



e.tv (Pty) Ltd
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Reg. No: 1997/012816/07

Independent Communications Authority of South Africa

350 Witch-Hazel Avenue,

Eco Point Office Park,

Eco Park, Centurion, Gauteng

Attention: Mr Davis Kgosimolao Moshweunyane

Dear Sirs

**RE: E.TV WRITTEN SUBMISSION ON THE UPDATED INFORMATION MEMORANDUM FOR THE
LICENSING OF THE INTERNATIONAL MOBILE TELECOMMUNICATION SPECTRUM**

1. e.tv (Pty) Ltd (“e.tv”) thanks the Independent Communications Authority of South Africa (“ICASA” or “the Authority”) for the opportunity to comment on the Second Information Memorandum (“IM”) and Reasons Document for the licensing of the International Mobile Telecommunication (“IMT”) Spectrum, published on 16 November 2021.
2. e.tv has participated in the auction process since its inception after the publication of the first Invitation to Apply in 2 October 2020. In respect of the publication of the first Information Memorandum, e.tv attended the virtual workshop, addressed letters to the Authority and submitted a written submission only to be told that it was not made in time and would not be considered. e.tv does not accept that this administrative action was lawful and continues to reserve its rights in this regard including the right to raise this in any future review proceedings. Moreover, to the extent that it may have been required, which is denied, ICASA has failed to give e.tv reasons why its application for condonation for several hours (during which time it would have been impossible for the Authority to consider the hundreds of pages of submissions made to it) was rejected. Again, all e. tv’s rights in this regard are reserved, including the right to deal with this in any review proceedings.
3. Furthermore, the decision to not consider e. tv’s submission suggests that e.tv, as the only broadcaster who is participating in the process, is being treated unjustly and raises numerous questions around the fairness of the process itself. We submit that failing to

properly consider all stakeholder comments or submissions may be a violation of section 4(3)(b) of PAJA and may render the entire process procedurally irrational. Finally, equally troubling, is the stance taken by the Authority to the effect that it did not intend responding to the numerous questions raised at the workshop were not answered on the basis that the Authority undertook to do so in writing following the workshop. This too throws a pall over the fairness of the process.

4. At the outset we wish to highlight our concern with the truncated time periods in which this process has been followed. It appears from the other written submissions made in respect of the IM that a rushed process, in which the Authority intends to auction to IMT spectrum, is not in the interests of any stakeholder. Indeed, all stakeholders would rather see a process which is procedurally fair and takes account of all stakeholders' concerns. E.tv is concerned that the process is being rushed to accommodate the needs of the fiscus and the Government's attempts to ensure analogue switch-over by 31 March 2021. We need not remind the Authority of its constitutional need to remain independent. Moreover, both the Authority and the Minister are currently involved in litigation concerning the analogue switch off date and this needs to be fully and properly considered by the Authority in this process.
5. We submit that the intention to rush the process would possibly subject the entire process to a further review down the line. It is therefore in the interests of all stakeholders that the Authority does not embark on a rushed or truncated process. The timelines proposed currently do not provide stakeholders with sufficient time to make substantive and meaningful submissions, and it seems doubtful that the Authority would be able to properly apply its mind, consider the parties' submissions and provide reasons in just 10 days from the time of submission of this written submission and the proposed publication of the final ITA. The manner in which the Authority has delayed and continues to delay numerous processes before it contrary to existing legislation, points to what may be an ulterior motive in this regard.
6. As e.tv was not afforded the opportunity to provide a written submission on the publication on the first Information Memorandum, we attach hereto our previous submission, which still applies to the Updated Information Memorandum. We request

that the Authority has sight of both our previous submission set out herein and this submission and responds to it in totality.

7. In addition, we set out some additional points in relation to the Second Information Memorandum below:

- a. The Reasons document sets out that this new process is based on a commitment by the Minister to complete the digital migration process by 31 March 2022. In addition, that the Authority intends to auction the spectrum in the 700 and 800 bands on condition that this deadline is met. However, should this deadline not be met, the Authority will consider the proportional payments on the 700 and 800 bands based on the availability of these two bands.
- b. We note that the Authority has decided to continue to auction the spectrum in the 700 and 800 frequency bands despite the uncertainty facing the analogue switch-off and current litigation currently between e.tv, the Minister and the Authority.
- c. In addition, e.tv is concerned that it appears that the Authority's intention is for broadcasters and telecommunications companies to share the spectrum in the IMT700 and IMT800 bands. We again caution the Authority that the sharing of this spectrum is not only unpractical but also impossible given the interference which would occur should broadcasters and telecommunication companies be forced to share the spectrum in the 700 and 800 bands prior to the completion of analogue switch off. In this regard, we submit that any decision which would result in "interference" would be unlawful and would be contrary to the State's Digital Migration Regulations which ensure continuity of analogue broadcasting by free-to-air broadcasters such as e.tv.

8. As explained above, we attach to this submission, our first submission to the Authority regarding the Information Memorandum. The issues raised in that submission remain valid and must be read as if incorporated herein. A copy of this submission is attached marked "A".

9. As set out previously, e.tv requires ICASA to provide written reasons in relation to any decisions taken by it in which consideration needs to be given to the factual and legal matters raised herein. These should be dealt with in the reasons document issued by ICASA pursuant to the comments received in relation to the second Information Memorandum. Recall that ICASA's attorneys specifically pointed out in correspondence to e.tv of its rights in this regard.
10. e.tv again requests an opportunity to consult with ICASA (whether in the form of a public hearing or otherwise) in relation to the above matters, prior to ICASA taking any further material steps in relation to the re-allocation of the analogue spectrum to telecommunications companies for mobile broadband services.

Yours faithfully

A handwritten signature in black ink, appearing to be 'PR' followed by a long, sweeping horizontal line.

Philippa Rafferty

eMedia Legal and Regulatory



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**RE: E.TV WRITTEN SUBMISSION ON THE INFORMATION MEMORANDUM FOR THE
LICENSING OF THE INTERNATIONAL MOBILE TELECOMMUNICATION SPECTRUM**

Introduction, Background and Procedural issues.

1. e.tv (Pty) Ltd ("e.tv") thanks the Independent Communications Authority of South Africa ("ICASA" or "the Authority") for the opportunity to comment on the Information Memorandum ("IM") for the licensing of the International Mobile Telecommunication ("IMT") Spectrum, published on 1 October 2021.
2. e.tv participated in the first auction process after the publication of the Invitation to Apply on 2 October 2020 in respect of the auction for the IMT700, IMT800, IMT2600 and IMT3500 band, published in the Government Gazette 43768 ("ITA").
3. Subsequently, e.tv joined Telkom as a co-applicant in the court application against the Authority. In these proceedings, in the first instance, e.tv and Telkom sought to interdict the Authority from continuing with the auction process pending a review of the authority's decisions in relation to the auction process. The interdict proceedings was heard and decided by Baqwa J, in e. tv's (and Telkom's) favour. Accordingly, the Authority was interdicted from continuing with the auction process pending a review to be brought by etv and Telkom in respect of the auction process and the decisions that underpinned it. The judgment affirms, critically, the importance of the Authority engaging in proper consultation with interested parties, including e.tv, prior to taking any further decisions in relation to the auction process. Subsequently, e.tv and Telkom proceeded with the review proceedings. After almost 9 months, without the Authority

filing opposing papers, the Authority reached a settlement of these proceedings by agreeing that its decisions in relation to the auction process should be reviewed and set aside. By agreeing to this relief, despite not saying so in so many words, the Authority clearly conceded that it had not consulted properly with interested parties in relation to the auction process. It is pursuant to this that the IM has now been published for comment.

4. Additionally, in 2016 in the matter of ***Minister of Telecommunications***¹, Sutherland J held that a process of public engagement is required before the so-called analogue switch off date can be determined.
5. Further to the recent announcement by the Minister of Communications that the Digital Migration process will be completed by March 2022, e.tv filed a further application against, amongst others, the Minister and ICASA. In this application, e.tv seeks an order that the digital migration process may not be completed unless and until the Minister and ICASA have undertaken the process of engagement and consultation, as referred to by, inter alia, Sutherland J, in the matter of ***Minister of Telecommunications*** and have ensured that those who are reliant on analogue transmission of broadcasting services, including the most indigent population in South Africa, have been provided with appropriate means to continue to access e.tv's services on a free-to-air basis.
6. The details of the relief sought in this application are set out in the Notice of Motion in the aforesaid application, attached marked "A". The founding affidavit is available on request. To date, neither the Minister nor ICASA have filed opposing papers. This application is crucial in relation to the auction process given the arguments put forward by e.tv that the analogue switch off (and hence the migration of broadcasters from the spectrum being auctioned, thereby making it available to the successful bidders in the auction process), cannot take place until the conditions set out in the application and Notice of Motion, have been achieved. e.tv submits that it is impossible to achieve this in the time frames proposed by the Minister. In these circumstances, e.tv submits that in

¹ Minister of Telecommunications and Postal Services v Acting Chair, Independent Communications Authority of South Africa; Cell C (Pty) Ltd v Acting Chair, Independent Communications Authority of South Africa (2016/59722; 2016/68096) [2016] ZAGPHC 883 (30 September 2016).

terms of the auction process, the Authority cannot make the spectrum in the IMT 700 to 800 bands currently occupied by broadcasters available to the successful bidder until the application has been decided and/or the conditions set out in the Notice of Motion in the application concerning the minimum requirements for analogue switch off have been met. To do otherwise would be, at very least, unconstitutional and could very well result in the auction process being delayed once again.

7. e.tv sets out in its various legal papers in respect of the litigation set out above, that none of the required engagement has taken place, and that this failure means that the Minister and ICASA have failed to take account of the very real impact of a rushed digital migration process upon free-to-air broadcasting, e.tv's licence obligations, and the necessary minimum conditions to ensure that indigent South Africans are able to access free-to air television on a free basis (i.e. without having to pay data fees or subscription fees). e.tv has previously drawn these critical issues to the Authority's attention.
8. In all these circumstances, e.tv is surprised that the Authority has embarked on a "truncated" auction process and has self-imposed a deadline of 1 March 2022 to start the auction. Of greater concern, however, was following the virtual workshop on the IM which was held on 15 October 2021, a number of questions posed by e.tv and other stakeholders were left unanswered. In fact, the recording of the proceedings will show that many of the questions posed to Icasa by interested parties were simply ignored. Other questions posed by participants were only partially answered. In this regard, Icasa undertook to respond in writing to the unanswered questions and with the aim of providing clarity to the issues raised.
9. Following the workshop, and on 21 October e.tv wrote to the Authority highlighting its concerns and requesting clarity on when the written answers would be provided. Of importance is that one of the questions posed by e.tv which remained unanswered was when the Authority anticipated answering the questions and whether the parties would be given additional time beyond the published date of 1 November to either make or supplement their submission.
10. The Authority responded to e. tv's letter on 25 October 2021 setting out that it had

answered all questions posed to it by stakeholders including e.tv and that no written response would be forthcoming to the questions, nor would any dates be extended. e.tv finds this stance rather perturbing as e.tv has re-watched the recording of the workshop and found that other stakeholders would also have understood that the procedural questions relating to the new auction process were not answered on the basis that the Authority would be providing greater clarity on the process and would be responding in writing.

11. Insofar as not responding to those questions which remained unanswered at the workshop, this is contrary to the Authority's position adopted at the workshop. It bears mentioning that the position not to extend dates was clearly predetermined without considering e. tv's letter sent following the workshop as the IM makes it clear that the Authority had already decided not to grant any extensions to any of the timelines. e.tv has reserved and hereby reserves all its rights in this regard. It appears that the Authority is intent on rushing the process in order to achieve the Minister's timelines and raise finance for the fiscus without exerting an independent mind in relation to the IM and the auction process generally.
12. In addition, it became clear during the workshop that the Authority does not intend to publish a draft ITA for public comment. e.tv believes that the Authority ought to publish a draft ITA following the Information Memorandum before it publishes a final ITA. This would allow parties to better respond to the myriad of procedural and technical issues which this process involves. By requiring parties to make written submission on a process which is unclear, as demonstrated by the multitude of questions posed by stakeholders in the workshop, would be unfair and irrational. Moreover it bears mentioning that contrary to the Authority's regular practice, it has elected not to have any hearings in relation to the submissions made whether into either the first or second IM.
13. In light of this, should the Authority later decide to provide written clarity on some of these concerns, e.tv reserves its right to amplify on these submissions to the extent which this may be necessary. In light of the above, the Authority is invited to reconsider

its position as set out in its letter to e.tv dated 25 October 2021.

14. Finally, insofar as the timeline is concerned, e.tv is perturbed that no provision is made for providing reasons for its decision following representations made in relation to both the first and second IM. The Authority is invited and requested to provide written reasons for any decisions take by it in this regard.

Information Memorandum

15. The Information Memorandum published by the Authority does not provide any clarity or comfort to television broadcasters. We will address some of the critical aspects of the IM affecting television broadcasters below:

16. 1.1.4 of the IM states that:

1.1.4 Television broadcasting licensees licensed in the in the 694 to 862 MHz band will not be required to vacate any portion of their analogue spectrum assignments during their relevant licence period, other than as shall be determined by the Minister, in concurrence with ICASA, in the analogue switch-off in the digital migration process (our emphasis).

17. e.tv remains concerned about the digital migration process which the Minister embarked and which sets an unattainable deadline by which digital migration must have been completed and analogue “switch off” will take place. This date of March 2022, has been set without the Minister (or Icasa) having engaged in any meaningful form of public consultation in relation to whether or not the date which the Minister has unilaterally determined for the switch off date is realistic or achievable given the requirements of public consultation and the need to ensure that the technical requirements are all in place. Reference is once again made to the minimum requirements which e.tv believes need to be achieved before switch-off can take place as set out in the Notice of Motion attached hereto marked “A”.
18. In this regard it should be noted that Judge Sutherland has previously held that a

process of public engagement is required before the so-called switch off date can be determined:

“in terms of the amended Broadcasting Digital Migration Policy of 18 March 2015, the analogue – to – digital Migration Policy of 18 March 2015, the analogue –to – digital migration process is subject to a switch off date which is to be determined by MOT in consultation with the Cabinet, a decision which shall be made after a process of engagement with the affected parties has been concluded and is not expected to be soon. Accordingly, ICASA cannot migrate the current non-mobile users without MOT’s participation and an orderly process requires co-ordination between them.” (our emphasis)

19. One of the reasons that such consultation will have to take place meaningfully is to ensure that the Minister and the Authority’s process and relevant decisions in this regard properly take account of the very real impact of a rushed digital migration process upon public and community free-to-air broadcasting, e.tv’s (and other broadcasters’) licence obligations, and the necessary pre-conditions to ensure that indigent South Africans are able to access free-to-air television for free (i.e. without having to pay data fees or subscription fees or being dependent on a contractual arrangement in terms of which DStv has undertaken to make free-to-air broadcasts available to its subscribers resulting in those who no longer pay or cannot afford to pay their monthly subscriptions are denied access to free-to-air channels). e.tv has already drawn these critical aspects to the Authority’s attention in respect of the first auction process and they ought not to be ignored.
20. Should television broadcasters be forced to vacate their analogue spectrum assignments prior to the necessary pre-conditions being met, the viewers who access the free-to-air channels, including e.tv on analogue (which currently make up 54% of e.tv’s audience) will not be able to do so. This will have a disastrous impact on the broadcasting market in general and will skew the market even further in favour not only of the dominant subscription broadcaster but the telco’s as well who are increasingly eating into the advertising pie whilst being unregulated. The availability of the auctioned spectrum will only exacerbate this situation. It cannot be assumed that these

analogue viewers can afford to switch to a digital service (an accepted premise of government's DTT policy). In fact, the contrary is true.

21. There are a number of reasons why it will simply not be possible for digital migration and the switch off date to take place by the arbitrarily determined March 2022 date. As such, free-to-air broadcasters cannot be removed from the IMT700 and IMT 800 bands until such time as proper consultation has taken place with all affected television broadcasters to ensure that digital migration is effected fairly and does not result in millions of indigent South Africans being without access to free to air television.

22. 1.1.5. of the IM states that:

Due to the digital migration process that is currently underway, the Authority provided for the conditions of use in the RFSAP IMT 2015, in order to minimise the radio frequency interference, to ensure the efficient use of the radio frequency spectrum and to further ensure that value can be earned by the prospective winners of the bands.

23. e.tv notes that the Authority has not provided any information how the conditions of use in the RFSAP IMT 2015 will minimise the radio frequency interference. Interference has already been experienced during the National State of Disaster while the telcos have made use of the emergency spectrum.
24. Moreover, in making a decision, account needs to be taken of the current Radio Frequency Plan and any contractual obligations which may exist between Sentech and free-to-air broadcasters.

25. 1.1.6. of the IM states that:

The prospective winners of the bands shall coordinate with the television broadcasting services licensees before utilising the spectrum, to ensure that television broadcasting services are protected in accordance with transitional arrangements during the digital migration period.

26. Again, the Authority has not provided any information as to how television broadcasters

and prospective winners are meant to ensure there is no interference. In fact, as set out above, interference is inevitable and will impact broadcasters more than the telco's occupying these bands. The ECA places the responsibility on the Authority to prescribe regulations governing the coordination of spectrum use.

27. 1.1.7. of the IM states that:

The above considerations take a view that the Authority intends to auction the IMT700 and IMT800 whilst the digital migration process is underway. The Authority is also inclined as the second option, to not auction the IMT700 and IMT800 up until such time that the migration process is concluded.

28. It is not clear from the IM how the Authority intends to deal with the IMT700 and IMT800 bands and whether they will form part of the auction at all. This is a critical issue which all stakeholders should be consulted on prior to the issuing of the second IM and the final ITA. Should the Authority continue to auction the IMT 700 and IMT 800 bands whilst the digital migration process it is unclear when telecommunications companies will be allocated the spectrum and when they may commence using it.

29. It is submitted that even if the auction process proceeds according to the suggested timelines, the Authority should make it a condition of the auction that any allocated spectrum cannot be used until the conditions referred to above and as set out in the Notice of Motion attached marked "A" (and particularly paragraphs 5.1-5.4) have been met. e.tv supports the option of delaying the auction process until after the migration process has been lawfully concluded and subject to the finalisation of the ongoing litigation between e.tv on the one hand and, inter alia, the Minister and Icasa.

30. As explained above, prior to the determination by the Minister of the analogue switch-off date, ICASA and the Minister are required to undertake a process of public consultation with affected parties (including e.tv) regarding the date of the digital migration and whether appropriate measures are in place to ensure that those in South Africa who are reliant on analogue broadcasting are not deprived of their right of access to information by means of receiving free-air-broadcasts. It bears mentioning that in respect of the current relief sought against the Minister as set out in the Notice of

Motion attached marked “A”, Media Monitoring Africa and SOS Support Public Broadcasting have intervened as applicants in this litigation on the basis that they too (and community broadcasters for that matter) were not consulted before the Minister set the date for analogue switch-off.

31. There are a number of reasons why it is simply not possible for the digital migration process to be completed by March 2022:

- a. For example, it is noteworthy that Sentech has not re-tuned a single DTT transmitter to sub 694 MHz in the last number of years and has explained that it would take more than 18 months to do so, which will also require the switching off of the transmitters. This would mean that for a period of 18 months, a sizeable proportion of the migrated viewers will be entirely cut off from receiving access to free-to-air broadcasts by way of a digital signal.
- b. In addition, there are currently not a sufficient number of set top boxes/devices which would be required to ensure that members of the public would be able to access free-to-air television in the near future. It is estimated by e.tv that approximately 3,8 million boxes/devices will still be required to be rolled out to members of the public. Furthermore, there is a global shortage of chips which are central to the functionality of set-top-boxes and other devices. From information available to it, e. tv’s, it appears that the lead time for the delivery of chips is 52 weeks or more from the date of order.
- c. There are also insufficient capable installers who would be able to roll out the installation of over 3.8 million devices in a period of five months.
- d. There is still no clarity as to the subsidy which will be provided for the procurement of devices (which is a critical precondition for the ordering of new devices). There is a considerable degree of uncertainty as to the amount, the mechanics through which the subsidy will be paid and any related procurement processes. Simply put, until the details of the subsidy and the plan have been consulted upon and announced, it is impossible for third parties to properly and comprehensively plan for a digital migration process.

- e. Given the haste with which the Government is seeking to finalise the long-stalled digital migration process, e.tv is concerned about the manner in which the plan relating to the timing of switch-off was developed, without being disclosed beforehand and presented to all stakeholders, and the manner in which the process will be implemented. This is a highly complex process with a large number of interdependent factors and considerations.
- f. There has been no or insufficient communication with members of the public regarding how they can utilise the subsidy and how they can then have a set-top-box installed. To the extent that public service announcements have been made, the time afforded for registering to receive a subsidy has been grossly inadequate with the cut off date being unrealistic. Nor have sufficient lines of communication been set up to allow those requiring further information as to the subsidy or the meaning of digital migration been set up. Moreover, should switch-off occur while millions have not registered for the subsidy, denying them access to free-to-air television will render them incapable of receiving public service announcements in respect of which television is the main source for this sector of the population. These people, being the most indigent in South Africa will then have no means of understanding how to apply for and receive a subsidy.

Failure to consider broadcasters use of the IMT700 and IMT800 spectrum

32. The Authority is mandated to enforce the objects of the Electronic Communications Act (“ECA”) and must, inter alia, promote the universal provision of electronic communications networks and electronic communications services and connectivity for all; encourage investment and innovation in the communications sector; and ensure the efficient use of the radio frequency spectrum. As such, any use of the spectrum needs to consider and allow for changes in technology which will impact the future of free-to-air broadcasting in South Africa. The fact of the matter is that the future of broadcasting may not be realised on DTT but other developing technologies such as 5G. This needs to be investigated and understood. Moreover, provision ought to be made for existing broadcasters to maintain some of their current spectrum in the 700 to 800 MHz bands,

to enable them to compete with telco's in the provision of OTT services such as video on demand. After all, with digital migration, these free-to-air broadcasters will have less frequency and will have been deprived of spectrum previously available to them. The Authority has an interest in ensuring that free-to-air broadcasters can continue competing with telcos and the dominant subscription broadcaster thereby ensuring their continued survival. Their role in society is essential and cannot be replaced. It is, amongst others, the only source of free news available to a vast majority of the population.

33. To fully to assess how spectrum should be allocated the Authority should investigate and understand the absolute use and effectiveness of spectrum in the 5G world and assess whether broadcasters should have access to a portion of the 700 MHz spectrum and co-exist with telecommunication companies using these spectrum bands. It is the opportunity created by technological advancements that requires a reconsideration of the most efficient use of spectrum in South Africa for the years to come which will permit for technological advancements and changes. The Authority should not turn a blind eye to these technological changes in an ever-changing environment.

34. The irony of the delays in the auction of spectrum (and amendment to the spectrum plan) and the rollout of DTT, has placed South Africa at the forefront of allowing it to embrace cutting edge technology that allows for broadcasting and IMT services to co-exist, resulting in the possibility of sharing of the spectrum without the necessity of one of the mediums having primacy. To achieve the goal set out above will involve retaining some spectrum between 700 MHz and 850MHz for the purposes of free-to-air broadcasting. In the circumstances, e.tv is of the view that broadcasters should not be excluded from using this spectrum. Given the slow rate of progress of DTT penetration in South Africa, the refusal to accept that it will be possible for 5G technology to broadcast in the same areas as IMT (and hence replace DTT), will result in the Authority taking a step backwards in circumstances in which it now has the opportunity to become a world leader. If the spectrum between 700 MHz and 850MHz is handed to the telecommunication companies through the proposed auction, this will irreversibly change and threaten the existence of free-to-air broadcasting.

35. Additionally, South Africa cannot afford for the spectrum earmarked for the WOAN in the 700 MHz to 850 MHz band to be used exclusively by the telecommunication companies. The Authority ought to investigate this matter further before taking a final decision in this regard. E.tv holds the view that exclusivity ought not to be permitted and will be discriminatory against broadcaster and inhibit their ability to compete on an equal footing in the marketplace.

36. Once again, considered alongside the various attempts to auction spectrum currently occupied by the broadcasters and the attempt to remove broadcasters from certain frequencies as set out in the draft frequency plan, e.tv submits that the auction of the WOAN is also premature and will have the effect of prejudicing broadcasters as against telecommunication companies. This will permanently skew the field in favour of the telecommunication companies and create an environment of unfair competition which is contrary to one of the objects in the ECA. Telecommunications companies with greater resources will increasingly have the ability to encroach into the domain of broadcasters and threaten their continued existence. The mandate of the Authority is to ensure that this does not happen.

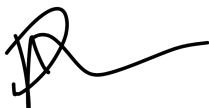
37. In these circumstances the Authority needs to consider the ever-changing needs of broadcasters as well as developing technologies. It is essential that broadcasters are protected given the universal access obligations and are not made secondary to telecommunications companies. There is no rational reason to favour mobile telephony over broadcasting services in this regard. As stated above, members of the public who, in many instances, have no other access to news and vital information other than through free-to-air broadcasting, need to be catered for as part of the universal access principle. This is recognised and supported in the Broadcasting Act. To prefer mobile telephony over broadcasters would have the effect of denying a large portion of the population access to, for example, the provision of educational programming, programming which strengthens the spiritual and moral fibre of society, the accessibility to the plurality of news, views and information, and access to a wide-range of entertaining and educational programmes as required by the Broadcasting Act.

Conclusion

38. e.tv supports digital migration and understands that this process needs to happen and will happen. However, the digital migration process may not be completed, and the analogue switch-off date may not be proclaimed by the Minister unless and until the Minister and ICASA have complied with their constitutional obligations and public promises to provide those South Africans who are presently reliant on analogue broadcasting with the means to access e.tv's services, which obligations include the obligations to ensure that:
- a. Members of the public who are currently reliant on analogue broadcasting services (including more than half of e.tv's viewers) are provided with access to set top boxes and/or reception devices to enable them to continue to be in a position to access free-to-air broadcasts without subscription or charge following digital migration;
 - b. adequately resourced call-centres are operational to process viewer queries sufficiently and effectively;
 - c. an effective viewer information campaign has been conducted; and
 - d. sufficient Sentech resources have been allocated.
39. For the reasons outlined above, it is clear that a digital migration date of 31 March 2022 is not achievable because of the large number of households which have not been migrated despite the lengthy period of time since the digital migration strategy was originally adopted. As explained, the Government has consistently promised those who are reliant on analogue broadcasting that they will not be left without access following the transfer to digital broadcasting, and these promises are binding. An early switch-off will have the opposite effect denying many of those reliant on free-to-air broadcasting access to such broadcasting.

40. There are also a number of binding constraints, which been highlighted, including the global shortage of chips which are required for the manufacture of set-top boxes, the shortage of qualified installers, the lack of clarity as to the subsidy which will be provided to installers for the purpose of providing indigent households with a means of accessing free-to-air broadcasting, the identification of indigent households who will qualify for such a subsidy as well as the failure to ensure that the digital terrestrial transmission network is capable of being able to receive the migrated viewers. Simply put, the above reasons confirm that the intention to force e.tv and other free-to-air broadcasters off the IMT700 and IMT800 spectrum prematurely is unworkable, impractical, unlawful and unconstitutional in that it will deny millions the right to receive information as guaranteed by section 16 of the Constitution.
41. We attach to this submission, our original submission to the Authority regarding the auction process made in 2020. All the issues raised in that submission remain valid and must be read as if incorporated herein. A copy of this submission is attached marked "B".
42. e.tv requires ICASA's to provide written reasons in relation to any decisions taken by it in which consideration needs to be given to the factual and legal matters raised herein.
43. e.tv also requests an opportunity to consult with ICASA (whether in the form of a public hearing or otherwise) in relation to the above matters, prior to ICASA taking any further material steps in relation to the re-allocation of the analogue spectrum to telecommunications companies for mobile broadband services.

Yours faithfully

A handwritten signature in black ink, appearing to be 'PR' followed by a long horizontal stroke.

Philippa Rafferty
Legal and Regulatory

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 51159/21

In the matter between

e.tv (PTY) LTD

Applicant

And

**MINISTER OF COMMUNICATIONS AND DIGITAL
TECHNOLOGIES**

First Respondent

**THE INDEPENDENT COMMUNICATIONS
AUTHORITY OF SOUTH AFRICA**

Second Respondent

**CHAIRPERSON: INDEPENDENT
COMMUNICATION AUTHORITY OF SOUTH
AFRICA**

Third Respondent

NATIONAL ASSOCIATION OF BROADCASTERS

Fourth Respondent

**SOUTH AFRICAN BROADCASTING
CORPORATION SOC LIMITED**

Fifth Respondent

VODACOM (PTY) LIMITED

Sixth Respondent

MOBILE TELEPHONE NETWORKS (PTY) LIMITED

Seventh Respondent

CELL C (PTY) LIMITED

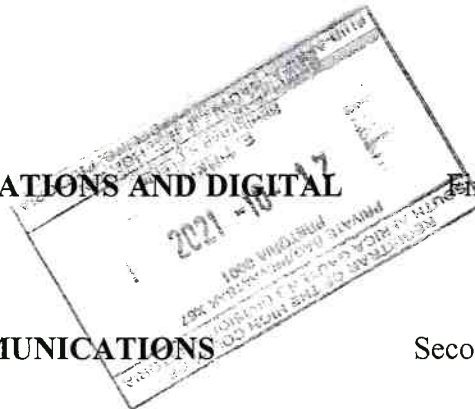
Eighth Respondent

TELKOM SA SOC LIMITED

Ninth Respondent

WIRELESS BUSINESS SOLUTIONS (PTY) LIMITED

Tenth Respondent



t/a RAIN

LIQUID TELECOMMUNICATIONS SOUTH AFRICA Eleventh Respondent
(PTY) LIMITED

SENTECH SOC LIMITED

Twelfth Respondent

NOTICE OF MOTION

TAKE NOTICE THAT, the applicant (“*e.tv*”) intends to seek the following relief:

1. That only to the extent necessary and pursuant to directions issued by the case management judge (the Honourable Mr Justice Fourie), the ordinary provisions regarding service and time periods are dispensed with and this matter is treated as one of urgency in terms of Uniform Rule 6(12).
2. It is declared that, prior to the determination by the Minister of the analogue switch-off date and the date for completion of digital migration, the Minister is required to undertake a process of consultation with affected parties, including, but not limited to *e.tv*, regarding the date of the analogue switch off date and the date for the completion of digital migration and whether appropriate measures are in place to ensure that those in South Africa who are reliant on analogue broadcasting are not deprived of their right of access to information by means of receiving free-to-air broadcasts as a consequence of the determination by the Minister.
3. It is declared that the digital migration process may not be completed, and/or the analogue switch-off date may not be proclaimed by the Minister unless and until

the Minister has complied with her constitutional obligations and public promises to provide those South Africans who are presently reliant on analogue broadcasting with alternative means to access e.tv's services on a free-to-air basis.

4. To the extent that the Minister has taken a final decision in relation to the determination of the date for digital migration's completion and analogue switch off, or takes such a decision prior to the determination of this application (*"the determination decision"*):

- 4.1. The determination decision is declared to be unlawful and invalid;

- 4.2. The determination decision is reviewed and set aside.

5. The Minister is directed to file a Report to this Court within one (1) month of the date of this Order, or such other period as this Court should determine to be appropriate and just and equitable, setting out the steps that have been taken to ensure that:

- 5.1. members of the public who are currently reliant on analogue broadcasting services (including but not limited to 54% of e.tv's viewers as measured over the period September 2020 to August 2021) are provided with access to set-top boxes and/or reception devices to enable them to continue to be in a position to access free-to-air broadcasts without subscription or charge following digital migration;

- 5.2. adequately resourced call-centres are operational to process viewer queries sufficiently and effectively;

5.3. an effective viewer information campaign has been conducted; and

5.4. sufficient Sentech resources have been allocated to action the switch-off of transmitters.

6. Such further and / or alternative relief as this Court considers necessary and just and equitable.

7. If the application is opposed, the respondents so opposing are ordered to pay the applicant's costs, such costs to include the costs of three counsel.

TAKE NOTICE FURTHER that the affidavit of **PHILIPPA RAFFERTY** annexed hereto will be used in support of the application.

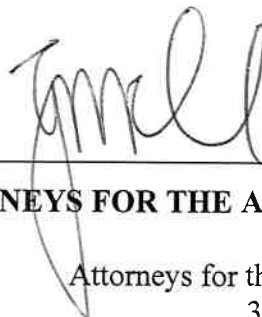
TAKE NOTICE FURTHER THAT the applicant has appointed the address of its attorneys of record mentioned below at which it will accept notice and service of all documents in these proceedings.

TAKE FURTHER NOTICE this application is to be determined on an expedited basis, pursuant to the Directive of His Lordship Mr Justice Fourie of 5 October 2021 (attached to the affidavit of **PHILIPPA RAFFERTY**), and that any party that opposes the relief sought in this application is:

- a. to file a notice of intention to oppose within 5 days of service of this notice of motion, and, in the notice, appoint an address within 15 kilometres of the office of the Registrar of this court at which it will accept notice and service of all documents in these proceedings; and
- b. to file its answering affidavit on or before 12 November 2021.

TAKE NOTICE FURTHER that if you do not give notice of your intention to oppose this application, it may be enrolled for hearing without any further notice to you.

DATED at Parkhurst on this 12th day of October 2021.



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Reg. No: 1997/012816/07

"B"

Independent Communications Authority of South Africa

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Highveld Park

0169

Attention: Chairperson Dr Keabetswe Modimoeng

Dear Dr Modimoeng

**IN RE: RE-ALLOCATION OF E.TV'S ANALOGUE RADIO FREQUENCY SPECTRUM TO MOBILE
TELECOMMUNICATION COMPANIES**

Introduction

1. E.tv holds an individual commercial (free-to-air) broadcasting licence. This entitles e.tv, as it does, to broadcast the e.tv free-to-air channel. Its activities are highly regulated in terms of its broadcasting licence, which also imposes onerous public interest obligations. The e.tv channel is broadcast as an analogue channel using radio frequency allocated to e.tv in terms of a radio frequency licence.
2. As part of the digital migration process, ICASA proposes to re-allocate the spectrum currently licensed to e.tv and which is used for analogue broadcasting ("analogue spectrum") (together with that used by other analogue broadcasters) to telecommunications companies for mobile broadband services.
3. These telecommunication companies are increasingly competing directly with e.tv by providing broadcasting (audio-visual) content over broadband (so-called streaming services).
4. Providing the telecommunications companies with additional spectrum to offer increased mobile broadband services will allow them to offer more streaming services, thereby reducing the demand for advertising on e.tv. This will have significant and detrimental effects on e.tv. As a licensed free-to-air broadcaster, e.tv relies solely on revenue generated from advertisers to fund its broadcasting activities.

5. Currently, on average, 63% of the people who constitute e.tv's audience access the e.tv channel by analogue broadcasting. When e.tv's analogue spectrum is taken away and e.tv is no longer able to broadcast e.tv in analogue it will lose viewers. This is particularly so given the almost non-existent roll out and penetration of digital-terrestrial-television ("DTT") and the failure by government to ensure that DTT set-top boxes are provided to viewers. This is a serious issue that will have both financial consequences for e.tv and other broadcasters, and public consequences (since a large proportion of the population will lose access to free public broadcasting).
6. Therefore, e.tv believes that ICASA must take into account three materially relevant issues when exercising its public powers in respect of re-allocating e.tv's analogue spectrum to telecommunication companies.
 - a. *First*, telecommunications companies offering streaming services that compete with that of e.tv and other broadcasters, should, in terms of the Electronic Communications Act correctly interpreted, be licensed to provide broadcasting services.
 - b. *Second*, the licensing of additional spectrum to telecommunications companies should be made subject to conditions that ensure that the competitive equilibrium is maintained, to avoid the unfairness of a situation in which e.tv and other broadcasters compete with telecommunications companies which do not operate under the same onerous ICASA licence conditions as e.tv and those broadcasters.
 - c. *Third*, the reasonable and constitutionally compliant reallocation process should require that the telecommunications companies who benefit from the re-allocation of spectrum which was previously used by e.tv, should be required to pay compensation to e.tv.
7. Below we address each of these three issues. To provide context, we first set out the relevant background.

Background

8. E.tv is the holder of a Radio Frequency Spectrum Licence dated 17 December 2008 and

an Individual Broadcasting Service Licence (the amended version was signed on 31 December 2010). These licences are effectively a continuation of the licence which had been awarded to e.tv in 1998. In terms of these licences, e.tv was allocated a certain amount of radio frequency spectrum for the provision of analogue television broadcasting.

9. In 2012, ICASA promulgated the Digital Migration Regulations with the ostensible purpose of regulating the digital migration process. The Regulations contemplate that, once the digital migration period has come to an end, e.tv will be deprived of the analogue spectrum that was allocated to it in terms of its radio frequency licence.
10. It is understood that ICASA intends that e.tv's analogue spectrum will be taken from e.tv (together with spectrum of other analogue broadcasters) and it will then be auctioned to various telecommunication companies. ICASA will re-allocate this spectrum to telecommunications companies for mobile broadband services (generally referred to as "IMT", International Mobile Telecommunications, a generic term used to designate mobile broadband systems).
11. E.tv is concerned with the slow progress of the digital migration process demonstrated by the poor DTT penetration in the country. Currently, almost 37% of the audience of traditional free-to-air broadcasters is now receiving broadcasting channels through satellite services. According to the most recent Arianna report (August 2020), of the remaining 63% of audience, only 0.13% receive television through the state-run DTT infrastructure, meaning that the rest are still fully reliant on using analogue services. (Source: Arianna)
12. This is illustrated in the table below:

Day Part group	Variable	%			
	Market \ Channel	e.tv	SABC 1	SABC 2	SABC 3
06:00:00 - 23:59:59 1 Hour Split(MTWTFFSS)	National	100%	100%	100%	100%
	DStv	26%	36%	27%	18%
	Open View (OVHD)	12%	5%	13%	15%
	Analogue	63%	59%	60%	68%

13. It is not clear how these analogue viewers will be able to access the e.tv and SABC channels once the analogue spectrum has been taken from e.tv and the SABC. And it cannot be assumed that these analogue viewers can afford to switch to a digital service (an accepted premise of government's DTT policy).
14. It is thus clear that there is an imminent and immediate loss of viewership to free-to-air broadcasters if there is no adequate platform to host the approximately 63% of analogue viewers (which is as high as 68% for SABC3). DTT in South Africa is meant to cover this imminent loss. However, DTT has proven to be a late starter, with almost no viewership (not much more than a tenth of 1%), given that there has been no meaningful roll out of DTT boxes. If this analogue spectrum is lost to free-to-air broadcasters and there is no adequate alternative, then the broadcasters will stand to lose revenue and the Government will stand to lose communication with approximately 63% of its electorate. No free-to-air broadcaster can continue to operate its business if there is a loss of audience to this extent. This could amount to a revenue loss in the billions of Rands. And no responsible regulator can ignore the very serious impacts on the existing entitlement of South Africans, particularly given our country's stark economic realities, to enjoy free-to-air television.
15. E.tv's radio frequency licence, and the rights to spectrum it affords, are property for the purposes of section 25 of the Constitution. Thus, the re-allocation of spectrum would need to comply with the requirements in the Constitution that any deprivation of property must not be arbitrary or irrational and that expropriation must only occur where there is just and equitable compensation.
16. The increased availability of mobile broadband that the reallocation of broadcaster's analogue spectrum facilitates will effectively provide a vehicle for these telecommunication companies to increase their ability to offer audio-visual services (often referred to as "*streaming services*"), which are unregulated and in direct competition to e.tv's broadcasting activities.
17. Certain telecommunication companies already provide various types of broadband broadcasting service offerings (for instance Vodacom offers "*Video Play*" a video-on-

demand subscription service to its customers and MTN is preparing its content offering, which is loosely called "*MTN Player*") or related third party services (for instance over-the-top stream services like Netflix) to consumers or subscribers to their broadband offering. "*Triple Play*" is the term used to describe these broadband service offerings through broadband. The three services include telephony, data, and content (including, in particular, audio-visual (broadcasting) services). This will only increase and be added to as the telecommunications companies are given further and unregulated spectrum taken from e.tv and other analogue broadcasters.

18. As required by its broadcasting services licence, e.tv is a free-to-air channel. This means that the only revenue which it generates to provide this channel is through selling advertising opportunities to advertisers. However, e.tv also bears a number of onerous obligations arising from its broadcasting services licence.
19. The allocation of additional spectrum to telecommunications companies that offer Triple Play services would effectively mean that the telecommunication companies will increasingly become direct competitors to e.tv for viewers' attention. Put simply, viewers will be able to choose whether to watch broadcasted content on e.tv and that which is made available by mobile broadband telecommunications companies such as Vodacom, MTN and Cell C. The inevitable loss in viewership for e.tv caused by an increase in competing streaming services directly impacts e.tv's ability to attract advertisers, which is its only revenue stream to provide the e.tv channel. E.tv will probably also lose some advertisers directly to the telecommunication companies, depending on the advertising model which they choose to use.
20. In contrast to e.tv, telecommunication companies do not need to generate advertising revenue to fund their activities and to stay in business. They have alternate sources of revenue (in particular, they operate a subscription model, whereby they generate income from fees charged to customers for their services). Advertising would constitute, and need only constitute, a very small percentage of their overall revenue.
21. Thus, analogue spectrum that had been allocated to e.tv (together with spectrum that was allocated to other analogue broadcasters) will now be allocated to companies that

will use that spectrum to directly compete with e.tv in the context of broadcasting to viewers in South Africa. Yet:

- a. E.tv, which must provide its channel as a free-to-air service, is forced to rely solely on advertising to provide its channel;
- b. E.tv is required to be, and is, a licensed broadcaster. E.tv's broadcasting service licence places a number of onerous obligations on e.tv. These obligations place public interest duties on e.tv in order to ensure that various segments of the public are adequately catered for by its programming. This includes, but is not limited to, local programme content obligations, obligations to broadcast children's programmes and news, and obligations in relation to programme language. E.tv's licence even prescribes the amount of advertising that may be shown on e.tv.
- c. Currently, the mobile telecommunication companies, which are the parties interested in obtaining the spectrum in the range currently licensed to e.tv that ICASA intends to re-allocate, do not have broadcasting service licences.
- d. These companies are effectively broadcasting (or offering products which compete directly with holders of broadcasting licences) through their customer video streaming services.
- e. However, these telecommunication companies are not currently licensed as broadcasters and, therefore, are not subjected to these licensing obligations. They are not being made subject to the same or an equivalent regime as the one applicable to broadcasters, while they are in substance acting as broadcasters.
- f. The telecommunication companies broadcasting activities (via the streaming services they offer) will only increase as they are allocated more spectrum.
- g. This is plainly inequitable and also means that the viability of e.tv and other broadcasters is under considerable threat as they will have to compete increasingly against entities which are not being required to apply for or be subject to licences as broadcasters under the Electronic Communications Act, and therefore bear none of the same onerous obligations as e.tv and other public broadcasters.

22. Allowing these telecommunications companies to operate as broadcasters by offering streaming services, and providing them with more spectrum to do so, while not requiring them to be licensed as broadcasters (or not imposing similar obligations on them) is patently inequitable, and leads to unfair, unreasonable and irrational outcomes.
23. One way to avoid these outcomes, is that e.tv should be protected from such unfair and inequitable competition by being permitted to retain its current allocation of analogue spectrum to allow it to provide (broadcasting) streaming services to the public. As an incumbent content provider and broadcaster, e.tv should be allowed to continue its business by, like the telecommunication companies, being able to provide content through streaming.
24. If e.tv is not permitted to retain its analogue spectrum for this purpose, then it is imperative that the issues raised below to deal with the situation that will arise from the taking away of e.tv's analogue spectrum are properly considered (including the possibility of e.tv being compensated by the telecommunication companies that are allocated its spectrum).
25. In the circumstances, as indicated in the introduction, ICASA should consider the following issues as materially relevant to its consideration of how the reallocation of analogue broadcast frequency to telecommunication companies ought to be undertaken:
 - a. Properly interpreted, the Electronic Communications Act requires telecommunication companies to be licensed as broadcasters if they wish to offer streaming services. ICASA should therefore enforce this requirement in respect of telecommunication companies when those companies act as competing broadcasters.
 - b. Even if ICASA determines that the Electronic Communications Act does not require telecommunication companies to be licensed as broadcasters despite offering streaming services, ICASA may nevertheless impose conditions to address the inequity of permitting the telecommunications companies to compete with

e.tv and other broadcasters where they are not doing so under any or the same onerous conditions. Therefore, ICASA should impose licence obligations similar or equivalent to those on broadcasters, as conditions when issuing frequency licences to telecommunication companies in respect of this re-allocated spectrum.

- c. Telecommunication companies granted access to the analogue spectrum should compensate existing analogue spectrum licensees (in particular, e.tv. as a free-to-air licensee) for the portion of analogue spectrum which has been taken from the existing licensees and allocated to the new entrants. This obligation to pay compensation could and should be imposed as a condition by ICASA when allocating spectrum to the telecommunication companies.

26. We discuss each of these issues below.

Telecommunications companies that wish to offer streaming services should apply for broadcasting licences in terms of the Electronic Communications Act

27. Video-on-demand or similar audio-visual services offered by telecommunication companies to their mobile broadband customers appear clearly to constitute a broadcasting service that is provided over an electronic communications network (mobile broadband or even fixed-line systems, are undoubtedly electronic communication networks).¹

28. In section 1 of the Electronic Communications Act, “*broadcasting*” is broadly defined as:
*“any form of unidirectional electronic communications intended for reception by-
(a) the public; (b) sections of the public; or (c) subscribers to any broadcasting service,
whether conveyed by means of radio frequency spectrum or any electronic*

¹ See *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd and Others* (CCT184/14) [2015] ZACC 29; 2015 (6) SA 440 (CC).

communications network or any combination thereof, and 'broadcast' is construed accordingly."

29. It appears that video-on-demand or streaming type services constitute "broadcasting" as defined: it is evidently a unidirectional communication intended for reception by a section of the public and/or reception by subscribers to that service.

30. "Broadcasting service" is, in turn, defined to mean:

"any service which consists of broadcasting and which service is conveyed by means of an electronic communications network, but does not include-

(a) a service which provides no more than data or text, whether with or without associated still images;

(b) a service in which the provision of audio-visual material or audio material is incidental to the provision of that service, or

(c) a service or a class of service, which the Authority may prescribe as not falling within this definition;" (emphasis added)

31. The streaming services offered by telecommunications companies plainly fall within the definition in section 1, unless they are excluded by one of the three exceptions to the definition.

32. Obviously, by definition, the types of audio-visual services, like video-on-demand, that are being, or are envisaged to be, offered by telecommunications companies would undoubtedly be more than data or text with or without still images. Therefore, exclusion (a) does not apply.

33. There is nothing "incidental" about video-on-demand services with respect to mobile broadband. Where telecommunication companies decide to provide some type of video stream service, this constitutes a significant separate offering, that would be in addition to existing services. Therefore, exception (b) does not apply.

34. And, as far as we are aware, audio-visual broadcasting using mobile broadband has not been prescribed by ICASA as a class of service that does not fall within the definition of broadcasting service. Therefore, exclusion (c) does not apply.
35. Accordingly, telecommunication companies that provide some type of video streaming service should be directed to apply for a broadcasting service licence in terms of the Electronic Communications Act.

Broadcasting licence obligations imposed on telecommunication companies when issuing frequency licences

36. Currently, telecommunication companies, which are the parties interested in obtaining the analogue spectrum currently licensed to e.tv that ICASA intends making available, do not have broadcasting licences (neither do over-the-top services like Netflix, which are made possible by mobile broadcasting). As we note above, the mobile telecommunications companies are effectively broadcasting (or offering products which compete directly with holders of broadcasting service licences) through their video streaming services. For example, Vodacom has a video-on-demand service (*"Video Play"*), which can be subscribed to by the public (according to its website it *"allows you to watch the latest movies, series, kids shows and music videos wherever you are"*).
37. Therefore, we have explained why telecommunication companies that provide some type of video streaming service should be directed to apply for a broadcasting service licence in terms of the Electronic Communications Act.
38. However, if for any reason ICASA forms the view that these telecommunications companies are not offering *"broadcasting services"* as defined in the Electronic Communications Act, then e.tv believes that the following should occur: When ICASA issues frequency licences to a telecommunications company for new frequency, by re-allocating the existing analogue spectrum to these telecommunication companies, it is entitled to, and should, include appropriate conditions in those licences.
39. The Electronic Communications Act and the regulations thereunder provide for ICASA to impose conditions. In particular:

- a. Regulation 7 of the Radio Frequency Spectrum Regulations 2015 deals with a situation where ICASA issues an invitation to apply for a licence where a radio frequency spectrum licence will be awarded/granted on a competitive basis and where it determines that there is insufficient spectrum available to accommodate demand in terms of section 31(3)(a) of the Electronic Communications Act.
 - b. Regulation 7 would apply to ICASA auctioning off analogue frequency bands to telecommunication companies.
 - c. Regulation 7(2) specifically provides that the invitation to apply must set out proposed licence terms and conditions (7(2)(f)).
40. Accordingly, even if it were possible for telecommunication companies to convince ICASA that the services which they provide do not fall within the definition of “*broadcasting service*” in terms of section one of the Electronic Communications Act, ICASA may nevertheless impose conditions to address the irrationality and inequity of permitting the telecommunications providers to compete with e.tv and other broadcasters while being given a free pass in respect of the applicable and comparative onerous conditions that ICASA continues to impose on broadcasters like e.tv.
41. Were ICASA not to impose such conditions, it would be irrational, unreasonable, and inequitable and involve treating certain entities in an unjustifiably preferential fashion. Access to additional spectrum (including spectrum currently held by e.tv) will allow for unequal privileging of telecommunication companies that are effectively able to compete with broadcasters without having to comply with any of the regulatory conditions that apply to broadcasters. In e.tv’s view, the only way of levelling the playing field is for ICASA to impose appropriate conditions on telecommunication companies and to effectively differentiate between traditional broadcasters and telecommunication companies. One way in which this differentiation can be made is by preserving local content in the domain of the traditional broadcasters.
42. It is for the above reasons that e.tv suggests that ICASA consider also subjecting the telecommunication companies to appropriate licence conditions set by ICASA. These

conditions could, among other things, include the following obligations:

- a. Telecommunication companies should be restricted from carrying local content, which would be a necessary protection for domestic broadcasters, thereby ensuring differentiation between the offering of traditional broadcasters and telecommunication companies' streaming services;
- b. Telecommunication companies should be required to pay free to air broadcasters fair market-related remuneration for their content when they stream it on their streaming services; and
- c. Telecommunication companies must share their statistics in respect of viewership with the broadcasters in order that these payments can be monitored.

Compensation

43. In terms of section 25 of the Constitution, e.tv may not be arbitrarily deprived of its analogue spectrum, and any expropriation must be accompanied by just and equitable compensation.
44. For the reasons set out above the re-allocation of spectrum and its allocation to telecommunications providers involves the deprivation and/or expropriation of property currently held by e.tv. The situation is made more egregious since the spectrum will be taken from e.tv to allocate it to commercial entities to allow them to use that spectrum to compete with e.tv. This spectrum taken from e.tv will be used by these telecommunications companies to provide unregulated mobile broadcasting, through broadband streaming services, in competition with e.tv, and will allow them to earn significant profits. As a consequence, there will be an inevitable loss in viewership for e.tv caused by an increase in competing streaming services, which directly impacts e.tv's ability to attract advertisers, its only revenue stream to provide the e.tv channel. Moreover, e.tv and other broadcasters also face the real risk of losing viewers (over 60%) who currently access e.tv and these other channels through analogue broadcasting if they have not migrated to a digital platform when the analogue spectrum is taken away (which is highly likely given the almost non-existent roll out of

DTT). This loss of viewership would have a detrimental impact on e.tv and its revenue.

45. This loss of viewership is particularly relevant given that, as appears to be ICASA's intention, rather than allowing e.tv to retain its analogue spectrum to make use thereof to provide its own streaming (broadcasting) service, that spectrum is going to be taken away from e.tv and given to telecommunication companies to offer streaming services in direct competition with e.tv.
46. In determining whether, in these circumstances, there should be some form of compensation in relation to ICASA's proposed reallocation of e.tv's spectrum, it is relevant that South Africa is a member of the International Telecommunications Union's ("ITU"). ICASA must, in its decision in relation to the reallocation of spectrum, take account of relevant recommendations by the ITU:
 - a. In terms of Regulation 3(3) of the Digital Migration Regulations, account must be taken of the ITU regulations and resolutions.
 - b. The 2019 Migration Plan incorporates the ITU's Recommendation from the Radio Sector ("**ITU Recommendation**") in relation to spectrum redeployment.
47. The ITU Recommendations include a discussion on the question of whether broadcasters, such as e.tv, should be compensated for their loss of previously allocated spectrum.
48. In Paragraph 4(2) of the ITU Recommendation, the ITU draws attention to the fact that one of the available models for compensation that ought to be considered is for the new entrant to compensate existing spectrum users. As the ITU explains, "*[b]asically, it consists of the new entrant(s) compensating the existing spectrum users for early vacation of the frequency band.*" ITU draws attention to the fact that numerous countries have adopted this approach of requiring the new entrants to compensate the existing spectrum users. These countries include Bulgaria, Finland, France, Israel, Italy, Jordan, the United Kingdom and the United States of America.
49. The ITU also notes that "*[t]he advantages of this approach are that the administration does not have to fund any compensation and, if properly managed, it can speed up the*

release of spectrum only when the new entrant requires it."

50. These recommendations are relevant considerations that ICASA must take into account in exercising its regulatory powers rationally, reasonably, and in a procedurally fair manner.
51. Thus, ICASA's conduct is to be measured against and guided by the ITU Recommendations as a materially relevant factor in any constitutionally compliant decision-making in relation to spectrum reallocation.
52. Given that the spectrum that ICASA intends, in the reallocation process, to take from e.tv is to be allocated to commercial entities that compete with e.tv, and that will use the allocated spectrum to offer commercial broadcasting services (in the form of streaming) and thus earn profits, it is submitted that:
 - a. it would be irrational, unreasonable, and inequitable if e.tv's spectrum were to be re-allocated to telecommunication companies without any form of compensation paid to e.tv;
 - b. as the recipient of the re-allocated spectrum is the primary beneficiary of the re-allocation process (and can and will reap significant financial rewards from having access to this additional spectrum), it is rational and reasonable that the recipient should compensate e.tv for the spectrum which has been taken from e.tv;
 - c. this approach, proposed by the ITU, has been adopted by numerous countries;
 - d. such an approach would be the only fair and lawful means by which ICASA would be able to ensure that there is no unjustifiable deprivation of property in violation of section 25 of the South African Constitution.
53. The requirement for telecommunication companies to pay this compensation could be stipulated as a condition when allocating this spectrum to telecommunication companies.
54. Furthermore, even though more than 15 years have passed since government decided to roll out DTT, currently only 0.13% (little more than a tenth of 1%) of viewers currently

use DTT to access e.tv, and recent media reports suggest that DTT is going to be even further delayed. Therefore, ICASA must take the following into account:

- a. In mitigation of the fact that DTT has not taken off, and if indeed ICASA accepts that South Africa will rely on satellite as the platform for digital distribution of broadcasting (as an alternative or gap-filler for the lack of DTT penetration in the country), then e.tv is of the view that:
 - i. All satellite distribution platforms in the country should be required to carry all channels offered to them by the free-to-air broadcasters;
 - ii. ICASA should consider whether e.tv's own free-to-air satellite platform, Openview, should be compensated for assisting the state in reaching its electorate in areas that DTT is not covering.
 - b. There are considerable costs involved in the distribution of DTT. The signal distribution cost per person through Sentech's terrestrial network is escalating beyond reasonable and acceptable norms, thus making Sentech a growingly, unaffordable distribution partner to the free-to-air broadcasters.
55. Given its obligation to adopt a rational, reasonable and procedurally fair decision-making process, that takes account of all relevant considerations, ICASA is urgently required to consider the adoption of this compensation process and to take account of the above considerations, when it determines what conditions to impose when issuing licences to telecommunications companies for the re-allocated analogue broadcasting spectrum.
56. To be constitutionally compliant, ICASA's decision on whether and in what manner to provide for compensation, would need to be fully supported by reasons, having regard to all the relevant considerations and facts, including the ITU recommendations, and be in accordance with the requirements of section 25 of the Constitution.

CONCLUSION AND NEXT STEPS

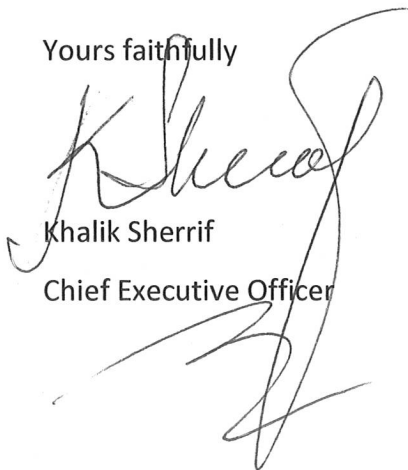
57. To summarise, the discussion and issues raised above:

- a. E.tv has two core concerns in regard to the proposed re-allocation of spectrum to telecommunication companies.
 - b. *First*, e.tv does not rely on subscriptions and is a free-to-air channel, which the public does not pay a subscription to receive. Therefore, it depends on advertising to generate revenue. If telecommunication companies acquire e.tv and other broadcasters' spectrum that was used for analogue broadcasting, it would mean that the telecommunication companies will become direct competitors for viewer attention, and any loss in viewership for e.tv directly impacts its ability to attract advertisers, which is its main revenue stream. Furthermore, it may also lose advertisers directly to these services where they allow for advertising.
 - c. *Second*, e.tv is a broadcaster and, therefore, it is required to have a broadcast service licence. However, telecommunication companies are not licensed as broadcasters. Consequently, they are not subjected to stringent licence conditions, even though they receive all the benefits and operate in direct competition with e.tv.
58. E.tv, therefore, requests ICASA to confirm that: (i) telecommunications companies which offer streaming services will be directed to apply for a broadcasting service licence in terms of the Electronic Communications Act; (ii) that, particularly to the extent that ICASA does not believe that telecommunications companies will be required to be licensed as broadcasters, ICASA will impose appropriate conditions on these companies when allocating spectrum to them; and (iii) when re-allocating spectrum to the telecommunications companies, ICASA will require them to pay direct compensation to e.tv for the loss of its spectrum to entities which are competing directly with it, alternatively to at least consider imposing this obligation and invite submissions thereon.
59. E.tv invites ICASA's response in writing to these issues, and the broader issues raised in this letter, and how ICASA intends to proceed with the allocation process in light of the legal concerns raised. E.tv also welcomes an opportunity expeditiously to consult with ICASA in relation to the above matters, prior ICASA taking any further material steps in

relation to the re-allocation of the analogue spectrum to telecommunications companies for mobile broadband services.

60. E.tv respectfully requests ICASA to provide its considered response, including in relation to whether ICASA would be amenable to consult with e.tv, by no later than 20 October 2020.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Khalik Sherrif', is written over the typed name and title. The signature is fluid and cursive, with a large loop at the end.

Khalik Sherrif

Chief Executive Officer