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CONTENTS • INHOUD

No.

Page
No. Gazette
No.**GOVERNMENT NOTICE****Independent Communications Authority of South Africa***Government Notice*

1066	Electronic Communications Act (36/2005): Application for individual electronic communications network services (I-ECNS) licence for the provisioning of broadcasting services	3	33774
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GOVERNMENT NOTICE

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

No. 1066

16 November 2010



Pinmill Farm, 164 Katherine Street, Sandton
Private Bag X10002, Sandton, 2146

**APPLICATION FOR INDIVIDUAL ELECTRONIC COMMUNICATIONS NETWORK
SERVICES (I-ECNS) LICENCE FOR THE PROVISIONING OF BROADCASTING
SERVICES**

REASONS FOR DECISION

NOVEMBER 2010

A handwritten signature in black ink, appearing to read 'S. Mncube', written over a horizontal line.

**DR STEPHEN MNCUBE
CHAIRPERSON
ICASA**

SS Mncube (Chairperson), NA Batyi, WH Currie, JM Lebooa, TLV Makhakhe, N Ndhlovu, FK Sibanda,

MM Sockwa, WF Stucke (Councillors), TTC Dlamini (CEO)

INDEPENDENT COMMUNICATIONS AUTHORITY
OF SOUTH AFRICA

**APPLICATIONS FOR INDIVIDUAL ELECTRONIC COMMUNICATIONS
NETWORK SERVICE LICENCES FOR SELF PROVISIONING BY
BROADCASTING SERVICE LICENSEES**

REASONS FOR DECISION

NOVEMBER 2010



1. INTRODUCTION

- 1.1. On 9 January 2009 the Minister of Communications, Dr Ivy Matsepe Cassaburi (now deceased) ("the Minister") issued a policy direction¹ on Individual Electronic Communications Network Service Licences ("I-ECNS licences") ("the policy direction").
- 1.2. In terms of Section 3(2) of the Electronic Communications Act, No.36 of 2005 ("ECA") the Minister may, subject to subsections (3) and (5), issue to the Independent Communication Authority of South Africa ("the Authority") policy directions consistent with the objects of the ECA and of the related legislation in relation to, amongst others, the determination of priorities for the development of electronic communications networks and electronic communications service or any other services contemplated in chapter 3 of the ECA².
- 1.3. In terms of Section 3(1) of the ECA the Minister may make policies on matters of national policy applicable to the ICT Sector, consistent with the objects of the ECA and of the related legislation in relation to, amongst others:
 - 1.3.1. the radio frequency spectrum;
 - 1.3.2. universal service access policy;
 - 1.3.3. any other policy which may be necessary for the application of the ECA or the related legislation³; and

¹ Government Gazette no. 31773, Notice No.12 of 9 January 2009

² Section 3(2)(b), ECA

³ Section 3(1)(l), of the ECA

115

1.3.4. The consideration of any matter within the Authority's jurisdiction reasonably placed before the Authority by the Minister for urgent consideration⁴.

1.4. The issue of the policy direction was preceded by a notice published by the Minister in the Government Gazette on 7 July 2008 in which the Minister had invited comments on the proposed policy direction in compliance with the provisions of Section 3(2) read with 3(5) of the ECA.

2. THE POLICY DIRECTION

2.1. In terms of the policy direction, the Authority is directed to accept and consider applications for I-ECNS licenses, prioritizing, amongst others, the licensees intending to use satellite infrastructure for the provisioning of broadcasting services; and applicants whose primary target is the poor.

2.2. The policy direction further directed the Authority to ensure that, in the licensing process aforesaid, a fair balance should be maintained between the public and private allocation of radio frequency spectrum which was considered a scarce public resource⁵.

2.3. The policy direction further directed the Authority to pay special attention, when considering licence applications to the needs of the poorest sections of the South African population⁶.

2.4. In this regard, the policy direction stipulated that appropriate enabling as well as restrictive licence conditions for any applicants

⁴ Section 3(2)(c), ECA

⁵ Paragraph 4, policy direction

⁶ Paragraph 5, policy direction

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that may be targeting the poorest as their primary target customers, should be innovatively considered so as to ensure that the objective of prioritizing and empowering the poor in granting I-ECNS licensees is met; and that the use of the radio frequency spectrum for that purpose is achieved without allowing those considerations to be misused by the need for the purposes of unfairly benefiting therefrom, without making a qualitative difference in the serving the poor⁷.

2.5. In terms of the policy direction applicants for I-ECNS licensees who do not qualify for consideration in terms of paragraph 6 of the policy direction or who are not successful during the licensing period under the policy direction may only be considered under a new process after the next policy direction is issued to the Authority as part of the implementation of government's policy of managed liberalisation⁸.

2.6. The policy direction enjoined the Authority to facilitate the licensing of I-ECNS licences to qualifying applicants as a matter of urgency⁹.

3. THE INVITATION TO APPLY

3.1. On 26 March 2009 and pursuant to the policy direction, the Authority published an Invitation to Apply ("ITA") for I-ECNS licences for the provisioning of broadcasting services in terms of Section 9(1) and (2), read with Section 63(1) of the ECA¹⁰.

3.2. The ITA was constrained to apply only to:

⁷ Paragraph 5, policy direction

⁸ Paragraph 7, policy direction

⁹ Paragraph 8, policy direction

¹⁰ Government Gazette no. 32066, Notice 329 of 2009

- 3.2.1. those licensees that were considered for licence conversion in accordance with Section 93 of the ECA;
 - 3.2.2. licensees who had a temporary permit, authority or licence or were granted a private broadcasting licence by the Authority for broadcasting services and wished to self provide their signal distribution services using satellite technology; and
 - 3.2.3. Any special case as may be exceptionally presented to the Minister by the Authority between the policy direction and the next one to be issued by the Minister in terms of Section 5(6) of the ECA.
- 3.3. The applications were required to comply, amongst others, with the following:
- 3.3.1. the applications must include a percentage of equity ownership held by persons from historically disadvantaged groups that is not less than 30% (thirty percent);¹¹
 - 3.3.2. the application must be accompanied by non refundable application fee of R50 000.00¹²;
 - 3.3.3. All applications submitted must be in the format as provided in annexure "A" of the ITA¹³.

¹¹ Paragraph 4(d), ITA

¹² Paragraph 4(l), ITA

¹³ Paragraph 4(k), ITA

- 3.4. Failure to comply with any of the above requirements would render the application liable to disqualification¹⁴.
- 3.5. The applications were to be submitted to the Authority by 21 May 2009.

4. THE APPLICATIONS

- 4.1. On 13 July 2009 the Authority¹⁵ published a notice, setting out details of the applications received from the applicants; viz:
 - 4.1.1. Walking on Waters (WoW);
 - 4.1.2. e.tv;
 - 4.1.3. On Digital Media (ODM);
 - 4.1.4. Telkom Media; and
 - 4.1.5. World Space.
- 4.2. In terms of the notice aforesaid the Authority invited interested persons to submit written responses to the applications by 31 July 2009.
- 4.3. The Authority also made known its intention to hold public hearings on the applications on 20 August 2009.
- 4.4. Despite the notice and invitation aforesaid, no written responses to the applications were received by the 31 of July 2009.

¹⁴ Paragraph 4 (o), ITA

¹⁵ Government Gazette no. 977 of 2009

4.5. Accordingly, on 20 August 2009 the Authority published a notice in the Government Gazette¹⁶ notifying interested parties that the public hearings had been cancelled.

4.6. We now proceed herein below with an analysis of each of the applications.

5. ANALYSIS OF APPLICATIONS

5.1. e.tv (Pty) Ltd ("e.tv")

5.1.1. Application Fee

5.1.1.1. E.tv paid the applicable application fee upon submission of its application.

5.1.2. Compliance with Section 5(8)(b) of the ECA

5.1.2.1. Section 5(8) (b) of the ECA provides that when applying for a licence an applicant or registrant must demonstrate that the applicant or registrant or the person to be awarded the licence, in the case of juristic person, is, or will be, registered under the laws of the Republic and has or will have its principal place of business located within the Republic.

5.1.2.2. e.tv (Pty) Ltd is a company registered and incorporated in accordance with the laws of the Republic of South Africa with registration

¹⁶ Government Gazette no. 32413 of 20 August 2009

number 1997/012816/0, with its registered address within the Republic at 5 Summit Road, Dunkeld West, Johannesburg, 2096 and thus complies with the provisions of section 5(8)(b) of the ECA.

5.1.3. Authority of Signatory

5.1.3.1. On 19 May 2009, e.tv passed a resolution authorizing Mr Marcel Golding to sign any documents and/or to represent the company at the hearings the Authority may hold in relation to the application and/or to do all things which may be necessary in relation to the application.

5.1.3.2. Accordingly, e.tv complies with this requirement.

5.1.4. Equity Ownership by Historically Disadvantaged Groups

5.1.4.1. E.tv represents that its shareholder is Sabido Investments (Pty) Ltd ("Sabido"), which is owned 100% by persons from historically disadvantaged groups.

5.1.4.2. Sabido's controlling shareholder is stated to be Hosken Consolidated Investments Limited, a company listed on the JSE Limited. According to a BEE verification certificate issued by Empower Logic. E.tv has a 35.27% black

ownership, 18, 56% of which is held by black women. Accordingly, e.tv complies with this requirement as the equity ownership by historically disadvantaged groups in e.tv is above the 30% stipulated in the ITA.

5.1.5. Strategy And Commitment To Meet Universal Access Goals

- 5.1.5.1. E.tv submitted a proposed strategy and commitment on how they will serve and empower the poor, to meet universal access goals and how they will ensure that the poorest are their primary target consumers.
- 5.1.5.2. E.tv submits that whilst it has used all efforts to ensure that it reaches as far and as wide an audience as possible, signal distribution costs has prevented the provision of universal services and access to all. e.tv, however, contends that it broadcasts to more than 80% of the South African population.
- 5.1.5.3. e.tv submits further that the ability to self provide its transmission via satellite will enable it to achieve greater control of a very important cost component in its service delivery structures and this, it is contended, will allow for a review of e.tv's current coverage areas with a view to providing coverage in areas where there is currently no or poor coverage.

E.tv does not propose to make any firm commitments in that regard, but submits that this process can only be undertaken once the licence is issued to e.tv and a detailed cost analysis undertaken. It submits further that, it can use the licence, if granted, to reduce its transmission costs and apply those savings to improve its content provision, thereby allowing for diverse program offerings and improved access to television services through alternative means.

- 5.1.5.4. The Authority is satisfied with the strategy and commitment shown by e.tv to meet universal access goals as well as the proposed approach through which they will service and empower the poor. The Authority is, however, of the view that this requirement may best be addressed by the imposition of special conditions upon grant of the licence in accordance with the provisions of 9(6) (b) and (7) of the ECA.

5.1.6. Decision

- 5.1.6.1. E.tv substantially complies with the criteria set out in the ITA for the granting of an I-ECNS licence.

5.1.6.2. The Authority has therefore decided to grant an I-ECNS licence to e.tv in accordance with the provisions of section 5(8) and (9) of the ECA.

5.2. On Digital Media (Pty) Ltd ("ODM")

5.2.1. Application Fee

5.2.1.1. ODM paid the applicable application fee upon submission of its application.

5.2.2. Compliance with Section 5(8)(b) of the ECA

5.2.2.1. Section 5(8) (b) of the ECA provides that when you are applying for a licence an applicant or registrant must demonstrate that the applicant or registrant or the person to be awarded the licence, in the case of juristic person, is, or will be, registered under the laws of the Republic and has or will have its principal place of business located within the Republic.

5.2.2.2. On Digital Media (Pty) Ltd is a company registered and incorporated in accordance with the laws of the Republic of South Africa with registration number 2006/001353/07, with its registered address within the Republic at Building 1, Parc Nicol, 3001 William Nicole Drive, Bryanston, 2021 and thus complies with the provisions of section 5(8)(b) of the ECA.

5.2.3. Authority of Signatory

5.2.3.1 On 19 May 2009, ODM passed a resolution authorising Mr. Vinothan Govender in his capacity as the Director of the Company to sign the I-ECNS application and to attend the Authority's hearings in regard thereto on behalf of the company.

5.2.3.2 Accordingly, ODM complies with this requirement.

5.2.4. Equity Ownership by Historically Disadvantaged Groups

5.2.4.1. ODM represents that 78.87 of its shares are held by historically disadvantaged groups, made up as follows:

5.2.4.1.1. Lereko Media - 30%;

5.2.4.1.2. Kopano Ke Matla- 20%;

5.2.4.1.3. FNMIH¹⁷ - 27,87%;

5.2.4.1.4. A N Moodley - 1%;

5.2.4.2. Accordingly, ODM complies with this requirement as the equity ownership by

¹⁷ First National Media Investment Holdings (Pty) Ltd

historically disadvantaged groups in ODM is above the 30% stipulated in the ITA.

5.2.5. Strategy and Commitment to Meet Universal Access Goals

- 5.2.5.1. ODM sets out in Appendix 2 of its application a summary of its submissions regarding universal service and access.
- 5.2.5.2. ODM submits that given the ambitious coverage targets in regulation 12(10) it is of the view that the DTT network will not guarantee the expected coverage targets of the population and that the roll-out of the network will prove to be timely and an expensive burden on the tax payer. It contends that terrestrial broadcasting will encounter significant difficulties in some regions as it is generally not cost effective to reach the last 5 – 10% of the SA population.
- 5.2.5.3. ODM further submits that satellite DTH (direct-to-home) TV and radio services can complement the roll out of the digital terrestrial network in order to achieve 100% coverage of the country on a cost effective basis, thereby achieving universal service and access of all services throughout the country.

- 5.2.5.4. It contends that the digital switchover is a responsibility of all broadcasters and platform operators, and migration will benefit both the *end consumer and broadcasters alike*. ODM submits that the Authority should make it obligatory for all platforms, terrestrial and satellite to carry the Free DTT channels, which must be broadcast as a free to air bouquet with no subscription cost. It submits that the DTT channel providers should not be in a position to refuse such services to these platforms as it is in the interest of achieving national coverage, universal service and access.
- 5.2.5.5. Section 5 of the policy directive, directed the Authority to pay special attention to the needs of the poorest sections of our population. The policy directive further states that appropriate enabling as well as restrictive for any applicants that may be targeting the poorest as their primary target customers should be innovatively considered to ensure that the objective of prioritising and empowering the poor in granting I-ECNS licences is met.
- 5.2.5.6. The issue of prioritizing the poor is atomically catered for in the case of satellite infrastructure because on the day of launch of service satellite can cover 100% of the entire country. In the case where the footprint does not cover the entire country, it is up to the applicant to

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ensure that the proper capacity in the constellations of satellites is acquired to ensure that the entire country is covered. The issue of rollout target and hence universal access is immaterial given the fact that 100% coverage is attained from the day of launch of service.

5.2.6. Decision

5.2.6.1. ODM complied with the criteria set out in the ITA for the granting of an I-ECNS licence.

5.2.6.2. The Authority has therefore decided to grant an I-ECNS licence to ODM in accordance with the provisions of section 5 (8) and (9) of the ECA.

5.3. Telkom Media (Pty) Ltd

5.3.1. Application Fee

5.3.1.1. Telkom Media paid the applicable application fee upon submission of its application.

5.3.2. Compliance with Section 5(8)(b) of the ECA

5.3.2.1. Section 5(8) (b) of the ECA provides that when you are applying for a licence an applicant or registrant must demonstrate that the applicant or registrant or the person to be awarded the licence, in the case of juristic person, is, or will

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be, registered under the laws of the Republic and has or will have its principal place of business located within the Republic.

5.3.2.2. Telkom Media is a company registered and incorporated in accordance with the laws of the Republic of South Africa with registration number 2006/003303/07, with its registered address within the Republic at Eco Fusion Park 5 Block C, 2 Teak Close, Centurion, 0063 and thus complies with the provisions of section 5(8)(b) of the ECA.

5.3.3. Authority of Signatory

5.3.3.1. Telkom Media has passed, and attached to the application, a resolution authorizing Mr Bernard Mandlenkosi Cecil Ngcobo to sign the application and any other documents that may be required in respect of the application.

5.3.3.2. Accordingly, Telkom Media complies with this requirement.

5.3.4. Equity Ownership by Historically Disadvantaged Groups

5.3.4.1. At the time of submission of its application on 14 May 2009 Telkom Media represented that 84% of its shares were held by historically

115

disadvantaged groups. Its shareholding at the time was made up as follows:

5.3.4.1.1 Videovision Home Entertainment (Pty) Ltd ("Videovision") – 15%;

5.3.4.1.2 MSG Africa Media (Pty) Ltd ("MSG") – 5%;

5.3.4.1.3 WDB Investment Holdings ("WDB") – 5%;

5.3.4.1.4 Telkom South Africa Ltd ("Telkom SA") – 75%.

5.3.4.2 A breakdown of its shareholding by historically disadvantaged groups was not provided. Telkom SA is a company listed on the Johannesburg Securities Exchange. Presumably some of its shares, as listed, are held by historically disadvantaged groups.

5.3.4.3 Subsequent to the submission of its application (i.e. on 15 May 2009 to be specific) Telkom Media underwent a change of shareholding. This followed upon a transaction between Telkom SA and Shenzhen Media South Africa (Pty) Ltd ("Shenzhen") in terms of which Shenzhen acquired from Telkom SA 75% of the shares held by Telkom SA in Telkom Media. This was followed by a change of the

115

directorate of Telkom Media and later on a name change from Telkom Media to Super 5 Media (Pty) Ltd ("Super 5") (for the sake of convenience all reference to Telkom Media in respect of the application and where appropriate, will now henceforth refer to Super 5). These changes took place before the Authority had taken a decision on Telkom Media's application.

5.3.4.4 At the time of the Authority making its decision the shareholding of Super 5 was as follows:

5.3.4.4.1 Shenzhen – 75%;

5.3.4.4.2 Videovision – 15%;

5.3.4.4.3 MSG – 5%;

5.3.4.4.4 WDB – 5%.

5.3.4.5 The shares in Shenzhen are held 20% by Sino-Africa Group Ltd ("Sino"), a foreign company owned by Chinese shareholders and 80% by Imbani Media (Pty) Ltd ("Imbani"). Imbani is 100% owned by historically disadvantaged individuals. The shares in Videovision, MSG and WDB are also wholly owned by historically disadvantaged groups.

5.3.4.6 Super 5 represents that 85% of its shares are held by historically disadvantaged groups.

5.3.4.7 Accordingly, Super 5 complies with this requirement as the equity ownership by historically disadvantaged groups in Super 5 is above the 30% threshold stipulated in the ITA.

5.3.5 Strategy and Commitment to Meet Universal Access Goals

5.3.5.1 Super 5 submits that it will offer a commercial television service to all South Africans, with a particular focus on the under-served subscription television market, and the company wishes to self-provide the broadcasting signal distribution to avoid unnecessary service provider costs. Based on extensive market research, it contends that its value proposition is the recognition that current pay TV offerings are beyond the reach of the vast majority of South Africans.

5.3.5.2 In addition to contributing financially to the universal access fund, Super 5 proposes to contribute significantly to the country's development goals through increased innovation and competition. It aims to provide a quality service to South African citizens at an affordable price. It proposes to offer competitively priced products, including entry level set-top boxes that will give many South Africans an opportunity to access a multi

channel pay TV offering, with a diverse range of programming. Super 5 also contends that it will contribute to universal access by carrying public broadcasting service channels as part of its service offering.

5.3.5.3 Super 5 commits to support sub-titling in order to allow viewers with hearing disability to access Super 5's pre recorded broadcast services, subject to demand and availability of content where sub-titling is available.

5.3.5.4 Super 5 is satisfied with the strategy and commitment shown by Super 5 to meet universal access goals as well as the proposed approach through which they will service and empower the poor. The Authority is, however, of the view that if a licence is to be granted to Super 5, this requirement may best be addressed by the imposition of special conditions upon grant of the licence in accordance with the provisions of 9(6)(b) and (7) of the ECA.

5.3.6 Decision

5.3.6.1 In terms of regulation 6(1) of the Processes and Procedures Regulations¹⁸ where

¹⁸ Regulations Regarding The Processes and Procedures For Applications For An Individual Licence To Provide Electronic Communications Network Services, Electronic Communications Services and Broadcasting Services, And For Temporary Special Authorisations And Matters Pertaining Thereto of 2010

information included in an application changes at any time after the submission thereof but before the Authority makes a decision thereon, the applicant must notify the Authority of such change and make a request to amend the application in writing within fourteen (14) days of such change.

- 5.3.6.2 In terms of regulations 6 (2), the Authority may grant the request to amend the application where this will not unfairly prejudice other parties; or impede the expeditious and proper consideration of the application; or materially change the application.
- 5.3.6.3 In terms of regulation 6(3) the Authority may, in the event it grants the request for amendment, referred to in regulation 6¹⁹(1), publish a notice in the Gazette, regarding the amendment and invite interested parties to submit written representations in relation to the amended application within the period stated in the notice.
- 5.3.6.4 On 05 July 2010, Super 5 media submitted an application form with the updated details. On 16 July, Super 5 wrote to the Authority seeking condonation with respect to late submission of it updated application form. On 07 September 2010, the Authority decided to grant the

¹⁹ See 19 Supra

request to amend the application as this was unlikely to prejudice any party.

- 5.3.6.5 During November 2009 the Authority issued an *Individual Broadcasting Service Licence* to Super 5 Media subject to the condition that a shareholders' agreement or equivalent be provided to the Authority by 12 January 2010.
- 5.3.6.6 At the heart of the protracted engagement between Super 5 and the Authority is compliance with the provisions of section 64(1) of the ECA which stipulates, amongst others, that a foreigner may not, whether directly or indirectly, exercise control over a commercial broadcasting licensee. Control is not a defined term in the ECA or the regulations promulgated under the ECA. In its various interactions with the Authority Super 5 maintained that Sino, being the only foreign shareholder (albeit indirect) in Super 5 does not exercise any direct or indirect control in Super 5. In support of this representation it has provided to the Authority the share sale agreement, a heads of agreement regulating relations among shareholders until a shareholders' agreement is concluded, various draft shareholders' agreements, share register, share certificates, and the memorandum and articles of association of Super 5.

- 5.3.6.7 It is indeed so that the documents aforesaid do not evince any direct or indirect control of Super 5 by Sino. However, apart from the documents aforesaid, the most common instruments in which control measures may be located are often the funding agreements and management agreements, amongst others. Super 5 has been tardy in its disclosure of the relevant information to the Authority.
- 5.3.6.8 The Authority referred the matter of non-compliance of a licence condition by Super 5 media to the Complaints and Compliance Committee.
- 5.3.6.9 On 24 June 2010, the Complaints and Compliance committee made a decision that Super 5 submission of heads of arguments is sufficient. Also that Super 5 media's Chairman must write an affidavit that states that Super 5 media is not in contravention of section 64 of the Electronic Communications Act.
- 5.3.6.10 As a result of this decision the Authority had to now consider super 5's application for the I-ECNS licence. .
- 5.3.6.11 Super 5 substantially complies with the criteria set out in the ITA for the granting of an I-ECNS licence.
- 5.3.6.12 The Authority has therefore decided to grant an I-ECNS licence to Super 5 in accordance with

the provisions of section 5(8) and (9) of the ECA.

5.4 Walking on Water Television (Pty) Ltd ("WoW")

5.4.4 Application Fee

5.4.4.1 WoW paid the applicable application fee upon submission of its application.

5.4.5 Compliance with Section 5(8)(b) of the ECA

5.4.5.1 Section 5(8) (b) of the ECA provides that when applying for a licence an applicant or registrant must demonstrate that the applicant or registrant or the person to be awarded the licence, in the case of juristic person, is, or will be, registered under the laws of the Republic and has or will have its principal place of business located within the Republic.

5.4.5.2 Walking on Water Television (Pty) Ltd is a company registered and incorporated in accordance with the laws of the Republic of South Africa with registration number 2006/017925/07, with its registered address within the Republic at The Ambridge Office Park, Vrede Avenue, Douglasdale Extension 5, Bryanston, 2191 and thus complies with the provisions of section 5(8) (b) of the ECA.

5.4.6 Authority of Signatory

5.4.6.1 On 15 May 2009 WoW passed a resolution authorizing Mr Luyanda Mansfield Manqquku to sign any documents and/or to represent the company at the hearings the Authority may hold in relation to the application and/or to do all things which may be necessary in relation to the application. Accordingly, WoW complies with this requirement.

5.4.7 Equity Ownership by Historically Disadvantaged Groups

5.4.7.1 WoW has indicated in its application that 96.4% of its equity is owned by persons from previously disadvantaged groups. The applicant has provided the names of persons (including equity shareholding) that comprise the 96.4%.²⁰

5.4.7.2 Accordingly, WoW complies with the requirement as the equity ownership in WoW is above the 30% stipulated in the ITA.

²⁰ Application: Appendix 1.7, page 15 - 16

5.4.8 Strategy and Commitment to Meet Universal Access Goals

5.4.8.1 Wow submits that it will utilise the vast number of church buildings across South Africa as technology hubs in building a distribution network that reaches out to all South Africans through satellite technology, reaching the most remote and under-serviced areas.

5.4.8.2 Its strategy to cater for the poorest communities will be to forge relationships with churches across South Africa. This network of churches, it contends, will allow WoW to provide services and extend access to resources which urban dwellers do not have access to. In so doing it proposes to incorporate the needs and views of the communities in its broadcast service provision. It proposes to include among its services educational programmes, regional and community television, farming programmes and internet services. Further, it plans to convert church buildings to multipurpose centres that will not only be places of worship, but will also be utilized for empowering local communities.

5.4.8.3 The strategies proposed by WoW appear radical and in some respects very abstract. The Authority is, however, of the view that this

requirement may best be addressed by the imposition of special conditions upon grant of the licence in accordance with the provisions of 9(6) (b) and (7) of the ECA.

5.4.9 Decision

5.4.9.1 WoW substantially complies with the criteria set out in the ITA for the granting of an I-ECNS licence.

5.4.9.2 The Authority decided to grant an I-ECNS licence to WoW in accordance with the provisions of section 5(8) and (9) of the ECA.

5.5 WorldSpace Southern Africa (Pty) Ltd

5.5.4 Application Fee

5.5.4.1 WorldSpace paid the applicable application fee upon submission of its application.

5.5.5 Compliance with Section 5(8)(b) of the ECA

5.5.5.1 Section 5(8) (b) of the ECA provides that when you are applying for a licence an applicant or registrant must demonstrate that the applicant or registrant or the person to be awarded the licence, in the case of juristic person, is, or will be, registered under the laws of the Republic

and has or will have its principal place of business located within the Republic.

5.5.5.2 World Space is a company registered and incorporated in accordance with the laws of the Republic of South Africa with registration number 1996/03896/07, with its registered address within the Republic at 391 Jan Smuts Avenue, Craighall Park, 2196 and thus complies with the provisions of section 5(8)(b) of the ECA.

5.5.6 Authority of Signatory

5.5.6.1 A copy of a resolution authorizing Harmza Farooqui to sign any documents and/or to represent the company at the hearings the Authority may hold in relation to the application and/or to do all things which may be necessary in relation to the application.

5.5.6.2 Accordingly, WorldSpace complies with this requirement.

5.5.7 Equity Ownership by Historically Disadvantaged Groups

5.5.7.1 None of the shares in WorldSpace are held by persons from historically disadvantaged groups (HDG). At the time of submission of this application World Space indicated that it was

engaged in negotiations with a black owned entity with a view to concluding an agreement that will result in the BEE entity acquiring 30% of the shares in World Space.

5.5.7.2 Accordingly, WorldSpace does not comply with this requirement as there is no ownership of equity in World Space by persons from historically disadvantaged groups. The requirement for a 30% ownership by persons from historically disadvantaged groups is a material one, the foundations of which do not lie in the ITA, but sections 2(b) and 9(2)(b) of the Electronic Communications Act, 2005 (Act No.36 of 2005) and thus a material requirement of the ECA. In light hereof failure to comply with this requirement in terms of the ITA, read together with the ECA, should disqualify World Space from the licensing process.

5.5.7.3 The Authority decided to allow World Space to finalise the HDG's requirement. The Authority gave WorldSpace a period of six months to comply²¹. The six-month period expired in April 2010. WorldSpace sent a response cum application for condonation on 28 June 2010 addressed to the new Chairperson of ICASA (Dr Stephen Mncube) who was announced by the Minister on 30 June 2010 and assumed

²¹ Letter dated 13 October 2009

office on 1 July 2010. The committee approached council, in a council meeting held on 13 July 2010, for guidance and advice in dealing with the application of WorldSpace. Council agreed that the committee should by way of a letter seek clarity from WorldSpace on the following: (i) whether WorldSpace has acquired the permission/rights of the transfer; (ii) the details of the court process; and (iii) proof that they have complied with HDG requirements. The committee in execution of a council decision addressed a letter²² to WorldSpace seeking clarity on the aforesaid three issues. The letter also indicated that the said information must reach the Authority by no later than 30 July 2010, and no response(s) was received from the office of WorldSpace. The WorldSpace matter was tabled before a council meeting held on 19 August 2010 whereat the committee advised council that WorldSpace had not responded to the letter of the committee dated 16 July 2010 that sought clarity on the aforesaid three (3) issues, whereafter council agreed that WorldSpace be informed by way of a letter that the matter is closed. The Authority had done everything in its power to allow the applicant to meet the HDG requirements prescribed in terms of the ITA and the provisions of the ECA and is in no position to keep a licensing process open ad

²² Letter dated 16 July 2010

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infinitem. There must, at some point, be closure to a licensing process for purposes of regulatory certainty. On 09 September 2010 the Authority informed WorldSpace that it has failed to comply with the deadline and that it considered the matter closed.

5.5.8 Strategy and Commitment to Meet Universal Access Goals

- 5.5.8.1 World Space submits that satellite radio reaches out to the needs and preferences of major, as well as, niche target listener divisions within South Africa and is committed to complying with the universal services regulations. World Space is steadfast in its aspirations to provide rural areas within South Africa with high quality radio programming, including an extensive variety of music, news and entertainment channels, in addition to, meeting the demands of listeners from different linguistic and cultural backgrounds.
- 5.5.8.2 Once a licence has been obtained, World Space submits that it will be in a position to become more involved in community projects within the rural areas beginning with a donation of at least 1,000 (one thousand) receivers into disadvantaged schools and clinics with a particular focus on rural areas.

- 5.5.8.3 World Space undertakes to target the rural clinics which service the poor once the licence has been issued.
- 5.5.8.4 World Space contends that a key strategy is to reduce the price of receivers by licensing manufacturing in the local markets, and obtaining manufactures' commitments to reduce receiver prices over time.
- 5.5.8.5 *World Space submits that it has launched the Africa Learning Channel as a forum for Africans to share ideas, best practices and solutions to their common challenges. The Africa Learning Channel features programming produced by African NGOs, community media groups and other civil society organizations. The African Learning Channel broadcasts 24 hours a day, 7 days a week reaching over 50 million African listeners. Further, the FVI also provides NGO's schools and community centres in the poorest areas of Africa with sponsored "kits", including radio and antennas in order to be linked-up with the African Learning Channel and its educational data services. However WorldSpace does not make an attempt to relate the viewership set out above to the South African Market.*

5.5.8.6 The Authority is satisfied with the strategy and commitment shown by WorldSpace to meet universal access goals as well as the proposed approach through which they will service and empower the poor. The Authority is, however, of the view that, if an I-ENCS licence is granted to World Space, this requirement may best be addressed by the imposition of special conditions upon grant of the licence in accordance with the provisions of 9(6)(b) and (7) of the ECA.

5.5.9 Decision

5.5.9.1 WorldSpace has failed to comply with the requirement of the ITA and the ECA in relation to equity ownership of 30% by historically disadvantaged groups. This is a substantive requirement.

5.5.9.2 Therefore Authority has refused to grant World Space an I-ECNS licence on account of the non-compliance.

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