



Independent Communications Authority of South Africa
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INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

**REASONS FOR DECISION: AMENDMENT OF TELEVISION BROADCASTING SERVICE
LICENCES FOR PURPOSES OF DIGITAL TERRESTRIAL TELEVISION**

1. The Independent Communications Authority of South Africa ("**the Authority**") hereby publishes, for public information, attached reasons for its decision in relation to the amendment of television broadcasting service licences for purposes of digital terrestrial television.

A handwritten signature in black ink, appearing to read 'W. Currie'. The signature is written in a cursive style and is positioned above a horizontal line.

William Currie

Acting: Chairperson

DATE: 10/05/2011

REASONS FOR DECISION: AMENDMENT OF TELEVISION BROADCASTING SERVICE LICENCES FOR PURPOSES OF DIGITAL TERRESTRIAL TELEVISION

1. BACKGROUND

These reasons only cover the aspect related to the amendment of the television broadcasting service licences for purposes of the Digital Terrestrial Television and not the amendment of the radio frequency spectrum licences. The process for the amendment of the radio frequency spectrum licences will be undertaken separately. However, reference will be made to the regulatory provisions dealing with the process for the amendment of the radio frequency spectrum licences for purposes of a holistic view and a better understanding.

- 1.1 On 15 February 2010, the Authority published the Digital Migration Regulations (“**DTT Regulations**”).¹
- 1.2 Regulation 12(1) of the DTT Regulations provides that “the Authority will amend, in terms of section 10(1)(d) of the Electronic Communications Act, No. 36 of 2005 (“**EC Act**”) and the procedures contained in the Process and Procedure Regulations (Individual Licences) or in terms of the procedures contained in the Process and Procedure Regulations (Class Licences), as the case may be, each of the broadcasting service licences held by incumbent television broadcasting service licensees to reflect the fact that multi-channel services will be made available to those licensees using Digital Terrestrial Television”.
- 1.3 Section 10(1)(d) of the EC Act provides that “the Authority may amend an individual licence after consultation with the licensee to the extent necessitated by technological change or in the interest of orderly frequency management”.
- 1.4 Regulation 9 of the Amended Process and Procedure Regulations for Individual Licences² provides that “an application to amend a licence must be in format set out in Form C and it must be accompanied by the applicable fee.”

¹ Government Gazette No. 32956 of 15 February 2010.

² Government Gazette No. 33296 of 14 June 2010.

- 1.5 Regulation 8 of the Amended Process and Procedure Regulations for Class Licences provides that “an application to amend a licence must be made in the format set out in Form D and must be accompanied by the applicable fees.”
- 1.6 The applicable administrative/ application fees is R50 000.00 for an Individual licence amendment and R1000.00 for community broadcasting licence.³
- 1.7 The main aim of the service licence amendment as contemplated in the DTT Regulations is to provide for a multi-channel broadcasting service. Regulation 6 of the DTT Regulations provides for a procedure that must be followed in authorizing an incentive channel for the incumbent television broadcasters.
- 1.8 However, until such time as the incumbent broadcasters’ licences have been amended, in terms of Regulation 12(2) of the DTT Regulations, the incumbent broadcasting service licensees are considered to be authorized to provide a multi-channel broadcasting and these licences are deemed to confer such authorization.
- 1.9 Regulation 12(3) of the DTT Regulations provides that the Authority will amend in accordance with section 31(4)(c) of the EC Act, each of the radio frequency spectrum licences held by the incumbent broadcasting service licensees to reflect the radio frequency spectrum which they are authorized to use for the purposes of DTT.
- 1.10 The main aim of the radio frequency spectrum licence amendment as contemplated in the DTT Regulations is to reflect the radio frequency spectrum which the incumbent television broadcaster are authorized to use for the purposes of DTT.
- 1.11 Section 31(4)(c) of the EC Act provides that “the Authority may amend a radio frequency spectrum licence to effect the migration of licences in accordance with a revised radio frequency plan or the transition from analogue to digital broadcasting”.
- 1.12 Similarly, until such time as the incumbent broadcasters’ radio frequency spectrum licences have been amended, in terms of Regulation 12(4) of the DTT Regulations, the incumbent broadcasting service licensees is considered to be authorized to

³ Government Gazette No. 32084 of 1 April 2009.

utilize the radio frequencies included in Multiplex 1, or 2 and these licences are deemed to confer such authorization.

- 1.13 In terms of Regulation 12(6) of the DTT Regulations, at the end of the performance period, the broadcasting service licences and radio frequency spectrum licences of the incumbent broadcasters will again be amended in terms of the relevant provisions of the EC Act, the Process and Procedure Regulations to reflect the fact that those incumbent broadcasting service licensees have ceased analogue broadcasting and are no longer authorized to utilize the radio frequency spectrum which was previously assigned to them for analogue broadcasting purposes.

2. TELEVISION BROADCASTING SERVICE LICENCE AMENDMENT APPLICATIONS

- 2.1 On 14 May 2010, the Authority requested the current television broadcasters (i.e. SABC, e.tv (Pty) Ltd, Trinity Broadcasting Network; and M-Net) to submit television broadcasting service licence amendment applications as required in terms of the DTT Regulations.
- 2.2 The Authority has received television broadcasting service licence amendment applications from SABC, e.tv (Pty) Ltd and Trinity Broadcasting Network.
- 2.3 M-Net is of the view that its broadcasting service licence does not require an amendment save for its spectrum licence. This is because M-Net's converted licence was drafted using the same framework that applies to the other subscription broadcasting service licences, which are entitled to add channels. The Authority accepted the view expressed by M-Net on this matter.

3. AUTHORITY'S DECISION

3.1 Amendment Process: Television Broadcasting Service Licences

- 3.1.1 Section 10(2) of the EC Act provides that the provisions of section 9(2) to (6) apply, with the necessary changes, to the amendment of an individual licence. Section 9(2)(a),(b), (c), (d) and (e) of the EC Act provides that "the Authority must give notice of the application in the Gazette and invite interested persons to submit

written representation in relation to the application within the period mentioned in the notice; include the percentage of equity ownership to be held by persons from historically disadvantaged groups, which must not be less than 30%, give interested persons an opportunity to submit written response to any representation submitted; and may conduct a public hearing in relation to the application”.

- 3.1.2 The literal interpretation of the section 10(2) of the EC Act and the procedures contained in the Process and Procedure Regulations is that the amendment applications received from the incumbent television broadcasters must be published for public comment.
- 3.1.3 The purpose of inviting written representations is to afford interested parties an opportunity to express their views thereby ensuring fair and just process. The Authority reasoned that the DTT Regulations have already been subjected to public consultation. The DTT Regulations clearly provides what information should be included in the amended licences. Further, until such time that the licences of the incumbent broadcasters are amended, the incumbent broadcasting service licensees are considered to be authorized to provide a multi-channel broadcasting and the incumbent broadcasters are considered to be authorized to utilize the radio frequencies included in Multiplex 1, or 2 and these licences are deemed to confer such authorization. For instance, if public representations were to be advanced to the effect that the incumbent television broadcaster’s licences are not supposed to be amended for whatever reasons, this representation will not stand because these licences are deemed to be amended before they are in fact amended. In this light, subjecting the licence amendment applications to public consultation will not add any value.
- 3.1.4 Accordingly, the Authority has decided not to subject the television broadcasting service licence amendment applications for public comment.

3.2 Consultative process with the relevant incumbent television broadcasters

On 16 September 2010, the Authority forwarded the draft television broadcasting services licences to the relevant incumbent television broadcasters for comments.

Representations by e.tv (Pty) Ltd

3.2.1 Licence conditions in relation to promise of performance

3.2.1.1 The draft proposed amended licence conditions are sub-divided into two schedules, namely: generic and channel/s. The e.tv (Pty) Ltd submitted that the following licence conditions were part of the promise of performance made during the licensing of the e.tv (Pty) Ltd channel and cannot necessarily be applied to all future channels and as a consequent, these licence conditions should be moved to the schedule of the existing channel (e.tv channel) instead of being part of the generic schedule:

"7.3 All local programming, other than news and current affairs, shall be commissioned out to the independent production sector".

"7.5 The licensee must invest 5.5% of its total annual salary cost escalating annually at the rate of inflation, in staff training".

3.2.1.2 The Authority decided to accept the proposal by the e.tv (Pty) Ltd.

3.2.2 Applicability of channel conditions

3.2.2.1 The e.tv (Pty) Ltd also submitted that the following wording should be included under the heading "Existing Television Channel":

"The conditions contained herein are applicable to the e.tv channel only".

3.2.2.2 The Authority decided to accept the proposal by e.tv (Pty) Ltd.

Representations by the SABC

3.2.3 Interim versus final broadcasting service licences

- 3.2.3.1 The SABC submitted that it is not certain whether or not the draft proposed amended broadcasting service licences will be final licences post the dual illumination.
- 3.2.3.2 The Authority reasoned that, in terms of Regulation 12(6) of the DTT Regulations, “at the end of the performance period, the broadcasting service licences and radio frequency spectrum licences of the incumbent broadcasters will again be amended in terms of the relevant provisions of the EC Act, the Process and Procedure Regulations to reflect the fact that those incumbent broadcasting service licensees have ceased analogue broadcasting and are no longer authorized to utilize the radio frequency spectrum which was previously assigned to them for analogue broadcasting purposes”.
- 3.2.3.3 The Authority decided that the television broadcasting service licences of the incumbent television broadcasters should be final licences post dual illumination period until the review of the current broadcasting regulatory regime, if necessary. Only spectrum licences will be interim licences until analogue switch over/off.⁴

3.2.4 Review of licence condition upon digital broadcasting environment

- 3.2.4.1 The SABC submitted that the amended broadcasting service licences should state that the current licence conditions will be reviewed in future to reflect digital broadcasting environment. The SABC also submitted that the current licence conditions were issued under an analogue environment where there were no sufficient channels to provide for particular genres such as education, sports, news and current affairs.

⁴ Regulation 12(3) of the DTT Regulations provide that “the Authority will amend in accordance with section 31(4)(c) of the EC Act, each of the radio frequency spectrum licences held by the incumbent broadcasting service licensees to reflect the radio frequency spectrum which they are authorized to use for the purposes of DTT”.

3.2.4.2 The Authority decided that it is not necessary to state that the current licence conditions would be reviewed in future to reflect digital broadcasting environment. The licence conditions may be updated after the review of the current broadcasting regulatory regime, if necessary. However, it is not necessary to include a provision in the licence to that effect, as this is not a licence condition. The DTT Regulations seek to address the channels for particular genres pointed out by the SABC.⁵

3.2.5 Multichannel broadcasting and technology neutrality

3.2.5.1 The SABC submitted that the amended broadcasting service licences should make provision for multichannel broadcasting and technology neutrality.

3.2.5.2 The Authority decided that it is not necessary to state that the licensee will be required to provide multichannel broadcasting service nor is it important to indicate that the amended broadcasting service licences are technology neutral. The right to provide multichannel broadcasting is provided for in the DTT Regulations. Further, the licences issued to the subscription television broadcasters do not include a provision for a multichannel broadcasting. Instead, this provision is included in the Subscription Broadcasting Service Regulations.⁶ The broadcasting service amended service licences are technology neutral. There is no mention of technology specifications such as terrestrial, satellite, cable, etc. It is not necessary to include a provision which explicitly indicate that the licence is technology neutral. It is not the words "technology neutral" which makes the licence technology neutral but the provisions of the licence as a whole.

⁵ Regulation 12(7) of the DTT Regulations provide that "Until such time as they are repealed or amended, each of the incumbent broadcasting service licensees must comply with ICASA South African Television Content Regulations, as at the date of the commencement of these Regulations, for each channel broadcast by it, provided that those channels which by the nature of the programming provided, including channels which consists exclusively of sport or education programming, cannot comply with the ICASA South African Television Content Regulations may be exempted by the Authority from this requirement, upon written application by the incumbent broadcasting service licensee."

⁶ Government Gazette: Notice 152 of 31 January 2006.

3.2.6 Future licensing model in a digital environment

- 3.2.6.1 The SABC submitted that there is a need to review the licensing model of the SABC. In this regard, the SABC television will need to be licensed as a network rather than as individual channels with individual quotas. To this end, the current South African Television Content Regulations and other related regulations which did not anticipate a multichannel digital broadcasting environment will need to be reviewed.
- 3.2.6.2 The Authority noted the need to review the South African Television Content Regulations and other related regulations in light of the multichannel digital broadcasting environment.

Representations by the TBN

3.2.7 Reinstatement of the current licence conditions

- 3.2.7.1 TBN is of the view that “the conditions previously imposed on it, which are identical to the draft conditions proposed by the Authority for the migration, do not fit the nature of a community broadcaster and especially one which broadcasts to a niche market”.
- 3.2.7.2 TBN submitted that the niche market which it operates has its own set of unique constraints and limitations. Those effectively remove TBN from the commercial sphere of broadcasting to one almost of philanthropy. By that it means TBN survives primarily through donations.
- 3.2.7.3 TBN also submitted that it should therefore not be subject to the type of “debilitating” conditions proposed by the Authority. It accepts that it has to be inclusive of the people it broadcasts to. It accepts as well the need to train and “upskill” employees. Whilst it can perform some of the things expected of it in some of the conditions, it cannot perform all the things or to the extent required by the Authority given its financial constraints. TBN indicated that it is uneconomic to implement the proposed conditions in their current format.

- 3.2.7.4 TBN further submitted that the aforesaid concerns have previously been brought to the Authority's attention on numerous occasions.
- 3.2.7.5 The Authority has noted that TBN has no valid specific comments on the proposed amended licence, save for being uncomfortable with the whole current converted licence conditions. TBN received their converted licence in January 2009. However, TBN did not raise the aforesaid concerns upon receipt of their converted licences.
- 3.2.7.6 The Authority noted the need to review the South African Television Content Regulations and other related regulations in light of the multichannel digital broadcasting environment.
- 3.2.7.7 For general comments on licence conditions related to historically disadvantaged persons and staff complement, the Authority has decided to advise TBN to apply for a separate amendment application to address these issues.