

**REPRESENTATIONS BY M-NET AND  
MULTICHOICE ON THE PROPOSED ICT  
POLICY REVIEW FRAMING PAPER, 2013**

**15 JUNE 2013**

## INTRODUCTION

- 1 M-Net and MultiChoice welcome the launch of the ICT Policy Review process and the opportunity to comment on the Framing Paper gazetted on 24 April 2013.
- 2 We support the views of the Minister and of the Department that dramatic changes within the communications sector require new integrated policies and changes to the legislative framework, and that these be in line with international best practice.
- 3 Our approach to these representations is the following:
  - 3.1 Prior to commenting on certain of the principles raised in the Framing Paper, we deal with the dramatic changes which have occurred within the communications sector over the past 20 years, since that ought to inform the entire Policy Review process.
  - 3.2 In our view those changes are so dramatic that they necessitate questioning whether the historical reasons for regulating traditional broadcasting services are still valid. We deal with this in the second section of these representations.
  - 3.3 Thereafter we comment on certain of the principles raised in the Framing Paper.
  - 3.4 In the section thereafter, we indicate that a number of the principles raised in the Framing Paper are already more than adequately dealt with in various statutes and regulations of general application, and that such legislation is administered by and is the responsibility of specialist bodies. We accordingly propose that it is unnecessary for the ICT policies and legislative framework to address those principles.
  - 3.5 We then raise additional principles which we believe ought to be considered in the Policy Review process.

- 3.6 Finally, we make certain submissions concerning the current proposed amendments to the EC Act and the ICASA Act, and other policy processes which the Department has recently launched.

## **DRAMATIC CHANGES IN THE COMMUNICATIONS SECTOR OVER PAST 20 YEARS**

- 4 In approaching the principles which will guide the ICT Policy Review process, cognizance must be taken of the dramatic changes which have occurred in the communications sector over the past 20 years.
- 5 In the past, voice communication was transmitted over fixed line networks provided by telephone companies. Video programming was transmitted over terrestrial radio frequency spectrum by broadcasters. Legislators and regulators developed licensing and regulatory frameworks based on the characteristics of the transmission medium and the nature of the communications being transmitted. For example, the high costs of rolling out fixed line telephone networks led to them being regulated as natural monopolies (rate regulation, access requirements, etc), and since telecommunications services involved private person-to-person communications they were free of content regulation. Broadcasting services were regulated so as to minimise radio frequency spectrum interference. Given the influence of broadcasting services, they were also subject to a number of content restrictions and obligations. Since each of these two types of communication was essentially limited to a single mode of transmission, it was not surprising that the transmission technology was the primary determinant of the regulatory regime imposed.
- 6 Over time problems began to emerge with this bifurcated approach. Telecommunications companies started to use radio frequency spectrum for wireless telephone networks (mobile). Broadcasting evolved to use cable and satellite networks. Broadcasters began to supply data using broadcast spectrum, whilst telecommunications operators began to supply video content over telecommunication (fixed and wireless) networks.

7 These problems, which started to emerge in the analogue environment, have increased exponentially with digitisation and the convergence of broadcasting, telecommunications and ICT services and products across all elements of the supply chain. We are witnessing the substantial increase in the availability of audio-visual content on fixed and wireless broadband telecommunication networks ("the online environment"). In the online environment, there is now a plethora of content available from service providers who are not traditional licensed broadcasters ("online players"). These online players include telecommunications companies, online content aggregators, user-generated content, content owners/creators, news organisations, social media sites – to name just a few of the emerging content service providers. It also includes global players, which are now providing content online in South Africa (e.g. YouTube, Apple iTunes, Facebook and Twitter) without those players having to comply with South African legislation and regulations. For example, YouTube offers subscription broadcasting channels and one can download movies currently screened on DStv from the South African Apple iTunes store. Furthermore, many South African circumvent the geo-blocking<sup>1</sup> and are able to download the content of foreign broadcasting services via the internet. Those foreign broadcasting services are thus competing with South African broadcasters such as the SABC, e.tv and M-Net. This content is also available on an ever increasing number of connected devices, and not only traditional television sets. Increasingly, broadband networks are being used to deliver on-demand video and broadcast-like content by means of multicasting. Consumers now have a wide range of choices as to how and when they access and consume audio-visual content. This reflects a dramatic change from the traditional consumption patterns of linear broadcasting in the 20<sup>th</sup> century.

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<sup>1</sup> Geo-blocking involves the practice of preventing users from viewing web sites and downloading applications and media based on location. It is used by countries to block foreign material, as well as by movie and TV studios to restrict viewing to specific regions. Geo-blocking is accomplished by excluding targeted Internet (IP) addresses

- 8 Future policies for South Africa must focus on equivalent regulation for like services, and on enabling local broadcasters and other content providers to distribute their content over an ever-increasing range of platforms, thereby increasing the opportunities for the public to access content.
- 9 These dramatic changes necessitate a fundamental questioning throughout the Policy Review process of whether the historical reasons for regulating broadcasting services are still valid when competition across a range of content delivery platforms is leading to better services, higher quality and more consumer choice.<sup>2</sup>
- 10 A further fundamental issue which needs to be addressed in the Policy Review process is that conventional television broadcasting services are now competing head-on with online audio-visual content providers for audience attention, advertising and subscribers. However, they are not competing on a level playing field. Conventional broadcasting services are at a huge disadvantage in that they have significant regulatory restrictions and obligations imposed upon them, whilst online audio-visual content providers are subject to little or no such restrictions and obligations. The asymmetry in the regulation of these various services needs to be addressed in the Policy Review process.

## **HISTORICAL REASONS FOR REGULATING BROADCASTING, AND ARE THOSE STILL VALID?**

- 11 In many countries throughout the world, and with the initial development of broadcasting, one of the key rationales for regulating radio (FM/AM) and television (VHF/UHF) services transmitted via terrestrial radio frequency spectrum was that spectrum was scarce. This became known as the ***Scarcity Rationale***. The premise was that there is a fixed natural limitation upon the number of services that may operate without causing interference with one another. This rationale was thus extended to prevent interference.

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<sup>2</sup> P. Seabright and J. von Hagen (eds.) 2007. *The Economic Regulation of Broadcasting Markets: Evolving Technology and Challenges for Policy*. Cambridge: Cambridge University Press

- 12 It was argued that because radio frequency spectrum was finite and could not accommodate everybody who wished to use it, government would have to decide, through various methods, who the privileged few would be that were entitled to use the spectrum for broadcasting. In exchange for this privilege, and instead of paying high fees for spectrum, government felt it was permitted to impose obligations and restrictions on the content carried by licensed broadcasters. This included providing balanced debate, education, the promotion of local content, diversity of programming, the protection of children from harmful content, and prohibitions against owners of other media (e.g. newspapers) from controlling broadcasters.
- 13 In conjunction with the Scarcity Rationale, in many countries government also developed a **Public Interest or Public Trust rationale**. In terms of this rationale, spectrum was treated as a public resource and government its custodian. Broadcasters therefore do not own the spectrum assigned to them. They are merely licensed to use it in the public interest. Government was of the view that it was therefore entitled to impose public interest obligations as part of the right to use the radio frequency spectrum.<sup>3</sup>
- 14 Internationally, the third main rationale for the regulation of broadcasting, was the **Pervasiveness Rationale**, since broadcasting was the main means of mass communication in the world. Broadcasting services also provided education and entertainment, with the result that historically people used to spend many hours listening and watching this mass medium. The view of government was that given the pervasive nature of broadcasting services, whoever controls that content is in a unique position to influence the way in which listeners and viewers view the world and their own culture. This led government to impose obligations and restrictions on broadcasters so as to encourage certain content, and to restrict other content.

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<sup>3</sup> <http://transition.fcc.gov/ownership/materials/already-released/scarcity030005.pdf>

- 15 Given all these dramatic changes in the communications sector, the ICT Policy Review process must take into consideration whether these rationales still apply in a converged digital broadcasting environment, coupled with the plethora of choices available on Internet platforms.
- 16 The issues which will have to be debated in the next stage of the ICT Policy Review process ought to include the following:
  - 16.1 Have these traditional rationales for regulating broadcasting been eroded by the abundance of audio-visual content providers over a plethora of platforms and devices?
  - 16.2 Does increasing convergence and cross-platform competition undermine the logic behind, and effectiveness of, broadcast-specific regulation?<sup>4</sup> The Framing Paper in fact supports this approach. It refers to the "important principle of similar and equitable treatment of like services regardless of the platform or technology used to deliver the service in order to promote the objective of diversity and choice. It further requires that any framework governing the sector is flexible and can adapt to changing technological, market and customer circumstances and needs".<sup>5</sup>
- 17 In concluding this section, we would like to make the point that the Framing Paper possibly gives inadequate recognition to the fact that in the 2000s, progress was made in South Africa to address digitisation and convergence. The first was the merging of the Independent Broadcasting Authority ("the IBA") and the South African Telecommunications Regulatory Authority ("SATRA") to form a converged regulator, namely ICASA. This was by virtue of the ICASA Act, No. 13 of 2000. Subsequently, in mid-2003, the Department of Communications held a National Colloquium on Convergence Policy. The report of the conference stated that the "convergence of technologies has challenged current legislative and regulatory frameworks. There is a need for

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<sup>4</sup> [http://bradleyosborn.com/regulating\\_internet\\_broadcasts.pdf](http://bradleyosborn.com/regulating_internet_broadcasts.pdf)

<sup>5</sup> Pg 24 of Gazette

policy makers to respond, to ensure that regulations and policies enhance the development of cross-sector applications, services and businesses."<sup>6</sup> Building on the success of this National Colloquium, the Department published for public comment a draft Convergence Bill in late 2003. The consultation with industry and the Convergence Bill ultimately resulted in promulgation of the EC Act, which came into operation in mid-2006. The EC Act is specifically intended to deal with a range of convergence issues. Key principles and objectives reflected in the EC Act and which ought to remain as fundamental principles and objectives in the Policy Review process are the following -

- 17.1 to promote and facilitate the convergence of telecommunications, broadcasting, information technology and other services contemplated in the EC Act;<sup>7</sup>
  - 17.2 to create a technologically neutral licensing framework;<sup>8</sup> and
  - 17.3 to give high priority to applications for spectrum where the applicant proposes to use digital electronic communications facilities for the provision of broadcasting services, electronic communications services and electronic communications network services;<sup>9</sup>
- 18 The current Policy Review process should thus be seen as a continuation of a process that began some time ago, in which South African policies and legislation have already addressed some of the challenges of digitisation and convergence.

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<sup>6</sup> National Convergence Policy Colloquium Detailed Report, DOC, July 2003, pg 3

<sup>7</sup> s2(a) of EC Act

<sup>8</sup> s2(b) of EC Act

<sup>9</sup> s30(1)(c) of EC Act

## COMMENTS ON CERTAIN OF THE PRINCIPLES RAISED IN THE FRAMING PAPER, INCLUDING FREEDOM OF EXPRESSION, DIVERSITY, AND ACCESS TO A BROAD RANGE OF INFORMATION, OPINION AND NEWS

19 Prior to commenting on certain of the principles raised in the Framing Paper, we wish to make the following introductory comments: s16(1) of the Bill of Rights in the Constitution of the Republic of South Africa, provides:

"Everyone has the right to freedom of expression, which includes –

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity; and
- (d) academic freedom and freedom of scientific research."

20 Obviously, legislation governing the communications sector ought to give effect to this constitutional right to freedom of expression, and any limitation to that right must comply with the limitation of rights provisions in s36 of the Bill of Rights.

21 As regards the 14 principles reflected in the Framing Paper, whilst it is correct, in 3.5.1, to refer to the fact that "South Africans have a right to freedom of expression" (emphasis added), since that is a constitutional right, it is, with respect, an overstatement in relation to each of the remaining principles to state that "South Africans have a right" (emphasis added). M-Net and MultiChoice support most of those principles, but submit that it is incorrect to elevate them to a "right". Instead, they ought to be policies and objectives. We turn now to deal with certain of those principles.

22 The Framing Paper identifies a broad set of objectives and principles which will inform the Policy Review, including –

22.1 the right to freedom of expression;

22.2 the right to access a diverse range of content; and

- 22.3 the right to access a broad range of information, opinion and news of relevance to communities and people's lives.
- 23 These principles speak largely to the creation and consumption of content and, as pointed out in the Paper, they have been encapsulated in legislation and various sets of regulations. The Paper asks two questions, are these still core principles and are there any other considerations which should be taken into account?
- 24 In attempting to articulate a set of objectives for this Policy Review process, the issue is not so much whether the ideals of freedom, diversity and access to information, opinion and news continue to apply – we believe they do - but whether our assumptions about how best to achieve those policy objectives are still correct.
- 25 The first point to note is that traditionally, regulations intended to achieve those principles have applied almost exclusively to broadcasting services. Before the Internet, broadcasting and print media were the only sources of media available to meet the content demands of consumers. Centrally controlled broadcasting services were transmitted via national networks to passive consumers. The social, cultural and political impact of those services was thus significant, and concerns about that impact underpinned the regulation of broadcasting services (see the earlier section of these representations dealing with the **Pervasiveness Rationale**).
- 26 Convergence has changed everything about the way content is consumed. We identify below the most significant of these changes, which ought to be borne in mind in determining objectives for the Policy Review process. In particular, consideration ought to be given to how these changes have contributed significantly to achieving the objectives of freedom of expression, diversity and access to information, opinion and news, and thus, to what extent regulation remains necessary.

### No boundaries

- 27 We have already made the point that in a converged world, South Africans access content and content services from across the globe and create content for distribution across the globe. Services no longer adhere to national boundaries.

### Active, not passive

- 28 The era of passive consumption of content has passed. Today, technology has enabled individuals to connect and to create and share their own views about media content.

### Multiplicity of sources

- 29 Technology has lowered barriers to the creation and distribution of content and has empowered individuals to create, record, and distribute content in new ways. In the past, the high cost of production and distribution meant that these activities could only be undertaken by well-funded corporations. Today, anyone with a mobile phone can take pictures, record sound and create video content - this has facilitated new forms of cultural expression which were not contemplated in previous policy discussions.

### Creating and sharing news

- 30 Today, major news stories (like the Oscar Pistorius story) break on social media platforms and are then picked up by traditional media. In addition, news channels and broadcasters now rely on citizen journalists to cover major news stories. International news network, CNN, launched iReport in 2006 allowing individuals to contribute photos, and audio-visual coverage of current events.

### Major source of political and social influence

- 31 As stated earlier in these representations, one of the key rationales for the regulation of broadcasting services was the pervasiveness or influence of these services. Convergence has significantly reduced the pervasiveness and influence of traditional broadcasting services in political and social discourse.

32 The Middle East provides an interesting case study. In all the countries affected by the political uprisings referred to as the "Arab Spring", traditional media was under tight government control. This drove citizens to mobile and online platforms to find information and express their political views. In countries like Tunisia and Egypt, Facebook and Twitter allowed young people to organise and co-ordinate very effective political protests.

33 These platforms have not only been politically effective in the Middle East, they also have provided a space for individuals to address social issues which are restricted on traditional platforms:

"Perhaps the greatest sense of empowerment has come through the ability to use cyberspace as a location for doing what could not otherwise be done in reality: assemble to discuss ideas, concerns, and complaints, and to share frustrations, while also providing the social networking opportunity to unite, strategize, and plan for change. In cyberspace, the social restrictions that exist in reality in some places – such as gender segregation – disappear, providing groups of people who might otherwise never meet and converse the opportunity to connect and recognize what they share in common."<sup>10</sup>

34 Some may suggest that this reality is still a long way off in South Africa, but a cursory analysis of social media usage in our country starts to tell a different story. Consumers are able to tell their own stories, create their own content, access diverse views and to impart and receive information. The usage data which is publicly available indicates that South Africa has:

34.1 5.33 million users on Facebook.<sup>11</sup> This number is considered to be understated because Facebook does not measure mobile-only usage.

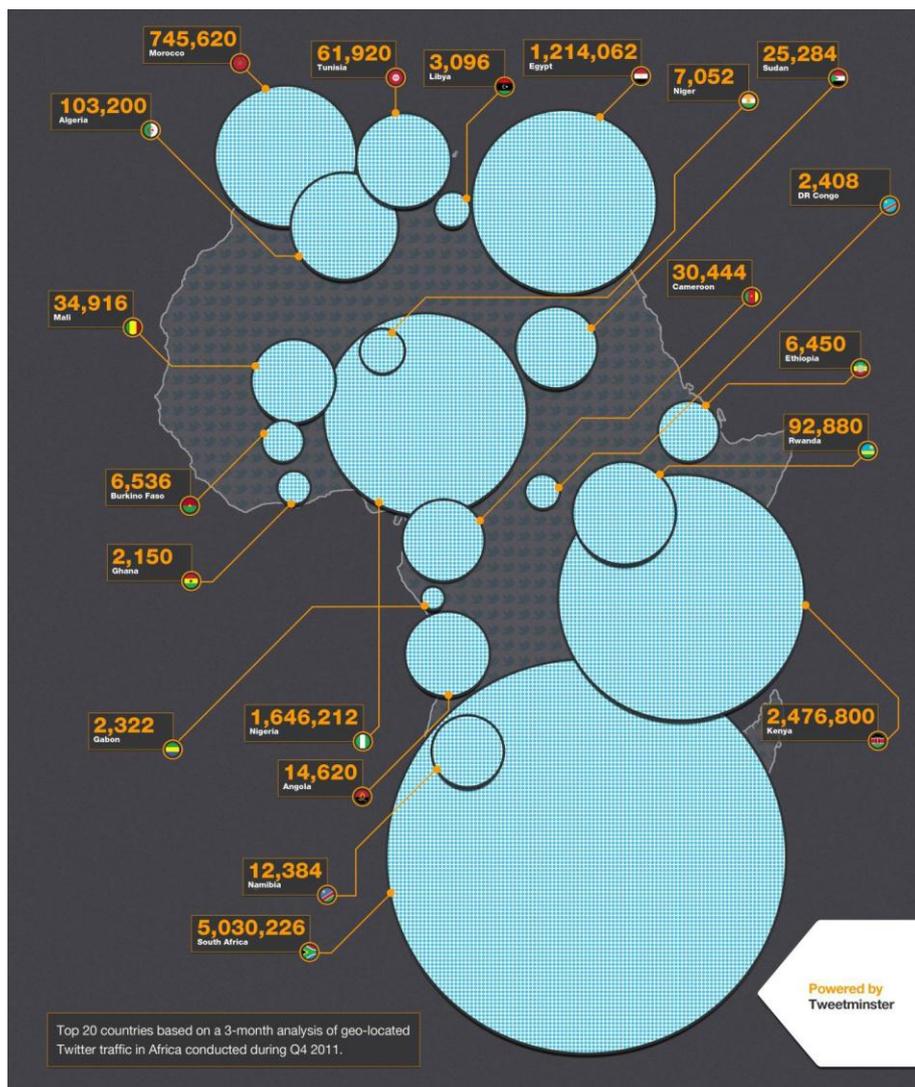
34.2 5 million users on Twitter.<sup>12</sup> South Africa has the highest number of active Twitter users in Africa as demonstrated in Figure 1 below:

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<sup>10</sup> [http://www.oxfordislamicstudies.com/Public/focus/essay0611\\_social\\_media.html](http://www.oxfordislamicstudies.com/Public/focus/essay0611_social_media.html)

<sup>11</sup> <http://www.worldwideworx.com/wp-content/uploads/2012/10/Exec-Summary-Social-Media-20121.pdf>

FIGURE 1



35 South Africans have also embraced online video services – like Youtube - which is estimated to have 6 million users in South Africa.<sup>13</sup> In 2012 alone, Youtube visits from South Africans increased by 80% and uploads grew by 30%. Revenue paid to South Africans who have uploaded videos grew by 60% year on year.<sup>14</sup>

<sup>12</sup> Although the Social Media Report by World Wide Worx identified 2.43 million Twitter uses in South Africa by August 2012, a March 2013 report by Portland Communications which looked at 3 months of geo-located Twitter data put South African users at 5,030,226 [http://www.portland-communications.com/Twitter\\_in\\_Africa\\_PPT.pdf](http://www.portland-communications.com/Twitter_in_Africa_PPT.pdf)

<sup>13</sup> <http://www.bluemagnet.co.za/blog/the-current-state-of-social-media-in-south-africa/>

<sup>14</sup> <http://www.techcentral.co.za/the-s-africans-coining-it-on-youtube/38801/>

36 Online services challenge conventional ideas about how citizens can be empowered to create and disseminate content. Youtube hosts a number of local channels. The top 3 South African channels on Youtube are set out below:<sup>15</sup>

#	Channel	<u>Uploaded video views</u>
1.	 <a href="#">Soul Candi TV</a>	3 975 855
2.	 <a href="#">Supa Strikas FC</a>	3 874 692
3.	 <a href="#">Mdu Comics TV</a>	3 581 437

37 The usage data presented above demonstrates the extent to which South Africans are embracing online and mobile platforms to find information, express their views, share their lives, their insights, their photos and videos – in effect, they are creating and distributing their own, individualised content and commentary. Three million or five million users may not seem such a great number when measured as a percentage of the total South African population. However, these numbers exceed the audiences of most traditional broadcasting services.

38 Digitisation and convergence have resulted in content being created and consumed by multiple services over a variety of platforms and through a wide range of devices. The principles of freedom of expression, diversity and access to information are thus being addressed and advanced by these realities.

39 As a consequence of these developments, the Policy Review process needs to address the following questions and issues:

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<sup>15</sup> <http://www.socialbakers.com/youtube-statistics/country/south-africa/>

- 39.1 Whilst the principles of freedom of expression, diversity and access to information remain valid, in the light of the realities described above, to what extent is the regulation of broadcasting services necessary to achieve and advance these principles?
- 39.2 Furthermore, given the fact that content is being created and consumed through multiple services over a variety of platforms and through a wide range of devices, the impact and influence – the pervasiveness – of broadcasting services has diminished significantly. This is a further reason why the justification for the regulation of broadcasting services needs to be questioned.

## **SPECTRUM CONSIDERATIONS**

- 40 Almost all countries have recognised the scarcity of spectrum and that it is a natural resource which needs to be managed efficiently.
- 41 However, policies on allocating and licensing spectrum differ from country to country. They may include –
- 41.1 raising funds for the fiscus to advance the economic and social well-being of the population;
  - 41.2 growing the ICT sector;
  - 41.3 providing universal access to the ICT sector;
  - 41.4 providing a range of services;
  - 41.5 promoting a diversity of views;
  - 41.6 promoting competition in the sector; and
  - 41.7 promoting diversity of ownership.

- 42 The allocation and licensing of spectrum in a number of countries has taken the route of auctions, with the highest bidder or those with the financial backing – usually telecommunications operations - being licensed more spectrum. However, in our view spectrum allocation based only on financial capacity does not necessarily advance many of the objectives listed in the previous paragraph.
- 43 In the South African market context, auctions alone will not necessarily assist in advancing new entrants, particularly those who were previously disadvantaged, into the ICT sector.
- 44 These policy goals should inform the licensing of new bands of spectrum going forward. We propose a form of "beauty contest", and only if the beauty contest could not determine a successful applicant should an auction be considered.
- 45 The demand for spectrum by broadband services providers, has led to the ITU re-considering spectrum allocations, and particularly re-allocating broadcast spectrum to broadband services. Broadcasting services are under increasing pressure to migrate to lower bands of the spectrum so as to free up the upper band for broadband services. In line with these trends, South Africa is also focussing on the development of broadband and promoting infrastructural development which will increase bandwidth. The migration to digital broadcasting and the consequent freeing up of spectrum in the 800 MHz band is seen by many in South Africa as providing an opportunity for the provision of broadband services.
- 46 Proponents in favour of allocating the digital dividend for the provision of broadband services argue that with digital broadcasting, broadcasters will need far less spectrum. Whilst digital broadcasting brings with it the ability to use spectrum more efficiently, broadcasting technology has also changed to include bandwidth hungry technologies such as 3D, and ultra high-definition. Furthermore broadband technologies are capable of delivering broadcast content, which enables those service providers to compete with broadcasters using the very spectrum which broadcasters are being forced to relinquish.

47 The further spectrum issue requiring consideration is that the broadcasters which are required to migrate to lower bands are the persons creating the digital dividend. These broadcasters incur significant costs in that migration, for which they ought to be properly compensated by the persons to whom that digital dividend is assigned. By way of example, in the USA, the Federal Communications Commission has provided incentives for television broadcasting services to move to lower bands by means of an Incentive Auction.<sup>16</sup>

48 A final policy proposal in relation to fixed and wireless networks is net-neutrality, which will assist in levelling the playing field and improve the competitive landscape, since all content will be treated in a similar manner regardless of who distributes the content over the network.

**CERTAIN PRINCIPLES IN FRAMING PAPER ALREADY ADEQUATELY DEALT WITH IN OTHER LEGISLATION AND BY OTHER BODIES, AND ACCORDINGLY SHOULD NOT BE INCLUDED IN POLICY REVIEW PROCESS**

49 In numerous instances, the Framing Paper deals with issues and raises questions which are more than adequately dealt with and in great detail in various statutes and regulations of general application (i.e. they apply to the entire economy and all persons within South Africa), and which legislation is administered by and is the responsibility of specialist bodies. For example, the Framing Paper deals with issues and raises questions relating to the following –

49.1 in section 3.5.10, the right to privacy and the protection of information, yet these issues are dealt with in detail in the Protection of Personal Information Bill, which is soon to be finalised in Parliament;

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<sup>16</sup> <http://www.mondaq.com/unitedstates/x/201650/Telecommunications+Mobile+Cable+Communications/FCC+Issues+Groundbreaking>

- 49.2 in section 3.5.12, competition issues, yet these issues are fully dealt with in the Competition Act, No. 89 of 1998, and which Act is the responsibility of the Competition Commission, the Competition Tribunal and the Competition Appeal Court – all of which institutions have extensive expertise and experience in competition matters;
- 49.3 in section 3.6.13, consumer protection issues, yet these issues are fully dealt with in the Consumer Protection Act, No. 68 of 2008, which Act is the responsibility of the National Consumer Commission and the National Consumer Tribunal, as well as the Electronic Communications and Transactions Act, No. 25 of 2002, and portions of the EC Act and regulations made in terms thereof;
- 49.4 in section 3.6.14, health and safety, as well as environmental issues, yet those issues are extensively dealt with in a wide range of health and safety legislation, as well as legislation aimed at protecting the environment.
- 50 We submit that for the following reasons, neither the Policy Review process, nor the communications sector policy framework, nor communications specific legislation, should deal with any of these issues:
- 50.1 For the reasons stated in preceding paragraphs, this is simply not be necessary.
- 50.2 If it is not necessary, neither the Minister of Communications, the Department of Communications, interested parties within the communications sector and Parliament should spend time, money and resources dealing with and considering those issues.

- 50.3 Specialist bodies have already been established and have developed experience and expertise dealing with those issues. It would be a waste of public monies, time and resources if ICASA (which is already under-funded, under-resourced and battling to properly perform its mandate) were to have to expand to be able to administer and deal with those additional issues. Not only would such duplication be wasteful, but ICASA, unlike those specialist bodies, would lack the experience and expertise to properly deal with those issues.
- 50.4 If communications specific legislation were to deal with those issues, then entities within the communications sector would be subject to and have to comply with the sector specific legislation as well as extensive legislation dealing with those issues in laws of general application. This would be overly burdensome and would result in entities within the communications sector having to spend time, money and resources ensuring compliance with all this legislation.
- 50.5 These entities will also be exposed to double jeopardies, which is undesirable.
- 50.6 There is a significant risk that if those issues are dealt with in communications specific legislation and in laws of general application, there are likely to be numerous provisions which may conflict with one another and there are likely to be difficulties around the interpretation of an entity's obligations. This in turn is likely to result in unnecessary disputes and litigation.
- 50.7 Parallel regulatory frameworks are also likely to result in entities within the communications sector indulging in forum shopping. There may also be undesirable turf wars between the specialist bodies dealing with the laws of general application and ICASA.
- 51 For all these reasons, we would strongly urge the Minister and the Department to remove the issues identified above from the Policy Review process.

## **CAPABLE, EFFICIENT AND EFFECTIVE INSTITUTIONS AND PROCESSES REQUIRED**

- 52 The Framing Paper recognises that there is a "need for capable, effective and efficient processes and institutions".<sup>17</sup> Scattered throughout the Framing Paper are related statements concerning principles which ought to apply to ICASA as an institution and to its processes and the regulatory framework as a whole.
- 53 M-Net and MultiChoice believe that these principles are fundamental, and instead of them being referred to fleetingly, they ought to be grouped together as a distinct set of objectives and principles aimed at ensuring that ICASA and its processes are capable, effective and efficient.
- 54 To this end, we believe the Framing Paper, and the subsequent documents contemplated at pg 9 of the Gazette ought to endorse the following objectives and principles, which should guide the formulation of communications sector policies and legislation:
- 54.1 ICASA ought to be independent of government, political or commercial interference and act in the public interest.<sup>18</sup> This principle is already endorsed in s192 of the Constitution of the Republic of South Africa, and in s3(3) and (4) of the ICASA Act.
- 54.2 ICASA ought to be properly funded and resourced so as to ensure that as an institution it is capable, effective and efficient.
- 54.3 The regulatory framework ought to be transparent and promote certainty and stability within the communications sector, which is fundamental if investment is to be encouraged within the sector.<sup>19</sup>

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<sup>17</sup> Pg 24 of Gazette

<sup>18</sup> Support for this objective is reflected at pg 14 of Gazette

<sup>19</sup> Support for the objective of stability is to be found at pg 12 of Gazette

54.4 The regulatory framework ought to be flexible and create an enabling environment for the communications sector – again, in order to encourage investment within that sector.<sup>20</sup>

54.5 The communications sector legislation and regulations must ensure that all ICASA's public consultative processes and those processes affecting licensees are clearly stated and are procedurally fair.

## **COMMENTS ON CURRENT LEGISLATIVE AMENDMENTS**

55 In her budget speech of 21 May 2013, the Minister of Communications indicated that amendments to both the ICASA Act and the EC Act would be tabled imminently. Since then, notices were gazetted indicating that copies of both Bills could be obtained from the Department, and that the Bills would shortly be introduced into Parliament.

56 It is unclear why the Minister intends proceeding with legislative amendments when at the same time she has launched the ICT Policy Review process, and other important processes such as the Broadband Policy Process. From what the Minister has stated as regards these processes, she intends that they be dealt with expeditiously. Furthermore, it is inevitable that these processes are likely to result in dramatic changes to the current legislative framework for the communications sector

57 We thus submit that to the extent that the Minister persists with the EC Amendment Bill and the ICASA Amendment Bill, the amendments to both statutes ought to be confined to amendments which are of a technical nature and which are strictly necessary for the immediately interim period – i.e. for the period prior to the significant revision of the existing sector specific legislation.

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<sup>20</sup> Support for these objectives is to be found at pgs 11 and 12 of Gazette

58 It would be unfortunate if both Bills were to propose amendments other than these (i.e. amendments of a substantive nature), since this would then require interested parties and Parliament to invest considerable resources in participating in lengthy public consultative processes concerning such amendments to the EC Act and the ICASA Act, which statutes may subsequently be completely overhauled.

## **CONCLUSION**

59 Once again, M-Net and MultiChoice want to thank the Minister and the Department for the opportunity to comment on the Framing Paper, and look forward to participating in this Policy Review process.