

**REPRESENTATIONS BY
MULTICHOICE NAMIBIA ON
VARIOUS DRAFT REGULATIONS IN
TERMS OF THE
COMMUNICATIONS ACT, 2009**

14 MARCH 2011

**TABLE OF CONTENTS: REPRESENTATIONS BY MULTICHOICE NAMIBIA ON
DRAFT REGULATIONS IN TERMS OF THE COMMUNICATIONS ACT, 2009**

REPRESENTATIONS BY MULTICHOICE NAMIBIA ON VARIOUS DRAFT REGULATIONS IN TERMS OF THE COMMUNICATIONS ACT, 2009	1
INTRODUCTION.....	1
About MultiChoice Namibia.....	2
DStv Service	2
MultiChoice Namibia provides subscription management services for DStv service.....	2
Namibian broadcasting services provided by the MultiChoice Group	3
Digital terrestrial television re-broadcasting service	3
Mobile re-broadcasting service.....	3
MultiChoice Namibia supports development of enabling regulatory framework	4
DRAFT LICENCE CATEGORIES REGULATIONS.....	5
Categories of broadcasting service licences	5
Overarching comments on broadcasting licence categories	7
Broadcasting is changing rapidly.....	7
Digitisation and transmission methods	9
Differentiation between "push" and "pull" services	9
Differentiation between broadcasting services based upon nature, mandate, influence and funding of services.....	10
Differentiation between single-channel and multi-channel broadcasting services, and broadcasting and re-broadcasting services	13
Multi-channel re-broadcasting services have virtually no control over the content on the channels on their service	15
Suggestions regarding multi-channel broadcasting services and re-broadcasting services	17
Multi-national services.....	18
International best practice as regards licensing and regulation of multi-national satellite broadcasting services.....	19
Mobile television broadcasting services.....	21
Signal distribution.....	22
Introductory comments re signal distribution	22
Signal distribution not a category of broadcasting	23
Definition of signal distribution.....	23
Sub-categories of signal distribution services	24

Co-assignment of frequency spectrum to broadcasting licensee and signal distribution licensee.....	24
Concluding comments re licence categories	25
DRAFT LICENSING PROCEDURES REGULATIONS	26
Licence exempt telecommunications services.....	26
Amendment and modification of licences	27
Application procedures	27
DRAFT TRANSITIONAL PROCEDURES REGULATIONS	27
Pending licence applications	27
Existing spectrum licensees	29
Existing service licensees	30
Miscellaneous administrative law issues.....	32
Right of reply	32
Extensions and condonation for late filing.....	33
Publication of Authority’s decisions	34
DRAFT CONSUMER COMPLAINTS REGULATIONS.....	34
Introductory comments re draft Consumer Complaints Regulations	34
Regulations are wide and vague.....	35
Time frames	36
Record keeping requirements.....	37
Representation at oral hearings.....	38
GENERAL.....	38
CONCLUSION	39
ANNEXURE A: LICENSING AND REGULATION OF MOBILE TELEVISION BROADCASTING SERVICES	40
Mobile TV services are still in developmental stages	40
Commercial challenges to take up of mobile TV	41
Mobile TV user has ultimate control.....	42
Nature of device further limits manner in which service is received and influence of service.....	43
Mobile TV regulatory framework should be appropriately tailored	44

REPRESENTATIONS BY MULTICHOICE NAMIBIA ON VARIOUS DRAFT REGULATIONS IN TERMS OF THE COMMUNICATIONS ACT, 2009

INTRODUCTION

1 MultiChoice Namibia thanks the Communications Regulatory Authority of Namibia ("the Authority") for the opportunity to comment on the draft regulations regarding –

1.1 broadcasting and telecommunications service licence categories ("the draft Licence Categories Regulations");¹

1.2 licensing procedures for telecommunications and broadcasting service licences and spectrum licences ("the draft Licensing Procedures Regulations");²

1.3 transitional procedures for telecommunications and broadcasting service licences and spectrum licences ("the draft Transitional Procedures Regulations");³ and

1.4 consumer complaints ("the draft Consumer Complaints Regulations");⁴

(collectively the "draft Regulations").

¹ Notice of intention to make regulations in respect of regulations regarding broadcasting and telecommunications service licence categories, Notice No. 14, Gazette No. 4647, 11 February 2011

² Notice of intention to make regulations in respect of regulations regarding licensing procedures for telecommunications and broadcasting service licences and spectrum licences, Notice No. 15, Gazette No. 4647, 11 February 2011

³ Notice of intention to make regulations in respect of regulations regarding transitional procedures for telecommunications and broadcasting service licences and spectrum licences, Notice No. 17, Gazette No. 4647, 11 February 2011

⁴ Notice of intention to make regulations in respect of regulations regarding consumer complaints, Notice No. 18, Gazette No. 4647, 11 February 2011

About MultiChoice Namibia

- 2 MultiChoice Namibia provides –
 - 2.1 support services for the DStv service;
 - 2.2 a multi-channel digital terrestrial television (“DTT”) subscription re-broadcasting service; and
 - 2.3 a multi-channel mobile television re-broadcasting service, using the DVB-H standard,to subscribers in Namibia.

DStv Service

- 3 The DStv service is a multi-channel digital satellite direct-to-home (“DTH”) African subscription broadcasting service. It currently includes nearly 100 video channels and over 20 audio channels.
- 4 The DStv service is provided by MultiChoice Africa from South Africa and Spain, in line with the legislative and regulatory frameworks applicable in those countries, to subscribers in over 46 countries across the African continent, including Namibia.

MultiChoice Namibia provides subscription management services for DStv service

- 5 MultiChoice Namibia provides subscriber management services to subscribers to the DStv service received in Namibia. These include facilitating subscription fee collection services, marketing and sales, technical and installation support and the operation of a national call centre.
- 6 These are support services for subscribers to the DStv service in Namibia. A subscription management service is neither a broadcasting service nor a broadcasting signal distribution service.

Namibian broadcasting services provided by the MultiChoice Group

- 7 MultiChoice Africa provides subscribers with news, information and entertainment that are of the highest global standard. Constant technological development also ensures that its subscribers in Africa have access to the latest digital technologies.
- 8 The MultiChoice group's experience in the subscription broadcasting sector has taught it that the conventional notion of a broadcasting service as it is known today is rapidly changing. It constantly strives to move forward by providing its subscribers with a range of quality services available on any platform and on any device.
- 9 In keeping with this ambition, the MultiChoice group has, in recent years, been a pioneer in bringing digital terrestrial television ("DTT") to traditional television sets in Africa as well as to mobile television handsets using the DVB-H standard ("mobile television") to consumers in Africa.

Digital terrestrial television re-broadcasting service

- 10 In February 2005 MultiChoice Namibia launched a multi-channel DTT re-broadcasting service in Windhoek ("the DTT service")⁵, using the DVB-T standard.
- 11 MultiChoice Namibia receives the broadcast signals of the channels comprising this service from the IS 7 satellite and re-broadcasts them on its DTT re-broadcasting service. MultiChoice Namibia does not, and may not, interfere with the content on the channels on the DTT service.

Mobile re-broadcasting service

- 12 In March 2008 MultiChoice Namibia launched a mobile television re-broadcasting service using the DVB-H standard⁶ on a commercial basis⁷,

⁵ MultiChoice Namibia had previously provided an analogue terrestrial re-broadcasting service in Namibia

bringing Namibia to the forefront of the development of mobile television, making Namibia one of the first African countries to launch these cutting edge services.

- 13 The mobile television bouquet currently includes approximately 12 audiovisual and audio channels.
- 14 In a process which is very similar to that which occurs *vis a vis* the transmission of the DStv digital satellite subscription television broadcasting and the DTT service, the broadcast signals of the channels included in the mobile television bouquets are uplinked (for backhaul purposes only) to the IS 902 satellite.
- 15 The signals are then downlinked to DVB-H sites in Namibia, where DVB-H modulation occurs. MultiChoice Namibia has erected DVB-H transmitters at each of these sites.
- 16 From these sites, the broadcast signals are transmitted to mobile phones with DVB-H receivers.
- 17 MultiChoice Namibia does not, and may not, interfere with the content on the channels on the mobile television service. MultiChoice Namibia simply receives, modulates and re-transmits the channel signals. The mobile television service is thus a re-broadcasting service.

MultiChoice Namibia supports development of enabling regulatory framework

- 18 MultiChoice Namibia supports the establishment of an environment conducive to the growth of broadcasting services in Namibia, and applauds the publication of the draft Regulations to prescribe broadcasting and telecommunications service licence categories, licensing procedures, transitional procedures and regulations regarding consumer complaints.

⁶ DVB-H is the European digital terrestrial broadcast standard for the transmission of audiovisual, audio and multimedia content to handheld terminal devices. DVB-H is based on the DVB-Terrestrial ("DVB-T") standard for digital terrestrial television, and is combined with Internet Protocol ("IP") technology to make content delivery more flexible. DVB-H is tailored for the special requirements of the pocket-size class of receivers

⁷ MultiChoice Namibia first conducted mobile television trials in Namibia in January 2007

- 19 The success of the broadcasting industry depends on an enabling and appropriate regulatory framework which will promote growth, stability, innovation and investment.
- 20 An appropriate regulatory framework will provide greater choice and diversity and, encourage the development of stimulating and entertaining services for Namibian consumers, inspire investor confidence, and create an environment that is conducive for broadcasters to invest in for the development of the sector and Namibia as a whole.
- 21 We believe that the draft Regulations are an important step towards the creation of a streamlined and progressive regulatory framework for communications services in Namibia. We hope to contribute constructively to the development of such a framework.
- 22 We have a number of comments on the draft Regulations relating to broadcasting which we believe will, if implemented, enhance the draft Regulations and create a sound foundation for the growth and development of the Namibian broadcasting sector.

DRAFT LICENCE CATEGORIES REGULATIONS

Categories of broadcasting service licences

- 23 We welcome the Authority's initiative to prescribe the categories of broadcasting licences as required by s84 of the Communications Act,2009 ("the Act"). s84(2) of the Act provides:

"When different categories of broadcasting licences are determined, the following distinguishing characteristics of the services must be taken into account –

- (a) the method used to distribute the services concerned;
- (b) whether scarce resources such as portions of the radio spectrum are used by the service;

- (c) the extent to which the licensee has editorial control over the contents of channels or programs forming part of the services concerned and whether the provider concerned is a provider contemplated in section 83(2)⁸;
- (d) whether the services concerned are community, commercial or public broadcasting services.”

24 The draft Regulations propose four categories of broadcasting service licences, namely "commercial", "community", "public" and "signal distribution".⁹

25 That proposed categorisation is flawed in several fundamental respects, including that –

25.1 it fails to take into account the critical factors which must be taken into account by the Authority when prescribing licence categories set out in s84(2)(a), (b) and (c) of the Act, referred to in paragraph 23 above;

25.2 it makes no distinction between free-to-air and subscription broadcasting services – it simply refers to “commercial” broadcasting services;

25.3 it makes no distinction between broadcasting and re-broadcasting services;

25.4 it makes no distinction between single-channel and multi-channel services;

25.5 it makes no distinction between traditional broadcasting services and emerging broadcasting services such as mobile broadcasting;

⁸ s83(2) of the Act provides:

“A broadcasting licence is also required in respect of any broadcast transmitted from outside Namibia if such broadcast is intended to be received only by persons who subscribe to the service in question or provide any other consideration to receive that service”

⁹ Draft Reg. 4(1) of the draft Licence Categories Regulations

- 25.6 it makes no distinction between broadcasting services based on their coverage area (e.g. e.g. multi-national, national, regional, metropolitan);
- 25.7 it makes no provision for the appropriate licensing and regulation of broadcasting services transmitted from outside Namibia¹⁰ or to deal with a person who promotes such a service in Namibia, or who receives payment as consideration for access to such a service, and who is deemed to be operating the service in question;¹¹ and
- 25.8 signal distribution should not be a category of broadcasting services.
- 26 By disregarding these factors, the Authority has failed to comply with s84(2) of the Act.
- 27 More importantly, the legislature has given the Authority a unique opportunity to devise a broadcasting licensing framework which is nuanced, flexible, progressive and alive to the intricacies and the dynamic nature of broadcasting. By disregarding the factors described in paragraph 25 above, the Authority has failed to benefit from this important opportunity, to the detriment of the broadcasting industry and the country as a whole.
- 28 We therefore elaborate on this issue below.

Overarching comments on broadcasting licence categories

Broadcasting is changing rapidly

- 29 Historically broadcasting legislation was developed in the context of, and was appropriate for "traditional" broadcasting services, namely single channel, analogue terrestrial domestic broadcasting services.

¹⁰ Where such broadcasts are intended to be received only by persons who subscribe to the service in question or provide any other consideration to receive that service, as contemplated in s83(2) of the Act

¹¹ In terms of s83(3) of the Act

- 30 However, the broadcasting industry is characterised by rapid change and development, which has, in certain instances, outpaced regulation.
- 31 We are witnessing dramatic technological developments, globalisation, digitisation and convergence, and an increase in the different technologies and platforms used by broadcasters, such as terrestrial (traditional analogue, DTT, DVB-H), satellite, cable, Internet, etcetera.
- 32 The "one-size-fits-all" approach of "traditional" broadcasting regulation is no longer appropriate for all types of broadcasting services, whether available now or in the future.
- 33 Broadcasting legislative and regulatory frameworks are facing the need to adapt to –
- 33.1 digitisation, with the effect that frequency spectrum is used more efficiently. Digitisation also makes the provision of broadcasting services over a number of new technologies possible (e.g. mobile television and Internet protocol television (“IPTV”));
 - 33.2 an increasing variety of transmission methods and platforms (e.g. terrestrial radio transmitters, satellite, cable, fibre, digital telephone lines) and formats (e.g. analogue and digital);
 - 33.3 a corresponding shift in control from the broadcaster to the end user – i.e. a shift from “push” to “pull” services; and
 - 33.4 increased differentiation between types of broadcasting services based on their nature, mandate and funding, and, in particular, differences between public, commercial (free-to-air and subscription) and community broadcasting services;
 - 33.5 the shift from single channel broadcasting services towards multi-channel broadcasting and / or multi-channel re-broadcasting services, coupled with an increase in re-broadcasting – i.e. an increase in situations where the broadcasting service licensee has diminishing

editorial control over the channels and/or the programming content on its broadcasting service; and

33.6 differentiation between broadcasting services and support services for broadcasting services.

34 The relevance of broadcasting regulation based on traditional models of broadcasting will be challenged by the technological changes in the broadcasting environment, making it necessary to review existing broadcasting licensing concepts.

Digitisation and transmission methods

35 The substantial increase in network capacity, the possibility of content and services to be delivered over a number of platforms, the increase in competing routes to customers and improvements in digital compression suggest that in a fully digital environment, scarcity may over time become a less significant issue, calling for current regulatory approaches to be reassessed.

36 The traditional justification for the regulation of broadcasting, namely that broadcasters use terrestrial frequencies which are a scarce resource (the so-called "frequency scarcity rationale"), is becoming increasingly inapplicable, given developments in technology, digitisation and convergence.

Differentiation between "push" and "pull" services

37 As a result of digitisation and developing technologies there is an increasing trend from "push" to "pull" services, such that consumers have more choice and control over their television viewing.

38 There is a trend away from a relatively passive audience (where viewers and listeners watch and hear the programming which broadcasters choose to provide) to an increasingly empowered audience which is able to influence what they want to view, when and how.

39 The draft Information and Communications Technology, Telecommunications and Broadcasting Policy, 2008 published by the Namibian Ministry of

Information and Communications Technology in 2008 aptly described this as follows:

"Regulation will distinguish between the measures appropriate for content and services consciously sought out and chosen by users ('pull' media) and those where choice and control cannot be exercised so effectively ('push' media). In respect of 'pull' media the provisions of general Namibian law (for example on competition, freedom of expression, access to information, offensive and harmful content) will constitute the main governing framework. In respect of "push" media these general legal provisions also apply but so too will additional requirements which will be embodied in codes of conduct formulated by the organised broadcasting sector (a self-regulatory media council) in conjunction with the independent Regulatory Authority. The mandate of the Regulatory Authority will distinguish between pull and push media." ¹²

Differentiation between broadcasting services based upon nature, mandate, influence and funding of services

- 40 It is recognized internationally and by the Namibian Communications Commission ("the NCC") that different types of broadcasting services are regulated differently based on their different nature, mandate, influence and funding.
- 41 MultiChoice Namibia commends the draft Regulation's differentiation between public¹³, commercial¹⁴ and community broadcasting services.¹⁵ However, we submit that the Authority ought to distinguish further between commercial free-to-air and commercial subscription broadcasting services.
- 42 The differences between broadcasting services based on their nature, mandate and funding should determine whether a licence ought to be required for a

¹² Pg 8 of the draft Broadcasting Policy

¹³ Draft Regulation 4 (1)(c) of the draft Licence Categories Regulations

¹⁴ Draft Regulation 4 (1)(a) of the draft Licence Categories Regulations

¹⁵ Draft Regulation 4 (1) (b) of the draft Licence Categories Regulations

particular activity, and, if so, the legislative and regulatory requirements, and licence terms and conditions with which a broadcasting service licensee must comply.

- 43 The regulatory and licensing requirements, and licence terms and conditions, of the public broadcaster, commercial free-to-air broadcasting services, commercial subscription broadcasting services, community broadcasting services, etc ought to differ substantially and be appropriately tailored to suit the nature of the service.
- 44 Public broadcasters have a public service mandate and are primarily funded by licence fees and/or government grants. Public broadcasters have a broad reach and are accordingly far more influential. Thus, the norm internationally is that the primary responsibility of achieving public interest objectives, such as the development of local programming, is borne by the public broadcaster.
- 45 Commercial free-to-air broadcasting services, financed by advertising revenue, ought to have fewer public interest obligations.
- 46 Subscription broadcasting services (which are strictly commercial services) rely primarily on subscription revenues. The success of subscription broadcasting services depends entirely on the extent to which they are responsive to the programming preferences of their existing and potential subscribers. If subscribers are dissatisfied with the programming of a subscription broadcasting service, they will unsubscribe. This places constant pressure on the service to ensure high quality programming that meets subscribers' preferences.
- 47 The relationship between subscribers and subscription broadcasting service providers was aptly described in a report by the prior Australian regulator, the Australian Broadcasting Authority, to the Minister for Communications and the Arts. The report states:

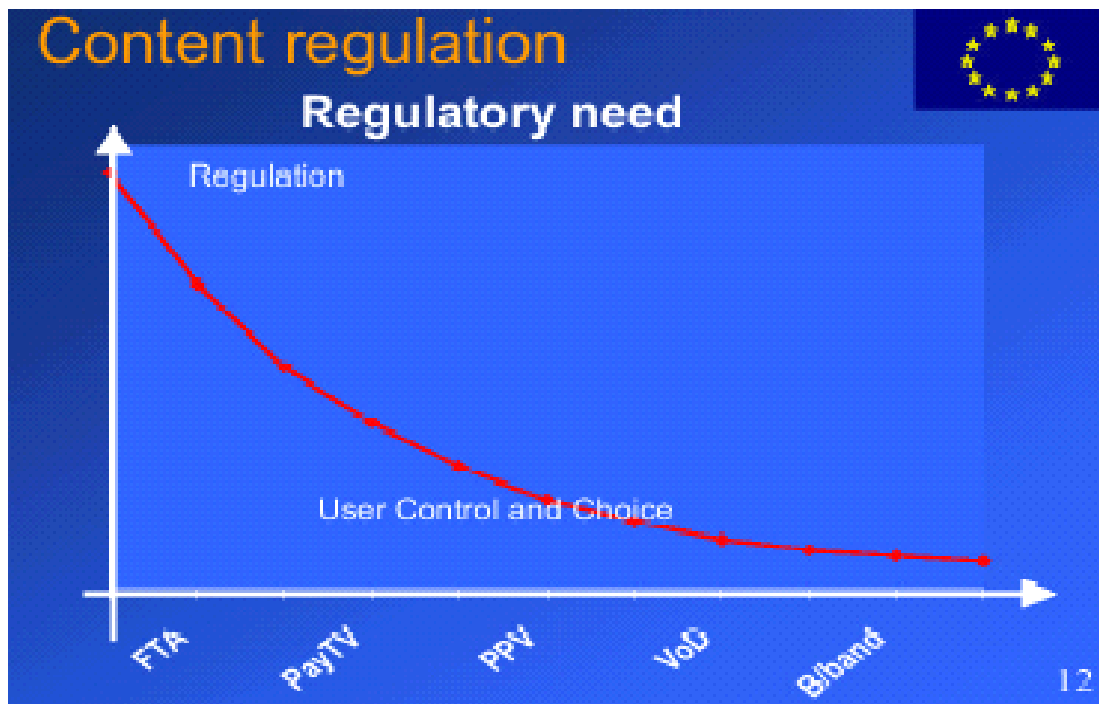
“For Pay TV broadcasters, subscribers pay them directly. In this way the cost involved comes from people’s discretionary entertainment spending. To this extent the survival of the industry is dependent on its ability to

provide viewers with what they want to watch, when they want to watch it and at a price they wish to pay.”¹⁶

- 48 Light-touch regulation is appropriate for subscription broadcasting services precisely because of subscribers' voluntary election to choose to subscribe to the relevant service and then to select the programming/channels which they wish to view.
- 49 Moreover, the influence of subscription broadcasting services is far more limited than that of free-to-air broadcasting services for the following reasons:
- 49.1 First, the number of viewers of subscription broadcasting services is generally limited. Subscription broadcasting services are discretionary services that cater for specific market segments and are generally not a “mass-market” product. Subscription services are acquired pursuant to an agreement between the subscriber and the subscription broadcasting service provider.
- 49.2 Second, subscription broadcasting services are primarily entertainment services – they are not regarded as important providers of domestic news and other programming of social consequence. This responsibility is borne by the public broadcaster and, to a lesser extent, community and commercial free-to-air broadcasting services.
- 50 MultiChoice Namibia therefore submits that the draft Regulations ought to differentiate between subscription and other broadcasting services. Subscription broadcasting services ought to bear far fewer obligations than other broadcasting services, and any obligations imposed ought to be narrowly tailored and appropriate, taking into account the nature of subscription services.
- 51 This approach accords with international best practice. The following graph from the European Commission demonstrates that the rationale for the regulation of broadcasting services decreases with technological development

¹⁶ *Australian Content on Pay TV: Report to the Minister for Communications and the Arts*, ABA, 1997, pg 27

and convergence and as users are able to exercise more control and choice over the content which they wish to view and listen to:



52 For the abovementioned reasons draft Regulation 4 of the draft Licence Categories Regulations should differentiate further between commercial free-to-air and commercial subscription broadcasting services.

Differentiation between single-channel and multi-channel broadcasting services, and broadcasting and re-broadcasting services

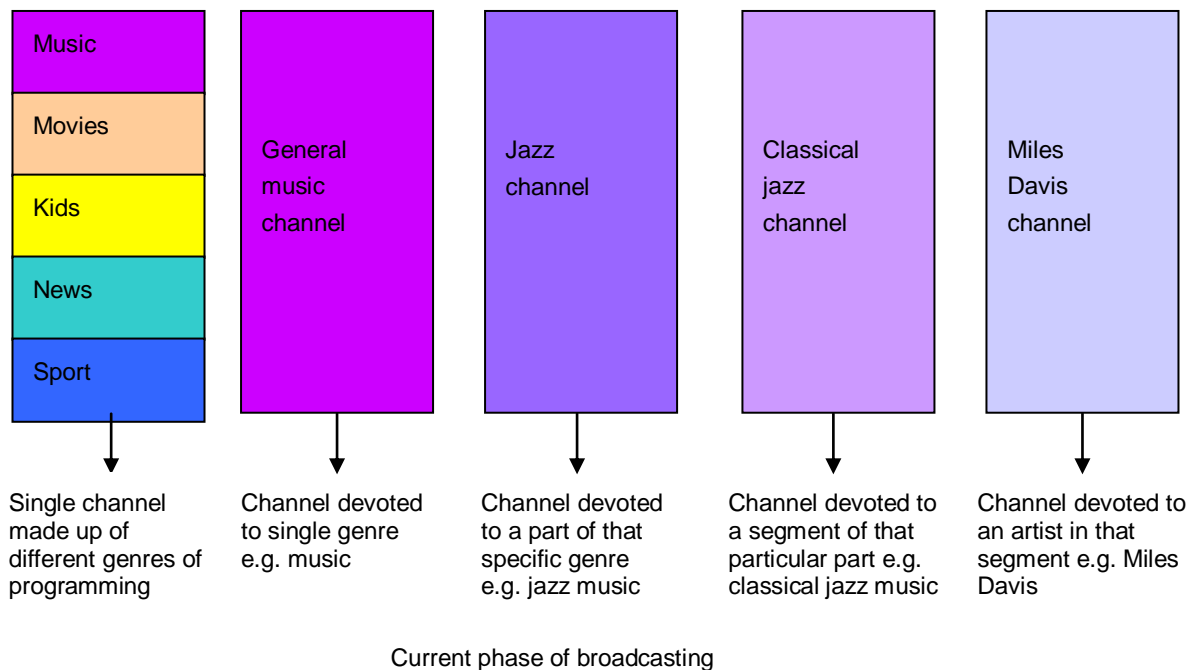
53 A distinction ought to be drawn between a single channel broadcasting service and a multi-channel broadcasting service.

54 Technological developments in the broadcasting sector in the past decade reflect a dramatic shift from –

54.1 a few channels to hundreds, and even thousands, of channels;

54.2 local channels to international channels that are designed for the global market (for example, National Geographic, Afro Music and CNN); and

54.3 a few channels that offer general/full-spectrum programming to numerous, increasingly thematic, channels (for example, the shift from a general channel, to a music channel, to a jazz channel, to a classical jazz channel, to a Miles Davis channel). The table below illustrates this last point.



55 Multi-channel broadcasting services are often re-broadcasting services – that is a service which receives the channel signals of another service and re-broadcasts those signals as they are. Thus, as alluded to in s84(2)(c) of the Act, a further distinction ought to be drawn between a broadcasting service where full editorial control lies with the service provider in Namibia and a re-broadcasting service (where editorial control lies with the original channel supplier, who may or may not be in Namibia). A re-broadcasting service provider has no editorial control over the channels on its broadcasting service, and is thus unable to control the content on the channels which it re-broadcasts.

56 Multi-channel re-broadcasting services may include a number of international channels that are aimed at a continental or global audience. The regulation of a

multi-channel re-broadcasting service must recognise that the service may include channels that are offered in many countries, across different time zones, and to a variety of different cultures and language groups.

57 MultiChoice Namibia believes that it is inappropriate for multi-channel re-broadcasting services carrying international channels to be regulated in the same manner as single-channel domestic broadcasting services (e.g. a national single-channel Namibian broadcasting service).

58 We elaborate on the reasons for these statements below.

Multi-channel re-broadcasting services have virtually no control over the content on the channels on their service

59 The primary respect in which multichannel re-broadcasting services differ from "traditional" broadcasting services is that the providers of a multi-channel re-broadcasting service have virtually no editorial control over the content of the channels on their services.

60 The providers of such services acquire pre-packaged channels and package these into one or more bouquets. Whilst the providers of such services have the discretion as to the choice of channels which will be included in their bouquets, as packagers of bouquets, they have no influence over the programming content on the channels.

61 Channel suppliers do not allow content changes or insertions to a channel without their consent, since this would undermine the brand of the channel through the insertion of different content. For example, MultiChoice Africa carries the National Geographic channel without making any changes to the content of the channel. (Even if channel suppliers were to allow content changes (which is very unusual), the multi-channel re-broadcasting service provider would require substantial technical equipment, and the investment of substantial time and resources, to make any insertions on a channel.)

62 Furthermore, international channels play an important role in multichannel re-broadcasting services' offerings.

- 63 International channel suppliers craft their business models to suit multiple territories and package their channels for international audiences.
- 64 The pre-packaged channels cannot be altered to suit each country to which the channels are supplied. Imposing regulations on an international channel that is made available to audiences in Namibia would have the unintended consequence of regulating the channel in all countries in which it is available.
- 65 The possible imposition of different regulatory requirements in numerous countries, across numerous time zones, and to a variety of different cultures and language groups would render the provision of that channel to more than one country technically and financially unpractical.
- 66 For example, the CNN channel is distributed to more than 1.5 billion people in over 212 countries and territories. Rather than modifying its channel, or allowing any third party to do so, CNN would simply refuse to make the channel available to that third party. (In this event, it is the consumers in the country concerned who would suffer, as the channel would simply not be available in that country. This would have the effect of reducing, rather than increasing, choice and diversity.) A broadcasting service, in Namibia, for instance, is therefore unable to compel a channel supplier such as CNN to tailor the channel to meet the regulatory requirements applicable in Namibia. The same principle applies to all broadcasters, anywhere in the world, who wish to re-broadcast the CNN channel on their service.
- 67 Multichannel re-broadcasting services are accordingly not able to determine or interfere with the business models of international channel suppliers or the programming on international channels.
- 68 An international channel originating from Namibia targeting a multi-national cross-border audience will be subject to the regulatory requirements of Namibian authorities, and may similarly not be able to comply with requirements from other jurisdictions where the channel is received.
- 69 A service provider is, however, in a position to decide, subject to commercial negotiations, which channels to include in its service. The service provider

would, however, not be able to change the content on those channels – it is required to carry them as they are, complete and unaltered on its re-broadcasting service.

- 70 It is noteworthy, in this regard, that subscription broadcasting services (unlike free-to-air broadcasting services) are constrained by consumer-demands, both in terms of what consumers are willing to pay for and the price they are willing to pay. Accordingly, whilst a multichannel subscription broadcasting service does not have any editorial control over the content on the channels which it re-broadcasts on its service, it is driven to select channels which meet subscriber preferences.

Suggestions regarding multi-channel broadcasting services and re-broadcasting services

- 71 We suggest that the draft Licence Categories Regulations create sub-categories of broadcasting services which distinguish between –

71.1 single-channel and multi-channel broadcasting services; and

71.2 broadcasting and re-broadcasting services.

- 72 We suggest that these terms be defined in draft Regulation 1 of the draft Licence Categories Regulations as follows:

72.1 "single-channel broadcasting service" means –

"a broadcasting service which transmits only one channel at a time on the same frequency";

72.2 "multi-channel broadcasting service" means –

"a broadcasting service which transmits more than one channel at the same time on the same frequency";

72.3 "re-broadcasting service" means –

"a broadcasting service which transmits one or more channels over which it has no editorial control".

73 As we have sought to demonstrate above, the "one-size-fits-all" approach of "traditional" broadcasting regulation is no longer appropriate: It is inappropriate to regulate all types of broadcasting services in the same manner. A single set of generally applicable rules is insufficient to adequately cater for the fundamental differences between different categories of broadcasting services. We commend, in this regard, the draft Regulation's differentiation between public, commercial and community broadcasting services. However, it is imperative that the draft Regulations differentiate further between the additional broadcasting licence classifications described above, and that an appropriately tailored legislative, regulatory and licensing framework is created for the different licence categories. We elaborate on this below.

Multi-national services

74 s84(2) of the Act mandates the Authority to take into account (in addition to the method used to distribute the services concerned, whether scarce resources such as portions of the radio spectrum are used by the service, the extent to which the licensee has editorial control over the content of channels or programs forming part of the services concerned), whether the provider concerned is a provider contemplated in s83(2) of the Act. It provides:

“A broadcasting licence is also required in respect of any broadcast transmitted from outside Namibia if such broadcast is intended to be received only by persons who subscribe to the service in question or provide any other consideration to receive that service”

75 Multi-national services are often digital satellite re-broadcasting services which are available in more than one country. The reach of a satellite broadcasting service is restricted only by the shape and size of its satellite footprint. Satellite providers consider the size of the market and are generally forced to spread the satellite costs over a maximum coverage area. It is not practical to launch a satellite to cover a single country such as Namibia, or to confine the footprint of an existing satellite to cover Namibia only, as the market would be too small to recoup these costs.

- 76 A multi-national satellite re-broadcasting service, by its very nature, provides a range of international channels to a continental or global audience, in many countries, across different time zones, and to a variety of different cultures and language groups. It is therefore not practical to seek to license and regulate such a service in every country in which it is available.
- 77 We therefore suggest that the draft Licence Categories Regulations differentiate between domestic and multi-national services.
- 78 The broadcasting licence categories should differentiate further between domestic broadcasting services based on their coverage area (e.g. national, regional, metropolitan, etc).

International best practice as regards licensing and regulation of multi-national satellite broadcasting services

- 79 The norm internationally is that a multi-national multi-channel digital satellite subscription broadcasting service would typically be regulated only in the country from which the service is transmitted, and not in every country in which the service is receivable. In other words, it would be licensed and regulated only in its “country of origin”.
- 80 For example, in the European Union ("the EU"), the Television Without Frontiers Directive (now the Audiovisual Media Services Directive¹⁷) was enacted specifically to cater for the unique characteristics of satellite broadcasting in the EU. The Television Without Frontiers Directive created a legal framework for the transmission of DTH satellite services which cross national boundaries within the European Union, in terms of which such services would be licensed only in their country of origin.

¹⁷ Directive 2007/5/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of broadcasting activities, Official Journal of the European Union, L 332/27, 18 December 2007. Formerly the Television Without Frontiers Directive (Directive 89/552/EEC, amended by Directive 97/36/EC)

- 81 In principle, this Directive provides that a DTH satellite service will be regulated under the laws of the Member State in which the operator is established, which may not necessarily be, but often is, the country from which the operator transmits its service. If the broadcaster is established in more than one Member State, the governing jurisdiction is based on where the DTH satellite service had its centre of activity, and most importantly where its scheduling decisions are taken.
- 82 The Directive provides that "one Member State and one only has jurisdiction over a broadcaster in connection with the provision of services ..." Thus, for example, services compiled and transmitted from the United Kingdom ("the UK"), but which are received in a number of European countries, are only required to be licensed in the UK, and are regulated in terms of the UK's legislation.
- 83 These principles are echoed in the Arab Satellite Broadcasting Charter ("the Charter"),¹⁸ which also adopts the principle that the state of origin¹⁹ will have jurisdiction over satellite broadcast and re-broadcast transmission entities.²⁰
- 84 The authorities in several African countries have also recognised that requiring a multi-national multi-channel digital satellite subscription broadcasting service to be licensed and regulated in the same manner as a broadcasting service

¹⁸ Arab Satellite Broadcasting Charter: Principles for Regulating Satellite Broadcasting Transmission in the Arab World, Unofficial Translation, February 2008

¹⁹ "State of origin" is defined in Article 2 of the Charter as follows:

"The state of origin is considered any member state in the League of Arab States that fulfils any of the following conditions:

1. The state offering the licence.
2. The state that hosts within its territory any of the administrative headquarters (the central administrative headquarter of the station) or the programme production headquarters (the headquarters of the administration that issues decisions related to programmes, production or broadcast) to the transmission or retransmission entities or to one of the offices of the transmission or retransmission entities where most of its employees work. If the two headquarters (the administrative and the programme production) are equal in numbers of persons, the state of origin shall be the state that has the central administrative headquarters on its territory.
3. The country that hosts within its territory the uplinking facilities for the satellite broadcast signals or the country that uses its facilities in the uplinking transmission for the satellite broadcasting, including media free zone cities."

²⁰ Article 5(3) of the Charter

which is provided from, and whose signal originates within, their own country, and which is targeted specifically at audiences within that country, is inappropriate. Examples include Ethiopia, Tanzania, Uganda, and Zanzibar. The dispensations adopted in these countries are working well. Most recently the Lesotho Communications Authority has invited MultiChoice to apply and pay for landing rights in respect of the DStv service being receivable in Lesotho, which application is in progress.²¹ Similarly, MultiChoice Namibia is currently regulated by a progressive dispensation adopted by the NCC, which realised that a distinction ought to be drawn –

84.1 between, on the one hand, a broadcasting service whose output signal originates in Namibia, and which is targeted specifically at the Namibian audience, and on the other hand, a service whose output signal originates outside Namibia, and which is intended to be received in more than one country (i.e. whose target is a multi-national audience), such as the DStv service; and

84.2 between a broadcasting service and a re-broadcasting service, such as the DTT and mobile re-broadcasting services provided by MultiChoice Namibia to subscribers in Namibia.

Mobile television broadcasting services

85 Mobile television broadcasting is a relatively new service, where the audiovisual content is transmitted to mobile phones or other portable devices ("mobile terminal devices"), rather than to traditional television sets ("mobile TV services").

86 Mobile TV services are unique and their regulation ought to differ substantially from traditional broadcasting services. This is submitted for the following reasons:

²¹ In contrast to s83(3) of the Act, the authorities in some of these countries have elected to issue a support services licence to the entity which provides support services for the multi-national satellite broadcasting services provided to subscribers in their country in circumstances when the service is a multi-national service which is provided from another country to numerous countries, including theirs

- 86.1 Mobile TV services are on the verge of being launched, or have recently been launched, in numerous countries throughout the world, including Namibia.
- 86.2 There are a number of commercial challenges to the take up of the service, including that of persuading people to purchase the equipment to be used to receive the service, which may be expensive and of a brand unknown to consumers.
- 86.3 The user will be in control of their access to the service and will only receive the service under the circumstances deemed appropriate by that user.
- 86.4 Given the nature of a mobile terminal device and the size of the screen, the time that the average person spends watching mobile TV is likely to be less than that spent watching traditional television.
- 86.5 The geographic coverage of the service is not as extensive as a national broadcasting service.
- 87 Such mobile services should be distinguished from fixed broadcasting services. We elaborate on the above characteristics and their impact on the regulation of mobile TV in **Annexure A**.

Signal distribution

Introductory comments re signal distribution

- 88 Draft Regulation 4(1)(d) of the draft Licence Categories Regulations has categorised “signal distribution” as a category of broadcasting.
- 89 Subject to our comments below, we support the differentiation between broadcasting itself and the distribution of broadcasting signals (signal distribution). We also support the proposed definition of “signal distribution” in draft Regulation 1 of the draft Licence Categories Regulations.

Signal distribution not a category of broadcasting

- 90 Whilst we support the creation of a licence category for signal distribution, it should not be a sub-category of broadcasting.
- 91 Generally, a broadcaster would be responsible for assembling and presenting programme services and packaging programmes into channels, alternatively packaging channels into bouquets, for provision to members of the public. Thus, the broadcaster determines (albeit to a lesser degree in the case of re-broadcasting services), the content of the broadcasting services and creates the final output signal that will be transmitted to viewers/listeners.
- 92 Signal distribution, on the other hand, is the process of transmitting broadcasting signals to the public or to subscribers to a broadcasting service who have the necessary receiving facilities.
- 93 Thus, a signal distributor would receive and transmit the output signal of a broadcasting service and distribute the signal for the broadcaster over a particular platform and in a particular format. This meaning is correctly captured in the definition of “signal distribution” in draft Regulation 1 of the draft Licence Categories Regulations.²²
- 94 We therefore propose that the Authority create a separate licence category for signal distribution services (distinct from “broadcasting”).

Definition of signal distribution

- 95 As we indicated above, we support the proposed definition of “signal distribution” in the draft Licence Categories Regulations. However, the definition of “ECNS” and the definition of “signal distribution” in draft Regulation 1 are somewhat contradictory, as the definition of “ECNS” excludes broadcasting, but “signal distribution” is defined to mean a particular type of

²² “Signal distribution is defined to mean –
“ the electronic communications network service where the output signal of a broadcasting service is taken from the point of origin, being the point where such signal is made available in its final content format, from where it is conveyed to any broadcast target area, by means of electronic communications”

ECNS. In order to resolve this, we propose that the definition of “signal distribution” be amended slightly to read as follows:

“Signal distribution” means the service whereby a person makes available an electronic communications network, whether by sale, lease or otherwise, for that person’s own use for the provision of a broadcasting service, to another person for that other person’s use in the provision of a broadcasting service, or for resale, where the output signal of a broadcasting service is taken from the point of origin, being the point where such signal is made available in its final content format, from where it is conveyed to any broadcast target area, by means of electronic communications.”

Sub-categories of signal distribution services

96 We support draft Regulation 4(2) of the draft Licence Categories Regulations, which gives broadcasting licensees the option whether to self-provide signal distribution for their own broadcasting services or to contract with a signal distribution licensee therefore.²³

97 We suggest that the Authority make sub-categories of “signal distribution” to differentiate between different types of signal distributors, namely a common carrier²⁴, selective and preferential (or “commercial”) signal distributors, and self-providers.

Co-assignment of frequency spectrum to broadcasting licensee and signal distribution licensee

98 We also support the proposal that each broadcasting service licensee and telecommunications service licensee, and each person providing a telecommunications service which may be provided without a licence, must

²³ Draft Regulation 4(2) of the draft Licence Categories Regulations provides:

“In respect of the commercial, community, and public broadcasting service categories, each broadcasting service licensee may provide its own signal distribution service or may contract with a signal distribution service licensee for such service”

²⁴ “Common carrier” could be defined to mean “a signal distribution licensee who is obliged to provide broadcasting signal distribution on a non-discriminatory and non-exclusive basis”

obtain from the Authority any required radio frequency spectrum licences in addition to its service licence.²⁵

99 In the broadcasting environment the frequency spectrum should be co-assigned to the broadcasting service licensee and its chosen signal distributor.

Concluding comments re licence categories

100 In the light of our comments above, we suggest that the draft Licence Categories Regulations contain the following categories.

101 First, the draft Licence Categories Regulations should differentiate between broadcasting and signal distribution services.

102 Second, broadcasting should be divided into public, community, commercial free-to-air and commercial subscription broadcasting services. Taking into account the provisions of s84(2) of the Act, broadcasting should be sub-divided into the following further categories:

102.1 broadcasting and re-broadcasting services;

102.2 the transmission method (e.g. satellite, cable, terrestrial, or platform neutral);

102.3 single-channel and multi-channel services;

102.4 domestic and multi-national services;

102.5 the coverage area of the broadcasting service (e.g. national, regional, metropolitan; and

102.6 fixed and mobile services;

²⁵ Draft Reg. 4(3) and 5(3) of the draft Licence Categories Regulations and Reg. 6(4) of the draft Licensing Procedures Regulations

102.7 services transmitted from outside Namibia if such broadcast is intended to be received only by persons who subscribe to the service in question or provide any other consideration to receive that service, as contemplated in s83(2) of the Act; and

102.8 a deemed operator as contemplated in s83(3) of the Act.

103 Third, signal distribution should be divided into common carrier²⁶, selective and preferential (or “commercial”) signal distributors, and self-providers.

DRAFT LICENSING PROCEDURES REGULATIONS

Licence exempt telecommunications services

104 Any person intending to provide a telecommunications service that may be provided without a licence must register, in writing, with the Authority, at least 14 days prior to commencing providing the service. The registration must set out the name and contact details of the person, and identify the type of telecommunications service that will be provided without a licence.²⁷

105 The purpose of registration is not apparent. Generally, the rationale for a licence exemption is to remove any unnecessary regulation where there is no rationale therefore. The requirement to register exempt services is unusual and does not accord with international best practice. Registration defeats the purpose of an exemption and leads to unnecessary administrative burden and strain on the time and resources of both the Authority and the exempt party.

106 The requirement for the registration of an exempt service should therefore be deleted.

²⁶ "Common carrier" could be defined to mean "a signal distribution licensee who is obliged to provide broadcasting signal distribution on a non-discriminatory and non-exclusive basis"

²⁷ Draft Reg. 5 of the Licensing Procedures Regulations

Amendment and modification of licences

107 Draft Regulation 9 of the Licensing Procedure Regulations deals with the "amendment and modification" of licences. Draft Regulation 13 deals with "modification". The difference between "amendment" and "modification" is not clear. These two sections should be consolidated and duplication removed.

Application procedures

108 Draft Regulation 12 of the Licensing Procedure Regulations deals with application procedures. Draft Regulation 12(3) provides that the Authority may, if it considers it appropriate, also provide an opportunity for the submission of applicant responses to comments made by third parties on an application made by the applicant. This provision fails to provide the applicant with sufficient opportunity to respond – the applicant should have a right of reply, and sufficient time within which to do so.

109 Similarly draft Regulation 12(6) of the Licensing Procedure Regulations, which provides that the Authority may consider written submissions not timeously filed if, in its opinion, it is practicable to do so, should be subject to the applicant's right of reply.

110 Those amendments are necessary to respect the applicant's right to fair administrative action.

DRAFT TRANSITIONAL PROCEDURES REGULATIONS

Pending licence applications

111 Any person who has a licence application pending before the NCC must submit, in writing, to the Authority within 30 days from the publication of the regulations in their final form²⁸ the information and documentation set out in

²⁸ Or 30 days after the coming into operation of the relevant provisions of the Act, whichever is the later

draft Regulation 6 of the Transitional Procedures Regulations in the form made available by the Authority. The form is not attached to the draft Regulations.

112 In essence, draft Regulation 6 of the Transitional Procedures Regulations requires the applicant to re-submit the pending application, together with its name and contact details, and an amendment to the application including as regards its ownership details, “as contemplated in s135(11)” of the Act.²⁹

113 The Authority must deal with all applications for licences pending before the NCC upon the commencement of the Act as if that application had been made under the Act. s135(10) of the Act provides:

“All applications for licences pending before the Namibian Communications Commission established by section 2 of the Namibian Communications Commission Act, 1992 (Act No. 4 of 1992), on the date on which this Act comes into operation must be dealt with by the Authority as if that application have been made under this Act.”

114 Furthermore, s135(11) of the Act provides:

“The Authority must allow applicants to amend their applications to comply with the provisions of this Act”

115 Accordingly, the Act contemplates that persons with applications pending before the authority must be permitted, but not required, to amend their applications to comply with the Act.

116 Draft Regulation 6 of the Transitional Procedures Regulations is accordingly unnecessary and inappropriate, and will merely serve to increase the administrative burden on the Authority and applicants. It should therefore be deleted.

²⁹ Draft Reg. 6(1) of the draft Transitional Procedures Regulations

Existing spectrum licensees

- 117 Any person who holds a licence, certificate or authority contemplated in s101(11) of the Act (“existing spectrum licensees”) must submit, in writing, to the Authority within 30 days from the publication of the regulations in their final form,³⁰ the information and documentation set out in draft Regulation 7 in the form made available by the Authority. The form is not attached to the draft Regulations.
- 118 Amongst other things, draft Regulation 7 proposes that the licensee must submit their name and contact details, full ownership interests (including foreign ownership), a complete and accurate list of licences, certificates and authorities held in respect of spectrum use, a list of radio frequencies or groups of radio frequencies licensed, and a concise explanation of the services provided using this spectrum (including a description and diagram of any network operated, constructed or used), an indication whether and to what extent the spectrum is currently being used, an indication whether and to what extent spectrum use fees have been paid and proof thereof, and a copy of the licences concerned.³¹
- 119 If a licensee does not provide all of the information required by the draft Regulations within the time provided, the Authority may revoke the licensee's licence and no new licence will be issued and, in the case of spectrum licences, spectrum may be reallocated.³²
- 120 However, s101(11) of the Act provides:

“A licence, certificate or authority issued in terms of section 7(1) (a), (c) or (d) of the Radio Act, 1952 (Act No. 3 of 1952), and which was still valid immediately before the date of commencement of this Act, is deemed to have been issued in terms of this section.”

³⁰ Or of the commencement of the Act whichever is the later

³¹ Draft Reg. 7(1) of the draft Transitional Procedures Regulations

³² Draft Reg. 9(7)(a) of the draft Transitional Procedures Regulations

121 Draft Regulation 7 of the draft Transitional Procedures Regulations is accordingly unnecessary and inappropriate, and will merely serve to increase the administrative burden on the Authority and existing spectrum licensees. It should therefore be deleted.

Existing service licensees

122 Existing telecommunications and broadcasting service licensees, and holders of a licence to operate, construct or use an electronic communications network, must submit, in writing, to the Authority within 30 days from the publication of the regulations in their final form³³ the information and documentation set out in Regulation 4 of the draft Transitional Procedures Regulations in the form made available by the Authority.

123 The information and documentation required to be submitted is akin to an entirely new application for a new service licence.

124 Existing telecommunications and broadcasting service licensees such as MultiChoice Namibia have entered into numerous contracts, and made substantial investments, running into millions of Namibian Dollars, to establish and provide their services. At the time of making these investments, they operated in terms of the law applicable at the time and in accordance with licences duly granted and issued by the NCC. They acted on the assumption that they would be entitled to exercise the rights acquired in terms of such contracts and investments. To the extent that the proposed licence review interferes with and seeks to take away these vested rights, the proposed licence review would be inconsistent with the property provisions in s16 of the Constitution of the Republic of Namibia.

125 In *Yankee Network Inc v FCC*³⁴ the DC Circuit court observed that:

“[T]he granting of a licence by the [Federal Communications] Commission creates a highly valuable property right, which, while limited in character,

³³ Or 30 days after the relevant provisions of the Act came into operation, whichever is the later

³⁴ 107 F. 2d 212 (D.C.Cir. 1939)

nevertheless provides the basis upon which large investments of capital are made and large commercial enterprises are conducted.”

126 This theme was repeated in *L.B. Wilson Inc v FCC*³⁵, in which the DC Circuit Court noted the rights of licensees:

“That private as well as public interests are recognised by the Act is not to be doubted ... [T]he right under a licence for a definite term to conduct a broadcasting business requiring, as it does, substantial investment is more than a mere privilege or gratuity. A broadcasting licence is a thing of value to the person to whom it is issued ... [P]rovisions of the Communications Act itself ... recognise that a broadcasting licence confers a private right, although a limited or defeasible one.”

127 A leading American constitutional academic, Lawrence Tribe, wrote in relation to property:

“[A] government must respect 'vested rights' in property and contract - that certain settled expectations of a focussed and crystallised sort should be secure against governmental disruption, at least without appropriate compensation.”^{36 37}

128 When existing licensees invested in their licensed services they operated in terms of the law applicable at the time. They acted on the assumption that they would be entitled to continue to enjoy the returns of their investments. The Act must be presumed not to interfere with or take away these vested rights.

129 The Authority is thus required to protect vested rights and legitimate economic interests and expectations.

³⁵ 170 F.2d 793 (D.C.Cir. 1948)

³⁶ Lawrence Tribe, *American Constitutional Law*, (1988), pg 587

³⁷ Various Australian courts have also held that a broadcasting licence constitutes property - see, for example, *Australian Capital Television (Pty) Ltd and others v The Commonwealth of Australia and Another* ((1992) 177 CLR 106 F.C. 92/033), *Austereo Ltd v Trade Practices Commission* ((1993) 114 ALR 636) and *Poulos Bros (Wholesale) (Pty) Ltd v William George Abbott*, (*Judgment of Tasmanian Supreme Court, Judgement No. A88/1994*)

130 It is therefore inappropriate to require existing service licensees to, in effect, apply afresh for a service licence akin to applicants for new licences. In addition to the concerns raised above, to do so would cause serious disruption in the transition period, and conflict with some of the fundamental objects of the Act, namely to stimulate commercial development, encourage private investment, and support the social and economic growth of Namibia.³⁸

131 Accordingly, all existing service licences should be converted on no less favourable terms, and without prejudice to the rights, interests and expectations of the licensees concerned.

Miscellaneous administrative law issues

Right of reply

132 Members of the public may submit written representations to the Authority on the list of licences issued under previous licensing dispensations together with an indication as to which licences will be issued to the licensees concerned in terms of the Act which must be gazetted by the Authority.³⁹ We support that provision. However, the draft Regulations do not provide for a right of reply to any written representations submitted to the Authority.

133 The Authority may request further written submissions, for example for purposes of further information or clarification, which must be provided to the Authority in the manner set out by the Authority.⁴⁰ However, that section also does not provide for a right of reply.

134 Members of the public may submit written representations on an application to the Authority in terms of draft Regulation 10 of the draft Transitional Procedures

³⁸ s2 of the Act

³⁹ Draft Reg. 9(3) of the draft Transitional Procedures Regulations

⁴⁰ Draft Reg. 9(5) of the draft Transitional Procedures Regulations

Regulations.⁴¹ However, no provision is made for a right of reply by the applicant concerned here either.

135 Draft Regulations 9(3), 9(5) and 10 should be amended to provide for a right of reply.

Extensions and condonation for late filing

136 In terms of Draft Reg. 9(7) of the draft Transitional Procedures Regulations:

136.1 If a licensee does not provide all of the information required by the regulations within the time provided, the Authority may revoke the licensee's licence and no new licence will be issued and, in the case of spectrum licences, spectrum may be reallocated.⁴²

136.2 The Authority will not issue new licences to existing licensees until–

136.2.1 all fees due and payable in respect of the licences are paid;
and

136.2.2 all licences issued under previous licensing dispensations are returned to the Authority.⁴³

137 Similarly, if an applicant does not provide all of the information required by the transitional licence applications procedures within the time provided, the Authority will not grant and issue the licence.⁴⁴

138 These consequences are very harsh. Moreover, the draft regulations do not give the Authority the discretion to extend the period in which the relevant information must be submitted to it and/or by when fees must be paid, licences returned, etc, or to condone lateness on good cause shown.

⁴¹ Draft Reg. 10(2) of the draft Transitional Procedures Regulations

⁴² Draft Reg. 9(7)(a) of the draft Transitional Procedures Regulations

⁴³ Draft Reg. 9(7)(b) of the draft Transitional Procedures Regulations

⁴⁴ Draft Reg. 10(9)(a) of the draft Transitional Procedures Regulations

139 The draft Regulations should be amended to allow for this. If the draft Regulations are not amended to provide for this, the Authority, which is a creature of statute, will be unable to grant extensions and/or condonation, with unduly harsh consequences. The Authority should not tie its hands in this manner nor penalise operators so severely.

Publication of Authority's decisions

140 All decisions made in terms of the regulations and the relevant provisions of the Act will be communicated to the applicants in writing, and may be gazetted.⁴⁵ All decisions of the Authority should be gazetted.

141 Moreover, there is no requirement in the draft Regulations for the Authority to give the applicant reasons for its decision. The Authority ought to be required to give the applicant reasons for its decision, at least where an application has been refused, or granted only in part, and to publish those reasons in the gazette.

142 Consequently, and as has been the practice, we recommend that all decisions and the reasons thereof of the Authority should be gazetted.

DRAFT CONSUMER COMPLAINTS REGULATIONS

Introductory comments re draft Consumer Complaints Regulations

143 MultiChoice Namibia believes that it is in the interests of all businesses to implement and adhere to sound consumer policies and practices.

144 As a provider of subscriber management services and subscription broadcasting services, MultiChoice Namibia is driven and constrained by consumer demands and preferences. MultiChoice Namibia believes that consumers will gravitate towards businesses with good consumer practices,

⁴⁵ Draft Reg. 15(1) of the draft Transitional Procedures Regulations

including good complaints handling procedures. MultiChoice Namibia accordingly regards consumer issues as a key business imperative.

145 However, MultiChoice Namibia has a number of concerns about the draft Consumer Complaints Regulations which we elaborate on below.

Regulations are wide and vague

146 "Complaint" is defined too widely.⁴⁶ This definition is problematic in that, amongst other things –

146.1 it includes vague and imprecise concepts such as "criticisms," "grievances" and "disagreements";

146.2 "complaint" is not limited to complaints lodged with the Authority;

146.3 it blurs the distinction between complaints per se, investigations by the Authority, and the resolution of disputes by the Authority. For example, the regulations apply to "investigations" contemplated in terms of s122 to 127 of the Act,⁴⁷ and "mediation" contemplated in s132 of the Act;⁴⁸

146.4 it extends to non-regulated activities "e.g. billing,⁴⁹ customer services and customer treatment⁵⁰; and

⁴⁶ The term is defined to mean -

- "Any complaint, dispute, grievance, criticism, objection or disagreement -
- (a) alleging non-compliance or breach of a licence;
 - (b) alleging non-compliance or breach of a contract;
 - (c) alleging non-compliance or breach of the Act or regulations; and
 - (d) shall include, but is not limited to, complaints involving the following -
 - (i) billing;
 - (ii) charges and refunds;
 - (iii) service delivery and product delivery;
 - (iv) confidential information;
 - (v) customer services and customer treatment; and
 - (vi) service interruptions and dropped calls"

⁴⁷ Draft Reg. 3(1)(d) of the draft Consumer Complaints Regulations

⁴⁸ Draft Reg. 3(1)(c) of the draft Consumer Complaints Regulations

⁴⁹ Draft Reg. 1(d)(i) of the draft Consumer Complaints Regulations

⁵⁰ Draft Reg. 1(d)(iv) of the draft Consumer Complaints Regulations

146.5 it opens the door to frivolous complaints and the abuse of process.

Time frames

147 The draft Regulations contain various time frames, including the following:

147.1 A complainant may lodge a complaint with the Authority if the complainant has lodged the substance of the complaint with the respondent and after 14 days the respondent is not adequately resolved the complaint.⁵¹

147.2 After a complaint has been submitted to the Authority, the respondent has seven days within which to submit its response to the complaint.⁵²

147.3 If the Authority decides to conduct oral hearings, the Authority must give the relevant parties at least seven days prior notice of the hearings.⁵³

148 These time frames are insufficient to enable the parties concerned to address a complaint fully. We propose that the draft Regulations be amended to provide for –

148.1 a minimum of 30 business days before a complaint may be lodged with the Authority as contemplated in draft Regulation 4(1)(a) of the draft Consumer Complaints Regulations;

148.2 a period of 21 business days within which the Respond may submit its response to the complaint as contemplated in draft Regulation 5(2) of the draft Consumer Complaints Regulations; and

148.3 a minimum of 21 business days prior written notice of oral hearings as contemplated in draft Regulation 6(2) of the draft Consumer Complaints Regulations.

⁵¹ Draft Reg. 4(1)(a) of the draft Consumer Complaints Regulations

⁵² Draft Reg. 5(2) of the draft Consumer Complaints Regulations

⁵³ Draft Reg. 6(2) of the draft Consumer Complaints Regulations

Record keeping requirements

- 149 Licensees and persons registered with the Authority to provide services without a licence "must maintain records of all Complaints and provide bi-annual reports to the Authority in the format set out by the Authority from time to time".⁵⁴
- 150 It is not clear which complaints must be recorded. For example, it is not clear whether it refers to complaints lodged with the Authority or to all complaints received by the licensee/exempt person. It is also not clear what information must be recorded or for how long the records must be retained.
- 151 These vague requirements will unduly increase the administrative burden on the Authority, licensees and exempt persons, and strain the time, and financial and human resources of both the Authority and licensees.
- 152 Nor is it apparent why exempt persons should be required to comply with record keeping requirements. Given that exempt persons are not regulated entities, they should not be subject to record keeping requirements.
- 153 To address this issue we propose that –
- 153.1 licensees should be required to maintain a log of all complaints (properly defined) regarding its licensed service which were lodged with the Authority in accordance with the Consumer Complaints Regulations;
 - 153.2 the log should indicate the date on which the complaint was lodged with the Authority, the nature of the complaint, whether the complaint has been addressed, and, if so, when;
 - 153.3 licensees should provide the Authority with a copy of the log once a year (rather than bi-annually), on a specified date (and each anniversary thereof), which should be not earlier than one year after

⁵⁴ Draft Reg. 4(3) of the draft Consumer Complaints Regulations

the commencement date of the draft Consumer Complaints Regulations; and

153.4 licensees should keep the log for six months after submitting it to the Authority.

Representation at oral hearings

154 The draft Regulations should specify that a party is allowed legal or other representation at any oral hearings conducted by the Authority.

GENERAL

155 In numerous instances the draft Regulations refer to documents or information which must be submitted to the Authority "in the form made available by the Authority".⁵⁵ All of these forms should be published for comment.

156 On numerous instances the draft Regulations refer to application fees to be paid by the Authority.⁵⁶ All of the fees should be published for comment.

157 On numerous occasions the draft Regulations provide that the Authority may request further information or documentation which must be provided to the Authority in the manner set out by the Authority.⁵⁷ Such provisions should be narrowly tailored to ensure that the information/documentation is reasonably required for purposes of the matter being considered by the Authority. It should also provide for adequate due process, including to ensure that the licensee concerned has sufficient time to respond to the Authority's request.

⁵⁵ See for example draft Regs. 4(1), 5(1), 6(1), 7(1), 7(2)(f), 8(1), 9(2), 10(1) and 11(2) of the draft Licensing Procedures Regulations, and Regs. 4(1), 5(1), 5(2), 5(4), 6(1), 7(1), and 8(1) of the draft Transitional Procedures Regulations

⁵⁶ See for example draft Regs. 11(3)(e) of the draft Licensing Procedures Regulations, 4(2)(g), 7(1)(g) and 9(7)(b)(i) of the draft Transitional Procedures Regulations

⁵⁷ See for example draft Regs. 4(5), 6(5), 7(4), 8(6), 9(6), 10(4) and 11(4) of the draft Licensing Procedures Regulations, Regs. 4(3) and 7(3) of the draft Interconnection and Tariff Regulations, and Regs. 4(2), 5(5), 6(2), 7(2) and 8(4) the draft Transitional Procedures Regulations

158 The various sets of draft Regulations deal with the manner of submission of documents to the Authority. All of the draft Regulations except for the draft Licence Categories Regulations provide for the submission of documents to the Authority by e-mail or by fax. E-mail and fax should be included in the draft Licence Categories Regulations as well.

CONCLUSION

159 MultiChoice Namibia thanks the Authority, once again, for the opportunity to make representations on the draft Regulations. MultiChoice Namibia reiterates its support for this process and we hope that our input will be viewed as a constructive contribution to the finalisation of the draft Regulations.

ANNEXURE A: LICENSING AND REGULATION OF MOBILE TELEVISION BROADCASTING SERVICES

Mobile TV services are still in developmental stages

- 1 Mobile television broadcasting services (“mobile TV services”) are still in developmental stages and the launch of such services may therefore be a challenge to prospective mobile TV operators. That has certainly been our experience.
- 2 There are a number of factors which may be detrimental to the success of mobile TV, including the -
 - 2.1 costs associated with rolling out a network for mobile TV;
 - 2.2 cost of content;
 - 2.3 availability of enabled mobile terminal devices;
 - 2.4 costs of setting up dedicated advertising and marketing campaigns;
 - 2.5 difficulties in persuading potential business partners to invest in new (often untested) technologies and business models;
 - 2.6 difficulties in persuading consumers to invest in mobile terminal devices; and
 - 2.7 uncertainty of the demand for the service and, therefore, of the market.
- 3 It is still not certain what a viable business model for mobile TV is. Operators can implement a variety of payment options with respect to mobile TV services, each with its own benefits and drawbacks. An operator may choose a pay-per-view, subscription, free-to-air, hybrid or other payment option. Operators can offer a variety of different subscription bundles and prices so as to target different demographic groups.
- 4 Accordingly, prospective mobile TV operators will have to finance the deployment of a new network, without having the certainty of a viable business

model, for an untested market. Such an operator would only be willing to invest in mobile TV if they were confident that the regulatory framework provides sufficient flexibility to enable the operator to, in the long run, recoup their costs and make a profit from the service.

- 5 The regulatory framework for mobile TV must, accordingly, be flexible enough to enable an operator to find a viable business model, and appropriate to allow innovation and attract investment in the mobile TV sector.

Commercial challenges to take up of mobile TV

- 6 Potential mobile TV users need to be encouraged to invest in mobile terminal devices that are capable of receiving mobile TV. This may not be an easy task because -
 - 6.1 users have not yet developed a mobile TV viewing habit or culture, given the novelty of such services;
 - 6.2 the mobile terminal devices may be of a brand unknown to prospective users;
 - 6.3 mobile TV capability increases the costs of mobile terminal devices, and manufacturers are reluctant to invest without the guarantee of returns; and
 - 6.4 given the costs involved in producing the complex mobile terminal devices, the devices are likely to be too expensive for some people, especially during the early stages before the devices attain critical mass.
- 7 The biggest driver of consumer take up of a broadcasting service is the content available on the service. Accordingly, the regulatory framework for mobile TV should not hamper the service provider's ability to meet user preferences, including giving mobile TV service providers the flexibility to provide content that is most appealing to prospective customers.

Mobile TV user has ultimate control

- 8 The nature of mobile TV is such that it provides the user with the ultimate control over the services which that user receives. In particular, the user would elect to receive the service and would have control over -
 - 8.1 what content is viewed on their device;
 - 8.2 where and when mobile TV is viewed on their device; and
 - 8.3 who watches mobile TV on their device.

- 9 The user's level of control is guaranteed by various factors, including the following:
 - 9.1 After purchasing the mobile terminal device, the user must first activate the service before receiving it. If the service is a subscription service, the subscriber will have to pay for the service before being able to receive it.
 - 9.2 The user will select from the mobile TV content offering to elect what content to view.
 - 9.3 Given the small size of the screen of a mobile terminal device and the decreased visual and sound impact of mobile TV, the number of viewers is likely to be limited to one or two people.
 - 9.4 The owners of mobile terminal devices are able to secure their devices so that other people/their children cannot use them, e.g. by using PIN codes and passwords. In this case, the service would only be accessible to a person who has the PIN code or password for the mobile terminal device.

- 10 There is, accordingly, very little chance that the mobile TV viewer will be exposed to content that is unwanted or considered offensive by the viewer. This should be borne in mind when the regulation of mobile TV is formulated.

Nature of device further limits manner in which service is received and influence of service

- 11 The services and viewing experience of mobile TV differ in a variety of ways from traditional television viewing, most notably in the size of the viewing screen. Very few users are likely to plan their day around pre-scheduled mobile TV episodes. First of all, they'll be tuning into mobile video at odd times (waiting for a train, riding in a taxi, etc.) and they may not have a lot of time. (Mobile TV is sometimes referred to as "snack TV"). So users are less likely to spend time and money "channel surfing" on their phones or staying with a programme they don't really want to watch.
- 12 Mobile TV may be distinguished from traditional television by virtue of screen size, image and sound quality, viewing comfort, the ability to watch in a group, mobility of viewing, battery/power capacity, and the ability to personalise the viewing experience.
- 13 Mobile TV is likely to be used –
 - 13.1 on the move;
 - 13.2 for short periods of time (average time person will spend watching mobile TV is far less than conventional television); and
 - 13.3 in specific areas (high population urban areas).
- 14 International research to date indicates that the average time a person will watch a mobile subscription broadcasting service is between 5 and 40 minutes a day. This is significantly less than the average time a person will watch a traditional television broadcasting service on a conventional screen. Using a conventional television screen at home for watching television will always be preferred when possible, but the location independence of mobile TV will provide users with more added value and convenience.
- 15 In addition, mobile TV services are usually limited to metropolitan areas and are therefore not likely to have a geographic coverage area as wide as that of traditional television.

- 16 Due to the above –
- 16.1 the impact of mobile TV on traditional television broadcasting services is likely to be minimal;
 - 16.2 the influence of mobile TV services is likely to be limited – they are primarily entertainment services, rather than important providers of public interest programming; and
 - 16.3 mobile TV is likely to supplement, rather than replace, traditional television broadcasting services.
- 17 For these reasons, the regulation of mobile TV services ought to be light touch and flexible enough to encourage the growth and take up of these services.

Mobile TV regulatory framework should be appropriately tailored

- 18 The development of mobile TV challenges traditional perceptions and legal regulation. However, it offers enormous opportunities to provide consumers with new platforms to receive multi-media content, and to control their viewing experience.
- 19 Given the nature of this new and exciting service and in the light of international experience, the regulation of mobile broadcasting services should be light touch and appropriately tailored for these services. It should allow innovation, promote growth and attract investment. We recommend a flexible and liberal regulatory framework which endorses technology neutrality principles, which allows a market-led (consumer-driven) approach, and which attracts substantial investments in the broadcasting sector.
- 20 We further recommend an approach to the regulation of mobile TV services which will contribute to the promotion and facilitation of convergence, encourage research and development, and promote the development of the Namibian broadcasting industry as a whole.
- 21 It is imperative to bear in mind that mobile TV services will be consumer-led and demand driven. This will inherently constrain mobile TV service providers

to meet user preferences. As a result, mobile TV providers are best placed to determine the nature and content of their services. Self regulation is therefore particularly desirable and appropriate in the mobile TV environment. Whilst we are not suggesting that mobile TV services should not be licensed, the regulation of mobile TV services should be minimal, and enabling rather than restrictive, including enabling mobile TV licensees to self-regulate their services in line with user preferences. Industry codes of conduct may also be appropriate in certain circumstances.