

**SUBMISSION BY e.tv (PTY) LIMITED ON THE NATIONAL INTEGRATED ICT
POLICY GREEN PAPER**

INTRODUCTION

- 1 On 24 January 2014, the National Integrated ICT Policy Review Green Paper (the “Green Paper”) was published by the Minister of Communications for general information and comment. e.tv (Pty) Limited (“e.tv”) welcomes the opportunity to make its submissions on the Green Paper. e.tv has been an active participant in all the ICT Policy Review processes and we look forward to the finalisation of a new policy for the sector.

- 2 e.tv was South Africa's first commercial free-to-air television licensee and since its inception has made a significant contribution to the country's broadcasting landscape:
 - ☐ e.tv is a Level 2 BBBEE contributor;
 - ☐ e.tv's holding company, Sabido Investments, is majority-owned and controlled by HCI;
 - ☐ HCI's major shareholder is the SACTWU Investment Group, the investment vehicle for the South African Clothing and Textile Workers Union;
 - ☐ e.tv's ultimate shareholder beneficiaries are:
 - ☐ members of the South African Clothing and Textile Workers Union (SACTWU) and their families

- ❑ Annual dividend payments of R40 - R50 million are made to SACTWU;
 - ❑ 20 million South Africans watch e.tv daily;
 - ❑ The channel broadcasts 45% South African content;
 - ❑ The channel makes significant investment in South African independent production, staff development and training – 5.5% of payroll; and
 - ❑ In excess of 1200 employees are employed in the broader media group (including eNCA and others).
- 3 e.tv agrees with the Green Paper that the ICT sector is experiencing major technological and market changes and that against that background the policies and laws governing the sector need to be reviewed. In addition, e.tv believes that there are certain trends apparent in the broadcasting sector that, unless arrested, will impact negatively on the long-term health and viability of the broadcasting sector, particularly the free-to-air ("FTA") broadcasting sector. We deal with these and other issues below.

BROADCASTING

THREATS TO THE FREE-TO-AIR TELEVISION MARKET

- 4 In 2013, e.tv made various submissions on the ECA Amendment Bill (attached as Appendix 1) dealing with action urgently needed to preserve the long term

health of the FTA Broadcasting sector. During that process Parliament requested that these matters be referred to the Policy Review process (see extract of PCC's recommendations, attached as Appendix 2). e.tv therefore submits that these matters must now be considered during the ICT Policy Review Process.

- 5 As the Green Paper reflects, South African broadcasting policy and regulation is predicated on the notion of a three-tier system of broadcasting – public, commercial and community – each with its own business model. It also recognises that each sector must perform public interest obligations, but that the extent of these obligations differs. In particular, it is the FTA broadcasters that bear the bulk of the public interest obligations.
- 6 e.tv submits that there is an urgent need for regulatory and legislative action to preserve the viability of the FTA segment of the television broadcasting industry, which is under threat as a result of the increasing dominance of pay-television.
- 7 This has a direct negative impact on the health of the South African broadcasting industry. In particular, the participation of pay-television players in the advertising market is effectively unregulated. This has started to erode the revenue base of the free-to-air channels which rely largely, or in the case of commercial FTA broadcasters such as e.tv, solely, on advertising for revenue.
- 8 The growth of subscription TV in tandem with subscription TV's participation in the advertising market thus directly undermines the very foundation upon which

South African broadcasting policy and regulation is built. The long term consequences are that the viability of FTA broadcasting, already under threat, will cease and that the public interest obligations of the FTA broadcasters may no longer be performed.

- 9 The weakening of the FTA broadcasters points to a long-term outcome which may see the majority of South Africans having to pay to access television - a startling development which would undermine national development goals and increase the digital divide between rich and poor – at a time when all national policies are supposed to be directed towards bridging that divide. As the *National Development Plan, 2030*, notes:¹

“Access to information via print, broadcasting and the internet are vital for building an informed citizenry. It also contributes to education and economic development.”

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

- 11 But section 60(4), as it is currently drafted, is meaningless. As of March 2013,

the annual gross revenue for TV advertising in South Africa was estimated at approximately R16.5bn whereas DStv's subscription revenue for the year ending March 2013 was estimated to be approximately R15.5bn. This means that DStv is permitted to earn up to R15.5bn in advertising revenue (94% of the total television advertising revenue) before it would be in breach of section 60 (4) of the ECA. Consequently section 60(4) does not in any way limit the ability of a dominant subscription television provider to take revenue from the advertising market and does not protect free-to-air broadcasters in any way. DStv currently takes an enormous 41% of total TV advertising revenue (equal to the advertising share of the largest free-to-air broadcaster in the country – SABC) while e.tv, which relies exclusively on advertising, takes 18%.

- 12 The previous White Paper realised the inherent dangers of allowing pay-television broadcasters to have access to advertising revenue.

"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".²

- 13 The White Paper further instructed the Independent Broadcasting Authority ("the IBA") – ICASA's predecessor – 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.

² Chapter 3.3.2: private television (in chapter 3 dealing with commercial broadcasting)

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. It will consider whether a lower hourly limit should be imposed upon subscription services."

- 14 Notwithstanding this, the IBA did not take any action. To date, ICASA has also taken no action in this regard. Such action is long overdue and is now urgently required.
- 15 Since the primary sources of television funding worldwide are advertising, subscription fees and government funding, there are only three ways directly to counteract acute loss of advertising revenues by free television in South Africa.
 - 15.1 First, the government could provide additional subsidies to FTA broadcasters. Since additional subsidies are unlikely in the South African context given the other budget priorities facing government (and given the government's existing funding commitments to the SABC), we do not believe this is a realistic option. However, there are two other options which are not mutually exclusive and can be implemented in combination:
 - 15.1.1 The limits on subscription services' access to the advertising markets (e.g. section 60(4) of the ECA) could be revised to levels that are economically meaningful.
 - 15.1.2 FTA broadcasters can be given an opportunity to share proportionately in the substantial revenue which the subscription

provider collects in providing broadcasters signals. We consider each of these two options in turn:

Meaningful Caps on Subscription Service Advertising Revenue

15.2 Stringent caps on advertising revenue share by pay TV broadcasters could go a long way towards addressing the market imbalance. If the subscription provider did not compete with FTA broadcasters for available advertising revenue then it would pose less of a threat to FTA television. But, as mentioned above, the advertising cap placed on DStv as a subscription broadcaster by section 60 (4) of the ECA is meaningless. One subscription television provider – DStv - controls 100% of subscription revenue in the country and 41% of total television advertising revenue. Under the present cap, the subscription provider could control essentially 100% of annual television advertising nationwide before it reached the cap (see comment above regarding section 60(4) of the ECA). Yet if that occurred, FTA broadcasting would have long since ceased to be economically viable. Even at today's levels the financial viability of FTA broadcasting is in question, and the subscription operator's advertising share has been growing steadily.

Proportionate Carriage Fees

15.3 A third option to address the market imbalance would be to ensure the Individual FTA television licensees receive carriage or integration fees

reasonably approximating the value they contribute to the pay TV platform. In terms of this approach, must-carry status would be extended to all Individual FTA television licensees and pay TV operators would be required to compensate those broadcasters for the value of their channels as measured by objective factors such as the audience and revenue performance of the pay TV platform, the content costs of the FTA channel and the contribution each FTA channel makes to the pay TV platform's viewership.

16 In the US, where carriage fees are provided for, the US Congress³ acknowledged the following in relation to pay-television when adopting these laws in 1992⁴:

- "a very substantial portion of the fees which consumers pay to cable systems is attributable to the value they receive from watching broadcast signals."
- "using the revenues they obtain from carrying broadcast signals, cable systems have been able to support the creation of cable services [and now] sell advertising on these channels in competition with broadcasters."
- this condition "has created a distortion in the video marketplace which threatens the future of over-the-air broadcasting."
- "public policy [does not support] a system under which broadcasters in effect subsidize the establishment of their chief competitors."

³ Background to the US Carriage laws is provided in Appendix 3

⁴ Note that "cable" here refers to pay TV and "broadcast", "broadcaster" or "over the air" refers to FTA TV.

- once a home receives cable service "that home becomes extremely dependent upon that cable for reception of local television stations. Even though these signals theoretically are available over-the-air, when a local television station is not carried on a cable system, cable subscribers effectively lose their ability to watch it. The cable becomes a gate over which the local system has control."
- "television broadcasting plays a vital role in serving the public interest. [This] role is in jeopardy if cable operators can use their market power either to refuse to carry local television broadcast signals or to extract favourable terms as consideration for carriage of these signals."

17 In summary, the U.S. Congress found that subscription services undermine the foundation of FTA broadcasting when they use free access to broadcast signals to grow their platforms and then use those platforms to compete with FTA broadcasters in the sale of advertising and the purchase of programming. FTA television can remain free to those who choose not to take subscription services only if FTA broadcasters can receive the fair value of their signals from those who would retransmit them or otherwise use them to enhance the value of their own pay-TV platforms.

18 The South African market today bears many similarities to the market in the United States in 1992. A near monopoly subscription television service has built a large and very profitable business, in substantial part by re-selling FTA broadcast signals (SABC and e.tv) while avoiding the considerable costs of public interest obligations. The subscription service now acts as a gatekeeper to

its subscribers, making FTA broadcasters dependent on that distribution. Yet the subscription service also takes an extremely large and rapidly growing share of the country's advertising revenue, undermining the viability of FTA broadcasters, even as those FTA broadcasters continue to subsidize growth of the pay television platform.

- 19 Unlike in the US though, where there is a strong market for regional and local advertising which FTA broadcasters are in the best position to capture, all television advertising in South Africa is national in scope, so the direct-to-home subscription satellite operator is able to compete with the SABC and e.tv for essentially all advertising revenues. That means the erosion in advertising revenue supporting free broadcasting has been especially acute in South Africa and the remedies may need to go beyond what has been contemplated in the US and other jurisdictions.
- 20 Whereas the carriage of the SABC channels is currently subject to the ICASA Must Carry Regulations, 2008,⁵ as contemplated by section 60(3) of the ECA, there is no regulation governing carriage of any other FTA channels by pay TV operators. Moreover, the Must Carry Regulations have been ineffective in addressing the types of economic issues raised above, even in relation to the SABC which, as far as e.tv is aware, is not compensated for its channels by DStv despite the high levels of audiences which the SABC channels draw to the DStv

⁵ General Notice No. 1271, Government Gazette No. 31500 (31 October 2008)

platform.

- 21 e.tv submits that there is a need to regulate the manner and the extent to which all major FTA channels are used by pay- television operators. At present e.tv is one of the most viewed channels on DStv, therefore making a significant contribution to the platform. Also, over 24% of e.tv's audience watches the channel through DStv, as the default system of convenience and choice which means that e.tv would be in a precarious position if DStv declined to carry it in future.
- 22 **e.tv submits that the final ICT Policy should require that the section of the ECA dealing with must-carry is amended so that subscription broadcasters are required to carry and pay for the channels of Individual FTA Television Broadcasting Service Licensees.**
- 23 e.tv also submits that there are a number of other areas where the activities of the dominant pay TV operator are impacting on the health and viability of the free-to-air broadcasters. Other jurisdictions have adopted provisions restricting the behavior of pay TV operators relative to FTA players, including:
 - Tiering – wherein requirements are set to ensure that eligible broadcast signals must be carried or otherwise made available to all subscribers on all tiers of the platform

- Channel/guide position – requirements for eligible broadcast signals to be carried on their FTA channel number or on another channel number acceptable to the broadcaster in the same neighborhood with other broadcast signals.
- Signal quality and pass-through of programme-related data – requirements stating that a subscription service must not materially degrade the quality of a FTA broadcaster's signal and must pass through all programme related data, including ratings information and closed captioning.
- Full reach – requirements that eligible signals should be made available and must be viewable on all devices on which subscription services provide a connection.

24 As a result of its market power as a dominant player, DStv is also increasingly acquiring exclusive rights for programmes for longer and longer licence periods. DStv's exclusive licence periods run for up to three years – which is more than double the international norm for pay-TV operators in more competitive environments. The effect of this is that by the time FTA television has access to these programmes, they are old and dated and do not have the same appeal for audiences and advertisers as they would have if the DStv exclusive licence window was shorter.

- 25 **e.tv proposes the final ICT Policy require the Authority to conduct a broad inquiry into the impact of pay TV on FTA broadcasting.**

PUBLIC BROADCASTING

- 26 In relation to the SABC and Public Broadcasting, e.tv believes that measures are urgently needed to address the manner in which, in spite of its public mandate, the three television channels of the SABC effectively operate as a single dominant commercial network – sharing programming, adopting complementary scheduling, cross-promoting programmes and selling advertising across the network. e.tv submits that the current provisions of the Broadcasting Act which seek to regulate these practices are inadequate and in any event are not being fully complied with by the SABC.

- 27 The Broadcasting Act currently requires that the SABC must consist of two separate operational divisions, namely: a public service division and a commercial service division. These divisions are to be separately administered and a separate set of audited financial statements are to be prepared in respect of each division. Notwithstanding these provisions, the SABC engages in various anti-competitive practices:

27.1 The SABC cross-sells advertising across its three television channels and therefore makes no distinction between the public service and commercial

channels. In addition, the SABC offers high discounts to advertisers in exchange for such advertisers buying advertising exclusively on SABC. 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.

27.2 The SABC collectively purchases commercial international programming (particularly movies) for all three channels. As the SABC has never supplied separate accounts 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 subsidizing the costs of the commercial division. So, for example, a movie which is licensed to the SABC for three runs may be broadcast first on SABC1 and subsequently shown on SABC3 in circumstances in which the cost of the movie is amortised 100% against its first run on SABC1. The quantity of international programming acquired by the SABC also exceeds its requirements and a significant portion of this programming is written off.

27.3 The SABC cross-schedules local and international programmes on all three channels, doing the first run on SABC 1 or SABC 2 and then a repeat on SABC 3 (or vice versa). 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.

This practice also provides SABC3 the opportunity to earn additional advertising revenue from these SABC1 and SABC2 programmes. In the case of SABC 3, the channel uses the repeats as a means to meet its local content quotas. This constitutes a further subsidy by the PSB Division of the Commercial Division as it results in SABC 3 not investing in local content.

27.4 Finally, there is the matter of the services which are shared by the divisions. These shared services include not only administrative and legal services, but extend to core broadcast functions such as programme commissioning and acquisition. e.tv believes that the sharing of such services by the commercial and public service divisions runs counter to the Broadcasting Act, which attempts to separate the operations of the two divisions.

28 **e.tv submits that the collective impact of the SABC's current practices is that there is no real and meaningful distinction between the operations of the public service and commercial divisions. e.tv strongly recommends that provisions restricting the SABC's commercial practices listed above are included in the final ICT Policy.**

SPECTRUM ISSUES

29 A key issue related to the long-term viability of broadcasting services, particularly terrestrial broadcasting services, is access to spectrum. In this regard, it is concerning to e.tv that the Department of Communication's ("DoC's) position on broadcaster's future access to spectrum is not yet certain. This lack of clarity sits against the backdrop of the various World Radio Conference ("WRC") decisions which have seen increasing amounts of spectrum which was previously allocated to terrestrial television, allocated to mobile services.

29.1 In 2007, the ITU held the World Radiocommunication Conference (WRC-07) which allocated, on co-primary basis, the upper part of the UHF broadcast band to mobile services. This was to provide for international mobile telecommunications (IMT) in Region 1 in the range 790 to 862 MHz (800MHz band). In Europe, the 800 MHz band has subsequently been identified specifically for IMT after the broadcasting digital migration is completed, and countries have re-farmed the UHF frequencies (previously identified for DTT use) in the 800 MHz band for mobile services. This has resulted in additional costs for re-planning frequency for DTT networks.

29.2 After WRC-07, the telecommunication sector in ITU Region 1 proposed a second digital dividend from the UHF spectrum for mobile use. The WRC-12 provided the opportunity for the telecommunication sector to push for allocation of 694-790 MHz (700MHz band) to mobile services as from the end of 2015. Resolution 232 of WRC-12 resolved to allocate the frequency

band 694-790 MHz in Region 1 to mobile services on a co-primary basis with other services to which this band is allocated on a primary basis after WRC-15. The technical and regulatory conditions applicable to the mobile service allocation in this band are to be determined at WRC-15 after considering ITU-R studies on the impact on broadcasting services currently occupying 700 MHz band.⁶ This has the potential to affect the long term viability of the terrestrial broadcasting platform in South Africa and many European countries where terrestrial broadcasting is the primary platform of delivery of television broadcasting services.

30 e.tv cautions that any approach to spectrum allocation which fails to provide sufficient spectrum for free-to-air terrestrial television in future could have a profoundly negative impact on the future viability of the industry in South Africa and this will have a consequent impact on the quantity and quality of television available to the poorest South Africans. The unique public interest function performed by all tiers of free-to-air terrestrial broadcasters, including commercial broadcasters such as e.tv, could therefore be undermined. These public interest contributions are wide ranging and extend to support for local content, language development and news and information. Such programming is only available on free-to-air terrestrial television and not on subscription television.

31 In addition, the ability of the terrestrial television platform to compete with other

⁶ Resolution 232 [COM5/10] [WRC-12] <http://www.itu.int/oth/R0A0600004B/en> [accessed 19 December 2012]

television platforms such as satellite and IPTV will be greatly undermined if the spectrum needs of terrestrial television are not given sufficient prominence. For instance, the current DTT spectrum allocations will not allow for sufficient high definition services to be carried. Consumers will increasingly demand those services and terrestrial television will be at a competitive disadvantage if it cannot, in future, access spectrum to provide such services. In effect, such a situation would result in the ghettoisation of terrestrial television and will result in those South Africans who cannot afford subscription television receiving a poorer service. The European Broadcasting Union has recommended that that a minimum of 20 to 25 HDTV channels would need to be provided on the terrestrial platform in order to make it competitive relative to other platforms.⁷ The EBU report also concluded that a generalization of HDTV is expected as well as the introduction of UHD TV and 3D. It stated further that spectrum is needed for enhanced technologies and that broadcasters need to keep the current available spectrum including the 694-790 MHz band.

- 32 While the desire of mobile operators to increase the speed, capacity and coverage of mobile and wireless broadband and to align Europe and Africa with Asia and the Americas is understood, it should be kept in mind that television can only be implemented in the VHF and UHF bands, The primary concern of terrestrial broadcasters is that if the 700 MHz band is re-farmed in addition to the 800 MHz, it will result in a spectrum scarcity for terrestrial broadcasting services

⁷ EBU. 2009. Tech 3334 – Accommodation of HDTV in the GE-06 Plan. Geneva, February 2009. p.5

similar to what occurred in the analogue broadcasting environment with the result that there is no investment, no development, and no innovation resulting in the decline of the DTT platform.

- 33 **e.tv therefore submits that the particular role and needs of terrestrial television should be reflected in all spectrum allocation decisions. e.tv believes it is critical that the final ICT Policy prioritise the allocation of spectrum to DTT services. e.tv further recommends that the principle of sharing must be retained as IMT and broadcasting services should be enabled to develop new and innovative services and that contiguous band assignments for sharing must be adopted as this is the most spectrum efficient and feasible means of spectrum sharing.**

FUNDING DIGITAL MIGRATION

- 34 Notwithstanding the detailed planning on DTT, South Africa has to date, not launched a DTT platform. The reasons for the repeated delays are multi-faceted and complex. Like many stakeholders, e.tv wishes to see a DTT platform launched expeditiously and wishes to see the migration programme run quickly and smoothly so that a strong DTT platform, and a viable future for free-to-air broadcasting, is built.
- 35 The migration process is a costly one to the state, to broadcasters and to

consumers. It is e.tv's view that the main beneficiaries of the digital dividend spectrum should make a contribution to these costs as they are ultimately the beneficiaries of the migration programme. e.tv suggests that the most effective way of raising revenues to fund DTT migration would be for the digital dividend spectrum (or a portion thereof) to be earmarked for auction. This has been done successfully in a number of other territories, most notably Germany where EUR 3.6 billion was raised from the auctioning of 72MHz digital dividend spectrum.

- 36 e.tv believes it would be an enormous opportunity lost for the South African fiscus, if auctions were not used to raise funds from the digital dividend spectrum. Clearly earmarked funding for DTT migration is likely to have a greatly beneficial effect on the speed with which migration occurs. Many of the difficulties besetting South African DTT are linked to the fact that there is no clarity on the extent of state subsidies for dual illumination and STBs. Direct financial compensation to broadcasters who face financial losses as a result of the migration, paid out of the digital dividend revenues, would also greatly assist and would result in the migration programme being driven more aggressively and possibly an earlier switch-off date.

- 37 **e.tv recommends that the final ICT Policy provide for auctions of the digital dividend spectrum and that a portion of the funds raised are ring-fenced and used to contribute to funding the digital migration process.**

SPECIFIC QUESTIONS

38 *What new regulatory approaches should be adopted to support innovation, access to affordable services and the creation and promotion of a diverse range of South African public interest programming to all audiences?*

38.1 Please refer to paragraphs 4 – 33 above. e.tv believes that the regulatory approaches needed to achieve the above must emphasise the following:

38.1.1 the achievement of a fair competitive environment, especially as pertains between pay TV and the FTA sector and the development and / or amendment of various regulations to achieve this;

38.1.2 the amendment of the current must-carry provisions to state that pay TV operators must carry and pay for the channels of the Individual FTA television licensees;

38.1.3 restrictions on the commercial activities of the SABC; and

38.1.4 the allocation of sufficient spectrum to DTT services so as to allow for its future growth and development of terrestrial television services.

39 *Is there a need to review the definition of broadcasting services, given the changing environment, in order to ensure that identified public interest objectives for the sector are met? If so, how?*

39.1 e.tv supports the concept of regulatory parity wherein like services are treated in a similar manner, regardless of how they are delivered. As the distinction between traditional television services and video delivered over the internet is becoming increasingly blurred e.tv believes that the approach to the regulation of broadcasting services and internet based video services will need to adjust to achieve regulatory parity. This may, in time, include the need for an amendment to the definition of broadcasting services.

40 *How should policy ensure that there is a diversity of services and content and that audiences should have access to international, national, provincial and local news, information and other programming of relevance to them given that new services will not be limited to specific licence areas?*

40.1 Currently, a combination of regulations and licence conditions are used to ensure that audiences are offered a diversity of programming by broadcasting licensees. As the Green Paper notes this may become increasingly difficult to enforce in a converged environment where services no longer have local or even national boundaries.

40.2 e.tv submits that it is likely that as converged services proliferate, regulators and policy makers will have to find new approaches to regulating content, in order to ensure regulatory parity between services. e.tv suggests that support for content makers at a local level could be most effective in ensuring that programming of interest to local communities still

finds its way on air.

41 *What key issues should be considered in relation to spectrum allocation to ensure that the public interest, cultural, social and economic objectives linked to audio-visual and audio-content services are met?*

41.1 Please refer to paragraphs 29 – 33 above. e.tv believes that policy should emphasise the spectrum allocation for DTT services.

42 *What objectives should the SABC prioritise? How should the mandate of the SABC, as described, be funded? Are the current funding arrangements adequate to fulfil all the requirements placed on the SABC in law? What should the role of government as the shareholder of the SABC on behalf of the public be?*

42.1 Please refer to paragraphs 26 – 28 above. As stated, e.tv believes the commercial activities of the SABC television division are impacting seriously on its ability to perform a public broadcasting mandate and also on the fair competitive environment in the broader industry.

42.2 e.tv believes that restrictions on the commercial practices of the SABC are long overdue and that the funding model of the SABC should accordingly also be revised. e.tv suggests that the SABC is funded by monies appropriated by Parliament, as is the case with many other public broadcasters around the world.

CONCLUSION

- 43 e.tv thanks the DoC for the opportunity to comment on the Green Paper and we look forward to participating in the further stages of this policy development process.

APPENDIX 1



Presentation on Draft ECA and ICASA Amendment Bills

October 2013



Introduction

- ☐ e.tv welcomes opportunity to make submissions on the draft ECA and draft ICASA Bills
- ☐ Due to limited time available, we will focus this presentation on urgent amendments required to those sections of the ECA dealing with restrictions on subscription broadcasting services – section 60 of the current ECA
- ☐ We have legal counsel available to answer any questions on any other aspects of our full written submission

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Introduction (2)

- ❑ Section 60 of the ECA is titled "Restriction on Subscription Broadcasting Services"
- ❑ The policy goal informing this section was to place restrictions on pay TV in order to protect the free-to-air sector which makes significant social contributions to the fabric of South Africa
- ❑ For instance, the White Paper on Broadcasting Policy stated that:

"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"

and

"Free-to-air television must have priority over subscription services as it is better able to serve the widest number of South Africans"

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Introduction (3)

- ❑ e.tv strongly believes that the existing provisions of section 60 of the ECA have been ineffective in protecting the viability of free-to-air (FTA) television services
- ❑ There are a number of trends in the SA TV environment which indicate the business model for free TV (which includes SABC, community TV and e.tv) is being threatened
- ❑ These include:
 - ❑ The audience growth of pay TV
 - ❑ The advertising revenue growth of pay TV
 - ❑ The high viewership of the leading free-to-air channels on pay TV which channels are not paid for by pay TV

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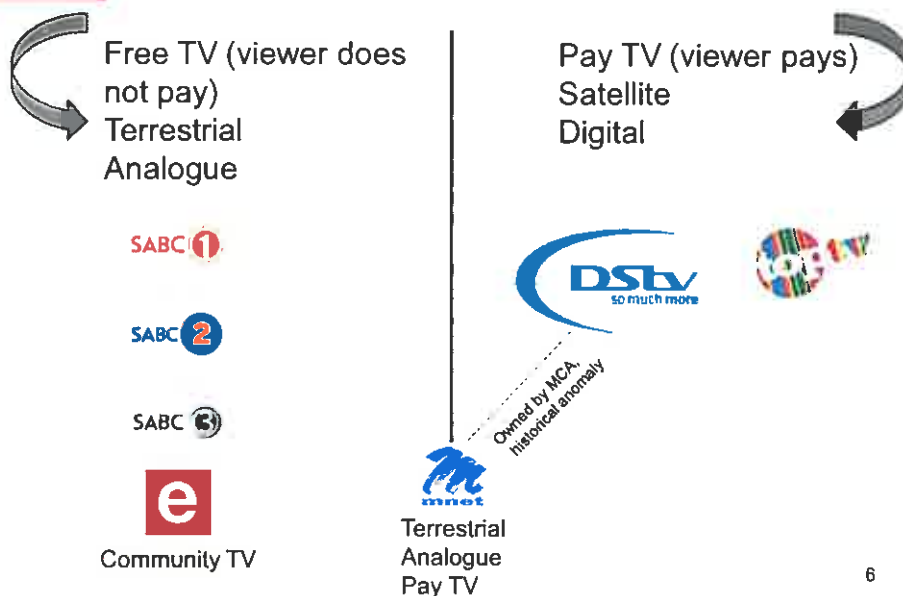
Introduction (4)

- ☐ e.tv believes amendments to section 60 of the ECA are required to address these trends and to secure the continued viability of free TV
- ☐ We propose amendments to deal with:
 - ☐ Retransmission fees
 - ☐ Participation of pay TV in the advertising market
 - ☐ Treatment of free TV channels by pay TV

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Current SA TV environment



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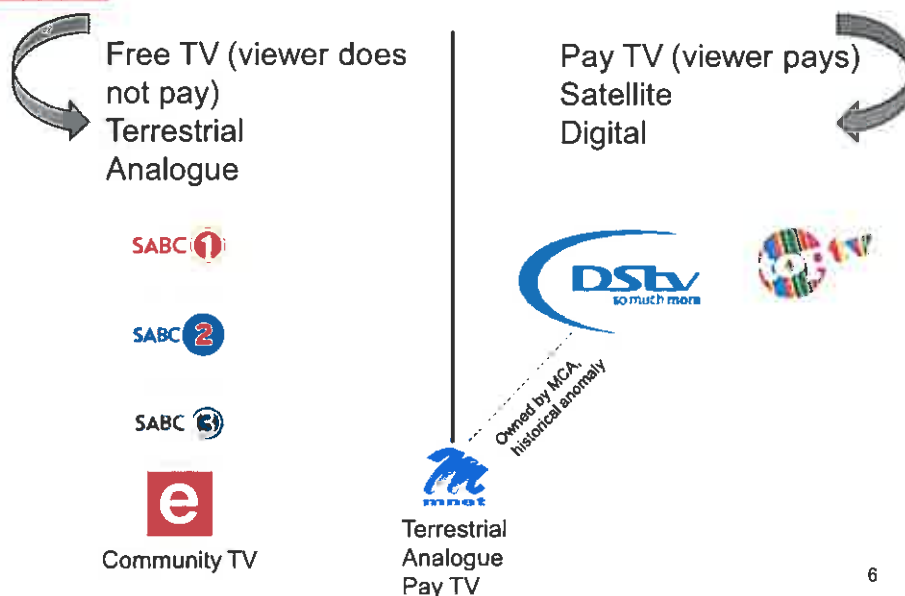
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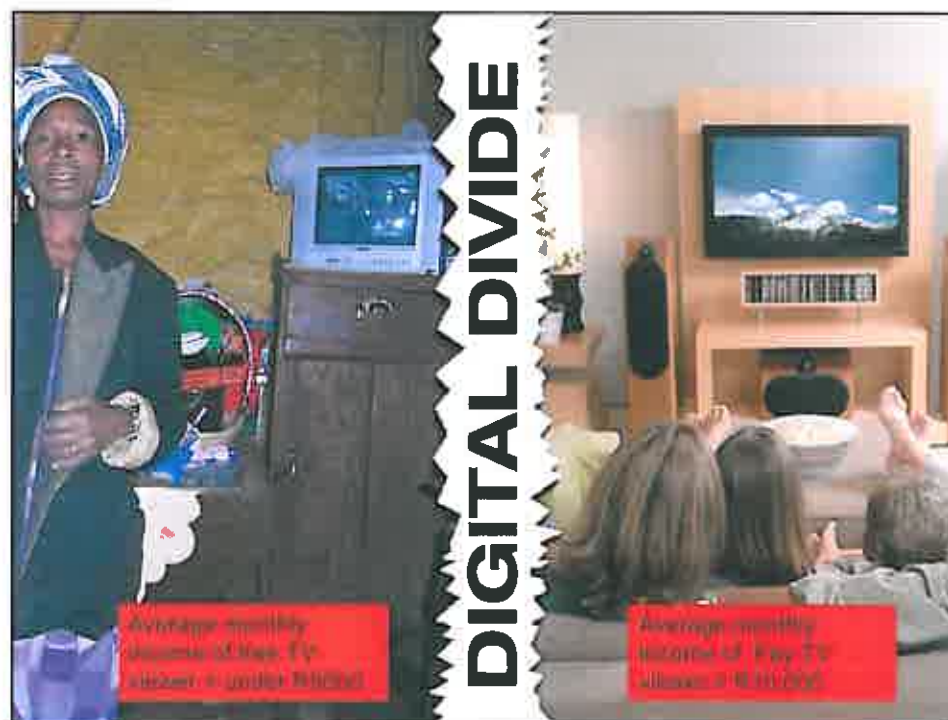
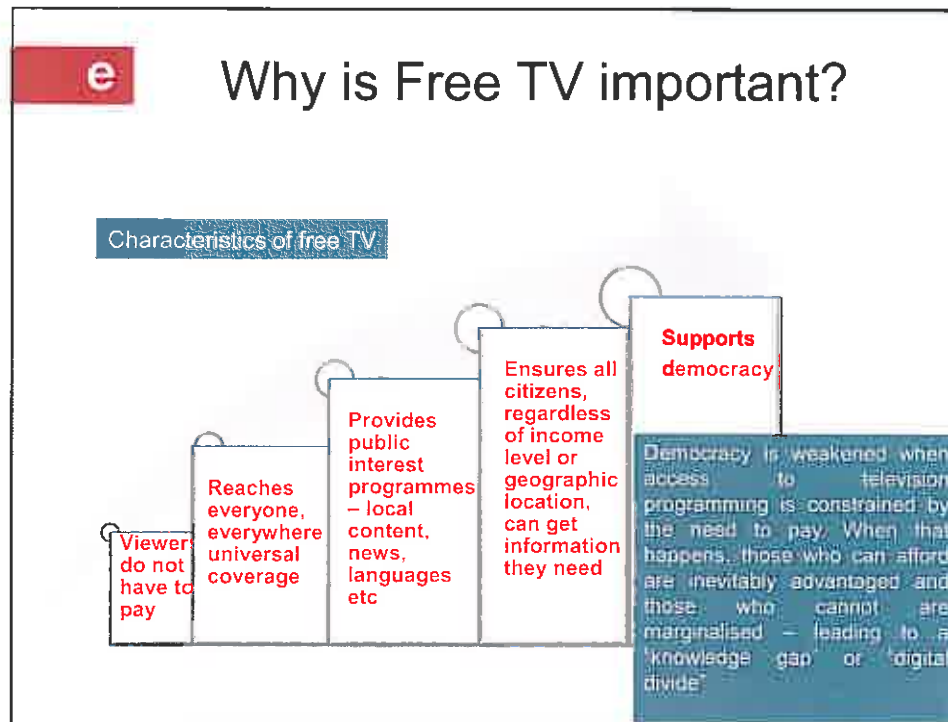
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Current SA TV environment



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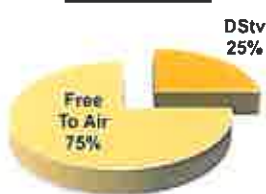
SA TV audience breakdown

Pay TV is growing aggressively at the expense of FTA leading to audience decline on FTA broadcasters. Pay TV uses its ability to offer many additional channels (including the FTA channels) and its exclusivity of sport and premium content to drive growth

Total SA TV households in 2007



Total SA TV Households in March 2012



Total SA TV Households in March 2013



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SA TV commercial revenue

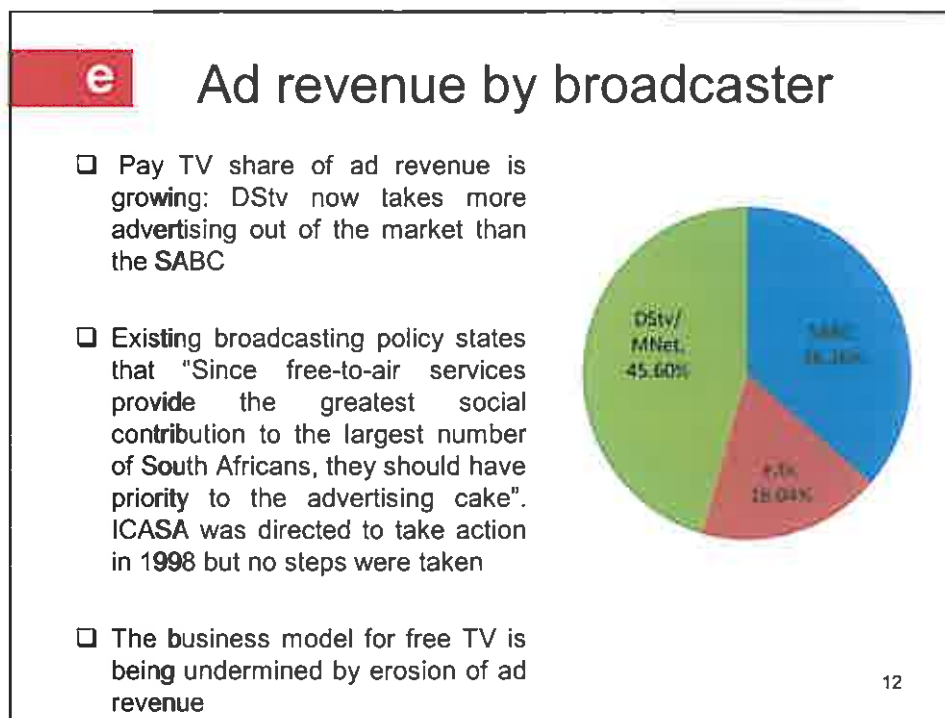
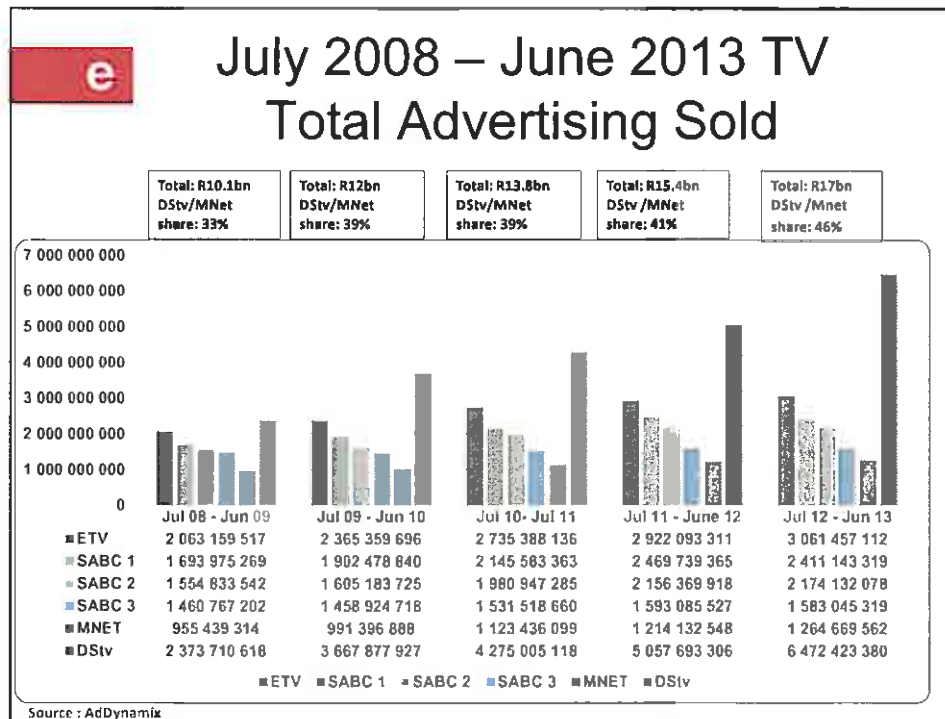
- There are two commercial sources of revenue – advertising and subscriptions
- Subscription revenue is only available to pay TV operators whereas all broadcasters (including pay TV) can compete for ad revenue

Annual TV revenue 2012 - 13



Entirely DSTv (Top TV negligible and has been excluded)

Split between SABC, e.tv and DSTv



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SA viewership trends

Free TV channels are the most watched channels, even in Pay TV homes. Pay TV business model relies on free access to popular free TV channels.

Top 10 Channels on DStv Compact

1	SABC 1	3 513,000
2	e tv	2 726,000
3	SABC 2	2 541,000
4	SABC 3	1 942,000
5	AfricaMagic	1,455,000
6	Channel O	987,000
7	Mzansi Magic	836,000
8	SuperSport 4	762,000
9	AfricaMagic Movies	761,000
10	SuperSport 3	676,000

Top 10 Channels on DStv Premium

1	SABC 2	1 410,000
2	e tv	1 175,000
3	M-Nel Movies 1	1,113,000
4	SABC 1 on DStv	1,076,000
5	SABC 3 on DStv	987,000
6	M-Nel Movies 2	945,000
7	M-Nel	940,000
8	M-Nel Action	722,000
9	kyknet	619,000
10	eNCA	576,000

Source: AMPS, (July 2012 – June 2013)

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How pay TV undermines free TV

- ❑ Pay TV operator:
 - ❑ Uses free TV channels (including government subsidized SABC) to drive growth of pay TV platforms
 - ❑ Does not compensate free TV broadcasters for the use of free TV channels
 - ❑ Controls which other channels can be introduced on the proprietary pay TV platforms (gives preference for pay channels)
 - ❑ Side-lines the free TV channels on the pay TV platform (low EPG number, low bit-rate etc)
 - ❑ and competes with the free channels for advertising revenue but takes 100% of subscription revenue
 - ❑ Able to discount aggressively, ad revenue is "gravy" on top of a highly profitable subscription business

The cumulative result of these practices is that the future viability of free TV is threatened.

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Lessons from the US

- ☐ SA is not the only country to experience the undermining of free TV by pay TV
- ☐ In the early 90s there was a similar experience in the US and an attempt to intervene to guarantee position of Free TV
- ☐ We can learn from some of the interventions (and mistakes) made there
- ☐ Based on US experience there are possible areas of intervention for SA, including:
 - ☐ Mandatory carriage of FTA broadcasters
 - ☐ Retransmission fees payable by pay TV for free TV channels based on value of those channels to the pay TV platform
 - ☐ Limitation on pay TV taking advertising
 - ☐ Rules on the treatment of free TV by pay TV

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Considerations in SA

- ☐ Mandatory retransmission fees which must be paid by Pay TV platforms to free-to-air broadcasters would contribute to the continued viability of FTA television in general and would help address the SABC's funding issues
- ☐ It would also allow for greater investment by FTA broadcasters in the digital migration project, thus freeing up valuable spectrum which is critical to the ICT sector and economic growth
- ☐ ECA Amendment Bill currently before Parliament provides opportunity to introduce this by directing ICASA to hold an inquiry and thereafter make regulations regarding retransmission fees – within a specified timeframe

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Proposed amendments (1)

- Amendment to section 60 (3) to introduce retransmission fees
 - *The Authority must, within 180 days of the coming into operation of the Electronic Communications Amendment Act, 2013, prescribe regulations requiring [regarding the extent to which] subscription broadcast services [must] to carry and pay for, subject to commercially reasonable terms, the television [programmes] channels provided by [a public] individual free-to-air broadcast service licensees. "Commercially reasonable" means terms that account for the content costs of the individual free-to-air television broadcast service licensees and the contribution each free to air television broadcast service licensee makes to the subscription broadcast service as reflected by the viewership and revenue performance of the subscription broadcast service generally.*

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Proposed amendments (2)

- Amendment to section 60 (4) to limit pay TV share of advertising
 - *Subscription broadcasting services may draw their revenues from subscriptions, advertising and sponsorships, however, in no event may advertising or sponsorship, or a combination thereof, [be the largest source] constitute more than two per cent of annual revenue."*
- Introduction of new section 60 (5) to deal with treatment of FTA channels by pay TV
 - *(5) In addition to the provisions of section 60 (3) (as amended), the Authority must, within 24 months of the coming into operation of the Electronic Communications Amendment Act, 2013, commence an inquiry into the impact of subscription broadcast services on the viability of individual free-to-air television broadcast licensees and prescribe such regulations as may be necessary to govern the conduct of subscription broadcast services in relation to free-to-air broadcasters.*

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Conclusion

- ☐ SA is at a critical juncture – the continued viability of free TV is under severe threat
- ☐ If steps are to be taken to save free TV then they must be taken now
- ☐ e.tv recommends the Portfolio Committee give urgent consideration to amending section 60 of the ECA

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Thank you

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APPENDIX 2

Matters emanating from PCC deliberations raised



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Department:
Communications
REPUBLIC OF SOUTH AFRICA

☐ NEW CLAUSE

② That the following be a new clause:

② **Amendment of section 60 of Act 36 of 2005**

② 27. Section 60 of the principal Act is hereby amended by the substitution for subsection (3) of the following subsection:

“(3) The Authority must prescribe regulations regarding the extent to which subscription broadcast services must carry and pay for, subject to commercially negotiable terms, the television programmes provided by a public broadcast service licensee..”

② The Department previously proposed that a new clause be inserted into the Bill to amend section 60(3) to make provision for a ‘must carry and pay’ obligation. Following further consideration of the matter as directed by the PCC, the Department proposes that the amendment not be proceeded with to allow due consideration of it during the ICT Policy Review process

APPENDIX 3

BACKGROUND ON MUST-CARRY AND RETRANSMISSION RULES IN THE UNITED STATES AND RELEVANCE TO THE SOUTH AFRICAN MARKET

BACKGROUND ON MUST-CARRY AND RETRANSMISSION RULES IN THE UNITED STATES AND RELEVANCE TO THE SOUTH AFRICAN MARKET

1. Subscription multichannel television first emerged in the United States in the 1940s as “cable” television services. Cable systems retransmitted local broadcast stations beyond the reach of the stations’ signals. Cable systems were permitted to retransmit broadcast signals without the broadcasters’ consent and without making any payment to the broadcasters.
2. Cable services grew rapidly by selling broadcast signals they obtained for free. By the 1980s cable service was available to most households and penetration was still growing fast. Cable systems could also refuse to carry local stations, and when they did, local stations lost viewership and advertising, compromising their ability to meet local public interest obligations. Cable systems, which operated with few public interest obligations and offered no local programming of their own, also began to sell advertising in competition with broadcasters, creating the first “dual revenue stream” television service and further undermining the economic foundation of FTA broadcasting. In addition, cable systems operated as monopolies everywhere.
3. In 1992, after years of hearings, the United States Congress adopted new laws allowing certain broadcasters to choose either “must carry” status, which required the cable system to carry the station but without any compensation, or instead to choose to negotiate for carriage, seeking cash payments or other terms (“retransmission consent”). This was the first “must carry” law. The US Congress found that:
 - “a very substantial portion of the fees which consumers pay to cable⁸ systems is attributable to the value they receive from watching broadcast signals.”
 - “using the revenues they obtain from carrying broadcast signals, cable systems have been able to support the creation of cable services [and now] sell advertising on these channels in competition with broadcasters.”
 - this condition “has created a distortion in the video marketplace which threatens the future of over-the-air broadcasting.”
 - “public policy [does not support] a system under which broadcasters in effect subsidize the establishment of their chief competitors.”
 - once a home receives cable service “that home becomes extremely dependent upon that cable for reception of local television stations. Even though these signals theoretically are available over-the-air, when a local television station is not carried on a cable system, cable subscribers effectively lose their ability to watch it. The cable becomes a gate over which the local system has control.”
 - “television broadcasting plays a vital role in serving the public interest. [This] role is in jeopardy if cable operators can use their market power either to refuse to carry local

⁸ Note that “cable” here refers to pay TV and “broadcast”, “broadcaster” or “over the air” refers to FTA TV.

television broadcast signals or to extract favorable terms as consideration for carriage of these signals.”

4. After the 1992 law was enacted the most popular broadcaster stations naturally elected “retransmission consent” expecting to negotiate market-based payments for the value of their signals. But the cable operators resolutely refused to pay. When carriage was terminated the broadcasters lost enormous advertising revenues, but cable companies, which had no competitors, lost few subscribers. Ultimately, broadcasters capitulated and permitted carriage without payment, and for more than a decade cable systems paid little or nothing for rights to carry the broadcast signals that comprised more than 40% of the viewing on their platforms.
5. The 1992 Act made little difference, because by the time it was enacted the monopoly pay television operator was already the gatekeeper to viewing in a large number of television homes. Broadcasters, still reliant on a single revenue stream from advertising, continued to subsidize the growth of pay television. And pay television continued to grow rapidly, taking a larger and larger share of advertising revenue every year. In the two dozen years between 1993 and 2013 free over-the-air television became a viable option for fewer and fewer households as “must have” sports and entertainment programming migrated from free television to pay television.
6. Cable operators finally began making payments to broadcasters around 2005, after satellite television began adding local broadcast signals to their lineups, creating real competition to cable operators for the first time. The payments were nominal at first and remain far lower than payments made for much less popular pay-only channels.
7. Since 1992 dozens of other countries have adopted must-carry laws. The particulars vary from country to country because television markets tend to be very different in each country.
8. The South African market today bears many similarities to the market in the United States in 1992. A monopoly subscription television service has built a large and profitable business, in substantial part by re-selling FTA broadcast signals while avoiding the considerable costs of public interest obligations. The subscription service now acts as a gatekeeper to its subscribers, making FTA broadcasters dependent on that distribution. Yet the subscription service now takes an extremely large and rapidly growing share of the country’s advertising revenue, undermining the viability of broadcasters, even as those broadcasters continue to subsidize growth of the pay television platform. And, like the experience in the United States, the government’s initial implementation of “must-carry”, even in conjunction with the advertising limits on subscription television, has not slowed erosion of the economic foundation of FTA television.
9. It has been argued that subscription services should not have to pay for signals a broadcaster makes available for free over-the-air. However, the FTA service only exists through commercial advertising sales or government subsidies or combination of the two. As the U.S. Congress found in 1992 after years of hearings, subscription services undermine the foundation of free broadcasting when they use free access to broadcast signals to grow their platforms and then use those platforms to compete with broadcasters in the sale of

advertising and the purchase of programming. Broadcast television can remain free to those who choose not to take subscription services only if broadcasters can receive the fair value of their signals from those who would retransmit them or otherwise use them to enhance the value of their own platforms.

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