SUBMISSION BY e.tv (PTY) LIMITED ON THE SECOND DRAFT FREQUENCY MIGRATION REGULATIONS AND 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. Subsequently oral hearings were held..

1.3. e.tv made written submissions and an oral presentation regarding the draft regulations and the draft plan.

1.4. On 24 December 2012 ICASA again published two documents – the second draft radio frequency migration regulations ("the second draft regulations") and the radio frequency migration plan ("the migration plan").

1.5. ICASA invited interested parties to make comments on the second draft regulations and the migration plan. e.tv hereby makes its written submission and requests an opportunity to participate in any oral hearings held into the 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.

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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

1.6. e.tv notes that in publishing the second draft regulations and the migration plan, ICASA has, without any reasons or explanation, ignored many of the comments and submissions made by e.tv both in its written submissions and oral representations in relation to the draft regulations and the draft plan. For this reason, many of these submissions are repeated hereunder.

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. 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 these second draft regulations and the migration 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 not conducted an inquiry into the future spectrum requirements for broadcasting in relation to VHF and UHF

spectrum.

2.8. e.tv submits that the second draft regulations and migration 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 second draft regulations and migration 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 response to the draft regulations and draft plan, the National Association of Broadcasters ("NAB") made a written submission dealing with inter alia, the vacation by broadcasters of the 790MHz to 862MHz and 697Mhz to 790Mhz and submitted that no decision should be made by ICASA regarding the vacation of these bands prior to a comprehensive analysis by ICASA of the country's future broadcasting needs. e.tv, as a member of the NAB, stands by and repeats this submission. Additionally, e.tv submits that 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. e.tv refers the Authority to the detailed submissions made by the NAB which e.tv continues to support.

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 second draft frequency migration regulations and the migration 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 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 second 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 second draft regulations and migration 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 and still holds the expectation that it will be granted a minimum of a full multiplex after analogue switch-off. e.tv points out that it is the biggest user of the UHF band and ultimately the biggest contributor to the digital dividend.

3.2. The migration 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 migration plan for the reasons stated above and in the NAB submission in the relation to the draft migration plan, 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 second draft regulations and migration plan are promulgated in their current form, this will <u>not</u> 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 second draft regulations, together with the migration 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]

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; and
4.3.3. 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

[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.
[6] Section 1
[7] This is subject to section 34 dealing with a radio frequency plan.

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]

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

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[8] Section 4(1)(d)
[9] Section 4(2)(b)
[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.

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"**.

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.

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

[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)

5.7. 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 ….

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 which may be assigned, ceded or transferred.

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[20] Ibid at paragraph 85 (emphasis added)
[21] Ibid at paragraph 90 (emphasis added)
[22] Ibid at paragraph 99 (emphasis added)

5.10. By reason of the provisions of the Radio Frequency Spectrum Regulations of 2011 (“the spectrum regulations”), e.tv submits that a spectrum licence may be transferred. In particular, regulation 10(1)(a) – which allows for the transfer of a spectrum licence with ICASA’s approval – provides as follows: "Except with the approval of the Authority, no licensee must transfer a radio frequency spectrum licence."

5.11. Regulation 10 forms part of Part IV of the Spectrum Regulations, which deals with procedures for spectrum licensing and assignment. Entitled “Procedures in Respect of Transfers”, regulation 10 makes it plain that there are only very narrow grounds on which ICASA may refuse a transfer application. The bulk of regulation 10 sets out detailed procedures for the approval of transfers, with regulation 10(7) setting out the grounds upon which ICASA will not approve the transfer of a spectrum licence:

The Authority will not approve the transfer of a spectrum licence

a) Where the Licensee has been found to have contravened provisions of the Act, legislation, regulations or terms and conditions of the licence by the Complaints and Compliance Committee ("the CCC") of the Authority and has not complied with the order by the Authority in terms of section 17 of the ICASA Act, or

b) If such transfer will reduce or limit competition or

c) If such transfer will result in the reduction of direct ownership by HDIs.

5.12. Absent the applicability of any one of these three grounds, the

Spectrum Regulations contemplate the transfer of a spectrum licence conditional only upon compliance with the procedural requirements.

5.13. In the circumstances, the ECA read together with the relevant regulations recognizes 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 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

[23] 2002 (4) SA 768 (CC) at paragraph 51
[24] Subsections (5) through (9) deal expressly with land reform.

> acquisition and beneficial capital improvement of the property; and
>
> *(e)* the purpose of the expropriation.
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> (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;

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

[25] AJ van der Walt, *Constitutional Property Law* (Juta and Co. Ltd, Cape Town: 2011) at 107

[26] Ibid

[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)

> 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]

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]

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[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.

[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

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 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. Spectrum as an economic resource

7.1. The ICT Regulation Toolkit ("the toolkit"),[39] 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

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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.

[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] The ICT Regulation Toolkit is available at http://www.ictregulationtoolkit.org/en/Index.html. Module 5 is entitled "Radio Spectrum Management".

as an economic resource. In particular, it notes that spectrum "can be traded, in the sense that property rights can be assigned to it."[40]

7.2. In the part entitled "Defining Property Rights for Spectrum Trading",[41] the toolkit recognises that "[c]learly defined property rights are thus a precondition for efficient spectrum markets."[42] 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.

7.3. 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".

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

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[40] Part 1.2.1
[41] Part 5.8.1
[42] See Hazlett, "Assigning Property Rights to Radio Spectrum Users: Why Did FCC License Auctions Take 67 Years?", above note.

8. Conclusion

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

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

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

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

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

8.2. 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.

8.3. 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.

8.4. 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.

8.5. 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.

8.6. 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.

8.7. 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.

8.8. In conclusion, e.tv submits that:

8.8.1. 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,

8.8.2. The second draft regulations read together with the migration 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

14 February 2013