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12 October 2012

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ICASA
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Dear Makgotlho

DRAFT FREQUENCY MIGRATION REGULATION AND RADIO FREQUENCY MIGRATION PLAN

Herewith please find e.tv's submission on the Draft frequency Migration Regulations and Draft Frequency Migration Plan.

Yours sincerely

BRONWYN KEENE-YOUNG
Chief Operating Officer

SUBMISSION BY e.tv (PTY) LIMITED ON THE DRAFT FREQUENCY MIGRATION REGULATIONS AND DRAFT FREQUENCY MIGRATION PLAN

1. Introduction

1.1. On 17 August 2012, the Independent Communications Authority of South Africa ("ICASA") published two documents – the draft Frequency Migration Regulations ("the draft regulations") and the draft Frequency Migration Plan ("the draft plan") – for public comment.[1]

1.2. In terms of section 4(1) of the Electronic Communications Act 36 of 2005 ("the ECA"),[2] ICASA invited interested parties to make written submissions on the draft regulations and plan by 28 September 2012. On 28 September ICASA extended the deadline for written submissions to 12 October 2012.

1.3. e.tv hereby makes its written submission. It will require approximately one hour to present its submission at the oral hearings to take place into this matter. In view of the need for counsel and e.tv's top management representatives to attend, we request that e.tv be consulted regarding its availability well in advance of the scheduled hearings.

2. Procedural concerns

2.1. On 14 December 2011, the Minister of Communications published "Draft Policy Directions on Exploiting the Digital Dividend" in Government Gazette No. 34848 (Notice 898 of 2011) ("the Draft Ministerial Policy").

2.2. The Draft Ministerial Policy was published in terms of section 3(2) of the ECA.

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[1] General Notice 606 of 2012, *Government Gazette* No. 35598 (17 August 2012)

[2] Read together with sections 31(4), 34(7)(c)(iii), 34(8) and 34(16) of the ECA

Interested persons were requested to make submissions on the Draft Ministerial Policy within 30 calendar days of the publication of the Notice.

2.3. As far as e.tv is aware, the Minister has not yet published a final policy on exploiting the digital dividend.

2.4. In the circumstances, e.tv submits that the publication by ICASA of the draft regulations and the draft plan – insofar as the digital dividend is concerned – is premature. Matters concerning the digital dividend can be addressed by ICASA only once the final Ministerial Policy on Exploiting the Digital Dividend ("the final Ministerial Policy") has been published.

2.5. In addition, the Draft Ministerial Policy sets out a particular set of requirements which, if included in the Final Ministerial Policy, would require ICASA to engage in several processes prior to determining how to approach the allocation of the digital dividend. Paragraph 2 of the Draft Ministerial Policy states as follows:

"The Independent Communications Authority of South Africa (ICASA) is hereby directed to in terms of section 3(2) of the Electronic Communications Act of 2005 (Act No. 36 of 2005) to:

"2.1. Undertake an inquiry into the rational and efficient exploitation of the remaining Very-High Frequency (VHF) and Ultra-High Frequency (UHF) spectrum for future digital dividends, and report to the Minister on the following issues:

2.1.1. ***Future spectrum requirements for all 3 spheres of digital terrestrial television broadcasting (public, community, commercial) in the next 10 years;***

2.1.2. ***Future spectrum requirements for digital sound broadcasting***

after analogue switch-off;

2.1.3. Possible use of "white space" technologies;

2.1.4. ***Implementation of large and small multiplexes within the framework of the national digital broadcasting frequency plan;***

2.1.5. Future spectrum requirements for mobile broadband applications within the digital dividend over the next ten years;

2.1.6. Take into consideration the possible impact of any recommendations made on the digital dividend on neighbouring countries that are parties to the GE-06 agreement."

(emphasis added)

2.6. Paragraph 1.2 of the Draft Ministerial Policy defines the digital dividend as the spectrum "in the frequency bands 174 – 230 MHz and 470 – 790 MHz."

2.7. As far as e.tv is aware, ICASA has conducted no inquiry into the future spectrum requirements for broadcasting in relation to VHF and UHF spectrum.

2.8. e.tv submits that the draft regulations and draft plan cannot be considered insofar as the digital dividend is concerned without the Draft Ministerial Policy having been finalized. In addition, presuming that the policy directions remain similar to those in the Draft Ministerial Policy, ICASA cannot proceed with the draft regulations and draft plan to the extent that these are concerned with the digital dividend.

2.9. In any event, notwithstanding the processes outlined in the Draft Ministerial Policy, it would be inappropriate, unfair, unreasonable and contrary to the objectives of the ECA for ICASA to make a decision concerning the digital dividend without a prior assessment of the future needs of television

broadcasting and the resultant impact on broadcasters of any allocation of the digital dividend.

2.10. In this regard, e.tv refers to the submission by the National Association of Broadcasters ("NAB"). e.tv is a member of the NAB and therefore is party to the submissions made by the NAB on the draft regulations and the draft plan. e.tv will not repeat the substance of the NAB's submissions in this document except to stress that no decision should be made by ICASA regarding the vacation by broadcasters of the 790MHz to 862MHz and 697Mhz to 790Mhz bands prior to a comprehensive analysis by ICASA of the country's future broadcasting needs. Such a study should take account of the extent to which most South Africans rely on free-to-air terrestrial broadcasting as their only source of information and entertainment in their own languages and reflecting their own culture. It should also take account of the extent to which improvements in technology (e.g. HD) require greater bandwidth to enable broadcasters to deliver these services on an equitable and competitive basis. The NAB has provided detailed submissions in this regard and e.tv will not repeat these here. Suffice to say that e.tv supports the NAB's position in this regard. e.tv would add that it is critical for such an analysis to have regard to the likelihood of analogue switch-off in December 2013 and the implications if this deadline is not met.

2.11. e.tv also notes that on 15 December 2011, ICASA published a draft spectrum assignment plan for the combined licensing of the 800MHz and 2.6 GHz bands. e.tv made submissions, in accordance with the notice, on 29 February 2012. e.tv attaches its submission in response to the notice as Annexure 1 hereto and requests that it be read together with this submission on the draft frequency migration regulations and the draft frequency plan.

2.12. ICASA withdrew the draft spectrum assignment plan early in 2012 and there has been no further movement in this regard. It is not clear whether the draft frequency migration plan is meant to replace the draft spectrum assignment plan or whether a further draft spectrum assignment plan will be made available. e.tv is also unclear as to the status of a "frequency migration plan" as opposed to a "spectrum assignment plan" in the context of the digital dividend. e.tv is further concerned that the submissions made by it and other stakeholders in respect of the draft spectrum assignment plan have not been taken into account in the development of the draft frequency migration plan.

2.13. e.tv submits that the various draft documents (the Draft Ministerial Policy and the draft spectrum assignment plan) which have been published but not finalized, have created confusion among stakeholders in circumstances where such stakeholders (particularly broadcasters facing digital migration) have a right to procedural certainty on matters which are critical to their future viability.

3. The scope of the draft regulations and draft plan

3.1. The analogue spectrum which e.tv currently occupies represents the equivalent of a full multiplex in the digital environment. During the dual illumination period, e.tv, along with other terrestrial broadcasters, has been granted part of a digital multiplex (in e.tv's case 50% of multiplex 2 under the current draft DTT regulations) for the purposes of simulcasting the current (analogue) e.tv channel in digital as well as providing "digital incentive" channels. Since the start of the digital migration policy process, e.tv has held the expectation that it will be granted a minimum of a full multiplex after analogue switch-off. We point out that e.tv is the biggest

user of the UHF band and ultimately the biggest contributor to the digital dividend.

3.2. The draft plan indicates the intention of ICASA to migrate broadcasting from the 790MHz to 862MHz and 697Mhz to 790Mhz bands and to make this spectrum available for use by other services. While e.tv objects to the draft plan for the reasons stated above and in the NAB submission, e.tv submits that even if this is the case, the entitlements of existing analogue terrestrial broadcasters after analogue switch-off have yet to be determined and that no decision has yet been taken by ICASA in this regard.

3.3. In other words, e.tv understands that even if the draft regulations and draft plan are promulgated in their current form, this will not amount to any decision regarding:

3.3.1. The allocation of spectrum to existing licensed analogue terrestrial broadcasters after analogue switch-off ;

3.3.2. Whether a reduction in spectrum in respect of a specific broadcaster pursuant to digital migration amounts to an expropriation of property; and

3.3.3. What compensation will be afforded to those broadcasters whose spectrum is reduced pursuant to digital migration.

3.4. e.tv is concerned that certain parties may seek to interpret the draft regulations, together with the draft plan as purporting to permit existing broadcasters being required to give up spectrum in order to achieve the digital dividend without compensation.

3.5. That then would raise a host of complex constitutional and policy concerns.

3.6. In what follows, we set out some of the constitutional and policy concerns which would arise if this were the case.

3.7. e.tv therefore submits that the final Frequency Migration Regulations and Frequency Migration Plan (or at the very least ICASA's reasons) must make it clear that the rights of existing analogue broadcasters, insofar as the digital dividend is concerned, will be considered at a later stage in a separate consultative process.

4. e.tv's position on the digital dividend, expropriation and compensation

4.1. e.tv is of the view that, following analogue switch-off, it must be –

4.1.1. guaranteed at least one full DTT multiplex to replicate its position in the analogue environment; or

4.1.2. compensated for the loss of spectrum in the event that it is not provided with a full multiplex.

4.2. e.tv makes this submission on the basis of the following two arguments:

4.2.1. First, permanently reducing the capacity which a licensee has historically enjoyed – "for a public purpose or in the public interest"[3] – would constitute the expropriation of property that is subject to the payment of just and equitable compensation;[4] and

4.2.2. Second, there is no lawful basis for treating broadcasters differently from telecommunication companies ("telcos").[5]

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[3] Section 25(2)(a) of the Constitution of the Republic of South Africa, 1996 ("the Constitution")
[4] As contemplated by section 25(2) of the Constitution
[5] Historically, as technology has improved, telcos have not been required to vacate some of their spectrum; to the contrary, they have been allowed to re-use their existing allocation to provide additional services.

4.3. The purpose of this submission is to draw attention to the complex and contested questions of law that the issue referred to in paragraph 3.3.2. above – the expropriation of property – raises. In so doing, it covers the following areas:

4.3.1. Radio frequency spectrum under the ECA;
4.3.2. Constitutional property in South Africa;
4.3.3. Radio frequency spectrum in other jurisdictions; and
4.3.4. Spectrum as an economic resource.

5. Radio frequency spectrum under the ECA

5.1. The ECA defines spectrum as "the portion of the electromagnetic spectrum used as a transmission medium for electronic communications".[6] It implicitly recognises spectrum as a public resource under the stewardship of ICASA. In particular, section 30(1) expressly provides that ICASA "controls, plans, administers and manages the use and licensing of the radio frequency spectrum",[7] in line with the long title of the ECA which – amongst other things – refers to its enactment "to provide for the control of the radio frequency spectrum".

5.2. ICASA is an organ of state with the power to make subordinate legislation. Amongst other things, it is empowered by the ECA to make regulations dealing with "the control of the radio frequency spectrum";[8] in particular, it has the power to make different regulations "in respect of different … uses of radio frequency spectrum".[9]

[6] Section 1
[7] This is subject to section 34 dealing with a radio frequency plan.
[8] Section 4(1)(d)
[9] Section 4(2)(b)

5.3. To be able to use spectrum, a person must hold a radio frequency spectrum licence ("a spectrum licence") issued by ICASA. Such a licence may be "assigned, ceded or transferred to any other person" with ICASA's "prior written permission".[10] Headed "Transfer of individual licences or change of ownership", section 13 also permits ICASA to "set a limit on, or restrict, the ownership or control of an individual licence" for certain purposes.[11]

5.4. Simply put, the ECA expressly recognises a spectrum licence as something of value that may be owned: it may – with ICASA's permission – be assigned, ceded or transferred. While a spectrum licence may be amended in certain circumstances,[12] or even withdrawn (in even narrower circumstances),[13] it is an "item of wealth" in respect of which the licensee has certain legal rights. As Charles Reich noted in his seminal piece "The New Property":[14]

> Wealth or value is created by culture and by society; it is culture that makes a diamond valuable and a pebble worthless. Property, on the other hand, is the creation of law. A man who has property has certain legal rights with respect to an item of wealth; **property represents a relationship between wealth and its "owner"**.

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[10] Section 13(1)

[11] Section 13(3), which allows for regulations to place limits on or restrict the ownership or control of an individual licence to "promote the ownership and control of electronic communications services by historically disadvantaged groups" or to "promote competition in the [information, communications and technology] sector."

[12] Section 31(4)

[13] Section 31(8) provides as follows:

> Subject to subsection (9), [ICASA] may withdraw any radio frequency spectrum licence when the licensee fails to utilise the allocated radio frequency spectrum in accordance with the licence conditions applicable to such licence.

Subsection 9 provides as follows:

> Before [ICASA] withdraws a radio frequency spectrum licence in terms of subsection (8), it must give the licensee prior written notice of at least 30 days and the licensee must have 7 (seven) business days in which to respond in writing to the notice (unless otherwise extended by [ICASA]) demonstrating that it is utilising the radio frequency spectrum in compliance with [the ECA] and the licence conditions.

[14] (1964) 73 *Yale Law Journal* 733 at 739 (emphasis added)

5.5. The nature of a spectrum licence may be compared to certain rights in mining.[15] In *Minister of Minerals and Energy v Agri SA (CALS amicus curiae)*,[16] a recent decision of the Supreme Court of Appeal (SCA), Agri SA argued that the Mineral and Petroleum Resources Development Act 28 of 2002 ("the MPRDA"), which acknowledges that "South Africa's mineral and petroleum resources belong to the nation and that the State is the custodian thereof",[17] expropriated common law mining rights.[18]

5.6. The SCA made it plain that the right to mine is vested in the state:[19]

> [T]he right to mine in South Africa, in the sense of the right to prospect and mine for minerals and extract and dispose of them, is vested in the State. **It is allocated by the State in accordance with policies that are determined from time to time and embodied in the applicable legislation**. The MPRDA is the current iteration of that right. The contention that all mineral rights that existed in South Africa under the 1991 Act were expropriated under the MPRDA is incorrect.

5.7. Section 3(2)(a) of the MPRDA, in terms of which the state is empowered to "allocate" the right to mine, provides as follows:

> As the custodian of the nation's mineral and petroleum resources, the State, acting through the Minister, may … grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right and production right ….

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[15] The fact that section 25 does not expressly refer to mineral rights does not mean that such rights are not protected by section 25. In this regard, see *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) at paragraph 74:

> A further objection was that the [new text] contains no express recognition of mineral rights. Once again this objection finds no basis in [Constitutional Principle] II. Our examination of international conventions and foreign constitutions shows that it is extremely rare for there to be any mention of mineral rights within a property clause. It certainly could not be said to be a "universally accepted fundamental right".

[16] [2012] ZASCA 93 (31 May 2012)

[17] Preamble to the MPRDA

[18] Because of this, Agri SA argued that this gave rise to entitlements to compensation.

[19] Agri SA, above note 16 at paragraph 99 (emphasis added)

5.8. The following three passages in the *Agri SA* case, both individually and collectively, indicate that the SCA views the holding of a right to mine as a right in property:

> That right [to mine] was never vested in the holders of mineral rights, but was vested in the State and allocated to those holders in accordance with the legislation applicable to it from time to time. It could not therefore be expropriated **although rights flowing from the State's allocation of the right to mine could**.[20] …
>
> Accordingly both elements of an expropriation – deprivation and acquisition – are absent. **I do not exclude the possibility that some holders of rights may be able to advance a case that, because of their own particular circumstances, there has been an expropriation of some or all of the rights they previously enjoyed**. However, we are not concerned with such a case but with a contention that there was a blanket expropriation of mineral rights.[21] …
>
> The judgment does not exclude **the possibility that the MPRDA may have effected an expropriation of certain rights that existed under the previous dispensation**, but holds that whether it did so depends not on any general expropriation of mineral rights, but on the facts of a particular case.[22]

5.9. Based on the text of the ECA and the *Agri SA* case, it is e.tv's submission that the statute recognises a spectrum licence as a right in property. As the following section shows, such a licence may also be considered as property for the purposes of section 25 of the Constitution.

6. Constitutional property in South Africa

6.1. In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* ("the *FNB* case"),[23] the Constitutional Court noted that it is impossible to define comprehensively what is "property" as contemplated

[20] Ibid at paragraph 85 (emphasis added)
[21] Ibid at paragraph 90 (emphasis added)
[22] Ibid at paragraph 99 (emphasis added)
[23] 2002 (4) SA 768 (CC) at paragraph 51

by section 25 of the Constitution.

6.2. For our purposes, the relevant part of section 25 provides as follows:[24]

> (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
> (2) Property may be expropriated only in terms of law of general application—
> *(a)* for a public purpose or in the public interest; and
> *(b)* subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
> (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—
> *(a)* the current use of the property;
> *(b)* the history of the acquisition and use of the property;
> *(c)* the market value of the property;
> *(d)* the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
> *(e)* the purpose of the expropriation.
> (4) For the purposes of this section—
> *(a)* the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
> *(b)* property is not limited to land.

6.3. According to van der Walt, "the objects of property rights in section 25 are not restricted to tangible things";[25] further, these rights are not limited to rights of ownership and are not "absolute or exclusive".[26] Put differently, "property" for the purposes of section 25 can relate to –

6.3.1. tangible and intangible objects;

[24] Subsections (5) through (9) deal expressly with land reform.
[25] AJ van der Walt, *Constitutional Property Law* (Juta and Co. Ltd, Cape Town: 2011) at 107
[26] Ibid

6.3.2. real and personal "traditional" property rights and interests;[27] and

6.3.3. other rights and interests which traditionally were not considered property.[28]

6.4. e.tv's concerns relating to the treatment of the digital dividend are premised on the understanding that the right in question is a right to use the spectrum. This raises the question: is a state-granted and controlled licence a property interest protected by section 25? Van der Walt's analysis of foreign case law shows that such an interest may indeed be considered as a right in property:[29]

> Commercial licences, permits and quotas are usually created by state grants and awards and are thus subject to the state's normal powers of cancellation, amendment and regulation, and therefore they are often not regarded as property. However, in the world of commerce these interests can acquire great value, especially when they give access to services, trading or manufacturing opportunities and when they can be sold and transferred. Because of their origin in administrative awards, there is some resistance to the notion that commercial interests in licences, permits and quotas could be protected as property, but some of these interests have enjoyed limited constitutional protection in foreign case law. **The tendency is to regard commercial licences, permits and quotas as constitutional property only if they have commercial value and once they have been vested and acquired according to the relevant (statutory or regulatory) requirements; in some instances it is also required that they should be transferable**.[30]

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[27] By traditional property rights, van der Walt refers to the traditional private-law (and pre-Constitutional) meaning of property.

[28] Van der Walt, above note 25 at 107. Van der Walt notes that the shift from the term "rights in property" in section 28 of the interim Constitution to "property" in section 25 of the Constitution "should make little or no difference to the meaning and scope of the property guarantee in principle." (Ibid at 107-108).

[29] Ibid at 158 (emphasis added)

[30] Van der Walt cites *Pine Valley Developments Limited and Others v Ireland* [1991] 14 EHRR 319 as a case in which an established development right (based on a permit) was recognised as property on this basis. In footnote 286, van der Walt cites additional cases in which transferable commercial licences and permits have been accepted as constitutional property.

6.5. Van der Walt expands on the third requirement:[31]

> In general terms it could be said that commercial licences, permits and quotas acquire the status of intangible commercial property for constitutional purposes when they exceed the limits of mere grants or expectancies and display the characteristics of acquired, transferable rights. The facts that these rights have commercial value and that they can be traded are important indications of such a change in status.

6.6. In *ICM Agriculture Pty Ltd v Commonwealth*,[32] the High Court of Australia considered the issue of transferability alongside the degree of permanence or stability of the right in question.[33] The court explained:[34]

> It often has been remarked that the facility given by statute for the transfer of rights created by or pursuant to that statute is an indication that for the general purposes of the law the rights may be classified as proprietary in nature. … But … where a licensing system is **subject to ministerial or similar control with powers of forfeiture**, the licence, although transferable with ministerial consent, nevertheless may have an insufficient degree of permanence or stability to merit classification as proprietary in nature.[35]

6.7. e.tv's licence, in terms of which it has the right to use a defined part of the spectrum, satisfies all three of van der Walt's requirements: it has commercial value, it has already been vested and it may – subject to ICASA's approval – be transferred (or assigned or ceded). But unlike the licence considered in *ICM Agriculture*, it is not "inherently susceptible of variation";[36] nor is it subject to control with "powers of forfeiture". To the contrary, it has a sufficient "degree of permanence … to merit classification

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[31] At 159

[32] [2009] HCA 51. See also *Arnold and Others v Minister Administering the Water Management Act 2000 and Others* [2010] HCA 3 at paragraphs 11, 48 and 72.

[33] In that case, the licence in question – a bore licence to extract ground water – was not considered to be property.

[34] *ICM Agriculture*, above note 32 at paragraph 76

[35] See also *Government of Malaysia and Another v Selangor Pilot Association* [1978] AC 337, in which the Privy Council held that non-transferable licences are not constitutional property as contemplated by article 13 of the Constitution of Malaysia.

[36] The court noted the licence's "insubstantial character" and the fact that it was "inherently susceptible of variation". In this regard, see paragraphs 77 and 78.

as proprietary in nature."

6.8. If the right to use part of the spectrum is indeed a property right recognised by the Constitution, then taking that right away and giving it to another entity – whether a broadcaster or a telco – would constitute expropriation as contemplated by section 25(2) of the Constitution.[37] That, in turn, would give rise to an entitlement to just and equitable compensation, as contemplated by section 25(3) of the Constitution.[38]

7. Radio frequency spectrum in other jurisdictions

7.1. It appears that ICASA has been giving consideration to how other jurisdictions deal with this issue. The approach of other jurisdictions, whilst informative, can provide little guidance on how to interpret the ECA and the nature and extent of the property right in section 25 of the Constitution.

7.2. For example, while Canadian courts have considered some of these issues, there are two reasons why Canada is of little assistance in understanding the nature and extent of spectrum rights in South Africa: first, there is no right to property in the Canadian Charter of Rights and Freedoms; and second, the Broadcasting Act makes no provision for a licence of any type to be "assigned, ceded or transferred to any other person", as is the case in South Africa. Instead, licences may only be issued, amended, renewed, suspended or revoked.[39]

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[37] For a discussion on the difference between deprivation and expropriation, see the *FNB* case, above note 23 at paragraphs 57-60.

[38] For a discussion on expropriation, see *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC).

[39] See the following sections of the Broadcasting Act: section 9 (general powers of the Canadian Radio-television and Telecommunications Commission ("the CRTC")); section 11 (regulation-making powers of the CRTC); and sections 22-25 (licences).

7.3. That said, the consideration of foreign experience is helpful to the extent that it indicates that –

7.3.1. the legal nature of a spectrum licence is dependent on an analysis of the legislative framework within which it is allocated, as well as the nature and extent of the relevant constitutional property clause (if it exists); and

7.3.2. there is no technical reason why a spectrum licence cannot be considered as a right in property.[40]

7.4. This is demonstrated by the position in the United States.

7.5. In part 1.1.2 of the annex to the draft plan,[41] ICASA places some focus on the approach of the United States to the relationship between spectrum licences and the right to property. Consider, for example, the following excerpts:[42]

> Though the [Federal Communications Commission (FCC)] does not explicitly address the issue of whether licensees have … recognizable positions or expectation[s] of reallocation in [the] case of [the] expiry of a license or spectrum assignment, it clearly indicates that **at least for the case of withdrawal of spectrum before expiry of the assignment period there are rights and expectations that cannot be ignored. The reason for this is that in general, under the Takings Clause of the Fifth Amendment of the U.S. Constitution, compensation is required if property is taken away for public uses**. At least for the case of non-expiry of [a] license the application of the clause could be argued.[43] …
>
> **The radio spectrum is owned by the federal government**, some spectrum is used by the military and other federal agency. The FCC assigns the spectrum for commercial use. Usually licenses are limited in time, in the USA the usual spectrum license is issued for 10-15 years. **Though the FCC does not explicitly grant spectrum holders property rights, and restricts**

[40] See, for example, Abhijit Sur, "Sharing spectrum" (2003) 37(9) *Telecommunications Americas* 8, which sees an "exclusive property rights model" as an option for allocating spectrum.

[41] The annex is entitled "International Best Practice Benchmark"

[42] See also footnotes 45, 46, 47, 49 and 63 of the annex

[43] General Notice 606 of 2012, above note 1 at 81-82 (footnotes omitted and emphasis added)

> **their use of spectrum to certain applications the argument is often raised, particularly in the context of broadcasting**.[44] …
>
> In the case of spectrum currently held by broadcasters the USA faces a lock-in situation: Broadcasters cannot take advantage of it for other [than] TV services as it has been assigned to them for this purpose only. And the FCC may not take it away as they claim to have property rights to it or at least some expectations. Even if this is not the case a long legal battle in court can be expected. Therefore [the] FCC could now make that spectrum available by either giving broadcaster the right to use the spectrum i.e. for mobile data services or 'redesignating' the spectrum to make it accessible for trading. Or it could take the spectrum away due to it not being used. **The FCC favours the incentive auction option where the incumbent licensees agree to relinquish their licenses in return for receiving revenues generated by an auction**.[45]

7.6. In noting that "the FCC does not explicitly grant spectrum holders property rights", the annex refers to the Communications Act of 1934 which "explicitly denies property rights to license holders and clearly bans private ownership of radio spectrum".[46] In particular, it refers to the following extract:[47]

> It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.

7.7. In addition, the annex to the draft plan notes that "[i]n the context of broadcasting, the Communications Act remains somewhat open for interpretation as section 204 implies that licenses will be renewed absent violation of terms."[48]

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[44] Ibid at 82 (footnotes omitted and emphasis added)
[45] Ibid at 86-88 (footnote omitted and emphasis added)
[46] Footnote 46 of the annex
[47] 47 USC § 301 – License for radio communication or transmission of energy
[48] Above note 46

7.8. The annex seems to place much reliance on a recent academic article that "finds that broadcasters have a very weak property rights claim over their spectrum licenses."[49] Nevertheless, the article suggests a pragmatic solution to what it refers to as the "spectrum rationalization challenge", based on an implicit acceptance of rights in property:

> For practical political reasons, including maximizing revenue from future spectrum auctions, the most expedient way to reallocate spectrum is to incentivize the broadcasters to voluntarily participate in a reallocation plan by providing compensation beyond the legally required minimum.

7.9. Thus, on ICASA's own understanding of US law, regulation and practice, the following key principles may be distilled:

7.9.1. The relationship between spectrum licences and the right to property remains unclear;

7.9.2. While the Federal Government owns the spectrum, licensees may have some rights in property, although the nature and extent of their rights remains unclear; and

7.9.3. A reasonable approach to the digital dividend may entail an implicit recognition of licensees' rights in property.

7.10. It thus certainly cannot be suggested that ICASA can – whether on the basis of foreign law or otherwise – disregard the potential effect on property rights that would be occasioned by the digital migration process. On the contrary, as the US position makes clear, this is a highly complex and nuanced area which requires considerable thought and analysis.

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[49] J. Armand Musey, "Broadcasting Licenses: Ownership Rights and the Spectrum Rationalization Challenge", (2012) 13 Columbia Science & Technology Law Review 307. But see Thomas W. Hazlett, "Assigning Property Rights to Radio Spectrum Users: Why Did FCC License Auctions Take 67 Years?", (1998) 41 *Journal of Law and Economics* 529.

8. Spectrum as an economic resource

8.1. The ICT Regulation Toolkit ("the toolkit"),[50] described as "a practical, web-based tool intended for ICT policymakers and regulators around the world" and produced by the Information for Development Program of the World Bank and the International Telecommunication Union, considers spectrum as an economic resource. In particular, it notes that spectrum "can be traded, in the sense that property rights can be assigned to it."[51]

8.2. In the part entitled "Defining Property Rights for Spectrum Trading",[52] the toolkit recognises that "[c]learly defined property rights are thus a precondition for efficient spectrum markets."[53] It explains:

> Where trading occurs, it is desirable or even necessary that buyer and seller – as well as the regulator and the courts where appropriate – share the same understanding of this bundle of rights and obligations which is changing hands. This is true of land, for example, and also of a spectrum licence.

8.3. Amongst others, the toolkit recognises "[t]he band which is available for use" as one of "[t]he dimensions of rights and obligations in a spectrum licence".

8.4. The toolkit's relevance is twofold: first, it shows that there is no technical bar to recognising licensees' rights in property relating to spectrum; and second, it makes it plain that property rights are necessary if any form of spectrum trading is to take place. With this in mind, it is important to note once again that under the ECA, spectrum licences may be "assigned, ceded or

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[50] The ICT Regulation Toolkit is available at http://www.ictregulationtoolkit.org/en/Index.html. Module 5 is entitled "Radio Spectrum Management".
[51] Part 1.2.1
[52] Part 5.8.1
[53] See Hazlett, "Assigning Property Rights to Radio Spectrum Users: Why Did FCC License Auctions Take 67 Years?", above note 49.

transferred", strongly indicating that spectrum in the South African context can amount to property.

9. Conclusion

9.1. As this submission makes clear, there are a host of complex and novel constitutional issues that will be raised by decisions on:

9.1.1. The future allocation and use of the digital dividend;

9.1.2. The entitlements of existing analogue terrestrial broadcasters after analogue switch-off;

9.1.3. Whether a reduction in spectrum in respect of a specific broadcaster pursuant to digital migration amounts to a expropriation of property; and

9.1.4. What compensation will be afforded to existing broadcasters in the event their spectrum is reduced pursuant to digital migration.

9.2. The policy issues involved in this regard are just as complex, especially the apparently disparate treatment of broadcasters, on the one hand, and telcos, on the other.

9.3. In the event of improvement in technology – for example 3G to 4G – telecommunications licensees have not been required to forfeit their spectrum allocation. On the contrary, the improved technology has allowed them to make more efficient use of their spectrum and thus enabled them to enhance their services.

9.4. Yet, in the migration from analogue to digital television, broadcasters are apparently being treated differently. On the basis that broadcasters can provide the same services with less spectrum, broadcasters are being required to forfeit their spectrum.

9.5. If broadcasters were treated in the same manner as telecommunications licensees, digital television would be seen as a technological improvement which would allow broadcasters to provide more services with their existing capacity – and their capacity would therefore not be reduced.

9.6. Given the convergence of technology, telecommunications operators are increasingly moving into the commercial space once occupied solely by broadcasters – the delivery of content. Broadband to the home has, in many countries, becoming a serious threat to the ongoing viability of broadcast television. In these circumstances, ICASA must adopt a technology-neutral approach to the regulation of telecommunications operators and broadcasters and, in doing so, allow broadcasters to commercially exploit the efficiencies brought about by technological advances in the same manner as telecommunications operators.

9.7. At the same time, ICASA must be mindful of the unique role which television plays in entertainment, education, information and nation-building in South Africa and any decision concerning the digital dividend must take account of the fact that terrestrial television is currently the only free source of such content.

9.8. In conclusion, e.tv submits that:

9.8.1. The allocation of Digital Dividends 1 and 2 should not be determined in the Frequency Migration Plan before (1) the Draft Ministerial Policy has been finalized and (2) a comprehensive study has taken place into the future television needs of the country; and,

9.8.2. The draft regulations read together with the draft plan should make it clear that the issue of allocation of spectrum and/or compensation for incumbent terrestrial broadcasters after analogue switch-off will be dealt with in a separate process.

e.tv

12 October 2012

Annexure 1

e.tv SUBMISSION ON DRAFT SPECTRUM ASSIGNMENT PLAN FOR THE COMBINED LICENSING OF THE 800MHZ AND 2.6GHZ BANDS

29 February 2012

1 INTRODUCTION

1.1 On 15 December 2011 in Notice 911, ICASA published Government Gazette number 34872 containing the draft spectrum assignment plan for the combined licensing of the 800MHz and 2.6GHz bands. e.tv thanks ICASA for the opportunity to comment on the draft spectrum assignment plan and further requests the opportunity to make an oral submission should hearings be held.

1.2 As the only commercial free-to-air television broadcasting service licensee, e.tv is a vibrant presence in the South African broadcasting landscape and is directly and significantly impacted by the planned migration to DTT. As ICASA is aware, e.tv has been a productive participant in the various planning processes around DTT, which have been running for some time.

1.3 Notwithstanding the detailed planning on DTT, South Africa has to date, not launched a DTT platform. The reasons for the repeated delays are multi-faceted and complex. For the purposes of the present submission it is noteworthy that at this point, the beginning of 2012, there is still no finalized regulatory framework for DTT nor a SABS approved minimum specification for the set-top box (STB) both of which are required some months before a DTT platform can start.

1.4 It is within this context that e.tv makes its brief comments on the draft spectrum assignment plan. Given the continuous delays on DTT, e.tv is understandably concerned as to how it will be affected by the licensing of 800MHz spectrum to 3rd parties for International Mobile Telecommunications (IMT) technologies. This is because part of that spectrum is licensed to e.tv for both its analogue and DTT broadcasts. e.tv therefore wishes to see the necessary checks and balances being put in place to ensure that the

licensing of 800MHz spectrum to 3rd parties for IMT services does not in any way undermine e.tv's existing rights in this band.

2 e.tv SPECTRUM ASSIGNMENTS IN 800MHz BAND

2.1 e.tv currently holds a Radio Spectrum Licence in terms of which the following frequencies in the 800Mhz band are licensed to e.tv for its existing analogue television service. It is noteworthy that most of these are major sites, and in total, millions of e.tv viewers are served by these transmitters.

ATT	TRANSMITTING STATION NAME	CH	FREQ MHz
1	SABIE	64	815.25
2	TABLE MOUNTAIN	64	815.25
3	LADYBRAND	68	847.25
4	RUSTENBURG	68	847.25
5	TZANEEN	68	847.25
6	AMANDA GLEN	61	791.25

Table 1: e.tv analogue assignments

2.2 In addition, the Digital Migration Regulations award e.tv capacity on DTT Multiplex 2. The Final Terrestrial Broadcasting Frequency Plan of 2008 assigns 27 frequencies in the 800Mhz band for use by DTT Multiplex 2 (see Table 2 on next page). The Digital Migration Regulations state in regulation 12(4) that "each of the incumbent broadcasting service licensees is considered to be authorized to utilize the radio frequencies included in Multiplex 1 or 2 …and the existing radio frequency spectrum licences are deemed to confer such authorization".

DTT	TRANSMITTING STATION	CH	FREQ MHz
1	ERMEL	61	794
2	EAST LONDON	62	802
3	MOLEMA	62	802
4	GREYTOWN	62	802
5	GREYTOWN DORP	62	802
6	SENEKAL	62	738
7	TZANEEN	62	802
8	VOKSRUST	62	802
9	ITSOSENG	63	810
10	MADIBOGO	63	810
11	HOLY CROSS	64	818
12	MOUNT AYLIFF	64	818
13	PILANESBERG	65	826
14	SOMERSET EAST	65	826
15	VILLIERSDORP	65	826
16	CAROLINA	66	834
17	DEWETSDOP	66	844
18	ELLIOT	66	834
19	MBUZINI	66	834
20	MOGWASE	66	834
21	FRANSCHHOEK	67	842
22	MOOI RIVIER	67	842
23	THABA NCHU	67	842
24	DONNYBROOK	68	850
25	GEORGE	68	850
26	PANKOP	68	850
27	SUPINGSTAD	68	850

Table 2: DTT Multiplex 2 assignments

2.3 Although e.tv does not have any spectrum assignments on DTT Multiplex 1, it is worth noting that there are 15 assignments to DTT Multiplex 1 in the 800MHz band.

3 ASSURANCES FOR BROADCASTERS REQUIRED IN LICENSING 800MHz SPECTRUM FOR IMT SERVICES

3.1 At the outset, e.tv wishes to note that it has no in-principle objection to the licensing of 800MHz spectrum for IMT services at the appropriate time. e.tv has in fact previously advocated to ICASA and the Department of Communications the 'early' auctioning of the digital dividend spectrum so that revenues are raised to fund the digital migration process. e.tv repeats its argument that the Authority should use the licensing of digital dividend spectrum to raise revenues so as to fund the digital migration process.

3.2 Notwithstanding this, it is concerning to e.tv that the draft spectrum assignment plan provides no assurances to the television broadcasters currently licensed to use the band. Although the draft spectrum assignment plan notes in paragraph 7.1 that "the 800MHz band is currently used for television broadcasting by broadcasters" no further mention is made of the potential impact on television broadcasters such as e.tv.

3.3 e.tv is particularly concerned that in paragraph 7.2, ICASA states that "(this approach) allows successful applicants to consider innovative ways of using the spectrum in co-ordination with broadcasters prior to complete release of the spectrum". This appears to contemplate the sharing of the spectrum. e.tv has grave concerns about the feasibility of broadcasting and IMT services sharing spectrum and the conditions under which this would occur. What are to be the guidelines for such sharing arrangements? How are competing

interests to be balanced? e.tv submits that further detail is required and that guarantees are needed that there will be no interference to the television services as they are the existing licensees of this band. The current draft spectrum assignment plan provides no such guarantees and provides scant information.

3.4 e.tv submits that the spectrum assignment plan, when finalized, must provide protection for the rights of broadcasters as existing licensees of the 800MHz band. Any radio frequency spectrum licences issued for IMT services must provide that usage may not commence until broadcasters have vacated the band in accordance with an appropriate regulatory framework which governs DTT. To do so would be severely prejudicial to e.tv which has a licensed right to broadcast on the 800MHz band and would constitute unlawful interference with e.tv's right as aforesaid. This would require e.tv to take steps to put a halt to the process.

4 TIMELINES

4.1 The draft spectrum assignment plan is predicated on the basis that "the release (of 800MHz spectrum) is anticipated in year 2015 or immediately after that." e.tv is very aware that all concerned parties are working towards a full digital migration by 2015. However, it is noteworthy that digital switch-on has not yet occurred and that it is only envisaged for end 2012. In the context of all the delays that have occurred on DTT to date, planning for a full digital migration of over 8 million TV households within 3 years is ambitious to say the least.

4.2 e.tv's concern is what the situation would be if such migration is not complete within the envisaged time-frame? Successful applicants for IMT services will understandably be anxious to start monetizing their investment but e.tv

cannot afford any disruption to, or interference with, its existing analogue service which is, after all, the basis for its sole source of income. e.tv strongly urges that the appropriate assurances, to itself and to other broadcasters, must be provided in the spectrum assignment plan and that any radio frequency spectrum licences issued for IMT services should provide that usage may not commence until broadcasters have vacated the band in terms of an appropriate regulatory framework governing DTT. e.tv repeats what is set out in paragraph 3.4 above.

4.3 In providing for the licensing of 800 MHz spectrum, the draft spectrum assignment plan impacts not just on analogue services but on the new DTT services too. This means that not only must the analogue to digital migration process be complete by 2015 but that the plan envisages a digital to digital migration process. No provision has been made in any regulatory framework for a digital to digital migration for e.tv and this further disruption of its service (following the immense challenges of converting viewers from analogue to digital) is highly prejudicial to e.tv. e.tv is unaware of any plan for a digital to digital migration to occur by 2015.

5 LACK OF CONSULTATION

5.1 e.tv notes that in paragraph 8 the Authority states that it has “embarked on a consultative process with incumbents (of the 800MHz and 2.6 GHz bands)”. In spite of the fact that e.tv holds a licence to assignments in this band, e.tv was not consulted with prior to the publication of the draft spectrum assignment plan. e.tv wishes to register its objection to the fact that it was not consulted and wishes to caution that e.tv has been severely prejudiced by not being given a right to be heard during the consultative process. Additionally, e.tv submits that had the Authority in fact consulted with e.tv as it states it had done, the very nature of the draft spectrum assignment plan may have been

different. This is particularly so as e.tv's objections as set out herein are concerned. In this regard, all e.tv's rights are reserved.

6 CONCLUSION

e.tv thanks ICASA for the opportunity to comment on the draft spectrum assignment plan and wishes the Authority all the best as it finalizes the assignment plan. Like the policy objective to deliver broadband for all, DTT is also about bridging the digital divide. To do this successfully, the approach to the digital dividend must ensure that the future of free-to-air television is secured in the interests of all South Africans. e.tv therefore eagerly awaits the outcome of the consultations on the draft assignment plan.