



**NATIONAL ASSOCIATION OF BROADCASTERS'  
SUBMISSION TO THE GENERAL TERMS AND  
CONDITIONS OF INDIVIDUAL AND CLASS LICENCES  
UNDER CHAPTER 3 OF THE ELECTRONIC  
COMMUNICATIONS ACT 36 OF 2005**

**19 SEPTEMBER 2007**

## **1. INTRODUCTION**

1.1 On 30 August 2007, the Independent Communications Authority of South Africa (The Authority) published its intention to prescribe the general terms and conditions of the licences (the draft terms and conditions) in terms of Chapter 3 of the Electronic Communications Act 36 of 2005 (The EC Act), in Government Gazette 30246, Notice 1084. The Authority invited interested persons to submit their written representations no later than 16h30 on 19 September 2007.

1.2 The National Association of Broadcasters (The NAB) would like to thank the Authority for the opportunity of making its written representation, in relation to the draft terms and conditions.

1.3 The NAB would like to be given the opportunity to participate in oral representations, should the Authority deem it fit to hold oral representations in respect of this process.

1.4 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:

- Three television public broadcasting services, and eighteen sound public broadcasting services, of the South African Broadcasting Corporation of South Africa (the SABC);
- All the commercial television and sound broadcasting licensees;
- Both the licenced common carrier and the selective and preferential carrier broadcasting signal distributors;
- Over thirty community sound broadcasting licensees, and the first licensed community television broadcasting service, Trinity Broadcasting Network (TBN)

## **2. OBJECTS OF THE DRAFT TERMS AND CONDITIONS**

2.1 The NAB is fully supportive of the Authority's initiative of prescribing the draft terms and conditions in so far as it contributes to the licence conversion process the Authority is currently engaged in.

2.2 The Authority states in the draft terms and conditions that it aims to prescribe the general terms and conditions of the licences in terms of Chapter 3 of the EC Act.

2.3 Section 8(1) of the EC Act reads as follows:

*“The Authority must prescribe standard terms and conditions to be applied to individual licences and class licences. The terms and conditions may vary according to the different types of individual licences and, according to different types of class licences.”*

2.4 Section 8(2) of the EC Act outlines areas which the Authority should take into account when prescribing the terms and conditions. The NAB wishes to applaud the Authority in its initiative, as it has attempted to address all areas of concern in the draft terms and conditions, as articulated by section 8(2).

2.5 However, in so doing, the Authority should be cautious of duplicating provisions of other regulations which are still pending before the Authority. The draft terms and conditions seem to touch on certain aspects, which are dealt with in detail by other regulations. For instance, issues such as customer privacy are addressed in detail in the pending Regulations in respect of End-User and Subscriber Service Charters<sup>1</sup>, and are contained in the draft terms and conditions. The duplication has the potential of creating confusion and uncertainty on the part of licencees.

2.6 Further more, when prescribing the terms and conditions, the Authority should be cautious of depriving existing licencees of their existing rights. Section 93(1) of the EC Act, provides as follows:

*“...the Authority must convert existing licences by granting one or more new licences that comply with this Act on no less favourable terms”*

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<sup>1</sup> Notice number 851 of 2007, published in government gazette number 30073, dated 13 July 2007.

### **3 PROVISIONS OF GENERIC APPLICATION**

3.1 In order to avoid repetition when commenting on certain provisions of the draft terms and conditions, the NAB will first address provisions of the terms and conditions, which should apply generally to all licence categories, then followed by provisions affecting only the individual and class broadcasting service licences. This will then be followed by comments on specific provisions. For this part of the submission, the following format will be followed:

3.1.1 Comments on paragraph 7 dealing with Commencement of Operations will apply to terms and conditions of all class and individual licences.

3.1.2 Comments on:

3.1.2.1 Paragraph 11 dealing with Contribution to Universal Services and Access Fund (USF);

3.1.2.2 Paragraphs 13 and 15, dealing with Compliance with Codes and Charters and Compliance with the Code of Conduct for Broadcasting Service Licencees and Code of Advertising; and

3.1.2.3 Paragraph 20 dealing with Interconnection;  
will all apply to class and individual broadcasting services licences.

### **3.2 AD PARA 7: COMMENCEMENT OF OPERATIONS**

3.2.1 In terms of the draft terms and conditions, the licensee must commence operation within 6 months from the date of issue of the licence.

3.2.2 The NAB is of the opinion that the period during which operations should commence is too soon after the date of issue of the licence. It may be impossible for licencees to comply with this requirement. The Authority should take into account that delays to commence operations may be caused by circumstances beyond the licensee's control.

3.2.3 The NAB therefore recommends that the Authority should open the issue for discussion with applicants, with the view to allowing negotiations for a longer period.

### 3.3 AD PARA 11: CONTRIBUTION TO THE UNIVERSAL SERVICE ACCESS FUND

3.3.1 In terms of section 89(3) of the EC Act broadcasting service licencees contributing to the Media Development and Diversity Agency (MDDA) must have their annual MDDA contributions set off against their annual USF contributions. In their current form, the provisions of the draft terms and conditions are open to multiple misleading interpretations. Consequently, the NAB is of the view that the draft terms and conditions of broadcasting services licencees should reflect this provision so as to avoid ambiguity.

### 3.4 AD PARA 13: COMPLIANCE WITH CODES AND CHARTERS

3.4.1 The NAB supports the need for broadcasting service licencees to comply with all applicable Codes of Conduct and End User and Subscription Services Charter. However, the NAB is of the opinion that the Codes of Conduct for licencees to be promulgated in terms of section 69(1) read in conjunction with subsection (2) of the EC Act are not applicable to broadcasting service licencees for the following reasons:

3.4.1.1 The wording of these provisions expressly state that the sections apply only to electronic communications services (ECN) and electronic communications network services (ECNS); and

3.4.1.2 Currently, broadcasting licensees are subject to the BCCSA Code of Conduct, which has been recognized by the Authority, which are in line with the provisions of section 54 of EC Act.

3.4.2 The NAB therefore recommends that paragraph 15 of the draft terms and conditions should be merged with paragraph 13, as it addresses additional codes of conduct that broadcasting service licencees should comply with.

### 3.5 AD PARA 20: INTERCONNECTION

3.5.1 The NAB notes that the EC Act mandates all licencees to interconnect, on request, to any other person licensed in terms of the EC Act<sup>2</sup>. This

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<sup>2</sup> Section 37(1) of the EC Act.

provision by default includes broadcasting services and broadcasting signal distribution.

3.5.2 The NAB submits that the inclusion of broadcasting services and broadcasting in the obligation to interconnect is erroneous and also not technically possible.

3.5.3 The NAB suggests that the wording of the provisions of paragraph 20 of the draft terms and conditions should be amended to stipulate that licencees have the right to interconnect where technically and financially feasible with any other Licensee and have the obligation to do so when so requested by other Licensees, subject to and in accordance with the provisions of Chapter 7 of the Act.

#### **4. STANDARD TERMS AND CONDITIONS FOR CLASS BROADCASTING SERVICES LICENCES**

##### **4.1 AD PARA 3: OWNERSHIP AND CONTROL**

###### **4.1.1 Para (c)**

The draft terms and conditions require that no reduction in the percentage of effective Broad Based Black Economic Empowerment (BBBEE) ownership, whether direct or indirect, of the licensee may be effected without the licensee submitting a written application to the Authority for its prior approval.

4.1.2 The NAB is of the view that BBBEE requirements do not apply to community based broadcasting services. By their nature, community broadcasting services are owned and controlled by the members of the community the broadcasting service is serving<sup>3</sup>. Therefore, the management of the community broadcasting service are the very members of the community the broadcasting service is serving. In this regard, the NAB submits that this provision is irrelevant and should not apply to licences based on communities of interest. BBBEE ownership requirements become senseless. However, in granting a class licence

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<sup>3</sup> Section 1 of the EC Act the definition of Community Broadcasting Service

community broadcasting licence, the Authority should take into account the provisions of section 9 of the EC Act.

- 4.1.3 It is important to note that while there is legislative requirements for equity ownership to be held by persons from historically disadvantaged groups in respect of individual licences, there is no such legislative requirement in respect of community broadcasting services<sup>4</sup>. Consequently the NAB's submission that the BBBEE ownership requirements should not be applied to community broadcasters finds support from the legislation.
- 4.1.4 The NAB therefore recommends that the paragraph dealing with BBBEE issues be deleted from the draft terms and conditions for Class Licences for Broadcasting Services.

#### 4.2 AD PARA 5: DURATION OF THE LICENCE

- 4.2.1 In terms of section 19(1) of the EC Act, the term of validity of a class licence must not exceed 10 years. The draft terms and conditions stipulate that the validity period of class licence broadcasting services is 4 years.
- 4.2.2 The NAB applauds the Authority in that the term of validity for low power community and low power commercial broadcasting services has been increased from 3 year to 4 years. However, the validity period for community sound broadcasting services remains the same. The NAB would like the authority to clarify why the term of validity for community sound broadcasting services remain unchanged.
- 4.2.3 The NAB recommends that the validity period of community sound and television broadcasting services be increased. This is because over the years since the inception of community sound broadcasting services, community sound broadcasting services have demonstrated some level of independence and sustainability.

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<sup>4</sup> Section 9(2)(b) of the EC Act

- 4.2.4 In addition, imposing longer validity periods lessens the administrative burden on the Authority, especially with the number of applications and renewals that the Authority will need to deal with in a given time. Similarly, the administrative burden will be lifted from the community broadcasting service licencees.

## **5. STANDARD TERMS AND CONDITIONS FOR CLASS ELECTRONIC COMMUNICATIONS NETWORK SERVICES LICENCES**

### **5.1 AD PARA 5: DURATION OF THE LICENCE**

- 5.1.1 Section 63(1) of the EC Act provides as follows:

*“Broadcasting service licencees may provide their broadcasting signal distribution upon obtaining an electronic communications network services licence”*

- 5.1.2 The NAB’s understanding of this provision is that, for those broadcasting service licencees who elect to do their own signal distribution, the EC Act stipulates that they must be in possession of a broadcasting service licence and an ECNS licence. It is the NAB’s understating that these two licences should be issued concurrently, as the broadcasting services cannot take place in the absence of an ECNS licence.

- 5.1.3 Further more the NAB’s expectation is that the duration of the broadcasting services licence should be synchronized with the duration of the ECNS licence.

- 5.1.4 However, in terms of the draft terms and conditions, the duration of a class licence for electronic communications network service (CLECNS) is 10 years. The NAB suggests that the duration of the CLECNS should be synchronized with the duration of the class licence broadcasting service. This will help alleviate a situation where broadcasting services will cease because of an expired CLECNS licence.



## 6. INDIVIDUAL LICENCE FOR BROADCASTING SERVICES

### 6.1 AD PARA 5: DURATION OF THE LICENCE

6.1.1 In terms of section 5(10)(a) of the EC Act, an individual licence may not be issued for a period exceeding 20 years. The following duration periods have been provided for individual broadcasting service licences:

**6.1.1.1 Eight years for public/public commercial or commercial free to air television broadcasting services:** The Authority has not increased the duration period for this category of broadcasting services.

**6.1.1.2 Ten years for commercial or public commercial subscription broadcasting services:** In its Position Paper for Subscription Broadcasting Services<sup>5</sup>, the Authority reached a decision that it would make a recommendation that section 54 of the Independent Broadcasting Authority Act 1993 (the IBA Act) be amended to insert section 54(e) to read as follows:

*“the term of validity of a broadcasting licence-  
(e) in the case of subscription broadcasting licence shall be twelve years”<sup>6</sup>*

The Licencing regime for Subscription broadcasting services in South Africa is a new phenomenon, however, a detailed consultative process was embarked on by the Authority and stakeholders on the term of validity of Subscription Broadcasting licences. The outcome of the process was that the duration of the subscription television broadcasting licence should be 12 years, and 12 years for a composite subscription broadcasting licence. However, the Authority has deviated from this in the draft terms and conditions.

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<sup>5</sup> Subscription Broadcasting Services Position Paper 01 June 2005

<sup>6</sup> At page 61

**6.1.1.3 Six years for public/public commercial or commercial free-to-air sound broadcasting services:** The authority has not increased the duration period for public and commercial free to air sound broadcasting services.

6.1.2 On the contrary, the Authority has fixed the duration of individual ECS licences to 15 years, and individual ECNS licences to 20 years. The NAB is concerned to know why preference has been given to ECS and ECNS licencees as opposed to broadcasting service licencees, when these services are categorized under the same Licencing framework.

6.1.3 The NAB's submission in this regard is the following:

6.1.3.1 In view of the fact that an ECNS licence is required for a broadcasting service to take place, the terms of an ECNS licence should be synchronized with that of broadcasting service licences.

6.1.3.2 It is beneficial to impose longer licence validity periods for broadcasting services, as it takes long before a break-even point is reached, hence enabling the broadcasting service licencees to recoup their start up losses.

6.1.3.3 With the advent of digital migration, which necessitates the need for broadcasting service licencees to provide broadcasting services in dual illumination, it would be in the best interests of broadcasting service licencees to be given longer validity terms.

6.1.3.4 In addition, imposing a longer validity period lessens the administrative burden on the Authority, especially with the number of applications and renewals that the Authority will need to deal with in a given time.

## **7. CONCLUSION**

- 7.1 The NAB once again thanks the Authority for the opportunity of making its written submissions in response to the draft general terms and conditions of individual and class licences. The NAB is committed to this process, and hopes its inputs will add value to the finalisation of the draft terms and conditions. The NAB will forever be available to assist the Authority in issues of policy and regulations.