COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS TO THE PARLIAMENTARY PORTFOLIO COMMITTEE ON COMMUNICATIONS REGARDING THE CONVERGENCE BILL (B9-2005)

11 April 2005

1. Introduction

1.1. The National Association of Broadcasters ("the NAB") is the voice of South Africa's broadcasting industry. It aims to further the interests of the broadcasting industry in South Africa by contributing to the development and diversity of the environment.

1.2. NAB members include:

- the three television and the eighteen radio stations of the public broadcaster, the South African Broadcasting Corporation ("the SABC");
- all licensed commercial free-to-air and subscription television broadcasters;

- all licensed commercial sound broadcasters;

- both the common carrier and the selective and preferential carrier licensed signal distributors; and

- over thirty community television and radio broadcasters.

1.3. The NAB welcomes the tabling of the Convergence Bill and thanks the Parliamentary Portfolio Committee on Communications ("the Committee") for the opportunity to make written representations on the proposed legislation.

1.4. The NAB has been part of the consultative process to develop the draft Convergence Bill since the process started in 2003. The NAB therefore also wishes to thank the Department of Communications ("the Department") for its efforts in ensuring broad industry involvement in the drafting of the Convergence Bill.

1.5. The NAB wishes to state that while this submission represents the views of a wide range of members of the NAB, it does not purport to represent all the different opinions that the NAB members may hold on any particular issue. Where a particular member has a different view to that of the NAB on a specific issue, the individual member shall make its own submissions on the Convergence Bill.

1.6. The NAB hereby requests an opportunity to make oral representations at the hearings to be conducted by the Committee. The NAB shall use this opportunity to augment its written submissions with regard to drafting proposals in line with these comments. There are indications in this submission where proposals might be made. The NAB is willing to make further contributions and assist the Committee in the finalisation of this important process.

1.7. This submission has been set out in the following way:

- **Preliminary Issues**: this section deals with related proceedings that may impact on the interpretation and application of the Bill;

- **Approach to Convergence**: this section summarises the approach to convergence in the proposed legislation;

- **Procedural Issues**: this section sets out proposed amendments to the Icasa Act and procedural rights;

- **Ministerial Powers and the Independence of the Regulator**: this section looks at the increased powers given to the Minister and the effect on Icasa's independence;

- **Market Structure**: this section deals with the structure of the market proposed in the Bill and how this is reflected in the definitions, licensing and transitional provisions;

- **Content**: this section examines what is meant by content and how content should be regulated; and

- **Access**: this section examines rights of access for broadcasting services licensees.

2. Preliminary Issues

2.1. There are a number of processes that are underway, which may affect the way that certain matters are dealt with in the Bill. The NAB is concerned that the possible impact of these processes should be taken into account in preparing a timetable for finalising and implementing this Bill, to avoid lengthy amendment procedures in future.

2.2. In particular the NAB notes the following processes that may affect the Bill:

2.2.1. The Minister is considering ownership and control limitations on broadcasting subsequent to recommendations from the Authority;

2.2.2. The Minister is considering the migration of broadcasting technologies and services from analogue to digital pursuant to several processes;

2.2.3. Several amendments appear to be required to the Independent Communications Authority of South Africa Act 13 of 2000 ("the Icasa Act"), which have been discussed in more detail below; and

2.2.4. The ICT Charter concerning empowerment and how this might be defined and implemented in the communications industry is in the process of being finalised.

3. Approach to Convergence

3.1. Broadcasting Regulation

3.1.1. Broadcasting is currently regulated primarily by the Independent Broadcasting Authority Act 153 of 1993 ("the IBA Act") and the Broadcasting Act 4 of 1999 ("the Broadcasting Act"). Broadcasting and broadcasting signal distribution are regulated separately. These Acts regulate broadcasting services in traditional categories such as television, radio, free-to-air and subscription services.

3.1.2. Content is regulated under these Acts.

3.1.3. In addition, radio frequency spectrum planning and allocation are regulated, as are equipment standards and approval.

3.2. Telecommunications Regulation

3.2.1. Currently, telecommunications is regulated primarily by the Telecommunications Act 103 of 1996 ("the Telecommunications Act"). The licensing and regulatory scheme was influenced by the market structure, as it existed when the Telecommunications Act was promulgated in the mid-1990s. Different types of services providers are regulated differently under the Act, for example, public switched telecommunication services ("PSTS"), mobile cellular telecommunication services ("MCTS") and value added network services ("Vans") are regulated differently from one another.

3.2.2. However, networks are not regulated separately, although every services provider had to obtain the physical facilities needed to build the network from the then monopoly PSTS licensee, Telkom SA Limited. These restrictions, however, along with certain others, were lifted for MCTS and Vans licensees by the Minister of Communications in Notice 1924 of 2004 (published in Government Gazette No 26763 dated 3 September 2004).

3.2.3. Content is not regulated in the Telecommunications Act.

3.2.4. Other aspects of regulatory intervention are dealt with in the Act, including planning and allocation of the radio frequency spectrum, equipment standards and approval, interconnection and facilities-leasing and price regulation.

3.3. Convergence Regulation

3.3.1. Convergence is a concept without a precise definition. Services traditionally carried over one type of network are being carried over different type of networks more efficiently and effectively. New, better and less expensive services and content are being created. A regulatory environment conducive to convergence and the possible benefits thereof, will allow any service or content to be carried over any network in a manner that benefits consumers.

3.3.2. In 2000, in recognition of the coming wave of convergence, the then South African Telecommunications Regulatory Authority and Independent Broadcasting Authority were replaced with one regulator for the telecommunications and broadcasting industries, the Independent Communications Authority of South Africa (Icasa). This was done in terms of the Icasa Act.

3.3.3. The NAB understands the Bill to be a more substantive regulatory response to convergence. It repeals most of the existing telecommunications and broadcasting legislation, although it does leave the provisions in the Broadcasting Act applicable to the public broadcaster alive, and does not repeal section 5 of the Broadcasting Act, which sets out the existing categories of licensable broadcasting services.

3.3.4. The Bill regulates the following categories of services:

- Communications network services,
- Communications services,
- Applications services, and
- Content services.

Not being true convergence legislation, it also sets out alongside these “converged” services, the following service:

- Broadcasting services

However, although “broadcasting services” are regulated, “content services” that are not also “broadcasting services” are not regulated.

3.3.5. The Bill deals with frequency planning and allocation, and equipment standards and approval. It provides for rights of way and regulates related issues for communications network services, and it also regulates interconnection and facilities leasing (access issues), pricing, the planning and allocation of numbers, and universal service.

3.3.6. It also delineates the spheres of regulation by Icasa, the independent regulator, on the one hand and the Minister of Communications on the other hand.

3.3.7. It also contains a chapter of transitional provisions to address (mainly) the transition of existing licences to licences under the new regime.

3.3.8. The NAB is in general agreement with this approach to convergence. However, because broadcasting services are regulated separately and differently than other converged services with regard to content and other matters, it seems as if the use of the term “licenses” in the bill in several places should be reviewed to ascertain whether it is also appropriate to apply such provisions to broadcasting services licenses. In particular the provisions of Chapters 10 (regarding consumer issues), 11 (regarding general matters) and 12 (regarding universal service) should be reviewed carefully in this regard.

3.3.9. In particular in section 81(1), it would appear that broadcasters may be required by virtue of holding a licence in terms of Chapter 3, to contribute to the Universal Service Fund. The NAB respectfully suggests that this may be an error, as broadcasters contribute to universal service in terms of specific license terms and conditions and in regard to supporting the Media Development and Diversity Agency.

4. Procedural Issues

4.1. Icasa Amendment Act

4.1.1. There are many references to sections of the Icasa Act that do not currently exist, for example, in the definitions of “Complaints and Compliance Committee” and “investigation unit”, and sections 3(2)(a), 10(d), 13(4)(b), 14(b), 52(2), and 60(6). Apparently, the Icasa Act is meant to be amended in conjunction with the Convergence Bill. However, the draft Icasa Amendment Act has not been made available. In the circumstances, it is impossible to comment on some of the provisions set out in the Bill, where such provisions refer to the Icasa Act as to be amended.

4.1.2. There are also procedural provisions in the existing legislation that are not included in the Bill. We suggest that those provisions either be included in the Bill or in the Icasa Amendment Act.

4.1.3. The following table details those sections of existing legislation that the NAB is most concerned with.

Legislation	Section	Matter
Telecommunications Act	27	Enquiries by Authority
Telecommunications Act	46	Accounts and records of licensees
Telecommunications Act	92	Register of licensees
Telecommunications Act	97	Production of accounts and records
Telecommunications Act	98 – 99	Appointment and powers of inspectors
Telecommunications Act	100	Adjudication of offences by licensees
Broadcasting Act	27	Right of SABC to require payment of TV licence fees
IBA Act	28	Enquiries by the Authority
IBA Act	41(6) et seq, 42	Procedures for applications for licences
IBA Act	44	Procedures for renewals for licences
IBA Act	52	Procedures for amendments of licences
IBA Act	66 and 67	Adjudication of offences by licensees
IBA Act	70	Register of licenses
IBA Act	71	Records of licensees

4.1.4. The NAB may wish to supplement these comments after the draft Icasa Amendment Bill has been made available.

4.2. Procedural Rights

4.2.1. The NAB is concerned that the Bill does not adequately protect the rights of the industry and the public to participate in the following proceedings:

- Making of regulations
- Making of the radio frequency plan
- Making of the numbering plan
- Making of standard and additional license conditions
- Licensing (services and frequencies)
- Amendments to licences
- Transfer and transfer of control of licences
- Renewal of licences
- Suspension and cancellation of licences and other orders following offences

4.2.2. The NAB is of the opinion that the procedural provisions in the Bill (and/or the Icasa Amendment Act) should be carefully considered to make sure that they are consistent with the constitutional right to just administrative action and the Promotion of Administrative Justice Act, which was promulgated to give effect to that right. In particular, in each of the categories above, there should be procedural safeguards that allow the public and licensee(s) that might be affected to participate in a meaningful way, in the particular circumstances of the type of proceeding involved.

4.2.3. The NAB is particularly concerned that licensees or other parties whose rights are potentially affected by regulatory action, must be afforded the opportunity to be adequately heard, for example, by having a right of reply to comment made by the public or other parties. The NAB also believes that the regulator should be

required to always provide written reasons for its decisions and that those reasons should be published.

4.2.4. In order to ensure an environment of transparency, a provision should also be included requiring the Authority to keep copies and a register of all regulations, licences and other documents, including the radio frequency and numbering plans, and to make such documents available upon request.

4.3. Competition Issues

4.3.1. Competition issues, the NAB understands, will be important in a converged communications environment. The NAB suggests that provisions be included in the Bill similar to those found in the Competition Act (sections 3(1A)(a), 21(1)(h) and 82(1) and (2)), which more clearly delineate the separate jurisdictions of the independent communications regulator on the one hand and the competition authorities on the other hand.

4.3.2. The NAB is also of the view that competition matters should be addressed in more detail in the Bill in two aspects. A definition of control should be included. The definition of “control” might echo that included in the Competition Act.

4.3.3. Further, the procedures for determining how a licensee might be found to have significant market power (or control of an essential facility, or be vertically integrated) are included in the Bill. Such procedures might follow the procedures outlined in the draft Interconnection guidelines recently published for comment by the Authority, which would follow the general principles outlined in the section on procedural rights above.

4.4. Regulations

4.4.1. With regard to the power to make regulations, the NAB has commented that the procedure should be more fully established in the Bill in order to protect the right to administrative justice for the public as well as affected parties.

4.4.2. The NAB is also of the opinion that the regulator should have the power to make any regulations necessary or expedient for the regulation of the industry in terms of the Bill and the related legislation. As section 4 is currently written, the regulator only has the power to make regulations necessary or expedient with regard to technical matters (section 4(1)(a)) and procedural matters (section 4(1)(b). The NAB suggests that the words "necessary or expedient" should be included in the introductory language of section 4, applying to all regulations, rather than only in the subsections 1(a) and (b), with regard to technical and procedural matters.

5. Ministerial Powers and the Independence of the Regulator

5.1. In terms of chapter 2, the Minister may make policies (which the executive must do in terms of the Constitution). She may also give policy directions to the Authority.

5.2. Under current law, the Minister must consult the Authority before making policy directions. In terms of the draft Bill, she does not have to. The NAB is of the opinion that the Minister should have to consult the Authority prior to making policy directions, which are directed to the Authority. Accordingly, the word "may" in section 3(4)(g) should be replaced with the word "must".

5.3. The NAB also is of the opinion that policy directions must not limit the independence of the Authority in the sphere of broadcasting, since

chapter 9 of the Constitution requires, inter alia, that an independent authority regulate broadcasting. The NAB therefore suggests that the safeguards that appear in the IBA Act regarding policy directions be included in the Bill. To assist in this objective, the NAB suggests the following wording should be included in section 3 in a new subsection:

> "No policy made by the Minister in terms of subsection (1) or policy direction issued by the Minister in terms of subsection (2) may be made or issued—
>
> (a) regarding the granting, amendment, transfer, change of ownership, renewal, suspension or revocation of a licence; or
>
> (b) if it interferes with the independence of the Authority or affects the powers or functions of the Authority in terms of this Act or the related legislation."

5.4. The following sections give the Minister powers that may not be appropriate or permitted by the constitutional mandate that the broadcasting regulator be independent:

Section	**Powers**
5(4)-(5)	Invite applications for communications network services, and determine geographic areas of service provision
9(2)(e)	Approve licence conditions for individual licences
21(2)	Make guidelines for the rapid deployment and provisioning of communication facilities
34(7)-(9)	Approve radio frequency plan
34(13)	Resolution of disputes involving radio frequency migration when

	"governmental entities or organizations" are involved
34(14)	Allocate and control radio frequency spectrum for security services
62(4)	Establish a centre for government departments and entities to communicate with the public to ensure efficiency in administrate services
68(1), (3) and 71(2)	Establish public emergency (112) communications centres with accountability to the Minister
Chapter 12	Various powers in regard to universal access/service

5.5. The NAB proposes the deletion of section 5(4)-(5). It is inappropriate at this stage for the Minister to have to decide to and invite applications for any type of licences. Furthermore, this power is inappropriate in the broadcasting context, as it would unduly interfere with the regulator's independence requirement in the Constitution.

5.6. For similar reasons, the NAB proposes the deletion of section 9(2)(e), which makes it the Minister's responsibility to approve licence conditions for individual licences. This is unconstitutional in the broadcasting arena.

5.7. With regard to sections 34(13) and (14), the Minister has control over the radio frequency spectrum allocated to the security services. However, section 34(13) should be re-drafted to apply *only* to the security services. As it is drafted now, it applies to "governmental entities or organisations" and might arguably, apply to Telkom, the SNO, Sentech and the SABC. The NAB suggests the substitution of the phrase "governmental entities or

organisations" with the phrase "the security services". Similarly, section 34(4)(c) should be amended to apply only with regard to the security services.

5.8. The NAB also suggests the deletion of sections 34(7)-(9), which allow the Minister to approve the radio frequency plan. The NAB is of the opinion that the power to plan the radio frequency spectrum must rest with the independent regulator in terms of the constitutional independence mandate discussed above.

5.9. The NAB does suggest however the establishment of a joint liaison committee with regard to radio frequency spectrum planning and allocation issues, with representation from the regulator, the Ministry, the industry and the security services. The following should be considered as a new section 30(1):

> "The Minister must establish a joint liaison committee comprising representatives from the Ministry of Communications, Security Agencies, the Authority and the communications industry to advise the Authority in relation to its functions to control, plan, administer, manage and license the radio frequency spectrum."

6. Market Structure (Chapters 1, 3 and 13 and section 72)

6.1. Proposed Market Structure

6.1.1. Under the converged regime, the following types of services providers will exist in the communications industry:

- Communications network service licensees
- Communications service licensees (including resellers)
- Application service licensees

- Broadcasting service licensees
- Content service providers (not licensed)

6.1.2. However, the Bill does not give the industry a clear indication in a sufficiently logical way how existing licensees will be categorised in terms of the Bill and whether the new categories are adequate to regulate all the providers. A diagram is attached depicting the confusion.

6.2. Definitions (Chapter 1)

6.2.1. The following definitions are intended to support the market structure:

- "**Communication network service licensee**" is "a person licensed to provide communication network services" and "**communication network service**" is a "communications service whereby a … licensee makes available a communications network or communication facilities … for its own use for the provision of communications services or other services …, to another communications network service licensee [for the same purpose] …, or for resale [sic] to a communications service licensee, or to any person providing content services or any other licensed service …". "**Communication network**" and "**communication facility**" are also defined, albeit in a somewhat repetitive manner.

- "**Communication service licensee**" is "a person authorised to provide communications services in terms of a class license" and "**communication service**" is "any service … [which] consists wholly or mainly of the conveyance of communications over communications networks, including transmission over communication networks used for broadcasting, but excluding

content services". "**Communications**" is "the emission; transmission or reception … of voice, sound, data, text, video, visual images, signals or a combination thereof, including applications … but does not include content services".

- "**Application service licensee**" is "a person licensed to provide an application service" and "**application service**" is a "communications service provided by means of applications", and "**application**" is "any technological intervention by which value is added to a communications network service …"

- "**Broadcasting service licensee**" is not defined, but "**broadcasting service licence**" is a "licence … for the purpose of providing a defined category of broadcasting services" and "**broadcasting service**" is "any service which consists of the broadcasting of television or sound broadcasting material … [excluding] a service … that provides no more than data, or … text … [and] a service … that make programmes available on demand on a point-to-point basis, including a dial-up service" and "**broadcasting**" is "any form of unidirectional communications service …".

- "**Content service**" is "the provision of content or the exercise of editorial control over the content conveyed via a communications network to the public or sections of the public, such as online publishing and information services". "**Content**" is "any sound, text, still picture, moving picture, other audio visual representation or sensory representation, or any combination of the preceding, which is capable of being created manipulated, stored, retrieved, and communicated, but excludes content contained in private communications between consumers".

6.2.2. There are various problems with these definitions. First, the term “communications service” in each of the licence categories listed above is used as a generic/descriptive term. However, there is also a specific category (seemingly non-generic) identified with that name. In some places in the Bill, the term seems to be used generically and in others to specifically to refer to the category of licence. However, its use is less than clear or consistent throughout the Bill. In the NAB’s view, the term should be used to apply to a specific category and thereafter the use of the term throughout the Bill needs to be changed appropriately. For example, the definition of “communications network service licensee” should refer only to “a service whereby … a licensee …”. The NAB will present drafting proposals at the hearings to be held by the Committee.

6.2.3. The definitions are also not precise. The result is a blurring of lines between the service categories, which will end in litigation causing a negative effect on innovation and investment in the industry.

6.2.4. Specifically in relation to broadcasting, the definitions of “broadcasting” and “broadcasting service” are too limiting and do not reflect the technological or commercial realities of the broadcasting industry. The definitions are too restrictive in that they refer to a “unidirectional” service and exclude interactive services.

6.2.5. While these definitions might be adequate in an analogue broadcasting environment, the definition are no longer appropriate in a digital environment, or in a converged environment. The NAB refers the Committee to the description of broadcasting by the International Telecommunication Union, which is as follows:

> "Broadcasting makes use of point-to-everywhere information delivery to widely available consumer receivers. When return channel capacity is required (e.g. for access control, interactivity, etc.), broadcasting typically uses an asymmetrical distribution infrastructure that allows high capacity information delivery to the public with lower capacity return link to the service provider. The production and distribution of programs (vision, sound, multimedia, data, etc.) may employ contribution circuits among studios, information gathering circuits (ENG, SNG, etc.), primary distribution to delivery nodes, and secondary distribution to consumers."

Adoption of the above concept of broadcasting is appropriate in a converged environment. The interactive, multimedia characteristics of digital broadcasting services must be recognised, and catered for.

6.2.6. There are also problems with the definitions of content and content service on the one hand and broadcasting and broadcasting service on the other hand, when one tries to distinguish the two different categories. It seem as if broadcasters are all content services providers or a subset of content services providers. As with the definitions of broadcasting and broadcasting services discussed above, there is a need to get the definitions of content and content services, and the use thereof right. Otherwise, the success of the convergence regulation will be greatly compromised.

6.2.7. It is the NAB's opinion that the reference to broadcasting as a distinct content service in a truly converged environment should be removed from the Bill. The result would be that all content providers no matter what mode of transport (for example, mobile cellular networks, the Internet, etc) would be treated similarly. In a

fully converged environment, it is highly artificial to regulate content providers differently from one another.

6.3. Licensing (Chapter 3)

6.3.1. Sections 5 and 8 of the Bill contain detailed provisions in relation to licensing and licence conditions. In terms of section 5, licences are categorized as either individual or class as follows:

- Individual licences
    - Communications network services
    - Radio frequency spectrum
    - Broadcasting services

- Class licences
    - Communications services (including resellers)
    - Application services

6.3.2. The NAB is in general agreement with this licensing structure. However, it has some suggested changes to improve the Bill. First, section 5(10) deals with a transitional issue and should be moved to section 85 of the Bill.

6.3.3. Second, there is a proviso in section 8(6)(j) (read with 8(3)), which states that the Authority may make licence conditions only in regard to licensees who have significant market power, control essential facilities, should have universal service obligations or are vertically integrated. This provision arguably may apply to all broadcasters. The NAB believes that section 8(3) is not intended to apply to broadcasters. Section 8(6)(j) is the only section that is applicable to broadcasters. Instead, a different provision ought to be introduced to indicate that the regulator may make terms and

conditions with regard to the matters specified in this section for all broadcasters.

6.3.4. The NAB has made suggestions with matters incidental to licensing such as procedures for application, amendment, transfer, renewal, and surrender in greater detail above. The NAB has also made specific proposals in regard to competition issues.

6.4. Transitional Provisions (Chapter 13 and section 72)

The NAB wishes to raise concerns regarding the following aspects:

- Conversion of existing licences – who gets what in the converged regime, and

- Procedure for and timing of transition – is it clear and adequate.

6.4.1. Conversion of Existing Licences

6.4.1.1. In many cases it is impossible to ascertain from the transitional provisions set out in Chapter 13 what existing licensees or service providers will be licensed to provide under the new regime.

6.4.1.2. In terms of the transitional provisions, it is clear that public switched telecommunication services ("PSTS") providers and mobile cellular telecommunication services ("MCTS") providers will be licensed as communications network services providers (section 85(3)(f)), communications service providers (section 85(3)(e)) and application services providers (section 85(3)(a)(i). It is also clear that PSTS and MCTS licensees will receive radio frequency spectrum licences to provide services (section 85(3)(a)(ii).

6.4.1.3. It is less clear in this section what kind of licences broadcasting services licensees will require. Section 85(3)(b) is particularly confusing, particularly when read with sections 5(10), 34, 72, 84(1) and 85(6). These sections should not contradict one another. Section 85(3)(b) should give way to section 84, which applies equally to all existing licensees, including broadcasting licensees. Section 85(3)(b) should therefore be deleted as it is not necessary.

6.4.1.4. In the converged environment, multi-channel signal distribution in appropriate included in the definition of "broadcast signal distribution". However, broadcast signal distribution is classified as communications network services under section 85(3)(f) and "multi-channel signal distribution" is classified as a "communication services" under section 85(3)(e). The NAB suggests the deletion of this section in order to ensure that all broadcast signal distributors are treated similarly.

6.4.1.5. Section 72 should be deleted in its entirety. It is particularly and singularly disadvantageous to broadcasters, placing an undue restriction on them in the transition process that is not also placed on telecommunication services providers.

6.4.1.6. Furthermore, section 5(10) (which should be moved to section 85) should be amended to delete reference to "individual licences" as it further confuses the classification and should simply say that existing licences remain subject to all terms and conditions in the licences until they are converted.

6.4.1.7. In other words, the Bill must confirm –

6.4.1.7.1. that broadcasting licences remain in force according to their terms, including terms relating to frequency use, until the transitional provisions have taken effect; and

6.4.1.7.2. that all broadcasting licensees may (at their election) apply for and receive a broadcasting services licence, a radio frequency spectrum licence and/or a communications network services license in order to distribute broadcasts.

6.4.1.8. As a final issue of concern regarding the transition, as the Bill does not deal with migration to digital technologies in the broadcasting arena as yet and as existing telecommunication service providers, including PSTS and MCTS providers were granted automatic access to use of frequencies for migration of their networks and services to digital (as opposed to analogue) in the Telecommunications Act, the NAB is of the opinion that it is fair and equitable that existing broadcasters have a similar guaranteed right to digital broadcasting frequencies set out in this Bill.

6.4.2. Procedure for and Timing of Transition

6.4.2.1. There are also some procedural difficulties regarding the transition. First, the meaning of section 85(3)(d) is not clear. It provides that guidelines identified in related legislation or regulations or licenses must be used by the Authority in converting licenses. It is not clear what guidelines are being referred to, or who will identify such guidelines. The NAB has been unable to locate any items identified as “guidelines” in the related legislation.

6.4.2.2. Second, section 84(4) of the Bill indicates that Icasa must convert all existing licenses to licenses in terms of the new regime within twelve months. The NAB is concerned that the twelve-month deadline is not realistic. In addition to converting all existing licenses and deemed licenses within the twelve-month period, Icasa will likely first have to make regulations regarding at least the following:

Section of the Bill	**Regulation or other Intervention Required**
6	Types of services that may be provided without a licence
8(1) and (3)	Standard terms and conditions applicable to individual and class licences
13(3)	Limitations on ownership and control to promote diversity, HDIs, and competition in the industry
31(5)	Types of radio frequency spectrum use that may be done without a licence
33(2)	Procedures for the resolution of radio frequency spectrum coordination and dispute resolution
34(1)	Radio frequency spectrum plan
37(5), 38(1), 41(1), 42(3), and 43(1)	Matters relating to interconnection and facilities leasing
65(1)	Numbering plan and number portability matters
85(2)	Licence conversion process

6.4.2.3. The NAB suggests that a three-year transition would be more appropriate.

7. Content (Chapter 9)

7.1. Some concerns in relation to content are set out above. This section examines primarily Chapter 9 of the Bill.

7.2. In summary, the NAB's position in regard to content regulation is as follows.

7.2.1. The reference to broadcasting as a distinct content service in a truly converged environment should be removed from the Bill entirely – the principle being that similarly situated players should be treated similarly.

7.2.2. The NAB and its members understand that today and in the near future, South Africa is not in a truly converged environment especially with regard to broadcasting. The NAB's members understand their role and in particular their social obligations. However, the NAB urges the Committee to consider the provisions specifically applicable to broadcasters for example in respect of a code of conduct (section 51), advertisements (section 52) and political election broadcasts (section 53-56), and ask whether they should in any way be applied to all content providers.

7.2.3. Given that today's environment will change with convergence developing over time, the NAB suggests that a provision should be included in the Bill to require the Authority to review the broadcasting environment from time to time and if the sector is found to be sufficiently competitive, then the conditions presently applying to broadcasters ought to be lifted, alternatively applied to content providers similarly.

7.3. The NAB also believes two seemingly contradictory provisions in regard to local content regulation should be reconciled. The Authority may impose licence conditions on broadcasting services licensees with regard to "the appropriate amount of South African programming, including music content, news and information programmes, and where appropriate, programming of local or regional significance" in terms of section 8(6)(j). The Authority also must prescribe regulations with regard to the South African television and music content for subscription broadcasting services in terms of section 57(2). Either the Authority should be given the power to make regulations with regard to local broadcasting content or it should be allowed to impose licence conditions or both. There should not be a distinction, however, as to whether the relevant provisions should be a licence condition or regulation, based on whether a licensee is a subscription services licensee or not.

8. Access (Chapters 7 and 8 and section 58)

8.1. The relevant sections of the Bill relating to access to communications network services are chapter 7 (interconnection) and chapter 8 (communications facilities leasing). The concept of access in the broadcasting services arena seems to be dealt with only in terms of section 58.

8.2. Broadcasters are therefore unclear about several issues. Who will be authorized to provide what is now called broadcasting signal distribution? Will it be communications network services providers (in terms of an individual license)? Or will it be communications services providers (in terms of a class license)? Sections 58, 85(3)(e) and the definition seem to say the later. Section 85(3)(f) seems to say the former. This must be clarified. The NAB believes that all broadcasting signal distributors should be licensed as communications network services licensees.

8.3. It is also not clear that broadcasting services licensees will have guaranteed access to signal distribution services. Currently, Sentech is a common carrier and obligated to provide signal distribution services to broadcasters. Under the Bill, this guaranteed right of access has been eliminated. The NAB suggests that section 34 of the IBA Act or some provision similar thereto be included in the Bill, obliging Sentech (and perhaps other communication network services licensees as well) to provide broadcasting signal distribution.

9. Conclusion

The key concerns regarding the Bill pertain to the following matters.

- **Preliminary issues** – Numerous other proceedings may have an impact on the interpretation and application of the Bill, which the Committee must consider.

- **Approach to Convergence** – The NAB is in general agreement with the legislative approach to convergence, however, because broadcasting services are regulated separately and differently, some of the provisions in the bill should not apply to broadcasting services, such as those set out in chapters 10, 11 and 12.

- **Procedural issues** – the NAB is concerned that the Bill has removed many of the provisions in the related legislation that ensure fairness and transparency, and respectfully submits that these be reinstated. The NAB also suggests provisions to bring about clarity in regard to regulating competition issues and making regulations.

- **Ministerial Powers and the Independence of the Regulator** – the NAB notes with concern the powers given to the Minister and the effect on Icasa's independence. The NAB has made suggestions as to

where the Minister's powers should give way to the Authority's mandate as an independent regulator.

- **Market Structure** – the structure of the market proposed in the Bill as this is reflected in the definitions, licensing and transitional provisions, is likely to cause significant problems on interpretation and implementation. The NAB has summarised the key concerns and will recommend drafting proposals at the hearings.

- **Content** – the definitions and treatment of both "content services" and "broadcasting services" should be reviewed to ensure that in the converged environment, content providers are not treated differently without cause.

- **Access** – rights of access for broadcasting services licensees to broadcast signal distribution either through their own licences or by virtue of obligations to be imposed on common carriers will be critical to the success of broadcasting services in South Africa.