligations in terms of the ICASA Act by failing to make decisions within the time periods prescribed in the Act.
- Again, this is a failure by the Authority to exercise its powers, functions and duties as required by the Icasa Act and the underlying statutes.
- One can only speculate as to why the Authority has favoured Sentech for almost two decades.

LEGISLATIVE OBLIGATIONS

- The provision of terrestrial broadcasting transmission services for television in South Africa is a market segment in respect of which there is no competition. Other delivery methods do not fall into this market.
- Yet, the Authority refuses to conclude its study into the dominance of Sentech in the provision of broadcasting transmission services. The Supplementary Discussion Document is further proof of this.
- By now, the Authority ought to have finalised the 2021 Inquiry and prescribed regulations containing pro-competitive conditions on Sentech including requiring Sentech to publish information to ensure transparency and imposing price controls as provided for in section 67(7) of the ECA.
- The Authority's mandate as appears on its website includes the need to create competition in the telecommunications, broadcasting and postal industries. Insofar as broadcasting is concerned it has failed to live up to and achieving its obligations and public mandate.
- The Authority is now obliged to do so and **must** publish its findings document within, at most, **180** days of the conclusion of these oral hearings as it is legislatively obliged to do.
- However, in view of the delays caused by the Authority, it should publish these findings well before then and conclude the Inquiry without delay.

A HISTORY OF ATTEMPTS TO REGULATE THE PROVISION OF SIGNAL DISTRIBUTION SERVICES HIGHLIGHTS ICASA'S FAILURES.

- Although the Inquiry commenced in 2021, it is not the first time that the Authority has attempted to regulate the broadcasting transmission market.
- In 2011, the Authority issued a Discussion Document on the market and concluded that
 - it was not effectively competitive and was dominated by Sentech which had SMP.
 - Sentech was unlikely to have any realistic threats of competition for new entrants.
 - there were barriers of entry which made competition in the market all but impossible and that there were technological barriers which would impact end users if a new player was introduced.
 - there was no equal bargaining power for customers of Sentech.
 - a licensee having significant market power without regulation allows such a party to exploit their market power by engaging in inefficient and excessive pricing.
 - There are numerous pro-competitive remedies which could be imposed where a licensee has significant market power.

A HISTORY OF ATTEMPTS TO REGULATE THE PROVISION OF SIGNAL DISTRIBUTION SERVICES HIGHLIGHTS ICASA'S FAILURES.

- The remedies which the Authority found could be imposed where a licensee has SMP include –
 - Ensuring that such party acts fairly and reasonably
 - Imposing a transparency obligation requiring a party having SMP to publish terms and conditions prescribing accounting methods and price controls. This could prevent Sentech from raising prices.
 - The imposition of price control obligations where charges for services would be derived from the cost of the provision of those services.
 - This was essential so that Sentech was not in a position of strength in negotiating contracts for the provision relating to digital switch-over

ICASA'S FINDINGS DOCUMENT WHICH CONCLUDED ITS 2011 INQUIRY

In its findings, the Authority found the following:

- Sentech held and would continue to hold SMP in the analogue and digital terrestrial transmission markets.
- These markets would, in effect, remain uncompetitive.
- Sentech controlled an essential facility.
- Pro-competitive remedies were needed to address this ineffective competition.

In concluding its findings, ICASA notified all stakeholders that it intended initiating a regulation-making process to ensure that pro-competitive conditions were imposed on licensees having SMP (i.e. Sentech).

Despite this undertaking, such a regulation-making process has not commenced and the Inquiry drags on.

ICASA'S ABOUT-TURN

- Rather than commencing the process of imposing regulations, without any reason, in October 2014, ICASA withdrew its finding document issued in June 2013. Had it not done so, the 2021 Inquiry would have been unnecessary. Public resources would not have been wasted.
- Thereafter, and despite repeatedly stating in its annual performance plans of the need to deal with competition issues as required in terms of section 67(4) of the ECA, it took no steps until, 8 years later it published the 2022 Discussion Document.
- The 2022 Discussion Document reaches essentially the same conclusions and raises substantially the same issues as the 2011 Discussion Document. There was no need for the 2022 Discussion Document.
- Not only is this a waste of public resources and a failure by ICASA to fulfil its legislative and constitutional mandate, but the Authority's dereliction has favoured Sentech despite its having SMP at the expense of terrestrial broadcasters. It has thus encouraged continued unfair competition in the market.
- The 2010 and 2021 inquiries are, in effect, the same inquiry which 14 years later has not been concluded.

THE AUTHORITY'S DERELICTION OF ITS DUTIES

- Despite its findings that Sentech had SMP which needed to be regulated, the Authority has ignored its mandate and sat on its hands for a further period of three years since the 2021 Inquiry commenced.
- eMedia previously pointed to the Authority's failure to protect free-to-air broadcasters and to regulate entities with SMP. The Authority's actions have displayed that it is unwilling or unable to do so. The reasons for this are unknown but cannot be justified.
- This is not the only instance where the Authority has refused to regulate a market in which one player has SMP. The inquiry into Subscription Broadcasting where it has been found that Multichoice has SMP has been ongoing for 8 years with no end in sight. The Authority's conduct smacks of favoritism.
- The Authority has shown that it is able to act with haste when it wishes to. It did so in relation to the spectrum auction. Yet, despite its legislative obligations it has delayed and refused to regulate the television broadcasting market where pro-competitive intervention is required.
- If ever there was a dereliction of duties, this is it.

DERELICTION OF DUTIES –WHERE TO NOW?

- The 2022 Discussion Document issued pursuant to the first phase of the Inquiry reached many of the same conclusions and raised substantially the same issues as contained in the 2011 Discussion Document.
- Rather than finalising the process within 90 days as it undertook to do, the Authority has now issued the unnecessary and wasteful Supplementary Discussion Document.
- The Inquiry needs to conclude once and for all and there is no reason this cannot be done in 2024.
- The Authority must now set out how long it will take to issue its Findings Document pursuant to these hearings and state what steps it will take, and when it will take these, to finalise Phase 4 of this Inquiry.
- The Authority cannot leave the market unregulated any further and act in a protectionist manner towards Sentech.

e.TV'S USE OF SENTECH

- e.tv is obliged, in terms of its licence, to reach 77% of the South African population. Currently, it can only do so with the only player in the market, Sentech.
- Almost a quarter of the population in South Africa still receives television via Sentech's terrestrial networks. Which makes the final analogue switch-off almost impossible at this point of time. Some households also view television digitally on Sentech's terrestrial network.
- Sentech has an established infrastructure constructed over many years (often with government funds) enabling it to achieve national coverage and transmission of terrestrial television to almost the entire population. It is the only provider of a national terrestrial network able to provide a Managed Transmission Service.
- Sentech has no competitors able to provide a signal distribution service nationally which would enable e.tv to comply with its licence obligations. The Authority has recognised it is almost impossible to enter the signal distribution services market as a competitor.
- Nothing has changed between 2011 and the publication of the April 2022 Discussion Document or the Supplementary Discussion document – Sentech still has SMP with no-one able to compete in the market.

THE SENTECH AGREEMENT

- In August 1999, shortly after it began broadcasting in 1998, e.tv had no option but to rely on Sentech to provide it with signal distribution services. As Sentech had SMP, it dictated the terms of this agreement and required it to be an evergreen agreement.
- The term of the Sentech Agreement is for the period of e.tv's broadcasting licence and cannot be terminated by e.tv. e.tv had to accept the pricing imposed by Sentech at the time. As Sentech had no competitors it was impossible to compare tariffs and assess them objectively.
- In terms of the Sentech Agreement:
 - Sentech, without disclosing the basis on which tariffs are computed nor the costs linked to these tariffs, warrants that the tariffs are reasonable. This, in circumstances in which Sentech has not been transparent as to how these costs are calculated.
 - e.tv is prohibited from using the services of a third party even when the Sentech Agreement terminates or when its licence is renewed on terms and conditions **equal** or less favourable to it than those offered by Sentech. This ties e.tv into continuing to use Sentech ad infinitum unless another service provider offers its services on more favourable terms than Sentech.
 - The base cost contained in the 1999 agreement was to increase annually by CPI.

THE SENTECH AGREEMENT

- Analogue cost per household –

<u>Year</u>	<u>Analogue households</u>	<u>Cost per household</u>
2024	4,426,442	R 27.92
2019	7,149,563	R 18.86
2014	8,808,673	R 12.44

- DTT versus DTH cost per household

<u>Potential DTT cost per household</u>	<u>DTH Cost per household</u>
R 97.00	R 20.96

THE SENTECH AGREEMENT

- Sentech's imposed tariffs are not market related, and are not dealt with in an open and transparent manner so that they can be justified and assessed on a non-discriminatory basis.
- Due to Sentech's dominance and control of the market for the supply of terrestrial television signal distribution services, e.tv has no bargaining power which the Authority has accepted.
- The fact that Sentech imposed an evergreen agreement as opposed to an agreement for a period of time (even if 5 to 10 years) has meant that there is no obligation on Sentech to relook and renegotiate prices from time to time as would be the case if the agreement was for a fixed term.
- If there was an obligation to discuss pricing the above costing is an element which would be raised by e.tv in renegotiating prices.

SENTECH'S POSITION IN THE 2011 DISCUSSION DOCUMENT

- Sentech welcomed the fact that the Authority has initiated the possible regulation for broadcasting transmission services.
- Sentech was committed to the need to promote principles of fair competition in the interests of the public and to abide by such principles.
- Sentech supported laws protecting consumers by, for example, ensuring transparent cost-orientated pricing and fair and open contracting practices.
- Sentech played a key role in furthering government's aim of promoting fair competition in broadcasting.
- In order to ensure that it was run efficiently and effectively, its tariffs needed to be cost-orientated and similar to those that would apply in a more competitive environment.
- Its tariff structure needed to be transparent in line with the principles of fair competition.
- Sentech did not dispute the fact that it was difficult for any entity to replicate its infrastructure and provide a comparable national service and hence compete with it.

SENTECH'S POSITION TO THE 2011 DISCUSSION DOCUMENT

- To fulfil its mandate, Sentech needed to *“provide affordable and sustainable broadcasting ... infrastructure network services to the majority of South Africans”*.
- It needed to fulfil its public service mandate affordably and sustainably.
- Its mandate from government was not to maximise profits but to offer sustainable and affordable services.
- Sentech acknowledged that it had SMP.
- Sentech was committed to a new tariff methodology that would be robust and transparent and reflect the true costs and current value of assets.
- Sentech was prepared to engage the Authority to prepare a non-discriminatory tariff model.
- Sentech agreed that its existing agreements needed to be amended in stated that and that it was designing a new tariff model which would be *“fair, non-discriminatory, provide for accounting separation, be cost-reflective and bench-marked to global standards.”*

SENTECH'S ABOUT-TURN

Sentech made the following undertakings in response to the 2011 Discussion Document:

- it was committed to ensuring that its tariffs were cost-orientated and similar to those that would apply in a more competitive environment.
- it would have a transparent tariff structure linked to the costs of providing services in line with the principles of fair competition.
- its new focus was towards fulfilling its public service mandate affordably and sustainably.
- the mandate from its shareholders was not profit.
- it was committed to a new tariff methodology which would be robust, transparent and reflect the true costs of the current value of assets.
- it was committed to fairness and non-discriminatory pricing.
- it was prepared to engage with the Authority to prepare a cost model.

SENTECH'S ABOUT-TURN

- 13 years have passed since Sentech's submission. Not only has it failed to implement any of its aforesaid undertakings, but it has now done about-turn in its response to the Authority's 2022 Discussion Document.
- Sentech's position now is to find every reason as to why the Inquiry should not proceed or be delayed even further.
- In the Supplementary Discussion Document bizarrely, and with spurious reasons, suggests that the issuing of the Supplementary Discussion Document commenced a new Inquiry and that it was not part of the 2021 Inquiry. It also alluded to possible legal proceedings should its position not be accepted.
- The Authority cannot succumb to this view. There is no reason why Sentech should not be held to its undertakings and admissions regarding its practices contained in its 2011 submissions.

e.tv's POSITION HAS REMAINED UNCHANGED

- e.tv's position has not changed since 2011 or the commencement of this Inquiry. It remains concerned that:
 - Despite Sentech's response to the 2011 Discussion Document, it has not engaged in transparent cost-orientated pricing.
 - The Sentech Agreement is evergreen tying e.tv into using Sentech exclusively, without the ability to discuss Sentech's tariffs with it.
 - Sentech has refused to create a new transparent methodology to reflect its true costs and current value of assets.
 - Sentech wants to continue delaying its regulation for as long as possible
 - Sentech has needs a new tariff model which is fair, non-discriminatory, cost-reflective and benchmarked to global standards.

e.tv's POSITION HAS REMAINED UNCHANGED

- Due to Sentech's dominance, there is a lack of equal bargaining power by broadcasters.
- Sentech needs to amend agreements to ensure that terrestrial broadcasters do not pay excessive prices.
- The Authority needs to take urgent steps to ensure that the anti-competitive conduct of Sentech ceases.
- Tariff regulation is required without which e.tv had no ability to engage in meaningful negotiations with Sentech in relation to tariffs.

SENTECH'S RESPONSE TO THE 2022 DISCUSSION DOCUMENT

- Despite its candour in dealing with its SMP in response to the 2011 Discussion Document and providing numerous undertakings in relation to price control obligations and transparency, in response to the 2022 Discussion Document the thrust of Sentech's submission is that the 2022 Discussion Document should be withdrawn.
- The justification is based on numerous other regulatory processes, including the Draft White Paper on Audio and Audio Visual Content Services; the Digital Migration Regulations; the Terrestrial Broadcasting Frequency Plan and Re-stacking process and the Facilities Leasing Regulations.
- The attempt to justify the withdrawal of the 2022 Discussion Documents based on these ongoing regulatory processes is without foundation and spurious. It represents an attempt by Sentech to entrench its dominant position and continue with opaque terms and conditions and pricing structures.
- Notwithstanding this, Sentech still states that it is committed to ensuring that its tariffs are cost-orientated and similar to those that would apply in a more competitive environment and that this inquiry would assist in addressing *"perceptions that it is not applying these principles and/or in any way exploiting a dominant position in the market."*

SENTECH'S RESPONSE TO THE SUPPLEMENTARY DISCUSSION DOCUMENT

- Sentech's response to the Supplementary Discussion Document is even more perturbing.
- It now wishes to avoid the Inquiry and delay its regulation by alleging that the Supplementary Discussion Document initiates a "new process". This is the stuff of fairy tales! It merely seeks to continue entrenching its position where there can be no doubt that it holds SMP.
- Despite previously admitting that it has SMP in the terrestrial television broadcasting market, it now seeks to deny this by alleging that there are alternate modes of signal delivery such as satellite and IP-related technologies which form part of the same market.
- This misses the point – a vast number of people receive their television terrestrially and free-to-air broadcasters are accordingly obliged to use terrestrial signals. The only player in this market is Sentech.
- Nothing has changed – Sentech still has SMP and can behave in an anti-competitive manner.
- Sentech agrees that it is unlikely another firm can replicate its infrastructure.
- The fact that Sentech's customers are large companies has no relevance. However large they are, they are required to use Sentech as the only player in the market enabling Sentech to determine the terms on which it provides its services. These companies have no bargaining power in relation to Sentech.
- The Authority cannot kowtow to any threats in circumstances in which no findings have yet been made.

eMEDIA'S RESPONSE TO VARIOUS QUESTIONS POSED BY THE AUTHORITY

- The Supplementary Discussion Document was issued pursuant to the August 2022 hearings and a request for additional information from certain stakeholders, including eMedia and Sentech.
- It is of great concern that Sentech elected not to answer this request and hence participate meaningfully in the process. It now seeks to avoid the conclusion of the Inquiry altogether which cannot be sanctioned.
- The Inquiry and the Findings Document should proceed on the basis of the information which the Authority has.
- Sentech attempts to hide behind a barrier of non-disclosure, claiming confidentiality in response to general questions such as market definitions; effectiveness of competition in the market; market dynamics; current competition, countervailing bargaining power and SMP.
- These responses cannot, by their very nature, be confidential. This, in the face of Sentech having undertaken to be transparent.
- The Authority appears to have granted confidentiality and is requested to clarify why it granted confidentiality in respect of the above responses by Sentech in their entirety. This makes it difficult for stakeholders to respond to Sentech's stated position and may impact the Authority's findings.

SPECIFIC RESPONSES

General issues

- OpenView is not a signal distributor.
- Only Sentech distributes e.tv's terrestrial signals.
- Data costs remain unaffordable and OTT services or internet based television are not alternative means of enabling the public to watch free-to-air television.
- Terrestrial television is here to stay and will continue to be dominated by Sentech. This is so even after ASO as a substantial portion of the population will continue to rely on analogue terrestrial television due to the inability of government to distribute sufficient Set Top Boxes ("**STBs**") to the indigent and the unavailability of STB's even to those who need to purchase them.
- Accordingly, the Authority's position to only look at the digital terrestrial market is misplaced and it needs to revert to its previous position which included analogue terrestrial signal distribution.
- e.tv maintains that the relevant market only includes the distribution of terrestrial signals and not any alternative forms of distribution such as the internet.

SPECIFIC RESPONSES

Market definition

- The majority of South Africans are and will remain reliant on linear broadcast services for news, education and entertainment.
- The market includes both analogue and digital signal distribution.
- The Authority should not deviate from its previous findings regarding SMP in the market and the need for regulations in terms of the ECA.
- Nothing has changed in the market since the Inquiry commenced in 2021. There have been no substantial changes in the market since the 2011 Discussion Document which could negate the Authority's findings that Sentech has SMP.
- Sentech remains dominant with substantial bargaining power. Competition from different platforms have no bearing on this.

SPECIFIC RESPONSES

Effectiveness of competition in the terrestrial signal distribution market

- Sentech remains the only supplier of terrestrial television broadcasting transmission services at national level.
- Sentech has 100% of this market.
- Sentech can therefore engage in anti-competitive pricing, particularly given the uneven bargaining position between Sentech and its customers.
- This, and the fact that e.tv's agreement with Sentech is evergreen, means that e.tv has been and will remain unable to negotiate a different tariff for analogue signal distribution.
- Sentech's pricing remains non-transparent and secretive. There is therefore no way to determine whether it acts in a discriminatory manner in determining tariffs.
- The barriers of entry will continue to prohibit competition and failure to regulate Sentech will entrench its SMP and its ability to dictate contractual terms.
- This impacts not only FTA broadcasters such as e.tv but also members of the public.
- Without any alternatives for FTA broadcasters, Sentech will continue to hold SMP and will be able to hold FTA broadcasters to ransom.

CONCLUSION

CONCLUSION

- The Authority is urged to conclude this Inquiry once and for all and to, at the very least, publish draft regulations for comment before the end of 2024 should it still opine that the market needs to be regulated.
- To achieve the above, it must proceed with haste in releasing its Findings Document.
- The Authority should not be bullied by Sentech with its attempts to avoid being regulated including the threat of litigation.
- The Authority has consistently failed licensees by its bewildering inability to conclude any processes – this is particularly so in both this and the subscription broadcasting markets where it has found SMP exists.
- This conduct must stop and the Authority must fulfil its own mandate and act within the bounds of its legislative obligations.
- The Authority must complete this Inquiry and the inquiry into subscription broadcasting immediately and without delay. Its failure to do so will cast suspicion over why it is unwilling or unable to conclude these inquiries.

THANK YOU AND QUESTIONS

eMedia wishes to thank the Authority for the opportunity to participate in this process. eMedia welcomes any questions.