



**NAB WRITTEN SUBMISSION
ON THE DRAFT BROADCASTING RADIO FREQUENCY
SPECTRUM LICENCE FEES REGULATIONS**

30 September 2010

1. Introduction

- 1.1. The National Association of Broadcasters (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 fifteen sound broadcasting licensees;
 - Both the licenced common carrier and the selective and preferential carrier broadcasting signal distributors;
- Over thirty community sound broadcasting licensees, and one community television broadcasting licensee, Trinity Broadcasting Network (TBN)
- 1.2. On 27 August 2010, the Independent Communications Authority of South Africa (ICASA) published for public comment, in general notice number 825 of 2010, government gazette 33494, a notice inviting written comments on draft radio frequency spectrum fee regulations applicable to broadcasting service licencees (the draft broadcasting spectrum fees regulations).
- 1.3. Simultaneously, ICASA published in government gazette 33495 its final Radio Frequency Spectrum Licence Fees regulations (the final spectrum fees regulations), together with its explanatory memorandum for the Radio Frequency Spectrum Licence fees (the explanatory memorandum).
- 1.4. The NAB welcomes the opportunity to make its written representations to the draft broadcasting spectrum fees regulations. The NAB's intention is to provide its written comments on the draft broadcasting spectrum fees, however in order to bring context to its submission the NAB will touch on the final regulations on spectrum fees as well as the explanatory memorandum thereto, even though the Authority has not outlined the relation between the two documents to the draft broadcasting spectrum fees regulations. The NAB would like to be given the opportunity to make oral representations, in the event that ICASA may decide to hold public hearings.

1.5. The NAB has two major issues, it wants to address with the draft broadcasting issues, and these will be dealt with under the following categories:

1.5.1. Procedural issues concerning how the Authority conducted the drafting of the draft broadcasting spectrum fees.

1.5.2. Principle issues around the draft spectrum fees.

2. PROCEDURAL ISSUES

2.1. The Authority initiated the process of drafting spectrum fees regulations on 16 March 2009, when the Authority published a discussion document on spectrum fees. The intention of the draft spectrum fees regulations, was to layout a new structure and update the 1979 Radio Regulations published in General Rule 2862 of 1979 (the 1979 Radio Regulations). The motivation behind the amendment of the 1979 Radio Regulations was to:

2.1.1. Encourage efficient and effective utilization of spectrum, encouraging, on an incentive basis, migration to lesser populated and low-demand bands and;

2.1.2. At least cover the costs to ICASA for monitoring, interference investigations, international coordination, ITU membership and policy development.¹

2.2. The NAB supports the rationale provided for the revision of the spectrum fees, in so far as it applies to the telecommunications sector. The 1979 Radio Regulations were not applicable to broadcasting services, and consequently, the exemption was further amplified in the discussion document, and draft spectrum fees. The Authority stated in the discussion document that *“the methodology can be applied to broadcast services as well. However the users of broadcast services will not be subject to these regulations until the Authority decides otherwise”*.²

2.3. In its accession that the methodology can be applicable to broadcasts services, the Authority failed to demonstrate how this methodology would be applicable to broadcasts, this is despite the NAB’s concerns around the extent to which

¹ ICASA Notice inviting comments regarding draft Radio Frequency Spectrum Fee Regulations published in Government Gazette 32029, at page 10.

² Page 24 of the discussion document.

broadcasting services were exempted from the draft regulations.³ The discussion document was very vague about broadcast radio spectrum usage, and the methodologies proposed were telecommunications centric.

2.4. Subsequently the Authority published its final spectrum fees regulations on 27 August⁴; however, contrary to the position stated in the discussion document, the exemption that was extended to broadcasting services has been removed. However, in so doing, the Authority has not provided the rationale for the removal. This leaves the broadcasting service sector in a predicament, as in principle, the final spectrum fees regulations apply to broadcasting sector as well.

2.5. The Authority went further and published draft broadcasting spectrum fees regulations for public comment. The NAB is concerned about the propriety of the process the Authority is following in publishing draft broadcasting spectrum fees regulations, while in fact there is a set of regulations which in principle are already applicable to broadcasting services⁵. The issue is further compounded by the fact that the Authority has not attempted to adapt the methodology proposed in the draft broadcasting spectrum fees to conform to broadcasting services, as the draft broadcasting spectrum fees regulations are verbatim of the final spectrum fees, which were tailor made for the telecommunications operators.

2.6. Furthermore, when perusing the explanatory memorandum, the NAB expected to gain insight on why the Authority departed from the *status quo* by outlining reasons for the departure. However the NAB has not identified any reasons pertinent to broadcasting, instead the reasons provide apply to the telecommunications operators. The NAB will provide a brief commentary on the reasons outlined in the explanatory memorandum:

2.6.1. **Role of spectrum pricing⁶:** the reasoning provided by the Authority for implementing spectrum pricing does not apply to broadcasting services. Broadcasting services do not enjoy the flexibility of migrating to lesser populated and low demand frequencies. Unlike with telecommunications,

³ NAB written submission on the draft regulations on radio frequency spectrum fees dated 29 May 2002 at page 3.

⁴ Published in government gazette 33495

⁵ The final regulations for spectrum fees published on 27 August 2010.

⁶ Page 4 of the explanatory memorandum

with broadcasting, the frequency re-use is not possible within the same geographic area. Therefore to augment coverage in the same geographic area broadcasters are due to technical limitations, forced to use a different frequency, and in most instances there is overlap in coverage. This puts broadcasters in a disadvantaged position, as the technological limitations mean they have to incur costs which they would not have to incur should the migration to digital been concluded. Consequently, the migration anticipated by the Authority to low demand bands does not apply to broadcasting services. Conversely, applying spectrum fees to broadcasting services acts as a barrier to entry, economic development and innovation.

2.6.2. Administrative Incentive Pricing (AIP)⁷: The Authority cites preventing of spectrum stockpiling, and providing incentives to hand back unused spectrum, as some of the reasons for imposing the administrative incentive pricing. Similarly, these principles do not apply to broadcasting services, as spectrum hoarding is not possible in broadcasting. Broadcasting service licencees are assigned specific frequencies, and none use of spectrum in broadcasting results in the licence being revoked. This is further entrenched by the Standard Conditions Regulations which require broadcasting licencees to commence broadcasting within a specified period of time.⁸Currently it is impossible for broadcasting services to switch to spectrally efficient technologies. This move will be dependent on the migration to digital broadcasting, hence availing alternative technologies to broadcasters.

2.6.3. Furthermore, the Authority cites factors such as frequency band, power output, bandwidth used, geographic area etc as factors taken into account when calculating spectrum fees based on the AIP⁹. However from the NAB point of view these factors are not relative to broadcasting services at all. In broadcasting, these factors are pre-determined by

⁷ Page 5 of the explanatory memorandum

⁸ Published in government gazette 33294:6 months for community broadcasting services, 6 months for free-to-air sound broadcasting services, 12 months for both free to air and subscription television broadcasting services.

⁹ Pages 5 to 7 of the explanatory memorandum

ICASA through the broadcasting frequency plan. Broadcasters have very little or no flexibility regarding these factors. Parameters for these factors are set by ICASA in each invitation to apply (ITA) for individual licences that is published. Furthermore, the frequency plan categorizes frequencies into the different tiers of broadcasting by geographic area as well as limiting the power output. Bandwidth for broadcasting services in SW, MW, FM, UHF and VHF is internationally agreed and set by the ITU. Broadcasters cannot use more or less bandwidth than is technically possible in an analogue environment and therefore have no flexibility or choice in this regard.

2.6.4. Reference Table for Calculating Radio Frequency Spectrum Licence Fees¹⁰: This table is cumbersome, confusing, and does not categorically distinguish broadcasting frequencies from the rest of the frequencies. This further compound the predicament the NAB has with interpreting the table. The factors arrived at by ICASA are not explained. ICASA fails to provide any economic reasoning how it arrived at the values set for each of factor used.

2.7. The NAB therefore submits that both the final regulations and the draft broadcasting spectrum fees regulations cannot be applied to broadcasting services. Similarly, the explanatory memorandum focuses mainly on telecommunications issues, hence not binding on broadcasting service licencees

3. PRINCIPLE ISSUES

3.1. The NAB strongly advocates that broadcasting service licencees be exempted from paying spectrum fees based on the following principles:

3.1.1. In lieu of paying spectrum fees, broadcasting service licencees have regulatory obligations imposed by ICASA, which are intended to counterbalance the payment of spectrum fees. The obligations are very onerous on the broadcasting service licencees, because,. As opposed to the telecommunications operators, who have the flexibility of transmitting

¹⁰ Page 12 of the draft broadcasting spectrum fees regulations.

data, or voice on their networks, broadcasting service licencees are made to comply with how, and what should be broadcasted. Broadcasters are mandated to bridge language barriers, by availing broadcasting services in the official languages. This on its own is demanding on costs and resources. Further in pursuing its mandate the PBS has universal service obligations, and is obliged to avail broadcasting services to marginalized communities, whether or not there are audiences or listeners in those particular communities.

- 3.1.2. Coupled with this, all broadcasting service licencees are mandated to meet local content quotas, which specify the amount of locally produced programming and music a broadcaster has to broadcast. Broadcasters are mandated to report on current affairs, news, children and educational programming. In addition, broadcasting service licencees carry out promises of performance, which are additional obligations licencees negotiate with the Authority and are added to their licence conditions.
- 3.1.3. Community broadcasting service licencees are by nature non-profit making entities. Imposing spectrum fees on these entities, will immensely affect their viability, and this goes against the objectives of the EC Act.
- 3.1.4. When applying for broadcasting service licences, broadcasters never factored the cost of spectrum fees in their business plans, as spectrum fees did not form part of the broadcasting business model. It must also be borne in mind that revenue in broadcasting, particularly in television, is capped, by limiting the amount of advertising;
- 3.1.5. Spectrum usage is an integral part of the telecommunications service to be availed to consumers, while with broadcasting, the usage of spectrum forms part of the broadcasting value chain, to avail content as the ultimate product to the consumer;
- 3.1.6. The Authority must be cognizant of the fact that, broadcasting service licencees will play a huge role in promoting efficient spectral use. This will

be achieved by the migration from analogue broadcasting to digital broadcasting, wherein, broadcasting service licencees will free up a large amount of spectrum. However, imposing spectrum fees on broadcasting service licencees will be counterproductive, as this will result in broadcasters being subjected to a double jeopardy. Consequently, broadcasters will incur double illumination broadcasting costs, as well as spectrum fees for both analogue and digital broadcasting.

- 3.1.7. Furthermore, the methodology proposed in the draft broadcasting spectrum fees is not workable for broadcasting service licencees, as it is telecommunications oriented. If applied to broadcasting services it will yield undesired consequences. From the NAB point of view, the manner in which the formula applies does not have regard for the overlap coverage in broadcasting. The frequencies that are used in a highly congested area appear to be included in the calculation of the fee amount, and this leads to the overlapping frequencies being included in the calculation.
- 3.1.8. The NAB has conducted a financial impact analysis of the proposed formulae on the broadcasting industry, and we have attached hereto the report, marked **Annexure A** for the Authority's perusal.
- 3.1.9. Apart from paying annual licence fees, and meeting regulatory obligations, broadcasting service licencees are liable to pay other levies into various fund, such as needletime levies, mechanical rights levies, performer's rights levies, all of which are payable to collecting societies. ICASA has further introduced a levy on broadcasting service licencees, by prescribing Regulations for Annual Contributions of Licencees to the Universal Service and Access Fund¹¹, a fund into which broadcasters never paid.

4. CONCLUSION

- 4.1. The NAB once again thanks the Authority for the opportunity to make its written submission.

¹¹ Published in Government Gazette 31499, dated 10 October 2008.

4.2. The NAB would like to reiterate its position that the exemption of broadcasting services should be retained in the final regulations. Despite being termed draft broadcasting spectrum fees regulations, the draft regulations are telecoms oriented and not applicable to broadcasting services licences, nor does the explanatory memorandum speak to broadcasting service licencees.