
**SUBMISSIONS BY e.tv (PTY) LTD TO ICASA'S HIGH LEVEL INQUIRY
INTO THE STATE OF COMPETITION IN THE ICT SECTOR**

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A. INTRODUCTION

1 On 20 March 2014, the Independent Communications Authority of South Africa (“ICASA”) gave *“notice of its intention to hold a high level inquiry into the state of competition in the Information and Communications Technology (ICT) sector in terms of s4B(1)(a) of the Independent Communications Authority of South Africa Act, Act No. 13 of 2000”* (“the ICASA Act”).¹ ICASA’s notice gave interested parties 60 working days to make written submissions *“in relation to the inquiry”*.

2 e.tv welcomes the opportunity to make these submissions. As a commercial free-to-air (“FTA”) television broadcaster, e.tv has long maintained that ICASA should examine the state of competition in the sector. e.tv is acutely concerned that trends in the television industry point to the decline of FTA television in the long-term – in particular independent, commercial FTA television. This is to the significant detriment of viewers and other consumers, and in particular has a profound impact on fairness and equality of access to broadcasting, leaving the majority of viewers subject to a deepening digital divide. The current regulatory framework fails to prevent these significant negative impacts in two main respects:

2.1 First, the current regulatory framework allows subscription television broadcasters (“pay-TV operators”) unfairly to weaken the FTA television broadcasting sector. This threatens the viability of the FTA television broadcasting sector.

2.2 Second, notwithstanding the current regulatory framework governing the

¹ General Notice 229 of 2014, *Government Gazette* No. 37456 (20 March 2014)

SABC, it continues to operate as a single commercial network of channels with no proper separation between its public and commercial divisions.

3 In e.tv's experience, commercial FTA television finds itself severely weakened under the current regulatory regime as it sits uncomfortably between these two behemoths:

3.1 A pay-TV sector which undermines the FTA sector as a whole in a manner that is anti-competitive, unfair and contrary to the public interest; and

3.2 An overly-commercialised public broadcaster which uses the resources of the public service division to compete with commercial FTA television in a manner that is anti-competitive, unfair and contrary to the public interest.

4 This is obviously of extreme concern to e.tv. But it should also be equally concerning to ICASA and the public. ICASA cannot achieve its objectives for the broadcasting sector without a vibrant and viable commercial FTA broadcasting component. Similarly, without a vibrant and viable commercial FTA broadcasting component, members of the public will be prejudiced – particularly those who are not in a position to subscribe to pay-TV.

5 e.tv therefore welcomes the opportunity to make these written submissions to ICASA. In doing so, e.tv identifies the ways in which the current regulatory framework threatens the viability of both publicly- and commercially-funded FTA television. It also deals with the consequences of this decline for audiences, and for the achievement of ICASA's objectives for the broadcasting sector. Thereafter, e.tv makes specific regulatory and legislative proposals designed to address these

concerns.

6 These written submissions thus cover the following issues in turn:

6.1 In section B, we provide a summary of e.tv's key submissions and recommendations;

6.2 In section C, we deal with ICASA's mandate with regard to the issues raised in this inquiry;

6.3 In section D, we provide a summary of some important features of the television broadcasting sector;

6.4 In section E, we set out e.tv's substantive concerns regarding the current state of competition in the television broadcasting sector, and recommend how such concerns should be addressed; and

6.5 In section F, we identify ICASA's powers that enable it to implement the proposals made by e.tv.

7 e.tv respectfully submits that it is essential that ICASA holds public hearings as part of the inquiry. Should ICASA do so, e.tv requests the opportunity to make oral representations in addition to making these written submissions.

B. SUMMARY OF e.tv's KEY SUBMISSIONS AND RECOMMENDATIONS

- 8 Broadcasting policy and regulation recognises that, in order for the objects in the ICASA Act, the Broadcasting Act 4 of 1999 (“the Broadcasting Act”) and the Electronic Communications Act 36 of 2005 (“the ECA”) to be achieved, a vibrant and viable FTA television broadcasting sector, including both public and commercial broadcasters, is important.
- 9 There are alarming indications that the FTA sector, and especially the commercial FTA sector, is facing significant challenges. In e.tv's view, many of these challenges arise from the relationship between the FTA and pay-TV sectors. In particular, the following four features of the South African television market are collectively having the effect of severely weakening the position of FTA television:
- 9.1 DStv's dominant share of pay-TV subscribers;
 - 9.2 the drift of FTA audiences to pay-TV systems;
 - 9.3 DStv's capture of TV advertising revenue, such that it is now the largest earner of TV advertising revenue in South Africa; and
 - 9.4 DStv's exclusivity in respect of premium content, including movies and sports.
- 10 ICASA is required – both by the Constitution and its legislative mandate – to promote competition in the broadcasting sector, and to ensure the achievement of various public interest objectives.

11 As we explain below, e.tv requests that ICASA urgently takes the following four steps to protect the position of the FTA television sector in general:

11.1 First, ICASA should recommend to the Minister that section 60(3) of the ECA be amended to introduce a requirement that pay-TV licensees are required to carry and pay for FTA channels. ICASA should similarly amend the Must Carry Regulations² to introduce a requirement that pay-TV licensees are required to carry and pay for FTA channels and to deal with the manner in which the FTA channels are carried by pay-TV licensees.

11.2 Second, ICASA should recommend to the Minister that section 60(4) of the ECA be amended to introduce an effective limit on the extent to which pay-TV platforms can earn advertising revenue.

11.3 Third, ICASA should amend the Sports Broadcasting Regulations³ to ensure that FTA television broadcasters are neither prevented from, nor hindered in, broadcasting national sporting events.

11.4 Fourth, ICASA should make regulations which prohibit pay-TV platforms from entering into exclusive agreements with community television broadcasters.

12 e.tv considers these four steps to be the bare minimum that ICASA should take in order to ensure the viability of the FTA television broadcasting sector as a whole.

² ICASA Must Carry Regulations, 2008, General Notice 1271, *Government Gazette* 31500 (10 October 2008).

³ Sport Broadcasting Services Regulations, Government Notice No. R. 275, *Government Gazette* No. 33079 (7 April 2010).

These steps would be to the benefit not only of e.tv, but also of the FTA broadcasting sector as a whole, including the SABC, and ultimately to viewers and the wider public.

- 13 e.tv considers that ICASA should also go further and promulgate additional regulations that are necessary to ensure the viability of the FTA television broadcasting sector as a whole, and to facilitate the ability of FTA broadcasters to compete fairly with pay-TV broadcasters. In e.tv's view, these should include regulations –

13.1 that mandate access – on fair, reasonable and non-discriminatory terms – to the set top boxes (“STBs”) of pay-TV operators with significant market power; and

13.2 limiting the pay-TV window in respect of movie rights to a maximum of 18 months, whereafter such rights must be available for FTA licensing.

- 14 In relation to the conduct of the SABC, we deal below with e.tv's significant concerns regarding the manner in which the SABC's public and commercial divisions are unfairly run as a single commercial network. This too is having an unfair impact on, and prejudicially affecting the viability of, commercial FTA television. In e.tv's view, ICASA must deal with this issue, and could do so in one of two ways:

14.1 If ICASA is of the view that the existing provisions of the Broadcasting Act, applicable regulations and the SABC's licence conditions are not sufficiently clear in respect of the SABC conduct concerned, ICASA should take the

necessary steps to amend the relevant licence conditions and regulations, and recommend that the Minister make appropriate amendments to the Broadcasting Act.

- 14.2 Alternatively, If ICASA is of the view that (as e.tv contends) the existing provisions of the Broadcasting Act, applicable regulations and the SABC's licence conditions are sufficiently clear in respect of the SABC conduct concerned, it should then refer the SABC's breach of these provisions to its Complaints and Compliance Committee ("CCC") for adjudication.

C. THE SCOPE OF THE INQUIRY AND ICASA’S MANDATE

15 ICASA’s inquiry is to be conducted in terms of section 4B(1)(a) of the ICASA Act.

Section 4B(1) provides as follows:

“[ICASA] may conduct an inquiry into any matter with regard to –

- (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 the 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.”*

16 The object of the ICASA Act, as set out in section 2, *“is to establish an independent authority which is to” –*

- “(a) regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society, as required by section 192 of the Constitution;*
- (b) regulate electronic communications in the public interest;*
- (bA) regulate postal matters in the public interest in terms of the Postal Services Act; and*
- (c) achieve the objects contemplated in the underlying statutes.”⁴*

17 Section 1 of the ICASA Act defines the *“underlying statutes”* to include the Broadcasting Act and the ECA.

17.1 Section 2 of the Broadcasting Act states that its object *“is to establish and develop a broadcasting policy in [South Africa] in the public interest”*. For

⁴ Emphasis added

that purpose, the Broadcasting Act's objects include the following which are of relevance to the inquiry insofar as television broadcasting services are concerned:

17.1.1 *“ensure plurality of news, views and information and provide a wide range of entertainment and education programmes”*;⁵

17.1.2 *“encourage investment in the broadcasting sector”*;⁶

17.1.3 *“ensure fair competition in the broadcasting sector”*;⁷

17.1.4 *“establish a strong and committed public broadcasting service which will service the needs of all South African society”*;⁸ and

17.1.5 *“encourage the development of local programming content”*.⁹

17.2 Section 2 of the ECA states that its primary object *“is to provide for the regulation of electronic communications in [South Africa] in the public interest”*. For that purpose, the ECA's objects include the following which are of relevance to the inquiry insofar as television broadcasting services are concerned:

17.2.1 *“promote competition within the ICT sector”*;¹⁰

⁵ Section 2(d)

⁶ Section 2(g)

⁷ Section 2(h)

⁸ Section 2(l)

⁹ Section 2(r)

¹⁰ Section 2(f)

- 17.2.2 *“promote the development of public, commercial and community broadcasting services which are responsive to the needs of the public”*;¹¹
- 17.2.3 *“ensure that broadcasting services, viewed collectively ... promote the provision and development of a diverse range of sound and television broadcasting services on a national, regional and local level, that cater for all language and cultural groups and provide entertainment, education and information”*;¹²
- 17.2.4 *“ensure that broadcasting services, viewed collectively ... provide for regular ... news services; ... actuality programmes on matters of public interest; ... programmes on political issues of public interest; and ... programmes on matters of international, national, regional and local significance”*;¹³
- 17.2.5 *“protect the integrity and viability of public broadcasting services”*;¹⁴
and
- 17.2.6 *“promote stability in the ICT sector”*.¹⁵

18 It is therefore clear that ICASA’s objectives include considerations of fairness, equality, and development in the wider public interest, as well as concerns of

¹¹ Section 2(r)

¹² Section 2(s)(i)

¹³ Section 2(s)(ii)

¹⁴ Section 2(t)

¹⁵ Section 2(z)

competition and efficiency.

19 ICASA is therefore statutorily obliged to promote competition in the broadcasting sector, and to ensure the achievement of various public interest objectives in relation to the broadcasting sector. As is made clear by the submissions that follow, these requirements are in fact integrally linked.

20 Public interest objectives for the sector (which include notions of fairness and equality in broadcasting) are a central feature of the policy and regulatory environment that has governed the South African broadcasting sector since 1994. These goals were compellingly articulated in the White Paper on Broadcasting Policy published in 1998 which stated that:

*“It is vital that our emerging broadcasting system is imbued with a strong sense of public interest. These public interest values of access, diversity within the framework of national unity, equality, independence and unity are pervasive”.*¹⁶

21 What the White Paper recognised was that, without the application of considerations such as fairness and equality, the content that is broadcast, and the terms on which these broadcasts are available, would be driven by purely commercial factors. This could include providing broadcasts (or certain types of broadcasts) only to those with the ability to pay subscription fees, thereby excluding the vast majority of South Africans.

22 Moreover, the White Paper was at pains to emphasise the critical role to be played

¹⁶ Page 14, White Paper on Broadcasting Policy, Department of Communications, May 1998

by commercial FTA broadcasters such as e.tv. It specifically emphasised that subscription broadcasters were not in a position to play this role.

“The Government wishes to create an environment whereby the private free-to-air broadcasting sector can meet the important responsibilities that it is expected to play while being able to attract the investment needed to flourish. It recognises that the free-to-air sector of private broadcasting can meet public policy goals in a way that the subscription sector cannot. ...

...

Private free-to-air television has now been introduced to South Africa. Free-to-air television must have priority over subscription services as it is better able to serve the widest number of South Africans. Private television is particularly expected to play a key role in the provision of South African drama, in providing a new source of national and provincial news and other information programming to the general public, and in providing programming for children. It is expected to extend services to all of South Africa over a reasonable time frame.”¹⁷

23 There can accordingly be no question that, in order for the objects in the ICASA Act, the Broadcasting Act and the ECA to be achieved, a vibrant and viable FTA television broadcasting sector, including both public and commercial broadcasters, is critical.

24 This is because –

24.1 FTA broadcasters broadcast free-of-charge to the consumer, thereby ensuring that both rich and poor have access to the same news, views and information;

24.2 FTA broadcasters must broadcast nationally, extending their signals to

¹⁷ Page 21, White Paper on Broadcasting Policy, Department of Communications, May 1998

areas which are not necessarily economically viable, so that the geographic location of the viewers – whether urban or rural – is no impediment to their receiving television services;

- 24.3 FTA broadcasters must broadcast a range of public interest programming, much of which is not profitable and in respect of which similar obligations are not imposed on pay-TV broadcasters. This programming includes local content, African languages, local drama, children’s programmes, factual programming and news, thereby ensuring that viewers receive a wide range of programming. FTA broadcasters have a complex set of quotas to fulfil in respect of various programming genres. These exist in addition to the local content quotas which prescribe a minimum amount of local content. We attach as Annexure A, a list of these extensive obligations imposed on e.tv.
- 25 To date, the goal of creating a vibrant and viable FTA broadcasting sector has been partially successful. Despite the wide reach of pay-TV (and DStv in particular), the majority of the 13.1 million South African households with television sets are reliant on FTA broadcasters for access, and the FTA broadcasters provide audiences with a diverse range of programming.
- 26 However, there are now alarming indications that the FTA sector, and especially the commercial FTA sector, is facing significant threats. This is primarily due to the way in which the pay-TV sector has conducted itself. Given the overwhelming market dominance of DStv, as well as the weakness of StarSat, these submissions largely have Multichoice Africa (“MCA”) in mind when referring to the pay-TV sector.

27 These submissions focus on aspects of conduct by the pay-TV sector that require urgent redress from a regulatory perspective. If ICASA does address these issues as e.tv proposes, that will go a significant way towards strengthening the viability of the FTA sector and protecting it against unfair competition and anti-competitive practices.

28 In addition, these submissions address the conduct of the SABC that is also having a negative impact on the viability of commercially-funded FTA television. This primarily involves the SABC's conduct in operating as a single commercial network of channels, with no proper separation between its public and commercial divisions.

29 The consideration by ICASA of all of these issues is in line with paragraph 3 of the ICASA notice, which notes that the scope of the inquiry includes a consideration of the following issues:

29.1 *"The current state of competition in the ICT sector as a whole"*,¹⁸

29.2 *"Challenges to creating a level playing field across platforms"*,¹⁹ and

29.3 *"The tension between consolidation and plurality in the ICT sector"*.²⁰

¹⁸ Paragraph 3.1

¹⁹ Paragraph 3.2

²⁰ Paragraph 3.3

D. IMPORTANT FEATURES OF THE TELEVISION BROADCASTING SECTOR

30 In this section, we highlight the following important features of the South African television broadcasting sector:

30.1 MCA's dominant share of pay-TV subscribers;

30.2 The audience shift from FTA to pay-TV;

30.3 MCA's share of advertising revenue;

30.4 MCA's enjoyment of exclusive rights in respect of content; and

30.5 The relationship between the SABC's two operational divisions.

MCA's dominant share of pay-TV subscribers

31 The South African pay-TV market is made up as follows:

31.1 DStv, the pay-TV satellite platform owned by MCA, offers ten different packages (also known as bouquets) covering selections from over 100 channels, with monthly subscription fees ranging from R29 to R665.²¹ DStv has over 4.4 million subscribers in South Africa, paying an average monthly subscription fee of about R307.²²

31.2 M-Net Terrestrial, which is also owned by MCA, offers an analogue terrestrial pay-TV service at R265 per month, which includes the M-Net

²¹ See <http://selfservice.dstv.com/get-dstv/compare-packages/>

²² As at March 2013. See "DStv – more subscribers, more money", available at <http://mybroadband.co.za/news/broadcasting/81013-dstv-more-subscribers-more-money.html>. See also http://www.financialresults.co.za/2013/naspers_ir2013/index.php.

channel (also broadcast via satellite on DStv channel 101) in addition to the three SABC channels and e.tv. M-Net Terrestrial has about 51,000 subscribers.²³

31.3 On Digital Media (Pty) Ltd (“ODM”), the only pay-TV competitor to MCA, offers a satellite pay-TV service called StarSat which covers a selection of over 100 channels, at monthly subscription rates of R99 to R199 (depending on the package chosen), plus add-ons for additional Chinese or Indian content. StarSat was relaunched from its predecessor TopTV in October 2013, and currently has around 130,000 subscribers.²⁴

32 Table 1 below summarises the number of subscribers and the monthly subscription fees for each of the pay-TV platforms mentioned above:

Table 1: Number of subscribers and price range by subscription platform²⁵

Transmission platform	Method of transmission	Number of subscribers	Price range
DStv	Satellite	4,451,000	R29 - R665
M-Net Terrestrial	Analogue terrestrial	51,000	R265
StarSat	Satellite	130,000	R99 - R199 ²⁶
TOTAL		4,632,000	

33 MCA is plainly the overwhelmingly dominant entity in the pay-tv sector. On the basis of DStv alone, 96.1% of subscribers fall under MCA. When M-Net is

²³ No. households: AMPS Jan-Dec 2013

²⁴ No. households: AMPS Jan-Dec 2013.

²⁵ Public information obtained from company websites

²⁶ Plus optional add-ons for Chinese (R199) and/or Indian (R99) content.

included, the MCA share of subscribers rises to 97.2%.

34 Such high levels of concentration are highly problematic.

34.1 High concentration means that pay-TV operators are disinclined to offer fair payment for content, and are also inclined to engage in exclusionary practices. In any market, these incentives might result in adverse outcomes, and might prevent regulators from facilitating effective competition and other public interest objectives. That is the case in South Africa, as explained below.

34.2 In contrast, in a market with low concentration, if each of several pay-TV platforms has a significant base of subscribers, and there are switching costs between using different platforms (such as purchasing a new STB, or re-directing a satellite dish), then each platform may have substantial ability to extract value from a given channel, even if that channel is also licensed to other, competing, platforms. Competition between platforms would however still take place for new subscribers that have not yet committed to a particular broadcasting platform, and this competition would spur each platform on to offer a better price, better quality, and better service.

34.3 But if there is only one substantial pay-TV platform, then that platform will have reduced incentives to compete and innovate in these areas. Moreover, if there is not already a plurality of platforms, each with their own significant subscriber base, a dominant platform will have a greater ability and incentive to maintain the status quo. Such a dominant platform will have a greater ability, because any channel producers will have very limited

outside options to distribute their content to viewers (and so are likely to agree to more onerous terms demanded by the dominant platform); and greater incentives, because the dominant platform additionally benefits from maintaining a position in which it has limited competitive constraints in respect of price, quality and service.

- 34.4 In the case of a single dominant pay-TV broadcast platform, such as currently exists in South Africa, channel producers will not have any prospect of significant advantages in licensing any other platforms, and accordingly are more willing to grant such exclusivity to MCA. Moreover, where there is only a single dominant platform with access to a significant captured base of subscribers, then that platform is able to exert additional buyer power against any channel producer. This results in channel producers receiving lower payments, and/or accepting more onerous conditions (such as extensive exclusivity provisions), than would have been the case if there were more platforms.
- 35 In summary, the high concentration amongst pay-TV platforms in South Africa reduces the willingness of pay-TV platforms to pay for popular content (such as FTA channels).
- 36 This is so not only because DStv faces little credible competition for new viewers, but also because the FTA channel producers face no alternative means to target a large (and attractive) audience that is already tied in to this broadcasting platform. This affects the willingness of DStv to pay fees to FTA channel producers, and also its willingness to broadcast those FTA channels at a high

quality, and with an attractive position on the Electronic Programme Guide (“EPG”). It also enables DStv to extract concessions from channel producers (such as community television broadcasters) that would ordinarily be contrary to their interests and mandate, by demanding exclusivity in exchange for carriage.

37 This is not merely a theoretical problem. On the contrary, e.tv’s sister company Platco Digital has been informed by various community broadcasters that they are not permitted to be carried on its direct-to-home (“DTH”) free-to-view satellite platform,²⁷ because their carriage agreements with MCA do not permit carriage on platforms other than DStv.

38 A further issue is the vertical integration of MCA, which acts both as a channel producer and a broadcast platform. This reduces MCA’s incentives to offer competing channel producers equivalent access to the DStv broadcasting platform, and also reduces MCA’s incentives to offer its channels to other broadcast platforms on fair and non-discriminatory terms.

39 As explained below, regulatory interventions are required to offset the impact that DStv’s dominant share of pay-TV subscribers is having on the television market.

The audience shift from FTA to pay-TV

40 At the time MCA launched DStv in 1995, the Independent Broadcasting Authority (“the IBA”) had only been operating for a year. As such, it had not yet had the

²⁷ Known as Openview HD

opportunity to develop policy or regulation in relation to pay-TV or satellite broadcasting. While the ECA and its regulations now impose certain limitations on pay-TV licensees,²⁸ the sector as a whole remains significantly unregulated.

41 In contrast, as already explained above, FTA television broadcasting licensees are subject to a wide range of public service obligations. Their channels are also available on the DStv platform, for which they are not compensated by MCA. Ironically, these FTA channels are the most-watched channels on DStv.²⁹

42 A related – but separate – question is whether viewers are primarily watching television on a FTA basis or via a pay-TV platform (i.e. via a pay-TV STB).

42.1 The last decade has seen a marked decline in the number of households which watch their television on an FTA basis.

42.2 In particular, over the five-year period from 2007 to 2012, the share of households which watch television on an FTA basis has dropped from 87% to 69%.³⁰

42.3 Over the same period, pay-TV subscriptions have recorded above-inflation increases on average.³¹

²⁸ These regulations are the Sport Broadcasting Services Regulations, 2010 (Government Notice No. R. 275, *Government Gazette* No. 33079 (7 April 2010)); the Subscription Broadcasting Services Regulations, 2006 (General Notice 152 of 2006, *Government Gazette* No. 28452 (31 January 2006)); and the ICASA Must Carry Regulations, 2008 (General Notice No. 1271, *Government Gazette* No. 31500 (10 October 2008)).

²⁹ AMPS, June 2012 – June 2013

³⁰ AMPS

³¹ With effect from 1 April 2014, the monthly cost of DStv Premium, the operator's top-end bouquet, increased by an above-inflation 6,4% increase. The price of the cheaper Compact bouquet rose by 7,3%. Prices for the basic DStv Access and EasyView bouquets remained unchanged.

- 42.4 Forecasts point to the likelihood that a majority of households in South Africa will subscribe to pay-TV by 2018.³²
- 43 A number of factors have encouraged this audience shift:
- 43.1 Rising income levels and a willingness to spend on entertainment products, together with highly subsidised pay-TV STBs and cheap lower-tier pay-TV bouquets, put pay-TV in reach of a larger section of the consumer market;
 - 43.2 Consumer demand for multi-channel television (until the launch of Openview HD in late 2013, only pay-TV operators offered a digital multi-channel bouquet);
 - 43.3 Consumer demand for high definition (“HD”) television (until the launch of Openview HD in late 2013, only pay-TV operators offered HD channels);
 - 43.4 Increasing amounts of content (both premium and other) being made exclusive to pay-TV, meaning that consumers cannot see such content anywhere else; and
 - 43.5 Shifts in the licensing of broadcasting rights for certain content like premium movies, which have had the result that the pay-TV windows are much longer and FTA audiences cannot see these movies until they have been exclusive to pay-TV for up to three years (and sometimes even longer).
- 44 From ICASA’s point of the view, DStv’s exceedingly high share of the viewer

³² Farncombe analysis undertaken on behalf of e.tv; PwC analysis 2013

market should raise significant concerns for two reasons:

- 44.1 First, it gives rise to market distortions and inefficiency. As stated previously, a high share of pay-TV in comparison to FTA means that FTA channel producers have no alternative means to target the large and most attractive audience that is already tied in to the DStv broadcasting platform. This affects the willingness of DStv to pay fees to FTA channel producers, and also to broadcast those FTA channels at a high quality, and with an attractive position on the EPG. It also enables DStv to impose onerous conditions (e.g. exclusivity requirements) on FTA channel producers in circumstances where such producers would not ordinarily agree to such terms. In the future it might well also affect the willingness of DStv to carry the FTA channels at all.
- 44.2 Second, it causes outcomes that prevent ICASA from meeting its public interest objectives. As the migration of viewers to pay-TV platforms leads to revenue losses for FTA broadcasters, they are less able to invest in and fund their public service obligations. Likewise, under revenue pressure, FTA broadcasters will be less able to invest in quality content, leaving those viewers that remain reliant on FTA broadcasts excluded from quality programming – thereby exacerbating the digital divide.
- 45 Accordingly, ICASA should consider the outcomes caused by the shift of audiences from FTA to pay-TV, and develop an appropriate regulatory response which ensures the long-term viability of FTA television. FTA television remains the only platform accessible to a large portion of the population and its viability lies at

the heart of ICASA's public interest objectives.

MCA's share of advertising revenue

46 We have shown that MCA is in a dominant position in the pay-TV sector, and that FTA audiences are increasingly electing to watch television through pay-TV systems. We now consider the impact that these trends are having on the advertising market.

47 At the outset, it should be noted that commercial FTA television is **solely** reliant on advertising income. On the other hand, other FTA broadcasters, such as community television and the public broadcaster, receive donations, government grants, and in the case of the SABC, licence fee income. Pay-TV operators draw subscriptions as well as advertising income.

48 Broadcasting policy acknowledges these differing revenue streams, while asserting that FTA broadcasting should have a primary claim to advertising:

“Revenues for private broadcasting should come primarily from advertising and sponsorships for FTA broadcasting whereas the primary source of revenues for subscription services should come from subscription fees.”

“Free to-air services must have access to revenues that are sufficient to meet their public service obligations”.³³

49 Notwithstanding these policy objectives, the reality is that a single pay-TV

³³ White Paper on Broadcasting Policy, 1998

operator, DStv, now generates the largest advertising revenue among all broadcasters.

49.1 As Figure 1 below shows, DStv has doubled its advertising revenues over a five-year period (from Q3 2008 to Q2 2013). In doing so, DStv has overtaken SABC as the largest advertising revenue generator among television broadcasters.

49.2 While the SABC and e.tv saw some increases in their advertising revenues over this period, DStv has significantly outpaced the SABC and e.tv.

49.3 It is noteworthy that DStv's growth has occurred in circumstances where the growth of the advertising cake itself has been flat. Over the past two fiscal years, advertising spend has grown only 5% (year ending April 2013) and 2% (year ending April 2014).³⁴

50 DStv does not require its advertising revenue in order to be profitable – this is merely “gravy” on top of a highly profitable subscription business.

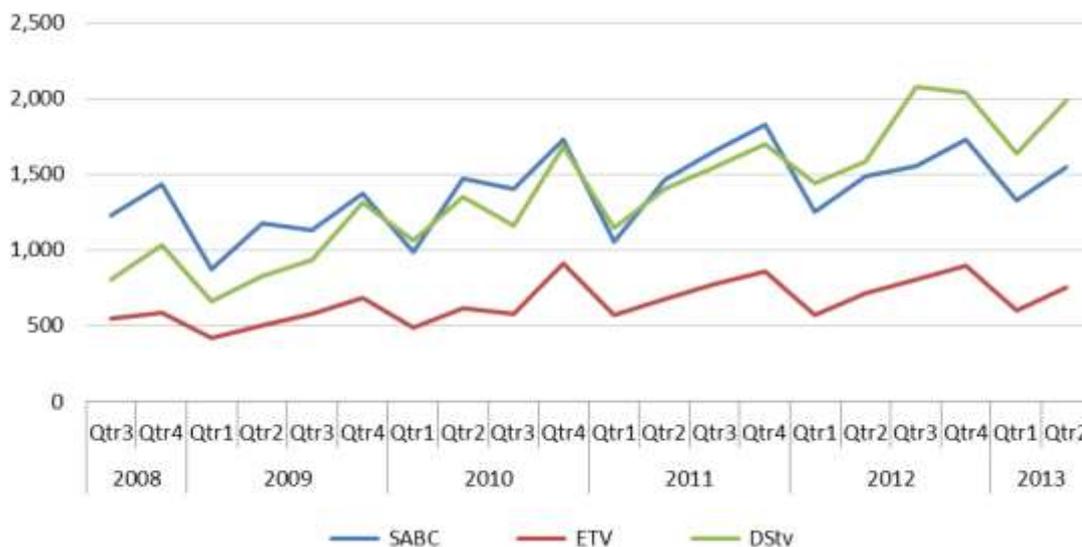
50.1 In the financial year ending 2012, MCA made approximately R13,4 billion from subscriptions in South Africa, and drew R1,9 billion from advertising.

50.2 In 2013, MCA made R16,7 billion in subscription revenue, and R2,1 billion from advertising.³⁵

³⁴ Nielsen AdDynamix

³⁵ Source: MCA Annual Reports, 2012 and 2013

Figure 1: Advertising revenues by broadcaster, Q3 2008 – Q2 2013 (R millions)³⁶



51 The primary regulatory concern which flows from the above is clear: as the dominant pay-TV operator is now the largest advertising revenue generator, how is FTA television to remain viable in the long-term, and to continue to deliver on its public service obligations?

52 Decisive regulatory intervention on access to advertising revenue is urgently required to secure the long-term viability of the FTA sector.

MCA's enjoyment of exclusive rights in respect of content

53 A further feature of the South African broadcasting market which poses a threat to FTA is the impact of MCA's enjoyment of exclusive rights in respect of content.

54 With regard to movies, MCA has secured the First Pay-TV Window rights to the

³⁶ Source: RBB Analysis of AdDynamix data – total advertising sold June 2008 – July 2013

movies of all major Hollywood film studios, including Warner Bros, Universal, Sony, Fox, Disney and Paramount. By “First Pay-TV Window”, we refer to that period during which a pay-TV operator – in terms of its exclusive agreements with the major film studios – is the only entity entitled to broadcast new movies on television.³⁷

55 With regard to sports, MCA has secured the exclusive rights to broadcast live a number of high profile events, including –

55.1 in football, the English Premier League (“EPL”), the Union of European Football Associations (“UEFA”) Champions League and the Fédération Internationale de Football Association (“FIFA”) World Cup;

55.2 in rugby, the Super Rugby, the Vodacom Cup, and the Heineken Cup;

55.3 in cricket, the Indian Premier League (“IPL”);

55.4 in motorsports, the Formula One and MotoGP; and

55.5 in basketball, the National Basket Association (“NBA”) of the USA.

56 The National Integrated ICT Policy Green Paper (“the Green Paper”), which was published by the Minister on 24 January 2014,³⁸ notes that the “[p]romotion of fair competition is critical to ensuring the viability of the broadcasting system as a whole”.³⁹ With this in mind, the Green Paper expressly recognises access to

³⁷ Such movies would already have been screened in movie theatres.

³⁸ Government Notice No. 44, *Government Gazette* No. 37261

³⁹ Paragraph 8.10, page 67

premium content as an issue to be addressed when considering fair competition in the television sector.⁴⁰

“Access to premium content such as sports or movies is crucial to the success of platforms such as free-to-air, subscription and mobile television. Competition issues may arise when buyers acquire exclusive rights to such premium content that effectively lock out competition. Given convergence, there is also the potential for rights bundling across platforms Ultimately, this may deprive audiences of choice and quality. The way rights are bundled and the period of such exclusivity, are often means through which these issues are addressed by regulatory authorities”.

57 Premium content, which is ordinarily licensed by rights holders on an exclusive basis, is generally understood to be the main driver of increased pay-TV subscriptions. This is explained in a 2008 report issued by the UK Office of Communications (“Ofcom”):⁴¹

“Our focus in this document is on that content which is likely to be most effective in driving pay TV subscriptions. This content must have two characteristics: a significant appeal to a broad audience, and limited availability via free-to-air TV channels. Content which has a broad appeal, but which is widely available free-to-air ... is unlikely to drive pay TV subscriptions, since consumers are unlikely to pay a significant premium to watch programmes similar to those which they can already watch for free. We identify two types of content which combine broad audience appeal with a high degree of exclusivity to pay TV: live top-flight sports and first-run Hollywood movies.”

58 Where there is only one substantial channel producer of premium content, that channel producer will have reduced incentives to compete and innovate. This is the case in South Africa with MCA’s SuperSport in respect of premium sport.

⁴⁰ Ibid (emphasis added)

⁴¹ “Pay TV second consultation: access to premium content”, 30 September 2008 (available at http://stakeholders.ofcom.org.uk/binaries/consultations/second_paytv/summary/condoc.pdf), paragraph 3.1, page 28 (footnote omitted). In its report, Ofcom defined “top-flight sports” to include “international matches or matches from the top national sports leagues”, and “first-run movies” as “movies that are being shown for the first time on TV” (at footnote 8)

Moreover, where there is not already a plurality of channel producers actively competing to present similar content types, a dominant channel producer will perceive an additional benefit from maintaining the status quo, and excluding an actual or potential rival channel producer. Absent regulatory intervention, this will result in the dominant channel producer negotiating a more restrictive contract that might have been negotiated by one of several producers negotiating for similar content.

59 Such high concentration results in less competition for sports and movie content rights, and less competition in regard to other factors such as presentation, price, quality and service levels. Moreover, such high concentration provides the dominant channel producer with an additional incentive to exclude actual and potential competitors. This is precisely what has occurred in the South African broadcasting sector.

60 This exclusionary conduct occurs, for example, where the dominant party –

60.1 prevents certain content from being aired; or

60.2 bids for rights that the channel producer is unable to exploit fully, whether legally, technically or for some other reason.

61 Again, this is precisely what has occurred in the South African broadcasting sector. e.tv's recent experience with the rights to certain soccer games that fall under the banner of the UEFA is particularly illustrative of the difficulty. The UEFA example illustrates the move of premium content away from free TV to pay-TV, and a corresponding increase in the amounts paid by pay-TV broadcasters for such

content. This has the effect of pricing FTA operators out of the market and limiting the extent to which the FTA rights can be exploited:

61.1 In 1999, e.tv acquired the rights from UEFA to broadcast Champions League football matches. Its ability to do so provided e.tv with a unique free offering of premium football in circumstances where international football is increasingly unavailable on a free-to-air basis. Accordingly, the inclusion of this content expanded the range of options and choice to FTA TV viewers (particularly viewers who are unable to afford high cost subscriptions), and enabled e.tv to reflect its responsiveness to customers, thereby enhancing its brand. Without a sports offering, a channel is weakened in the mind of both viewers and advertisers. e.tv's ability to broadcast UEFA football games on weekdays has, until now, allowed it to attract audiences that would ordinarily only watch pay-tv to access sport content. It also plays an important role in generating advertising revenues from a male-biased audience which comprises a significant portion of the target market for advertising.

61.2 In 2004, UEFA increased the number of games aired and e.tv did not have enough capacity on the channel to broadcast all the extra games. Accordingly, e.tv sub-licensed those games to MCA's subsidiary, SuperSport.

61.3 In the next round of tenders, UEFA granted SuperSport the licence to broadcast Champions League games, but included a requirement that MCA sub-licence at least two games to e.tv as a broadcaster. When the games were being sub-licensed from Supersport, e.tv started having to pay a

premium for the licence.

- 61.4 In the most recent round of tenders, SuperSport has been awarded exclusive English and Portuguese-language media rights for the 2015–18 UEFA Champions League and UEFA Europa League throughout Sub-Saharan Africa, as well as non-exclusive French-language media rights. Notably, SuperSport has also purchased the FTA rights to broadcast in both South Africa and the rest of Africa. The fact that SuperSport acquired the exclusive FTA rights (in circumstances where MCA is not even an FTA broadcaster) means that, even though it cannot use the FTA rights itself, SuperSport now has total control over whether, and to what extent, the FTA broadcasters can sub-licence these rights from it.
- 62 This experience illustrates how e.tv has been excluded from competing for premium sports rights. The effects of these ways of tying up premium sports content is exacerbated by the extended periods of exclusivity, which range from three to five years.
- 63 Moreover, in the case of a vertically integrated company such as MCA (which acts both as a channel producer and a broadcast platform), there is little incentive for it to offer –
- 63.1 competing channel producers equivalent access to the DStv broadcasting platform; and
- 63.2 its channels (such as its Supersport channels) to other broadcast platforms – whether pay-TV or free-to-view – on fair and non-discriminatory terms.

64 Regulatory interventions are required to address issues arising from the highly concentrated market structure in respect of access to premium content, at both a producer and broadcaster level.

Relationship between the SABC's two operational divisions

65 The final feature of the television broadcasting sector that requires particular consideration concerns the SABC, rather than the pay-TV sector. In particular, what requires consideration is the relationship between the SABC's two operational divisions.

66 The Broadcasting Act requires the SABC to consist of two separate operational divisions: a public service division, and a commercial service division. SABC1 and SABC2 are part of the public service division; SABC3 is part of the commercial service division.

67 These divisions are required to be administered separately, with a separate set of audited financial statements being prepared in respect of each of them. Yet in practice, the SABC treats its three television channels – two of which fall under the public service division and the third under the commercial service division – as part of a single network.

68 The SABC's three FTA channels effectively operate as a single dominant commercial network. They do so in at least the following respects:

68.1 sharing programming;

68.2 adopting complementary scheduling;

68.3 cross-promoting programmes; and

68.4 jointly selling advertising.

69 The effect of this is that there is no fair competition between the SABC's commercial division and e.tv. Instead, the playing field is inappropriately skewed in the SABC's favour. The public resources which ought to be ring-fenced for the use of the SABC public service division are instead being utilised in substantial part to protect and sustain the SABC's commercial division.

70 This is plainly unfair and inappropriate from the point of view of e.tv. Moreover, and critically, it is also at odds with the SABC's duties and responsibilities to the public. The public resources concerned were intended to be used for public service broadcasting – yet in substantial measure this is not what is occurring.

71 Intervention by ICASA is therefore required to ensure that there is a meaningful separation of the public and commercial divisions of the SABC.

E. e.tv's MAIN SUBSTANTIVE CONCERNS AND PROPOSALS

72 Having considered the important features of the South African broadcasting landscape, these written submissions now focus on e.tv's main substantive concerns and its proposed regulatory interventions to address these.

73 We deal with the following issues in turn:

73.1 Must carry, must pay obligations;

73.2 Access to advertising revenue;

73.3 Access to premium content, particularly national sporting events;

73.4 Access to community television channels;

73.5 Additional regulations to ensure the viability of FTA broadcasters; and

73.6 The conduct of the SABC in respect of the separation of its two operational divisions.

Must carry, must pay obligations

74 We have referred earlier to the four regulatory interventions that are urgently needed to protect the viability of the FTA broadcasting sector in general. The **first** of these interventions relates to the introduction of must carry, must pay obligations in respect of the pay-TV sector and would be to the benefit of both e.tv and the SABC.

75 As shown earlier, South African FTA audiences are increasingly electing to view

television through DStv's pay-TV system. While audiences still watch FTA channels, it is detrimental to FTA channels to have the access to their audience effectively controlled by the pay-TV operator.

76 This is because the pay-TV operator has its own channels on the platform which compete directly with the FTA channels for viewership and revenue. In these circumstances, the pay-TV operator has an incentive to promote its own channels above the FTA channels, for instance in terms of EPG position and in terms of the quality of broadcast. As the FTA channels have no alternative means to target the large and attractive audience that is already tied in to the DStv broadcasting platform, they are required to accept the carriage conditions determined by the pay-TV operator or face losing access to that audience completely.

77 The regulatory framework currently administered by ICASA only addresses one aspect of carriage: the obligation on pay-TV operators to *“carry, subject to commercially negotiable terms, the television programmes provided by a public broadcast service licensee.”*⁴² Pay-TV operators are not required to carry the programmes provided by commercial FTA broadcasters. In practice, this means that the current must carry obligation applies in respect of three of the four national FTA channels: SABC1, SABC2, and SABC3. Only e.tv is excluded.

78 In addition, in respect of those channels that pay-TV operators are required to carry, there is no regulation of the terms of carriage, including commercial terms.

⁴² In terms of section 60(3) of the ECA and the Must Carry Regulations, 2008 (General Notice No. 1271, *Government Gazette* No. 31500 (31 October 2008))

These are simply left to the parties to negotiate, in the absence of any legislative guidance. This clearly places the FTA broadcasters in an invidious position.

79 At present, over 24% of e.tv's audience watches the channel exclusively via the various bouquets of DStv, as their default system of convenience and choice. As DStv further entrenches itself as the default platform of choice for multi-channel broadcasting, it is highly unlikely that consumers will migrate from this platform if a particular FTA channel was no longer carried by it. In other countries, it has been acknowledged that – in the absence of appropriate regulation – this gives the dominant broadcasting platform the opportunity to extract “*economic rents*” from the channel provider.

80 After having considered the position in other countries, e.tv submits that to address this, the retransmission of FTA channels should be subject to regulation which ensures that –

80.1 there is an obligation on leading pay-TV platforms to carry not only the public broadcasting service (“PBS”) channels, but also all leading FTA channels;

80.2 retransmission is accompanied by an obligation on the pay-TV platform to pay a fee to the FTA channel; and

80.3 pay-TV platform owners pick up the additional costs arising from the carriage of the FTA channels on their platforms.⁴³

⁴³ These are the costs of retransmission.

81 South Africa's regulatory framework in this regard – made up of section 60(3) of the ECA and the Must Carry Regulations – is much weaker than that which exists in other countries and is inadequate:

81.1 Section 60(3) only requires ICASA to *“prescribe regulations regarding the extent to which subscription broadcast services must carry, subject to commercially negotiable terms, the television programmes provided by a public broadcast service licensee”*; and

81.2 The Must Carry Regulations,⁴⁴ which purport to *“[p]rovide for terms and conditions under which [pay-TV] operators will carry the programmes of the [SABC]”*⁴⁵ and to *“[d]etermine the transparent, equitable and reasonable terms and conditions under which the [SABC] may offer its programmes to [pay-TV operators]”*,⁴⁶ only impose the following substantive obligations on pay-TV operators:⁴⁷

81.2.1 Subject to regulation 5, which deals with exemptions,⁴⁸ all pay-TV operators must carry *“[a]ll the television programmes comprising a channel and broadcast by [the SABC] as part of its broadcasting service”*;⁴⁹

81.2.2 These channels must be simulcast *“without any alteration”*;⁵⁰

⁴⁴ Made in terms of section 4 of the ECA, read with section 60(3)

⁴⁵ Regulation 2(a)

⁴⁶ Regulation 2(b)

⁴⁷ The regulations also impose certain procedural requirements. In particular, regulation 8 requires each pay-TV operator to lodge a copy of its agreement with the SABC within 30 days of signature.

⁴⁸ For pay-TV operators that offer 29 or fewer channels on their platforms.

⁴⁹ Regulation 3, read with regulation 4(1)

⁵⁰ Regulation 7(2)

81.2.3 Whilst all of the SABC's current channels must be carried,⁵¹ its public service channels must be prioritised when new channels are added,⁵² and

81.2.4 While pay-TV operators are responsible for the costs of carriage,⁵³ the SABC may not charge a retransmission fee,⁵⁴ and is – in addition – responsible for the costs of transmitting the broadcast signal to the pay-TV operator in question.⁵⁵

82 e.tv submits that there is no rational basis for section 60(3) to distinguish between the SABC on the one hand and the only other national FTA broadcaster – e.tv – on the other. In addition, there is no good legal or policy reason why the Must Carry Regulations should not provide a regulatory framework within which the parties to a Must Carry agreement are able to negotiate "*equitable and reasonable terms and conditions*". We deal with terms of carriage below.

83 Put simply, e.tv submits that there is a need to regulate the manner in which, and the extent to which, FTA channels are re-transmitted by pay-TV operators. In e.tv's view, this would entail the imposition of must-carry, must-pay obligations on pay-TV operators – that is, an obligation to carry the channels coupled with an obligation to pay re-transmission fees.

⁵¹ Subject to the provisions of regulation 4(5)

⁵² Regulation 4(7)

⁵³ Regulation 4(4)

⁵⁴ Regulation 6(1)

⁵⁵ Regulation 7(1)

84 A must carry obligation on its own is however insufficient to address the threat to the FTA broadcasting sector as whole. There is also a clear need to legislate the payment of retransmission fees by pay-TV operators to FTA broadcasters. FTA channels will only be able to remain free for all South Africans, and of sufficient quality, if such broadcasters are able to receive the fair value of their channels from those who retransmit them to enhance the value of their own platforms. There is no reason why DStv should be able to benefit from carrying the SABC and e.tv channels without payment.

85 e.tv submits that fair value may be measured by objective factors such as the content costs of the FTA channel, the contribution such channel makes to the pay-TV operator's service (as reflected by the viewership and revenue performance of the pay-TV operator generally) and the value the platform brings to the channel, in terms of the ability to earn advertising revenue.

86 It is for these reasons that e.tv proposes that ICASA should recommend to the Minister that section 60(3) of the ECA be amended to introduce a requirement that pay-TV licensees are required to carry and pay for FTA channels. In particular, section 60(3) should be amended to read:

“The Authority must prescribe regulations requiring [regarding the extent to which] subscription broadcast services [must] to carry and pay for, subject to commercially [negotiable] reasonable terms, the television programmes provided by [a public] individual free-to-air broadcast service licensees.”

87 Linked to this, ICASA should amend the Must Carry Regulations to reflect a must carry, must pay obligation in respect of FTA channels. This would complement the proposed amendments to section 60(3) of the ECA.

87.1 For example, the amended Must Carry Regulations should expressly deal with “*commercially reasonable terms*” for such carriage, including the basis upon which parties are required to negotiate the quantum of retransmission fees.

87.2 Moreover, whatever approach is ultimately taken on the introduction of a must carry, must pay approach, the Must Carry Regulations should be amended to deal with the following four issues that other jurisdictions have addressed to ensure that FTA broadcast channels are not marginalised by the pay-TV operators which carry them:

87.2.1 Tiering: pay-TV operators are required to carry FTA channels on all tiers of the platform. In the case of DStv, this means a requirement that the FTA channels are carried on all ten of the pay-TV platform’s packages (or bouquets).

87.2.2 Full reach: pay-TV operators are required to ensure that the FTA channels are viewable on all devices which support the particular subscription service provided that the FTA broadcaster concerned has cleared the necessary rights for such devices.

87.2.3 Signal quality and pass-through of programme-related data: a pay-TV operator must ensure that its subscription service does not materially degrade the quality of any FTA broadcaster’s signal, and must pass through all programme-related data, including ratings information and closed captioning. This is significant, because e.tv receives complaints about the quality of its signal on DStv,

including from advertisers. In cases where both e.tv and Supersport are showing UEFA matches, the quality of the viewing experience on the e.tv channel on DStv is noticeably poorer.

87.2.4 Channel/guide position: a pay-TV operator must ensure that FTA channels are given sufficiently prominent channel numbers in the same neighbourhood on the electronic programme guide. This is because there is a direct link between the prominence of the channel number on the one hand, and size of viewership and ability to attract advertising revenue on the other. In addition, a pay-TV operator should not be able to change such channel numbers unilaterally. Again, e.tv's concern arises from its recent experiences with DStv.

(a) In 2012 e.tv and the SABC channels' EPG numbers on the DStv platform were unilaterally changed and were moved 60 places down the EPG, to the very last page on the entertainment genre. This was done without prior consultation and with no regard to the objections of e.tv. MCA's reasons for the change were that channels higher up in the EPG would be movie channels, but it was noteworthy that although the M-Net channel is also a general entertainment channel, it was not moved and retained the prime 101 channel number.

(b) There is no question that MCA gives preference in terms of channel position to channels within the group. It is concerning

to e.tv that there is no regulatory impediment to DStv repeating this action again in future.

Access to advertising revenue

88 The **second** of the four regulatory interventions that are urgently needed to protect the viability of FTA broadcasting concerns the ability of FTA broadcasters to access advertising revenue. Again this would assist the FTA broadcasting sector in general – that is both e.tv and the SABC.

89 As stated previously, FTA broadcasters in South Africa rely predominantly – and exclusively in the case of e.tv – on advertising revenue. At present, the participation of pay-TV operators in the advertising market is largely unregulated. Regulating the access of pay-TV operators to advertising spend would prevent them from unfairly attracting advertisers while not contributing equally towards the costs incurred by FTA broadcasters in discharging their public service obligations.

90 As far back as 1998, government realised the inherent dangers of allowing pay-television broadcasters to have access to advertising revenue. As the White Paper on Broadcasting Policy recognised:

*“Since free-to-air services provide the greatest social contribution to the largest number of South Africans, they should have priority to the advertising cake”.*⁵⁶

⁵⁶ Chapter 3.3.2: private television (in chapter 3 dealing with commercial broadcasting)

91 Accordingly, the ECA already recognises the dangers which pay-TV operators pose to the FTA market. It is for this reason that section 60(4) states that, while subscription broadcasting services may draw their revenue from subscriptions, advertising and sponsorships, such advertising and sponsorship may not be the largest source of annual revenue.

92 But section 60(4), as it is currently drafted, is unhelpful in the case of a pay-TV operator such as DStv. This is because DStv's subscription revenues have grown to such an extent that section 60(4) is entirely ineffective. Even if DStv took the entire R6bn currently spent on television advertising on all platforms in South Africa, it would still not be in breach of the provision by virtue of the R14bn in annual income which it derives from subscriptions.⁵⁷ In the result, section 60(4) has no impact at all in protecting the ability of FTA broadcasters to obtain advertising revenue, despite the fact that this was its clear intention.

93 The White Paper further instructed the IBA to take steps to limit the amount of advertising carried by pay TV operators:

“The Regulator will review the hourly limits on advertising for free-to-air stations to determine whether they are set at an appropriate level every two years.

The Regulator will further review whether the share of advertising revenue by subscription services is appropriate and not detrimental to the survival and viability of the free-to-air services.”

94 Notwithstanding this, the IBA did not take any action, and, until this Inquiry, ICASA has also taken no action in this regard. Such action is long overdue and is now

⁵⁷ Naspers Annual Financial Results, year ending March 2011.

urgently required.

- 95 e.tv therefore proposes that ICASA recommends to the Minister that section 60(4) of the ECA be amended as follows:

“Subscription broadcasting services may draw their revenues from subscriptions, advertising and sponsorships, however, the Authority shall impose licence conditions on such services which limit the amount of advertising or sponsorship revenue which may be earned in any one year.

- 96 Such a legislative amendment would enable ICASA to impose an appropriate and effective licence condition on MCA, such as a condition precluding MCA from earning more than a specific percentage of its annual revenue from advertising or sponsorship and/or a limit on the number of minutes per hour of advertising.
- 97 This would prevent MCA from undermining the ability of the SABC and e.tv to access advertising revenue. Moreover, it would cause little prejudice to MCA because MCA’s massive subscription revenues would be unaffected.

Access to national sporting events content

- 98 The **third** of the four regulatory interventions that are urgently needed to protect the viability of FTA broadcasting as a whole concerns the ability of FTA broadcasters to access national sporting events. Again this would assist both e.tv and the SABC.
- 99 In e.tv’s experience, access to both premium and non-premium sports content for

an FTA broadcaster plays a significant role in enhancing the brand of FTA channels and enables the FTA broadcaster to be responsive to its viewers by offering a varied and balanced programming schedule.

100 In South Africa, due to its substantial subscription and advertising revenues, MCA is able to pay inflated fees for premium sports content. As such, FTA broadcasters are unable to compete since they cannot match the prices offered by MCA for such content. This means that FTA viewers are in many cases excluded from premium sport. But even more concerning from e.tv's perspective is that MCA is able to influence, circumscribe or prohibit the FTA rights, in essence dictating how the FTA rights are exercised and whether they are exploited at all.

101 The pay-TV broadcaster's exclusivity extends even to news broadcasts. For example, when the Springbok Rugby team is announced, that announcement is made exclusive to Supersport and may not even be broadcast live on FTA news broadcasts.

102 The ability of FTA broadcasters to access sports content (whether premium or not) is important in order to deliver balanced and diversified programming to viewers. However, even if FTA broadcasters are able to acquire licences to non-premium sports content, pay-TV operators often attempt to restrict the ability of such broadcasters to broadcast this content through other commercial arrangements.

103 The move of such premium content (including the FTA rights to that content) away from the FTA broadcasters to pay-TV, and the corresponding increase in the amounts paid by pay-TV operators, severely restricts the breadth and quality of

content that can be accessed by the majority of South Africans, and further reduces the ability of FTA operators to remain viable competitors in the broadcasting market generally.

104 Moreover, it is notable that many premium sports rights are sold as a package. This provides a further opportunity for pay-TV broadcasters to prevent FTA broadcasters from accessing some of those rights, whether or not they are used and broadcast by the pay-TV platform operator.

105 For instance, SuperSport appears to have no plans to broadcast live coverage of a range of sporting events in respect of which it has secured the rights. In this regard, we refer to the rights it has secured from the South African Rugby Union (“SARU”) in respect of various youth games, as well as the above-mentioned FTA rights to broadcast certain UEFA soccer games.

105.1 Such conduct is abusive. Not only does it deny access to those with an interest in watching live coverage of these events, but – in the case of youth rugby – it serves to undermine the broader public interest. In particular, it limits SARU’s exposure as developers of youth rugby in South Africa, which in turn has financial implications for the development and transformation of South African rugby as a whole.

105.2 In terms of an agreement entered into between SuperSport and SARU, Supersport has the exclusive right to broadcast all of the latter’s events on DStv. This includes the various youth events that collectively make up the National Schools Rugby Weeks, including the Under-18 Coca-Cola Craven

Week,⁵⁸ the Under-18 Academy Week,⁵⁹ and the Under-16 Grant Khomo Week.⁶⁰ It also includes events such as the International Under-18 Series.

105.3 In 2013, TVPC Media (“TVPC”) – a media production house which provides content for broadcast and digital media – offered SARU live outside broadcast (“OB”) coverage of its three Under-18 internationals against England, France and Wales. SuperSport invoked its agreement with SARU to prevent TVPC from providing live OB coverage, sending in a single-cam crew to record the events. Some weeks after the event, SuperSport aired a short highlights programme. In other words, it chose not to broadcast the events live and yet prevented others from doing so.

105.4 In early 2014, TVPC – in its capacity as the youth sports supplier to OpenView HD and e.tv – approached SARU once again, this time seeking to cover the Under-18 Academy Week and the Under-16 Grant Khomo Week. Once again, SuperSport objected to such coverage. It is worth noting that, if these events were broadcast on another platform, it would be highly unlikely to reduce subscriber interest in the DStv rugby offering. Subscribers to DStv are paying for access to premium rugby like the Super Rugby series. Preventing FTA broadcasters from airing these events is therefore an abuse of DStv’s rights and is not related to DStv’s need to maintain its subscriber base. At this stage, it is not at all clear whether SuperSport will broadcast these events live, or will do what it did in 2013 in

⁵⁸ Scheduled for 14 to 19 July 2014 in Middelburg, Mpumalanga

⁵⁹ Scheduled for 7 to 10 July 2014 in Wellington, Western Cape

⁶⁰ Scheduled for 7 to 10 July in Pretoria, Gauteng

relation to the Under-18 internationals. If it does, it will have used its agreement with SARU once again to block live coverage.

106 These practices serve a two-fold purpose: first, to limit the ability of FTA licensees to broadcast sports content (and thereby their ability to retain both viewers and advertisers); and second, to increase subscriptions by requiring those with an interest in watching sports to pay for the privilege. In so doing, they further entrench the pay-TV sector at the expense of FTA television broadcasting licensees. This not only weakens competition, but also limits access to sports content for those who cannot afford to migrate to pay-TV.

107 There is a strong international precedent for regulatory agencies undertaking significant interventions, in particular regarding the licensing of premium content and the provision of wholesale access to the platform, in order to foster and encourage a sufficiently competitive environment to the lasting benefit of local stakeholders and ultimately local viewers and consumers. These interventions illustrate the importance of opening up access to content and platforms in order to boost competitiveness in the broadcasting market.

108 Section 60(1) of the ECA, which provides the legislative basis for ICASA to make significant interventions insofar as “*national sporting events*” are concerned,⁶¹ reads as follows:

“Subscription broadcasting services *may not acquire exclusive rights that prevent or hinder the free-to-air broadcasting of national sporting*

⁶¹ Even on a broad definition of “*national sporting event*”, this would exclude events such as the various UEFA competitions.

events, as identified in the public interest from time to time, by the Authority, after consultation with the Minister and the Minister of Sport and in accordance with the regulations prescribed by the Authority.”

109 In other words, ICASA is empowered by section 60(1) of the ECA to regulate the acquisition of exclusive broadcasting rights – in terms of both procedure and substance – to ensure that FTA television broadcasters are neither prevented from, nor hindered in, broadcasting national sporting events.⁶² This is a broad regulation-making power that could address both of e.tv’s concerns insofar as national sporting events are concerned.⁶³

110 The Sports Broadcasting Regulations were promulgated to address these concerns. In this regard, pay-TV broadcasters are required to sublicense national sporting events to FTA broadcasters. Unfortunately, however, the regulations’ lack of prescriptive detail has allowed the pay-TV broadcaster to undermine the intention thereof. For instance, MCA frequently awards the licences for such broadcasts only days before the events, thereby effectively preventing the FTA broadcaster from marketing the events and thus severely constraining the ability of the FTA broadcaster to monetise the event. Furthermore, the licensing fees charged by MCA are frequently excessive. In some instances, MCA even imposes contractual restrictions preventing the marketing of an event until the day of that event. Furthermore, the content is provided on a delayed basis. This conduct is designed to minimise audiences and revenues for the FTA broadcaster, and has

⁶² As identified in terms of prescribed criteria

⁶³ It does not address e.tv’s concerns in respect of UEFA matches. As is the case with matches governed by regional federations other than CAF, as well as domestic league matches outside of South Africa, UEFA matches cannot be considered as “*national sporting events*”.

that effect.

111 e.tv therefore proposes the following regulatory fixes be adopted to remedy these concerns:

111.1 The list of national sporting events in regulation 5 should be amended to include events such as Craven Week and Under-18 Internationals of all national teams. This may be done either by way of the quadrennial review in terms of regulation 7(1)(a),⁶⁴ or on application by an interested stakeholder such as e.tv in terms of regulation 7(1)(b).⁶⁵

111.2 The criteria set out in regulation 4(1) should be amended to include other important national sporting events, as well as confederation sporting events⁶⁶ where a national team or a South African team is not participating. This may be done either by way of the quadrennial review in terms of regulation 7(1)(a),⁶⁷ or by way of express amendments to regulations 4, 5 and 7.

111.3 Regulation 6 should be amended to prohibit the acquisition of FTA rights by pay-TV licensees.

⁶⁴ Read with regulation 7(1)(d)

⁶⁵ Read with regulations 7(1)(c) and (d)

⁶⁶ A *confederation sporting event* involves a national team or South African national interms of Regulation 7(1)(b), (c) and (d).

⁶⁷ Read with regulation 7(1)(d)

Preventing pay-TV exclusivity of community television channels

112 The **fourth** of the regulatory interventions that are urgently needed to protect the viability of FTA broadcasting as a whole involves preventing pay-TV exclusivity in relation to community television channels.

113 As we have explained above, a substantial difficulty has now arisen in respect of channels which have no alternative means to target the large (and attractive) audience that is tied in to existing pay-TV broadcasting platforms.

114 This is particularly the case in respect of community television broadcasters. Those channels depend on carriage by DStv in order to reach their target audiences. However, this dependency on DStv means that DStv can extract concessions from the community broadcasters which are contrary to these broadcasters' interests and mandate. In particular, DStv demands that the community broadcasters agree to be carried exclusively by it if they are to be carried at all.

115 This produces unfair and inappropriate consequences in two respects.

116 First, from the point of view of community broadcasters and the public, it is highly prejudicial and unfair. It means that those broadcasters have little choice but to agree to exclusivity arrangements even where these are at odds with their mandate.

116.1 It must be borne in mind on this score that the White Paper makes clear the role of community broadcasters. A community broadcaster is required to

“provide a distinct broadcasting service dealing specifically with community issues which are not normally dealt with by other broadcasting services covering the area in question. It will focus on the provision of programmes that highlight grass-root community issues, including developmental issues, health care, basic information and general education, environmental affairs, local interest matters and the reflection of local culture”.

116.2 Exclusivity arrangements are fundamentally inconsistent with this mandate.

Community channels should be accessible to all members of a given community – not merely those who can afford to subscribe to the pay-TV service in question. This is especially because community television channels are expected to be FTA in nature.

116.3 There is a need to ensure that this abuse by the pay-TV sector of its dominance is prevented.

117 Second, ICASA will be aware that in 2013 e.tv’s sister company Platco Digital launched OpenView HD – a direct-to-home (“DTH”) free-to-view satellite platform.

117.1 This provides, for the first time, a free multi-channel television platform to members of the public. This presents an ideal opportunity for community television channels to be broadcast on a free-to-view basis, in accordance with their mandate.

117.2 However, Platco Digital has been informed by various community broadcasters that they are unable to be carried on OpenView HD because their carriage agreements with MCA do not permit carriage on platforms other than DStv.

117.3 This is not only prejudicial and unfair to the community broadcasters and

the public, it also amounts to unfair competition with regards to Platco Digital and OpenView HD. It is important for this new enterprise that it is able to provide a wide range of channels to viewers. The MCA exclusivity arrangements prevent this.

118 For this reason, e.tv proposes that ICASA should make regulations which prohibit pay-TV platforms from entering into exclusive agreements with community television broadcasters.

Additional regulations to ensure the viability of FTA broadcasters

119 We have dealt above with the four steps that e.tv considers to be the bare minimum that ICASA should take in order to ensure the viability of the FTA television broadcasting sector as a whole.

120 However, e.tv considers that ICASA should go further and promulgate the additional regulations that are necessary to ensure the viability of the FTA television broadcasting sector as a whole, and to facilitate the ability of FTA broadcasters to compete fairly with pay-TV broadcasters. In e.tv's view, these should include regulations –

120.1 that mandate access – on fair, reasonable and non-discriminatory terms – to the set top boxes (“STBs”) of pay-TV operators with significant market power; and

120.2 limiting the pay-TV window in respect of movie rights to a maximum of 18 months, whereafter such rights must be available for FTA licensing.

121 In what follows, we expand briefly on the need for these regulations.

Access to the DStv STB

122 With its current reach, DStv already has access to millions of homes in South Africa. Given the nature and extent of its dominance in the pay-TV market, television viewers are unlikely to buy new STBs to access new channels offered by other platform providers. In such circumstances, access to the dominant broadcast platform's STB is required in order to enable real and vigorous competition between channels provided by different broadcasters to exist.

123 In some jurisdictions where there are pay-TV operators with significant market power, regulatory authorities have required such operators to provide broadcast channels with access to their STBs on "*fair, reasonable and non-discriminatory terms*". In practice, this means imposing a legal obligation on the relevant pay-TV operator to offer to carry others' channels on its satellite (or other) platform on such terms. This obligation takes the following form in the European Union ("EU"):⁶⁸

"All operators of conditional access services, irrespective of the means of transmission, who provide access services to digital television and radio services and whose access services broadcasters depend on to reach any group of potential viewers or listeners are to:

- *offer to all broadcasters, on a fair, reasonable and non-discriminatory basis compatible with Community competition law, technical services enabling the broadcasters' digitally-transmitted services to be received by viewers or listeners authorised by means of decoders administered by the service operators, and comply with Community competition law;*
- *keep separate financial accounts regarding their activity as conditional access providers."*

⁶⁸ EU Access Directive 2002/19/EC, Annex 1, Part 1(b) (emphasis added)

124 This obligation arises in the television context because without access to the relevant pay-TV operator's STB, other broadcast channels would not be able to access their potential viewers. And without being able to access such viewers, such broadcasters would be unable to provide their services. Thus access to the STB in question is key to ensuring that the market for channels is able to become competitive. Without access, the barriers to market entry will be too high to permit effective competition.

125 Thus to promote competition, e.tv submits that ICASA should make regulations that enable access by broadcast channels – on fair, reasonable and non-discriminatory terms – to the STBs of pay-TV operators with significant market power. As is the case in the EU, e.tv submits that this requirement should be withdrawn in circumstances where the pay-TV operator no longer has significant market power, and end users' access and effective competition are not adversely affected.⁶⁹

Access to Movies

126 Insofar as access to movies is concerned, e.tv is concerned about a particular practice in the pay-TV sector: securing the rights to lengthy pay windows which unreasonably limits access to such movies on other platforms, whether pay-TV or FTA. Only once this period is over are others entitled to offer the movies on their channels and/or platforms.

127 Pay-TV windows for movie content have increased drastically over the last few

⁶⁹ See Article 6(3) of the EU Access Directive

years in South Africa. For example, a blockbuster movie used to be licensed to pay-TV in South Africa for a period of between 12 and 24 months. This period was longer than pay windows elsewhere in the world which typically range from 6-9 months before they go to FTA television. Accordingly other pay-TV broadcasters in the world have much shorter pay windows. Nevertheless, the DStv pay window, notwithstanding that it is already longer than that of pay-TV operators elsewhere, has recently been extended even further to 3 years, thereby impeding the FTA broadcasters' ability to air this content even more severely.

128 Since Top TV entered the South African market, some of the movie studios have been convinced to allow for two separate pay windows – in the first pay window, the content is available to DStv, and in the second pay window it is available to another pay TV operator, such as Top TV. This means that movies have taken, and will take, even longer to get to the majority of South African TV audiences who only have access to FTA channels as FTA may only air these movies once the pay windows have expired.

129 e.tv does not object to the existence of pay windows in principle, recognising that their use is a standard commercial practice across jurisdictions. Rather, its concern relates to the duration of the pay window in South Africa, which is significantly longer than in other countries. This appears to flow directly from the severe lack of competition in the domestic pay-TV market.

130 While e.tv accepts that some viewers will always be prepared to pay a premium to watch movies as soon as they are available on any television platform, it is concerned about the impact of an unreasonably lengthy pay window on FTA

broadcasters and their viewers. The longer the period, the less able FTA television is to offer its viewers a quality service, which will, in turn, undermine the viability of the FTA sector.

131 At present, there is nothing in any regulation to deal with the issue of unduly lengthy pay windows. That should be changed, either by way of new regulations made either in terms of ICASA's broad regulation-making powers in terms of section 4(3)(j) of the ICASA Act, or in terms of a licence condition in terms of section 67 of the ECA. Such a provision should expressly limit the pay window to a maximum of 18 months at which point the content must be made available for FTA licensing.

The separation of the SABC's public and public commercial divisions

132 As noted earlier, the SABC is required to maintain two separate operational divisions in respect of public and public commercial broadcasting, but in practice this distinction does not exist.

133 That this is the case and that it has serious consequences, has been recognised by government in the 2014 Green Paper:⁷⁰

"The SABC in line with policy and regulation is funded by government, licence fees, advertising/sponsorship and other incidental income (sale of programmes, etc). As noted above, one of the reasons for the division of the SABC into public and public commercial divisions was to protect the public mandate by allowing for cross-subsidisation of the public wing by commercial services.

⁷⁰ p 58

The SABC, to date, has not published separate accounts for the divisions, and it is thus difficult to thoroughly review whether or not the division of the SABC has, as envisaged in the White Paper and Broadcasting Act, enabled the cross-subsidisation of the mandate by the commercial services.”

134 e.tv submits that this blurring between the two SABC divisions has a damaging impact not only on the SABC’s performance of its public broadcasting mandate but also on the FTA market as a whole and constrains the ability of other FTA broadcasters to compete effectively.

135 First, the SABC cross-sells advertising across its three television channels and therefore makes no distinction between the public service and commercial channels. Aside from the fact that the SABC is able to sell across platforms and channels, it is also able to discount heavily on its television channels as it has 36 minutes of advertising per hour to offer advertisers as against e.tv’s 12 minutes per hour. In addition, the SABC offers large discounts to advertisers in exchange for such advertisers buying advertising exclusively on SABC. It is able to engage in this practice largely because of its cross-selling approach.

136 Second, the SABC collectively purchases commercial international programming (particularly movies) for all three channels.

136.1 As it does not supply separate financial statements in respect of its public and commercial service divisions, it is impossible to determine the extent to which – contrary to the provisions of the Broadcasting Act – revenues from the public service division may be subsidising the costs of the commercial division, rather than the reverse position intended by the White Paper and Broadcasting Act.

136.2 For example, a movie which is licensed to the SABC for three runs may be broadcast first on SABC1, and then shown on SABC3 in circumstances in which the cost of the movie is fully amortised against its first run on SABC1. The quantity of international programming acquired by the SABC also exceeds its requirements – a significant portion of this programming is written off.

137 Third, the SABC cross-schedules local and international programmes on all three channels, doing the first run on SABC1 or SABC2, and then a repeat on SABC3 (or vice versa).

137.1 This practice provides SABC3 with the opportunity to earn additional advertising revenue from SABC1 and SABC2 programmes.

137.2 Moreover, SABC3 uses the repeats as a means to meet its local content quotas, constituting a further subsidy of the commercial division by its public service counterpart (as SABC3 does not have to invest separately in local content, as its public service obligations require).

138 Finally, there is the matter of shared services across divisions: not only administrative and legal services, but also core broadcast functions such as programme commissioning and acquisition. The sharing of such services by the two divisions runs counter to the spirit and letter of the Broadcasting Act, which seeks to separate their operations and to ensure that public funds are not used to assist the commercial operations of the SABC.

139 The inescapable conclusion is that, contrary to the Broadcasting Act, the public

service division is financing the commercial service division of the SABC in respect of programming costs.

140 ICASA is charged by the Broadcasting Act to monitor and enforce the SABC's compliance with its Charter. In light of this obligation, e.tv recommends that ICASA give the SABC an opportunity to respond to e.tv's submissions herein. On the basis of this response, ICASA should adopt one of two routes to deal with the issue:

140.1 If ICASA is of the view that the existing provisions of the Broadcasting Act, applicable regulations and the SABC's licence conditions are not sufficiently clear in respect of the SABC conduct concerned, ICASA should take the necessary steps to amend the relevant licence conditions and regulations, and recommend that the Minister make appropriate amendments to the Broadcasting Act.

140.2 Alternatively, If ICASA is of the view that (as e.tv contends) the existing provisions of the Broadcasting Act, applicable regulations and the SABC's licence conditions are sufficiently clear in respect of the SABC conduct concerned, it should then refer the SABC's breach of these provisions to the CCC for adjudication.

F. ICASA'S POWERS TO ACT ON THE OUTCOME OF THE INQUIRY

141 A number of e.tv's proposals call on ICASA to make recommendations to the Minister regarding the amendment of relevant legislation governing the broadcasting sector. This is plainly within ICASA's powers. Section 4(3)(a) specifically empowers ICASA to:

“make recommendations to the Minister on policy matters and amendments to this Act and the underlying statutes which accord with the objects of this Act and the underlying statutes to promote development in the postal and communications sectors”.

142 A number of e.tv's proposals also call on ICASA to amend existing regulations or make new regulations. This too is plainly within ICASA's powers.

142.1 ICASA's general regulation-making power under the ECA is located in section 4(1), in terms of which the regulator “may make regulations with regard to *any matter which* in terms of [the ECA] or the related legislation *must or may be prescribed, governed or determined by regulation.*”⁷¹

Section 1 of the ECA defines “the related legislation” to include the Broadcasting Act and the ICASA Act.

142.2 Of particular relevance to the substantive issues that e.tv has identified in this submission are sections 60 and 67 of the ECA, dealing with “*[r]estriction[s] on subscription broadcasting services*” and “*[c]ompetition matters*” respectively.

142.3 ICASA is further empowered to make regulations in terms of section 4(3)(j)

⁷¹ Emphasis added

of the ICASA Act, which allows for the making of regulations "*on any matter consistent with the objects of ... the underlying statutes*". The objects of the underlying statutes relevant to e.tv's concerns are set out in paragraphs 17.1 and 17.2 above.

142.4 When read together with these objects and section 4(3)(j) of the ICASA Act, section 4(1) of the ECA provides ICASA with a broad regulation-making power to ensure the viability of the FTA television broadcasting sector as a whole, including its ability to compete with subscription television broadcasters. Should the inquiry result in ICASA accepting e.tv's proposals on the need to make regulations to address this concern, it would be acting well within its legislative mandate to invoke this broad regulation-making power.

142.5 In addition, ICASA is able to make regulations in accordance with section 67 of the ECA. That provision was recently amended by section 28 of the Electronic Communications Amendment Act 1 of 2014 ("the 2014 ECA amendments"), subsection (4) of which provides – in part – as follows:

"[ICASA] must, following an inquiry, prescribe regulations defining the relevant markets and market segments and impose appropriate and sufficient pro-competitive licence conditions on licensees where there is ineffective competition, and if any licensee has significant market power in such markets or market segments."

142.6 Following this inquiry, ICASA would therefore be empowered to deal with many of the concerns raised in this submission by making regulations and imposing "*appropriate and sufficient pro-competitive licence conditions*" on

pay-TV operators such as DStv.⁷² Amongst others, the amended section recognises the following types of pro-competitive licence terms and conditions that may need to be imposed on certain licensees:

142.6.1 “*obligations to publish any information specified by [ICASA] in the manner specified by it*”;⁷³

142.6.2 “*rate regulation for the provision of specified services, including without limitation price controls on wholesale and retail rates as determined by [ICASA], and matters relating to the recovery of costs*”;⁷⁴

142.6.3 “*obligations concerning the amount and type of premium, sports and South African programming for broadcasting*”;⁷⁵ and

142.6.4 “*distribution, access and reselling obligations for broadcasters.*”⁷⁶

⁷² This power is to be understood as being in addition to the broad regulation-making powers discussed above.

⁷³ Section 67(7)(c)

⁷⁴ Section 67(7)(f)

⁷⁵ Section 67(7)(h)

⁷⁶ Section 67(7)(i)

G. CONCLUSION

143 e.tv thanks the Authority for the opportunity to make this submission. e.tv is hopeful that the outcomes of this long-overdue Inquiry will effectively address the challenges facing the FTA television sector, including the relationship between the FTA and pay-TV sectors, with a particular focus on how the latter ought to be regulated so as to ensure the integrity and viability of the former. e.tv notes that commercial FTA broadcasting is a critical element of our broadcasting ecology.

144 In the light of their importance we appeal to the Authority to take the necessary regulatory steps, as are summarised in paragraphs 11 to 14 above, to address these concerns on an urgent basis.

ANNEXURE A:**E.TV PUBLIC SERVICE OBLIGATIONS AS PER LICENCE**

- 1 Required to broadcast 45% local content.
- 2 Required to broadcast nationally and cover minimum 77% population.
- 3 Required to broadcast two hours a week news and information programming in a wide range of official languages other than English.
- 4 Required to broadcast four hours a week of programming, other than news and information programming, in a wide range of official languages other English.
- 5 Required to broadcast 10% South African drama programmes in a wide range of official languages other than English.
- 6 Required to broadcast 20% South African children's programming in a wide range of official languages other than English.
- 7 Required to have sign language interpretation on screen during the prime time news bulletin.
- 8 Required to commission all local programming, other than news and current affairs, from the independent production sector.
- 9 Required to commission programming from the different provinces.
- 10 Required to broadcast two hours thirty minutes of SA drama per week of which two hours twenty minutes must be during prime time.
- 11 Required to broadcast at least 19 hours of information programming a week of which two hours must be during prime time.
- 12 Required to broadcast two hours a day of news programming of which 30 minutes must be a single programme broadcast during prime time.
- 13 Required to broadcast 16 hours of children's programming per week of which 20% must be local.

- 14 Required to broadcast children's programming between the hours of 13h00 and 18h00 on weekdays and 07h00 and 13h00 on weekends.
- 15 Required to broadcast one hour 30 minutes of SA youth drama during prime time.
- 16 Required to comply with advertising limitations of an average of 10 minutes per hour and no more than 12 minutes in any one hour.
- 17 Required to invest 5.5% of total annual salary cost in staff training.
- 18 Required to recruit, train and develop individuals from Historically Disadvantaged groups.
- 19 Required to comply with Employment Equity obligations as follows:
 - 19.1 At least 40% of employees to be African
 - 19.2 At least 35% of employees to be women
 - 19.3 At least 5% to be disabled
 - 19.4 Management to be made up predominantly of Historically Disadvantaged groups