

**INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH
AFRICA**

**APPLICATIONS FOR
COMMERCIAL SATELLITE AND CABLE SUBSCRIPTION
BROADCASTING LICENCES**

REASONS FOR DECISIONS

NOVEMBER 2007

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SECTION A: OVERVIEW (“X” denotes confidential information)

1. INTRODUCTION

- 1.1. The Independent Communications Authority of South Africa (“**the Authority**”) finds its origins in section 192 of the Constitution of the Republic of South Africa¹, which provides that national legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.
- 1.2. The Independent Broadcasting Authority Act² established the Independent Broadcasting Authority (“**IBA**”) and conferred specific powers onto it with the mandate to regulate broadcasting activities in South Africa in the public interest. New legislation, the Independent Communications Authority of South Africa Act³ (“**the ICASA Act**”), was promulgated on 1 July 2000. All regulatory functions of the IBA were wholly transferred to the Authority.
- 1.3. Later, the IBA Act was also repealed in its entirety by the Electronic Communications Act⁴ (hereinafter referred to as “**the Act**”) which came into effect on 19 July 2006, and which is the source of the Authority’s power to provide for the regulation⁵ of electronic communications services, electronic communications network services and broadcasting services, in the public interest⁶. At the same time, the ICASA Act was amended by the Independent Communications Authority of South Africa Amendment Act⁷ to provide for the Authority to exercise the powers conferred on it by the Act.
- 1.4. The Act came into being as a result of the need to converge various technological platforms so as to deliver a variety of affordable and quality electronic communications and broadcasting services to the consumer under a single legislative and regulatory framework.

¹ The Constitution of the Republic of South Africa,, 1996.

² Act No. 153 of 1993 (“the IBA Act”).

³ Act No. 13 of 2000 (“the ICASA Act”).

⁴ Act No. 36 of 2005 (“the Act”).

⁵ Preamble to the Act, 2005

⁶ Section 2 of the Act.

⁷ Act No. 3 of 2006.

- 1.5. Section 92(7) of the Act provides that *“any current applications ... pending before the Authority ... upon the coming into force of this Act must be considered to have been submitted in accordance with the provisions of [the] Act and must be considered in terms of the relevant sections of [the] Act⁸”*. Accordingly, following the repeal of the IBA Act prior to the finalisation of the licensing process, the Act became applicable to the consideration of applications which had been submitted for the subscription licensing process (hereinafter referred to as **“the process”**).
- 1.6. Those current licensing provisions of the Act are contained in Chapter 3, which sets out the general licensing framework for electronic communications services licensees; electronic communications network services licensees; and broadcasting services licensees. In terms of section 5(2)(b) read with section 5(3)(b), an individual licence is required for the provision of commercial broadcasting services.
- 1.7. The Act defines a broadcasting service as –
- “any service which consists of broadcasting and which service is conveyed by means of an electronic communications network, but does not include -*
- a service which provides no more than data or text, whether with or without associated still images;*
- a service in which the provision of audio-visual material or audio material is incidental to the provision of that service, or*
- a service or a class of service, which the Authority may prescribe as not falling within this definition”*.
- 1.8. Broadcasting is, in turn, defined as -
- “any form of unidirectional electronic communications intended for reception by-*
- the public;*
- sections of the public; or*

⁸ Section 92(7) of the Act.

subscribers to any broadcasting service, whether conveyed by means of radio frequency spectrum or any electronic communications network or any combination thereof, and “broadcast” is construed accordingly”.

1.9. The Broadcasting Act defines a broadcaster as :

“any legal or natural person who composes or packages television or radio programme services for reception by the public or sections of the public or subscribers to such a service irrespective of technology used”⁹.

1.10. The Act defines “commercial broadcasting” as:

“a service operating for profit or as part of a profit entity but excludes any public broadcasting service.”

1.11. “Subscription broadcasting service” is defined as:

“a broadcasting service provided to a subscriber upon payment of a fee.”

1.12. Chapter 9 of the Act deals specifically with broadcasting services and provides for the manner in which the Authority is required to regulate such services. In particular, section 51 sets out the factors that the Authority must consider in evaluating applications for new commercial broadcasting services.

1.13. A licence granted by the Authority confers on the holder thereof, the privileges and imposes the obligations provided for in the Act and as specified in the licence conditions ¹⁰.

1.14. After considering the arguments presented during the public hearings held by the Authority during May and June 2007 (“**the hearings**”), the information submitted post the hearing and applying its mind to the interpretation of the Act, the Authority determined that it would consider the applications in so far as they related to commercial broadcasting service licences and not for individual Electronic Communications Network Services (“ECNS”) licences. This represents a departure from the previous regulatory regime where a

⁹ Section 1 of the Broadcasting Act, 1999.

¹⁰ Section 5 (12) of the EC Act.

licence for a subscription broadcasting service would have been a bundled service (being a composite licence encompassing both a service licence and a network licence).

2. BACKGROUND

2.1. In terms of section 28(8)(b) of the IBA Act, the IBA (the Authority's predecessor-in-law) was obliged to conduct an inquiry with regard to various aspects of the regulatory regime in respect of broadcasting. Following the inquiry, the IBA drafted a policy document that has colloquially become known as the Triple Inquiry Report. In the Triple Inquiry Report, the IBA stated that:

2.1.1. its approach to satellite broadcasting is that South Africa needs a broadcasting environment wherein all participants, irrespective of the various modes of signal delivery, must contribute towards achieving the objectives and general spirit of the IBA Act; and

2.1.2. it recognises that satellite regulations must be adapted to cater for differences in signal delivery methods. It followed that there would be some difference in the regulations imposed on broadcasters, based on whether one provides an open terrestrial service (which reaches mass audience), a satellite free-to-air service (also reaches mass audience but does not take up broadcasting frequencies), or a satellite subscription service (based on the principles of niche market segmentation and freedom of contracting).

2.1.3. In short, the Triple Inquiry Report advocated for light touch regulatory approach to Subscription Broadcasting Services.¹¹

2.2. Arising out of the Triple Inquiry Report, the Authority published a Position Paper on the Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences ("**the Review Paper**")¹². Briefly the purpose thereof was to outline mechanisms and provide for a policy framework to properly regulate the control and ownership of commercial broadcasting services and to make recommendations to the

¹¹ IBA -Triple Inquiry Report, Johannesburg, 1995 at paragraph 16.2.2.2

¹² Published by the Authority on 13 January 2004.

Minister of Communications for consideration in legislation.

- 2.3. The Authority then initiated the process contemplated by section 31 of the Broadcasting Act which stated:

(1) As soon as possible after the promulgation of this Act, the Authority must conduct an inquiry in terms of section 28 A of the IBA Act, into the economic feasibility of the provision of additional subscription services and make known its findings by notice in the Gazette.

(2) The Authority must conduct a licensing process immediately if it finds that the provision of additional subscription television services is feasible.

- 2.4. The Authority subsequently published its Position Paper on Subscription Broadcasting Services ("**Subscription Broadcasting Services Position Paper**")¹³ setting out the policy and regulatory framework in respect of subscription broadcasting in South Africa.

- 2.5. In analysing the framework for the regulation of subscription broadcasting services, the Authority was guided by, amongst other things, section 2 of the IBA Act which set out the primary objectives of the Act. Pursuant to the Subscription Broadcasting Position Paper process, the Authority took the position that the regulation of subscription broadcasting services and the introduction of more subscription broadcasting services would result in a marked increase in investment opportunities in the broadcasting industry¹⁴.

3. PROCEDURE

- 3.1. In January 2006, the Authority published an invitation to apply for Commercial Satellite and Cable Subscription Broadcasting licences ("**the ITA**")¹⁵. The ITA was issued in terms of sections 41 and 46 of the IBA Act¹⁶. Section 41 of the said Act set out the procedure that would be followed in considering applications for broadcasting licences. Section 46 set out the

¹³ Published on 01 June 2005.

¹⁴ The Subscription Broadcasting Services Position Paper: Page 55.

¹⁵ Published in *Government Gazette* 28455 of 31 January 2006.

¹⁶ *Ibid*, at page 5.

factors that the Authority ought to consider in the evaluation of applications for private (commercial) broadcasting licences. The ITA, in accordance with the above provisions, set out the material aspects of the application process, including the closing date for the submission of applications and the relevant application fees.

- 3.2. The ITA further stipulated that subscription broadcasting services that were issued with permission to continue in terms of the now repealed section 4 (1) of the Broadcasting Act¹⁷ had to apply for a licence in terms of section 46 of the IBA Act¹⁸. The services referred to were those that were operating and/or conducting their business prior to the implementation of a regulatory framework. Where a subscription broadcasting service was provided in accordance with said permission, the permission would have lapsed at 16H00 on 31 July 2006, being the closing date for submission of applications, in the event that such a permission holder failed to apply as directed¹⁹. Where the permission holder had applied for a licence but the application was refused by the Authority, the Position Paper stated the permission would cease on the date and time to be determined by the Authority²⁰.
- 3.3. The date for submitting applications was extended to 31 August 2006 in order to afford the applicants an opportunity to align their applications with the provisions of the Act.
- 3.4. Although the Authority afforded the applicants an opportunity to amend their applications, it did not deem it necessary to amend the ITA at the time the Act was promulgated. Thus the approach of the Authority, in evaluating the applications, had to take into account the changed circumstances in order not to prejudice the applicants. In this regard, the Authority had to, among other things, consider the impact of the distinction between a broadcasting service licence and an individual ECNS licence. The latter could only be issued upon an invitation to apply following a ministerial policy direction

¹⁷ Act 4 of 1999. Section 4(1) of the Act.

¹⁸ ITA, Page 5.

¹⁹ Ibid.

²⁰ ITA, Page 3

issued in terms of section 3 of the Act²¹.

- 3.5. As stated above, the Act came into force on 19 July 2006. In terms of section 97 read with the schedule to the Act, section 4 of the Broadcasting Act was repealed in its entirety and replaced by section 92(5) which reads:

“Any person, who immediately before the commencement of th[e] Act, lawfully provided any service or used the radio frequency spectrum in terms of the Telecommunications Act, Broadcasting Act or IBA Act without a licence is considered to have permission to continue to provide such a service on the same conditions and terms, or use the frequency spectrum on the same conditions and terms without a licence until such time as the Authority has granted or refused a licence application”

- 3.6. The effect of section 92(5) is that any permission holder, who submitted an application, continues to provide their service lawfully until the Authority has made a decision on the application.

- 3.7. The Authority received eighteen (18) applications from the following:

- 3.7.1. African Spirit Trading 330 (Pty) Ltd
- 3.7.2. Black Earth Communication CC
- 3.7.3. Deukom Television (Pty) Ltd
- 3.7.4. E-Sat (Pty) Ltd
- 3.7.5. Goal Technology Solution (Pty) Ltd
- 3.7.6. Khetha Media (Pty) Ltd
- 3.7.7. Laegoma (Pty) Ltd
- 3.7.8. Max TV (Pty) Ltd
- 3.7.9. Multichannel Television (Pty) Ltd
- 3.7.10. MultiChoice Africa (Pty) Ltd
- 3.7.11. Ndabenhle Group (Pty) Ltd
- 3.7.12. On Digital Media (Pty) Ltd

²¹ Section 5 (6) of the ECA Act.

- 3.7.13. Q Digital Cable Vision (Pty) Ltd
- 3.7.14. Quantic TV Network (Pty) Ltd
- 3.7.15. Sentech Ltd
- 3.7.16. Telkom Media (Pty) Ltd
- 3.7.17. Walking on Water Television (Pty) Ltd
- 3.7.18. Worldspace Southern Africa (Pty) Ltd
- 3.8. The Authority subsequently received a written notice of withdrawal from the process from Multichannel Television (Pty) Ltd, Worldspace Southern Africa (Pty) Ltd and Sentech Ltd.
- 3.9. Multichannel withdrew during the hearings and cited the impending Digital Terrestrial Television process and the possible impact it may have on subscription broadcasting. Worldspace withdrew immediately before the commencement of the hearings and did not give reasons for its withdrawal. Sentech withdrew whilst the Authority was engaged in deliberations, and did not give any reasons for its withdrawal.
- 3.10. The Authority gave notice of the material particulars of the applications in accordance with section 9 of the Act²². Simultaneously, interested persons were invited to lodge written representations in relation to the applications by 10 January 2007, later extended to 31 January 2007. Applicants were required to respond in writing to the various representations (if any), as a matter of procedure.
- 3.11. Chapter 3 requires the Authority to prescribe regulations setting out the process and procedures for applying for or registering, amending, transferring and renewing individual and class licences. The regulations should further set out the documentation that applicants or registrants must include in their applications or registrations and the licence fees payable in respect of such licences²³. The regulations referred to were not in place when the subscription broadcasting licensing process was underway. However, section 95(2) of the Act provides that the regulations that were

²² Government Gazette number 29395 dated 15 November 2006.

²³ Section 5 (7) of the Act.

made under the IBA and Broadcasting Acts remain in force until they are repealed or amended

- 3.12. In terms of section 4(4) read with section 17 of the ICASA Act, the Authority appointed a committee of Council ("**the Committee**") to consider applications received and conduct hearings in terms of section 9(2)(e) of the ICASA Act. The committee was constituted by Councillors Zolisa Masiza (Chair) and Dr. Marcia Socikwa, assisted by members of the Authority's staff and consultants: Mr Bruce Mkhize (Project Leader); Mr Amos Hlabioa; Mr Bethuel Makola; Mr Victor Grootboom; Mr Thato Mahapa; Ms Gugu Mazibuko; Ms Fikile Hlongwane; Mr Kgomotso Mokitle; Mr Paseka Maleka; Mr Patrick Meyer; Mr Johannes Kgampe; Ms Barbara Paxinos; Ms Khethiwe Kubheka; and Mr Molahlehi Msimanga.
- 3.13. At the hearings, applicants were given an opportunity to make oral representations in support of, and to clarify their respective applications. The Authority also posed questions to the applicants on various aspects of their applications. Persons who had made written representations in respect of particular applications were afforded the opportunity to make oral submissions on the applications concerned. In such instances, the relevant applicants were allowed to respond to submissions made.
- 3.14. Subsequent to the hearings, the Authority afforded the applicants a further seven days to supplement their applications by furnishing further information which could assist to clarify certain aspects of their respective applications.
- 3.15. The Authority also afforded interested persons the opportunity to make written submissions on any additional information submitted by the applicants and the latter were also afforded a further opportunity to respond to representations. In instances where an applicant submitted new information which on the face of it materially changed the applicant's original application, the Authority reserved the right not to accept such information. .

4. RELEVANT CRITERIA AND CONSIDERATIONS

- 4.1. Section 5(8)(a) and (b) of the Act provides that every applicant for an individual licence in terms of the Act must demonstrate that the applicant or other person to whom a licence is to be awarded in the case of a -

- 4.1.1. natural person, is a citizen of the Republic of South Africa; or
- 4.1.2. juristic person, is or will be registered under the laws of the Republic of South Africa and has or will have its principal place of business located in South Africa.
- 4.2. In granting a licence, the Authority is required by section 5(9)(a) and (b) to–
 - 4.2.1. ensure that broadcasting services, viewed collectively, are provided by persons or groups of persons from a diverse range of communities in South Africa; and
 - 4.2.2. promote the empowerment of historically disadvantaged persons (“**HDPs**”) including women, the youth and people with disabilities in accordance with the charter for the promotion of black economic empowerment (“**BEE**”) in the information and communications technology sector.
- 4.3. Section 51 of the Act provides that, in considering the grant of a new commercial broadcasting licence, the Authority must, with due regard to the objects and principles enunciated in section 2 of the Act, take into account the following factors:
 - 4.3.1. the demand for the proposed broadcasting services within the proposed licence area;
 - 4.3.2. the need for the proposed broadcasting service within such licence area, having regard to the broadcasting services already existing in that area;
 - 4.3.3. the expected technical quality of the proposed broadcasting service, having regard to developments in broadcasting technology;
 - 4.3.4. the capability, expertise and experience of the applicant;
 - 4.3.5. the financial means and business record of the applicant;
 - 4.3.6. the business record of persons in a position to control the operations of the licensee, either in an individual capacity or directly or indirectly in relation to management or corporate structure;
 - 4.3.7. the applicant’s record and the record of persons in a position to control

- the operations of the licensee in relation to situations requiring trust and candour;
- 4.3.8. whether the applicant is precluded in terms of section 64 of the Act from holding a broadcasting licence²⁴; and
- 4.3.9. whether the applicant or any person in a position to control the applicant has been convicted of an offence in terms of the Act or the related legislation.
- 4.4. The Authority regards the following objects and principles set out in section 2 of the Act as particularly important in considering applications for commercial subscription broadcasting licences:
- 4.4.1. promote and facilitate the convergence of telecommunications, broadcasting, information technologies and other services contemplated in this Act;
- 4.4.2. promote and facilitate the development of interoperable and interconnected electronic networks, the provision of the services contemplated in the Act and to create a technologically neutral licensing framework;
- 4.4.3. encourage investment and innovation in the communications sector;
- 4.4.4. promote competition within the ICT sector;
- 4.4.5. promote an environment of open, fair and non-discriminatory access to broadcasting services, electronic communication networks and to electronic communications services;
- 4.4.6. promote the empowerment of historically disadvantaged persons, including Black people, with particular attention to the needs of women, opportunities for youth and challenges for people with disabilities;
- 4.4.7. encourage research and development within the ICT sector;
- 4.4.8. ensure that broadcasting services and electronic communications services, viewed collectively, are provided by persons or groups of persons from a diverse range of communities in the Republic;

²⁴ Section 64 of the EC Act imposes limitations on the foreign control of commercial broadcasting services.

- 4.4.9. provide assistance and support towards human resource development within the ICT sector;
- 4.4.10. subject to the provisions of this Act, promote, facilitate and harmonise the achievement of the objects of the related legislation;
- 4.4.11. develop and promote SMMEs and cooperatives;
- 4.4.12. promote the development of public, commercial and community broadcasting services which are responsive to the needs of the public;
- 4.4.13. ensure that broadcasting services, viewed collectively—
 - 4.4.13.1. promote the provision and development of a diverse range of sound and television broadcasting services on a national, regional and local level, that cater for all language and cultural groups and provide entertainment, education and information;
 - 4.4.13.2. provide for regular—
 - (aa) news services;
 - (bb) actuality programmes on matters of public interest;
 - (cc) programmes on political issues of public interest; and
 - (dd) programmes on matters of international, national, regional and local significance;
 - 4.4.13.3. cater for a broad range of services and specifically for the programming needs of children, women, the youth and the disabled;
- 4.4.14. ensure that commercial and community broadcasting licences, viewed collectively, are controlled by persons or groups of persons from a diverse range of communities in the Republic;
- 4.4.15. ensure that broadcasting services are effectively controlled by South Africans;
- 4.4.16. provide access to broadcasting signal distribution for broadcasting and encourage the development of multi-channel distribution systems in the broadcasting framework;

- 4.4.17. refrain from undue interference in the commercial activities of licensees while taking into account the electronic communication needs of the public;
- 4.4.18. promote stability in the ICT sector.

5. GENERAL FINDINGS

- 5.1. The Authority has made the following general findings in respect of the applications for commercial sound broadcasting licences in the Commercial Satellite and Cable Subscription Broadcasting Licences process.
- 5.2. The ITA was issued prior to the promulgation of the Act. The criteria listed in the ITA were contained in section 46 of the IBA Act
- 5.3. With the coming into effect of the Act, section 92(7) requires that the applications be considered in terms of the Act. The relevant criteria in the Act are set out in section 51 which has already been referred to in paragraph 4.3 above.
- 5.4. To that extent, the promulgation of the Act did not affect the relevant criteria for the consideration of applications for broadcasting service licenses. In the process of evaluating the applications, the Authority observed the following:

5.5. Corporate Status

The Authority concluded that the majority of applicants had changed their shareholding structure for various reasons relevant to each applicant. The Authority accepted changes that did not materially change the original applicant and application. The details are apparent in part 2 of this document.

5.6. Ownership and control restrictions

- 5.6.1. In terms of the repealed IBA Act, limitations in respect of ownership and control of commercial broadcasting services were imposed by sections 48, 49 and 50.
- 5.6.2. The relevant part of section 48 provided:

(1) One or more foreign persons shall not, whether directly or indirectly—

- (a) exercise control over a commercial broadcasting licensee; or*
 - (b) have financial interest or interests either in voting shares or paid-up capital in a commercial broadcasting licensee, exceeding twenty (20) percent.*
- (2) Not more than twenty (20) percent of the directors of a commercial broadcasting licensee may be foreign persons.*

5.6.3. The relevant part of section 49 provided:

- (1) No person shall —*
- (a) directly or indirectly exercise control over more than one commercial television broadcasting licence; or*
 - (b) be a director of a company which is, or of two or more companies which between them are, in a position to exercise control over more than one commercial television broadcasting licence; or*
 - (c) be in a position to exercise control over a commercial television broadcasting licence and be a director of any company which is in a position to exercise control over any other commercial television broadcasting licence.*
- (2).....(5)*
- (6)(a) On application by any person the Authority may, on good cause shown and without departing from the objects and principles enunciated in section 2, exempt such person from adhering to any of the limitations contemplated in the preceding sections*
 - (b) An exemption in terms of paragraph (a) may be made subject to such terms and conditions as the Authority deems appropriate and equitable in the circumstance.*

5.7. The relevant part of section 50 provided:

- (1) Cross-media control of broadcasting services must be subject to such limitations as from time to time determined by the*

Transitional Executive Council acting on the recommendation of the Authority, or, where the Transitional Executive Council has dissolved in terms of section 29 of the Transitional Executive Council Act, 1993, by the National Assembly so acting, in accordance with the provisions of the Constitution.

(2)(a) No person who controls a newspaper, may acquire or retain a financial control in both a radio and TV licence.

.....

(d) A 20% percent shareholding in a radio or television licence shall be deemed to constitute control.

.....

(3) The Authority may, on good cause shown and without departing from the objects and principles as enunciated in section 2, exempt the publisher of a newspaper or, where such publisher is a company, the person in control of such company, from adherence to any of the limitations determined in this section.

5.7.1. In terms of the repealed section 31(3) read with 31(4) of the Broadcasting Act, sections 49 and 50 of the IBA Act did not apply to broadcasting services carrying more than one channel until the Authority had issued a recommendation in terms of the section 31(4) following an inquiry in terms of section 28 read with section 31(3). Such recommendation had to be submitted to the Minister who was to table such before the National Assembly for adoption.

5.7.2. In January 2004, the Authority, after conducting an inquiry, published its findings in a document titled "*The Review Of Ownership And Control Of Broadcasting Services And Existing Commercial Sound Broadcasting Licences: Position Paper*"²⁵. The Authority proposed various amendments to the IBA Act in line with its recommendation that "...*limitations on ownership be relaxed but not dispensed with...*"²⁶.

²⁵ Published 13 January 2004.

²⁶ Ibid, at page 37.

5.7.3. In 2005, the Authority published the “*Subscription Broadcasting Services Position Paper*”²⁷. In relation to the ownership and cross-media limitations, the Authority found such to be “*more justifiable when imposed on terrestrial free-to air broadcasting services.*” The Authority’s Triple Inquiry Report proposed that subscription broadcasting services should be more lightly regulated than terrestrial free-to-air broadcasting services. Although the proposals were made in relation to the imposition of South African content quotas, the same argument could be made for the regulation of subscription broadcasting services in general²⁸. Thus the Authority decided to recommend that sections 49 and 50 of the IBA Act should not apply to subscription broadcasting services.

5.7.4. As the Act has now repealed the IBA Act in its entirety and also repealed section 31 of the Broadcasting Act, the limitations are now in terms of sections 64, 65 and 66.

5.7.5. The relevant part of section 64 reads:

- (1) *A foreigner may not, whether directly or indirectly—*
 - (a) *exercise control over a commercial broadcasting licensee; or*
 - (b) *have a financial interest or an interest either in voting shares or paid-up capital in a commercial broadcasting licensee, exceeding twenty (20) percent.*
- (2) *Not more than twenty (20) percent of the directors of a commercial broadcasting licensee may be foreigners.*

5.7.6. The relevant part of section 65 reads:

- (1) *No person may—*
 - (a) *directly or indirectly exercise control over more than one commercial broadcasting service licence in the television broadcasting service; or*
 - (b) *be a director of a company which is, or of two or more*

²⁷ Published on 1 June 2005.

²⁸ Ibid, at page 70. It also made reference to the IBA – Triple Inquiry Report,(Johannesburg, 1995, at paragraph 16.2.2.2)

companies which between them are, in a position to exercise control over more than one commercial broadcasting service licence in the television broadcasting service; or

(c) be in a position to exercise control over a commercial broadcasting service licence in the television broadcasting service and be a director of any company which is in a position to exercise control over any other commercial broadcasting service licence in the television broadcasting service.

(6) The Authority may, on application by any person, on good cause shown and without departing from the objects and principles enunciated in section 2, exempt such person from the provisions of subsections (1) to (5).

5.8. The relevant part of section 66 reads:

(1)

(2) No person who controls a newspaper may acquire or retain financial control of a commercial broadcasting service licence in both the television broadcasting service and sound broadcasting service.

(3) No person who is in a position to control a newspaper may be in a position to control a commercial broadcasting service licence, either in the television broadcasting service or sound broadcasting service, in an area where the newspaper has an average ABC circulation of twenty (20%) percent of the total newspaper readership in the area, if the licence area of the commercial broadcasting service licence overlaps substantially with the said circulation area of the newspaper.

(4) In this section "Substantial overlap" means an overlap by fifty (50%) percent or more.

(5) A twenty (20%) percent shareholding in a commercial broadcasting service licence, in either the television broadcasting service or sound broadcasting service, is considered as

constituting control.

(6) The Authority may, on good cause shown and without departing from the objects and principles enunciated in section 2, exempt affected persons from any of the limitations provided for in this section.

5.8.1. The provisions of the Act quoted above are considered to be equivalent to the repealed sections of the IBA Act, in this context, as they substantially regulate the same issues in a similar, if not the same, manner. To that end, it then becomes important to consider section 92(3) of the Act which reads:

“Where sections of the related legislation and the IBA Act did not apply to broadcasting services pending a recommendation by the Authority, the equivalent sections in this Act will not apply to such services until the recommendation has been adopted in the National Assembly”.

5.8.2. The Authority has concluded that sections 49 and 50 of the IBA Act did not apply to broadcasting services carrying more than one channel. Such broadcasting services are those providing services on a subscription basis. Consequently, sections 65 and 66 are not applicable to subscription broadcasting services in terms of section 92(3). However, section 64 remains applicable to all services.

5.9. **Management and experience**

5.9.1. Section 2.3 of the ITA required applicants to provide each member of the applicant's senior management team including all directors, members and trustees as the case may be. In view of the explicit requirement in section 51(d) to consider “capability, expertise and experience of the applicant”, the Authority enquired whether the applicants were restricted by limited skills in the sector. In response to the Authority's concerns, the applicants generally agreed that there was a limited skills pool and secondly that personnel with the requisite skills could not be secured prior to the granting of a licence.

5.9.2. In the absence of formal research into the skills pool in subscription

broadcasting services, the Authority concluded that it was necessary that applicants demonstrate how they would obtain such skills in the short and long term, and what they would do to address gender parity and equity.

5.9.3. Given the concerns expressed above regarding the shortage of skills, the Authority did not apply the requirement set out in section 2.3 of the ITA stringently but considered the capabilities and experience of the key personnel of the applicants in relation to the applicants' proposed services.

5.10. **Staffing**

5.10.1. Section 2.4 of the ITA required applicants to provide a staffing organisational chart showing all proposed station management and staff posts, and indicate clearly the planned reporting structure and the race and gender of each employee.

5.10.2. In response to the above requirements, most applicants provided a detailed organogram reflecting the structure of the organisation they would establish once they were licensed. However, not all could demonstrate how they would populate such an organisational structure with regard to the race and gender of each employee, as they had not secured employment of the relevant persons. The applicants indicated that it was difficult to secure appropriate employment of individuals prior to granting of licences.

5.10.3. In view of the above difficulties expressed by applicants, the Authority did not apply the requirement set out in section 2.4 of the ITA stringently.

5.11. **Finance**

5.11.1. Section 3 of the ITA required the applicants to provide details of their financial matters including but not limited to, funding, method of raising capital, sensitivity tests, business plans, financial projections and income and expenditure statements.

5.11.2. Further, section 51(e) of the Act provides that the Authority must, when

considering applications for commercial broadcasting services, take into account the financial means and the business record of the applicant.

- 5.11.3. The majority of the applicants provided detailed projections of their financial statements. They attempted to demonstrate the necessary sensitivity tests they conducted and described methods of raising capital. However, upon extensive enquiry and post-hearing analysis, the Authority concluded that some applicants had not raised sufficient capital to finance the operations of their proposed business plan.
- 5.11.4. Certain applicants' financial projections (i.e. the start-up capital for the launching of the proposed broadcasting service) appeared to be over-inflated, unrealistic and not supported by credible research.
- 5.11.5. Not all applicants satisfactorily demonstrated tangible documentary proof of funding or sources of funding.
- 5.11.6. The Authority considered compliance with this requirement as fundamental to the success of an application. In particular, the Authority placed emphasis on the extent the proposed finance was proportionate to the requirements of the proposed service.

5.12. **Research – demand and need**

- 5.12.1. Paragraph 10 of the ITA required the applicants to submit copies of audience and market research. Section 51 of the Act also requires the applicants to demonstrate demand and need for the proposed service. The Authority required the applicants to submit their audience and market research in order to determine that there was a need and demand for the proposed services. In other words, applicants had to demonstrate that they had conducted market and audience research to establish and determine the demand and need of their proposed services. In the absence of reliable and credible audience and market research, the Authority could not objectively verify that there was a need and demand for the proposed service.
- 5.12.2. Further, in the absence of reliable and credible audience and market research, the Authority could not objectively assess the basis of applicants' business plans and subscriber uptake going forward.

Therefore in the Authority's opinion reliable and credible audience and market research is crucial in determining the sustainability of any proposed service.

5.13. **Programming**

5.13.1. The Regulations on South African content for subscription broadcasting services, gazetted on 31 January 2006, Notice 154, Gazette 28454 (**"ICASA South African Television Content Regulations"**) place certain obligations on subscription broadcasters. In this regard, Regulations 5,6 and 7 state:

5.1 A terrestrial or cable subscription television broadcasting licensee must ensure that a minimum weekly average of 10% during the South African television performance period, measured over the period of a year, consists of South African television content. In fulfilling this obligation, a terrestrial or cable subscription television broadcasting licensee may broadcast the South African television content on dedicated channel(s) or across its bouquet.

5.2 In complying with its obligation in terms of regulation 5.1 above, a terrestrial or cable subscription television broadcasting licensee must, to the extent that it is applicable to the type of broadcasting service, ensure that a minimum of 2% of its South African television content programming consists of South African drama programming.

5.3 The Authority may, in lieu of the obligations on the terrestrial or cable subscription television broadcasting licensee in terms of regulation 5.1 direct that the licensee must annually spend a specified sum of money, subject to a reasonable yearly escalation or alternatively, a specified minimum percentage of the licensees' gross revenue on programming which has South African television content.

5.4 A satellite subscription television broadcasting licensee must ensure that a minimum of 10% of their channel acquisition budget is spent on channels with South African television content that are compiled and uplinked from South Africa.

5.5 The broadcasting by a satellite subscription television broadcasting

licensee of licensed terrestrial free-to-air public television broadcasting services or licensed terrestrial free-to-air commercial television broadcasting services will not count towards compliance with regulation 5.4.

6 Public, commercial, community, and subscription television broadcasting licensees must ensure that a minimum of 40% of their South African television content programming consists of programmes which are independent television productions and the independent television productions are spread reasonably evenly between, where applicable, South African arts programming, South African drama, South African documentary, South African informal knowledge-building, South African children's and South African educational programming.

7 Public, commercial and subscription television broadcasting licensees/services shall ensure that their terms of trade and commissioning procedures are, inter alia, fair, transparent, and non-discriminatory.

5.13.2. In terms of section 60(4) of the Act 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 of annual revenue.

5.13.3. The Authority is of the view that content is the key element for sustainability and viability for any subscription broadcaster. It is therefore crucial that any content acquisition strategies by the applicants are supported by financial strategies reflected in their business plans. Further, the Authority believes that there should be a clear indication from market research which the applicant conducted, to support content uptake and establish need and demand; since the largest source of applicants' revenue would have to be drawn from subscription which is highly dependent on consumer choice.

5.14. **Authorisation of channels**

5.14.1. The Regulations for subscription broadcasting services, gazetted on 31 January 2006, Notice 154, Gazette 28452 (**“the Subscription**

Broadcasting Services Regulations") provide as follows:

- 5.14.1.1. A subscription broadcasting licensee may not add or remove channels to its service unless the Authority, on application by the licensee, has authorised the channels
- 5.14.1.2. An application by the subscription broadcasting licensee to the Authority for the authorisation of one or more channels must be made in writing and must state:
 - 5.14.1.2.1. the name of the channel;
 - 5.14.1.2.2. the nature of the channel and its content;
 - 5.14.1.2.3. the country where the channel was packaged;
 - 5.14.1.2.4. the full name of channel supplier;
 - 5.14.1.2.5. the primary language(s) of channel; and
 - 5.14.1.2.6. the duration of the channel (whether it is a special event channel).
- 5.14.2. One of the reasons behind this requirement is to determine how the satellite subscription broadcasting licensee intends to comply with the ICASA South African Television Content Regulations given that, for a satellite subscription broadcasting licensee, 10% of its channel acquisition budget has to be spent on channels that will be compiled and uplinked in South Africa with South African content.

5.15 Competition and Diversity

- 5.15.1 At the hearings the Authority was requested to invoke the provisions of Chapter 10 of the Act as part of the licensing process. Chapter 10 of the Act relates to competition matters. It was argued by some representors that the Authority was empowered and indeed entitled to invoke provisions of Chapter 10 as part of the licensing process to refuse application by incumbent(s) or prevent any potential anticompetitive behaviour by the incumbent(s) by imposing restrictive licence

conditions²⁹.

- 5.15.2 The representors who made the request, submitted that the Authority was empowered in terms of section 8 (3) of the Act to take into account provisions of Chapter 10 as part of this process.
- 5.15.3 Section 8 (3) of the Act provides that:
“the Authority may prescribe additional terms and conditions that may be applied to any individual or class licence taking into account the provisions of Chapter 10”
- 5.15.4 In response to this request, MultiChoice Africa responded that the Authority was not entitled to invoke Chapter 10 as part of this process. MultiChoice argued that the Authority was not entitled to apply Chapter 10 provisions until it had prescribed regulations in terms of section 67(3) and (4) of the Act.
- 5.15.5 Regulations contemplated in section 67(3) of the Act relate to anti-competitive conduct, enforcement and protection of consumers and penalties.
- 5.15.6 Regulations contemplated in section 67 (4) of the Act relate to, among other things, the definition of relevant markets and market segments and imposition of pro-competitive conditions upon licensees having significant market power.
- 5.15.7 The Authority had not prescribed the regulations referred to above when it commenced with the subscription broadcasting licensing process. The Authority therefore had not defined the relevant markets and had not declared any licensees in the relevant markets as having significant market power for the purposes of imposing pro-competitive licence conditions.
- 5.15.8 In the absence of the regulations contemplated in sections 67(3) and (4) of the Act, the Authority is of the opinion that it is not entitled to impose any additional terms and conditions in terms of section 8(3) of the Act to any

²⁹ While it was generally accepted during the licensing process that any reference to the incumbent was reference to MultiChoice Africa (Pty) Ltd, it important to note that some representors such as E-Sat (representations to Telkom Media's application), Khetha Media and Black Earth Communications (representations to E-Sat's application) opted for a wider definition and considered applicants such E-Sat, Sentech and Telkom Media as incumbents.

commercial subscription broadcasting service.

5.16 Number of licences to be issued

5.16.1 The Authority received a submission from E-Sat in respect of the number of the licences to be issued by the Authority. In essence, E-Sat's intention was to caution the Authority against over-licensing. In support of its submission E-Sat submitted a market study conducted by its consultants. E-Sat recommended that the Authority should grant at most one or two additional licences.

5.16.2 The report makes extensive reference to international jurisdictions and makes a comparative study of the effect over-licensing has had in other jurisdictions. E-Sat concluded that over licensing leads to market failures, market disruptions and has a negative effect on both the industry and consumers.

5.16.3 E-Sat further submitted that its study concluded that South African market will not be able sustain more than two licensed subscription broadcasting services and recommended that the Authority limit the number of licences to two; alternatively that the Authority should apply the requirements of the ITA stringently.

5.16.4 Max TV also supported E-Sat's submission³⁰.

5.16.5 In response to E-Sat's submission most applicants were of the opinion that the Authority should not limit the number of the licences to be granted. The applicants generally submitted that the Authority had an obligation to encourage competition and that the market will decide on the success of any licensees.

5.16.6 The Authority considered both E-Sat's submission and opposing responses to the submission and decided not to limit the number of licences to be granted for the following reasons:

5.16.6.1 When the Authority issued the ITA, it did not limit the number of the licences to be applied for. Therefore, the Authority is of the view that it would be against the principles of fair administrative law to introduce the

³⁰ Max TV transcript page 239.

suggested limit after it had received applications and held public hearings.

5.16.7 Further and as indicated in paragraph 2.1.2. above, the Authority's approach to satellite subscription broadcasting services is different to free-to-air terrestrial services as the former is characterised by niche market segmentation and freedom of contracting and there are no challenges of spectrum scarcity.

5.17 Technology Neutral Licences

5.17.1 MultiChoice Africa indicated that it was applying for a technology neutral licence and requested that the Authority grant all successful applicants technology neutral licences.

5.17.2 In support of its submission, Multichoice referred the Authority to section 2 (b) of the Act which provides for promotion and facilitation of the development of interoperable and interconnected electronic networks and creation of technologically neutral licensing framework.

5.17.3 It was pointed out to MultiChoice that the ITA was specific in that it invited applications for Satellite and Cable Broadcasting Services and that it specifically excluded terrestrial subscription broadcasting services.

5.17.4 In its response MultiChoice indicated that the Authority may grant service licences and that the issue of frequencies may be dealt at a later stage when the applicant may apply for network and frequency licences.

5.17.5 The Authority has decided not to grant technology neutral licences for the following reasons:

5.17.5.1 At the time of considering the applications for subscription broadcasting services, the Authority had not developed a licensing framework which is in line with the provisions of the Act.

5.17.5.2 The Authority is currently developing a licensing framework in terms Chapter 3 of the Act. As part of that process, the Authority will comply with the requirements of section 2 (b) of the Act with respect to technologically neutral licensing framework.

5.17.5.3 The Authority will thereafter align all licences issued prior to the new licensing framework with the new framework.

5.17.5.4 The Authority also noted that section 5 (2) of the Broadcasting Act which categorised licences along platforms was not repealed in terms of the Act.

5.17.5.5 The Authority is therefore of the opinion that the issues relating to technology neutrality and the effect of section 5 (2) of the Broadcasting Act on the proposed licensing framework can be best dealt with as part of the process of creating the licensing framework contemplated by the Authority.

5.18 SABC's request in respect of Television Licence Fees

5.18.1 The Authority received a submission from the South African Broadcasting Corporation ("**the SABC**") requesting the Authority to impose licence conditions on all the successful applicants requiring successful applicants to ensure that their subscribers have paid up TV licences.

5.18.2 The SABC submitted that the Authority has an obligation to protect its viability and that it was in the public interest that the Authority imposes such obligations. The SABC referred the Authority to section 2 (t) of the Act which provides for protection of the integrity and viability of the public broadcasting services by the Authority.

5.18.3 Some applicants opposed the SABC's submission citing among other reasons, the administrative burden that would result from carrying out such obligations and that the SABC was also a competitor in the process and it would therefore be unfair for them to be expected pass on information of their subscribers to their competitor.

5.18.4 The Authority has decided not to impose the obligations as requested by the SABC on the successful applicants for the following reasons:

5.18.4.1 The Authority is not satisfied that the SABC demonstrated that the Authority has the powers and obligation to impose such conditions on the on the successful applicants as part of this process.

5.18.4.2 Further, the Authority is of the opinion that its obligations as set out in terms of section 2 (t) of the Act will be addressed as part of a separate process to be conducted by the Authority in due course.

5.19 Before moving on to consider individual applications, the Authority would

like to add the following observations it made, that is; the broadcasting sector is a very lucrative and yet highly challenging market to do business in and the customers in the market are very diverse due to the broad demographics of South Africa. One of the challenges that face the operators in this market is the ever changing composition of target markets as a consequence of the transformation processes consistently taking place in the country. Given the above, the Authority is of the view that a new entrant into the broadcasting sector therefore faces significant barriers to entry and related challenges, a few of which are listed hereunder:

- 5.19.1 High capital investment requirements to start operations;
 - 5.19.2 the high skills shortages in the industry and the significant cost associated with the retention of existing skills;
 - 5.19.3 the supply of suitable content and programmes and infrastructure availability for content production;
 - 5.19.4 supplier agreements in respect of content and equipment;
 - 5.19.5 advertising and its associated costs; and
 - 5.19.6 challenges in the outsourcing of services.
- 5.20 It was therefore critical that the applicants applied their minds to these barriers and challenges and built sound strategies to deal with them. Without the aforementioned considerations, the survival and viability of the successful applicants who will be new players in this market will be threatened.
- 5.21 In certain instances some applicants showed a disturbing disregard for the value and importance of market and audience research, with respect to their proposed business plans, in relation to programming content. Of greatest concern has been insufficient compliance with the requirements of the ITA and the Act in this regard.

SECTION B: APPLICATIONS AND DECISIONS

6. AFRICAN SPIRIT TRADING 330 (PTY) LTD

6.1. Introduction

6.1.1. The Authority received an application in terms of the ITA from African Spirit Trading 330 (Pty) Ltd (“**AST**”) for a commercial satellite broadcasting licence. AST intends operating a service under the name and style of Footprint Media. The applicant is a company registered and incorporated under the Companies Act, 61 of 1973 with registration number 2006/026062/07. The applicant does not hold permission to continue broadcasting in terms of the now repealed section 4 (1) of the Broadcasting Act.

6.1.2. The applicant intends providing a multi-channel satellite subscription television service on a national basis.

6.2. CORPORATE STATUS

6.3. Applicant’s legal form

6.3.1. Section 2.1 of the ITA required the applicants to describe their legal form and to provide all relevant founding documentation. Further the applicant had to provide whether it is part of any consortia, and also to provide a resolution authorising the signatory to sign the application on its behalf.

6.3.2. The applicant is African Spirit Trading 330 (Pty) Ltd, intending to broadcast as Footprint Media as already indicated above.

6.3.3. The applicant, in its application, presented the following shareholding structure:

- Judi Nwokedi 10%
- Vasu Moodley 10%
- Future Management 10%
- Mmathoto Lephadi 10%
- Mark Jakins 10%

- Fola Ogunsiakan 10%
- Peter Mombaur 10%
- Western Cape Community TV 5%
- National Film Foundation 5%
- Broad Based Empowerment Consortium 10%
- Staff Allocation 10%

6.3.4. At the Public Hearings held on 11 June 2007, the applicant presented the following structure:

- Judi Nokwedi 17%
- Devan Naidoo 10%
- Silent shareholder 10%
- Empowerment Fund 10%
- Fola Ogunsiakan 13%
- HDI Fund For AFDA students 10%
- Baithekgi Investments (Pty) Ltd 10%
- Future Management 10%
- Staff Allocation 10%

6.3.5. The applicant initially provided, amongst others, a certificate of incorporation, a certificate to commence business and a memorandum of association, but did not submit a shareholders' agreement. A signed shareholders' agreement, confirming the above shareholding information, was submitted as part of the applicant's post hearing information.

6.3.6. The Authority is satisfied that the applicant complied with the ITA's requirements in respect of shareholding.

6.4. **Empowerment of historically disadvantaged persons**

6.4.1. Section 2.1.1 of the ITA required the applicant to specify the Black

Economic Empowerment component in each shareholder.

- 6.4.2. The applicant submitted that over 30% of its shares are held by black shareholders, while 27% of its shares are held by women.
- 6.4.3. The Authority is satisfied that the applicant complies with the empowerment requirements set out in sections 5(9) (b) and 9(2) (b) of the Act.

6.5. **Ownership and control**

- 6.5.1. Section 2.2 of the ITA required the applicant to provide information on ownership and control including details of the shareholder(s) and to submit the relevant documents.
- 6.5.2. In its original application, the applicant indicated that 80% of its shareholding was held by South African persons and 20% by foreigners. Subsequent to the hearings, the applicant advised that its shareholding had changed to 87% South African and 13% foreign.
- 6.5.3. The Authority is satisfied that the applicant does not have foreign ownership exceeding 20% as prescribed in terms of section 64 of the Act.

6.6. **Management**

- 6.6.1. Section 2.3 of the ITA required applicants to provide full details of members of their senior management team including all directors, members, trustees, relevant previous experience as well as information on shares held by members of their senior management.
- 6.6.2. The applicant's proposed management originally comprised of Judi Nokwedi, Vasu Moodley, Mmathoto Lephadi, Mark Jankins and Fola Ogunsiakan. The applicant's post hearing proposed executive management comprises of Judi Nwokedi, Devan Naidoo, Thabo Leshilo, Fola Ogunsiakan and Mmathoto Lephadi³¹.
- 6.6.3. Based on the Authority's analysis of the submitted curriculae vitae, the Authority is satisfied that the proposed executive management has the

³¹ AST additional information

requisite experience and capabilities to operate the proposed service in accordance with section 51 of the Act and section 2.3 of the ITA's requirements.

6.7. Staffing

- 6.7.1. Section 2.4 of the ITA required the applicants to provide staffing organisational charts reflecting all proposed management and staff posts and indicate clearly the planned reporting structure. Further the applicant had to show the race and gender of each employee.
- 6.7.2. The applicant submitted an organisational structure which comprises of 214 full time employees, 10 part time employees and 50 freelance employees.³²
- 6.7.3. The applicant indicated that it would be responsible for its subscriber management system by overseeing the call centres with which it will have the necessary agreements in place. The applicant plans to outsource specialist engineering and technology skills³³.
- 6.7.4. The applicant did not provide the gender, disability and / or racial breakdown of its staff, but stated that it envisaged that by the third year of operation 70% of its staff will be historically disadvantaged people, and 40% will be female³⁴.
- 6.7.5. The Authority is satisfied that the applicant complied with the requirements of the ITA with regard to staffing.

6.8. FINANCE

- 6.8.1. Section 3 of the ITA required applicants to provide information on and attach proof of, amongst others, the applicant's business plan, funding, financial projections, cash flow analysis, sensitivity analysis, and profitability.

6.9. Business plan

- 6.9.1. The applicant intends providing a multi-channel satellite subscription

³² Page 14 of the application.

³³ AST Additional information page 4 section 3

³⁴ AST Application page 14

television service on a national basis to people in the LSM 6 category and above.

6.9.2. The applicant proposed offering 100 local and international channels such as HBO, ESPN, Cartoon Network, Discovery Channel and the History Channel at a monthly subscription fee of X.

6.9.3. The applicant did not demonstrate:

6.9.3.1. planned actions and initiatives to take market share from the incumbent or to increase that market share or stave off competition from potential rivals;

6.9.3.2. moves to react and respond to changing external circumstances such as currency fluctuation and shifts in interest rates; and further

6.9.3.3. actions to capitalize on new opportunities or to defend against threats to the applicant's sustainability.

6.9.4. Having regard to the applicant's subscription fee and the types of channels sought to be included in the service offering, the applicant did not provide the Authority with sufficient information showing that the applicant's proposed model would be sustainable.

6.10. **Funding**

6.10.1. The applicant proposed a capital structure of X and X equity. It aims to aggressively become X geared in the 6th year. It is not clear if the X that the shareholders are contributing is indeed equity or not. The applicant plans to raise equity from investors through a road show that intends to attract BEE investors and financial institutions. The applicant claims further that, part of its equity will come in as discounted non-cash services from its strategic partners.

6.10.2. In the absence of a clear explanation of equity acquisition, it is difficult for the Authority to make an accurate assessment of the applicant's capital structure.

6.10.3. The applicant pledged X towards the start-up costs as equity. The applicant intended to bankroll the balance of the start-up financial requirements by giving equity to financial advisors and foreign content

providers.

- 6.10.4. The applicant did not provide the Authority with sufficient evidence of which financial advisors and content providers it had secured commitments from with respect to obtaining equity funding. The Authority was therefore not convinced that the applicant had secured, or would be able to secure, funding.

6.11. **Financial projections**

- 6.11.1. The applicant listed a number of assumptions informing its projected financial statements. One of the assumptions was to disregard the required working capital. In so doing, the financial statements lost significant substance required for a full and accurate analysis.³⁵

- 6.11.2. The applicant made the assumption that inflation equals price and cost increases and thus opted not to include it in its model³⁶. The Authority believes that this is fundamentally flawed because, price and cost increases are not solely driven by inflation and they do not necessarily move in tandem with inflation.

- 6.11.3. The applicant made the assumption that the interest rate on debt would be fixed at 10% per annum to the year 2020, without providing substantiation for this assumption. It is the Authority's view, that without substantiation, an interest rate of Xper annum on debt appears overly optimistic.

- 6.11.4. As stated above, the applicant intends raising equity of X towards its start-up costs and for this it will issue X of its ordinary shares to its investors. However, a detailed listing of what the funds will be spent on was not provided. The applicant highlights fixed asset requirements of X in the first year. The cash flow and income statement indicate that the applicants will be operating at a loss for the first four years. The total expenditure required is not clearly indicated and it is not clear where funding to recoup losses will be derived from.³⁷

³⁵ Original application: annexure 3.1.8 and post hearing information income statement.

³⁶ Original application: annexure 3.1.8 and post hearing information income statement.

³⁷ Original application: annexure 3.1.10.

6.11.5. The applicant's financial statements do not show current assets and current liabilities and therefore the computation of these ratios was hampered. Moreover, the solvency of the business could not be verified due to the fact that the balance sheet was not detailed³⁸.

6.12. **Cash flow analysis**

6.12.1. The applicant chose to use the indirect method for projecting cash flows, but omitted critical items such as the increase in accounts receivable and increase in accounts payable, amongst others. It is therefore the Authority's view that the applicant's cash flow projections could not be relied upon.

6.13. **Sensitivity analysis**

6.13.1. The applicant submitted a sensitivity analysis in compliance with section 3.1.12 of the ITA.

6.13.2. However, the Authority observed that the applicant's sensitivity analysis did not address pertinent and likely situations, for example, the change in the exchange rate and rand depreciation, amongst others³⁹. Accordingly, the Authority found the applicant's sensitivity tests to be inadequate as they failed to take into account the aforementioned pertinent and likely scenarios.

6.13.3. Furthermore, the sensitivity analysis does not provide the financial statement projections as set out under section 3.1.12 of the ITA. As a result, the Authority could not deduce the effect of each change on the applicant's cash-flow, profitability and liquidity, amongst others.

6.14. **Profitability**

6.14.1. The applicant's projected income statements indicate that it will only realize profit after tax (PAT) in the fourth year. The applicant makes this assumption on the basis of optimistic market growth. Furthermore, the applicant plans to more than treble its subscriber base in the second

³⁸ Original application: annexure 3.1.10.

³⁹ Original application: page 25 – 26.

year and more than double the same figure in the third year⁴⁰.

- 6.14.2. The applicant provided statistics which were not substantiated by any relevant research and accordingly the Authority could not satisfy itself as to the veracity of the applicant's claims.

6.15. **MARKET AND AUDIENCE RESEARCH**

- 6.15.1. Section 51 (a) and (b) of the Act requires the applicant to demonstrate the need and demand for the proposed service.
- 6.15.2. In addition section 10 of the ITA required applicants to submit copies of market and audience research.
- 6.15.3. In response to this requirement, the applicant submitted generic research which merely provided estimates of the potential market and made the assumption that television households would be willing to take the offering provided by the applicant⁴¹.
- 6.15.4. In response to the Authority's questions at the hearing with regard to research used and how it was applied to the application submitted, the applicant indicated that it had conducted the required research and that it would provide the Authority with the copy of the research as part of the post hearing additional information⁴².
- 6.15.5. Subsequent to the hearing the applicant submitted a power point presentation entitled 'Pay Television Tender' prepared for the Third Party which in the Authority's view does not constitute research whatsoever.
- 6.15.6. The applicant did not conduct or commission specific market and audience research to substantiate the need and demand for the proposed service.
- 6.15.7. The applicant appeared to rely on the assumption that the reason for the current low penetration of subscription television is as a result of poor relevant content and higher prices charged by the current incumbent,

⁴⁰ Original application: appendix 3.1.8.

⁴¹ Original application; page 28

⁴² Transcript; pages 48 and 49.

MultiChoice Africa. In this regard there was no further substantiation or verification of the available market nor did the applicant take into account the rate of churn from the current incumbent or itself. This information is important given the fact that the applicant assumed that subscriber maturity levels would be reached in five years.

6.15.8. The Authority is therefore not satisfied that the applicant has complied with section 51 (a) and (b) of the Act.

6.16. **COMPLAINTS AND CODES OF CONDUCT**

6.16.1. Section 5.1 of the ITA required applicants to indicate how they intend dealing with complaints and whether they intend becoming a member of any organisation (e.g. NAB, BCCSA, etc.).

6.16.2. The applicant proposed that customers' comments and complaints would be handled through an outsourced call centre to avoid set up costs⁴³. The applicant, during the hearing and in its post hearing submission proposed that it would handle its call centre so as to ensure that its customers' rights and complaints are taken more seriously⁴⁴. The applicant further submitted that it will become a member of the National Association of Broadcasters ("**NAB**") and subscribe to the codes of the Broadcasting Complaints Commission of South Africa ("**BCCSA**").

6.16.3. The Authority is satisfied that the applicant complied with the requirements of the ITA in this regard.

6.17. **PROGRAMMING**

6.17.1. Section 6 of the ITA required the applicants to outline in brief and in general terms the approach and objectives of the proposed programme service. Further, the applicant was required to state whether it is aimed at a general or niche market, to provide programming supply agreements, and how it intends to comply with the ICASA South African Television Content Regulations.

⁴³ AST's application page 30

⁴⁴ Transcript page 89

- 6.17.2. The applicant identified its primary target market to fall within the LSM 6 and above income brackets⁴⁵. The applicant's programming was divided into two parts, namely local and international content.
- 6.17.3. According to the applicant, its programming will be packaged and priced on a value-for-money basis to ensure that a fair and appropriate amount of content is made available to various segments of customers based on the customers' financial capability⁴⁶. The applicant, however, did not substantiate on how it would achieve its intended objective.
- 6.17.4. The applicant further submitted that its local content offering would be managed through in-house development, re-broadcasts and market-based acquisitions. This will include creating, compiling, purchasing, and producing local contents such as news, sports, children's and specialty channels, which will be sourced from, but not limited to, channels such as BBC, CNN, MTV and ESPN⁴⁷. The applicant, at the hearings, stated that it intends to comply with the ICASA South African Television Content Regulations, and that it is confident it will exceed both the 8% local programming content and the 35% local content requirement for unencoded content. During the hearing and in its post-hearing submission, the applicant conceded that the local content quotas it had used were outdated; and committed itself to comply with the current regulatory quotas⁴⁸.
- 6.17.5. The applicant indicated that content will be the main driver for the proposed service. In that regard, it will utilise the services of Attraction Corporation for content development and production.
- 6.17.6. It was clear to the Authority that the applicant was not aware of the current South African Television Content Regulations ("**the local content regulations**"). The regulations that the applicant referred to had since been amended and amendments were published by notice in

⁴⁵ AST Application page 34

⁴⁶ Page 32 of the application

⁴⁷ AST's application page 32-34

⁴⁸ Transcript: page 20

the Government Gazette⁴⁹.

6.17.7. The applicant, in its post hearing information, indicated that it would comply with the local content regulations, but did not specify how it would do so. It was therefore not possible for the Authority to make an assessment of whether the applicant would be in a position to comply with the local content regulations. Furthermore, the business plan submitted by the applicant also did not provide for how it would comply with the local content regulations.

6.17.8. The Authority is therefore not satisfied that the applicant demonstrated how it would comply with the local content regulations.

6.18. **TECHNICAL**

6.18.1. Section 7 of the ITA required applicants to provide details on, amongst others, the company that would be responsible for signal distribution and information on equipment to be used for the proposed service, and relevant technical details.

6.18.2. The applicant, in its application documents, indicated that it would use the services of LaserNet and SWE-DISH for its signal distribution. However, it was indicated to the applicant during the hearings that the two proposed signal distribution providers are not licensed in the Republic.

6.18.3. In its response, the applicant acknowledged that the two proposed companies are not licensed, but failed to provide the details of a licensed signal distributor. However, the applicant committed to comply with the license conditions.

6.19. **DECISION**

6.19.1. The Authority has decided not to grant the applicant's application for a satellite subscription broadcasting licence for the following reasons:

6.19.1.1. The Authority is not persuaded that the applicant has secured funding for its project. Furthermore the applicant's financial projections are unsubstantiated. The Authority is therefore of the

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view that the applicant's revenue projections are unrealistic and not credible in the circumstances. Accordingly, the Authority finds that the applicant has failed to satisfy the provisions of section 51(e) of the Act, read with item 11 of schedule 1 to the ITA.

6.19.1.2. In addition, the applicant's business model relies heavily on putative economic growth, rather than on any factual research data which would demonstrate the applicant's long-term financial or economic viability. Furthermore, the business model proposed by the applicant is largely informed and guided by the expertise of the applicant's shareholders, rather than by any factual data which would indicate that the proposed service is likely to attract subscribers and therefore be a financially viable proposition.

6.19.1.3. The applicant's proposed programming format is not informed by appropriate audience research. The applicant was therefore unable to demonstrate to the Authority that there would be a demand and need for the proposed service and accordingly did not satisfy the requirements of section 51(a) and (b) of the Act, read with item 4.1 of schedule A to the ITA. Most importantly the applicant did not indicate what informs its financial projections, given that its financial projections are heavily dependent on subscriber uptake.

6.19.1.4. The applicant did not demonstrate to the Authority, in terms of its business plan, how it will accommodate South African content in its content acquisition strategy, given that 10% of its budget will have to be spent on the acquisition of channels with South African content that is compiled and uplinked from South Africa.

7. BLACK EARTH COMMUNICATIONS (PTY) LTD

7.1. Introduction

7.1.1. The Authority received an application in terms of the ITA from Black Earth Communications CC ("**BEC**") for a commercial satellite broadcasting licence. BEC intends operating a service under the name and style of BESTv. The applicant does not hold permission to continue

broadcasting in terms of section 4 (1) of the Broadcasting Act.

7.1.2. The applicant proposes providing a multi-channel satellite subscription television service on a national basis.

7.2. **CORPORATE STATUS**

7.3. **Applicant's legal form**

7.3.1. Section 21 of the ITA required the applicants to describe their legal form and to provide all relevant founding documentation. Further the applicant had to provide whether it is part of any consortia, and also to provide a resolution authorising the signatory to sign the application on its behalf.

7.3.2. The applicant is Black Earth Communications CC and intends to broadcast as BESTv. The applicant was originally a close corporation registered and incorporated under the Close Corporations Act, 69 of 1984 with registration number 97/65692/23. The applicant only had one member, namely Ms Kubeshni Govender-Jones ("**Ms Jones**")⁵⁰.

7.3.3. During the hearings, the applicant advised that it had been converted into a private company⁵¹ with registration number 2007/012898/07. Ms Jones is still the sole shareholder. The applicant added further that it was in negotiations with potential South African equity partners and anticipated that a minimum of 68% of the equity would be held by people from historically disadvantaged groups⁵². In its post-hearing submission, however, the applicant intimated that it would have further shareholders, but did not disclose their identities.

7.3.4. The applicant submitted its memorandum of association, articles of association and a shareholder certificate.

7.3.5. The Authority is satisfied that the applicant has complied with the ITA's requirements in respect of shareholding.

7.4. **Empowerment of historically disadvantaged persons**

⁵⁰ Volume 1, page 22

⁵¹ Hearing transcript, page 6, lines 4 - 6

⁵² Hearing transcript, page 6, line 16 - 18

- 7.4.1. Section 2.1.1 of the ITA required the applicant to specify the Black Economic Empowerment component in each shareholder.
- 7.4.2. The applicant submitted that 100% of its shares are currently held by a black shareholder, namely Ms Jones.
- 7.4.3. The Authority is satisfied that the applicant complies with the empowerment requirements set out in sections 5(9) (b) and 9(2) (b) of the Act.

7.5. **Ownership and Control**

- 7.5.1. Section 2.2 of the ITA required the applicant to provide information on ownership and control including details of the shareholder(s) and to submit the relevant documents.
- 7.5.2. In the original application, the applicant had Ms Jones as the sole member with a 100% interest in the CC. This position did not change when the CC was converted into a private company.
- 7.5.3. During the hearings the applicant indicated that Ms Jones is married in community of property to Mr Andrew Jones (“**Mr Jones**”) who is a US citizen. Furthermore the applicant presented a signed a resolution, in its application documents, authorising Mr Jones to sign all documents pertaining to this process on behalf of the applicant. Mr Jones is also the Chief Executive Officer (“**CEO**”) of the applicant.
- 7.5.4. Further the issue of potential indirect control by Mr Jones was raised by the representors. The representors indicated that Mr Jones, by virtue of his matrimonial property regime, could have a certain degree of indirect control.
- 7.5.5. The Authority has considered all representations and is satisfied that Ms Jones is the sole shareholder, and therefore has control of the applicant. The Authority is satisfied that the applicant has complied with the ITA and section 64 of the Act in this regard.

7.6. **Management**

- 7.6.1. Section 2.3 of the ITA required applicants to provide full details of members of its senior management team including all directors,

members, trustees, relevant previous experience as well as information on shares held by members of its senior management.

- 7.6.2. The proposed Executive Management will comprise of Andrew Jones (Chief Executive Officer), Kubeshni Govender-Jones (Chief Operations Officer), Trevor Cele (Performance Management System), Thava Govender (Human Resources), Ludwig Weiss (Chief Information Officer), Mark Shelton (Customer Relation Manager), Alba Williams (Chief Financial Officer), Brendan Hughes (Legal Consultant), Linda Hart (Marketing Consultant), and Mark Deitch (Content Consultant)⁵³.
- 7.6.3. The gender composition of the management of the applicant is 40% female and 60% male. The racial composition of the applicant's management is 60% white and 40% black⁵⁴.
- 7.6.4. Based on the Authority's analysis of the submitted curriculae vitae it appears that Mr Jones is the only person in the applicant's management who has the requisite experience.
- 7.6.5. Although the Authority is not satisfied that the current proposed executive management is representative of the gender and racial demographics of the Republic, this dissatisfaction is mitigated by the fact that the applicant has proposed and committed to an employment equity plan.
- 7.6.6. The Authority is not satisfied that the applicant complied with section 51 (d) of the Act as, given the extent of its proposed service offering the applicant does not have sufficient management with the requisite experience and capabilities to operate the proposed service.

7.7. **Staffing**

- 7.7.1. Section 2.4 of the ITA required the applicants to provide staffing organisational charts reflecting all proposed management and staff posts and indicating clearly the planned reporting structure. Further the applicant had to show the race and gender of each employee.

⁵³ Volume 1, page 29

⁵⁴ Volume 1, page 29

- 7.7.2. The applicant submitted an organisational structure, in its post-hearing submission, which comprises of 90 (ninety) full time employees, 6 (six) part time employees, 5 (five) freelance employees, and 14 (fourteen) outsourced positions⁵⁵.
- 7.7.3. The applicant indicated that by its fifth year of operation it envisaged that its staff complement will be made up of 45.9% African, 27.3% Coloured, 16.4% Indian, and 10.4% White⁵⁶.
- 7.7.4. The applicant, in its post-hearing submission, submitted information relating to its commitment to the advancement of persons with disabilities.⁵⁷
- 7.7.5. The Authority is satisfied that the applicant complied with the requirements of the ITA with regard to staffing.

7.8. **FINANCE**

- 7.8.1. Section 3 of the ITA required applicants to provide information on and attach proof of, amongst others, the business plan, funding, financial projections, cash flow analysis, sensitivity analysis, and profitability.

7.9. **Business Plan**

- 7.9.1. The applicant intends providing a multi-channel satellite subscription television service on a national basis to people in the LSM 4 – LSM 10 categories. Further the applicant indicated that it plans to enter the market targeting both well established and the newly established members of the previously underserved black market in South Africa which it refers to as the “ACI” market namely African, Coloureds and Indians. No research was conducted to determine the size of the target market and its interests.
- 7.9.2. It was not clear to the Authority as to how many channels the applicant sought authorisation for as differing figures were provided. In its application the applicant indicated that it will provide 8–10 television channels and 10-20 radio bouquet channels within two years.

⁵⁵ Post Hearing Submission: page 5, attachment 1.1.3A

⁵⁶ Volume 2, page 352

⁵⁷ Page 38 of the post-hearing bundle.

Elsewhere in the application, the applicant indicated that it would provide 5-10 channels which it would increase by between 100 and 300 channels within 3 years.⁵⁸

7.9.3. During the hearings the applicant was requested to clarify exactly how many channels it sought authorisation for. In its response, which was submitted as part of its additional information, the applicant did not provide clarity, instead it referred the Authority to its application.

7.9.4. The applicant proposed to offer its services at a monthly subscription of R100.00. The applicant did not however provide the Authority with information on how it reached this pricing and whether the service would be sustainable.

7.9.5. The Authority is of the view that the applicant did not provide a clear and realistic business plan. Further the applicant did not provide the Authority with sufficient information to assess the sustainability of the applicant's proposed model.

7.10. **Funding**

7.10.1. The applicant indicated in its financial statements that it would raise X as start-up capital. Further the applicant's financial statements reflect X debt X. It is further stated that investors will be invited to participate on an equity basis, however this is not reflected in the applicant's financial statements.

7.10.2. A number of venture capital companies, mostly from Botswana, were listed as potential investors in the applicant, but no concrete agreements were cited.

7.10.3. In the absence of a clear explanation of equity acquisition, it is difficult for the Authority to make an accurate assessment of the applicant's capital structure.

7.10.4. It is not clear who the applicant's other potential shareholders will be and how much equity they will hold in the applicant. There is a potential risk of the inability to raise sufficient funds for the applicant's start-up

⁵⁸ Application; Volume 2 page 314-317.

operation.⁵⁹

7.10.5. Furthermore the applicant submitted two letters expressing interest for debt financing (“**the letters**”) from two financial institutions. The letters were not, in any way commitments to fund the applicant’s proposed service, nor did they specify any amount which would be made available to the applicant.

7.10.6. The Authority was therefore not convinced that the applicant had secured, or would be able to secure, funding.

7.11. **Financial projections**

7.11.1. The applicant makes the assumption that inflation is zero because it equals price and cost increases. It is the Authority’s view that this approach is fundamentally flawed. Price and cost increases are not solely driven by inflation and they do not necessarily move in line with inflation.

7.11.2. The applicant disregarded its working capital in its statements. In so doing, the statements lost significant substance needed to enable a full and accurate analysis.

7.11.3. On the applicant’s financial projections, it is not clear whether the borrowings will be in US Dollars or Rands. However, repayment is fixed at X for five years without the applicable interest rate being mentioned. This is based on the applicant’s assumption that the interest rate remains constant even though no currency adjustments were made in the financial projections.

7.11.4. The applicant has indicated that it will depreciate its assets, en masse, over five years. Depreciating all assets from computers to buildings over the same period is fundamentally flawed, as it skews the applicant’s expenditure and negates profitability outlook.

7.12. **Cash flow analysis**

7.12.1. The cash flow and income statement show that the applicant will be

⁵⁹ The applicant provided an “in principle” letter from ABSA dated 22 June indicating that ABSA would be willing to consider funding the applicant.

operating at a loss for the first two years and the total expenditure required is not clearly indicated. It is also not clear where funding to recoup losses will be derived from.

7.12.2. Further, the applicant's cash flow projections are not detailed and do not indicate the manner in which the funds will be spent. The Authority could, therefore, not rely upon the information provided.

7.13. **Sensitivity analysis**

7.13.1. The applicant provided a brief sensitivity analysis that assessed the following scenarios based on various market percentage penetrations.

7.13.2. The analysis only considered the scenarios based on market percentage penetration to the extent of having fewer subscribers than expected but failed to address a change in the exchange rate (e.g. Rand depreciation, etc) or sufficient variation in expenditure.

7.14. **Profitability**

7.14.1. The applicant's projected income statements indicate that it will only realize profit after tax (PAT) in the third year⁶⁰. This is assumed against the backdrop of optimistic market growth. Further, it is the applicant's intention to more than treble its subscriber base in the second year and more than double the same figure in the third year. It is the Authority's view that the statistics which have been provided are overly optimistic.

7.14.2. The methods used to drive the applicant's subscriber base are not indicated in the applicant's business plan either. The applicant indicated that it anticipates its subscriber figures to grow to more 300,000 by year three. However it did not indicate how it would achieve that. The Authority could therefore not verify the correctness of the applicant's claims.

7.15. **MARKET AND AUDIENCE RESEARCH**

7.15.1. Section 51 (a) and (b) of the Act requires the applicants to demonstrate the need and demand for the proposed service.

⁶⁰ Application, volume 2, appendix 3.1.12

- 7.15.2. In addition section 10 of the ITA requires applicants to submit copies of their market and audience research.
- 7.15.3. The applicant did not submit market and audience research to demonstrate a need and demand for the proposed service amongst the niche target market that it had identified. It was therefore difficult to ascertain how the applicant would cater for the broadcast needs of the niche target market it intended to provide for.
- 7.15.4. The applicant's business plan included generalised assumptions on the market with no specific research meant to test the assumptions. The applicant's business model was informed by the assumption that the individuals from the so called "ACI group" (namely Africans, Coloureds and Indians) were not catered for by MultiChoice⁶¹. The applicant did not ascertain whether the lack of growth in MultiChoice's black subscriber base was related to financial consideration or content.
- 7.15.5. Although the applicant clearly identified the "ACI group" as its target market, no credible test or research was conducted to ascertain whether the applicant's offerings would be acceptable to the target group.
- 7.15.6. The applicant stated that it had conducted some research to determine the size of the market and to assess market interest. However, the applicant's research did not establish why there is perceived "potential in Black households" and other households in the LSM 4-10 target market.
- 7.15.7. The Authority is therefore not satisfied that the applicant has complied with section 51 (a) and (b) of the Act.

7.16. **COMPLAINTS AND CODES OF CONDUCT**

- 7.16.1. Section 5.1 of the ITA required applicants to indicate how they intend dealing with complaints and whether they intend becoming a member of any organisation (e.g. NAB, BCCSA, etc.).
- 7.16.2. The applicant submitted a complaints procedure which sets out the

⁶¹ This was understood to mean that DSTV's current offering does not cater for the ACI group within the identified LSM target market.

steps to be followed should a complaint be lodged. The applicant has indicated that it has indicated that it has a two fold approach to deal with internal and external complaints.

7.16.3. Further, the applicant stated that all matters relating to compliance by employees and others associated with the service will be done in collaboration with Michalsons, an SA based IT legal firm.

7.16.4. The Authority is satisfied with the applicant's proposed measures to deal with complaints.

7.17. **PROGRAMMING**

7.17.1. Section 6 of the ITA required applicants to outline in brief and in general terms the approach and objectives of the proposed programme service. Further, to state whether they are aimed at a general or niche market, to provide programming supply agreements, and how they intend to comply with the ICASA South African Television Content Regulations.

7.17.2. In its application, the applicant indicated that it will meet its local content requirements as stipulated in the ICASA South African Television Content Regulations, by first purchasing local content (from the SABC, Universities and foreign broadcasters) and then packaging it. The applicant states that by year 3, it will investigate producing its own sitcoms, made for TV movies, entertainment specials, current affairs productions and other forms of original content. The applicant states that there is already sufficient local content, which can sustain the applicant's requirements for its first few years of existence⁶².

7.17.3. The applicant indicated that there is sufficient local content available to sustain it for its first few years of operation⁶³. Notwithstanding the applicant's claim of sufficient local content, the applicant did not provide the Authority with detailed information as to how it would comply with the local content regulations. It was therefore not possible for the Authority to make an assessment as to whether the applicant would be in a position to comply with the regulations. Furthermore, the business

⁶² Volume 3, Pg 631

⁶³ BEC's application, volume 3, page 631

plan submitted by the applicant did not provide for how it would comply with the local content regulations.

7.17.4. The Authority is therefore not satisfied that the applicant demonstrated how it would comply with the local content regulations.

7.18. **TECHNICAL**

7.18.1. Section 7 of the ITA required applicants to provide details on, amongst others, the company that would be responsible for signal distribution and information on equipment to be used for the proposed service, together with the relevant technical details.

7.18.2. The applicant indicated that it would use the services of Blue Sky, African Union Communications, and GlobeCast for its signal distribution. It was, however, pointed out to the applicant that all the three companies are not licensed to provide signal distribution in the Republic.

7.18.3. In response the applicant indicated that it could not approach licensed signal distributors (Sentech, Orbicom, and Telkom) as they are also competitors in the subscription broadcasting licensing process. The applicant ultimately did not provide the Authority with the details of a licensed signal distributor.

7.19. **DECISION**

7.19.1. The Authority has decided not to grant the applicant's application for a satellite subscription broadcasting licence for the following reasons set out below:

7.19.1.1. The applicant did not demonstrate that its senior management has the requisite skills and expertise to operate the proposed service. The proposed business model is largely informed and guided by the subjective expertise of the applicant's sole shareholder and the proposed CEO. The applicant therefore did not comply with section 51 (d) of the Act.

7.19.1.2. The applicant did not demonstrate that it had secured or would be in a position to secure funding for the proposed service. Furthermore, the applicant did not substantiate its financial

projections. The Authority is therefore of the view that the applicant's revenue projections are unrealistic and not credible in the circumstances. Accordingly, the Authority finds that the applicant has failed to satisfy the provisions of section 51(e) of the Act.

- 7.19.2. The applicant's business model is not supported by factual research data, which would be required to demonstrate the applicant's long-term financial or economic viability. There is no objective factual data which would indicate that the proposed service is likely to attract its target market and therefore be a financially viable proposition.
- 7.19.3. The Authority is not satisfied that the applicant demonstrated a demand and need for the proposed service.
- 7.19.4. The applicant did not demonstrate how it would comply with the local content regulations. Furthermore, the proposed programming format was not supported by appropriate audience research. In that regard, the applicant did not satisfy the requirements of section 51(a) and (b) of the Act.

8. DEUKOM TELEVISION (Pty) Ltd

8.1. Introduction

- 8.1.1. The Authority received an application in terms of the ITA from Deukom Television (Proprietary) Limited for a commercial satellite subscription broadcasting licence. The applicant intends operating a service under the name and style of Deukom Television. The applicant is a company registered and incorporated under the Companies Act, 61 of 1973. The applicant's registration number is 1995/009335/07. The applicant currently has permission to continue broadcasting in terms of Section 4 (1) of the Broadcasting Act.
- 8.1.2. The applicant proposes providing a multi channel, composite sound and television service to South Africa.

8.2. CORPORATE STATUS

8.3. The applicant's legal form

8.3.1. Section 21 of the ITA required the applicants to describe their legal form and to provide all relevant founding documentation. Further the applicant had to state whether it is part of any consortia, and also to provide a resolution authorising the signatory to sign the application on its behalf.

8.3.2. The application presented the following shareholding structure:

8.3.2.1.	Prodomo (Pty) Ltd (" Prodomo ")	50.5%
8.3.2.2.	The Meyer Trust	9.5%
8.3.2.3.	Tiroler Tuchfabrik Baur-Foradori GmbH (" TTB ")	10%
8.3.2.4.	Harold Bopalamo	30%

8.3.3. The applicant informed the Authority that Prodomo is wholly owned by The Meyer Trust, which is a South African Trust duly established in South Africa. The Authority was not provided with a copy of the Trust's Trust Deed, and was accordingly unable to verify the identities of the Trust's beneficiaries.⁶⁴

8.3.4. The applicant informed the Authority that TTB is an Austrian company, and it represents the applicant's foreign component.

8.3.5. The Authority is satisfied that the applicant complied with the requirements of the ITA in respect of the ITA's corporate status requirements.

8.4. Empowerment of historically disadvantaged persons

8.4.1. Section 2.1.1 of the ITA required the applicant to specify the Black Economic Empowerment component in each shareholder.

8.4.2. Harold Bopalamo, a historically disadvantaged person, holds 30% of the shares in the applicant.

⁶⁴ The applicant stated that the beneficiaries of the Trust are "Jochen Weida and/or hi s spouse and/or children and failing a spouse or children his siblings; Gitta Mayer and/or her spouse and/or children and failing a spouse or children her siblings; Miriam Michaela Hagner and/or her spouse and/or children and failing a spouse or children her siblings; and Heinz Henkenjohan." Letter to the Authority dated 11 June 2007.

- 8.4.3. At the hearings the applicant was asked whether its component of historically disadvantaged persons was sufficient and broad enough taking into account that only one individual from a historically disadvantaged background holds 30% of its shares.
- 8.4.4. In its response, the applicant indicated that it was of the opinion that it had complied with the provisions of section 9(2)(b) of the Act as the aforementioned section only required that a minimum of 30% equity be held by persons from historically disadvantaged backgrounds.
- 8.4.5. The applicant indicated that the provisions of section 9(2)(b) do not prescribe the number of individuals from a historically disadvantaged group required to hold equity.
- 8.4.6. The Authority agrees with the applicant and is therefore satisfied that the applicant complied with section 9(2)(b) of the Act.

8.5. **Ownership and control**

- 8.5.1. Section 2.2 of the ITA required the applicant to provide information on ownership and control including details of its shareholder(s) and to submit the relevant documents.
- 8.5.2. The applicant indicated that 90% of its shareholding is held by South Africans and 10% by foreigners.
- 8.5.3. The applicant stated further that in order to maintain the limit of 20% foreign shareholding, it had added a clause in its articles of association limiting its foreign shareholding to 20%.
- 8.5.4. The applicant further stated that similar clauses were added in its articles of association.
- 8.5.5. The Authority is therefore satisfied that the applicant does not have foreign shareholding exceeding 20%.

8.6. **Management**

- 8.6.1. Section 2.3 of the ITA required applicants to provide full details of members of the applicant's senior management team including all directors, members, trustees, relevant previous experience as well as

information on shares held by members of the applicant's senior management.

- 8.6.2. The applicant submitted a list of its management which comprised of Managing Director, Mr Heinz Henkenjohann, Broadcasting Monitoring and Complaints, Ms. Gabi Carstens, Market Research and Programming, Ms. Iris Boeger, Financial, Ms. Linda Badenhorst and Administration, Mr. Jochen Wieda.
- 8.6.3. The gender composition of the management of the applicant is 40% male and 60% female. The racial composition is 100% white. The applicant indicated that it was impractical for it to employ Black persons due to a German language limitation.
- 8.6.4. Based on the analysis of the curriculae vitae submitted, the Authority is satisfied that the applicant's executive management has extensive experience, capabilities and the necessary expertise required to operate the proposed service⁶⁵. In this respect, the applicant complies with section 51(d) of the Act.
- 8.6.5. The Authority is also satisfied that the gender composition of the applicant reflects the demographics of the Republic.
- 8.6.6. The Authority is however not satisfied that the racial composition of the applicant's management reflects the demographics of the Republic. The Authority is also not satisfied with the reasons provided by the applicant for its inability to recruit Black persons as it can do so in positions which do not necessary require proficiency in the German language such as , Finance Administration.
- 8.6.7. The Authority is enjoined in terms of section 2 (h) of the Act to promote empowerment of historically disadvantaged persons including Blacks. The applicant did not demonstrate any plans aimed at recruiting, developing or promoting Black people to senior management positions.

8.7. **Staffing**

- 8.7.1. Section 2.4 of the ITA required the applicants to provide staffing

⁶⁵ Transcript, pg 4 lines 5-7 and pg 32 lines 3-6.

organisational charts reflecting all proposed management and staff posts and indicate clearly the planned reporting structure. Further the applicant had to show the race and gender of each employee.

8.7.2. The applicant submitted an organogram and expanded on it by stating that it currently has 21 employees and that its staff complement is sufficient to provide the audio and video services to its niche market, being the German speaking population of the Republic⁶⁶.

8.7.3. The Authority is satisfied that the applicant complied with the requirements of the ITA with respect to staffing.

8.8. **FINANCE**

8.9. **Business Plan**

8.9.1. The applicant indicated that it has been in operation since 1996 and that it provides television and radio services aimed at the niche market of the German speaking community in South Africa.

8.9.2. The business plan submitted by the applicant is based on conservative growth estimates and therefore does not foresee the need to raise additional capital. The applicant is turning over RX per annum with a subscriber base of 10,270 individuals and projects its turnover to grow annually by X. This growth estimate is not in any way related to the licence as it is historical. The applicant's revenue is from subscriptions, with no contribution from advertising.

8.10. **Funding**

8.10.1. According to the applicant its service is financed through internally generated profits.

8.10.2. The applicant also has access to an overdraft facility of X with First National Bank of South Africa Limited, as well as shareholder loans to support its working capital requirements.

8.11. **Sensitivity Test**

8.11.1. Sensitivity tests were conducted, based on three external factors:

⁶⁶ Transcript, pg 32 line 3, 8 &9

subscriber variations; foreign exchange rates; and inflation. Four tests were conducted as follows:

- 8.11.1.1. The first test assumed a X loss in market share with no further growth in subscribers. A negative cash flow would be incurred in the first year of operation followed by positive cash flows from then on. The current balance sheet shows a healthy cash and equivalents reserve at X, which will be sufficient to absorb the projected negative X balance in the first year.
- 8.11.1.2. The second sensitivity test assumed that the South African Rand would devalue by X against major international currencies. The effect of this scenario is a significant decline in the cash generated by the applicant compared to the actuals, however the applicant would still have a positive cash balance.
- 8.11.1.3. The third sensitivity test was based on the assumption that there would be no increase in subscriptions, and expenses would grow by X per annum. The net impact of this scenario in the first year is minimal as the cash inflows are marginally less than the actuals. Going forward, there would be a significant decline in the applicant's net cash inflow with a projected X decline.
- 8.11.1.4. The fourth sensitivity test assumed a X loss of market share combined with an X devaluation of the South African Rand against major international currencies. The impact on the business would be a reduction of the cash inflow by X in the first year with a recovery thereafter. The company would still have positive cash flows throughout the projection period.
- 8.11.2. The application was based on the existing business model which is profitable. There is little doubt about the continued profitability even under the various adverse scenarios which have been taken into consideration in the business plan. The applicant is able to finance the limited capital requirements from internal sources and also has recourse to its shareholders as well as its bankers for short term facilities.

8.12. **Profitability, Financial Projections and Cash Flow Analysis**

8.12.1. The application was based on the existing business model which is profitable. There is little doubt about the continued profitability even under the various adverse scenarios which have been taken into consideration in the business plan. The applicant is able to finance the limited capital requirements from internal sources and also has recourse to its shareholders as well as its bankers for short term facilities.

8.12.2. The Authority is therefore satisfied that the applicant demonstrated that it has sufficient funding for the proposed service. The Authority is further satisfied that based on the applicant's submission that it does not intend to aggressively grow its subscriber base, its financial projections and business plan are realistic.

8.13. **MARKETS AND AUDIENCE RESEARCH**

8.13.1. Section 51(a) and (b) of the Act requires the applicants to demonstrate a need and demand for the proposed service.

8.13.2. In addition, section 10 of the ITA requires applicants to submit copies of market and audience research.

8.13.3. The applicant did not submit any research with its original application.

8.13.4. In its application the applicant indicated that its proposed service is aimed at "*a very definite niche market, being German-speaking persons resident in the [Republic of] South Africa*". It further stated that this community is constituted of approximately 235 000 people. Of this number, the applicant states that it currently has a subscriber base of 10,279. This subscriber base grows at an average of about 220 subscribers per annum⁶⁷.

8.13.5. According to the applicant it has been providing a niche service to this target market since 1996.

8.13.6. The applicant stated that it has no intention to expand its target market.

8.13.7. The Authority is satisfied that the applicant demonstrated the need and

⁶⁷ Application: page 105 (Appendix 4.1).

demand of its services as required in terms of section 51(a) and (b) of the Act as its subscribers are evidence of an existing market.

8.14. **COMPLAINTS AND CODES OF CONDUCT**

8.14.1. Section 5.1 of the ITA required applicants to indicate how they intend dealing with complaints and whether they intend becoming a member of any organisation (e.g. NAB, BCCSA, etc.).

8.14.2. The applicant submitted its complaints procedure, which sets out the procedures to be followed should a complaint be lodged. It sets out three different categories of complaints with a general category reserved for management, should its department be unable to solve the problem. To ensure that the comments and complaints are handled effectively, the applicant has a dedicated call centre with 8 agents, headed up by Ms. Gabriele Carstens.

8.14.3. The applicant stated that it has not as yet registered to be a member of any organization, but will consider becoming a member of the National Association of Broadcasters (“**NAB**”). This will ensure that it subscribes to the Code of Conduct of the Broadcasting Complaints Commission of South Africa (BCCSA).

8.14.4. The Authority is satisfied with the applicant’s proposed measures to deal with complaints.

8.15. **PROGRAMMING**

8.15.1. Section 6 of the ITA required applicants to outline in brief and in general terms the approach and objectives of the proposed programme service. Further, the ITA required applicants to state whether they are aimed at a general or niche market, to provide programming supply agreements, and how they intend to comply with the ICASA South African Television Content Regulations.

8.15.2. The applicant indicated that all of its channels originate in Germany and are a mixture of public and private, free-to-air and subscription services. These are both television and sound services offering general

entertainment, news and information between them.⁶⁸

8.15.3. The service is aimed at a niche market being the German speaking residents of the Republic of South Africa.

8.16. **Local content**

8.16.1. The applicant acknowledged that it does not comply with the local content regulations. The applicant in particular does not comply with the following requirements of Regulations 5.4 and 6.1 respectively:

8.16.1.1. A satellite subscription television broadcasting licensee must ensure that a minimum of 10% of their channel acquisition budget is spent on channels with South African television content that are compiled and uplinked from South Africa

8.16.1.2. Ensure that a minimum of 40% of their South African television content programming consists of programmes that are independent television productions, furthermore that independent television productions are spread evenly where applicable, amongst South African arts programming, South African drama, South African documentary, South African informal knowledge building, South African children's and South African educational programming.

8.16.2. The applicant applied for an exemption from the content obligations in terms of Regulation 10.3 of the local content regulations. The applicant proposed to have 10% of its channel acquisition budget being reserved for a beneficiary nominated by the Authority on the pay or play principle ("**the beneficiary option**").⁶⁹

8.16.3. The essence of the applicant's submission on Regulation 10.3 is that "*the ICASA South African Television Content Regulations provides that the Authority shall be entitled to consider submissions made by a licensee and/or any interested person on the capacity of the licensee to fulfil the South African content quotes and that it makes such*

⁶⁸ Transcript: page 1 line 17.

⁶⁹ Transcript: pages 9-11.

*determination as it considers equitable in such circumstances.*⁷⁰

- 8.16.4. The applicant also argued further, that the Authority be “*urged to release Deukom from all obligations under this hearing in that it is a small and niche broadcaster catering for the needs of a specific community in South Africa which will otherwise not be catered for.*”⁷¹
- 8.16.5. The applicant argued further that it is not involved in the composition of the channels/services and consequently has no control and is unable to alter the content of those services. It added that it is in fact contractually obligated to broadcast the said channels in unaltered form⁷². The applicant then advanced arguments in terms of sections 2(k), (r), (s) and (v) of the Act. None of the representors objected to the Authority granting the applicant the exemption.
- 8.16.6. Regulation 10 of the ICASA South African Television Content Regulations is headed “Review of Regulations. It provides as follows:
- 10.1 *The Authority may, three years after these regulations have come into effect, hold an inquiry to review these regulations.*
- 10.2 *In reviewing the regulations, the Authority shall determine the procedure to be followed during the inquiry.*
- 10.3 *The Authority shall consider submissions made by the licensee and any interested person on its capacity to fulfil the South African content quotas and may make such determination as it considers equitable in the circumstances.*
- 8.16.7. It is the Authority’s view that Regulation 10, and specifically Regulation 10.3, is not relevant for the purposes of the ITA. Regulation 10 will only be applicable when the Authority undertakes the review of the ICASA South African Television Content Regulations. The review may take place in 2009.
- 8.16.8. Regulation 5.4, which states that a “...*satellite subscription television*

⁷⁰ Transcript: page 11, lines 9-14.

⁷¹ Transcript: page 11 line 21.

⁷² Application: page 115.

broadcasting licensee must ensure that a minimum of 10% of their channel acquisition budget is spent on channels with South African television content that are compiled and uplinked from South Africa,” is peremptory and does not afford any discretion to the Authority.

8.16.9. The applicant acknowledged at the hearings that there are no provisions in the Act that exempt niche based broadcasting services from the general licensing requirements.

8.16.10. The Authority is therefore of the view that the local content regulations do not provide for exemptions in the manner contemplated by the applicant. It is accordingly the Authority’s view that insofar as Regulation 10.3 is concerned, the Authority does not have the discretion to exempt a licensee from the Regulation’s provisions.

8.16.11. The Authority is therefore of the opinion that the applicant has not complied and that it will not be able to comply, with the local content regulations.

8.17. **TECHNICAL**

8.17.1. Section 7 of the ITA required applicants to provide details on, amongst others, the company that would be responsible for signal distribution and information on equipment to be used for the proposed service, and relevant technical details.

8.17.2. The applicant indicated that Orbicom, as a licensed electronic communications network services provider (signal distributor), will carry out the signal distribution function for the applicant. Should it be granted a licence, the applicant intends to take its channels from Multichoice and replace the current indoor equipment (set top box). Should the applicant choose a set top box different to that utilised by Multichoice, the outdoor equipment will be repositioned to allow reception of the applicant’s signal.

8.18. **DECISION**

8.19. The Authority has decided not to grant the applicant a licence to provide a satellite subscription broadcasting service, for the following reasons:

- 8.19.1. The applicant has indicated to the Authority that it cannot comply with the ICASA South African Television Content Regulations. In particular Deukom will not be to comply with:
- 8.19.1.1. Regulation 5.4 in that it will not be able to ensure that a minimum of 10% of its channel acquisition budget is spent on channels with South African television content; and
- 8.19.1.2. Regulation 6.1 in that it will not be able to ensure that a minimum of 40% of its programming is South African television content programming consisting of programmes that are independent television productions.
- 8.19.2. Although Deukom applied for an exemption from the provisions of the ICASA South African Television Content Regulations. The ICASA South African Television Content Regulations do not however permit the Authority to grant exemptions.
- 8.19.3. The Authority would be acting *ultra vires* if it granted the applicant an exemption on the terms which have been proposed by the applicant.
- 8.19.4. The applicant is accordingly unable to comply with the ICASA South African Television Content Regulations.
- 8.20. The Applicant's permission to continue providing a service in terms of section 92 (5) of the Act will lapse on the date to be determined by the Authority.

9. E-SAT (PTY) LTD

9.1. Introduction

- 9.1.1. The applicant is E-Sat (Proprietary) Limited ("**E-SAT**") a company registered and incorporated in accordance with the Companies Act, 61 of 1973. The applicant's registration number is 2003/014945/07. The applicant does not hold permission to continue broadcasting in terms of Section 4 (1) of the Broadcasting Act.
- 9.1.2. The applicant proposes to provide a multi channel, composite sound and television satellite broadcasting service to South Africa.

9.2. **CORPORATE STATUS**

9.3. **The applicant's legal form**

- 9.3.1. The applicant is a company registered and incorporated in accordance with the Companies Act, 61 of 1973
- 9.3.2. The applicant submitted properly signed founding documents to the Authority. These included its certificate of incorporation, articles of association as well as a memorandum of association⁷³. The applicant did not submit a shareholders' agreement as it is solely owned by Sabido Investments (Pty) Ltd ("**Sabido**").
- 9.3.3. The Authority accordingly considered the shareholders who make up Sabido. In this regard, Sabido is made up of the following shareholders:
- 9.3.3.1. Hosken Consolidated Investment (Pty) Ltd ("HCI"): 63.598%;
- 9.3.3.2. Venfin Media Beleggings (Pty) Ltd ("Venfin"): 31.398%; and
- 9.3.3.3. Sabido Share Trust: 5.0045%.
- 9.3.4. The Authority is satisfied that the applicant complied with the requirements of the ITA in respect of corporate status

9.4. **Empowerment of historically disadvantaged groups**

- 9.4.1. The applicant submitted to the Authority that historically disadvantaged persons are represented by a shareholding component of approximately 54.3%.
- 9.4.2. The applicant submitted further that, 40% of HCI is held by the South African Clothing and Textile Workers Union (SACTWU)⁷⁴.
- 9.4.3. The Authority is satisfied that more than 30% of equity ownership in the applicant is in the hands of historically disadvantaged persons, and therefore complies with Sections 5(9) (b) and 9 (2)(b) of the Act.

9.5. **Ownership and control**

- 9.5.1. The applicant did not submit a shareholders' agreement as the applicant

⁷³ Application: Appendix 2.1.1

⁷⁴ Application: page 15

is wholly owned by Sabido.

- 9.5.2. The applicant currently has no foreign shareholding. It has, however, indicated that it is engaged in negotiations to sell 10% of the applicant's issued share capital to a foreign company known as Gulf DTH LDC ("**Showtime**"), and these negotiations are at an advanced stage.
- 9.5.3. The Authority is satisfied that the applicant does not have foreign ownership exceeding 20% as prescribed in terms of section 64 of the Act.
- 9.5.4. The applicant disclosed that Sabido, its sole shareholder, owns 100% of Midi TV (Pty) Ltd, which has a licence to broadcast the terrestrial-free-to-air television channel, e-tv.
- 9.5.5. This disclosure was made given the fact that section 65(1)(a) of the Act states that no person may "*directly or indirectly exercise control over more than one commercial broadcasting service licence in the television broadcasting service;...*" Sabido accordingly applied for exemption from the provisions of section 65(1)(a) of the Act, which application was brought in terms of section 65(6) of the Act.
- 9.5.6. The Authority has noted the application for exemption, but has not considered it necessary to deal with the exemption application, given that the Authority has adopted the recommendation that sections 65 and 66 of the Act are not applicable to subscription broadcasting services.

9.6. **Management**

- 9.6.1. The applicant's management structure will consist of 5 directors and 14 senior managers⁷⁵. The applicant has attached the profiles of all senior managers⁷⁶.
- 9.6.2. The structure will consist of 8 (eight) males and 7 (seven) females⁷⁷ except for the 2 (two) vacant positions. The management of the applicant seem to be representative of all races and gender.

⁷⁵ Application: page 17 –25.

⁷⁶ Application: pages 17-19 and Appendix 2.3.1.

⁷⁷ *ibid*

- 9.6.3. At the hearings the applicant indicated that 23 people who are currently working for E-TV have been identified to occupy senior management positions in e-sat. Thirteen of these people will be black; while ten (10) will be women. According to the applicant, the proposed managers will be further promoted to group positions and their duties would be to oversee both e-sat and E-TV, while their deputies would be trained to focus solely on E-TV.⁷⁸
- 9.6.4. The applicant indicated further that once the licence has been issued to it, it will later reorganize its management structure and that there will be duplication of jobs since new staff will be developed in so far as various channels are concerned. It further stated that at the moment ETV has only one Channel Director but with a multiple channel environment, new Channel Directors will be employed.⁷⁹
- 9.6.5. The applicant made a commitment that it will develop the skills of employment in management and mid-level positions.
- 9.6.6. The Authority is satisfied that the applicant has requisite skills to operate the proposed service and that its management reflects gender and racial demographics of the Republic.
- 9.6.7. The Authority is satisfied the applicant has complied with the requirements of the ITA with regard to management.

9.7. **Staffing**

- 9.7.1. The applicant states that its total staff complement will be 626 full time permanent employees, 136 part time permanent employees and 14 freelance employees.⁸⁰
- 9.7.2. The applicant attached a staffing organizational chart.⁸¹ It did not however provide a gender, disability and racial breakdown of its staff below management level. The applicant, however, committed that, should it be awarded a licence, 60% of its employees will be black, and

⁷⁸ Transcript: page 10 line 9 to 13

⁷⁹ Transcript: page 66 line 6 to 21

⁸⁰ Application: volume 2, Appendix 2.4.2.

⁸¹ Application: volume 2, Appendix 2.4.1.

at least 35% will be women.⁸²

9.7.3. The Authority is satisfied that the applicant's management and staff have the requisite experience to operate the proposed service.

9.8. **FINANCE**

9.8.1. Section 3 of the ITA required applicants to provide information on finance and attach proof of, amongst others, the business plan, funding, financial projections, cash flow analysis, sensitivity analysis, and profitability.

9.9. **Business plan**

9.9.1. The applicant intends to provide a multi channel, composite sound and television satellite subscription on a national basis to subscribers in the LSM 5-10 category.

9.9.2. The business plan submitted by the applicant, is based on the following assumptions:

9.9.2.1. economic inflation at X

9.9.2.2. international price inflation of X

9.9.2.3. Rand/Dollar exchange rate of X;

9.9.2.4. the Rand depreciation rate of X and

9.9.2.5. a monthly subscription rate of X

9.9.3. The above assumptions appear reasonable and realistic. The Authority is satisfied that the applicant's proposed model would be sustainable over the period indicated in its future plans.

9.10. **Funding**

9.10.1. The applicant will require a cash investment of over X to fund the applicant's start-up costs. The applicant's principal shareholders have undertaken to provide up to X in the form of equity capital and interest

⁸² Application: volume 1, page 26.

free loans.⁸³

9.11. Financial projections

9.11.1. The applicant highlighted fixed asset requirements of X in the first year, X in the third year and X in the seventh year.⁸⁴

9.11.2. The applicant's projected income statements indicated that it will only realise positive profit before tax of X in the fifth year and X in the sixth year.⁸⁵

9.12. Cash flow analysis

9.12.1. The applicant submitted its detailed cash flow projections over a five year period. It predicts year 2008 as a year of partial operations and identified years 2009 to 2013 as the five years of full operations. The figures the applicant projected appear carefully considered and credible.

9.13. Sensitivity analysis

9.13.1. The applicant conducted sensitivity analysis as required by the ITA and put forward three scenarios, namely a X% reduction in annual subscriber additions, an X increase in the costs of international programming and a depreciation of the Rand.⁸⁶

9.13.2. Under scenario 1, the EBIDTA in year six was indicated as X compared to X on the base case.

9.13.3. In scenario 2, X increase in the cost of international programming would lead to an X increase in total operating expenses in 2013 and an X decrease in net profits, and the applicant would require an additional X to meet a likely increase in costs.

9.13.4. In scenario 3, should the Rand depreciate significantly from its current level, the applicant demonstrated that it would face higher costs for international programming and technical equipment and reduced profitability (reflecting an X drop in net profits). The applicant would be

⁸³ Application: volume 3, page 159.

⁸⁴ Application: volume 3, page 159.

⁸⁵ Application: volume 3, page 155.

⁸⁶ Application: volume 3, page 172.

required to inject an additional X in debt financing or shareholders' loans to meet the higher costs or reduce its international programming needs.

9.14. **Profitability**

9.14.1. The applicant's projected income statements indicated that it will delay profits and only realise positive profit before tax of X in the fifth year of operations and X in the sixth year.⁸⁷ The indicated delay in profits though would require additional funding of X which may be provided by further debt financing or shareholder loans, all of which appears reasonably planned for.

9.15. **MARKET AND AUDIENCE RESEARCH**

9.15.1. Section 51 (a) and (b) of the Act requires the applicants to demonstrate the need and demand for the proposed service.

9.15.2. In addition section 10 of the ITA requires applicants to submit copies of market and audience research.

9.15.3. The applicant's research and analysis covered areas such as⁸⁸:

9.15.3.1. trends in the economy and the South African population;

9.15.3.2. the current status of the electronic communications industry;

9.15.3.3. existing competition in the market place; and

9.15.3.4. the needs and interests of South African television audiences.

9.15.4. The applicant identified subscribers in the LSM 5–10 category as its target market.

9.15.5. The Authority is satisfied that the applicant has complied with the requirements of the ITA in this regard.

9.16. **COMPLAINTS AND CODES OF CONDUCT**

9.16.1. The applicant submitted its complaints procedure, which sets out the steps to be followed to deal with any complaint lodged.⁸⁹

⁸⁷ Application: volume 3, page 155.

⁸⁸ Application: volume 4.

⁸⁹ Application: volume 1, page 54.

- 9.16.2. The applicant has also indicated that it intends establishing a call centre, in addition to managing its subscription base, to deal with all customer care requirements and complaints regarding the service.
- 9.16.3. The applicant further submitted that it intends to register as a member of the National Association of Broadcasters (“**NAB**”) and that it will subscribe to the Code of Conduct of the Broadcasting Complaints Commission of South Africa (“**BCCSA**”). The applicant has also undertaken to subscribe to the code of the Advertising Standards Authority of South Africa (“**ASA**”).
- 9.16.4. The Authority is satisfied that the applicant has complied with the requirements of the ITA in this regard.

9.17. **PROGRAMMING**

- 9.17.1. Section 6 of the ITA required applicants to outline in brief and in general terms the approach and objectives of the proposed programme service. Further, to state whether they are aimed at a general or niche market, to provide programming supply agreements, and how they intend to comply with the ICASA South African Television Content Regulations.
- 9.17.2. The applicant proposes providing a multi channel, composite sound and television subscription broadcasting service to South Africa.
- 9.17.3. The applicant intends compiling many of its channels in South Africa, in order to avoid pass through channels which are compiled and scheduled abroad.⁹⁰
- 9.17.4. The applicant has cited those Regulations within the ICASA South African Television Content Regulations, which are particularly pertinent to the services the applicant intends to provide. The applicant submitted that, given that the majority of its channels will be compiled in, and uplinked from, South Africa, it will comply with the South African Television Content Regulations, and Regulations 5.4 and 6.1 in particular.

⁹⁰ Application: volume 1, page 61..

9.17.5. The Authority is accordingly satisfied that the applicant has complied with the provisions of the ITA relating to programming.

9.18. **TECHNICAL**

9.18.1. Section 7 of the ITA required applicants to provide details on, amongst others, the company that would be responsible for signal distribution and information on equipment to be used for the proposed service, and other relevant technical details.

9.18.2. The applicant has indicated that it will provide its own signal distribution service. However, pending the grant of a license in that regard, the applicant will make use of the services of a licensed signal distributor. The applicant did not provide the Authority with details of the required licensed signal distributor.

9.19. **DECISION**

9.19.1. The Authority has decided to grant the applicant a composite sound and television satellite subscription broadcasting licence to provide a subscription broadcasting service for the following reasons:

9.19.1.1. The Authority is of the view that the applicant's proposed revenue projections are realistic and credible;

9.19.1.2. The Authority is satisfied that the applicant has secured adequate funding for the start up operations of the proposed service. Accordingly the Authority finds that the applicant has satisfied the provisions of section 51(e) of the Act ;

9.19.1.3. The applicant's proposed service is adequately informed by appropriate audience and market research. The applicant was able to demonstrate that there is a need and demand for the proposed service. The applicant satisfied the requirements of sections 51(a) and (b) of the Act.

10. GOAL TECHNOLOGY SOLUTIONS (PTY) LTD

10.1. Introduction

10.1.1. The applicant is Goal Technology Solutions (Proprietary) Limited (“**GTS**”) a company registered and incorporated in accordance with the Companies Act, 61 of 1973. The applicant’s registration number is 2004/026011/07. The applicant does not hold permission to continue broadcasting in terms of section 4 (1) of the Broadcasting Act.

10.1.2. The applicant proposes providing a multi channel, composite sound and television service to South Africa.

10.2. CORPORATE STATUS

10.2.1. Section 2 of the ITA required the applicants to provide among others, information on the applicant’s legal form; ownership and control structure; management; and staffing.

10.3. Applicant’s legal status

10.3.1. The applicant submitted its founding documents to the Authority. These included its certificate of incorporation, articles of association as well as a memorandum of association.

10.3.2. Shareholding in GTS is as follows:

10.3.2.1. Mikcor Investment Holdings (Pty) Ltd (“**MIH**”) 66%

10.3.2.2. Ubhal As Airde (Pty) Ltd (“**UAA**”) 34%

10.4. Mr Miko Rwayitare held 100% of the shares in MIH. The shares in UAA are held as follows:

10.4.1.1. Adrian Maguire 48%

10.4.1.2. Patrice Lasserre 26%

10.4.1.3. Jaco Naude 26%

10.4.2. The Authority is satisfied that the applicant has complied with the requirements of the ITA in respect of corporate status.

10.5. Empowerment of historically disadvantaged persons

10.5.1. The applicant submitted to the Authority that historically disadvantaged

persons are represented by a shareholding component of approximately 66% held through MIH.⁹¹

10.5.2. The Authority is satisfied that more than 30% of equity ownership in the applicant is in the hands of historically disadvantaged persons, and therefore the applicant complies with Section 9(2)(b) of the Act.

10.6. **Ownership and control**

10.6.1. The Authority has received the applicant's shareholders' agreement. The applicant currently has no foreign shareholders.

10.6.2. The Authority is satisfied that the applicant complied with the requirements of section 64 (1) (b) of the Act.

10.7. **Management**

10.7.1. The applicant's proposed management structure will consist of 6 people, comprised of the following: a CEO – black male; a COO – white male; a CFO – white male; a Channel Director – still to be appointed; a Financial Manager – black female; and a Marketing Manager – black female.

10.7.2. The applicant's gender composition at senior management level would stand at 66.6% male and 33.3% female, while the racial composition would be 50% black and 50% white.

10.7.3. The Authority is satisfied that the applicant has complied with the requirements of the ITA in this regard.

10.8. **Staffing**

10.8.1. The applicant submitted that its total staff complement will be 71 full time permanent employees, 6 part time permanent employees and 3 freelance employees. The applicant further indicated that programming

⁹¹ During the course of the public hearings, the Authority requested GTS to provide a detailed breakdown of its shareholding and broad-based black economic empowerment status. GTS submitted the requested further information on 27 June 2007. GTS submitted a Black Economic Empowerment verification report compiled by Emex BBBEE Verification Services (www.emex.co.za). The Emex Report certifies that for purposes of the Broad Based Black Economic Empowerment Act, 53 of 2003: "GTS is a qualifying small enterprise; GTS is a Level 2 contributor; GTS has a Broad Based Black Economic Empowerment procurement recognition level of 125%; and GTS is 66% Black Owned." The Authority accepts that the Emex Report constitutes *prima facie* confirmation of GTS' broad-based black economic empowerment status. In this regard, see page 3 of the further information submitted on 27 June 2007.

staff will be both in-house and outsourced.⁹²

10.8.2. The applicant has only one person on its management who has been working as a senior manager at the SABC. The applicant did not provide a comprehensive track record on starting and running a business of this nature

10.8.3. The applicant submitted information on staff equity targets and its employment policies.

10.8.4. The Authority is however satisfied that the applicant's management and staff would be in a position to assemble the requisite experience to operate the proposed service.

10.9. **FINANCE**

10.9.1. Section 3 of the ITA required applicants to provide information on finance and attach proof of, amongst others, the business plan, funding, financial projections, cash flow analysis, sensitivity analysis, and profitability.

10.10. **Business Plan**

10.10.1. The applicant is specifically targeting potential subscribers in the LSM 10 target market in the age bracket 35 – 65 and more generally, black viewers in the LSM 9-10 category. Further, the business plan is based on the following assumptions:

10.10.1.1. No dividend payouts for the entire projected period of 5 years, and that all earnings will be retained to fund working capital, network expansion, and debt repayment requirements;

10.10.1.2. Growth is also assumed to start off slowly and then growing at a faster rate after the first 18 months; and

10.10.1.3. The CPIX rate and corporate tax are X and X% respectively.

10.10.2. The applicant intends to raise capital of X to fund the start up. X would be used for the first year and X in the second year. It is envisaged that from the third year onwards the company's cash flow will be adequate to

⁹² Application: volume 1, paginated page no. 100.

fund the expenditure for new subscription growth, working capital requirements, and debt repayments.⁹³

10.10.3. The sole shareholder of MIH, Mr Rwayitare, pledged to stand surety for the start up capital for the first X houses to be connected. MIH indicated that it will be in a position, and has undertaken, to provide the necessary funding. However this has not been proven as the financial status of this shareholder was not substantiated or supported.

10.10.4. It is the Authority's view that the applicant did not present a sound and coherent business plan, as the applicant's assumptions are not based on verified market research, but are based mainly on secondary research. Further, no reasons have been stated for some of the assumptions.

10.11. **Funding**

10.11.1. The applicant intends to have a debt / equity ratio of X. The company did not state clearly where and how it intends to raise its funds. The new business relies heavily on equity funding largely from its main shareholder and debt of approximately X. However, no clear details were provided in that regard.

10.12. **Cash flow analysis**

10.12.1. The applicant's cash flow projections depict negative net-flow for the first two years of operation. In the following three to five years the cash flow projections dramatically increase but there is no clear explanation to account for the growth.

10.13. **Sensitivity analysis**

10.13.1. The applicant performed a sensitivity analysis that gave three scenarios:

10.13.1.1. A pessimistic scenario – where there are fewer subscribers and advertisers;

10.13.1.2. An optimistic view where there were more subscribers than projected; and

⁹³ Application: volume 2, pages 26-27.

- 10.13.1.3. A scenario that depicts the effect of the company's vulnerability to exchange rates.⁹⁴
- 10.13.2. The applicant did not test the sensitivity of its operations to interest rate excursions. Given that the applicant's funding model pursues high financial leverage (high gearing), the Authority is of the view that such a test is important to the applicant, given the risk which any start-up operation faces.
- 10.14. **Profitability**
- 10.14.1. The applicant anticipates making a positive net profit in the second year of operation. The total revenue will have grown by more than eight times (from X). The applicant identified the main contributors as :
- 10.14.1.1. subscription revenue - growing more than X;
- 10.14.1.2. advertising revenue - growing by more than X;
- 10.14.1.3. pay-per-view - growing by more than X; and
- 10.14.1.4. video-on-demand - growing X
- 10.14.2. The Authority notes that advertising revenue contributes on average more than X of total revenue, yet no mention was made regarding any research to gauge potential advertisers' interest to estimate the quantity and value of prospective advertisers.
- 10.15. **MARKET AND AUDIENCE RESEARCH**
- 10.15.1. Section 51 (a) and (b) of the Act requires the applicants to demonstrate the need and demand for the proposed service.
- 10.15.2. In addition section 10 of the ITA requires applicants to submit copies of the market and audience research.
- 10.15.3. The applicant's market research was essentially based on data collection from the All Media and Products Survey, General Household Survey, and Census information. The main objective was to establish the size of the potential subscription target market.

⁹⁴ Application: volume 2, page 42.

- 10.15.4. The applicant maintains that it has conducted research but could not demonstrate how that would assist it to enter the market and be sustainable.
- 10.15.5. Further, when a question was posed during the hearings, regarding the research and that it appeared old and outdated, the applicant indicated that it was the most recent data from the AMPS that they have 'consulted'⁹⁵ rather than it was specifically commissioned or conducted by the applicant.
- 10.15.6. The applicant relied on a generic data available from secondary resources and did not commission service specific research to demonstrate the need and demand for its proposed service.
- 10.15.7. The applicant relied mainly on the method of delivery of its services and did not test its proposed service to its target market.
- 10.15.8. The Authority was not satisfied that the applicant in fact conducted its own research to determine the demand and need for its offering.

10.16. **COMPLAINTS AND CODES OF CONDUCT**

- 10.16.1. Section 5.1 of the ITA required applicants to indicate how they intend dealing with complaints and whether they intend becoming a member of any organisation (e.g. NAB, BCCSA, etc.).
- 10.16.2. The applicant's complaints and grievance procedure submitted to the Authority sets out the steps to be followed in the event that a complaint is lodged.
- 10.16.3. The applicant has submitted that it will apply for membership of both the Advertising Standard Authority of South Africa (ASA) and the National Association of Broadcasters (NAB). As a member of NAB, complaints against it will be dealt with by the BCCSA.
- 10.16.4. The applicant has accordingly complied with the requirements of the ITA.

⁹⁵ Transcript page 30, line 13

10.17. **PROGRAMMING**

- 10.17.1. Section 6 of the ITA required applicants to outline in brief and in general terms the approach and objectives of the proposed programme service. Further, to state whether they are aimed at a general or niche market, to provide programming supply agreements, and how they intend to comply with the ICASA South African Television Content Regulations.
- 10.17.2. The applicant requested authorisation for 20 video and 9 audio channels.
- 10.17.3. The applicant indicated that although its service will be national, it will split its target markets across four metropolitan areas, namely: Cape Town, Durban, Pretoria, and Johannesburg. The targeted audience would be the LSM 5–10 categories⁹⁶.
- 10.17.4. Applicant committed itself to complying with the local content regulations by using independent production companies for the production of its local production programmes.⁹⁷
- 10.17.5. The Authority is satisfied that the applicant complied with the requirements of the ITA in this regard.

10.18. **TECHNICAL**

- 10.18.1. Section 7 of the ITA required applicants to provide details on, amongst others, the company that would be responsible for signal distribution and information on equipment to be used for the proposed service, and relevant technical details.
- 10.18.2. The applicant intends providing direct-to-home services by delivering its output signal using predominantly power or electricity distribution wires. The applicant's attention was drawn to the fact that power or electricity distribution wires, in terms of the Act, cannot be used for broadcasting.⁹⁸
- 10.18.3. The applicant was requested to provide a legal opinion on the issue of the prohibition on the use of power or electricity distribution wires for

⁹⁶ Application, volume 1, section 4 page 217

⁹⁷ Application: volume 2, page 113 and post hearing information submitted on 29 June 2007 at page 20.

⁹⁸ See the comments of Mr Mahapa at pages 117 to 123 of the hearing transcript for GTS.

broadcasting. An opinion was provided, which in the Authority's view failed to address the issue.

10.18.4. If a satellite subscription broadcasting licence is awarded to the applicant, the Authority would be required to include specific conditions requiring the applicant to distribute its output signal using only licensed electronic communications network service providers (signal distributors).

10.19. **DECISION**

10.19.1. The Authority has decided not to grant GOAL TECHNOLOGY SOLUTIONS (Pty) (Ltd) an application for a composite sound / television subscription broadcasting licence to provide a satellite subscription broadcasting service for the following reasons:

10.19.1.1. The applicant did not demonstrate, to the Authority's satisfaction, a need and demand for its proposed service. It is the Authority's view that the applicant has not demonstrated the existence of a market for its offering. The applicant did not clearly detail what will differentiate it in terms of its offering, in comparison to its competition.

10.19.1.2. Further, it is the Authority's view that the applicant placed much emphasis on the delivery medium of its service and the consumer's experience of it than the content it would offer.

10.19.1.3. In both instances above, the Authority finds the applicant did not satisfy the requirements of section 51(a) and (b) of the Act.

10.19.1.4. The Authority is not satisfied with the applicant's business plan, particularly the aspects relating to funding. Further, the applicant's main shareholder indicated that it will be in a position, and has undertaken, to provide the necessary funding.

10.19.1.5. However no proof of such an undertaking was provided to the satisfaction of the Authority, as the financial position of the main shareholder was also not substantiated or supported. Accordingly, the Authority finds that the applicant has failed to satisfy the

provisions of section 51(e) of the Act.

11. KHETHA MEDIA (PTY) LTD

11.1. Introduction

11.1.1. The applicant is Khetha Media (Proprietary) Limited (“**Khetha**”) a company registered and incorporated in accordance with the Companies Act, 61 of 1973. The applicant’s registration number is 2006/013063/07. The applicant does not hold permission to continue broadcasting in terms of section 4(1) of the Broadcasting Act.

11.1.2. The applicant proposes providing a multi channel, composite sound and television service to South Africa.

11.2. CORPORATE STATUS

11.2.1. Section 2 of the ITA required the applicants to provide among others, information on the applicant’s legal form; ownership and control structure; management; and staffing.

11.3. The applicant’s legal status

11.3.1. The applicant is a company incorporated in accordance with the laws of South Africa. The applicant submitted its founding documents to the Authority. These included its certificate of incorporation, articles of association as well as a memorandum of association.

11.3.2. Shareholding in the applicant, as presented during the hearings, is as follows:

11.3.2.1.	Blue Label One (Pty) Ltd (“Blue Label”) (25% BEE)	42%
11.3.2.2.	Friedshelf 730 (Pty) Ltd (“Friedshelf”) (100% BEE)	23%
11.3.2.3.	Arengo 86 (Pty) Ltd (“Arengo”) (83% BEE)	35%

11.3.3. The Authority is satisfied that the applicant complied with the ITA in respect of its corporate status requirements.

11.4. Empowerment of historically disadvantaged persons

11.4.1. The applicant submitted to the Authority that historically disadvantaged persons are represented by a shareholding component of approximately

62%⁹⁹.

11.4.2. The Authority is satisfied that more than 30% of equity ownership in the applicant is in the hands of historically disadvantaged persons, and therefore complies with section 9(2)(b) of the Act.

11.5. **Ownership and control**

11.5.1. The Authority has received the applicant's unsigned shareholders' agreement.

11.5.2. The applicant currently has one director, Chantal Sturkenboom, a Dutch national. Her inclusion in the board is not in contravention of the provisions of section 64 of the Act.

11.5.3. The Authority is satisfied that the applicant complies with the requirements of section 64 of the Act.

11.6. **Management**

11.6.1. Khetha's proposed management structure that will consist of people who have operated in, and are experienced in, the broadcasting field.

11.6.2. In its application, Khetha presented the following board of directors:

11.6.2.1. Nkeke Kekana - Director – Black male;

11.6.2.2. Mark Steven Levy - Director – White male;

11.6.2.3. Sipho Johannes Mjwara - Director – Black male;

11.6.2.4. David Douglas Fraser - Director – White male;

11.6.2.5. Angelo Roussos - Director – White male;

11.6.2.6. Chantal Sophie Adzienne Sturkenboom - Director – White female;

11.6.2.7. Sylvia Elizabeth Vollenhoven – Director - Black female;

11.6.2.8. Mandleliso Msimang – Director – Black female

11.6.3. The applicant introduced Ms Mandleliso Msimang as a director at the hearing. Ms Msimang provided a letter of acceptance regarding the position.

⁹⁹ Hearing transcript, page 5, line 8

11.6.4. The applicant has put together a team of executives who have operated in the broadcasting arena, servicing some well known organisations such as the SABC. Some of its executives have experience on regulatory and policy formulation in the ICT sector. The applicant therefore appears to have a team that has sufficient expertise in the broadcasting industry.

11.6.5. The Authority is satisfied that the applicant has satisfied the requirements of the ITA in this regard.¹⁰⁰

11.7. **Staffing**

11.7.1. Khetha submitted that its total staff complement will be 90 full time permanent employees, 22 part time permanent employees and 10 freelance employees.¹⁰¹

11.7.2. Khetha submitted its organisational staffing chart reflecting all levels, including race and gender.

11.7.3. Khetha committed itself to achieving equity in the workplace by promoting equal opportunity and fair treatment through implementation of affirmative action measures. Khetha submitted its policies on management and staffing¹⁰² and training and development¹⁰³.

11.7.4. The Authority is satisfied that Khetha's management and staff have the requisite experience to operate the proposed service.

11.8. **FINANCE**

11.8.1. Section 3 of the ITA required applicants to provide information on finance and attach proof of, amongst others, the business plan, funding, financial projections, cash flow analysis, sensitivity analysis, and profitability.

11.9. **Business plan**

11.9.1. The applicant's target audience will be subscribers in the LSM 7-10 category. In arriving at the target market, the applicant identified its

¹⁰⁰Application: page 96

¹⁰¹Application: page 111

¹⁰²Appendix 2.4.3 of the application

¹⁰³Appendix 2.4.4 of the application

potential market by first segmenting the general pay television audience before analysing the size and content of each segment.

- 11.9.2. The applicant indicated that it will begin its service with 16 channels. The applicant also asserts that it will focus on superior aggregation and consolidation of a variety of content sources and repackage them to suit its viewers' specific demands.
- 11.9.3. However, the applicant did not elaborate on its pricing strategy. The applicant appears to labour under the assumption that pricing is not what drives audience away but content, as is evident from its comment that *"If such a large audience, with disposable income, is ignoring DSTV, the short answer is....Content Positioning"*.¹⁰⁴
- 11.9.4. Further, regarding sales and marketing, it is the Authority's view that the budgeted sales growth from year to year appears too high in relation to the marketing effort that the applicant intends to apply. The variable costs as a percentage of sales appear extremely high and that could lead to a depressed gross margin. To the Authority, that highlights a serious problem possibly in relation to the applicant's procurement strategy and is likely to threaten the applicant's long term survival.
- 11.9.5. Regarding assets, the applicant has not provided a full list of equipment and facilities with pricing, required to start up its broadcasting business. The balance sheet shows non-current assets of R19, 5 million in the first year. The Authority considers the asset base to be too low for an operation of the magnitude the applicant would like to enter into.
- 11.9.6. At the hearing, the applicant was required to submit a breakdown of its anticipated capital expenditure, to assist the Authority in assessing the viability of its business plan. The information provided took the matter no further.
- 11.9.7. It is the Authority's view that the applicant's business plan is very optimistic, relying heavily on advertising revenue and postulating a very high subscriber base from the first year. The applicant does not provide

¹⁰⁴ Application: page 155

evidence of how its subscriber base will be built. The applicant has not considered the effect of competition from other non-broadcasting players such as video shops and movie houses, which are presently competing with the current incumbent.

11.10. **Funding**

11.10.1. The applicant did not have its final, optimal debt-equity ratio in place. By way of example, in the financial statements which the applicant submitted, the applicant did not make a provision for equity-based finance of any kind.¹⁰⁵ The current 100% debt finance is risky and there was no clear commitment from the applicant that its funders will be willing to carry the large debt.

11.10.2. However, the applicant attached a letter from Investec Bank Limited issued in favour of Blue Label Investment¹⁰⁶, stating that the bank has facilities in place for one of the applicant's shareholders and, subject to credit approval, it will continue to support the applicant's shareholder by making credit facilities available.

11.10.3. It is the Authority's view that revenue from a start up operation such as that envisaged by the applicant cannot be guaranteed. The business would therefore require substantial cash to look after itself until it is self sustaining. It is the Authority's view that under those circumstances, equity becomes the most suitable form of funding as, unlike debt, in the normal course of commercial dealings it is not callable in the short to medium term,.

11.11. **Financial projections**

11.11.1. The applicant has, as indicated above, assumed a X debt financing model in the development of its business. The applicant was not certain of the extent of equity financing that was possible at the time of preparing its financial statements. Debt may be the applicant's preferred form of financing as it provides opportunities for financial leverage. It is however the Authority's concern that it involves great risk,

¹⁰⁵ Application: page 135.

¹⁰⁶ Post-hearing information; paragraph 3 of letter from the applicant, dated 29 June 2007.

as it could leave the applicant at the mercy of its creditors at all times, particularly in the case of a start-up, as cost overruns are highly possible.

11.11.2. The Authority also holds the view that the profitability of the applicant is questionable, particularly due to the applicant's heavy reliance on advertising revenue. Further, the Authority believes that there is a risk that the projected subscriber base may not materialise as a result of competition in the subscription broadcasting sector in the future. The Authority accordingly believes that the financial model in the form the applicant has presented, it is not convincing.

11.12. **Cash flow analysis**

11.12.1. The applicant's cash flow projections depict negative net-flow until the fourth year. Cash from operations is also negative in the first two years suggesting that the business operations will not be generating enough cash to cover its costs. In the Authority's view, that is very risky.

11.13. **Sensitivity analysis**

11.13.1. In the post hearing submission, the applicant provided the Authority with sensitivity analyses as follows:¹⁰⁷

11.13.1.1. unfavourable foreign exchange rate: positive net profit achieved in year 5;

11.13.1.2. significant drop in subscriber base: positive net profit not achieved even in year 5; and

11.13.1.3. unfavourable interest rates: positive net profit achieved in year 5.

11.14. **Profitability**

11.14.1. Assuming that the applicant's revenue stream is possible and will be achieved, the applicant's business will run at a loss in the first five years, reaching a cumulative loss of X in year 5. As indicated earlier, the applicant does not clearly state where the initial funds to absorb the possible loss will come from.

¹⁰⁷Post-hearing information; appendix A to the letter from the applicant, dated 29 June 2007

11.14.2. It is the Authority's firm view that no funds in the form of equity exist, for example, it does not appear the business will survive the first five years. The applicant shows a bank overdraft of up to X on its balance sheet. The Authority's view is that the said bank overdraft does not appear sufficient to cover the losses the applicant could suffer in the first three years of operation.

11.14.3. At the hearing, certain applicants expressed a concern regarding the extremely high level of advertising revenue reflected in the applicant's business plan. The concern was that it is higher than the regulated limits set in the Act¹⁰⁸ and further, that heavy reliance on advertising revenue may be risky as the revenue may not materialise.

11.15. **MARKETS AND AUDIENCE RESEARCH**

11.15.1. Section 51 (a) and (b) of the Act requires the applicant to demonstrate the need and demand for the proposed service.

11.15.2. In addition, section 10 of the ITA requires applicants to submit copies of market and audience research.

11.15.3. The applicant confirmed that its market research and analysis was not based on primary research, but relied on secondary data collection from All Media and Products Survey ("**AMPS**"), General Household Survey and Census information. The objective was to establish the size of the potential subscription target market.

11.15.4. The research conducted by the applicant is insufficient and its outcomes are not unique to the applicant's service offering. The applicant's research does not validate the propositions made in the applicant's business plan in relation to subscriber uptake and whether a market exists for its service offering.

11.15.5. It is accordingly the Authority's view that the applicant did not provide sufficient research to enable the Authority to determine that there is a need and demand for the applicant's proposed services.

11.15.6. The Authority is accordingly not satisfied with the research provided by

¹⁰⁸ Sec 60 (4)

the applicant.

11.16. **COMPLAINTS AND CODES OF CONDUCT**

11.16.1. Section 5.1 of the ITA required applicants to indicate how they intend dealing with complaints and whether they intend becoming a member of any organisation (e.g. NAB, BCCSA, etc.).

11.16.2. The applicant submitted its complaints procedure, which sets out the steps to be followed to deal with any complaint.¹⁰⁹

11.16.3. The applicant intends to be affiliated to the National Association of Broadcasters (“**NAB**”) and subscribe to the codes of the Broadcasting Complaints Commission of South Africa (“**BCCSA**”)¹¹⁰.

11.16.4. The Authority is satisfied that the applicant has complied with the requirements of the ITA in this regard.

11.17. **PROGRAMMING**

11.17.1. Section 6 of the ITA required applicants to outline in brief and in general terms the approach and objectives of the proposed programme service. Further, to state whether they are aimed at a general or niche market, to provide programming supply agreements, and how they intend to comply with the South African Television Content Regulations.

11.17.2. The applicant applied to provide broadcasting services via satellite.

11.17.3. The applicant requested authorisation for 16 channels.¹¹¹

11.17.4. The applicant committed itself to complying with the local content requirements by using independent production companies for the production of its local production programmes.¹¹²

11.17.5. The Authority is satisfied that the applicant complied with the requirements of the ITA in this regard.

11.18. **TECHNICAL**

11.18.1. Section 7 of the ITA required applicants to provide details on, amongst

¹⁰⁹ Application, appendix 5.1.1

¹¹⁰ Application, appendix 5.1.2

¹¹¹ Application: appendix 6.3, page 180

¹¹² Application: appendix 6.5, page 185.

others, the company that would be responsible for signal distribution and information on equipment to be used for the proposed service, and relevant technical details.

11.18.2. The applicant intends deploying its own earth station and transmission infrastructure if it is permitted to do so. However, for purposes of rapid growth, the applicant is considering the electronic communications network services (signal distribution) provided by GlobeCast Africa Ltd and Sentech Ltd.

11.19. **DECISION**

11.20. The Authority has decided not to grant the applicant a satellite subscription broadcasting licence to provide a satellite and cable subscription broadcasting service, for the following reasons:

11.20.1. The Authority is not satisfied with the applicant's business plan as it relies heavily on revenue from advertising.

11.20.2. The applicant provided the Authority with insufficient research to enable the Authority to satisfy itself that there is a need and demand for its proposed service. The Authority finds that the applicant has failed to satisfy the provisions of section 51(a) and (b) of the Act.

11.20.3. The applicant has not demonstrated to the satisfaction of the Authority, that it has access to sufficient funding to enable it to commence operations. The Authority finds that the applicant has failed to satisfy the provisions of section 51(e) of the Act.

12. LAEGOMA DIGITAL (PTY) LTD

12.1. **Introduction**

12.2. The Authority received an application in terms of the ITA from Laegoma Digital (Proprietary) Limited ("the applicant"). The applicant intends operating a service under the name and style of MiDigital. The applicant does not hold permission to continue broadcasting in terms of section 4(1) of the Broadcasting Act

12.3. The applicant applied for a multi-channel composite sound and television satellite subscription licence to broadcasting nationally.

12.4. CORPORATE STATUS

12.4.1. Section 2.1 of the ITA required the applicants to describe their legal form and to provide all relevant founding documentation. Further the applicant had to advise whether it is part of any consortium, and also to provide a resolution authorising the signatory to sign the application on its behalf.

12.4.2. The applicant is a company registered and incorporated in accordance with the Companies Act, 61 of 1973. The applicant's registration number is 2001/020032/07.

12.4.3. The applicant submitted its founding documents to the Authority, including its shareholders' agreement. These included its certificate of incorporation, articles of association as well as a memorandum of association.

12.4.4. The shareholding in the applicant is held as follows:

12.4.4.1.	MFP Holdings (Pty) Ltd ("MFP")	55%
12.4.4.2.	Nehawu Investment Holdings (Pty) Ltd ("NIH")	20%
12.4.4.3.	Tlhalefang Investments (Pty) Ltd ("Tlhalefang")	15%
12.4.4.4.	Pitso ICT Solutions ("Pitso")	5%
12.4.4.5.	Naledzi Holdings ("Naledzi")	5%

12.4.5. The Authority is satisfied that the applicant complied with the requirements of the ITA in respect of corporate status.

12.5. Empowerment of historically disadvantaged groups

12.5.1. Section 2.1.1 of the ITA required the applicant to specify the Black Economic Empowerment component in each shareholder.

12.5.2. The applicant submitted to the Authority that historically disadvantaged persons are represented by a shareholding component of 64%¹¹³.

12.5.3. The Authority is satisfied that more than 30% of equity ownership in the applicant is in the hands of historically disadvantaged persons, and

¹¹³ Hearing transcript, pages 7 - 8

therefore complies with section 9(2)(b) of the Act.

12.6. Ownership and control

12.6.1. Section 2.2 of the ITA required the applicant to provide information on ownership and control, including details of the shareholder(s) and to submit the relevant documents.

12.6.2. The applicant indicated that it is 100% South African owned.

12.6.3. The applicant further submitted that the control of the licence will vest in MFP as the majority shareholder. The applicant further indicated that MFP is 100% South African owned.

12.6.4. The Authority is satisfied that the applicant does not have foreign ownership exceeding 20%.

12.7. Management

12.7.1. Section 2.3 of the ITA required the applicant to provide full details of members of its senior management team including all directors, members, trustees, relevant previous experience as well as information on shares held by members of its senior management.

12.7.2. The applicant submitted an organizational chart outlining its management structure.

12.7.3. The applicant however indicated that it had not appointed its senior management.

12.7.4. The Authority is therefore unable to assess whether the applicant's management has the requisite experience and capabilities to operate the proposed service.

12.7.5. The Authority is not satisfied that the applicant has demonstrated the requisite experience and capabilities necessary to operate the proposed service as required in terms of section 51(d) of the Act.

12.8. Staffing

12.8.1. Section 2.4 of the ITA required the applicants to provide staffing organisational charts reflecting all proposed management and staff posts and indicate clearly the planned reporting structure. Further the

applicant had to show the race and gender of each employee.

- 12.8.2. The applicant submitted its organisational and staffing structure.
- 12.8.3. The applicant also submitted its Employment Equity and Work Skills Development policies, which are aimed at promoting the empowerment and advancement of women in the broadcasting industry, and encouraging equal opportunity employment practices in terms of its licence conditions.
- 12.8.4. The applicant indicated that it will have a total staff complement of over 300 people, of whom 7 will be corporate office staff, 248 will be attending to marketing and sales sourced from Adworx, 21 will be attending to content sourced from the production houses, 14 will attend to technical matters sourced from Logicom, 17 will attend to financial and legal matters sourced from Fuhrmann & Associates and 7 will tend to human resources, sourced from Tlhalefang.¹¹⁴
- 12.8.5. The applicant did not give a further breakdown in terms of race and gender and it was therefore difficult to assess whether it complied with the ITA. Further, although the applicant confirms that previously disadvantaged individuals have a great deal of representation, the applicant gave no figures when it provided information on its staff complement.
- 12.8.6. The Authority is however satisfied that the applicant complied with the requirements of the ITA in this regard.

12.9. **FINANCE**

- 12.9.1. Before analysing the information submitted by the applicant in respect of the finance section of the ITA, a few comments on the nature of the information submitted are necessary. The Authority was concerned that the applicant submitted inadequate information on various parts of its application, and in particular, on the finance section. The difficulty faced by the Authority in assessing the applicant's application is well demonstrated in the following comments by the Chairperson of the

¹¹⁴ Transcript: page 13 – The applicant confirmed the above information.

panel appearing on page 84 and 85 of the transcript of the hearing:

CHAIRPERSON: I hear what you are saying and the submission that you are making to us, but the dilemma that we are having is that we are evaluating the application that has been submitted to us without any of the information. And in terms of section 51 we are supposed to take into account whether you have certified or was [sic] satisfied that Laegoma understands the demand for the proposed service. We are also suppose[sic] to evaluate whether the proposed broadcasting service within the areas that you talk about have taken into account the competition that exist or might exist in those specific areas. And how then your business, your business modules equate to that, whether it would survive that. That is basically the biggest problem that we have...

So we are not in a position at this stage, we as the Authority, to fulfil the provisions of section 51 having regard to the application that has been submitted to us."

12.10. **Business plan**

12.10.1. The applicant's target audience will be the LSM 7 – 9 target market and the applicant applied for authorisation for 25 television channels and 20 audio channels.¹¹⁵

12.10.2. The applicant submitted a business plan with its main application. The applicant's business plan however, had no projected profit and loss statements, projected balance sheet, projected financial statements for the periods required by ITA.

12.11. **Funding**

12.11.1. The applicant indicated that it would initially require funding of R 300m made up of R 100 million equity from shareholders and R 250 million from project financing. The applicant further indicated that its shareholder will be on call for R150million.

12.11.2. The applicant submitted a letter from a financial institution relating to

¹¹⁵ Transcript: page 10, line 4.

potential funding. The letter however was not, in any way commitment to fund the applicant's proposed service, but a general expression of interest.

12.11.3. Further the applicant did not demonstrate that its shareholders have sufficient resources to finance the venture.

12.11.4. The Authority is therefore not satisfied that the applicant has secured or will be able to secure funding for the proposed service.

12.12. **Financial projections, Cash flow analysis, Sensitivity analysis and Profitability**

12.12.1. As indicated in the preceding paragraphs, the information submitted by the applicants in respect of the above was insufficient for proper analysis.

12.12.2. The Authority is therefore not satisfied that the applicant has demonstrated it has finances and a coherent business plan to operate the proposed service.

12.12.3. It is accordingly the Authority's view that the applicant did not satisfy the requirements of section 51(e) of the Act, read with item 11 of schedule A to the ITA.

12.13. **MARKETS AND AUDIENCE RESEARCH**

12.13.1. The applicant confirmed that its market's research and analysis was not based on primary research, but relied on the following¹¹⁶:

12.13.1.1. population studies and updates as issued by Statistics South Africa;

12.13.1.2. data collection from All Media and Products Survey ("**AMPS**");

12.13.1.3. Research Surveys' Black Diamond study focusing on the new black middle class;

12.13.1.4. reports and presentations made by the incumbent operators in television, namely MultiChoice, SABC, and E-TV; and

12.13.1.5. trends in content creation and production, trends in consumer

¹¹⁶ Post hearing document, page 5

electronic consumption, and the performances of subscription operators across the world.

12.13.2. The applicant did not support its research conclusions with quantitative research data, but only made reference to it having reviewed the research as conducted by other sources.

12.13.3. The Authority is, therefore, not satisfied with the research provided by the applicant, and believes that the applicant has failed to fulfil the requirements of sections 51(a) and (b) of the Act, together with the requirements of section 4 of schedule A to the ITA.

12.14. **COMPLAINTS AND CODES OF CONDUCT**

12.14.1. The applicant submitted its complaints procedure, which sets out the procedures to be followed should a complaint be lodged.

12.14.2. The applicant intends to be affiliated to the National Association of Broadcasters (“**NAB**”) and subscribe to the codes of the Broadcasting Complaints Commission of South Africa (“**BCCSA**”).

12.14.3. The Authority is satisfied that the applicant has complied with the requirements of the ITA in this regard.

12.15. **PROGRAMMING**

12.15.1. The applicant applied to provide broadcasting services/channels via cable and satellite services.

12.15.2. The applicant requested authorisation for 25 television channels and 20 audio channels.¹¹⁷

12.15.3. The applicant’s target audience will be the LSM 7 – 9 target market.

12.15.4. The applicant committed itself to complying with the local content ICASA South African Television Content Regulations, by using independent production companies for the production of its local production programmes.

12.15.5. The Authority is satisfied that the applicant complied with the requirements of the ITA in this regard.

¹¹⁷ Transcript: page 10, line 4.

12.16. **TECHNICAL**

12.16.1. The applicant intends using the services provided by GlobeCast Africa Ltd. The applicant is amenable to remaining within the confines of the law as far as signal distribution is concerned, and has intimated that it will ensure that it utilises the services of a licensed electronic communications network services provider (signal distributor).

12.17. **DECISION**

12.17.1. The Authority has decided not to grant the applicant a licence to provide satellite and cable subscription broadcasting services for the following reasons:

12.17.1.6. The applicant provided the Authority with insufficient research to enable the Authority to satisfy itself that there is a need and demand for its proposed service. In so far as research was conducted, the applicant did not support its research conclusions with quantitative research data. Accordingly, the applicant has not demonstrated a need and demand for its proposed service as required in terms of section 51(a) and (b) of the Act.

12.17.1.7. The Authority is not satisfied that the applicant has secured any, alternatively sufficient, funding for its proposed service and accordingly, the applicant has failed to satisfy the requirements of Section 51(e) of the Act.

13. MAX TV (PTY) LTD

13.1. **Introduction**

13.1.1. The applicant is Max TV (Proprietary) Limited ("**Max TV**") a company registered and incorporated in accordance with the Companies Act, 61 of 1973. The applicant's registration number is 2006/021851/07. The applicant does not hold permission to continue broadcasting in terms of section 4 (1) of the Broadcasting Act.

13.1.2. The applicant proposes providing a multi channel, composite sound and television service to South Africa.

13.2. **CORPORATE STATUS**

13.3. **Applicant's legal form**

13.3.1. The applicant submitted its founding documents to the Authority, including its shareholders' agreement. These included its certificate of incorporation, articles of association as well as a memorandum of association.

13.3.2. The shareholding in the applicant is as follows¹¹⁸:

13.3.2.1. ABSA Capital (Pty) Ltd ("**ABSA**") 25%

13.3.2.2. MTN Ltd ("**MTN**") 30%

13.3.2.3. Citabell TV Consortium (Pty) Ltd ("**Citabell**") 45%

13.3.3. The applicant indicated to the Authority that 20% of the equity will be warehoused for private investors, subsequent to the applicant being awarded the licence. The shareholding would then be diluted as follows:

13.3.3.1. ABSA Capital (Pty) Ltd 20%

13.3.3.2. MTN Ltd 15%

13.3.3.3. Citabell TV Consortium (Pty) Ltd 45%

13.3.3.4. Private equity 20%

13.3.4. The shareholders' agreement presented by the applicant, was only signed by one person representing Citabell. Notwithstanding requests, the Authority was not presented with any confirmation of shareholding or commitment from MTN and / or ABSA.

13.3.5. The Authority is not satisfied that the applicant complied with the requirements of the ITA in respect of corporate status. The Authority was accordingly unable to make a satisfactory assessment of the applicant in accordance with the provisions of sections 51(d), (e) and (f) of the Act.

13.4. **Empowerment of historically disadvantaged persons**

13.4.1. The applicant submitted to the Authority that historically disadvantaged

¹¹⁸ Application, shareholders' agreement, appendix 2.1

persons are represented by a shareholding component of 45% held by Citabell.¹¹⁹

13.4.2. The Authority is satisfied that more than 30% of equity ownership in the applicant is in the hands of historically disadvantaged persons, and therefore complies with section 9 (2)(b) of the Act.

13.5. **Ownership and control**

13.5.1. The applicant indicated that there will be foreign shareholding arising from ABSA and MTN's shareholding. The Authority was not presented with any percentage in this regard. The applicant indicated that Citabell will control the licence¹²⁰.

13.5.2. Notwithstanding a request by the Authority, no information was provided on the proportion of foreign shareholding in MTN and ABSA. The Authority is, therefore, not in a position to confirm whether or not the applicant complies with the provisions of section 64 of the Act.

13.6. **Management**

13.6.1. The applicant's proposed management will consist of 8 directors, namely:

13.6.1.1. Charlotte Nhlapo – Chairperson – Black female;

13.6.1.2. Themba Langa – Deputy Chairperson – Black male;

13.6.1.3. Ric Godinho – Executive Director – White male;

13.6.1.4. Zandile Nzalo – Non-Executive Director – Black female;

13.6.1.5. Pat Thekiso – Executive Director – Black female;

13.6.1.6. Lunga Williams – Executive Director – Black male;

13.6.1.7. Joe Thloloe – Non-Executive Director – Black male;

13.6.1.8. Richard Magau – Non-Executive Director – Black male;

13.6.2. The Authority is satisfied that the applicant has complied with the requirements of the ITA in this regard.

¹¹⁹ Application, page i

¹²⁰ Application, page 82, appendix 2.2.2

13.7. **Staffing**

13.7.1. The applicant submitted its organisational and staffing structure.¹²¹ The applicant also provided a breakdown of staff, by disability, race and gender.¹²²

13.7.2. The applicant also submitted its Human Resource Development Policy¹²³, which is aimed at providing clear guidelines and a transformational framework for the training, development and education of the applicant's employees.

13.7.3. The Authority is satisfied that the applicant complied with the requirements of the ITA in this regard.

13.8. **FINANCE**

13.9. **BUSINESS PLAN**

13.9.1. The applicant plans to institute a three-tier pricing strategy that caters for subscribers in the LSM 4 to 10 target groups. However, no explanation was provided regarding how the prices were tested in the market for considerations such as sensitivity, before the final figures were put forward.

13.9.2. The applicant proposes a bouquet of 120 video channels, 120 audio and 50 data channels. Most of the channels will originate and be broadcast from South Africa. An analysis of the target market's needs (backed by a thorough research) is not evident from the application.

13.9.3. The applicant is specifically targeting potential subscribers in the LSM 4 to 10 target groups. The applicant mentions that its intention is to minimise direct competition with DSTV, but the applicant's market growth in the LSM 9-10 target group (DSTV's market) is 300% in the second year, 690% in the third year before it eases off to 26% in the fourth year. It is the Authority's view that this is contradictory, as the business plan suggests an aggressive drive in the higher LSMs where DSTV is currently dominant.

¹²¹ Application, appendix 2.4.1

¹²² Application, pages 98-101

¹²³ Application, appendix 2.4.4 (a)

13.9.4. The applicant sets out to capture the market that it perceives to be largely ignored by DSTV. It intends to take aim at the customers that have disposable income (but are not subscribing to DSTV) through content differentiation and those with less disposable funds by introducing a cheaper package. It identified the LSM 4-10 band as its potential market.

13.9.5. The applicant seeks to acquire content and other accessories from global content vendors and other independent local producers / suppliers. The applicant did not shed light regarding the type of relationship(s) they intend building with its suppliers but mentioned that equity relationships are not currently an option.

13.10. **Funding**

13.11. **Capital Structure**

13.11.1. The applicant intends raising the required X following format:

13.11.1.1. Debt : X

13.11.1.2. Shareholders loans : X

13.11.1.3. Pure Equity : X

13.12. **Sources of Funding**

13.12.1. The applicant anticipates raising equity and shareholders' loans from the financial powerhouses in its shareholders' camp. The Authority was not provided with clarity on this arrangement.

13.12.2. In the post hearing submission, the applicant makes the following assertion in respect of funding for its venture: "*Maxtv has undertakings for funding, if successful in its application, however, we are not able to provide such proof at this stage.*"¹²⁴

13.12.3. From the Authority's analysis of the submission, it is evident that the applicant relies on equity and shareholder's loans, but such investors have not been secured yet. The applicant has not been able to prove that equity injectors do exist.

¹²⁴ Post Hearing Submission page 3, section 3.3

13.13. **Total Expenditure**

13.13.1. The applicant envisages a total funding requirement of RX for the period up to 2014. The applicant envisages expenditure being allocated as follows:

13.13.1.1. Working Capital: X

13.13.1.2. Capex: X

13.13.1.3. Finance Charges: X

13.14. **Profitability**

13.14.1. The applicant envisages achieving positive net profit in 2013, essentially its sixth year of operation. The applicant's financial figures and the marketing/promotion figures do not seem to be aligned. By way of example, the applicant's subscription revenue is projected to increase by more than 13 times in the second year, yet promotion costs drop from X to X (X) in the same period. The same revenue is also projected to more than double in the third year, yet the promotion costs remain constant.

13.14.2. On operating costs the applicant projects that it will only incur distribution costs from the third year of operation; the first and second year distribution costs are zero. The other costs that are zero in the first year and appear, unexplained in the third year are "General Operating Costs" X and legal fees of X. IT Facilities costs also appear in the first two years only.

13.14.3. During the course of the hearing, another applicant questioned the applicant in relation to its financial modelling and noted "*...financial section 3.1 we note that the income statement provided does not add up and certain balances that have been carried to the cash flow and balance sheet do not correspond. Cash-on-hand, for example, as per the balance sheet and as per the cash flow statement do not tie up.*"¹²⁵ The applicant attributed this to an oversight which may have resulted in re-distributed copies not reaching the intended recipients.

¹²⁵ Transcript page 38, Line 20

13.14.4. In clarifying the errors, the applicant stated the following *“However I need to state for the record that the calculation errors referred to in terms of the income statement were due to rounding, insignificant, the net result of that talking from memory resulted in a net changed position of less than X on a business for which 1 component, the content anticipated a spend of X over a 8 year period does not change the essence of the information that was submitted in any way whatsoever.”*¹²⁶

13.15. **Cash flow analysis**

13.15.1. The cash flow projections depict negative net-flow until the year 2013. Cash from operations is also positive only in 2012.

13.16. **Sensitivity analysis**

13.16.1. The applicant performed a sensitivity analysis to test the following scenarios:

13.16.1.1. Increase subscription costs by X

13.16.1.2. Reduce subscription growth by X

13.16.1.3. Increase subscription rate by X

13.16.1.4. Increase marketing costs by X

13.16.1.5. Increase content costs by X%

13.16.2. The Authority is however, of the opinion that the applicant should have included the scenario that reflects the effect of an increase in the interest rates, given that the rates have recently been on an upward trend. A scenario depicting a decrease in the subscription fee is also necessary because the current monopolistic player may decide to cut its costs

13.17. **MARKETS AND AUDIENCE RESEARCH**

13.17.1. The applicant submitted generic research from the following sources¹²⁷:

¹²⁶ Transcript Page 45, Line 18

¹²⁷ Application, appendix 4.1.2

- 13.17.1.1. The South African Film and Television Industry analysis (2006);
- 13.17.1.2. Project response;
- 13.17.1.3. VOXPOP 2006, and
- 13.17.1.4. Market Analysis for commercial regional and local television (2003).
- 13.17.2. The information submitted by the applicant in this regard is a generic research already available through secondary sources and did not in anyway test the need and demand of the applicant's proposed services.
- 13.17.3. The Authority is therefore not satisfied that the applicant did prove need and demand of the proposed service, as contemplated in sections 51(a) and (b) of the Act.

13.18. **COMPLAINTS AND CODES OF CONDUCT**

- 13.18.1. The applicant submitted its complaints procedure which sets out the procedures to be followed should a complaint be lodged.
- 13.18.2. The applicant intends to be affiliated to the National Association of Broadcasters (“**NAB**”) and subscribe to the codes of the Broadcasting Complaints Commission of South Africa (“**BCCSA**”).
- 13.18.3. The Authority is satisfied that the applicant has complied with the requirements of the ITA in this regard.

13.19. **PROGRAMMING**

- 13.19.1. The applicant proposed a bouquet of 120 video, 120 audio and 50 data channels¹²⁸.
- 13.19.2. The applicant indicated that the target market is within the LSM's 4 – 10 market¹²⁹ and requested authorisation for 25 television channels and 20 audio channels.
- 13.19.3. The applicant indicated that it will broadcast a minimum of 25% South African content, in compliance with the ICASA South African Television Content Regulations.

¹²⁸ Application, appendix 6.1

¹²⁹ Application, appendix 6.2

13.19.4. The Authority is satisfied that the applicant has complied with the requirements of the ITA in this regard.

13.20. **TECHNICAL**

13.20.1. The applicant intends using the services provided by Sentech Ltd.

13.21. **DECISION**

13.21.1. The Authority has decided not to grant Max TV a licence to provide a satellite subscription broadcasting services for the following reasons:

13.21.1.1. The applicant provided the Authority with insufficient research to enable the Authority to satisfy itself that there is need and demand for its proposed service;

13.21.1.2. The letters of intent from MTN and ABSA do not show proof of commitment to become shareholders in the applicant or even to fund the applicant's start up costs.

13.21.1.3. The Authority cannot confirm the applicant's compliance or non-compliance with Section 64 of the Act in the absence of an expressed foreign interest percentage.

13.21.1.4. The applicant's financial projections are unsubstantiated and questionable. The Authority is not persuaded that the applicant has secured adequate funding for its proposed service.

13.21.1.5. Therefore, the applicant has not demonstrated a need and demand for its proposed service as required in terms of Sections 51 (a) and (b) of Act.

14. **MULTICHOICE AFRICA (PTY) LTD**

14.1. **Introduction**

14.1.1. The Authority received an application in terms of the ITA from MultiChoice Africa (Pty) Ltd ("**MultiChoice**") for a composite subscription broadcasting licence. MultiChoice currently operates and intends to continue operating a service under the name and style of Dstv. The applicant is a company duly registered and incorporated in

accordance with the Companies Act, 61 of 1973 under the registration number is 94/09083/07. The applicant holds permission to continue issued by the Authority in terms of section 4(1) of the Broadcasting Act.

14.1.2. The applicant intends providing a multi channel composite service on a national basis.

14.2. **CORPORATE STATUS**

14.3. **Applicant's legal form**

14.3.1. Section 2.1 of the ITA required the applicants to describe their legal form and to provide all relevant founding documentation. Further the applicant had to provide whether it is part of any consortiums, and also to provide a resolution authorising the signatory to sign the application on its behalf.

14.3.2. The applicant is MultiChoice Africa (Pty) Ltd, broadcasting and intending to continue broadcasting as Dstv as already indicated above.

14.3.3. In its application documents the applicant indicated that it is a wholly-owned subsidiary of MultiChoice Investment Holdings Ltd, which is in turn a wholly-owned subsidiary of MultiChoice I Holdings Investments (Pty) Ltd, which is in turn a wholly-owned subsidiary of Naspers Ltd¹³⁰.

14.3.4. The applicant, however, indicated in its post hearing submission that it only has one shareholder, namely MultiChoice South Africa Holdings (Pty) Ltd ("**MCSA**")¹³¹.

14.3.5. The applicant further indicated that shareholding in MCSA is as follows:

14.3.5.1. MIH Holdings Ltd 77.5%

14.3.5.2. Phuthuma Nathi 1 & 2 22.5%

14.3.6. MIH Holdings Ltd is solely owned by Naspers Ltd¹³².

14.3.7. The applicant provided its certificate of incorporation, certificate to commence business, memorandum of association, and articles of

¹³⁰ Application, Volume 2, PagePg 312

¹³¹ Post hearing submission, annexure A

¹³² Post hearing submission, annexure A

association.

14.3.8. The Authority is satisfied that the applicant complied with the ITA's requirements in respect of shareholding.

14.4. **Empowerment of historically disadvantaged persons**

14.4.1. Section 2.1.1 of the ITA required the applicant to specify the Black Economic Empowerment component in each shareholder.

14.4.2. As stated above, In its application documents the applicant indicated that it is a wholly-owned subsidiary of MultiChoice Investment Holdings Ltd, which is in turn a wholly-owned subsidiary of MultiChoice I Holdings Investments (Pty) Ltd, which is in turn a wholly-owned subsidiary of Naspers Ltd¹³³.

14.4.3. Further, the applicant indicated that it was finalising a Black Economic Empowerment (“**BEE**”) transaction which would result in at least 30% of the equity being held by persons from historically disadvantaged groups¹³⁴.

14.4.4. During the hearings the applicant confirmed that the new BEE transaction had been finalised. This transaction saw Phuthuma Nathi 1 & 2 having a 22.5% stake in MCSA, which in turn is the sole shareholder of the applicant.

14.4.5. The applicant, in its post hearing submission, included an Empowerdex report (“**the report**”) assessing equity held by historically disadvantaged groups. According to the report effective shareholding held by historically disadvantaged groups amounted to 37.5%¹³⁵.

14.4.6. The Authority is of the view that Empowerdex is a credible rating agency.

14.4.7. The Authority is satisfied that the applicant complies with the empowerment requirements set out in sections 5(9)(b) and 9(2)(b) of the Act.

¹³³ Application, Volume 2, Pageg 312

¹³⁴ Application, Volume 2. page 312

¹³⁵ Post hearing submission, Annexure B

14.5. **Ownership and control**

- 14.5.1. Section 2.2 of the ITA required the applicant to provide information on ownership and control including details of the shareholder (s) and to submit the relevant documents.
- 14.5.2. The applicant indicated that its sole shareholder is a MCSA, a South African entity and that it has no foreign shareholder¹³⁶.
- 14.5.3. The Authority is satisfied that the applicant does not have foreign ownership exceeding 20% as prescribed in terms of section 64 of the Act.

14.6. **Management**

- 14.6.1. Section 2.2 of the ITA required the applicant to provide information on ownership and control including details of the shareholder (s) and to submit the relevant documents.
- 14.6.2. The applicant's proposed management is as follows:
- 14.6.2.1. Lehlohonolo Napo Letele – Black male (CEO) - Engineer
- 14.6.2.2. Jan Nicolaas Meyer – White male (CFO)–Chartered Accountant
- 14.6.2.3. John James Volkwyn – White male (Director of Multichoice and CEO of MIH) - Chartered Accountant
- 14.6.3. The applicant's directors are made up of 3 males of whom 2 are white and one black.
- 14.6.4. The applicant indicated that the composition of its management will change.
- 14.6.5. The management structure submitted by the applicant is made up of the following people: Lehlohonolo Napo Letele, Jan Nicolaas Meyer, John James Volkwyn, Aletta Maria Alberts, Errol John du Preez, Richard Clements Fyffe, Thabo Henry Moabi, Kwezi Mtenganya, Jonathan Clive Newman, Graham David Pfuhl, Motlogeloa Jack Rakitla, Mogamat Faik Sulaiman, Gerhardus Jacobus van Eeden and Linda Vermaas.

¹³⁶ Application, Volume 1, page 85

- 14.6.6. The senior management positions are indicated as follows:
- 14.6.6.1. CEO who is male and black
 - 14.6.6.2. Chief Technology Officer who is white and male
 - 14.6.6.3. Chief Financial Officer who is white and male
 - 14.6.6.4. COO who is white and female
 - 14.6.6.5. GM: Business Strategy and Development who is white and male
 - 14.6.6.6. GM: Human Resources who is coloured and male
 - 14.6.6.7. GM: New Media who is white and male
 - 14.6.6.8. GM: Content who is white and female
 - 14.6.6.9. Chief Info Officer who is white and male
 - 14.6.6.10. GM: Regulatory Affairs who is black and male
 - 14.6.6.11. GM: Corporate Affairs who is black and male
 - 14.6.6.12. GM: Marketing and Sales who is white and male
 - 14.6.6.13. GM: Operations who is black and male
- 14.6.7. The senior management ratios are therefore as follows:
- | | | |
|-----------|--------------|---------|
| 14.6.7.1. | Black Male | 38, 46% |
| 14.6.7.2. | White Male | 46, 15% |
| 14.6.7.3. | Black Female | 0% |
| 14.6.7.4. | White Female | 15, 39% |
| 14.6.7.5. | Male | 84, 62% |
| 14.6.7.6. | Female | 15, 38% |
- 14.6.8. It appears that the directors and management structure of the applicant is dominated by white males and there is no representation in respect of black females in the senior management structure of the applicant.
- 14.6.9. In its post hearing submissions, the applicant provided a comprehensive initiative strategy to appoint black women to its senior management

team¹³⁷. The applicant states that any new positions in its senior management team are earmarked for black women¹³⁸. The applicant points out that there are scarce skills coupled with an increasing demand for skilled black women¹³⁹. The applicant highlights a two-pronged strategy to develop and promote existing women employees and particularly black women as well as a prioritization in its external recruitment processes¹⁴⁰. Initiatives discussed by the applicant include succession planning and talent management, a women's forum, leadership development, training spend, budget allocation, flexible working arrangements, diversity awareness programmes and bring-a-girl-child-to-work¹⁴¹. The applicant then states that no further requirements/minimum standards ought to be imposed regarding advancement of women at senior management level¹⁴².

14.6.10. The Authority is satisfied that applicant has demonstrated that it has an established and solid base of skills enabling it to operate in the broadcasting industry in accordance with section 51 of the Act.

14.6.11. The Authority is however not satisfied that the applicant's management structure is reflective of racial and gender demographics of the Republic.

14.7. **Staffing**

14.7.1. Section 2.4 of the ITA required the applicants to provide staffing organisational charts reflecting all proposed management and staff posts and indicate clearly the planned reporting structure. Further the applicant had to show the race and gender of each employee.

14.7.2. The applicant submitted an organisational structure which comprises of

¹³⁷ Post Hearing Submission: Pg 2, paragraph 10 to Pg 6 paragraph 47

¹³⁸ Post Hearing Submission: Pg 2, paragraph 10

¹³⁹ Post Hearing Submission: Pg 2, paragraph 11

¹⁴⁰ Post Hearing Submission: Pg 2, paragraph 12

¹⁴¹ Post Hearing Submission: Pg 2 paragraph 20 to Pg 5 paragraph 40

¹⁴² Post Hearing Submission: Pg 5 paragraph 40

628 full time staff, 43 part time employees, 409 free- lance staff and no outsourced positions. The applicant submitted and organisational structure diagram. The staff organizational chart is attached¹⁴³.

14.7.3. The applicant's total staff ratios are as follows:

14.7.3.1.	African	38%
14.7.3.2.	Coloured	24, 2%
14.7.3.3.	Indian	19, 2%
14.7.3.4.	White	18, 6%
14.7.3.5.	Male	53, 3%
14.7.3.6.	Female	46, 7% ¹⁴⁴

14.7.4. The applicant also submitted its policy document on management and staff including issues such as race, gender and disability, submitted to the Authority deals with the following:

- 14.7.4.1. policy statement on management and staffing including issues such as race, gender and disability,
- 14.7.4.2. business code of conduct,
- 14.7.4.3. business code of ethics,
- 14.7.4.4. individual code of conduct,
- 14.7.4.5. employment equity policy,
- 14.7.4.6. recruitment and selection policy,
- 14.7.4.7. assessment policy and guidelines,
- 14.7.4.8. promotions policy and guidelines,
- 14.7.4.9. relocation policy,
- 14.7.4.10. sexual harassment policy,
- 14.7.4.11. AIDS / HIV policy, and

¹⁴³ Pages 106 to 118 of volume 1 of the application

¹⁴⁴ Volume 2, Pg 410 of the application

14.7.4.12. code of conduct: guidelines: poor performance, incapacity, code of conduct: schedule of offences and retrenchment policy.

14.7.5. The Authority is satisfied that the applicant complied with the requirements of the ITA with regard to staffing.

14.8. **FINANCE**

14.8.1. Section 3 of the ITA required applicants to provide information on and attach proof of, amongst others, the business plan, funding, financial projections, cash flow analysis, sensitivity analysis, and profitability.

14.9. **Business plan**

14.10. Financial assumptions

14.10.1. The operations will generate sufficient cash flows to reinvest in the business, service its obligations and also yield an adequate return to its shareholders. No external funding shall be required

14.11. Total Expenditure

14.11.1. The company does not anticipate incurring significant establishment costs “*as they have already been incurred in the preceding ten years of business*” It is probable that the existing infrastructure will be utilised to roll out the new service offerings.¹⁴⁵

14.12. Profitability

14.12.1. The company anticipates continuing to grow its revenue and net profit at the same rate as it currently does. The projected income statement does not clearly segment the contribution of the mobile broadcasting service, for example.

14.13. **Cash flow analysis**

14.13.1. The cash flow projections depict negative net-flow for 2007 and 2009. However, these will be taken care of by the company's existing X

¹⁴⁵ Submission: page 326

banking facility.¹⁴⁶

14.14. **Funding**

14.14.1. The applicant has indicated that it needs no further external funding. It will use existing facilities to fund its operations as and when required.¹⁴⁷

14.15. **Capital Structure**

14.15.1. The applicant did not provide its target debt: equity ratio after all the operations have been commenced. However, the balance sheet shows a long term debt in respect of lease agreements for transponders and set top boxes to the value of X

14.15.2. The applicant also has X banking facility which it call upon when required. Nevertheless, they have emphasised the fact that no new external funding will be required to finance the new project that they intend rolling out.

14.16. **Sensitivity analysis**

14.16.1. The applicant did not perform a sensitivity analysis. The applicant's argument for not doing so is that the business has been in operation, and successful for the past years. However, it would have been prudent for the business to test its future projections against the imminent pertinent changes in the pay TV industry. For example, the following scenarios could have been tested

14.16.2. A possible loss of a significant market share regarding the subscription base and advertisers

14.16.3. Reduction in the subscriber growth rate per annum

14.16.4. Reduced revenue due to lower prices as a consequence of price based competition with new entrants

14.16.5. Furthermore, the mobile bouquet licence that the company is applying for is a new venture and the projected elements should all be tested against worst case scenarios to determine the business viability.

¹⁴⁶ Submission: page 316

¹⁴⁷ Application: page 308

14.17. **MARKET AND AUDIENCE RESEARCH**

14.17.1. The applicant's market "research analysis" of the household DSTV subscriber was essentially based on secondary data collection from the All Media and Products Survey conducted by the South African Advertising Research Foundation (SAARF) in 2005. The research revealed that there were approximately 7 700 000 television households in South Africa and of these, about 1,048,000 are DSTV subscribers.

14.17.2. The applicant claims to have conducted primary research in a bid to ascertain the acceptability of the idea of mobile broadcasting.

14.18. **Marketing Assumptions**

14.18.1. The applicant made the following assumptions:

14.18.1.1. The business plan projections going forward are consistent with MultiChoice's historical operations, and are accordingly an extension of the applicant's current operations; and¹⁴⁸

14.18.1.2. Mobile broadcasting content is mainly consumed in short bursts, whereas television allows for the consumption of long format content such as movies.

14.18.2. During the hearing, the applicant was requested to confirm that it had conducted and submitted research as required by the ITA. In response, the applicant's representative replied as follows: "*The answer is yes to that. We do a lot of research in the course of our business. I mean we research, for example, once every two months to determine the market and the demand for various aspects of our service.*"¹⁴⁹

14.18.3. In a post hearing submission, MultiChoice submitted the following research reports in response to a request made at the hearing:

	Prepared By	Date
X	X	May 2006

¹⁴⁸ Application; page 305

¹⁴⁹ Transcript: page 182

X	MultiChoice	29 March 2007
■	■	March 2007

14.18.4. In addition, Multichoice also indicated in its post hearing submission that it has reference to AMPS research, Black Diamonds research and that the applicant conducts its own research from time to time.

14.19. **COMPLAINTS AND CODES OF CONDUCT**

14.19.1. Section 5.1 of the ITA required applicants to indicate how they intend dealing with complaints and whether they intend becoming a member of any organisation (e.g. NAB, BCCSA, etc.).

14.19.2. The applicant submitted its complaints handling procedure to the Authority, which sets out the procedures to be followed should a complaint be lodged. The applicant deals with complaints and comments via its customer liaison department, inbound call centre, three branches (located in Randburg, Cape Town and Durban) and 102 agencies throughout South Africa¹⁵⁰.

14.19.3. The applicant stated that it has established a dedicated regulatory affairs division to focus specifically on compliance issues¹⁵¹.

14.19.4. The applicant has submitted that it is an associate member of the National Association of Broadcasters (“NAB”) and a member of South African Digital Broadcasting Association (“SADIBA”). The applicant indicated that it will apply for full membership of the NAB and Broadcasting Complaints Commission of South Africa (BCCSA) should it be granted a subscription broadcasting licence.¹⁵²

14.19.5. The Authority is satisfied that the applicant has complied with the requirements of the ITA in this regard.

¹⁵⁰ Volume 2, Pg 349

¹⁵¹ Volume 2, Pg 352

¹⁵² Volume 2, Pg 358

14.20. **PROGRAMMING**

- 14.20.1. Section 6 of the ITA required the applicants to outline in brief and in general terms the approach and objectives of the proposed programme service. Further to state whether they are aimed at a general or niche market, to provide programming supply agreements, and how they intend to comply with South African content regulations.
- 14.20.2. The applicant has applied for a multi-channel composite service. The applicant states that it will be national based and the service will be a multi-channel composite service.
- 14.20.3. The applicant indicated that currently it has approximately 1,048,000 households subscribe to its service¹⁵³.
- 14.20.4. The applicant has applied for authorization of 7 new channels for its satellite broadcasting as well as 4 channels for DVB-H¹⁵⁴. The applicant also requested authorization for channels as at 31 March 2006¹⁵⁵.
- 14.20.5. The applicant indicated how it already complies with the local content regulations by providing examples such as the main MNet channel, KykNET, K World, Channel O, MK89 and Summit TV.
- 14.20.6. The applicant also indicated that upon its licensing it will ensure that at least 10% of its channel acquisition budget is spent on channels with South African television content that are compiled and uplinked from South Africa¹⁵⁶.
- 14.20.7. The Authority is satisfied that the applicant has demonstrated how it would comply with the local content regulations.

14.21. **TECHNICAL**

- 14.21.1. Section 7 of the ITA required applicants to provide details on, amongst others, the company that would be responsible for signal distribution and information on equipment to be used for the proposed service, and

¹⁵³ Volume 2, Pg 342, paragraph 2

¹⁵⁴ Supplement, Schedule A and B

¹⁵⁵ Supplement, After Schedule A and B

¹⁵⁶ Volume 2, Pg 374

relevant technical details.

- 14.21.2. The applicant, in its application documents, indicated that it would use the services of Orbicom (Pty) Ltd (“**Orbicom**”) for its signal distribution. The Authority is satisfied that Orbicom is a licensed signal distributor.

14.22. **DECISION**

- 14.22.1. The Authority has decided to grant the applicant a licence to provide a satellite subscription broadcasting services for the following reasons:

14.22.1.1. The fact that the applicant is currently a going concern with a current subscriber base, and the applicant provided the Authority with sufficient research to enable the Authority to satisfy itself that there is a need and demand for its proposed service;

14.22.1.2. The applicant is a going concern, has access to a large bank facility and does not have to incur any start-up costs; and

14.22.1.3. The applicant's financial projections are realistic and show that the applicant's business can be sustained.

14.22.1.4. The applicant demonstrated how it would comply with the local content regulations. In that regard, the applicant satisfied the requirements of section 51(a) and (b) of the Act.

14.22.1.5. The granting of a licence is subject to the following special conditions:

14.22.1.5.1 The applicant must within 60 days of receipt of the reasons submit to the Authority a plan with timeframes aimed at addressing race and gender imbalance at Senior Management level.

14.22.2 The Authority has decided not grant the applicant the application for DVB-H for the reasons stated in paragraph 5.17 above.

15. **NDABENHLE GROUP (PTY) LTD**

15.1. **Introduction**

15.1.1. The Authority received an application in terms of the ITA from Ndabenhle Group (Pty) Ltd (“**Ndabenhle**”) for a commercial satellite broadcasting licence. Ndabenhle intends operating a service under the

name and style SMTV. The applicant is a company registered and incorporated under the Companies Act, 61 of 1973 with registration number 2004/019034/07. The applicant does not hold permission to continue broadcasting in terms of Section 4(1) of the Broadcasting Act.

15.1.2. The applicant applied for a composite multi-channel subscription broadcasting licence.

15.2. **CORPORATE STATUS**

15.3. **Applicant's legal status**

15.3.1. Section 2.1 of the ITA required the applicants to describe their legal form and to provide all relevant founding documentation. Further the applicant had to provide whether it is part of any consortiums, and also to provide a resolution authorising the signatory to sign the application on its behalf.

15.3.2. The applicant submitted its founding documents to the Authority. These included its certificate of incorporation, articles of association as well as a memorandum of association. The applicant also provided its shareholders' agreement.

15.3.3. The shareholding in the applicant is made up as follows:

15.3.3.1. Louis Pasteur Investments (Pty) Ltd ("**LPI**") (100% BEE) 76%

15.3.3.2. Nompumulelo Ncube (Black female) 24%

15.3.4. Shareholding in LPI is made up as follows:

15.3.4.1. Louis Pasteur Holdings (Pty) Ltd ("**LPH**") 100%

15.3.5. Shareholding in LPH is made up as follows:

15.3.5.1. Louis Pasteur Medical Investments (Pty) Ltd ("**LPMI**") 74%

15.3.5.2. Bonitas Medical Fund 26%

15.3.6. The Authority is satisfied that the applicant has complied with the requirements of the ITA in respect of corporate status.

15.4. **Empowerment of historically disadvantaged persons**

15.4.1. Section 2.1.1 of the ITA required the applicant to specify the Black

Economic Empowerment component in each shareholder.

- 15.4.2. The applicant indicated to the Authority that it is 100% BEE compliant¹⁵⁷.
- 15.4.3. The applicant also submitted that 24% of equity in the applicant is in the hands of a black female, and that 50% of the board of directors is made up of females¹⁵⁸.
- 15.4.4. The Authority is satisfied that more than 30% of equity ownership in the applicant is in the hands of historically disadvantaged persons, and therefore complies with sections 5 (9) (b) and 9 (2) (b) of the Act.

15.5. **Ownership and control**

- 15.5.1. Section 2.2 of the ITA required the applicant to provide information on ownership and control including details of the shareholder (s) and to submit the relevant documents.
- 15.5.2. The applicant indicated that there is no foreign direct or indirect control or financial interest in it.
- 15.5.3. The Authority is satisfied that the Authority has complied with the provisions of Section 64 of the Act.

15.6. **Management**

- 15.6.1. Section 2.3 of the ITA required applicants to provide full details of members of the senior management team including all directors, members, trustees, relevant previous experience as well as information on shares held by members of the senior management.
- 15.6.2. The applicant's executive management structure will consist of 4 (four) people comprising of the Chief Executive Officer, Chief Operations Officer, Chief Financial Officer and Content Director¹⁵⁹. The structure consists of 3 (three) males and 1 (one) female.
- 15.6.3. The senior management will consist of 60% black women and the

¹⁵⁷ Hearing transcript, page 7

¹⁵⁸ Hearing transcript Hearing transcript, page 7

¹⁵⁹ Application: Appendix 2.3

management will consist of 75% black women.¹⁶⁰

15.6.4. The Authority is satisfied that the applicant has complied with the requirements of the ITA in this regard.

15.7. **Staffing**

15.7.1. Section 2.4 of the ITA required the applicants to provide staffing organisational charts reflecting all proposed management and staff posts and indicate clearly the planned reporting structure. Further the applicant had to show the race and gender of each employee.

15.7.2. The applicant indicated that it would have a staff complement of 225 full time employees, no part time employees, no free-lance employees and no outsourced positions¹⁶¹. The applicant also submitted its organisational and staffing structure¹⁶².

15.7.3. The applicant did not provide the gender, disability, and / or racial breakdown of its staff, but submitted its employment equity plan.

15.7.4. The Authority is satisfied that the applicant has complied with the requirements of the ITA in this regard.

15.8. **FINANCE**

15.8.1. The applicant intends investing X during its first five years of operation. X would be financed through a loan from financial institutions with X as shareholders equity.

15.8.2. No tangible evidence has been given of the readiness of financial institutions to provide such a loan and in addition it is not possible to determine whether the applicant's shareholders able to raise the remaining amount as their equity contribution.

15.8.3. The applicant advised that its revenue stream composition over a period of five years would be:

15.8.3.3. X subscription,

¹⁶⁰ Transcript: page 7 line 10 to 11

¹⁶¹ Application, appendix 2.4.2

¹⁶² Application, appendix 2.4.1

- 15.8.3.4. X sales of decoders,
- 15.8.3.5. X video on demand offering, and
- 15.8.3.6. X advertising¹⁶³.
- 15.8.4. The applicant stated that its national operating costs would be *“R70 million in the first year and you can see that we’ve estimated that that cost item will grow in excess of R2 billion over 5 years”*¹⁶⁴.
- 15.8.5. The applicant intends to finance the project through debt, equity and shareholders’ loans¹⁶⁵. The applicant claims that its major shareholder’s (LPI) net asset value, currently at X, will make it easy for the applicant to raise funding from financiers¹⁶⁶.
- 15.8.6. The applicant was questioned on whether it had conducted sufficiently detailed sensitivity tests, but was unable to provide full details on its sensitivity tests.¹⁶⁷ Further sensitivity tests were submitted as part of the applicant’s post hearing submission.
- 15.9. **Business plan**
- 15.9.1. It is the Authority’s view that no evidence was presented to show that the applicant undertook relevant market research. The basis of the applicant’s business plan is accordingly placed in doubt.
- 15.9.2. The Authority was unable to assess strategic thinking by the applicant, as the applicant did not seem to have taken into account the impact of the incumbent and future competition on its business.
- 15.9.3. The Authority was accordingly not convinced that the applicant complied with Section 51(e) and the the provisions of the ITA in this regard.
- 15.10. **MARKETS AND AUDIENCE RESEARCH**
- 15.10.1. The applicant indicated to the Authority that it had commissioned or

¹⁶³ Transcript page 16, line 5

¹⁶⁴ Transcript page 14, line 17

¹⁶⁵ Transcript page 15, line 4

¹⁶⁶ Transcript page 15, line 9

¹⁶⁷ Transcript page 78, line 5

used the following market research:¹⁶⁸

- 15.10.1.1. In-house commissioned research;
- 15.10.1.2. Desktop research using reports that are readily available to the public domain; and
- 15.10.1.3. Information in the possession of its sister company, ITV, whose target market is the Islamic community.
- 15.10.2. Based on its research findings, the applicant decided to target the LSM 4–6 target market as its primary target market and the LSM 7–10 target market as its secondary market.¹⁶⁹
- 15.10.3. It is the Authority's view that the above research was not sufficiently pertinent and the applicant could accordingly not, demonstrate a need and demand for its proposed services to the Authority's satisfaction.
- 15.10.4. The Authority is therefore of the view that the applicant has failed to demonstrate the need and demand contemplated by the provisions of sections 51(a) and (b) of the Act.

15.11. **COMPLAINTS AND CODES OF CONDUCT**

- 15.11.1. Section 5.1 of the ITA required applicants to indicate how they intend dealing with complaints and whether they intend becoming a member of any organisation (e.g. NAB, BCCSA, etc.).
- 15.11.2. The applicant submitted its customer complaints procedure¹⁷⁰ setting out the manner in which it will deal with complaints lodged.
- 15.11.3. Further the applicant and intends to subscribe to the codes of the Broadcasting Complaints Commission of South Africa ("**BCCSA**")¹⁷¹.
- 15.11.4. The Authority is satisfied that the applicant has complied with the requirements of the ITA in this regard.

15.12. **PROGRAMMING**

- 15.12.1. Section 6 of the ITA required applicants to outline in brief and in general

¹⁶⁸ Hearing transcript, page 9

¹⁶⁹ Hearing transcript, page 10

¹⁷⁰ Application, appendix 5.1.1

¹⁷¹ Application, page 16- 17

terms the approach and objectives of the proposed programme service. Further, to state whether they are aimed at a general or niche market, to provide programming supply agreements, and how they intend to comply with South African content regulations.

- 15.12.2. The applicant applied for a multi-channel composite subscription broadcasting licence.
- 15.12.3. The applicant identified its primary target market to fall within LSM 4 - 6 target market¹⁷².
- 15.12.4. The applicant has applied for authorization of 15 television channels¹⁷³.
- 15.12.5. The applicant divided the roll-out of its programming into two phases:
- 15.12.5.1. The first phase will be specifically for children between the ages of 2 and 18. The service will range from movies-on-demand and interactive video games to distance learning. The first phase will also include a video conferencing service which will be designed to serve a niche market i.e. government and corporates.¹⁷⁴
- 15.12.5.2. The second phase will see the roll out of subscription television. The service will be made up of a wide range of programming including but not limited to situation comedies, reality television and documentaries.¹⁷⁵
- 15.12.6. The two phased approach proposed by the applicant is not based on any research which was conducted. The Authority has accordingly not been convinced that the proposed programming format is likely to succeed. The market trends that the applicant relied upon are not specific to their product offering and cannot be the basis of indication of the market uptake for their product.
- 15.12.7. The applicant intends to comply with the local content regulations, however the Authority is of the view that given the fact that the applicant's first phase will range from movies-on-demand and interactive

¹⁷² Application, appendix 4.1

¹⁷³ Application, appendix 6.3

¹⁷⁴ Application: appendix 6.2

¹⁷⁵ Application: appendix 6.1

video games to distance learning, the applicant has not demonstrated to the Authority's satisfaction, that it will be able to comply with the local content regulations.

15.12.8. The Authority is accordingly not satisfied that the applicant complied with the requirements of the ITA in this regard.

15.13. **TECHNICAL**

15.13.1. Section 7 of the ITA required applicants to provide details on, amongst others, the company that would be responsible for signal distribution and information on equipment to be used for the proposed service, and relevant technical details.

15.13.2. The applicant, in its application documents, indicated that it would use the services of Telemedia for its signal distribution. However, it was indicated to the applicant during the hearings that the proposed signal distribution is not licensed in the Republic.

15.13.3. In its post hearing submission, the applicant indicated that it had reached an agreement with Sentech, which has a signal distribution licence, to provide it with signal distribution services.

15.14. **DECISION**

15.14.1. The Authority has decided not to grant the applicant a subscription broadcasting licence to provide a satellite subscription broadcasting services for the following reasons:

15.14.1.1. The applicant's financial projections are unsubstantiated and questionable. The Authority is therefore of the view that the revenue projections are unrealistic and not credible in the circumstances. Furthermore, the Authority is not persuaded that the applicant has secured adequate funding for its project. Accordingly, the Authority finds that the applicant has failed to satisfy the provisions of section 51(e) of the Act, read with item 11 of schedule A to the ITA.

15.14.1.2. The applicant did not demonstrate how it will comply with content regulations in particular in its first year of operation as it will rely

mainly on movies-on-demand and interactive video games to distance learning for its programming.

15.14.1.3. The applicant's business model relies heavily on putative economic growth, rather than on any factual research data which would demonstrate the applicant's long-term financial or economic viability. The applicant's proposed business model is largely informed and guided by the expertise of the applicant's shareholders, rather than by any factual data which would indicate that the proposed service is likely to attract subscribers and therefore be a financially viable proposition.

15.14.1.4. The applicant's proposed programming format is not adequately informed by appropriate audience research. The applicant was therefore unable to demonstrate to the Authority that there was a demand and need for the proposed service and accordingly did not satisfy the requirements of section 51(a) and (b) of the Act, read with item 4.1 of schedule A to the ITA.

16. ON DIGITAL MEDIA (PTY) LTD

16.1. Introduction

16.1.1. The applicant is On Digital Media (Pty) Ltd ("**ODM**") a company registered and incorporated in accordance with the Companies Act, 61 of 1973. The registration applicant's registration number is 2006/001353/07. The applicant does not hold permission to continue broadcasting in terms of Section 4(1) of the Broadcasting Act.

16.1.2. The applicant applied for a composite multi-channel national subscription broadcasting licence.

16.2. CORPORATE STATUS

16.3. Applicant's legal status

16.3.1. The applicant submitted its founding documents to the Authority. These included its certificate of incorporation, articles of association, memorandum of association and a Project Development Agreement ("**PDA**"). ODM submitted its shareholders' agreement during the course

of the public hearings.

16.3.2. The shareholding in the applicant is held as follows:

16.3.2.1.	Clidet No 718 (Pty) Ltd (“ Clidet ”)(effective BEE – 30%)	30%
16.3.2.2.	FNMIH (Pty) Ltd (“ FNMIH ”) (effective BEE – 13.19%)	25.87%
16.3.2.3.	Kopano Ke Matla / IDC joint venture (effective BEE – 14.8%) 21.13%	
16.3.2.4.	SES Africa SA (foreign investor) (“ SES ”)	20%
16.3.2.5.	AN Moodley (effective BEE – 3%)	3%

16.3.3. The Authority is satisfied that applicant complied with the requirements of the ITA in respect of corporate status.

16.4. **Empowerment of historically disadvantaged persons**

16.4.1. The applicant indicated to the Authority that it has a 54.43% black shareholding.¹⁷⁶

16.4.2. The Authority is satisfied that more than 30% of equity ownership in the applicant is in the hands of historically disadvantaged persons, and therefore complies with section 9(2)(b) of the Act.

16.5. **Ownership and control**

16.5.1. The applicant indicated that SES is the only entity representing foreign control. SES' interest does not exceed 20%.

16.5.2. The Authority is satisfied that the applicant has complied with the provisions of Section 64 of the EC Act.

16.6. **Management**

16.6.1. The applicant its senior management structure as well as the details of the candidates for the position. These details were granted confidentiality.

16.6.2. The following are four individuals were originally registered as directors of the applicant:

¹⁷⁶ Application, volume 1, page 28

- 16.6.2.1. AN Moodley
- 16.6.2.2. HL Kennedy
- 16.6.2.3. HCH du Plessis
- 16.6.2.4. M Murphy
- 16.6.3. In a letter of update regarding the applicant's board of directors that was submitted at the hearing, the Authority was advised that the following changes had been effected:¹⁷⁷
 - 16.6.3.1. Ms. Heather Kennedy had resigned as a director of the applicant,
 - 16.6.3.2. Mr. Vinothan Govender had been appointed as a director of the applicant,
 - 16.6.3.3. Mrs. Masabatha Florence Mthwecu was introduced as a new independent director representing Clidet 718,
 - 16.6.3.4. Mr. Alexander Oudendijk had been appointed as a director of the applicant, and
 - 16.6.3.5. Mr. A.N Moodley has resigned as director and Chief Executive Officer of the applicant.
- 16.6.4. The above update increases the number of director to 5 as opposed to the initial 4, and it further dilutes female representation from 50% to 40% while male representation increases to 60%. Of the 5 Directors, 1 (20%) of them are foreign. 20% of the directors are black, 20% Indian and 60% are white.
- 16.6.5. The Authority is satisfied that the applicant has complied with the requirements of the ITA in this regard.

16.7. **Staffing**

- 16.7.1. The applicant submitted its staffing organizational structure as well as its policy on management and staffing.

¹⁷⁷ Additional Confidential Information Page 3,
(letter dated 27/05/2007),

16.7.2. ODM has proposed a staff complement of 71 full time employees, no part time employees, no free-lance employees and no outsourced positions.

16.7.3. The Authority is satisfied that ODM complied with the requirements of the ITA in this regard.

16.8. **FINANCE**

16.8.1 Business Plan

16.8.1.1 The applicant indicated that it intends adopting a low pricing strategy to enable them to get subscribers from the LSM6 – 9, as well as product differentiation. The low price strategy was borne out of the research undertaken by Research Surveys in 2006 which shows that 70% of those who do not subscribe to DSTV believe that the fee is too high and that's why they do not subscribe.

16.8.1.2 The applicant intends to offer the multi-channel bouquet in a tiered or packaged manner so that the subscribers can choose from the package options that suit their affordability levels and viewing needs. The applicant also intends to offer about 40 channels at launch which will include local and international channels.

16.8.1.3 The applicant's proposed service is aimed at LSM's 6-9. The applicant has also further segmented its market into specific target markets and plans to focus its offerings to the specific targets. For example, there will be educational channels for specific target segments such as closed user groups, such as UNISA students. It will also include specific curricula for school learners, in which case schools within identified communities will have decoders installed for access to this educational content.

16.8.2 Funding

16.8.2.1 The applicant indicated that it will require a total amount of X in funding¹⁷⁸. The applicant starts off with a X debt since it finances its asset acquisition mainly from debt.

16.8.2.2 The capital shall be raised as below:

- Seed Capital X
- Equity X (Increased from the initial X)
- Senior Debt – X
- Capitalised Interest X
- Internally generated funds – X

The applicant also submitted letters from financial institutions in support of its application.

16.8.2.3 ODM's start-up investment costs are projected over a 36 month period from launch and they amount to approximately R1.74 billion. The expenditure breakdown is as follows:

- Current Assets : X
- Overheads : X
- Studio Establishment : X
- Capitalised Interest : X

16.8.3 Profitability

16.8.3.1 The applicant's projected income statements show that the company will only start to realize positive Profit before Tax (PBT) in the third year of operation year.

¹⁷⁸ Application, volume 1, page 9

16.8.3.2 The applicant's cash flow projections show that positive cash flow will be realised in the third year. Cash retained at the end of the year increase by X from third to fourth year and by X from fourth to fifth year

16.8.4 Sensitivity analysis

16.8.4.1 The applicant conducted sensitivity tests and which considered two scenarios as follows: a X devaluation of the Rand and the Market risk X lower subscriber numbers than anticipated.

16.8.4.2 The X devaluation of the Rand has the following effects:

- The company will only realise positive net profit in the fifth year.
- The total funding required before the operation can stand on its own increases to X
- Positive cash flow will only be attained in the fifth year

In scenario 2, a X lower-than-anticipated subscriber base will result in the following:

- The total funding required before the operation can stand on its own decreases to X
- The applicant will barely make a net positive income in the fourth year. The net profit will be X of the revenue.
- Positive cash flow will be achieved only in the fifth year

16.8.5. The Authority is satisfied that the applicant has secured sufficient funding to operate the proposed service and that the applicant's business plan is supported by factual data from the research it commissioned.

16.8.6. The Authority is satisfied that the applicant will be a going concern. The applicant has therefore complied with the requirements of Section 51(e) of the Act, together with the ITA's requirements in this regard.

16.9. **MARKETS AND AUDIENCE RESEARCH**

16.9.1. The applicant indicated to the Authority that it had conducted primary research.

16.9.2. It tested a sample size of X respondents out of a population. The applicant, in its research, considered trends in television channels viewed, audience profiles, and estimates of audience size relevant to the applicant's proposed service¹⁷⁹.

16.9.3. Applicant stated the following with regard to research:

"ODM has conducted independent market research in order to identify the potential audience for ODM's product offering. It has conducted extensive, qualitative and quantitative market research that confirms demand for true consumer, cost effective, tailor-made paid TV in the unserved segment of the population". ¹⁸⁰

16.9.4. The applicant is targeting the LSM 7 to 9 market segment.¹⁸¹ The estimated target market is 1.3 million households. .

16.9.5. The Authority is satisfied with the research provided by the applicant, and accepts that the applicant has satisfied the provisions of Sections 51(a) and (b) of the Act.

¹⁷⁹ Application, volume 2, section 4

¹⁸⁰ Page 17, line 6-10, Hearing proceedings document

¹⁸¹ Page 18, line 5 -6, Hearing Proceedings document

16.10. **PROGRAMMING**

16.10.1. The ITA requires the applicant to provide a proposed programme service that will form the basis of the applicant's "Promise of Performance" to be incorporated in the licence issued for the licence period, should the licence be granted.

16.10.2. Below is a summary of the generic programming as proposed by the applicant:

16.10.2.1. Kids and Youth,

16.10.2.2. Sport,

16.10.2.3. Family Entertainment,

16.10.2.4. Women,

16.10.2.5. Drama,

16.10.2.6. Movies,

16.10.2.7. News and Business,

16.10.2.8. Music,

16.10.2.9. Knowledge Building,

16.10.2.10. Lifestyle, and

16.10.2.11. A Variety of other Programmes.

16.10.3. The applicant believes that to attract a viable subscriber base, it is imperative to provide subscribers with a differentiated product in terms of the content offered on the proposed multi-channel television service. The applicant intends launching with an offering of at least 40 pay channels and the platform will be made available to any or all of South Africa free-to-air broadcasters.

16.10.4. In line with the market needs, as described in the research findings, the applicant will offer a variety of channels within the different genres with a mix of:

16.10.4.1. Local Channels,

16.10.4.2. International Channels, and

- 16.10.4.3. International Channels with some local content.
- 16.10.5. These channels will include, among others, education channels offering school curriculae, post-matriculation education and other programmes.
- 16.11. **Local content**
- 16.11.1. As highlighted above, more local and community programming will be considered. The applicant has recognized that local programming is highly valued by viewers as it fits into their cultural habits and commits to comply with ICASA South African Content Regulations from start up in its proposed channel offering.
- 16.11.2. The applicant has also extended that, to be able to comply with the regulations, it would impose the requirements upon content suppliers. Those who do not meet the requirements would be in a position to get their contracts terminated.¹⁸²
- 16.11.3. The Authority is satisfied that ODM complied with the requirements of the ITA in this regard.
- 16.12. **COMPLAINTS AND CODES OF CONDUCT**
- 16.12.1. The applicant submitted its customer complaints procedure, which the Authority accepts as being satisfactory.¹⁸³
- 16.12.2. The applicant intends becoming a member of the National Association of Broadcasters (“NAB”) and will thereby subscribe to the codes of the Broadcasting Complaints Commission of South Africa (“BCCSA”).¹⁸⁴
- 16.12.3. The Authority is satisfied that ODM has complied with the requirements of the ITA in this regard.
- 16.13. **TECHNICAL**
- 16.13.1. The applicant intends using the services provided by Sentech Ltd and GlobeCast Africa for its signal distribution.

¹⁸² Transcript, Page 75

¹⁸³ Application, volume 2, section 5

¹⁸⁴ Application, volume 2, section 5

16.14. **DECISION**

16.14.1. The Authority has decided to grant the applicant a licence to provide a satellite subscription broadcasting services for the following reasons:

16.14.1.1. The Authority is of the view that the applicant's proposed revenue projections are realistic and credible;

16.14.1.2. The Authority is satisfied that the applicant has secured adequate funding for the proposed service. Accordingly the Authority finds that the applicant has satisfied the provisions of Section 51(e) of the Act read with item 11 of Schedule A to the ITA;

16.14.1.3. The applicant's proposed service is adequately informed by appropriate audience and market research. The applicant was able to demonstrate that there is a need and demand for the proposed service. The applicant satisfied the requirements of Sections 51(a) and (b) of the EC Act, read with Section 4.1 of Schedule A to the ITA.

17. **Q DIGITAL CABLE VISION (PTY) LTD**

17.1. **Introduction**

17.1.1. The Authority received an application in terms of the ITA from Q Digital Cable Vision (Pty) Ltd ("**Q Digital**") for a commercial cable broadcasting licence. Q Digital intends operating a service under the name and style of Q Digital Cable Vision. The applicant is a company registered and incorporated under the Companies Act, 61 of 1973 with registration number 2003/014945/07. The applicant does not hold permission to continue broadcasting in terms of the now repealed section 4 (1) of the Broadcasting Act.

17.1.2. The applicant intends providing a multi-channel national subscription television service on a national basis.

17.2. **CORPORATE STATUS**

17.3. **Applicant's legal status**

17.3.1. Section 2.1 of the ITA required the applicants to describe their legal

form and to provide all relevant founding documentation. Further the applicant had to provide whether it is part of any consortium, and also to provide a resolution authorising the signatory to sign the application on its behalf.

17.3.2. The applicant is Q Digital Cable Vision (Pty) Ltd intending to broadcast as Q Digital Cable Vision.

17.3.3. The applicant submitted its founding documents, which included a certificate of incorporation, articles of association and a memorandum of association. The applicant also provided its shareholders' agreement.

17.3.4. The applicant, in its application¹⁸⁵, indicated that it had the following shareholding structure:

17.3.1.	KGCI Holdings SA BVI ("KGCI") (foreign)	20%
17.3.2.	Singita Investments (Pty) Ltd (50% BEE)	64.29
17.3.3.	Majota Kambule (Black male)	10.71%
17.3.4.	Q Digital Cable Vision Broad Based Empowerment Trust (100% BEE)	5%

17.3.5. During the hearings, and in its post hearing submission, the applicant presented the following shareholding structure¹⁸⁶:

17.3.5.1.	KGCI Holdings SA BVI Ltd (foreign)	20%
17.3.5.2.	Majota Kambule (Black male)	7%
17.3.5.3.	One Vision Investments 286 (Pty) Ltd	27%
17.3.5.4.	Quickvest 453 (Pty) Ltd	15%
17.3.5.5.	Sekunjalo Media Holdings (Pty) Ltd	31%

17.3.6. The Authority is satisfied that the applicant has complied with the requirements of the ITA in respect of corporate status.

17.4. **Empowerment of historically disadvantaged persons**

17.4.1. Section 2.1.1 of the ITA required the applicant to specify the Black

¹⁸⁵ Application, page 10

¹⁸⁶ Hearing transcript, page 8

Economic Empowerment component in each shareholder.

- 17.4.2. The applicant indicated to the Authority that approximately 53% of the equity in the applicant is in the hands of historically disadvantaged groups.¹⁸⁷
- 17.4.3. Currently the applicant's management is made up of males only, although the applicant indicated that of the 6 management members, 2 will be females¹⁸⁸.
- 17.4.4. The Authority is satisfied that the applicant has complied with the empowerment requirements set out in sections 5 (9) (b) and 9 (2) (b) of the Act.

17.5. **Ownership and control**

- 17.5.1. Section 2.2 of the ITA required the applicant to provide information on ownership and control including details of the shareholder (s) and to submit the relevant documents.
- 17.5.2. The applicant indicated that foreign control is not in excess of 20%. Foreign shareholding is represented by KGCI.
- 17.5.3. The Authority is satisfied that the applicant has complied with the requirements of section 64 of the Act.

17.6. **Management**

- 17.6.1. Section 2.3 of the ITA required applicants to provide full details of members of the senior management team including all directors, members, trustees, relevant previous experience as well as information on shares held by members of the senior management.
- 17.6.2. The applicant submitted the following names as forming part of its executive management team:
- 17.6.2.1. Dr. Iqbal Surve – Black male - Chairman (current CEO of Sekunjalo)
- 17.6.2.2. Majota Kambule – Black male - CEO

¹⁸⁷ Hearing transcript, page 25

¹⁸⁸ Application, page 15

- 17.6.2.3. Santosh Benjamin- CFO
- 17.6.2.4. CTO- not yet filled - to be occupied by a male
- 17.6.3. The applicant indicated it had identified two females to form part of its senior management team.¹⁸⁹
- 17.6.4. The breakdown of management and board is as follows:
- 17.6.4.1. Black male= 100%
- 17.6.4.2. Black female= 0%
- 17.6.4.3. White female= 0%
- 17.6.4.4. White male= 0%
- 17.6.5. The applicant submitted that at senior management level, females would make up 33.3% of the board.
- 17.6.6. The Authority is not satisfied that the applicant's management composition is reflective of the gender demographics of the Republic.
- 17.6.7. Further, from the analysis of the curriculae vitae submitted, the Authority is not satisfied that the senior management of the applicant has the requisite capabilities and experience to operate the proposed service.
- 17.7. **Staffing**
- 17.7.1. Section 2.4 of the ITA required the applicants to provide staffing organisational charts reflecting all proposed management and staff posts and indicate clearly the planned reporting structure. Further the applicant had to show the race and gender of each employee.
- 17.7.2. The applicant submitted its organisational structure¹⁹⁰. The applicant proposed a staff complement of 86 full time employees, no part time employees, 3 free-lance employees and 352 outsourced positions¹⁹¹.
- 17.7.3. The applicant indicated, in its post hearing information, that it would draw the majority of its staff from the ranks of historically disadvantaged groups, within 24 months of operation. The applicant highlighted that it

¹⁸⁹ Transcript pg 124, line 6-11

¹⁹⁰ Application, page 14

¹⁹¹ Application, page 16

hopes to employ a total percentage of 90% black employees by the second year of its operation. The breakdown will be 70% African, 20% Indian and coloured and 10% white staff¹⁹².

17.7.4. The Authority is satisfied that the applicant has complied with the requirements of the ITA with regard to staffing.

17.8. **FINANCE**

17.8.1. Section 3 of the ITA required applicants to provide information on and attach proof of, amongst others, the business plan, funding, financial projections, cash flow analysis, sensitivity analysis, and profitability.

17.9. **Business plan**

17.9.1. The applicant intends providing a multi-channel cable subscription television service on a national basis to the LSM 5 – 7 group. The applicant further intends targeting the 19 – 34 year old living urban, high density areas.

17.9.2. The applicant, in its application documents, indicated that in the initial phase it would cover the areas of Soweto, Alexandra and neighbouring areas in Gauteng province. It would thereafter move to other parts of the Republic¹⁹³.

17.9.3. The applicant further indicated that it planned to install 100 000 lines over a period of 5 years, and the installation costs would be in the region of R247 million¹⁹⁴.

17.9.4. The applicant proposed to offer 35 local and international channels at a monthly subscription fee of R79.00.

17.10. **Funding**

17.10.1. The applicant indicated that an amount of X will be required to fund its start up costs. The applicant stated that the required funding would be funded through a combination of equity and debt.

17.10.2. The applicant submitted a letter of interest from the Development Bank

¹⁹² Additional Information, Q Digital Cable Vision

¹⁹³ Application, appendix 3

¹⁹⁴ Application, appendix 3

of Southern Africa (“DBSA”) showing an interest to provide funding of debt between X. The letter is merely an expression of interest and did not demonstrate commitment by the DBSA to fund the applicant’s proposed service. The applicant further indicated that it had been granted a loan of X by KGC¹⁹⁵.

17.11. **Sensitivity analysis**

17.11.1. The applicant submitted a sensitivity analysis in compliance with section 3.1.12 of the ITA.

17.11.2. The applicant looked at scenarios where revenues decrease, while operating costs remain constant, and scenarios where operating costs increase while revenues remain constant.

17.11.3. The Authority, however, observed that the applicant’s analysis did not address pertinent and likely situations such as the change in the exchange rate.

17.11.4. The Authority found the applicant’s sensitivity analysis to be inadequate and could not deduce the effect of each change on the applicant’s business model.

17.12. **Profitability**

17.12.1. The applicant’s projected income statements indicate that it will only realize profit after tax (PAT) in the second year¹⁹⁶. This is assumed against the backdrop of optimistic market growth. It is the Authority’s view that the statistics which have been provided are overly optimistic.

17.12.2. Further the applicant’s projections are not substantiated by any relevant research.

17.13. **MARKETS AND AUDIENCE RESEARCH**

17.13.1. Section 51 (a) and (b) of the Act requires the applicants to demonstrate the need and demand for the proposed service.

17.13.2. In addition section 10 of the ITA required applicants to submit copies of

¹⁹⁵ Application, appendix 3

¹⁹⁶ Application, appendix 3

the market and audience research.

- 17.13.3. The applicant indicated to the Authority that it did not conduct any research, but relied on a combination of research already in the public domain and research conducted by experts in the KGCI group.¹⁹⁷
- 17.13.4. There is accordingly no information relating to sampling of the population specifically for the purpose of carrying out specific subscription TV market research. It is evident to the Authority that the applicant has not supported assumptions on subscription market figures with quantitative research data. The applicant extrapolated research results produced by the All Media Purpose Study (AMPS) research of 2005.
- 17.13.5. The applicant confirmed that it had not conducted market research which was specifically tailored for subscription TV in South Africa.
- 17.13.6. Whilst the AMPS research of 2005 avails invaluable information with regard to population trends, market sizes, uptake of free-to-air broadcasting services etc, the AMPS research does require adaptation to be useful. Further, a concerted effort by the applicant to administer questionnaires targeted at finding out market feasibility of subscription TV in South Africa would have provided valuable information. The Authority was not provided with records of any such research.
- 17.13.7. The Authority is not satisfied that the applicant complied with the requirements of Sections 51(a) and (b) of the Act and the relevant provisions of the ITA.

17.14. **COMPLAINTS AND CODES OF CONDUCT**

- 17.14.1. Section 5.1 of the ITA required applicants to indicate how they intend dealing with complaints and whether they intend becoming a member of any organisation (e.g. NAB, BCCSA, etc.).
- 17.14.2. The applicant submitted its customer complaints procedure setting out how it would handle any complaints.¹⁹⁸

¹⁹⁷ Application, page 25

¹⁹⁸ Application, page 26

- 17.14.3. The applicant indicated its intention to become a member of the National Association of Broadcasters (“**NAB**”) and thereby subscribe to the codes of the Broadcasting Complaints Commission of South Africa (“**BCCSA**”) ¹⁹⁹.
- 17.14.4. The Authority is satisfied that the applicant has complied with the requirements of the ITA in this regard.
- 17.15. **PROGRAMMING**
- 17.15.1. Section 6 of the ITA required applicants to outline in brief and in general terms the approach and objectives of the proposed programme service. Further, to state whether they are aimed at a general or niche market, to provide programming supply agreements, and how they intend to comply with South African content regulations.
- 17.15.2. The applicant applied for a multi-channel television subscription broadcasting licence.
- 17.15.3. The applicant identified its primary target market to fall within the LSM 5 – 7 group ²⁰⁰. Further the applicant indicated that it would target the 19 – 34 year old groups living in urban, high density areas.
- 17.15.4. The applicant submitted a letter of intent from KGCI showing commitment that it would provide content to the applicant.
- 17.15.5. In its application, the applicant has indicated that it will meet its local content requirements as stipulated in the local content regulations, by launching new channels featuring South African commissioned local content ²⁰¹.
- 17.15.6. The applicant further undertook to promote the development of new channel services that offer locally developed and produced content. ²⁰²
- 17.15.7. The Authority is satisfied that the applicant has demonstrated how it would comply with the local content regulations.

¹⁹⁹ Application, pages 27 - 28

²⁰⁰ Application, page 30

²⁰¹ Application, page 32

²⁰² Application, page: p 32

17.16. **TECHNICAL**

17.16.1. Section 7 of the ITA required applicants to provide details on, amongst others, the company that would be responsible for signal distribution and information on equipment to be used for the proposed service, and relevant technical details.

17.16.2. The applicant, in its application documents, indicated that it would procure the services of Sentech Ltd ("**Sentech**"), which is a licensed signal distributor, to provide it with signal distribution services.

17.16.3. The applicant submitted a letter of interest from Sentech indicating its willingness to provide the applicant with signal distribution services.

17.17. **DECISION**

17.17.1. The Authority has decided not to grant the applicant a licence to provide cable subscription broadcasting services for the following reasons:

17.17.1.5. The applicant's financial projections are, in the Authority's view, unsubstantiated and subject to query. The Authority is therefore of the view that the applicant's revenue projections are unrealistic and not credible in the circumstances. Furthermore, the Authority is not persuaded that the applicant has secured adequate funding for its project. Accordingly, the Authority finds that the applicant has failed to satisfy the provisions of section 51(e) of the Act, read with item 11 of Schedule A to the ITA.

17.17.1.6. The applicant's business model relies heavily on putative economic growth, rather than on any factual research data which would demonstrate the applicant's long-term financial or economic viability. Furthermore, the business model proposed by the applicant is largely informed and guided by the expertise of the applicant's shareholders, rather than by any factual data which would indicate that the proposed service is likely to attract subscribers and therefore be a financially viable proposition.

17.17.1.7. The applicant's proposed programming format is not adequately informed by appropriate audience research. The applicant was

therefore unable to demonstrate to the Authority that there is a demand and need for the proposed service and accordingly did not satisfy the requirements of section 51(a) and (b) of the Act, read with item 4.1 of schedule A to the ITA.

18. QUANTIC TELEVISION NETWORK (PTY) LTD

18.1. Introduction

18.1.1. The Authority received an application in terms of the ITA from Quantic Television Network (Pty) Ltd (“**Quantic**”) for a commercial satellite broadcasting licence. Quantic intends operating a service under the name and style of Quantic Television Network. The applicant is a company registered and incorporated under the Companies Act, 61 of 1973 with registration number 2002/02812807. The applicant does not hold permission to continue broadcasting in terms of the now repealed section 4 (1) of the Broadcasting Act.

18.1.2. The applicant intends providing a multi-channel national subscription television service on a national basis.

18.2. CORPORATE STATUS

18.3. Applicant’s legal status

18.3.1. Section 2.1 of the ITA required the applicants to describe their legal form and to provide all relevant founding documentation. Further the applicant had to provide whether it is part of any consortiums, and also to provide a resolution authorising the signatory to sign the application on its behalf.

18.3.2. The applicant is Quantic Television Network (Pty) Ltd intending to broadcast as Quantic Television Network.

18.3.3. The applicant did not submit its founding documents nor did it submit its shareholders’ agreement.

18.3.4. The applicant, in its application, indicated that it had the following shareholding structure:

18.3.4.1.	John Baloyi	(Black male)	51%
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- | | | |
|-----------|--|-----|
| 18.3.4.2. | Institute of the I AM Presence (NPO) | 19% |
| 18.3.4.3. | Annshaw Investment Holdings (Pty) Ltd (100% BEE) | 30% |
| 18.3.5. | During the hearings, and in its post hearing submission, the applicant presented the following shareholding structure: | |
| 18.3.5.1. | John Baloyi (Black male) | 51% |
| 18.3.5.2. | Institute of the I AM Presence (NPO) | 19% |
| 18.3.5.3. | Lindi Corp (100% BEE) | 30% |
| 18.3.6. | The applicant has still not submitted its founding documents. | |
| 18.3.7. | The Authority is therefore not satisfied that the applicant has complied with the requirements of the ITA in respect of corporate status. | |
| 18.4. | Empowerment of historically disadvantaged persons | |
| 18.4.1. | Section 2.1.1 of the ITA required the applicant to specify the Black Economic Empowerment component in each shareholder. | |
| 18.4.2. | The applicant indicated that John Baloyi, a representative of the Institute of the I AM Presence, and a representative of Lindi Corp would form part of senior management. | |
| 18.4.3. | The Authority is satisfied that more than 30% of the equity in the applicant would be in the hands of historically disadvantaged groups. | |
| 18.4.4. | The Authority, however, is concerned that the applicant has not demonstrated any intention to include females in any key positions. | |
| 18.5. | Ownership and control | |
| 18.5.1. | Section 2.2 of the ITA required the applicant to provide information on ownership and control including details of the shareholder (s) and to submit the relevant documents. | |
| 18.5.2. | The applicant indicated that it has no foreign control. | |
| 18.5.3. | The Authority is satisfied that the applicant has complied with the requirements of Section 64 of the EC Act. | |

18.6. **Management**

18.6.1. Section 2.3 of the ITA required applicants to provide full details of members of the senior management team including all directors, members, trustees, relevant previous experience as well as information on shares held by members of the senior management.

18.6.2. The applicant indicated that the management team would constitute of John Baloyi, a representative from the Institute of the I AM Presence, who is a Black female, and a representative from Lindi Corp.

18.6.3. The Authority is not satisfied that the applicant's management structure has requisite skills and experience to operate the proposed service.

18.7. **Staffing**

18.7.1. Section 2.4 of the ITA required the applicants to provide staffing organisational charts reflecting all proposed management and staff posts and indicate clearly the planned reporting structure. Further the applicant had to show the race and gender of each employee.

18.7.2. The applicant submitted its organisational and staffing structure. The applicant proposed a staff complement of 75 employees. The applicant has not specified as to how many will be full time or part time

18.7.3. The Authority is satisfied that the applicant has complied with the requirements of the ITA with regard to staffing.

18.8. **FINANCE**

18.8.1. Section 3 of the ITA required applicants to provide information on and attach proof of, amongst others, the business plan, funding, financial projections, cash flow analysis, sensitivity analysis, and profitability.

18.9. **Business plan**

18.9.1. The applicant intends providing a multi-channel satellite subscription television service on a national basis. The applicant does not have any specific LSM groups as it is targeting members of the Institute of the I AM Presence, a religious institution.

18.9.2. The applicant proposed to offer 12 channels, and indicated that it had

been negotiations such as Walt Disney for content provision. Further the applicant proposed to offer its services at a monthly subscription fee of R74.10.

18.9.3. The applicant further indicated that it will work out a system whereby subscribers pay off their decoder and installation costs over a period of time whilst receiving a 12 month free programming window.

18.9.4. The applicant did not specify any clear strategies as to how it would do this.

18.9.5. The applicant did not demonstrate any strategies to take market share from the incumbent, and moves to react to the changing external circumstances.

18.9.6. Having regard to the applicant's subscription fee and the type of channels sought to be included in the service offering, the applicant did not demonstrate to the Authority that its proposed model would be sustainable.

18.10. **Funding**

18.10.1. The applicant did not provide clear information to the Authority regarding its funding structure. In its application documents it refers to a funding letter ("**the letter**") from Annshaw Investment Holding. However, the letter is a business profile and makes no reference to any funding nor does it make reference of the applicant.

18.10.2. During the hearings, the new shareholder, Lindi Corp, indicated that funding could be received from Thebe Finance. The applicant has not submitted any letter of intent from Thebe or any other potential investor.

18.10.3. The applicant did not provide the Authority with sufficient evidence of which financiers it had secured commitments or at least interest from with respect to obtaining equity funding. The Authority was therefore not convinced that the applicant had secured, or would be able to secure, funding.

18.11. **Sensitivity analysis**

18.11.1. Section 3.1.12 of the ITA requires applicants to submit sensitivity tests

they have conducted.

- 18.11.2. The applicant indicated in its application documents that it had covered its sensitivity analyses in its cash flow projections. The Authority is not satisfied that the said cash flow projections reflect any sensitivity analyses.

18.12. **MARKETS AND AUDIENCE RESEARCH**

- 18.12.1. Section 51 (a) and (b) of the Act requires the applicants to demonstrate the need and demand for the proposed service.
- 18.12.2. In addition section 10 of the ITA required applicants to submit copies of the market and audience research.
- 18.12.3. The applicant indicated to the Authority that it did not conduct any research, but relied church related events and activities involving members of the Institute of the I AM Presence to whom the applicant's proposed service is targeted.
- 18.12.4. The applicant, however, did not provide any information to put the Authority in a position to assess whether there is a demand and need for its proposed service. Further the applicant did not specify any LSM groups, but indicated that members of the Institute of the I AM Presence range from the lowest LSMs to the highest LSMs.
- 18.12.5. The applicant relied on the sales of religious videos and CD's to support its contention that there is a demand and need for its proposed service. The Authority cannot rely on such information to make an assessment as to whether there is a demand and need or not.
- 18.12.6. The Authority therefore is not satisfied that the applicant complied with the requirements of sections 51(a) and (b) of the Act and the relevant provisions of the ITA.

18.13. **COMPLAINTS AND CODES OF CONDUCT**

- 18.13.1. Section 5.1 of the ITA required applicants to indicate how they intend dealing with complaints and whether they intend becoming a member of any organisation (e.g. NAB, BCCSA, etc.).

18.13.2. The applicant submitted its customer complaints procedure setting out how it would handle any complaints.

18.13.3. The applicant indicated its intention to become a member of, amongst others, the National Association of Broadcasters (“**NAB**”) and thereby subscribe to the codes of the Broadcasting Complaints Commission of South Africa (“**BCCSA**”).

18.13.4. The Authority is satisfied that the applicant has complied with the requirements of the ITA in this regard.

18.14. **PROGRAMMING**

18.14.1. Section 6 of the ITA required applicants to outline in brief and in general terms the approach and objectives of the proposed programme service. Further, to state whether they are aimed at a general or niche market, to provide programming supply agreements, and how they intend to comply with South African content regulations.

18.14.2. The applicant applied for a multi-channel television subscription broadcasting licence.

18.14.3. The applicant's targeted market is a niche market. The applicant is targeting members of the Institute of the I AM Presence who range from the lowest LSMs to the highest LSMs.

18.14.4. In its application, the applicant has indicated that it will meet its local content requirements as stipulated in the local content regulations by, amongst others, producing its own programmes.

18.14.5. The applicant further undertook to promote the development of new channel services that offer locally developed and produced content.

18.14.6. The Authority is satisfied that the applicant has demonstrated how it would comply with the local content regulations.

18.15. **TECHNICAL**

18.15.1. Section 7 of the ITA required applicants to provide details on, amongst others, the company that would be responsible for signal distribution and information on equipment to be used for the proposed service, and

relevant technical details.

- 18.15.2. The applicant, in its application documents, indicated that it would procure the services of Telemedia, which is not a licensed signal distributor, to provide it with signal distribution services.
- 18.15.3. The applicant submitted a letter of interest from Orbicom (Pty) Ltd, a licensed signal distributor, indicating its willingness to provide the applicant with signal distribution services.

18.16. **DECISION**

18.16.1. The Authority has decided not to grant the applicant a licence to provide cable subscription broadcasting services for the following reasons:

18.16.1.1. The applicant's financial projections are, in the Authority's view, unsubstantiated and subject to query. The Authority is therefore of the view that the applicant's revenue projections are unrealistic and not credible in the circumstances. Furthermore, the Authority is not persuaded that the applicant has secured adequate funding for its project. Accordingly, the Authority finds that the applicant has failed to satisfy the provisions of section 51(e) of the Act, read with item 11 of Schedule A to the ITA.

18.16.1.2. The applicant's business model relies heavily on putative economic growth, rather than on any factual research data which would demonstrate the applicant's long-term financial or economic viability. Furthermore, the business model proposed by the applicant is largely informed and guided by the expertise of the applicant's shareholders, rather than by any factual data which would indicate that the proposed service is likely to attract subscribers and therefore be a financially viable proposition.

18.16.1.3. The applicant's proposed programming format is not adequately informed by appropriate audience research. The applicant was therefore unable to demonstrate to the Authority that there is a demand and need for the proposed service and accordingly did not satisfy the requirements of section 51(a) and (b) of the Act, read with item 4.1 of schedule A to the ITA.

- 18.16.2. The applicant did not demonstrate that it has the requisite skills and experience to operate the proposed service.

19. TELKOM MEDIA (PTY) LTD

19.1. Introduction

- 19.1.1. The Authority received an application from Telkom Media (Pty) Ltd (“the applicant”) for a satellite and cable subscription broadcasting service. The applicant intends operating a service as IC Entertainment.
- 19.1.2. The applicant does not hold permission to continue broadcasting in terms of Section 4(1) of the Broadcasting Act.

19.2. CORPORATE STATUS

19.3. Applicant’s legal status

- 19.3.1. Section 2.1 of the ITA required the applicants to describe their legal form and to provide all relevant founding documentation. Further the applicant had to provide whether it is part of any consortiums, and also to provide a resolution authorising the signatory to sign the application on its behalf.
- 19.3.2. The applicant submitted its founding documents to the Authority, which included, amongst others, its memorandum and articles of association, certificate of incorporation, and shareholders’ agreement.
- 19.3.3. The applicant stated that its shareholding is as follows:
- | | | |
|-----------|---|-----|
| 19.3.3.1. | Telkom SA Ltd (11.58% BEE) | 66% |
| 19.3.3.2. | Videovision Home Entertainment (Pty) Ltd (100% BEE) | 15% |
| 19.3.3.3. | WDB Investment Holdings Ltd (“WDB”) (100% BEE) | 5% |
| 19.3.3.4. | MSG Afrika Media (Pty) Ltd (“MSG”) (100% BEE) | 5% |
| 19.3.3.5. | BBBEE Shareholder (100% BEE) | 5% |
| 19.3.3.6. | Staff Incentive Trust (100% BEE) | 4% |
- 19.3.4. 4% has been set aside to be transferred at the commencement of the applicant’s business to an employee incentive scheme.

- 19.3.5. 5% will be transferred to a broad-based black economic empowerment buyer within 120 days of the award of the licence to to the applicant.
- 19.3.6. The Authority is satisfied that the applicant complied with the requirements of the ITA in respect of corporate status.
- 19.4. **Empowerment of historically disadvantaged groups**
- 19.4.1. Section 2.1.1 of the ITA required the applicant to specify the Black Economic Empowerment component in each shareholder.
- 19.4.2. The applicant submitted to the Authority that more than 44.5% of its equity is in the hands of historically disadvantaged persons²⁰³.
- 19.4.3. The Authority is satisfied that more than 30% of the equity ownership in the applicant is in the hands of historically disadvantaged persons, and therefore complies with Section 9 (2) (b) of the Act.
- 19.5. **Ownership and control**
- 19.5.1. Section 2.2 of the ITA required the applicant to provide information on ownership and control including details of the shareholder (s) and to submit the relevant documents.
- 19.5.2. Telkom SA is the controlling shareholder of the applicant.
- 19.5.3. According to the applicant, no foreign person will, whether directly or indirectly:²⁰⁴
- 19.5.3.1. exercise control over the applicant;
- 19.5.3.2. have any financial interest either in voting shares of paid up capital in the applicant; and
- 19.5.3.3. will be appointed as a director of the applicant.
- 19.5.4. The Authority is satisfied that the applicant does not have foreign ownership exceeding 20%.
- 19.6. **Management**
- 19.6.1. Section 2.3 of the ITA required applicants to provide full details of

²⁰³ Application, section 2, volume 1, page 21

²⁰⁴ Appendix 2.2.1, Section 2, Vol. 1 Page 115

members of the senior management team including all directors, members, trustees, relevant previous experience as well as information on shares held by members of the senior management.

19.6.2. The applicant also indicated that it has appointed full time Executive Management and its representation is as follows:

19.6.2.1.	Member	Gender	Race
19.6.2.2.	Mandla Ngcobo	Male	Black
19.6.2.3.	Dr S Mohapi	Male	Black
19.6.2.4.	Mr R Matthyser	Male	White
19.6.2.5.	Mr L van Niekerk	Male	White
19.6.2.6.	Mr H Mokhesi	Male	Black

19.6.3. The applicant submitted as part of its post hearing additional information, an updated Employment Equity Plan which reflects its employment equity targets commencing in 2007 with 50% an increasing in 2014 to 58%. The applicant further states that the overall targets that have been set for Employment Equity, Women and People with Disabilities are 60%, 45% and 3% respectively. Of the 45% women the applicant states that 66% will be black²⁰⁵. Time frames were also provided as part of Promise of Performance.

19.6.4. Based on the analysis of the curriculae vitae submitted by the applicant, the Authority is satisfied that the applicant's management has the requisite skills and experience to operate the proposed service.

19.6.5. The Authority is satisfied that the racial composition of the applicant's management reflects the demographics of the Republic.

19.6.6. The Authority is not satisfied with the gender representation of the applicant's management. The Authority is however satisfied that the applicant has put in place plans with time frames aimed at rectifying gender imbalance.

²⁰⁵ Page 4 of the Additional information.

19.6.7. The Authority is satisfied that the applicant has complied with the requirements of the ITA in this regard.

19.7. **Staffing**

19.7.1. Section 2.4 of the ITA required the applicants to provide staffing organisational charts reflecting all proposed management and staff posts

19.7.2. The applicant submitted its organisational and staffing structure²⁰⁶.

19.7.3. The applicant indicated that, at year 7 of its operation, it will have a staff complement of 644 full time permanent employees, 30 part time employees and 47 free-lance employees²⁰⁷.

19.7.4. The applicant further indicated that its employment equity targets will be 60% historically disadvantaged individuals, 30% Black females, 45% females overall, and 3% disabled people²⁰⁸.

19.7.5. The Authority is satisfied that the applicant complied with the requirements of the ITA in this regard.

19.8. **FINANCE**

19.9. **Business Plan**

19.9.1. The applicant intends to provide multi-channel composite service using satellite for satellite subscription service and cable for IPTV services. The applicant's target market is the LSM 5-10 target market for satellite broadcasting service and the LSM 7-10 target market for IPTV service²⁰⁹.

19.9.2. The applicant indicated its pricing will start at R100,00.

19.10. **Funding**

19.10.1. The applicant stated that no external funding will be required as all funds will be raised from share capital investments and individual

²⁰⁶ Application, section 2, volume 2, appendix 2.4.1

²⁰⁷ Application, section 2, volume 2, appendix 2.4.2

²⁰⁸ Presentation slide, page 11

²⁰⁹ Pre Hearing Submission page 349

shareholder loans.

- 19.10.2. The applicant also submitted a letter from Telkom SA confirming funding.
- 19.10.3. Short term bank overdraft facilities, to a maximum of X, which may be needed to fund daily working capital requirement, will be negotiated with banks. Evidence of correspondence with banks to this effect was attached in the documents submitted by the applicant.
- 19.10.4. The applicant further indicated that in the event of overdraft being refused, the shareholders will loan additional funding.
- 19.10.5. The applicant submitted two letters from Standard Bank and ABSA Bank confirming funding.
- 19.10.6. The Authority is satisfied that the applicant has secured sufficient funding to operate the proposed service.

19.11. **Financial Projections**

- 19.11.1. The applicant opted for projections over a seven year period instead of five year period as required by the Authority as it believed that due to complex nature of the business it was highly unlikely to project significant returns on business over a five year period.
- 19.11.2. The applicant indicated that its satellite subscription broadcasting service business shall reach the break-even point in year six, with considerable profit and positive cash flow.
- 19.11.3. The Authority is satisfied that the applicant's financial projections are realistic.

19.12. **Sensitivity Analysis**

- 19.12.1. The applicant conducted sensitivity tests taking into account various scenarios. The scenarios considered by the applicant include:
 - 19.12.1.1. Subscribers reduced by X
 - 19.12.1.2. Subscribers reduced by X
 - 19.12.1.3. Price reduction by X% or X

- 19.12.1.4. Exchange rate of US Dollar
- 19.12.1.5. Increases of shareholder's loans
- 19.12.2. The Authority is satisfied that the applicant's sensitivity tests are realistic.

19.13. **Profitability**

- 19.13.1. The applicant indicated that it will only reach break-even in the sixth year. The analysis of the applicant's financial statements indicates that the applicant will have sufficient reserves to keep it afloat until the break-even point.
- 19.13.2. The Authority is satisfied that the applicant has secured sufficient funding and that its business plan is supported by the factual data from the research it conducted.
- 19.13.3. The Authority is therefore satisfied the applicant satisfies the requirements of Section 51(e) of the Act.

19.14. **MARKETS AND AUDIENCE RESEARCH**

- 19.14.1. The applicant carried out an extensive field interview research programme, assisted by companies such as X and X. The applicant demonstrated to the Authority that it had conducted primary research (both qualitative and quantitative)²¹⁰.
- 19.14.2. The Authority has been provided with a report of the research which was conducted.²¹¹
- 19.14.3. The Authority is satisfied that the applicant complied with the requirements of the ITA in this regard, and that it has demonstrated a need and demand envisaged by the provisions of sections 51(a) and (b) of the Act.

19.15. **COMPLAINTS AND CODES OF CONDUCT**

- 19.15.1. The applicant submitted its complaints and comments handling

²¹⁰ Hearing transcript, page 12

²¹¹ Application, section 4

procedure 212.

19.15.2. The applicant intends becoming a member of the National Association of Broadcasters (“NAB”) and thereby subscribe to the codes of the Broadcasting Complaints Commission of South Africa (“BCCSA”)²¹³.

19.15.3. The Authority is satisfied that Telkom Media has complied with the requirements of the ITA in this regard.

19.16. **PROGRAMMING**

19.16.1. The applicant applied for a multi-channel composite subscription broadcasting licence.

19.16.2. The applicant’s programming will target LSM’s 6 – 10214.

19.16.3. The applicant submitted its programming strategy to the Authority. This provides details of the applicant’s proposed offering.

19.16.4. The applicant demonstrated how it would comply with the Local Content Regulations.²¹⁵

19.16.5. The Authority is satisfied that the applicant complied with the requirements of the ITA in this regard.

19.17. **TECHNICAL**

19.17.1. The applicant initially indicated it would apply for electronic communications network services licence so that it could roll out its own network alternatively it would use the services provided by Telkom SA Ltd.

19.17.2. It was pointed out to the applicant that Telkom SA is not a licenced broadcasting signal distributor.

19.17.3. The applicant indicated it would consider its options including using Sentech.

²¹² Application, section 5, appendix 5.1.1

²¹³ Application, section 5, appendix 5.1.3

²¹⁴ Application, section 6, appendix 6.1

²¹⁵ Application, section 6, appendix 6.5

19.18. DECISION

19.18.1. The Authority has decided to grant the applicant a licence to provide satellite and cable subscription broadcasting services for the following reasons:

19.18.1.1. The Authority is of the view that the applicant's proposed revenue projections are realistic and credible;

19.18.1.2. The Authority is satisfied that the applicant has secured adequate funding for the proposed service and the Authority accordingly believes that the applicant has satisfied the provisions of Section 51(e) of the Act read with item 11 of schedule A to the ITA;

19.18.1.3. The applicant's proposed service is adequately informed by appropriate audience and market research. The applicant was able to demonstrate that there is a need and demand for the proposed service. The applicant accordingly satisfied the requirements of Section 51(a) and (b) of the Act, read with item 4.1 of Schedule A to the ITA.

19.18.1.4. The grant of the licence is subject to a special condition that the applicant's promise of performance in respect of gender and racial representation in its management structure be included as a licence condition.

20. WALKING ON WATER (PTY) LTD

20.1. Introduction

20.1.1. The Authority received an application in terms of the ITA from Walking On Water ("WOW") for a commercial satellite broadcasting licence. WOW intends operating a service under the name and style of WOW Tv. The applicant does not hold permission to continue broadcasting in terms of Section 4 (1) of the Broadcasting Act.

20.1.2. The applicant applied for a composite single channel national subscription broadcasting licence.

20.2. **CORPORATE STATUS**

20.3. **Applicant's legal status**

20.3.1. Section 2.1 of the ITA required the applicants to describe their legal form and to provide all relevant founding documentation. Further the applicant had to provide whether it is part of any consortiums, and also to provide a resolution authorising the signatory to sign the application on its behalf.

20.3.2. The applicant advised that its shareholding will be held as follows:

20.3.2.1.	WindsObey (Pty) Ltd (100% BEE)	40%
20.3.2.2.	Cornastone Technology Holdings (Pty) Ltd (91% BEE)	40%
20.3.2.3.	Lifa Investment Holdings Ltd (100% BEE)	5%
20.3.2.4.	Vhomakadzi Enterprise (Pty) Ltd (100% BEE)	5%
20.3.2.5.	WOW Employee Scheme (70% BEE)	10%

20.3.3. The Authority is satisfied that the applicant complied with the requirements of the ITA in respect of corporate status.

20.4. **Empowerment of historically disadvantaged persons**

20.4.1. Section 2.1.1 of the ITA required the applicant to specify the Black Economic Empowerment component in each shareholder.

20.4.2. The applicant submitted to the Authority that more than 30% of its equity is in the hands of historically disadvantaged persons.²¹⁶

20.4.3. The Authority is satisfied that more than 30% of equity ownership in the applicant is in the hands of historically disadvantaged persons, and therefore complies with Section 9(2) (b) of the Act.

20.5. **Ownership and control**

20.5.1. Section 2.2 of the ITA required the applicant to provide information on ownership and control including details of the shareholder (s) and to

²¹⁶ Application, section 2, volume 1, page 21

submit the relevant documents.

20.5.2. The applicant has no foreign shareholders.²¹⁷

20.5.3. The Authority is satisfied that the applicant has complied with the provisions of Section 64 of the Act.

20.6. **Management**

20.6.1. Section 2.3 of the ITA required applicants to provide full details of members of the senior management team including all directors, members, trustees, relevant previous experience as well as information on shares held by members of the senior management.

20.6.2. The applicant submitted the details of members of its board of directors.²¹⁸ The directors are:

20.6.2.1. Hamilton Ratshefola – Black male – Non-Executive Chairperson;

20.6.2.2. Nontokoza Mangquku – Black female – Chief Executive Officer;

20.6.2.3. Luyanda Mangquku – Black male – Chief financial officer;

20.6.2.4. Xolisa Vitsha – Black male – Non-Executive Director;

20.6.2.5. Nokuthula Mzizi – Black female – Non-Executive Director.

20.6.3. The applicant's senior management team viewed as whole does not seem to have extensive experience, capabilities and expertise in the broadcasting sector. The applicant admitted in the hearings that it did not have broadcasting experience but that it would obtain the services of people who do. This was then done by the applicant as evidenced by the letter of commitment from 3 individuals who do have broadcasting experience.

20.6.4. The Authority believes that the fact that the applicant will only be operating a single channel service, will count in its favour. The applicant is therefore unlikely to require a large amount of human capital.

20.6.5. The Authority is satisfied that the applicant has complied with the requirements of the ITA in this regard.

²¹⁷ Application, volume 2, appendix 2.2.1

²¹⁸ Presentation slide, page 7

20.7. **Staffing**

20.7.1. Section 2.4 of the ITA required the applicants to provide staffing organisational charts reflecting all proposed management and staff posts and indicate clearly the planned reporting structure. Further the applicant had to show the race and gender of each employee.

20.7.2. The applicant submitted its organisational and staffing structure.²¹⁹ The applicant indicated that it will have a staff complement of 26 full time permanent employees, 22 part time employees and 22 outsourced positions.²²⁰

20.7.3. There are 8 senior staff members who report to the CEO. They hold the following positions:

20.7.3.1. CFO who is male and black

20.7.3.2. Programme Director who is female and black

20.7.3.3. Content Director who is female and black

20.7.3.4. Chief Technology Officer who is male and white

20.7.3.5. Marketing and Sales Director who is female and black

20.7.3.6. Human Resource Director who is female and black

20.7.3.7. Corporate Affairs Director who is female and black

20.7.3.8. Regulatory Affairs who is male, black and disabled

20.7.4. Under the various Managers are support staff for the accounting function (70% black, 50% female and 10% disabled), call centre (70% black and 70% female), marketing and sales (50% black and 50% female), programming (50% black and 50% female) and human resources functions (70% black and 70% female).

20.7.5. The applicant advises that it is committed to implementing effective equity in order to correct the imbalances in the workforce that have

²¹⁹ Application, volume 2, appendix 2.4.1

²²⁰ Application, volume 2, appendix 2.4.2

resulted through past discriminatory legislation. The applicant's policy on management and staffing caters for the empowerment of women, disabled persons and previously disadvantaged persons²²¹.

20.7.6. The Authority is satisfied that the applicant has complied with the requirements of the ITA in this regard.

20.8. **FINANCE**

20.8.1. Section 3 of the ITA required applicants to provide information on and attach proof of, amongst others, the business plan, funding, financial projections, cash flow analysis, sensitivity analysis, and profitability.

20.9. **BUSINESS PLAN**

20.9.1. The applicant describes their offering as "... a Christian channel which provides our subscribers with selection of movies, dramas, talk-shows, game-shows, kids programmes, documentaries, music programmes, teen's programmes etc." This is expected to be a one channel operation and the projected financial statements recognise this fact as such.

20.9.2. According to the applicant it intends to operate in a niche market mainly targeting Christians and non Christians who would like to watch clean and family safe television content.

20.9.3. The applicant indicated that its plan is supported by a conclusion reached by Statistics SA that 80% of the South African population are Christian. The primary research supplied by the applicant makes specific reference to this target market in very clear terms.

20.10. **Funding**

20.10.1. The applicant has estimated the total funding to be R X over a 5 year period. This will be made up of X debt and X equity. The applicant has attached copies of letters of interest from potential financiers who are willing to fund the applicant if is awarded the licence.

20.10.2. The applicant submitted as part of its additional information letters of support from financial institutions.

²²¹ Volume 2, Pg 446

20.10.3. The Authority will however require the applicant to demonstrate that its shareholders have necessary funds to perform their equity financial obligations to the applicant.

20.10.4. The Authority is therefore, subject to the fulfilment of the condition in paragraph 20.10.3, satisfied that the applicant will be a going concern. The Authority believes that the applicant has satisfied the requirements of Section 51(e) of the Act, together with the requirements of the ITA.

20.11. **Financial projections**

20.11.1. The applicant has identified a total capital investment requirement of X to cover the operations of WOWtv in the first 5 years. The company is expected to run at a loss in the first 2 years and this will require peak working capital investment of X in the 2 years.

20.11.2. WOWtv plans to break even in the 3rd year and start posting positive profits in that year. This turnaround is quick and if achieved, will boost the future profitability of WOWtv tremendously.

20.11.3. If the advertising revenue stream is not realised, then WOWtv will face a serious challenge in respect of its own sustainability. Furthermore, sales growth of more than X in the second year is a cause for concern. It is not clear what is to drive this growth since marketing expenditure is flat at X per annum.

20.11.4. The Authority is however of the view that since the applicant intends operating a single channel the risk referred to above may not have a serious negative effect on its business plan.

20.12. **MARKETS AND AUDIENCE RESEARCH**

20.12.1. Section 51 (a) and (b) of the Act requires the applicants to demonstrate the need and demand for the proposed service.

20.12.2. In addition section 10 of the ITA requires applicants to submit copies of the market and audience research.

20.12.3. The applicant submitted primary research to the Authority²²². The

²²² Application, volume 3, page 551

applicant's submission confirms that market research was conducted, which was specifically tailored to determine the uptake of subscription TV in South Africa. The research contained targeted questionnaires and relevant statistical sampling of the population. Whilst other research (quoted in the submission by the applicant) gave invaluable information with regard to population trends, market sizes, uptake of free-to-air broadcasting services etc, the applicant's research sought to determine whether the market for subscription TV exists in South Africa.

20.12.4. The research conducted by the applicant has accordingly demonstrated a need and demand for the applicant's proposed service.

20.12.5. The Authority is satisfied that the applicant complied with Sections 51(a) and (b) the Act and requirements of the ITA in this regard.

20.13. **COMPLAINTS AND CODES OF CONDUCT**

20.13.1. Section 5.1 of the ITA required applicants to indicate how they intend dealing with complaints and whether they intend becoming a member of any organisation (e.g. NAB, BCCSA, etc.).

20.13.2. The applicant submitted the procedures it will be adopting to ensure compliance.²²³

20.13.3. The applicant intends becoming a member of the National Association of Broadcasters ("NAB") and thereby subscribe to the codes of the Broadcasting Complaints Commission of South Africa ("BCCSA")²²⁴.

20.13.4. The Authority is satisfied that the applicant has complied with the requirements of the ITA in this regard.

20.14. **PROGRAMMING**

20.14.1. The Section 6 of the ITA required applicants to outline in brief and in general terms the approach and objectives of the proposed programme service. Further, to state whether they are aimed at a general or niche market, to provide programming supply agreements, and how they intend to comply with South African content regulations.

²²³ Application, volume 3, appendix 5.1.2

²²⁴ Application, volume 3, appendix 5.1.3

- 20.14.2. Applicant applied for a single channel television satellite subscription broadcasting licence.
- 20.14.3. The applicant's programming is aimed at a niche market. The applicant's service is a Christian based service which targets Christians and non-Christians who want to watch family conducive television content²²⁵.
- 20.14.4. The applicant submitted its programming strategy to the Authority²²⁶. This provides details of the applicant's proposed offering.
- 20.14.5. The applicant indicated that it will comply with the ICASA Local Content Regulations.²²⁷
- 20.14.6. The Authority is satisfied that the applicant has complied with the requirements of the ITA in this regard.
- 20.15. **TECHNICAL**
- 20.15.1. Section 7 of the ITA required applicants to provide details on, amongst others, the company that would be responsible for signal distribution and information on equipment to be used for the proposed service, and relevant technical details.
- 20.15.2. The applicant intends using the services provided by Sentech Ltd for its signal distribution²²⁸.
- 20.16. **DECISION**
- 20.16.1. The Authority has decided to grant the applicant a licence to provide satellite subscription broadcasting services for the following reasons:
- 20.16.1.1. The Authority took into account that the applicant proposes to operate a single channel aimed at niche market.
- 20.16.1.2. The Authority is of the view that the applicant's proposed revenue projections are realistic and credible;
- 20.16.1.3. The Authority is satisfied that the applicant has secured adequate

²²⁵ Application, volume 3, page 485

²²⁶ Application, volume 3, page 622

²²⁷ Application, volume 3, appendix 6.5

²²⁸ Application, volume 3, page 677

funding from the financial institutions for the proposed service. The applicant will however be required to demonstrate that its shareholders have sufficient funds to perform their equity obligations.

20.16.1.4. The applicant's proposed service is adequately informed by appropriate audience and market research. The applicant was able to demonstrate that there is a need and demand for the proposed service. The applicant satisfied the requirements of Sections 51(a) and (b) of the Act, read with Section 4.1 of Schedule A to the ITA.