

Acting-Director-General
Department of Communications and Digital Technology

By email: aacs@dtps.gov.za

Dear Sir/Madam

**DRAFT WHITE PAPER ON AUDIO AND AUDIO-VISUAL CONTENT SERVICE
POLICY FRAMEWORK : A NEW VISION FOR SOUTH AFRICA 2020**

- 1 eMedia Investments (Pty) Ltd ("eMedia") hereby makes its submissions on the Draft Audio and Audio-Visual Content Service Policy Framework : A New Vision for South Africa 2020 ("the White Paper").
- 2 eMedia has a wide range of interests in broadcasting. Its interest in broadcasting centre around e.tv, the first private-free-to-air broadcaster in South Africa; e.sat.tv (branded eNCA) which supplies television, mobile and online news to various channels, including the 24 hour eNCA channel currently available on channel 403 on DSTV; OpenView, operated through Platco Digital, which is a free DTH satellite television platform company providing a multichannel free offering to viewers; and YFM, a radio station broadcast on the FM frequency. As such, eMedia has a direct interest in the White Paper and the outcome of the policies and legislation which may follow the White Paper.
- 3 eMedia supports many of the conclusions reached in the White Paper and submits that a change in the broadcasting landscape is long overdue. However, eMedia's concern is the length of time which processes such as this, as well as regulatory processes, take. This is prejudicial and has the effect of keeping the playing fields uneven, by allowing the increased dominance of MultiChoice in the broadcasting arena while threatening the survival of free-to-air broadcasters.

Regarding the latter, eMedia has made its position clear in on numerous occasions, including at the recent subscription broadcasting hearings, where it recorded its dismay that, having recognised the need to regulate the subscription broadcasting landscape for many years, by 2021, this has still not been achieved. These processes, including not only any regulations following the subscription broadcasting hearings, but any legislation and/or regulation arising pursuant to the White Paper, will still take several more years to complete, legal challenges aside.

- 4 While not wishing to cast aspersions, and appreciative of the work burden placed on the Independent Communications Authority of South Africa ("the Authority"), a better mechanism needs to be developed whereby the Authority does not consistently fail to meets its legislative obligation to make a finding on the subject matter of any inquiry within 180 days from the date of the conclusion of any inquiry (Section 6 ICASA Act 13 of 2000). This is often observed in the breach thereby perpetuating the status quo in the broadcasting sector and entrenching the imbalance in the sector. eMedia hopes that the processes surrounding the finalisation of issues raised in the White Paper will not similarly be delayed.
- 5 eMedia recognises that due to the rapid technological developments and inevitable forces of the fourth industrial revolution, the legal framework for broadcasting regulation, in the widest sense, needs to be undertaken and should be done in a manner which is as future-proof as possible. This is particularly so given the distinction between old-style linear broadcasting services and non-linear services including OTT and internet-based services. Importantly, eMedia supports the need for the Department and the Authority to have, as an underlying principle, the need to create a level playing field between competing services. Such regulation is long overdue. eMedia has been complaining about the unlevel playing fields and the need to impose regulations to achieve this purpose for quite some time. This should be a pivotal underlying principle in respect of any legislation or regulation which flow from the White Paper.

- 6 It bears emphasising that eMedia is disheartened by the numerous delays in regulating the broadcasting field generally. It is a matter of record that the ECA was promulgated in 2005 and it took until March 2015 to draft the National Integrated ICT Policy Review Report. Thereafter, it has taken another five years before this White Paper was published. The White Paper seeks, *inter alia*, to answer the questions posed in the 2015 report in order to underpin a new policy framework to address a broader market for audio and audio visual services.
- 7 It is clear that commenting on the White Paper is only the beginning of a lengthy process which may culminate in the introduction of new legislation and regulation in many years' time. While this happens, the unlevel playing fields will continue to grow and Sentech will be able to charge unregulated and uncompetitive rates which it determines without the benefit to broadcasters of competition in the transmission services market. Accordingly, in the interim, ICASA should be directed to continue with those processes it has already started and to finalise them without delay. This includes the inquiry commenced in 2011 into the regulatory framework for broadcasting transmission services, the belated attempt to regulate the subscription broadcasting sector and the sporting regulations.
- 8 In addition to the above, there are certain references in the White Paper to further studies and investigations which need to be carried out. These include, for example, the regulation of advertising on subscription broadcasting services. Considering the history of regulation in this sector, if these, or any of these investigations, are delayed and only undertaken subsequent to the promulgation of any new legislation or regulation resulting from the White Paper, this will, , merely serve to delay the Department and the Authority from dealing with crucial regulation in the broadcasting and related sectors for many years, if not decades . These investigations and inquiries should, accordingly, be undertaken by the Authority at this stage not to delay matters any further and the Department ought to instruct the Authority to do so and reach a decision within the time periods prescribed by the ICASA Act, notwithstanding the current White Paper process. The Authority ought not to hide behind the White Paper to avoid regulating the broadcasting sector in the existing environment.

- 9 In light of the above concerns, eMedia is of the view that should the Department see fit to publish another draft of the White Paper prior to the final version, then it should do so without delay and within the next 3 months so that the White Paper can be finalised this year.
- 10 eMedia sets out below certain general concerns it has arising from the White Paper.

The SABC generally and Must Carry

- 11 eMedia believes that a credible and sustainable public broadcaster is critical to the success of all free-to-air broadcasting services. However, eMedia remains concerned that the public broadcaster's mandate is too wide. It results in a disjuncture between its role as a public broadcaster and a commercial entity. The SABC, by statute, is and must remain a public broadcaster. It is the largest broadcaster that serves the majority of citizens and its mandate should, accordingly, be shaped by the needs and interests of all South Africans. To this end, it should be adequately supported by government and should implement a mechanism to ensure greater reliance on the collection of licence fees. The SABC is also able to compete with other broadcasters for advertising and sponsorship revenue. While it should be permitted to do so, given that it has three sources of revenue, it should be restrained from being allowed to participate in the commercial market in its totality in circumstances in which this runs contrary to its public service mandate and may run against the universal access principle which could deny swathes of the public access to its free public services. In this regard, the SABC should be prohibited from selling its channels to subscription broadcasters as this could deny certain members of the public access to its channels if the subscription broadcaster did not purchase these channels.
- 12 It bears repeating that one of the objectives of the SABC is to make its service available **throughout the Republic** (see section 8 of the Broadcasting Act, 4 of 1999). In amplification of the above, eMedia points out that private free-to-air

broadcasters sole source of income is advertising and sponsorship (which, incidentally, is being eroded by the dominant subscription broadcaster, MultiChoice/DSTV). e.tv and OpenView do not have the luxury of falling back on government funding should their survival be eroded, by the increasing dominance of MultiChoice and their being able to encroach, without limitation, on the available advertising spend in the broadcasting market where this is inconsistent with their viewership numbers.

- 13 Existing legislation provides for three tiers of broadcasting, being public, commercial and community. This distinction needs to remain. It is crucial that there be a distinction between public and commercial broadcasting with greater public service obligations falling on to public broadcasters due to their mandate and receipt of government funding.
- 14 For these reasons, eMedia supports the proposal that all the SABC channels will be considered as public services rather than commercial services. This mandate, including the obligations placed on the SABC as a public service (see section 10 of the Broadcasting Act), must be carried through to any further channels which the SABC broadcasts in a multichannel environment.
- 15 Both the pre-existing channels, being SABC1, SABC2 and SABC3, as well as any other channels developed by the SABC in a multichannel environment, should continue to be available for free on all satellite distribution platforms, whether pay or free. If they are not, those who obtain television by means of a decoder and satellite, are unlikely to have multiple decoders or satellites in their homes or access to analogue services, and would be denied access to these free public services if the public service channels were not purchased by a satellite broadcaster. This would impact the stated objective of making these channels available to all South Africans.
- 16 In these circumstances, the "must carry" obligations should remain in force. To get rid of the Must Carry Regulations would, run contrary to the aims of existing legislation, universal access as well as the provisions of the Broadcasting Act. It

bears mentioning, in this regard, that the public services provided by the SABC must be available to all South Africans. If the "must carry" rules are done away with and the SABC is permitted to sell its channels to, inter alia, subscription broadcasters, for the reasons outlined above, this may deny a section of the population access to these public channels.

- 17 eMedia further submits that if the government is to invest in any other broadcasters, if they hold a majority share in such broadcaster, then that broadcaster should also be considered a public broadcaster with all the obligations which come with this.
- 18 Insofar as "must carry" rules are concerned, this should extend to any digital incentive channels obtained by the SABC as contemplated in the relevant digital migration regulations. Any additional channels will need to be of a public nature and the Authority/Department should ensure that this is so. In this regard, the relevant Digital Terrestrial Television Regulations provide that the authorisation of any channels will be subject to an assessment by the Authority on the extent to which such channel meets at least the following:
 - 18.1 It supports citizenship, consumer protection and civil society;
 - 18.2 It provides fair and impartial news and current affairs coverage;
 - 18.3 It promotes education and learning;
 - 18.4 It stimulates creativity and cultural excellence;
 - 18.5 It represents the Republic in all its diversity; and
 - 18.6 It satisfies the requirements of section 10 of the Broadcasting Act (i.e., the section dealing with the public service which includes, inter alia, making services available to South African in all official languages, reflecting the unity and diverse cultural and multilingual nature of South Africa and all its cultures and regions).

- 19 In the event that "must carry" rules are abolished, it would create the possibility for MultiChoice, as the dominant player in the subscription television broadcasting market, to switch off the free-to-air broadcasters. This would have a negative impact on viewership and, as stated, this would deny a large section of the public access to such free-to-air channels. Moreover, as argued in various regulatory processes currently before the Authority, the "must carry" obligations should extend to all platforms, which would be obligated to carry not only the SABC but also e.tv as a free-to-air broadcaster with its own public service obligations. At the subscription broadcasting hearings, it was explained that, members of the public who subscribe to DSTV, should be entitled to continue watching the free-to-air channels, including the SABC and e.tv if they do not pay their subscriptions for DSTV. What currently happens is that if a consumer does not pay his or her subscription, their service is cut off and they are denied access to all channels, including the aforesaid free-to-air channels. Legislation / regulation should be implemented whereby it is impermissible to cut off the free-to-air channels even in these circumstances.

Commercial communications (advertising)

- 20 It is correct that television advertising and online video advertising compete for the same budgets and the same advertisers even though the services do not play the exact same function for advertisers. The White Paper correctly points out that there are differences in the rules around advertising which creates a regulatory imbalance between the two. There is, accordingly, a need to harmonise rules for all audio visual content services.
- 21 As a result of the aforesaid competition, the advertising spend available to broadcasters has been decreasing. This is recognised in the White Paper. Any further reduction in the advertising spend available to broadcasters would threaten the existence of free-to-air broadcasters and they should be protected by legislation/regulation.

- 22 The White Paper looks at the issue of the restriction of advertising on subscription broadcasting services. Consideration of this issue is long overdue. In the position paper for the introduction of the first free-to-air commercial television service in South Africa, the Authority took the position that *“protecting and growing free-to-air terrestrial broadcasting services beyond the introduction of a single commercial entrant requires the restriction of advertising on subscription broadcasting services.”* 25 years later, there are still no restrictions relating to advertising on multi-channel subscription broadcasting services and it appears that, although both the Department and the Authority continue to grapple this issue, they have taken no decisive action by imposing any such limitation. This needs to be done urgently to promote the continued survival of free-to-air broadcasters given the crucial role they play in South Africa.
- 23 Moreover, in the subscription broadcasting services position paper of June 2005, where the need to regulate subscription broadcasting and promote competition was recognised, and the issue of advertising limitations on multi-channel subscription broadcasting services raised, MultiChoice submitted to the Authority that the impact of subscription television broadcasting services on the advertising revenue of free-to-air terrestrial television broadcasting services had been minimal and that, even though advertising would increase commensurate with growth in subscribers *“it is unlikely that it will ever account for a similar percentage of revenue as that received by terrestrial subscription television broadcasting services.”* As it transpires, this is not the case. MultiChoice (through DSTV) has an unfair share of advertising revenue based on its audience share. This has directly impacted the advertising revenue available to free-to-air channels. In the case of e.tv and OpenView, this has a substantially greater impact than on the SABC as it receives neither government funding nor license fee revenue. Notwithstanding that, DSTV's audience share is similar to the combined channels broadcast by EMedia – e.tv and Openview – Multichoice's share of revenue, at 39.02%, is almost double that of the eMedia channels at 21.71%, and 11% bigger than that of the SABC channels at 28.78%. This is evidenced in the figures contained in **annexure 1** hereto.

- 24 Of course, even if DSTV channels offered no advertising and relied merely on subscription broadcasting, its revenue would far outstrip all the other channels revenue combined. This enables it to compete unfairly having greater resources to buy-up rights. To level the playing fields advertising restrictions on subscription broadcasting services need to be implemented.
- 25 eMedia supports the view that advertising should be regulated as aforesaid. This issue was recently raised before the Authority at the subscription broadcasting inquiry. The Authority ought not to delay looking into this issue on the basis of what is stated in this regard in the White Paper.
- 26 The White Paper contemplates that the Authority should hold an inquiry into whether the current share of advertising revenue by subscription services is appropriate and what the impact of online advertising will be on the TV advertising market in the short and long term. The White Paper goes on to state that *"if it is detrimental to the survival and viability of free-to-air services, the regulator must make regulations to protect the sustainability and viability of free-to-air services in South Africa taking into consideration the expansion of the regulatory licence framework to include all AAVCS."* To delay the matter until legislation is enacted may result in the survival and viability of free-to-air services being called into question given that this process may be delayed for many years. The Authority should immediately be directed to conduct such an inquiry should it fail to deal with this issue as part of the subscription broadcasting inquiry currently before it. The suggestions contained in the White Paper should not impede or delay this process.

Spectrum and digital migration on no less favourable terms

- 27 The process of digital migration commenced some 14 years ago in 2006. Originally, the deadline for the analogue switch-off (ASO) was to be 2015. This deadline (together with numerous later deadlines) was missed and the digitisation process is still far from completion.

- 28 In December 2012, ICASA promulgated the Digital Migration Regulations. The purpose of these regulations was to regulate the transition from analogue to digital broadcasting of the existing television channels, and to prescribe the conditions for the assignment of channel capacity for the purposes of digital migration.
- 29 The White Paper proposes that legacy broadcasters should be migrated "*on no less favourable terms*". However, eMedia is concerned that the White Paper does not provide any guidance on the licensing framework post analogue switch-off. It only provides that an inquiry should be held to consider licencing in a post-ASO world.
- 30 In a digital world, it is unavoidable that more channels will become available. However, an increase in channels does not equate to an increase in revenue. As a free to air broadcaster, e.tv and Openview rely on advertising as the only form of revenue as they are not entitled to charge licence fees or any other form of access fee. Their ability to generate advertising revenue is dependent on their ability to attract audiences to watch their programmes.
- 31 Currently, almost 37% of the audience accessing the traditional free-to-air channels including e.tv do so by means of satellite services. According to Arianna (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)
- 32 This is illustrated in the table below:

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

	Analogue	63%	59%	60%	68%
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- 33 From the above table it can be seen that, on average 63% of audiences access the e.tv channel by means of analogue broadcasting; 0.13% access e.tv through the state-run DTT infrastructure; and about 33% access e.tv through Openview or other satellite platforms.
- 34 The White Paper recommends that ICASA conduct an inquiry in order to determine the most appropriate licensing framework for digital terrestrial television (DTT) post analogue switch-off. However, it is not clear when the digital migration process will be completed. This jeopardises the commercial viability of DTT as an alternative content distribution platform.
- 35 Given the government's slow pace in the rollout of DTT, broadcasters have started to look at other alternative technologies to enable them to provide digital television. In order not to be left behind, e.tv found it necessary and strategic to invest in building a satellite platform in order to offer its customers digital television. The platform, named "Openview", was launched in October 2013 and is currently servicing more than 2 million homes. However, this came at a cost of approximately R1,1 Billion.
- 36 Despite e.tv's significant investment in satellite technology, research shows that the majority of e.tv's viewers still view e.tv through its analogue service. It is most concerning that it is still not clear how these analogue viewers will be able to access the e.tv and SABC channels once the analogue spectrum has been taken away from e.tv and the SABC. It certainly cannot be assumed that these analogue viewers will be able to afford switching to a digital service (an accepted premise of the DTT policy). The white Paper ought to deal with this.
- 37 In addition, e.tv only enjoys use of 55% of Multiplex 2 of the DTT coverage. In reality, there are some citizens who fall outside the coverage area of Multiplex 2 but inside the coverage of Multiplex 1 and are only able to access the SABC

channels via DTT. For e.tv to replicate all of its channel offering currently available on its Openview platform in the DTT platform, e.tv will require at least two full Multiplexes, which comes at a huge annual signal distribution cost.

- 38 This proves that DTT has serious capacity limitations and will disadvantage e.tv viewers and the public from fully enjoying multichannel digital offering. Moreover, Standard Definition (SD) broadcasting has become obsolete and High Definition (HD) is becoming the preferred technology worldwide and as such the full complex of DTT (being seven Multiplexes) will only be able to provide up to 32 HD channels.
- 39 In mitigation of the fact that DTT is not a viable alternative distribution platform, and if, indeed, the Department 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:
 - 39.1 all satellite distribution platforms in the country should be required to carry all channels offered to them by the free-to-air broadcasters and not only the SABC; and
 - 39.2 eMedia's own free-to-air satellite platform, Openview, should be compensated for assisting the state in reaching its electorate in areas that DTT cannot cover.
- 40 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 norms, thus making Sentech a growingly, unaffordable distribution partner to the free-to-air broadcasters. Sentech, as the common carrier, continues to operate without competition or regulation of, inter alia, its pricing structures.
- 41 Countries that have already migrated to digital broadcasting have realized the benefits of auctioning the digital dividend spectrum and using the proceeds to fund the migration. eMedia has tried to raise the issue of compensation directly

with the Authority It is concerned that broadcasters have still not been adequately compensated for the migration to digital – this needs to be urgently addressed in order to ensure that broadcasters are migrated on no less favourable terms.

Sentech as a common carrier

- 42 The Authority commenced with a process to determine if Sentech is a dominant player with significant market share ten years ago. Although broadcasters, Sentech and other interested parties submitted written submissions and attended public hearings, to date, and notwithstanding its statutory obligation to do so, ICASA has still not formally concluded this process. The regulation of Sentech and/or competition in the transmission market needs to be dealt with urgently.
- 43 While a lot of progress has been made in liberalising the broadcasting and telecommunications industry, with many new entrants being licenced, unfortunately, this has not occurred in the broadcasting signal distribution area. As a result, broadcasters, other than self-providing their signal distribution, presently must use the services of Sentech. Broadcasters including eMedia are forced to enter into terrestrial signal distribution agreements with Sentech in respect of which they have little negotiating power given the fact that there is no viable alternative. As a result, broadcasters have no local reference point to determine if they are being charged exorbitant signal distribution fees by Sentech. Broadcasters have always indicated that they are being overcharged by Sentech. e.tv showed why this was so in its 2011 submission at the inquiry into broadcasting transmission services. Nothing has changed in this regard.
- 44 As required by the ECA, broadcasters were issued with the following licences by the Authority : an individual or class broadcast licence; a spectrum licence; and an ECNS licence to self-provide their signal distribution. During the process leading up to the publication of the ICASA Digital Migration Regulations, all television broadcasters submitted that they should retain the spectrum licence that was issued to them by the Authority, and that the spectrum should not be licenced to Sentech. The main concern was that if the spectrum was licenced to

Sentech and not to the broadcaster, the broadcaster would not have an opportunity to either self-provide or move to another signal distributor licenced by the Authority in the future. As a compromise, the spectrum was co-assigned to the broadcaster as well as Sentech. We therefore propose that this co-assignment should continue for any further DTT mux licensing.

New licence framework

- 45 eMedia is of the view that simpler approach to licensing is required in order to future-proof the regulatory regime from further technological advancements. In this regard, eMedia supports the proposal in the White Paper to expand the current licence category of broadcasting service licences to include a broader category of audio and audio-visual content services. The White Paper proposes that the licensing framework will have three sub-categories - broadcasting services, on-demand content services and video sharing platforms. While eMedia supports the principle of a comprehensive licencing framework, we are concerned about the distinction made between broadcasting services and on-demand services in the White Paper. The distinction is premised on the distinction between linear and non-linear content services. This is a flawed distinction. Increasingly, on-demand services are providing services in a linear fashion. As such, it is not necessary to have a different license for linear and on-demand.
- 46 Furthermore, eMedia advocates for simpler licencing process altogether. We suggest that a new, flexible licensing regime for all audio-visual content service providers may be more appropriate.
- 47 In addition, eMedia supports a technology neutral licensing approach as articulated in the Electronic Communications Act, 2005 (ECA). However, we are concerned that the licensing framework proposed in the White Paper is inadvertently contrary to a technologically neutral approach. In our view, audio-visual content providers should be able to provide content across multiple platforms without having to apply for different licences. The licensing framework

should rather differentiate between an audio content service and an audio-visual content service irrespective of whether they use radio frequency spectrum.

- 48 Finally, we support the proposal advocated in the White Paper that the current approach for specifying a minimum percentage of total broadcasting time per channel reflects an analogue mind-set that is not appropriate in a multichannel environment. eMedia agrees and is of the view that its new licence (which will be renewed in 2023) should not impose specific conditions on the e.tv channel only, but rather should impose obligations across the platform of channels it operates, including any on-demand services.

Conclusion

- 49 eMedia wishes to thank the Department for the opportunity to participate in this process. eMedia Investments repeats that change in the broadcasting sector is long overdue and will continue participating in the process.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Khalik Sherrif', with a long horizontal flourish extending to the right.

Khalik Sherrif
CEO eMedia Investments

Annexure 1

Apr 19 – Mar 20

SA TV AUDIENCE & REVENUE SHARE

