

SUBMISSIONS MADE BY THE NATIONAL ASSOCIATION OF BROADCASTERS ON THE INTRODUCTION OF A REGULATORY FRAMEWORK FOR SUBSCRIPTION BROADCASTING IN SOUTH AFRICA

1. Introduction

- 1.1 The National Association of Broadcasters ("**the NAB**") is the leading representative of South Africa's broadcasting industry. It aims to further the interests of the broadcasting industry in South Africa by contributing to its development. NAB members include:
 - 1.1.1 the three television and the eighteen radio stations of the public broadcaster, the South African Broadcasting Corporation ("**the SABC**");
 - 1.1.2 all licensed commercial free-to-air broadcasters in both radio and television;
 - 1.1.3 all licensed subscription television broadcasters;
 - 1.1.4 both the common carrier and the selective and preferential carrier licensed signal distributors; and
 - 1.1.5 over thirty community television and radio broadcasters.
- 1.2 On 23 April 2004 the Independent Communications Authority of South Africa ("**the Authority**") published (under Government Notice 726 of 2004 in *Government Gazette* No. 26289) a Discussion Paper on Subscription Broadcasting ("**the Discussion Paper**"), with a view to generating comment from all stakeholders on the introduction of a regulatory framework for subscription broadcasting in South Africa.
- 1.3 In response to the Authority's invitation to make submissions on the Discussion Paper, the NAB, on behalf of its members, hereby submits its representations to the Authority. The NAB reserves its rights to amplify these representations should this become necessary in future.

- 1.4 The NAB requests an opportunity to make oral representations at any hearings conducted by the Authority in relation to subscription broadcasting in South Africa and the contents of the Discussion Paper.
- 1.5 The NAB notes at the outset that, in these submissions, it has not proffered a response to each question posed by the Authority in the Discussion Paper. Instead, the NAB has attempted to address the core legal and policy issues raised by the Authority in the Discussion Paper.
- 1.6 At the outset, the NAB submits it is unclear how this inquiry relates to the Convergence Bill and Government's strategy on digital migration, currently being developed. In light of the fact that the Authority also intends conducting an inquiry into multi-channel signal distribution and the draft Convergence legislation could be published later this year, it would be more appropriate if this inquiry were to be combined with the multi-channel signal distribution inquiry. The NAB submits that this would result in a more holistic approach to formulating broadcasting policy.

2. General Policy & Regulatory Issues

- 2.1 The aim of the proposed regulatory regime would be to encourage fair competition between broadcasters by giving the Authority the flexibility to regulate in a technological neutral way that ensures that the social goals of broadcasting regulation are met through the judicious imposition of appropriate licence conditions based on the essential characteristics of a broadcasting service.
- 2.2 The NAB submits that it is important that South African terrestrial broadcasters are not disadvantaged due to different regulatory regimes which apply unfairly to national as opposed to international broadcasters. However, the South African regulatory environment must be attractive for international broadcasters to invest in the industry.
- 2.3 The NAB welcomes the Authority's initiative to look at the key issues which arise in relation to subscription broadcasting. These issues involve the introduction of an appropriate licensing framework and regulatory environment which can sustain additional subscription broadcasting services, as well as the introduction of policies and regulations which will stimulate

growth and are able to sustain new entrants into the subscription broadcasting sector. The NAB is of the view that this can only be achieved by a light-touch, enabling regulatory framework without unnecessary restrictions on every aspect of subscription broadcasting.

2.4 Section 192 of the Constitution of the Republic of South Africa Act 108 of 1996 ("**the Constitution**") provides for the establishment of an independent body to regulate broadcasting in the public interest and to ensure fairness and a diversity of views which broadly represents South African society.

2.5 This mandate is reiterated in the provisions of the Independent Broadcasting Authority Act 153 of 1993 ("**the IBA Act**") and the Broadcasting Act 4 of 1999 ("**the Broadcasting Act**"). Section 2 of the IBA Act provides that:

"The primary object of this Act is to provide for the regulation of broadcasting activities in the Republic in the public interest through the Independent Broadcasting Authority...and for that purpose to—: ...

(o) ensure fair competition between broadcasting licensees".

2.6 In addition, section 2(h) of the Broadcasting Act states that:

"The object of this Act is to establish and develop a broadcasting policy in the Republic in the public interest and for that purpose to—...

(h) ensure fair competition in the broadcasting sector".

2.7 The Authority therefore has a constitutional mandate, in addition to its statutory mandate, to ensure fairness and fair competition between broadcasting services and to make certain that broadcasting services in South Africa are representative and cater for the needs of all South Africans.

2.8 Subscription broadcasting by its very nature is not a universal service. Its characterised by the fact that it is commercially driven and based on a contractual relation between the broadcaster and the consumer with very specific content offerings.

2.9 It is submitted that, in order to ensure the continuation of a fair, competitive broadcasting environment, any obligations placed on new entrants into the subscription broadcasting market must be fair in relation to obligations

imposed on its competitors. It should encourage new entrants and fair competition between broadcasters.

- 2.10 The NAB submits that in a digital subscription broadcasting environment where there is no use of scarce frequency spectrum, an even lighter touch regulatory approach would be more appropriate, as spectrum scarcity is not as big an issue as in an analogue environment.
- 2.11 By its very nature, subscription broadcasting is not a universal service but a commercial one. Market forces should be allowed to drive the take-up of digital subscription broadcasting. The take-up of digital subscription broadcasting in South Africa are likely to be in niche markets in limited geographic areas, and in the medium term take-up of digital subscription broadcasting is likely to remain confined to urban areas.

3. Ownership and Control

- 3.1 The imposition of restrictions on ownership and control is a tool that is generally used to meet certain pre-determined criteria. These criteria are not dissimilar to the objectives which underlie local content requirements, and include the development of the local industry and the control of the dissemination of information by local persons.
- 3.2 However, the NAB submits that the imposition of restrictions on ownership and control may not be appropriate in subscription broadcasting where defining characteristics of a broadcasting licence (namely, whether it is multi- or single-channel, pay or subscription, the nature of the service and the coverage area of the broadcasting service) should be taken into account in determining issues of ownership and control. Generally it is international practice to apply restrictions of this nature to free-to-air broadcasting services and not to subscription services because of their limited influence over news and information dissemination.
- 3.3 The NAB recognises the need to encourage foreign investment in broadcasting enterprises which will enhance the competitive nature of South Africa's broadcasting industry and enhance in its growth. This is particularly so in respect of subscription broadcasters with an international coverage

area. The NAB therefore proposes that the legislative approach to ownership and control should be a flexible one, judged on a case-by-case basis, and one which will be able to meet the objective of ensuring a competitive broadcasting market which encourages investment.

- 3.4 The NAB suggests that it would be highly inappropriate for the Authority to formulate rigid rules regarding ownership and control for every conceivable permutation of broadcasting service. Given the quick pace of technological development, there should be a more relaxed regulatory approach where the policy goals are set out in legislation together with the list of identifying characteristics of a broadcasting service. The Authority will then have the flexibility to set licence conditions in accordance with the particular of broadcasting service in question as well as meet the policy goals set out in the broadcasting legislation.

4. Licensing and Regulating Subscription Broadcasting

4.1 licensing framework for subscription broadcasting

- 4.1.1 With regard to the issue of the scope for digital terrestrial subscription broadcasting services, and whether there should be a moratorium on the licensing of any further subscription broadcasting services using analogue terrestrial frequencies (see questions 25 and 26 of the Discussion Paper), the NAB agrees with the Authority that the trend towards a digital broadcasting environment requires the introduction of a new regulatory regime. This cannot be addressed by a set of hard and fast classes of licence and it would further prove very difficult for the Authority to formulate uniform rules that would be appropriate to each broadcasting service, given that the different essential characteristics of broadcasting. The NAB submits that it would be more appropriate to adopt a holistic and flexible regulatory approach that is focused on the licensing process.
- 4.1.2 In keeping with international standards, and in order for South Africa to remain a meaningful competitor in the broadcasting arena as well as to free up the frequency spectrum, it is submitted that it is important for the Authority to put in place a moratorium on the licensing of any further

subscription broadcasting services using analogue terrestrial frequencies.

- 4.1.3 In considering the imposition of a moratorium on the further licensing of terrestrial analogue subscription broadcasting services, the NAB submits that the Authority must also take account of the lack of terrestrial analogue broadcasting frequencies available in metropolitan areas. The Authority will also need to retain spare capacities in order to facilitate a migration from analogue broadcasting to digital broadcasting.
- 4.1.4 The NAB suggests that light touch regulation is appropriate in respect of all digital services, due to the fact that frequency scarcity becomes far less of a problem in the digital environment than it is in the analogue environment.
- 4.1.5 It is important for the Authority to note that as the digital broadcasting value chain comprises content providers, multiplex operators and network service providers, there must be a regulatory distinction between content providers and networks service providers. This distinction is evident in the Broadcasting Act, which provides that content providers need only be authorised and not licensed, a notion which the NAB supports provided it is done through a simple and transparent process.
- 4.1.6 The NAB supports the suggestion that certain broadcasting equipment must be accepted or approved on the basis of determined or determinable quality standards.
- 4.1.7 The NAB suggests that the Authority should, in determining licence conditions for subscription broadcasting, adopt a flexible approach to licence conditions that is based not only on the category of licence(i.e. public, commercial or community), but also on the essential characteristics of the broadcasting service. In this regard, light touch regulation will be appropriate for commercial digital, subscription and/or international coverage services.

4.2 **barriers to entry**

- 4.2.1 The NAB submits that infrastructure barriers should be addressed in a way that is technology neutral and in a way that allows the market to determine the best technology for use in the broadcasting industry.
- 4.2.2 The NAB strongly believes that activities related to conditional access, subscriber management services, electronic programme guides and multiplexing should not be regulated as broadcasting activities as these are considered to be commercially competitive issues.
- 4.2.3 The NAB however supports the notion of interoperability between systems.

4.3 **South African content**

- 4.3.1 The imposition of local content requirements is a tool that is intended to achieve certain outcomes, namely, the development of the local broadcasting industry and ensuring that local ideas and cultures are disseminated in South Africa.
- 4.3.2 The NAB believes that local content should be regulated across the bouquet in a multi-channel environment. The Authority should however take care that such regulation for subscription broadcasters must be light touch seeing as the programme offering is based on a contractual agreement between the subscriber and the broadcaster. Specific local content requirements should be based on a process of negotiation between an applicant and the Authority and should be captured in the licence conditions of a broadcaster. The Authority should therefore review each application on a case-by-case basis.
- 4.3.3 The Authority should, however, when determining these obligations, take into account whether the programme offering is broadcast nationally or internationally. The requirements need to be appropriate to the coverage area of the broadcasting service as a whole.
- 4.3.4 The NAB submits that it is imperative for the Authority to consider the critical question of how services, which do not have control over content

of channel, can contribute to the objectives of local content. One of the options available is the “play or pay” principle.

4.3.5 play or pay principle

4.3.5.1 The NAB believes that the use of the play or pay principle (in a digital multi-channel environment wherein the licensee has no control over content of channels) is conducive to achieving the objectives that are stated in the broadcasting legislation with regard to local content, namely, the contribution by commercial subscription services in order to achieve the aims of the legislation. Due to the nature of subscription broadcasting and the importance of the content offering, the NAB believes that this option should be available to subscription broadcasting services. The Triple Inquiry Report has always recognised the importance of the “pay” principle for subscription broadcasters. The Authority might need to determine this principle on a case-by-case basis.

4.3.6 the nature of local content

4.3.6.1 Currently, the Authority determines the parameters of local content in relation to both local television content and South African music broadcast on sound broadcasting services. The NAB recommends that the legislation in this regard should be reconsidered, as there is a need to determine with more specificity the nature or definition of local content.

4.3.6.2 In particular, the NAB submits that the nature of local content, as contemplated in the IBA Act, is inappropriate because it does not recognise all possible forms of local content. The NAB does, however, acknowledge the concerns that seem to be inherent in the limitations of the definition of local content.

4.3.6.3 The NAB suggests that rigid percentages for local content be reconsidered and that light touch regulation is appropriate in respect of programming and content issues for subscription services and for all services that have an international coverage area.

- 4.3.6.4 The NAB suggests that local content requirements be set out in individual licence conditions. These may include an appropriate percentage of local content to be broadcast or other methods of supporting local content such as financial contribution can be made to a South African fund for supporting local content.

4.4 **empowerment**

- 4.4.1 The NAB supports the approach contained in the Discussion Paper aimed at encouraging empowerment by setting licence conditions on a case-by-case basis. It is submitted that the Authority should ensure that it is not possible to change the control of a licensee, nor to reduce the percentage of shares held in that licensee by historically disadvantaged persons, without the Authority's prior approval.
- 4.4.2 The setting of licence conditions should be done on a holistic basis. In particular, both applicants for licences as well as the Authority should be able to be innovative and flexible in relation to the proposal and imposition of licence conditions in relation to empowerment.
- 4.4.3 The NAB supports the view that the Authority should be guided by the Code of Practice promulgated under section 9 of the Broad-Based Black Economic Empowerment Act 53 of 2003, in relation to its formulation of policies on empowerment in the broadcasting sector. The Authority should also take into account the Black Employment Charter for the Information Communications and Telecommunications ("ICT") sector which is likely to come into effect in 2005.
- 4.4.4 However, the NAB also points out that, in formulating policies which relate to empowerment, the Authority must draw the necessary distinctions between listed and unlisted entities. In particular, the shareholder profile of a listed entity is completely distinct from the nature of the persons who control or manage these entities. In other words, listed entities are not readily in a position to control the profile of their shareholders. In relation to a listed company, empowerment should thus be viewed in the context of control and management of that entity, rather than shareholding of that entity.

- 4.4.5 Furthermore, in formulating policies related to empowerment, the Authority should also take into account whether a service has an international coverage area. The Authority's approach to such services should be even more flexible.

4.5 **licensing to stimulate the market**

- 4.5.1 In terms of the White Paper on Broadcasting 1998 ("**the White Paper**"), licensing conditions should promote competition on an equal footing and remove obstacles of entry. One way to encourage fair competition is to consider applications made by potential broadcasters on individual and case-by-case basis.
- 4.5.2 Licence conditions such as local content requirements and restrictions on foreign ownership are tools to achieve certain objectives and should not be seen as means in themselves. Thus, in laying down the licence conditions for each subscription licence, the Authority needs to implement a flexible approach which will ensure that a subscription broadcasting licensee participates in achieving such objectives.
- 4.5.3 The current approach where specific requirements are prescribed, such as percentages for local content and restrictions on foreign ownership, should be reconsidered to make place for a relaxed and flexible approach in any future regulatory environment. This would more readily achieve desired outcomes such as empowerment, development of the local industry and investment in the broadcasting industry.

4.6 **Code of Conduct for broadcasters**

Due to the nature of subscription broadcasting as a contractual agreement and also the amount of control over content that resides with the consumer, the NAB believes that there should be a clear distinction in relation to the application of the Code of Conduct to subscription broadcasting licensees. A further distinction should also be drawn between content that is originated locally and content that is originated outside of South Africa. The NAB proposed that the subscription industry and NAB via the BCCSA should develop a code of conduct for subscription broadcasters acceptable to the Authority and administered by the BCCSA.

5. Conclusion

- 5.1 The NAB submits that, in order to realise the outcomes stated in the Discussion Paper, the approach adopted by the Authority in relation to the regulation of subscription broadcasting should be flexible in order to ensure that the legislative objectives relating to the broadcasting industry (as laid down in the Constitution, the IBA Act and the Broadcasting Act) are met. Moreover, in future, when promulgating legislation and imposing licence conditions on subscription broadcasting licensees, the Authority should not impose onerous restrictions which would result in a hindrance to the development of the broadcasting industry and which would disincentive new entrants from participating in the broadcasting sector.
- 5.2 The NAB trusts that the Authority will take cognisance of the submissions made in this representation, in formulating a regulatory framework for subscription broadcasting in South Africa.