



**The NAB written submission to ICASA draft regulations on
standard terms and conditions:
class and individual licences**

7 August 2015

1. Introduction

1.1. On 26 June 2015, the Independent Communications Authority of South Africa (“ICASA”), published draft regulations for public comment, and these related to:

1.1.1. Standard Terms and Conditions–Individual Licences (“ draft Individual Regulations”) (government gazette 38918);

1.1.2. Standard Terms and Conditions – Class Licences (“draft Class Regulations”) (government gazette 38920).

1.2. The closing date for both draft Regulations is 30 working days from the date of publication in the government gazette i.e. 6 August 2015. The NAB would like to be given the opportunity to participate in oral hearings, should ICASA be holding any.

1.3. The NAB is the leading representative of South Africa’s Broadcasting industry. The NAB aims to further the interests of the broadcasting industry in South Africa by contributing to its development. The NAB membership includes all three tiers of broadcasting as well as signal distributors and associate members, these include:

1.3.1. Three television public broadcasting services, and eighteen sound public broadcasting services of the South African Broadcasting Corporation of South Africa (“the SABC”);

1.3.2. The commercial television broadcasters (e.tv, DStv, M-Net and ODM) and sound broadcasting licensees (that include media groups Primedia, Tsiya, Kagiso, MSG Africa and AME);

1.3.3. Both the licensed common carrier and the selective and preferential carrier broadcasting signal distributors;

1.3.4. Over thirty community sound broadcasting licensees and a community television broadcasting service, Trinity Broadcasting Network (TBN) trading as Faith Terrestrial.

1.3.5. A range of industry Associates, including training institutions.

- 1.4. The NAB supports the general principles advanced in both draft Regulations. However should the draft Regulations be adopted in their current state, they could yield undesired consequences. The NAB's concerns are discussed below as we address both draft Regulations. In this submission we will deal firstly with draft Individual Regulations, and secondly the draft Class Regulations.

2. Standard terms and conditions for Individual licences

2.1. Programme Syndication

2.1.1. The draft Regulations seek to substitute Regulation 9 of the 2010 Regulations with among others clause 9 (4) which seeks to limit programme syndication to not more than 20%. The clause provides *“programme syndication/network and programme share shall not exceed 20% of the community sound licensee’s programming”*.

2.1.2. The NAB is of the view that this issue of programming is misplaced and ought not to be included in these regulations. Should ICASA wish to address programme syndication, we believe that such should be done in the applicable licence conditions of licensees. We therefore recommend that the entire clause 9(4) be deleted from the draft Regulations.

2.2. Contraventions and fines

2.2.1. While clause 4(5) of the draft Regulations rightfully empowers ICASA to refer a licensee who fails to comply with sub clause 4(1)¹ to the Complaints Compliance Committee (“CCC”). Clause 14 of the draft Regulations², it seems to be divesting ICASA of the duty to refer matters to the CCC for the determination of non-compliance.

2.2.2. Regulation 14(1) of the 2010 Regulations recognised that a penalty could be meted on a licensee upon the determination of non-compliance by the CCC. In terms of the draft Regulations, however, it would seem ICASA is now unilaterally empowered to issue fines for non-compliance with clauses 6,7,9,10,12 without first referring the licensees to the CCC. The NAB proposes that the draft Regulations be re-drafted to expressly allow for the CCC to hear, determine, and recommend a fine to be meted to a licensee

¹ Clause 4(5) of the draft Regulations Empowers ICASA to refer a non-complaint licensee to the CCC for failing to provide the Authority with information.

² Contraventions and fines clause

found to be in contravention, in line with section 17B of the ICASA Act. In fact it might be better if ICASA retain the current Regulation 14(1), which provides: "Upon a determination of non-compliance by the Complaints and Compliance Committee in terms of the ICASA Act, the Authority may impose a fine not exceeding ...", since this allows the Authority to retain a discretion as regards the imposition of a fine as well as clearly defines the role of CCC .

2.2.3. Another concern with the proposed amendments to sub-clauses (1) and (2) is that the Authority would be compelled to impose a minimum fine, regardless of the circumstances. Again, this deprives the Authority of the ability to exercise its discretion as to whether or not a fine would be appropriate in the context of all the relevant circumstances.

2.2.4. NAB is also opposed to the the proposed fine in sub-clause (1) that a person could be liable to a fine not exceeding "R5 000 000, 00 (Five Million Rand) or 10% of the Licensee's annual turnover for every day or part thereof during which the offence is continued)" as it appears to be unduly excessive considering the objects of the Regulation.

2.3. **Revocation of licences**

2.3.1. In terms of clause 14(4) of the draft Regulations, ICASA is empowered to revoke a licence where a licensee fails to commence services within the stipulated commencement period. Due to spectrum scarcity as well as the principle of efficient spectrum management, which ICASA should uphold, the NAB supports the Authority's efforts to discourage spectrum hoarding whilst ensuring universal service and access to national public broadcasting services.

2.3.2. The NAB further recommends that, prior to issuing invitations to apply for individual broadcasting services, ICASA should first conduct feasibility studies and determine a markets' readiness to sustain new players. This will avoid a situation where entities are awarded licences, but are unable to go on air within the stipulated time, or not at all. The Authority is mandated to enable and foster a sustainable and viable industry and its licensing processes must therefore be informed by robust feasibility assessments.

3. Standard terms and conditions for Class licences

3.1. Disclosures pertaining to donation income

- 3.1.1. The draft Class Regulations require, under clause 10A (6), a licensee to furnish to the Authority, upon request, names, addresses and contact details of donors together with the details of the amounts donated by such donors.
- 3.1.2. Consultations with NAB class broadcasting members revealed that complying with this provision is not always possible; as such information could be confidential. It must be noted that, in most cases donations are made by electronic funds transfer (“EFT”) and are unidentified, while other donations are made anonymously.
- 3.1.3. Furthermore, stations generate small, yet many donations via other avenues such as sms-lines and these cannot be monitored with accuracy. In the case of high value donations the regulation can easily be circumvented by camouflaging the donation as an invoiced service for expensive airtime exposure. Thus, the objective of the regulation would be defeated.
- 3.1.4. In addition, for such information to be divulged, in terms of the Protection of Personal Information Act, permissions from donors will need to be sought. This will inevitably increase the cost of compliance by licensees as well as create a bigger administrative burden on both ICASA and class broadcasting services. The NAB therefore proposes that this clause be deleted from the draft Regulations.

3.2. Programme Syndication

- 3.2.1. As is the case with individual licence draft Regulations, the draft Regulations seek to substitute Regulation 7 of the 2010 Regulations with among others clause 7 (4) which seeks to limit programme syndication to not more than 20%. The clause provides “*programme syndication/network and programme share shall not exceed 20% of the community sound licensee’s programming*”.
- 3.2.2. The NAB reiterates its view that the issue of programming is misplaced in these draft Regulations. In the event that ICASA wants to limit programme syndication, such should be done in the applicable licence conditions of

licensees. The NAB therefore recommends that clause 7(4) be deleted from the draft Regulations.

3.3. Contraventions and Fines

3.3.1. Section 17B of the ICASA Act sets out the functions of the CCC and these include among others investigating, and hearing all matters referred to it by the Authority³.

3.3.2. Furthermore, in terms of section 17D(2) of the ICASA Act, the CCC must recommend to the Authority action to be taken by the Authority against a licensee who has been found in contravention, and these recommendations may include an imposition of a fine. Section 17H of the ICASA Act then goes further to prescribe the types of fines ICASA may impose.

3.3.3. When reading the draft Regulations however, they give ICASA unilateral authority to impose fines for non-compliance by licensees, except for clause 9⁴. This in our view is ultra vires ICASA's authority. We believe that alleged contravention of the draft Regulations must first be referred to the CCC, which in turn will recommend an imposition of a fine, where a contravention has been determined.

3.4. Application of Fines

3.4.1. Clause 10 provides a blanket application of fines across the regulations except for clause 4. This is impractical in relation to certain clauses:

3.4.2. Commencement of services:

A fine not less than R2500 and not more than R10 000 is applicable to a registrant that fails to commence a broadcasting service within 12 months of the effective date of the licence. In our view, the proposed penalty is not practical in this instance. More often than not, the reasons stations do not start their operations within the stipulated time are due to financial challenges. Class broadcasting licensees depend on sponsorships and donations for their funding, and it is well-known to ICASA that starting up a

³ Section 17B(a)

⁴ ICASA is empowered to refer a licensee that fails to supply requested information in terms of clause 9(1) of the Regulations to the CCC.

broadcasting service is costly and time consuming, and in the case of class licences, largely dependent on volunteers and donations. The NAB therefore proposes that failure to commence a class broadcasting service should not be subject to a fine.

3.5. Duration of Licence

3.5.1. Clause 11(2) of the draft Regulations empower ICASA to impose imprisonment of up to 30 days to a person in contravention of clause 4 of the regulations, or a fine not less than R50 000, and not exceeding R100 000. In our view clause 11(2) is flawed based on the following:

3.5.1.1. Regulation 4 of the 2010 Regulations⁵ deals with Duration of the licences, and does not invoke an action on the part of a licensee, yet a penalty of imprisonment or fine is proposed. The NAB seeks clarity from ICASA on the intention of the amendment.

3.5.1.2. ICASA cannot unilaterally impose a fine and imprisonment without the prior recommendation by the CCC for such a fine to be imposed, and clause 11(2) seeks to give ICASA unilateral authority to do so.

4. Conclusion

The NAB thanks ICASA for the opportunity to make its written submissions, and we look forward to participating in oral hearings should ICASA be holding any oral hearings in relation to this process.

⁵ Regulation 4 provides:

- 1) the following ;licences are valid for five (5) years from the effective date:
 - a) Community Sound BS;
 - b) Community Low Power Sound BS;
 - c) Commercial Low Power Sound BS; or,
 - d) Any other Low Power Service.
- 2) The Licence for Community Television BS is valid for seven (7) years from the effective date.
- 3) Special event licences are valid for a maximum period not exceeding 45 days for Community Sound Broadcasting and Low Power Services.