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**GENERAL NOTICE**

**Independent Communications Authority of South Africa**

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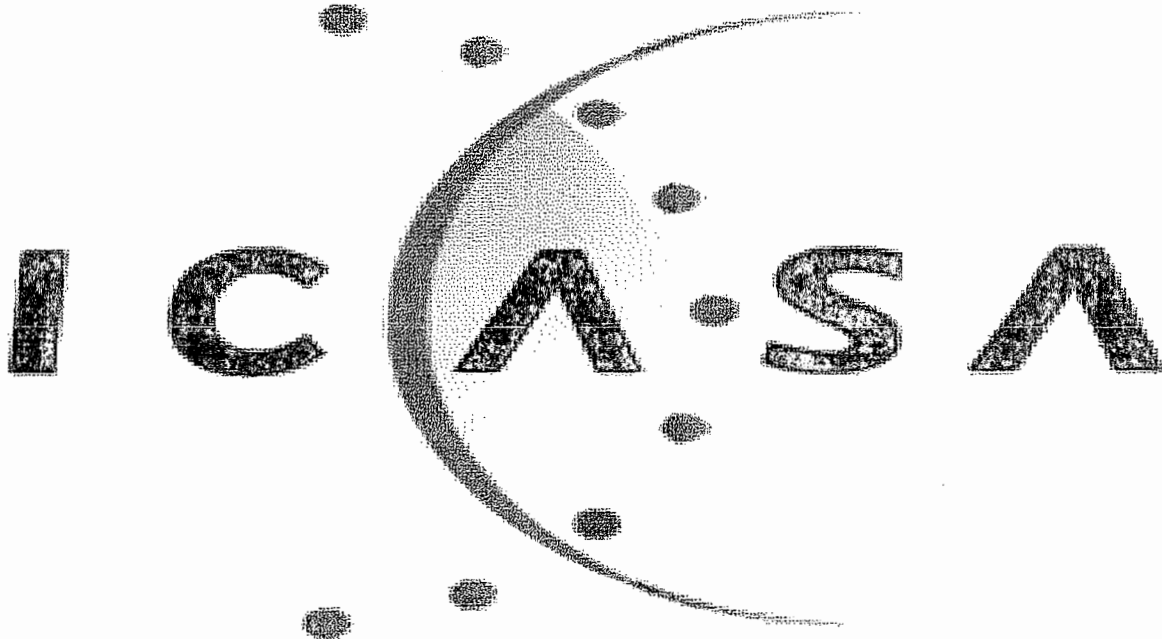
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## GENERAL NOTICE

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**NOTICE 770 OF 2010**



**INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA  
POSITION PAPER IN RELATION TO  
INTERNET PROTOCOL TELEVISION (IPTV) AND VIDEO ON DEMAND  
(VOD) SERVICES**

**AUGUST 2010**

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1. ArionBomema Technologies ("ABT");
2. Ericsson South Africa (Proprietary) Limited ("Ericsson");
3. e.tv (Proprietary) Limited ("e.tv");
4. Freedom of Expression Institute ("FXI"), the Association for Progressive Communications, the Shuttleworth Foundation and the Southern African NGO Network (SANGONet);
5. Professor Guy Berger;
6. Kagiso Media Limited ("Kagiso");
7. MultiChoice Africa (Pty) Limited ("MultiChoice");
8. MWEB Connect (Pty) Limited ("MWEB");
9. National Association of Broadcasters ("NAB");
10. Neotel (Proprietary) Limited ("Neotel");
11. Sentech Limited ("Sentech");
12. The South African Broadcasting Corporation Limited ("SABC");
13. The South African Communications Forum ("SACF");
14. Super 5 Media (Proprietary) Limited ("Super 5");
15. Telkom SA Limited ("Telkom");
16. Vodacom (Pty) Limited ("Vodacom");
17. WNC IT Services CC; and
18. Walking on Water Television (Proprietary) Limited ("WOW").

## 1. INTRODUCTION

1. There has been a marked convergence in communications technologies in recent years as a result of increased technological development and advancement. In particular, technological developments and advancements facilitating the provision of internet protocol television (“**IPTV**”) and Video-on-Demand (“**VOD**”) have made it necessary for the Independent Communications Authority of South Africa (“**the Authority**”) to consider –
  - 1.1 whether it falls within the scope of the Authority to regulate such services in light of the current regulatory framework;
  - 1.2 the appropriate means by which such services should be regulated, if at all, within the current regulatory framework; and
  - 1.3 whether any regulatory reform should be undertaken to facilitate the uptake and expansion of such services, which allow for new means of content delivery, in South Africa.
2. In considering these issues the Authority has taken into account the impact of structural change, the spread of information communication technologies and technological developments and the optimal conditions of competitiveness and legal certainty for information technologies in South Africa and its media industries and services, as well as respect for cultural and linguistic diversity.
3. The Authority has received numerous enquiries from various parties, including those who are presently licensed to provide communications services and entities looking to enter the sector, in relation to the regulatory treatment and licensing requirements which are attached to IPTV and VOD services in South Africa. The Authority’s intention in publishing this Position Paper is to set out the Authority’s position in this regard and the Authority’s policy decisions in relation to such services in order to provide clarity to participants in the communications sector.
4. The Authority initiated an inquiry into the regulation of IPTV and VOD in terms of section 4B of the Independent Communications Authority of South Africa Act 13 of 2000 (“**the ICASA Act**”). The Authority published a Discussion Document on the Regulation of Internet

Protocol Television (IPTV) and Video on Demand (VOD) (“**the Discussion Document**”) on 16 February 2010 under **GN 142** in **Government Gazette 32961** setting out various issues on which input from interested parties was requested by 26 March 2010.

5. The Authority then conducted public hearings on 8 and 9 April 2010 at which interested parties who had requested an opportunity to address the Authority, made presentations regarding their submissions in relation to the Discussion Document and the issues which, in their respective views, should be taken into account and addressed by the Authority. Certain parties then provided supplementary written submissions following the public hearings.
6. In this Position Paper, the Authority has set out its policy decisions in relation to the provision of IPTV and VOD services in South Africa in order to provide clarity to participants in the communications sector. Since the document largely focuses on conceptual issues and given that the Authority has decided not to make regulations in relation to IPTV and VOD services, the Authority will conclude the consultation process with the publication of this Position Paper.
7. The Authority has taken into account the various representations and submissions it received from interested parties, as well as the policy positions and regulatory actions which have been taken in other jurisdictions, bearing in mind the South African context and the particular legislative landscape against which the Authority acts. As such, the Authority cannot and will not necessarily adopt the same policy positions as have been adopted in other countries. While the Authority has not addressed each and every one of the submissions made by interested parties, the Authority has sought to set out its position in relation to the material issues raised by interested stakeholders.
8. The Authority has also taken into account the various submissions which were received from interested parties regarding legislative reform and the necessity to amend or replace the existing Electronic Communications Act 36 of 2005 (“**ECA**”) in terms of which communications services in South Africa are presently regulated. Various parties made submissions regarding the adoption of a unified licensing system that does not distinguish between electronic communications services (“**ECS**”) and broadcasting services, as the ECA presently does. The present regulatory development process cannot, however, achieve the broader goal of amending or replacing the ECA in this regard. While such reforms may be appropriate at some point in the future, at present, the Authority will work

within the ambit of the existing legislation, which provides for distinct categories of communications services which are provided to end-users i.e. ECS and broadcasting services, and attaches different licensing requirements to each of these distinct categories. Where necessary, the Authority will take the submissions received by interested parties into account in its policy recommendations regarding regulatory reform to the Minister of Communications ("**the Minister**"), as provided for in section 4(3)(a) of the ICASA Act. The Authority's objective at the present time is to ensure that there is clarity in the sector regarding the regulatory treatment (in terms of the licensing scheme provided for in the ECA) which is attached to IPTV and VOD services.

## 2. LEGISLATIVE FRAMEWORK

9. The South African communications sector is regulated by the Authority in terms of the ECA, read with the Broadcasting Act 4 of 1999 ("**the Broadcasting Act**"), and the ICASA Act. The ECA was enacted in part to take account of the convergence in communications technologies as a result of technological development and advancement over the years. Previously, telecommunications were regulated separately and specifically in terms of the Telecommunications Act 103 of 1996 ("**TA**") and broadcasting was regulated in terms of the Independent Broadcasting Authority Act 153 of 1993 ("**the IBA Act**") and the Broadcasting Act. The TA, the IBA Act, and certain provisions of the Broadcasting Act were repealed when the ECA came into effect on 19 June 2006.
10. The ECA deals with both electronic communications activities and broadcasting activities in a single statute and in terms of a common licensing framework. The legislative framework established under the ECA provides for the licensing of three types of service, namely: electronic communications network services ("**ECNS**"), ECS and broadcasting services. Licences to provide services (i.e. ECNS, ECS or broadcasting services) are issued as either individual or class (general authorisation) licences. While individual licences are subject to both standard terms and conditions and may be subject to additional and specific licence conditions, class licences are subject only to standard terms and conditions and additional terms and conditions, where necessary, to facilitate competition in the relevant market or market segment.
11. An ECNS is defined in the ECA as –



“a service whereby a person makes available an electronic communications network [(“ECN”)], whether by sale, lease or otherwise -

- (a) for that person’s own use for the provision of an [ECS] or broadcasting service;
- (b) to another person for that other person’s use in the provision of an [ECS] or broadcasting service; or
- (c) for resale to an [ECS] licensee, broadcasting service licensee or any other service contemplated by [the ECA]”.

12. For the purposes of the ECA, an ECN is defined as –

“any system of electronic communications facilities (excluding subscriber equipment), including without limitation –

- (a) satellite systems;
- (b) fixed systems (circuit- and packet-switched);
- (c) mobile systems;
- (d) fibre optic cables (undersea and land-based);
- (e) electricity cable systems (to the extent used for [ECS]); and
- (f) other transmission systems, used for conveyance of electronic communications”.

13. An ECS is defined as –

“any service provided to the public, sections of the public, the State, or the subscribers to such service, which consists wholly or mainly of the conveyance by any means of electronic communications over an [ECN], but excludes broadcasting services”.

14. The definitions of “electronic communications” and “broadcasting service” are central to establishing what constitutes ECS: any “electronic communications” that are conveyed over an ECN that are not “broadcasting services” will be an ECS (provided that the service is provided to the public, sections of the public, the State, or the subscribers to the service).

15. “Electronic communication” is defined as –

“the emission, transmission or reception of information, including without limitation, voice, sound, data, text, video, animation, visual images, moving images and pictures, signals or a combination thereof by means of magnetism, radio or other electromagnetic waves, optical, electro-magnetic systems or any agency of a like nature, whether with or without the aid of tangible conduct, but does not include content service”.

16. A broadcasting service is defined, in turn, as –

“any service which consists of broadcasting and which service is conveyed by means of an [ECN], 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".
17. "Broadcasting", the definition of which is key to establishing what is considered to be a broadcasting service, is 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 [ECN] or any combination thereof" (emphasis added).
18. In terms of the horizontal licensing structure established in terms of the ECA, a separate licence (an ECNS licence) is required to construct and/or operate an ECN which is used either by the carrier itself or by other customers ultimately to transmit ECS or broadcasting services to end-users. The ECA no longer recognises any difference between different types of networks and the same licence is required to operate an ECN regardless of the type of service which is provided over that network. In this way, the ECA takes account of the fact that, whereas in the past, particular networks were established and utilised for a dedicated, particular purposes, it is possible now for different types of services than those which the network was originally established to carry to be provided over the same network. For example, a network that was previously used only for broadcasting signal distribution can now potentially also be used to provide voice telephony services. Likewise, a mobile network (consisting of mobile base stations and fixed links) that was previously only used to provide mobile voice telephony services, can now potentially be used to transmit television broadcasting services to mobile devices.
19. The ECA does, however, maintain a distinction between the types of services that may be provided to end-users over such networks: that is, ECS or broadcasting services. The procedures in terms of which a licence may be granted by the Authority to provide ECS, on the one hand, and broadcasting services, on the other, are the same (except to the extent that Chapter 9 of the ECA imposes additional considerations to be taken into account by the Authority when dealing with applications for broadcasting licences). However, a person who is *only* licensed to provide ECS may not provide broadcasting services and vice versa. For this reason, the definitions of ECS and broadcasting services in the ECA are important as they delineate the broad categories of services which may be provided by particular

- licensees. Section 7 of the ECA provides that the provision of “any service without a licence” is prohibited except where a particular service is exempted by the Authority from the applicable licensing requirements. Although the word “service” has not been defined in the ECA, in practical terms it is appropriate to assume that this refers to the three types of services provided for in Chapter 3 of the ECA, namely ECNS, ECS and broadcasting services. As such, any person who provides a service which falls within the definition of a “broadcasting service” without a *broadcasting service licence*, is acting unlawfully. Similarly, any person who provides a service which falls within the definition of an “electronic communications service” without an *ECS licence*, is also acting unlawfully.
20. The distinction between ECS and broadcasting services *on the basis of the definitions contained in the ECA* may be summarised as follows –
- 20.1 Broadcasting services and ECS both consist in the conveyance of electronic communications.
- 20.2 Broadcasting services consist of “unidirectional” electronic communications which are conveyed to end-users.
- 20.3 The Authority may determine that certain types of services which may otherwise fall within the definition of “broadcasting service” should not be regarded as broadcasting services.
- 20.4 All electronic communications that are conveyed to end-users but which do not fall within the ambit of “broadcasting services” constitute ECS.
- 20.5 Any service which consists in the conveyance of electronic communications to end-users that is not “unidirectional” will be an ECS.
21. In terms of the ECA, read with section 5(1) of the Broadcasting Act, three types of broadcasting service licences may be issued: public, commercial and community. Public broadcasting services are those operated by the public broadcasting service, the SABC. Commercial broadcasting services are defined as “broadcasting service[s] operating for profit or as part of a profit entity but exclud[ing] any public broadcasting service”. A community broadcasting service is defined in the ECA as a broadcasting service which –

- 21.1 is fully controlled by a non-profit entity and carried on for non-profit purposes;
- 21.2 serves a particular community;
- 21.3 encourages members of the community served by it or persons associated with or promoting the interests of such community, to participate in the selection and provision of programmes to be broadcast in the course of such broadcasting service; and
- 21.4 may be funded by donations, grants, sponsorships or advertising or membership fees, or by combination of the aforementioned.
22. Further to the fact that broadcasting services and ECS are required in terms of the ECA to be authorised in terms of separate licences, the scope and nature of the particular broadcasting service or ECS, as the case may be, determines the particular type of broadcasting service or ECS licence (i.e. an individual or a class licence) which will be required. Section 5 of the ECA provides in this regard that –
- 22.1 ECS consisting of voice telephony services provided using numbers from the national numbering plan are required to be authorised in terms of an individual ECS licence. The implication is that ECS which are not comprised of voice telephony services using numbers from the national numbering plan are required to be authorised in terms of a class ECS licence and this is the interpretation of the ECA which the Authority has, to date, adopted;
- 22.2 commercial and public broadcasting services of national or provincial scope are required to be authorised in terms of an individual broadcasting service licence;
- 22.3 community broadcasting and low-power services, whether provided free-to-air or on a subscription basis are required to be authorised in terms of a class broadcasting service licence.
23. In addition, the Authority has the power, in terms of section 5(3)(e) and section 5(5)(c) of the ECA respectively, to make regulations providing that other services, further to those which are specifically enumerated in section 5, which the Authority finds have a significant impact on socio-economic development will require an individual licence, or which the

Authority finds do not have a significant impact on socio-economic development will require a class licence. Any specific services that the Authority may prescribe, in terms of either section 5(3)(e) or 5(5)(c), as requiring an individual or a class licence must be a service which falls within one of the three broad categories of licensable services i.e. ECNS, ECS or broadcasting service.

24. The distinction between the different categories of licence is significant because of the different processes which are to be followed to obtain an individual licence or a class licence. An application for an individual licence can only be made to the Authority pursuant to an invitation to apply ("ITA") issued by the Authority and a licence will only be awarded following a relatively intensive adjudication process. On the other hand, a class (general authorisation) licence can be obtained by submitting a registration notice to the Authority. The Authority has relatively limited discretion to refuse to register a registrant for a class licence. The implication is that it is more difficult to enter the market to provide a service for which an individual licence is required than where only a class licence is required.
25. The licensing of broadcasting services is subject to the additional requirements imposed by the Broadcasting Act. Section 5(1) of the Broadcasting Act provides that the Authority may "on such conditions as it may determine, issue a sound or television broadcasting service licence for a specified area" in the broadcasting service categories of public, commercial and community broadcasting. In addition, it is provided that broadcasting licences are categorised as –
- 25.1 free-to-air broadcasting service;
- 25.2 *terrestrial* subscription broadcasting service;
- 25.3 *satellite* subscription broadcasting service;
- 25.4 *cable* subscription broadcasting service;
- 25.5 low power sound broadcasting service; and
- 25.6 any other class of licence prescribed by the Authority from time to time.

26. As such, it is apparent that broadcasting service licences issued for *free-to-air* broadcasting services are not required to be issued in respect of any particular broadcast platform. By contrast, *subscription* broadcasting service licences are to be issued for specified platforms: terrestrial, satellite or cable. The Broadcasting Act does not supply any definitions as to what will be considered to be terrestrial or cable broadcasting services.
27. Notwithstanding the provisions of the Broadcasting Act, when licensing the new subscription television services – Multichoice, WOW TV, On Digital Media, E-Sat and Telkom Media (now Super 5 Media) the Authority authorised these subscription licensees to provide subscription broadcasting services without specifying the particular platform on which such services were to be provided in light of the advent of a technology neutral licensing framework and in accordance with the regulatory objectives expressed in sections 2(a) and (b) of the ECA<sup>1</sup> as well as section 94 of the ECA, that deals with conflicts between the ECA and other laws, such as the Broadcasting Act, relating to the regulation of broadcasting and electronic communications.

### 3. THE CHARACTERISATION OF IPTV AND VOD SERVICES

#### IPTV Services

28. The term IPTV can cause, and has caused, some confusion. In general terms, IPTV is a system through which services are delivered using the architecture and networking methods of internet protocol (“IP”) over a packet-switched network infrastructure (including the internet and broadband internet access networks), instead of being delivered via traditional radio frequency broadcast and satellite networks. IPTV has been defined by the International Telecommunications Union (“ITU”) as “a system where a digital television service is delivered by using [IP] over network infrastructure, which may include delivery by

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<sup>1</sup> Section 2(a) provides that the regulation of electronic communications should seek to “promote and facilitate the convergence of telecommunications, broadcasting, information technologies and other services contemplated in [the ECA]” and section 2(b) provides that it should “promote and facilitate the development of interoperable and interconnected electronic networks, the provision of the services contemplated in the [ECA] and to create a technologically neutral licensing framework”.

a broadband connection".<sup>2</sup> The official definition approved by the ITU's focus group on IPTV is as follows:

"IPTV is defined as multimedia services such as television, video, audio, text, graphics or data delivered over IP based networks managed to provide the required level of quality of service and experience, security, interactivity and reliability".

29. While a number of interested parties who made submissions during the Authority's inquiry into the regulation of IPTV and VOD accepted the definition of IPTV provided by the Authority in the Discussion Document, or as provided by the ITU, some parties attempted to provide their own definitions. For example:
- 29.1 MultiChoice defined IPTV as "a broadcasting service which is conveyed by means of a managed end-to-end electronic communications network using an Internet Protocol packetized data transport mechanism" (emphasis added) (MultiChoice additional submission, para 1.1); and
- 29.2 The NAB submitted that IPTV is the making available of interactive video and television-type content through secure and protected IP telecommunications network (emphasis added) (NAB submission, p 3, para 2.1).
30. In the Authority's assessment, the ITU definitions most clearly articulate what it understands IPTV to be. What is clear is that an IPTV service *will* involve the provision of scheduled television programming but that it *may also* involve the provision of unscheduled video (that is accessed on request by the user), audio, text, graphics and data *in addition to the scheduled television programming*.
31. IPTV should not be confused with Internet video which are unmanaged services that are offered by the streaming of video through the public Internet (for example, YouTube where users can upload and view other users' videos). Similarly, Internet television or broadcasting (as it was referred to in the Discussion Document), otherwise known as Web TV (for example, the US-based Joost or European-based Zattoo) is streamed through the public Internet, usually on a peer-to-peer network. By comparison, IPTV is offered over an IP-based platform and on a managed network, and can be received via a television with a set-top box or via a computer. As such, while Internet video and Web TV is seen to be

<sup>2</sup> ICT Regulations Toolkit, see (<http://www.ictregulationtoolkit.org/Glossary>).

available in a public sphere, IPTV is only available on a secure closed system with managed quality of service.

32. Some of the interested parties, including FXI and Professor Berger, raised concerns with respect to the regulation of the Internet (as opposed to services delivered over IP-based networks). Professor Berger also warned the Authority against so-called “regulation creep”. However, the Authority does not seek to regulate, nor does it contemplate regulating, Internet videos or Web TV. In fact, as discussed in further detail below, the Authority does not consider that, under the present regulatory framework, it has the power to regulate such services or means of content delivery. All that the Authority seeks to do is to delineate those services that are IPTV from those services that are Internet video or Web TV. The Authority considers that the ITU definitions of IPTV are sufficient to ensure that such services will not be confused with Internet video or Web TV.

### VOD Services

33. What constitute VOD services also resulted in some confusion on the part of certain interested parties. Various parties submitted their own definitions and characterisation of VOD services and the different types of VOD services which may be provided.
- 33.1 Telkom noted the distinction made by the Authority on page 12 of the Discussion Document between VOD in “Push Mode” and VOD in “Pull Mode”. Telkom defined “pull mode” to mean that a user initiates a request to receive content, or pulls content from a *server* where the content waits to be accessed, while “push mode” is defined to mean content that is delivered to the user’s *reception device* without the direct instruction from the user to interface the content (Telkom submission, pp 10-11).
- 33.2 e.tv submitted that *linear* VOD services operated where programmes were downloaded by the operator onto a storage device (e.tv submission, para 2.7).
- 33.3 MultiChoice submitted that VOD is a subset of *non-linear service* which could also include any form of video content distribution over the open Internet, and that the simplest definition of VOD is that it is a system which allows users to select and



watch or listen to video or audio content *on demand* (MultiChoice submission, paras 20 and 22). MultiChoice also submitted that VOD can be implemented in various ways: (1) the user can access a central server directly and request audiovisual content for streaming or downloading or (2) the audiovisual content can be cached on the user's connected storage device, such as a personal video recorder ("PVR") device, and the user's level of interaction will be limited to this device (MultiChoice submission, para 23). MultiChoice subsequently defined VOD, in its additional submission, as "an electronic communication service that allows the public, sections of the public or subscribers to view or download audiovisual content on-demand over an electronic communications network, but excludes Internet content". MultiChoice submitted that "Internet content" may, in turn, be defined as "content or other information that is kept on a server or other data storage device and may be accessed on the public Internet" (MultiChoice additional submission, paras 1.2 - 1.3).

- 33.4 MultiChoice also noted that the Authority regarded "push VOD" in the Discussion Document as the same as "near video on demand" ("NVOD"). MultiChoice submitted that this analysis is not correct in that NVOD is a term usually used for a pay-per-view technique where the same programme is broadcast at intervals to allow viewers to watch the programme at their convenience (MultiChoice submission, p 10, fn 15). MultiChoice also submitted that push video on demand ("PVOD") is "a service which provides no more than data or text, whether with or without associated still images", and as such, on the basis of the definition of a "broadcasting service" in the ECA, is not a broadcasting service for the purposes of the ECA, and that the file transfer method used to download the content does not use the broadcasting stream of the channel but is rather a separately defined data pipe (MultiChoice submission, para 29).
- 33.5 NAB submitted that the term VOD refers to a number of technologies offered over private networks and the Internet, all of which allow the selection and rental or download in a virtual or electronic form of video content for immediate or later viewing on a range of devices (NAB submission, para 2.3).
34. As noted by various interested parties who made submissions: VOD can refer generally to any video that is provided *on demand*. The Authority seeks only to deal with certain types of VOD; as set out above, the Authority does not wish to regulate video which is provided or

accessed via the public Internet (including user-generated content and programming provided on a subscription basis but provided on the public Internet) and, as discussed in further detail below, it does not consider that it has the power in terms of the ECA to do so. This may change in the future. The Authority accepts that, in the future, on-demand services consisting of programming provided over the public Internet may be a substitute for traditional television broadcasting and that it may be appropriate at that time for some form of regulation to be introduced. However, in the Authority's assessment, in order for the Authority to regulate such services, a legislative amendment would be necessary to permit the regulation of content services in certain circumstances.

35. The types of VOD services that the Authority wishes to deal with and to clarify the regulatory treatment to be given to such services are those on-demand (rather than scheduled) services which are directly *transmitted* to a user over an ECN in South Africa. In the case of on-demand Web TV services (such as, for example, on-demand television programmes provided in South Africa by DStv to its subscribers on the DStv website and in the United Kingdom on BBC iPlayer), the licensable service that is transmitted to and received by the user is the *Internet service* (for which an ECS licence is required); the on-demand programming that the user accesses via the Internet service is a *content service*. As set out below, the Authority does not seek to regulate content services that are accessed in this manner (e.g. via the Internet).

#### 4. REGULATING IPTV AND VOD

36. The ECA establishes a particular regulatory framework within which the Authority must regulate communications in South Africa. The problem with legislation which seeks to regulate the rapidly developing and changing communications sector is that it often fails to keep pace with the technological advancement which occurs in the sector. For example, broadcasting networks and services and telecommunications networks and services were purported to be regulated separately in terms of the IBA Act and the TA, respectively, long after it technically became possible for what were traditionally broadcasting services to be provided over traditional telecommunications networks and vice versa. The challenge that the Authority faces is to ensure that the development and provision of new services in South Africa is not impeded by the regulatory framework that is in place: the licensing

requirements must not be an insurmountable barrier to entry which will have the effect of inhibiting competition and thus limiting the delivery and potential uptake of new and innovative services such as IPTV and VOD and other means of content delivery. This must be balanced with the need to ensure that the licensed services which are provided, particularly to poor and vulnerable consumers, are viable: the viability of those services tasked with serving poor and vulnerable consumers, who do not necessarily have the means to access new and innovative services such as IPTV and VOD must not be undermined.

37. There are certain issues which arise in the context of the regulatory framework established by the ECA, which are particularly relevant when considering the manner in which IPTV and VOD services should be treated from a regulatory perspective.
38. As set out above, broadcasting services, as defined in the ECA, are unidirectional "electronic communications". Any "electronic communications" which are not unidirectional (and, thus, defined as broadcasting services) will be ECS in terms of the ECA.
39. Unidirectional "electronic communications" are communications which are transmitted in one direction only. The question then arises as to what it means for a particular service to be transmitted in one direction only. The word "unidirectional" as used in the definition of "broadcasting" is not defined in the ECA nor is there any case law dealing with the meaning of that term in the context of the ECA. What is clear, though, is that when something is *not* "unidirectional" it will be either bidirectional (in two directions) or multi-directional (in many directions).
40. Although there are two identifiable extremes in respect of the transmission of a service either being unidirectional or being a two-way communication, there is also a distinct blurring between these two extremes in the way in which many communications services are provided:
  - 40.1 At one end of the spectrum, is ordinary, scheduled analogue or digital terrestrial or satellite television broadcasting. These broadcasting services are transmitted from a single point to the public, which passively receives such services. Members of the public have no control over the services which they receive, which is determined solely by the broadcaster.

- 40.2 At the other end of the spectrum are voice telephony services, which are clearly not unidirectional. Voice telephony involves two parties (at least) both sending and receiving information (i.e. electronic communications). The two (or more) parties have complete control over the information which is sent and received.
- 40.3 Internet services fall somewhere on the continuum between these two extremes. Obtaining information from a website involves the Internet user seeking out the information which appears on the website and the Internet user has a large degree of control over the information which is received. At the same time, the information is primarily transmitted by one party (the website) to the other party (the Internet user) and, as such, there are some similarities to broadcasting in its traditional sense.
- 40.4 Services such as VOD also fall somewhere on the continuum between the two extremes of services which are (1) unidirectional (which are regarded as broadcasting services) and (2) bi-directional or two-way communications (which were traditionally regarded as telecommunications services). Such services are similar in some respects to ordinary television services and offer alternative means by which to receive content and programming that may otherwise be provided by television services. On the other hand, the viewer has a degree of control over the services which are received and the services are not simply transmitted without any involvement from the viewer (in fact, the services must specifically be requested in order to be received).<sup>3</sup>
41. It is thus not entirely self-evident, apart from the limited cases of traditional broadcasting over a traditional broadcasting network and voice telephony services, when a particular communications service provided to end-users is "unidirectional", and classed as a broadcasting service in terms of the ECA, and when it is to be regarded as "bidirectional" or "multidirectional" and thus classed as an ECS in terms of the ECA. The final determination as to what services constitute broadcasting services and what services constitute ECS is, to a large extent, a matter of policy.

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<sup>3</sup> The Authority has previously indicated, in the context of its inquiry into subscription broadcasting, that VOD (as opposed to scheduled pay-per-view programming provided by a broadcaster) is not regarded as broadcast programming and is, accordingly, not regarded as the provision of a broadcasting service.

42. A number of interested parties who made submissions objected to the use of the terms “linear services” and “non-linear services” in the Discussion Document. In particular, the parties objected to the fact that these terms had not been defined in either the Discussion Document or the ECA. Certain interested parties thus preferred the use of the phrase “unidirectional” when referring to so-called “linear” services and “bidirectional” when referring to so-called “non-linear” services, which is more consistent with the wording used in the ECA to describe broadcasting services.
- 42.1 Telkom proposed that the term “scheduled programming” should be used as opposed to the term “linear” (which seemed to refer to programming whose order cannot be changed). By contrast, Telkom proposed that “non-linear” could then be substituted by a term such as “user defined programming” (Telkom submission, para 1.2A, p 4).
- 42.2 Telkom also considered the terms “unidirectional” and “bidirectional” at length and elaborated on the differences between these two terms. In Telkom’s assessment “unidirectional” refers to a non-interactive service in terms of which data can only be received in the order that it is sent, data cannot be modified, and data can only be pushed. A “unidirectional” service can thus also be referred to as a “linear” service which focuses on programming or broadcast services and, in particular, television or radio broadcasting and IPTV. A “bidirectional” service is, in Telkom’s assessment, an interactive service in terms of which data can be received in any order that the user prefers, the possibility exists to modify data, and data is generally pulled although it may also be pushed. A “bidirectional” service can thus also be referred to as a “non-linear” service which focuses on content services and, in particular, on Internet television and VOD. Sentech agreed with this assessment (Sentech submission, paras 3.2.1 – 3.2.2).
- 42.3 Neotel submitted that the term “linear services” (in the context of IPTV) is a reference to services in terms of which “any or all subscribers can access a specific programme at a time scheduled by the IPTV provider of that programme and the same programme is transmitted continuously in the coverage area for the scheduled period”. On the other hand, Neotel defined “non-linear” services as existing when “any or all subscribers can access a specific program on request at any time and each requesting subscriber will immediately receive such information sent directly to him or her” (Neotel submission, para 8.3).

## 5. KEY ISSUES RAISED BY INTERESTED PARTIES

### The scope of the inquiry

43. A number of parties raised concerns regarding the scope of the Authority's inquiry. For example, e.tv noted in its written submission (e.tv submission, p 2) that the focus on IPTV is misplaced because the current licensing and regulatory framework already covers all broadcasting services (including broadcasting services which may be delivered over broadband networks). e.tv submitted that the correct inquiry should seek to provide clarity on the treatment of services which may form part of IPTV but do not fall within the definition of "broadcasting service", such as "true video on demand" ("TVOD") (e.tv submission, p 3). e.tv submitted further that TVOD must be licensed and regulated in terms of an ECS licence.
44. Kagiso submitted that the Discussion Document did not make it clear whether the Authority was looking to regulate the transmission or reception of content using a particular technology, or whether it was looking to regulate what is actually transmitted or received, i.e. the content itself. Kagiso noted, in this regard, that the Authority does not have the power, in terms of the ECA, to regulate content specifically, nor does Chapter 9 of the ECA authorise the Authority to deal specifically with programming content (Kagiso submission, p 2). Kagiso noted that IPTV has been classified as a broadcasting service in the Discussion Document and would, accordingly, be subject to editorial content and advertising rules (as provided for in Chapter 9 of the ECA and the various regulations published under the provisions of Chapter 9 and the licence conditions applicable to broadcasting service licensees).
45. MultiChoice submitted, in relation to VOD services, that the Authority's jurisdiction over ECS in terms of the ECA (into which service category MultiChoice submitted VOD services fall) does not extend to the regulation of content. The ECA specifically empowers the Authority to prescribe regulations to regulate the content on broadcasting services. However, in MultiChoice's assessment it would be *ultra vires* to exercise the same powers in respect of *content on an ECS* (which may be constitutionally invalid as well). MultiChoice referred to certain of the general laws, including the Criminal Law (Sexual Offences and

Related Matters) Amendment Act 32 of 2007, and regulatory entities which regulate content including the Advertising Standards Authority (“ASA”) and the Films and Publications Board (“FPB”). MultiChoice submitted that, when there are a sufficient number of VOD services in South Africa, there will be a natural evolution towards self-regulation by the sector (MultiChoice additional submission, paras 1.9 - 1.20).

### **Classification of IPTV and VOD services**

46. MultiChoice submitted that the Discussion Document correctly places IPTV within the broadcasting regulatory ambit and VOD within the ambit of ECS regulation (MultiChoice submission, p 2). In MultiChoice’s assessment, IPTV falls squarely within the ambit of “broadcasting” and “broadcasting services” as defined in the ECA and a provider of an IPTV service would thus require a broadcasting service licence issued in terms of the ECA. MultiChoice submitted that, as such, in line with the technology-neutral licences issued in terms of the ECA, all the existing broadcasting service licensees are presently able to offer IPTV broadcasting services (MultiChoice submission, p 7). However, any ancillary services would fall within the definition of an ECS and an ECS licence would be required. MultiChoice is of the view that this provides sufficient content-based regulation (MultiChoice submission, p 11), and that there is no basis for the Authority to apply broadcast television type regulation to VOD, just as there is no basis for the Authority to apply such regulation to a DVD/video store.
47. MWEB noted that the ECA already provides clear definitions of the respective services, indicates how they should be licensed and provides a technological neutral licensing framework: IPTV does not require a special licence and is regulated as a (unidirectional) broadcasting service, while Internet TV does not fall within the ambit of the ECA and as such falls outside the Authority’s regulatory jurisdiction. MWEB further stated that, at the present time, licensed broadcasters can provide IPTV services, while ECS licensees can provide VOD services (MWEB submission, pp 1-2, paras 2.1-2.3).
48. The following interested parties all agreed with this general approach: Professor Berger (Professor Berger’s submission, p 5); e.tv (e.tv submission, p 6); FXI (FXI submission, para 13.1); Kagiso (Kagiso submission, p 3); SACF (SACF submission, pp 9-10); Sentech (Sentech submission, para 3.2); Super 5 Media (Super 5 Media submission, p 3); and Telkom (Telkom submission, p 15).

49. Kagiso submitted that the ECA already provides for the licensing of a “network” in the case of non-linear services, and the licensing of a “broadcaster” in the case of linear services and, as such, that no further licensing is required (Kagiso submission, p 3).
50. Telkom submitted that the content regulation of VOD services is adequately covered by the provisions of the Films and Publications Act 65 of 1996 (“**FPA**”) and the Electronic Communications and Transactions Act 25 of 2002 (“**ECTA**”) and that the appropriate avenue for further intervention is in terms of these statutes, rather than on the basis of the ECA (Telkom submission, p 11). Telkom submitted that VOD should be considered to be a content service, which is not “electronic communications” in terms of the ECA and is thus not subject to the ECA; however, the delivery of VOD is over a network (such as the Internet) and thus an ECS licence would be required. Telkom further prefers the use of the term “audio-vision streaming over internet” or “VOD” as opposed to “Internet TV”. Telkom thus identified the key issue for the Authority to resolve is what the nature of particular services are (Telkom submission, p 12).

### **The Sentech licence**

51. While the conversion of the multimedia licence issued to Sentech in terms of the TA (“**the Sentech Licence**”), in terms of section 93 of the ECA, was not intended to be dealt with in the context of the consultation process initiated by the Authority in respect of IPTV and VOD services, issues were raised by Sentech in this regard in its written and oral submissions. The Authority reasoned that while the matter was not raised in the Discussion Document it was in the interests of the inquiry to allow stakeholders to raise related matters.
52. The TA, prior to the enactment of the ECA, defined a “telecommunication service” as any type of service transmitted over a telecommunication system. As such, telecommunications did not have any objectively defining features in their own right and would constitute telecommunications services simply by virtue of the fact that they were conveyed over a telecommunications network. The TA provided, in section 33, for the specific types of licences which could be issued in terms of the TA and the specific types of telecommunications services which could be provided under the authority of those licences.



Telecommunications operators were entitled to provide one of the specific types of services provided for in the TA including, amongst others, a multimedia services (section 32C(1)(b)).

A "multimedia service" was defined in the TA as –

"a telecommunication service that integrates and synchronises various forms of media to communicate information or content in an interactive format, including services such as –

- (a) internet through television;
- (b) pay-per-view;
- (c) video on demand;
- (d) electronic transactions;
- (e) text;
- (f) data;
- (g) graphics;
- (h) animation;
- (i) audio;
- (j) visual content" (emphasis added).

53. What constituted "internet through television", "pay-per-view" or "video on demand" was not defined in the TA.
54. Sentech submitted that, under the Sentech Licence, it had "the right to provide services and products using any communication configuration namely (1) point to point; (2) point to multipoint; (3) multipoint to point; (4) multipoint to multipoint" and "to provide linear and non-linear services". Sentech stated that it would "continue to provide point to multipoint service as it has that right" (Sentech submission, p 3 -4, para 2.3) and on the basis that the Sentech Licence was required to be converted "on no less favourable terms" as required in terms of the conversion process detailed under the ECA Sentech also argued that it was entitled, through the Sentech Licence, to provide IPTV by virtue of the fact that a multimedia service, as defined, included "internet through television". At the public hearings, Sentech argued that the ECA should be amended to provide for a new category of multimedia service licence and that Sentech should be issued with such a licence. A few of the other interested parties made submissions on the Sentech Licence and indicated that given that the Sentech Licence had been converted to an ECS licence in terms of the ECA and in the interests of fair competition, *all* ECS licensees should be entitled to provide the "multimedia services" that the TA had previously provided for.
55. MultiChoice submitted (against Sentech) that the Sentech Licence should have been (and was) converted by the Authority to an ECS licence as opposed to both a broadcasting service licence and an ECS licence. In this regard, MultiChoice relied on the terms

“telecommunications service” and “interactive format” which were employed in the definition of a multimedia service in terms of the TA. MultiChoice indicated that these terms imply that what were previously regarded as multimedia services employ *bi-directional* modes of transmission, as opposed to *unidirectional* modes of transmission (MultiChoice additional submission, paras 1.4 - 1.7). MultiChoice also disagreed with Sentech’s suggestion that “internet through television” meant the same as “IPTV”; at the time that the definition was drafted, “internet through television” meant the provision of “walled garden” internet services (not broadcasting) to a television and set top box, instead of a PC (MultiChoice additional submission, para 1.8).

56. Vodacom initially submitted that all ECS licensees are entitled to provide multimedia services, including the provision of IPTV services (and VOD) without any further approval, similar to Sentech, and there is thus no need to amend the ECA to enable the roll-out of IPTV services (Vodacom submission, Part B, p 9). The reasoning behind this submission was that Sentech is entitled to provide “multimedia services” in terms of its converted licences, while section 93(7) of the ECA provides that the Authority may not grant any monopoly or exclusive rights in a network or service. As such, Vodacom argued that all ECS licensees are afforded the same right to provide multimedia services (Vodacom submission, Part B, pp 8-9). Following the public hearings, Vodacom withdrew this submission and reached the following conclusion: that IPTV linear services fall under the definition of broadcasting services in the ECA and broadcasting regulations should thus apply to these services. Vodacom still argued that broadcasting will evolve such that in the future there will be no distinction between broadcasting services and ECS, which will make the distinction contained in the ECA invalid, and that there should thus be further discussion in this regard (Vodacom additional submission, p 2).

## 6. THE AUTHORITY’S REGULATORY DETERMINATIONS

57. The various policy positions available to the Authority and the basis for those positions in the context of the issues raised by the interested parties are set out below. In considering these positions, the Authority has taken into account that, aside from the fact that new and innovative means of content delivery are valuable and given that they increase consumer choice and may lead to more competition in the broadcast sector, emerging services such as IPTV and VOD have the potential to offer significant employment opportunities and will

stimulate economic growth and investment. The Authority endeavours to respect the basic principles of free competition and equal treatment in order to achieve transparency and predictability in markets for services, including services such as IPTV and VOD, and to achieve low barriers to entry. As such, there is a need to develop a policy which will ensure that technological developments and the implementation of such services will not be stifled in South Africa. A careful analysis of the appropriate regulatory approach is required.

58. As a starting point, and barring the possibility of legislative amendment at the present time, the Authority's powers must be exercised within the regulatory framework established by the ECA, and the definitions contained therein. As discussed above, the ECA establishes two broad categories of communications services which are provided to end-users: broadcasting services and ECS. At the present time, it is necessary to determine into which of these two categories of service particular communications services fit. This will have implications for the manner in which such services are required to be licensed and the licence conditions and regulatory requirements to which the services will be subject. The Authority has considered the most appropriate manner in which to approach the regulation of such services in light of the various regulatory options which are open to it.

### **Experience from the EU**

59. In considering the issues raised in the context of the Discussion Document, it is useful to look to the experiences and policies adopted in other jurisdictions which have examined the issue of what constitutes a broadcasting service. In this regard, the policy approach enunciated in the European Union ("EU") is particularly relevant given the similarities between the licence categories provided for in the ECA and the service categories which have been determined in the directives adopted by the EU. At the same time, the Authority agrees with the submission made by the FXI that the Authority should not feel compelled to slavishly follow European examples, such as the Audio Visual Media Services Directive and the definition of IPTV adopted by the ITU (FXI submission, para 15.1).
60. The EU Directive 2002/21/EC ("**the Framework Directive**") provides for an "electronic communications service" and for the "provision of an electronic communications network", the definitions of which are fundamentally similar to the definitions contained in the ECA in relation to ECS and ECNS. In addition to the Framework Directive, the EU has also

adopted Directive 2007/65/EC which will amend Directive 89/552/EEC (Television Without Frontiers Directive), which will become the "Audiovisual Media Services Directive".

61. In the Audiovisual Media Services Directive, an "audiovisual media service" is defined to mean: "a service... which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by [ECN] ... Such an audiovisual media service is either a television broadcast ... or an on-demand audiovisual media service; and/or audiovisual commercial communication". In turn, a "television broadcast" or "television broadcasting" (i.e. a "linear audiovisual media service") is defined to mean "an audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule", while an "on-demand audiovisual media service" (i.e. a "non-linear audiovisual media service") is defined to mean "an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider". An "audiovisual commercial communication" is defined as "images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, *inter alia*, television advertising, sponsorship, teleshopping and product placement".

62. In the Audiovisual Media Services Directive, it is stated as follows –

62.1 The Audiovisual Media Services Directive sets out a general approach of basic rules for all audiovisual media services, both television broadcasting (i.e. linear audiovisual media services) and on-demand audiovisual media services (i.e. non-linear audiovisual media services). Additional rules are imposed in relation to television broadcasting. It should be noted that on-demand audiovisual media services are different from television broadcasting with regard to the choice and control the user can exercise. The Audiovisual Media Services Directive states that this justifies imposing lighter regulation on on-demand audiovisual media services.

62.2 Audiovisual media services, whether television broadcasting or on-demand, are only services which are mass media. In other words audiovisual media services must be

intended for reception by, and which could have a clear impact on, a significant proportion of the general public. Activities which are not in competition with television broadcasting, such as private websites and services providing content to private users in communities of interest, should not be covered.

- 62.3 A characteristic of on-demand audiovisual media services (which are subject to the requirements imposed by the Audiovisual Media Services Directive) is that they are “television-like”. In other words, on-demand audiovisual media services compete for the same audience as television broadcasts and the nature and means of access to the service would lead the user reasonably to expect regulatory protection within the scope of the Audiovisual Media Services Directive.
- 62.4 Television broadcasting includes, in particular, analogue and digital television, live streaming, webcasting and near-video-on-demand whereas video-on-demand, for example, is an on-demand audiovisual media service.
- 62.5 In the context of television broadcasting, the notion of simultaneous viewing should also cover quasi-simultaneous viewing because of the variations in the short time lag which occurs between the transmission and the reception of the broadcast due to technical reasons inherent in the transmission process.
- 62.6 The Audiovisual Media Services Directive provides that the availability of harmful content in audiovisual media services is a concern for legislators, the media industry and parents. As such, the Audiovisual Media Services Directive provides that rules protecting the physical, mental and moral development of minors as well as human dignity in *all* audiovisual media services are therefore necessary.
63. In South Africa, the distinction between what is considered to be “broadcasting” in terms of the ECA and what is not is particularly significant given that broadcasting services are required to be licensed rather than only being subject to certain requirements, as provided for in the Audiovisual Media Services Directive. As such, it may not be appropriate to bring certain types of services which are regarded in other jurisdictions as broadcasting, such as webcasting, within the ambit of “broadcasting”, as provided for in the ECA.

## Experience from the UK

64. The UK Communications Act 2003 contains a broad definition of "electronic communications service", which is very similar to the definition of ECS contained in the ECA:

"a service consisting in, or having as its principal feature, the conveyance by means of an electronic communications network of signals, except in so far as it is a content service".

65. As such a service will be an "electronic communications service" for the purposes of the UK Communications Act where: (i) following removal of the content aspect of the service; then (ii) the service has as its principal feature the conveyance of signals by means of an ECN. This would include, for example, telephone calls. Where, however, the principal feature of the service is what is *comprised* in the signals as opposed to the *conveyance* of signals, then it will constitute a content service and not an ECS. It can clearly sometimes be difficult to assess whether a particular service is an ECS or a content service. The distinction is essentially whether the service is primarily the carriage, or conveyance, of signals or is instead the provision or editing of material that is intended to be carried over an ECN.

66. Unlike the ECA, which does not contain a definition of content services, content services are defined in section 32(7) of the UK Communications Act as—

"so much of any service as consists in one or both of the following—

- (a) the provision of material with a view to its being comprised in signals conveyed by means of an [ECN];
- (b) the exercise of editorial control over the contents of signals conveyed by means of such a network".

67. The word "signal" is widely defined and includes speech, music, sounds, visual images or communications, or data of any description.

68. In comparison with South Africa, where content services are not specifically defined, the definition and understanding of "content services" in terms of the UK Communications Act could potentially be used by the Authority to understand and delineate what exactly a "content service" (as referred to in the definition of "electronic communications" in the ECA) is for the purposes of the ECA. It is important to understand what a "content service" is given that the Authority has the power to regulate broadcast content but does not have

similar powers in terms of the ECA as presently drafted to regulate "content services" which are made available using a service provided by an ECS licensee.

### **The Authority's determination in relation to the Sentech Licence**

69. The Authority's determination at the time that the Sentech Licence was converted was that the Sentech Licence should be converted to an ECS licence, and that an ECS licence conferred on Sentech the right to provide all the services that previously fell within the definition of "multimedia services" in terms of the TA, which did not include those services that fall into the definition of "broadcasting services" in terms of the ECA.
70. Having considered Sentech's submissions and those of the other interested parties, the Authority's assessment is that its previous determination was correct. The Authority considers that the "multimedia services" that Sentech was previously authorised to provide in terms of the Sentech Licence did not include services that presently fall within the ambit of "broadcasting services" as defined in the ECA. As such, it was not necessary for the Authority to issue Sentech with a broadcasting service licence as well as an ECS licence at the time that the Sentech Licence was converted. Similarly, there is no need for Sentech to be issued with a further licence specifically authorising it to provide "multimedia services". First, no provision is made in the ECA for such a licence and a legislative amendment would be required in order for the Authority to be empowered to grant such a licence. Secondly, the services that were previously "multimedia services" in terms of the TA now fall within the broad category of ECS in terms of the ECA. Sentech is, accordingly, authorised in terms of its ECS licence to provide all the same services that it was previously authorised to provide in terms of the Sentech Licence and the conversion of that Licence to an ECS licence was, consistent with the requirements of section 93(1) of the ECA, "on no less favourable terms" than the Sentech Licence.
71. The ECA established broad categories of communications services rather than specific categories as the TA before it had done. The conversion process was aimed at mapping the various services that had previously been provided for in the TA and IBA Act onto the new categories of services, namely ECNS, ECS and broadcasting services, which are now provided for in the ECA (see section 93(4) of the ECA in this regard). As such, if a person licensed in terms of the TA was authorised to provide services that now fall within the ambit

of both ECS and broadcasting services, as defined in the ECA, that person should have been issued with both an ECS and a broadcasting service licence. If a person was previously authorised to provide services that fall only within the ECA's definition of ECS, then only an ECS licence was necessary. In the Authority's assessment, the conversion of the Sentech Licence falls into the second category.

### **The Authority's determinations regarding classification of IPTV and VOD services**

72. Having taken into account the submissions received from the interested parties, the Authority has determined that –

72.1 The definition of IPTV services which has been adopted by the ITU is a useful description of these services and is consistent with the Authority's understanding of such services.

72.2 The definition of "content services" in the UK Communications Act is useful for the purposes of understanding what constitute "content services" for the purposes of the ECA, which does not itself define content services. The Authority will consider making submissions to the Minister that the ECA should be amended to include a definition in this regard. The Authority does not consider that it has the power to regulate content services provided via an ECS. Consistent with its powers in terms of the ECA, the Authority is concerned only with regulating services which consist primarily of the carriage, or conveyance, of signals over an ECN rather than the provision or editing of material that is intended to be carried over an ECN.

72.3 IPTV services, which fall within the ambit of the ITU definitions discussed above i.e. which provide *scheduled television programming over a managed network* and may provide additional features such as data, text and audio which are ancillary to the *scheduled television programming* are **broadcasting services** for the purposes of the ECA. In the Authority's assessment, IPTV services are primarily provided on a unidirectional basis; the aspects of such services which are *interactive* (and thus bidirectional) are not the primary feature of the service being provided and are incidental to the broadcasting service.

72.4 VOD services (not including on-demand services which are provided over the public Internet, which are content services and which fall outside of the Authority's



regulatory powers) are **ECS** for the purposes of the ECA. This includes both “push VOD” i.e. on-demand content that is downloaded onto a user's device allowing the user to select from a limited and defined list of programming, and “pull VOD” or TVOD i.e. on-demand content which is accessed from an external server. In this regard, the Authority considered that the primary feature of VOD is viewer choice: viewers can choose the particular programming which they wish to view and can choose the time at which they wish to view it. This element of viewer choice allows a level of interaction between the viewer and the programming service that is not possible with traditional scheduled television broadcasting and, in the Authority's assessment, means that the service is bidirectional rather than unidirectional. The Authority considers that any distinction between “push VOD” and “pull VOD” which places “push VOD” in the broadcasting service category and “pull VOD” in the ECS category is not a sensible interpretation of the definitions provided in the ECA. Although the Authority appreciates that “push VOD” is perhaps somewhat more *unidirectional* than “pull VOD”, and thus closer on the continuum between traditional broadcasting services and traditional telecommunications services to a broadcasting service than is “pull VOD”, the Authority nevertheless considers that the interactive features of such services and the possibility of viewer choice (albeit possibly more restricted than in the case of “pull VOD” services) are not unidirectional in nature and, accordingly, fall within the category of ECS. Pay-per-view services are similarly regarded as VOD services.

## **7. REGULATORY TREATMENT OF IPTV AND VOD SERVICES**

73. On the basis of the Authority's policy determinations in relation to the classification of IPTV and VOD services in the context of the existing regulatory framework it is appropriate to consider the regulatory treatment which the Authority attaches to IPTV and VOD services. Issues which arise for consideration in this regard include:

73.1 Whether it is appropriate for IPTV services to require authorisation in terms of a broadcasting service licence. Having made the determination that IPTV services are “broadcasting services” for the purposes of the ECA, the implication, on the basis of section 5(3)(b) of the ECA, is that any IPTV service that is provided on a commercial basis i.e. for the purpose of making a profit, will require an individual

- broadcasting service licence. It is necessary for the Authority to consider whether this is desirable, having regard to the fact that application for individual broadcasting service licences can only be made pursuant to an ITA issued by the Authority and a relatively extensive adjudication process. As such, a prospective provider of such services would not simply be able to apply for the necessary licence at any time and would have to wait for the Authority first to publish an ITA.
- 73.2 Whether it is appropriate, where VOD services (including pay-per-view, push VOD and pull VOD) are provided by a licensed provider of a broadcasting service e.g. SABC, e.tv, MultiChoice, Super 5 Media, WOW and On Digital Media (Pty) Ltd, to require such broadcasters to obtain an additional ECS licence in order to do so. The implication of the Authority's determination that VOD services have been determined to be ECS for the purposes of the ECA is that a broadcaster's broadcasting service licence is not sufficient to authorise the provision of VOD services and that a further ECS licence would be required.
- 73.3 The implications of the fact that VOD services may compete with traditional broadcasting services for audiences.
- 73.4 What may be considered to be "content services" for the purposes of the ECA and the definition of "electronic communications" specifically.
- 73.5 Whether the Authority has the power to impose requirements in relation to the programming content that is made available on VOD services and whether it is desirable that the Authority should do so.
74. In this regard, the Authority has considered the various regulatory options which are available to it in terms of the ECA. These are the following (i) the exclusion of certain services from the definition of "broadcasting services" by the Authority in terms of paragraph (c) of the definition of "broadcasting service" in the ECA; (ii) a general exemption from the licensing requirements of the ECA; and (iii) the Authority prescribing in terms of section 5(3)(e) of the ECA that certain IPTV or VOD services which have a significant impact on socio-economic development require an individual licence or prescribing in terms of section 5(5)(c) of the ECA that certain IPTV or VOD services which do not have a significant impact on socio-economic development require a class licence. In making its policy determinations regarding the regulatory treatment to be given to IPTV and VOD

services, the Authority has also taken into account: (i) relevant EU Directives and (ii) the definition of content services as contained in UK legislation.

### **Excluding IPTV services from the definition of a “broadcasting service” or exempting IPTV services from the licensing requirements**

75. In terms of section (c) of the definition of “broadcasting service”, the Authority can prescribe certain services as falling outside the scope of the definition of a “broadcasting service”. In other words, in terms of the definition of “broadcasting services” in the ECA, the Authority has the power to determine that certain unidirectional electronic communications do not constitute broadcasting services. The Authority may, as such, determine that a service that possibly falls within the definition of a broadcasting service (i.e. a service consisting of unidirectional electronic communications) should not be regarded as a broadcasting service for the purposes of the ECA. The reasons for which the Authority could make such a determination may include, for example, where the Authority regards it as inappropriate to impose the significant obligations which are imposed on broadcasting services in terms of Chapter 9 of the ECA on a particular service, given the nature of that service. To the extent that the Authority adopts the view that particular electronic communications are not broadcasting services, such services will, be regarded as ECS, as defined in the ECA given that all electronic communications which are not broadcasting services are ECS. (See in this regard the discussion below regarding the Authority’s powers to exempt services from the licensing requirements.) As such, an ECS licence would be required for the provision of those services. The implication of this is that, if a service is a broadcasting service, it will be subject to the various rules and requirements which apply to broadcasting services in terms of Chapter 9 of the ECA, the various regulations published in terms of the provisions of Chapter 9 and the standard terms and conditions of licence which are applicable to broadcasting services. If, on the other hand, a service is an ECS it will not be subject to the requirements of Chapter 9 and the other requirements applicable to broadcasting services and the content provided via the ECS would not be subject to regulatory control by the Authority.
76. While the NAB agreed that the Authority has the power to exempt certain services in terms of section (c) of the definition of “broadcasting services”, it submitted that this was limited to grey areas raised by convergence and, as such, that the Authority is not allowed to exclude a service which clearly falls within the definition of broadcasting service (NAB submission, p

- 6). In other words, NAB submitted that the Authority cannot exempt IPTV as a whole from the definition of “broadcasting services”. In response to this submission, it must be noted that the definition of a broadcasting service is “any service which consists of broadcasting and which service is conveyed by means of an [ECN], but does not include... a service or a class of service, which the Authority may prescribe as not falling within this definition”. As such, in the Authority’s assessment, there is no restriction on its power to exempt services that may otherwise fall within the definition of “broadcasting service”..
77. The Authority could, as such, on the basis of its powers in terms of paragraph (c) of the definition of “broadcasting service” potentially declare that IPTV services, which in the Authority’s assessment (as set out above), fall within the category of “broadcasting services”, are not broadcasting services for the purposes of the ECA. This would mean that a *broadcasting service licence* would not be required for the provision of such services. Depending on one’s interpretation of the ECA, an *ECS licence* may still be required for the provision of the services in question.
78. Section 7 of the ECA provides that the provision of “any service without a licence” is prohibited except where a particular service is exempted by the Authority from the applicable licensing requirements (in terms of section 6 of the ECA). Section 6(1) of the ECA provides that the Authority may prescribe the—
- “(a) type of [ECS] that may be provided;
  - (b) type of ECN that may be operated;
  - (c) type of ECNS that may be provided; and
  - (d) radio frequency spectrum that may be used”.
79. This section does not provide that a “broadcasting service” can be exempted from the licensing requirements. The NAB submitted that a broadcasting service such as IPTV cannot be exempted under section 6 of the ECA, and is thus not a service that can be provided without a licence as contemplated in section 7 of the ECA.
80. e.tv submitted that it would constitute unfair competition if some services, such as TVOD services, were to be exempt from the requirement to hold a licence (e.tv submission, para 3.1) when broadcasting services are required to be licensed.
81. Although section 7 of the ECA does not specifically provide that a broadcasting service may be exempted from the licensing requirements, as discussed above, paragraph (c) of the

definition of "broadcasting service" provides that the Authority may prescribe that certain types of services do not fall within the definition of broadcasting services, and accordingly should not be treated as broadcasting services for regulatory purposes. The problem, however, is that, on the basis of the ECA's definition of ECS, a service that comprises of "electronic communications" that is *not a broadcasting service*, will be an ECS. As such, a service that is declared not to be a broadcasting service may nevertheless require the authorisation of an ECS licence.

82. In the Authority's assessment, IPTV services, which it has determined are broadcasting services for the purposes of the ECA, should generally be subject to the requirements of Chapter 9 of the ECA where they are provided on a commercial basis (i.e. for profit) or by the public broadcaster and to a mass audience. There is very little to distinguish IPTV services from television services provided via terrestrial or satellite networks and, as such, there is no basis on which to distinguish between IPTV and other types of television services solely on the basis of the platform on which they are provided. Accordingly, a broadcasting service licence is required to provide commercial or public IPTV services.

**Declaring certain services to require an individual or class licence in terms of section 5(3)(e) and section 5(5)(c) of the ECA respectively**

83. As set out above, the Authority has determined that IPTV services fall within the category of "broadcasting services" in terms of the ECA. As such, IPTV services are required to be authorised in terms of a broadcasting service licence. On the basis of sections 5(3) and 5(5) of the ECA, an IPTV service that is provided on a commercial basis, whether for free or on a subscription basis, will require an individual commercial television broadcasting service licence and an IPTV service that is provided by a community broadcasting service (i.e. to service the needs of a particular community and on a non-profit basis), will require a class community television broadcasting service licence.
84. The Authority considers it appropriate for IPTV service providers who provide such services on a commercial basis to be subject to all the regulatory requirements which are imposed on broadcasting service licensees in terms of Chapter 9 of the ECA, relevant regulations in

terms of the ECA and the standard terms and conditions of licence which are applicable to broadcasting service licensees.

85. The Authority intends to conduct a formal assessment of the state of the market for broadcasting services in future. The matters which the Authority will consider include whether further free-to-air or subscription broadcasting services should be licensed and whether the Authority should issue an ITA for licences to provide such services (given that, on the basis of the ECA, an individual broadcasting service licence is required to provide a commercial or public broadcasting service whether on a free-to-air or subscription basis). The Authority regards it as appropriate to consider the impact of IPTV services on socio-economic development in the context of the market assessment process which is to be conducted. Accordingly, the Authority will at that time consider whether IPTV services that are provided on a commercial basis have a significant impact on socio-economic development or not for the purposes of section 5(5)(c) of the ECA and whether it would be appropriate to differentiate between IPTV services and television services that are delivered on other platforms (such as terrestrial and satellite ECNs) and to make a determination that only a class broadcasting service licence is required to provide commercial or public IPTV services or certain types of commercial or public IPTV services. (Such a determination would also necessitate amendment of the Class Licensing Processes and Procedures Regulations, 2010.) The Authority will also consider whether certain types of broadcasting services (including IPTV services) that are not provided to the public or a section of the public but that are provided on a more limited basis e.g. over a private ECN (1) are broadcasting services for the purposes of the ECA (given that "broadcasting" is defined as electronic communications provided to *the public, a section of the public or subscribers*) or (2) should be declared not to be broadcasting services, in terms of paragraph (c) of the ECA definition of "broadcasting service").
86. The Authority's determinations will be subject to public comment in accordance with the Authority's obligations in terms of the Promotion of Administrative Justice Act 3 of 2000 and the ICASA Act.
87. Until the Authority's assessment is complete and pending any determination in terms of section 5(5)(c) of the ECA, the ordinary licensing requirements are applicable to IPTV services. As such, an individual broadcasting service licence is required to provide an IPTV service of national or regional scope on a commercial or public basis. The existing individual broadcasting service licensees are authorised to provide their existing

broadcasting services as IPTV services as well. A class broadcasting service licence is required to provide a community IPTV service.

88. As set out above, the Authority has determined that VOD services (not including on-demand services provided over the public Internet) are ECS for the purposes of the ECA. Given that such services do not include voice telephony services using numbers from the national numbering plan, a class ECS licence is required to provide VOD services whether on a provincial or national basis. The Authority considers that this is appropriate at the present time.

**Can and should the Authority impose requirements in relation to the content distributed on VOD services?**

89. e.tv stated that it would constitute unfair competition if some services, such as TVOD services, were to be exempt from the requirement to hold a licence or if such services were not subject to the same sorts of regulatory provisions as traditional subscription broadcasting services (e.tv submission, para 3.1). e.tv's submission in this regard was made on the assumption that a TVOD provider does not require a broadcasting licence under the ECA and requires only an ECS licence. e.tv's submission focused, accordingly, on what powers the Authority has to regulate TVOD providers. e.tv obtained an opinion from counsel in this regard.
90. On the understanding that TVOD providers would have to obtain ECS licences, e.tv's counsel submitted that the Authority could utilise the powers conferred on it in terms of section 8 of the ECA to make standard terms and conditions for licences, to regulate TVOD providers. For example, the Authority could prescribe standard terms and conditions dealing with harmful content on TVOD "for the protection of the interests of subscribers" (e.tv additional submission, paras 4 - 6). e.tv submitted further that the Authority would have broad regulation-making powers in terms of sections 2 and 4 of the ICASA Act but would not be entitled to, for example, set up a system of licences required for TVOD providers (as this would be at odds with the ECA and ICASA Act). However, the Authority could make certain limited regulations to ensure that TVOD service providers do not provide a service that is akin to and competing with broadcasting licensees without the constraints placed on such licensees. As such, the Authority may be entitled to make certain limited regulations dealing with TVOD in respect of local content requirements or

limits on the amount of advertising that may be carried (e.tv additional submission, paras 7 - 14). However, in this regard, it is the position of the Authority that the submission does not consider the implications of the fact that the definition of "electronic communications" in the ECA, specifically excludes "content services" in relation to the extent to which the Authority can regulate content provided via an ECS.

91. e.tv also disagreed with MultiChoice's submission that, as TVOD is similar to a DVD store, there is no basis for the Authority to apply content-based regulation to TVOD (just as there is no basis for applying such regulation to a DVD store) as: (i) the analogy is inapposite as the Authority has no jurisdiction over a DVD store given that no broadcasting licence or ECS licence is required for the store to operate; and (ii) it is universally accepted that TVOD requires an ECS licence to operate and, as such, the Authority is entitled to regulate TVOD (the question only being to what extent and by what means) (e.tv additional submission, para 16). As indicated above, it is the Authority's position that an ECS is required in relation to the *transmission* of particular types of services. The question is whether the Authority has the power to regulate the *content* provided over ECS rather than broadcasting services. MultiChoice appears to be drawing an analogy between a DVD store and a TVOD provider on the basis that the Authority does not have the power to regulate the manner in which the *content* is provided by each.
  
92. As described above, the Authority has determined that VOD services (including pay-per-view, push VOD and pull VOD or TVOD) constitute ECS. Following from this determination, it is necessary for the Authority to consider: (1) whether the Authority has the power to impose requirements such as those which are presently imposed on broadcasting service licensees in terms of Chapter 9 of the ECA, such as a binding code of conduct including provisions in relation to children's programming, violence and hate speech, sexual conduct, audience advisories and requirements in relation to local content and whether it would be appropriate to impose such requirements; and (2) whether the Authority has the power to impose requirements to, for example, limit the amount of advertising which may be carried by VOD providers on the basis that these services are akin to broadcasting services. Certain interested parties, including e.tv, proposed that the Authority should impose "light-touch" regulation on licensed VOD service providers. Other interested parties were of the view that the Authority should not seek to regulate the content that is provided on VOD services until such time as the services are a substitute for traditional television broadcasting services for the audience of such services.



93. Chapter 9 of the ECA applies specifically to broadcasting service licensees (see section 48 of the ECA). The requirements which are imposed on broadcasting service licensees in terms of this Chapter, which are substantially the same as the requirements which were previously imposed on licensees in terms of the IBA Act, include requirements in relation to the content which may be provided on broadcasting services, including the advertising which may be broadcast by broadcasting services (see section 55) and advertising restrictions (see section 60(4)) and the local content which must be broadcast (see section 61). The Authority has adopted the Code of Conduct in terms of section 54 of the ECA, which sets certain further requirements with which broadcasting service licensees must comply, including requirements in relation to children's programming and the watershed period and other programming content provided by broadcasting service licensees. Schedule 1 of the Standard Terms and Conditions for Individual Licences, 2010, which are applicable to public and commercial television broadcasting service licensees provides that specific terms and conditions of licence may be imposed on licensees in relation to, amongst other things, the language of the broadcasting service, the format of the broadcasting service including the content and presentation type, additional local content obligations further to the general obligations prescribed by the Authority and other general programming obligations.
94. Chapter 9 of the ECA specifically confers on the Authority the power to impose requirements regarding the programming content which is made available by broadcasting services. Similar specific powers have not been conferred on the Authority in relation to other types of licensable services. However, as pointed out by e.tv, the Authority has broad regulation-making powers in terms of the ICASA Act, which it has been urged to exercise by making regulations in relation to the content which is made available by certain classes of ECS licensees, namely VOD providers. As described above, however, the definition of "electronic communications" in the ECA specifically excludes "content services". The programming content which is made available by VOD providers who provide a licensable ECS by transmitting a signal to end-users on which the content is carried, would seem to be such a "content service", which does not form part of the licensable service over which the Authority has regulatory jurisdiction (i.e. the ECS).
95. In addition, subject to what is stated above regarding the provision of VOD services by broadcasting service licensees as an ancillary service to the main scheduled service rather than on a stand-alone basis, it is debatable whether it would be desirable at this stage to impose content regulation on VOD services even if the Authority considered that it has the

power to do so. While there is certainly an argument that, for the sake of consistency, similar content requirements should be imposed on VOD providers as are imposed on broadcasting service licensees, this argument really only becomes applicable when VOD services are a realistic substitute for standard broadcast television, when the same rationales for broadcasting-type regulation may apply. This is not the case at present in South Africa. This position may well change in the future just as it may well be necessary in future for some type of regulatory control to be imposed in relation to content delivered over the public Internet. For these purposes, the Authority will explore further whether its policy recommendations to the Minister should include proposals regarding the amendment of the ECA to allow for the imposition of broadcasting-type content regulation in appropriate circumstances i.e. where the same reasons for which broadcasting content is regulated are applicable to VOD, or whether a unified licensing system that does not distinguish between electronic communications and broadcasting services and that allows for the application of content regulation in relation to all such services in appropriate circumstances, should be adopted.

96. In short, the Authority does not intend at the present time to impose content requirements such as local content obligations, requirements in relation to the protection of children and restrictions on the amount of advertising which may be carried by VOD services. These services are, in any event, subject to the requirements imposed by the ASASA and the FPB. At the same time, the Authority takes an active interest in the implications of VOD on children, especially regarding child pornography and the exposure of children to harmful content. While this matter is indeed in the domain of the FPB, the Authority has a responsibility to create an enabling environment for the FPB to perform its work with regard to licensed providers of VOD. As such, VOD providers are encouraged to adhere to the standards set in the Code of Conduct in so far as they can be applied to on-demand services and to implement appropriate technical and other controls to seek to limit children's access to inappropriate programming. Prospective VOD providers who register for class ECS licences to provide such services should provide information on any such measures which they intend to adopt at the time of registration.

## 9. CONCLUSION

97. Clarification on the regulation of IPTV and VOD is necessary so as to assess the impact of any potential structural changes, communication technologies and technological developments, and the optimal conditions of competitiveness and legal certainty for the provision of communication services in the Republic. The Authority remains committed to engaging with stakeholders on better and innovative ways to regulate IPTV and VOD, which will lay the required foundation for the introduction of competition in such services. Obviously, hand-in-hand with technological advancements, a necessary development will be the improvement of high speed broadband access to ensure the provision of affordable quality services in the Republic.
98. In this Position Paper the Authority has sought to clarify the manner in which IPTV and VOD services are to be treated in the context of the regulatory framework established by the ECA and the types of licences which will be required to provide such services. IPTV services, which fall within the ITU definition of IPTV services, have been determined to be broadcasting services for the purposes of the ECA, and VOD services (not including on-demand services provided over the public Internet) have been determined to be ECS for the purposes of the ECA. As such, a broadcasting service licence is required to provide an IPTV service and an ECS licence is required to provide a VOD service. Where programming content is made available over the public Internet (which has been described as Web TV, Internet TV and Internet broadcasting) this does not fall within the Authority's regulatory jurisdiction, even where the programming content which is provided is the same as that provided on a broadcasting service. These services are not the same as IPTV services and the Authority wishes to make it clear there are no licensing requirements which are applicable in respect of such services in terms of which the persons who make the content available on the Internet must first obtain a licence to do so.
99. On the basis that a broadcasting service licence is required to provide an IPTV service, providers of IPTV services are subject to all the same requirements as are applicable to broadcasting services provided on any other platform.

100. The Authority does not consider that it has the power in terms of the ECA to impose content regulation similar to that which is imposed on broadcasting service licensees specifically in terms of Chapter 9 of the ECA on VOD providers, who are required to be authorised in terms of ECS licences and does not consider, in any event, that it is desirable or necessary to impose such requirements on VOD providers at the present time. This position may change in the future and a legislative amendment may be proposed to accommodate the regulation of content provided via on-demand services.



**DR. STEPHEN MNCUBE**

**CHAIRPERSON OF COUNCIL**

**INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA**