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## GENERAL NOTICE

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### NOTICE 577 OF 2013



#### INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

The Independent Communications Authority of South Africa (herein after referred to as “the Authority”) hereby gives notice of the Electronic Communications Act No. 43 of 2005 (herein after referred to as “the Act”) ....

Findings Document in terms of Section 4(C) (6) Of the ICASA Act, Act 13 of 2000 (As Amended) Regarding the Wholesale Broadcasting Transmission Services Discussion Document.

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Approved:

A handwritten signature in black ink, appearing to be 'S. Mncube', written over a horizontal line.

Dr. Stephen Mncube

Chairperson

## EXECUTIVE SUMMARY

The Authority has prepared this Findings Document to conclude the Section 4B Inquiry initiated in September 2010 into the Broadcasting Transmissions Market in South Africa. This inquiry was conducted in line with the provisions of Section 4C of the ICASA Act 13 of 2000.<sup>1</sup>

The intention of this Findings Document is to provide a report on the inquiry process and provide the Authority's views on the Wholesale Broadcasting Transmission market following the consultative process. The Authority has included the major points of discussion from the consultative process into this document. Not all issues that were raised are included in this document. The document confines itself to the provision of terrestrial transmission services. The document does not deal with the market for satellite transmission.

It is recommended that this Findings Document be read in conjunction with the Discussion Document<sup>2</sup>, should detailed information regarding the process be required.

The process followed by the Authority, with respect to the inquiry, included:

- Proposing definitions of the relevant markets;
- Identifying licensees likely to hold Significant Market Power (SMP);
- Setting out the methodology of determining whether competition is ineffective;
- Identifying and defining two (2) markets that appear to be ineffectively competitive on the basis of evidence examined in this inquiry; and
- Identifying the pro-competitive measures which would be appropriate to Broadcasting Transmission markets which are found to be ineffectively competitive.

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<sup>1</sup> ICASA Act 13 of 2000 (as amended).

<sup>2</sup> Government Gazette No. 34371 (Notice No. 346 of 2011).

## **FINDINGS**

### **Market Definition**

The Authority has identified two managed transmission services markets, namely;

- The market for Managed Transmission Services (MTS) for Television Broadcasting
- The market for Managed Transmission Services (MTS) for Radio Broadcasting

### **Significant Market Power and the Effectiveness of Competition**

The Authority declares that Sentech Limited holds and will continue to hold Significant Market Power in the two markets as defined and that these markets will remain ineffectively competitive, especially considering the introduction of Digital Terrestrial Television.

### **Proportionate Pro-Competitive Remedies**

The following pro-competitive measures are to be considered to address ineffective competition as part of the section 67 process that the Authority may follow in this regard:

- A transparency obligation, and specifically, an obligation to publish a Reference Access Offer;
- A non-discrimination obligation, including non-discrimination on pricing;
- A related price control obligation, where charges for network access would be reasonably derived from the costs of provision; and;
- A cost accounting obligation to support the price control obligation.

The Authority hereby concludes this Inquiry by hereby notifying all stakeholders that it intends releasing draft regulations under Section 67(4) of the Electronic Communications Act to ensure that pro-competitive conditions are imposed upon licensees having significant market power where the Authority has determined such markets or market segments to have ineffective competition.

**ACRONYMS**

DTT	Digital Terrestrial Television
ECA	Electronic Communications Act 36 of 2005; "The Act"
ICASA	Independent Communications Authority of South Africa
MDDA	Media Development and Diversity Agency
MTS	Managed Transmission Services
RAO	Reference Access Offer
SMP	Significant Market Power

## 1. INTRODUCTION

### 1.1 Inquiry into the wholesale transmission services market

1.1.1 The Independent Communications Authority of South Africa (the "Authority") initiated an inquiry into the provision of wholesale broadcasting transmission services under Section 4B of the Independent Communications of South Africa Act (the "ICASA" Act, no 13 of 2000) in response to complaints by a free-to-air television broadcaster and a number of community radio broadcasters regarding alleged excessive pricing and low quality of service standards by Sentech Limited ("Sentech").

1.1.2 The Authority published its intention to embark on this inquiry in Government Gazette No. 33599 of 30 September 2010 with the objective of the inquiry being to determine if it is necessary for the Authority to introduce pro-competitive regulations under Section 67(4) of the Electronic Communications Act, Act 36 of 2005 ("ECA"). This was done in line with Section 4B (2) of the ICASA Act.

1.1.3 Following the Notice, the Authority published a Questionnaire to enhance the Authority's knowledge of the wholesale broadcasting transmission market and assist in the preparation of a Discussion Document. The questionnaire was published on the Authority's website and circulated to licensees. The Authority furthermore held information gathering meetings with representatives of the industry including broadcasters, signal distributors and industry associations.

1.1.4 On the 15th of June 2011, the Authority published a Discussion Document setting out its initial views on the market definition(s) applicable to wholesale broadcasting transmission services, operator(s) that may have Significant Market Power (SMP) in these markets and proposed necessary pro-competitive measures.<sup>3</sup>

1.1.5 The Discussion Document was published in terms of section 4B (1) of the ICASA Act, 13 of 2000, "the Act" as amended. In terms of this section;  
"the Authority may conduct an inquiry into any matter with regard to:

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<sup>3</sup> Government Gazette No. 34371 (Notice No. 346 of 2011)



- (a) *the achievement of the objects of this Act or the underlying statutes;*
- (b) *regulations and guidelines made in terms of this Act or the underlying statutes;*
- (c) *compliance by applicable persons with this Act and the underlying statutes.*
- (d) *compliance with the terms and conditions of any licence by holder of such licence issued pursuant to the underlying statutes; and*
- (e) *the exercise and performance of its powers, functions and duties in terms of this Act or the underlying statutes.*<sup>4</sup>

1.1.6 Section 4B (2) furthermore provides that the intention to conduct an inquiry must be published in a Gazette, and that interested persons be invited to make written representations within 60 days of the publication of the inquiry.

## **2. PROCESS OF PUBLIC CONSULTATION**

### **2.1 List of Respondents:**

#### **2.1.1 Written Submissions**

- e.tv
- Media Development and Diversity Agency ("MDDA")
- Digital Radio Mondiale
- Taylor Engineering
- Neel Smuts
- Telemedia (Pty) Ltd
- Cape Town TV (CTV) and Tshwane TV
- M-Net and Orbicom
- Neotel

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<sup>4</sup> Section 4B (1) of the ICASA Act 13 of 2000

- Sentech

#### 2.1.2 Oral Submissions<sup>5</sup>

- e.tv
- Neotel
- Taylor Engineering
- Cape TV
- Sentech
- MDDA

### 3. REVIEW OF SUBMISSIONS

This section considers the input received from stakeholders regarding the proposed market definitions, evaluation of effectiveness of competition and the proposed pro-competitive remedies.

#### 3.1 Market Definition

##### 3.2 The Discussion Document proposed the following market definitions:

- The provision of Managed Transmission Services (MTS) for satellite broadcasting;
- The provision of MTS for the purpose of providing analogue (and digital, when available) terrestrial broadcasting transmission services within South Africa to deliver television broadcasting services;
- The provision of MTS for the purpose of providing terrestrial broadcasting transmission services within South Africa to deliver radio broadcasting services at a national and regional level (non-local terrestrial);
- The provision of MTS for the purpose of providing terrestrial broadcasting transmission services within South Africa to deliver radio broadcasting services at a location other than at a national or regional level (local)<sup>6</sup>

3.1.3 In the written submission made by Neel Smuts in response to the ICASA Discussion paper, it was stated that the broad concept of Broadcasting

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<sup>5</sup> Oral submissions were made during hearings held at ICASA Head Office on the 28<sup>th</sup> and 29<sup>th</sup> November 2011.

<sup>6</sup> Government Gazette No. 34371 (Notice No. 346 of 2011) Page 10

Transmission would include the distribution of programme material or packaged programmes from one broadcaster to another, including special events, to many other broadcasters. The Authority considers this statement to refer to the definition of markets for content. This falls outside the scope of this inquiry and will not be considered further.

- 3.1.4 The MDDA raised a concern regarding the proposed market definitions. They stated in their written submission that:

*“the introduction of terms such as ‘local’ and ‘non-local’ is not derived from the broadcasting sector as understood in terms of the ECA and will confuse the market.”<sup>7</sup>*

The Authority concurs with the observation by the MDDA and will, therefore, not refer to the terms ‘local’ and ‘non-local’ in this Findings Document.

- 3.1.5 In the Discussion Document, the Authority determined that it is unlikely that in the case of a 10% price increase from a supplier of MTS for a radio broadcaster that MTS for television would be an effective demand-side substitute and vice versa. This approach was criticised by Sentech who stated at the public hearings upon being questioned regarding its criticism:

*“...that if one looks at the elements that we found in the discussion to me that can differentiate that in fact, I mean the skills are the same, the equipment or the facilities or components that make up the value chain for delivery of those services in fact is the same across the board.”<sup>8</sup>*

Sentech’s view suggests that there is potential for supply-side substitution in the Television Broadcasting (Analogue- free to air/subscription and Digital – free to air/subscription) market by a MTS supplier for television when a supplier of MTS for radio increases its prices. The Authority understands and notes Sentech’s

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<sup>7</sup> P14. MDDA Submission to the Discussion Document

<sup>8</sup> Public Hearings 28 November 2011 – Transcript (p. 141).

position and its argument that much of the site locations, technical equipment and staff skills are very similar for television broadcasting as for radio broadcasting. However, the fact that infrastructure is shared does not necessarily mean that the services are in the same market.

3.1.6 Although the MDDA raised concerns with regards to terminology, there were no other concerns raised with regards to the manner in which ICASA defined the market for MTS for terrestrial broadcasting services. Sentech, indeed, supports the Authority's view stating the following:

*"... we have noted in our submission that we see broadcast transmission services and managed transmission services in a similar light because we believe that you cannot provide the transmission services, the transmitter, the feeder cables, the combiners, the antenna systems and then the rest of the infrastructure around that without considering yourself as an end to end provider of the services beyond the network or element services."*<sup>9</sup>

3.1.7 e.tv also supported this view, whereby in their response to question eight (8) of the Discussion Document, they state that the Broadcasting Transmission service it receives from Sentech is a managed transmission service.<sup>10</sup>

3.1.8 However, some respondents stated that the Authority had not paid sufficient attention to the provision of leased lines. It is theoretically possible to utilise the facilities leasing regime of Chapter 8 of the ECA to purchase various network components of a managed broadcasting transmission service from different licensees and that this may require examining the provision of each component in determining the definition of a market.

3.1.9 However, the practice in South Africa is that licensees either provide their own managed transmission service, or purchase a complete managed transmission

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<sup>9</sup> Public Hearings 28 November 2011 – Transcript (p. 98).

<sup>10</sup> Public Hearings 28 November 2011 – Transcript (p. 27).

service from Sentech. Therefore, it is practical to consider the provision of managed transmission services, which includes various network components, as one market.

3.1.10 However, an evaluation of the effectiveness of competition in the provision of managed transmission services will not only identify whether there is a need to identify different markets, but also establish whether managed transmission services may be defined as a single market.

### 3.3 Evaluation of the Effectiveness of Competition

3.2.1 A determination on the effectiveness of competition in the market and market segments may only be made on the basis of an analysis of the following factors. The following factors were considered in this analysis:<sup>11</sup>

- (aa) actual and potential existence of competitors;*
- (bb) the level, trends of concentration, and history of collusion, in the market;*
- (cc) the overall size of each of the market participants;*
- (dd) control of essential facilities;*
- (ee) technological advantages or superiority of a given market participant;*
- (ff) the degree of countervailing power in the market;*
- (gg) easy or privileged access to capital markets and financial resources;*
- (hh) the dynamic characteristics of the market, including growth, innovation, and products and services diversification;*
- (ii) economies of scale and scope;*
- (jj) the nature and extent of vertical integration;*
- (kk) the ease of entry into the market, including market and regulatory barriers to entry.*

The current situation is such that Sentech is the dominant provider in the defined market. This is acknowledged by Sentech as follows:

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<sup>11</sup> Factors as outlined in Section 67(6) (b) (ii) of the ECA:

*“Sentech accepts that its market share exceeds 45% and that, using the test for dominance as contained in the Competition Act, 1998, it is therefore dominant in the market. As such and based on its dominance alone, Sentech acknowledges that it has Significant Market Power (SMP) in this market.”<sup>12</sup>*

3.2.2 It is necessary to establish whether this current level of dominance is likely to remain so within a reasonable period of time, being three to five years. If this dominance is likely to remain in place, then Sentech holds Significant Market Power and the market is likely to be ineffectively competitive.

3.2.3 The Authority need not look into the above factors per segment of the market given that Sentech has identified itself as dominant in the provision of services (holds Significant Market Power). The discussion below analyses only the factors considered relevant to the future of competition in the market as defined.

### **3.4 Actual and potential competitors**

3.3.1 Respondents generally agreed that there is very little competition in the provision of national terrestrial broadcasting services. However, Sentech argued that the mere fact of dominance does not necessarily mean ineffective competition by stating:

*“...it does not follow that because Sentech has SMP that the market is not effectively competitive. Again, the conclusion that the competition is ineffective in the market seems to be based on the fact that Sentech has SMP and not an assessment of the various section 67(6) factors.”<sup>13,14</sup>*

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<sup>12</sup> Sentech 's written response to the Discussion Paper. Page 33; Question 18: Answer 23.1

<sup>13</sup> Sentech's written response to the Discussion Paper Page 36; Question 20: Answer 25.2.

<sup>14</sup> See Section 3.10 for a further discussion on this point

### **3.5 Level and Trends in Market Concentration**

3.4.1 Sentech's substantive market share<sup>15</sup> in the provision of managed transmission services for radio and television services means that there is little likelihood that competitors will emerge within the next three to five years.

### **3.6 Control over essential facilities**

3.5.1 None of the respondents raised any concerns with the Authority's view that Sentech has control over essential facilities.<sup>16</sup>

### **3.7 Dynamic market characteristics of the market, including growth, innovation, and products and services differentiation**

3.6.1 All respondents agreed with the Authority's view that the introduction of DTT services would limit the potential for new entry into the market.

### **3.8 Economies of scale and scope**

3.7.1 Economies of scale arise when increasing production causes average costs (per unit of output) to fall. The presence of economies of scale can act as a barrier to entry as well as an advantage over existing competitors.

3.7.2 None of the respondents disagreed with the Authority's view that based on the country-wide infrastructure that Sentech controls, along with its customer base, Sentech benefits from economies of scale.

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<sup>15</sup> Sentech's market shares: 99% in the provision of MTS for terrestrial television broadcasting services; 60% for terrestrial radio broadcasting services and 100% for terrestrial radio broadcasting services)

<sup>16</sup> Government Gazette No. 34371 (Notice No. 346 of 2011) Page 58 as stated in the Discussion Document.

### **3.10 Declaring licensees with SMP and establishing the existence of ineffective competition.**

3.10.1 As part of the consideration of the market definitions, Sentech disagreed in its supplementary submission following the public hearing process with the following statement made by the Authority in the Discussion Document:

*“The Authority considers that Sentech has significant market power in this market. As a result this market has been found not to be effectively competitive”.*

Sentech argues that section 67(4) equates “ineffective competition” to “market failure” quoting the legislation as follows:

*“...set out pro-competitive measures that the Authority may impose in order to remedy the perceived market failure in the markets or market segments found to have ineffective competition taking into account subsection 7”.*

3.10.2 Sentech therefore argued that a two stage process should be followed where (1) a determination whether there is SMP should be made and then (2) a determination on whether or not there is ineffective competition (i.e. market failure) should be made.

3.10.3 Neotel provided a succinct response to Sentech’s argument by making the following statement, with which the Authority concurs:

*“...From an economic perspective, if you’ve got a dominant player that has significant market power and in economic terms that really means that a firm is able to raise prices above competitive levels, then effectively the market outcomes that you will see is that prices are above effectively competitive levels and therefore the market is not competitive.*



*So, from an economic perspective it makes perfect sense to conclude that a market is not effectively competitive where you have found a player to have significant market power....<sup>17</sup>*

The Authority concurs with Neotel's view that where a player has SMP, the market is not effectively competitive.

#### **4. THE POTENTIAL CONSEQUENCES OF SMP AND INEFFECTIVE COMPETITION IN THE DEFINED MARKETS**

The Authority would like to emphasize that licensees that are found to have SMP in an ineffectively competitive market are in a position to adversely impact the market through exploiting their market power. Accordingly, regulation may be used to prevent potential or existing abuses of this position.

The potential consequences of SMP, in an ineffectively competitive market, that the Authority would like to prevent include:

- Inefficient and excessive pricing of services;
- The provision of services at an inferior quality; and
- Delays in providing services within reasonable timeframes.

##### **4.1 Potential Pro-competitive Remedies applicable to the identified markets**

4.1.1 The Authority put forward proportionate pro-competitive remedies to address ineffective completion being:

- A transparency obligation, and specifically an obligation to publish a Reference Access Offer;
- A non-discrimination obligation, including non-discrimination on pricing, particularly taking into account the geographic coverage of the service sought;
- A related price control obligation, where charges for network access would be reasonably derived from the costs of provision; and

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<sup>17</sup> Public Hearings 28 November 2011 – Transcript (p. 16).

- A cost accounting obligation to support the price control obligation.

4.1.2 The written responses received by the Authority were generally in agreement with the suggested proportionate pro-competitive remedies.

4.1.3 Sentech itself committed to a Reference Access Offer based on a transparency obligation, non-discriminatory approach, price controls and cost-oriented tariffs.

## **5. DETERMINATION**

### **5.1 Market Definition**

5.1.1 The following services are not currently considered part of the Managed Transmission Services market:

- The distribution of content between broadcasters does not form part of this market definition.
- Ancillary technical broadcasting services such as set-top boxes and electronic programme guides etc.; and
- Production of broadcasting content.

5.1.2 The Authority maintains that managed transmissions services for radio are not a demand-side substitute for managed transmission services for television since television is a visual and audio service while radio is only an audio service, and may be 'consumed' as a secondary activity without requiring the user's full attention – accordingly these services are not in the same product market. The Authority, therefore, concludes that there is no supply side substitution.

5.1.3 Given that all broadcasting service licensees who use Sentech purchase end-to-end managed transmission services, there is no need, within this timeframe, to identify different network components of the managed transmission service as separate markets.

5.1.4 Therefore the Authority determines that there are two managed transmission services markets, defined as follows:

- **The market for managed transmission services for Television Broadcasting**
- **The market for managed transmission services for Radio Broadcasting**

## **5.2 Significant Market Power and the Effectiveness of Competition**

Sentech is the dominant player in the provision of managed transmission services in both markets. In addition, the Authority declares that Sentech holds and will continue to hold Significant Market Power in the two MTS markets as defined and that these markets will remain ineffectively competitive, especially considering the introduction of DTT.

## **5.3 Pro-competitive Remedies to Address Ineffective Competition.**

The following pro-competitive measures are to be considered as potential options to address the potential for anti-competitive behaviour as part of regulation-making under Chapter 10 of the ECA:

- A transparency obligation, and specifically an obligation to publish a Reference Offer;
- A non-discrimination obligation, including non-discrimination on pricing;
- A related price control obligation, where charges for network access would be reasonably derived from the costs of provision; and
- A cost accounting obligation to support the price control obligation.

## **6. CONCLUSION**

The Authority hereby concludes this Inquiry by notifying all stakeholders that it intends initiating a regulation-making process under Section 67(4) of the ECA to ensure that pro-competitive conditions are imposed upon licensees having significant market power where the Authority has determined such markets or market segments to have ineffective competition.

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