NAB SUBMISSION TO THE DEPARTMENT OF COMMUNICATIONS ON THE DRAFT CONVERGENCE BILL AS PUBLISHED IN GOVERNMENT GAZETTE 25806, NOTICE 3382 OF 03 DECEMBER 2003.

3 FEBRUARY 2004

1. **Introduction and Background to and Context of the NAB's Submissions**

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 broadcasters in both radio and television;

1.1.3. both the common carrier and the selective and preferential carrier licensed signal distributors; and

1.1.4. over thirty community television and radio broadcasters.

1.2. The NAB respectfully submits these comments on the draft convergence bill published in Notice 3382 of 2003, *Government Gazette* No. 25806, dated 3 December 2003 (hereafter "draft bill"). The NAB first outlines some general comments and then

sets out some specific comments on certain provisions of the draft bill.

2. General

2.1. Convergence policy

2.1.1. Convergence means different things to different people and in different contexts. This, however, should not serve as an excuse not to define the concept in the context convergence legislation. Indeed, because of the inherent ambiguity of the convergence concept, there is an immense need to explore and articulate the policy objectives of regulating for convergence.

2.1.2. However, apart from the recognition of convergence as inevitable in various policy documents (White Paper on Telecommunications Policy para 2.5, White Paper on Broadcasting Policy chapter 7 and para 11.3, and Green Paper on E-Commerce chapter 9), there has been no specific policy articulated as to the appropriate regulatory response to the inevitable process of convergence.

2.1.3. A more considered and comprehensive approach to the development of appropriate convergence policy for South Africa will help to set the stage for legislative and other interventions to effectively promote and facilitate convergence. The NAB therefore suggests that a green paper / white paper process be immediately initiated, in which all of the issues of convergence should be explored in a holistic and comprehensive manner.

2.1.4. At the same time, the required investigations that need to be carried out by ICASA, the Minister and other bodies (some of which are set out in the table below) should proceed with all deliberate speed to address individual issues. Those proceedings should feed into the convergence policy process and vice verse. As it is now, they are proceeding at their own speed and in some instances without regard to convergence. On the other hand, convergence policy seems to have proceeded without regard to the relevant issues.

Study	Responsible party	Legislative provision	Study completed?	Legislative provision repealed by draft bill?
Economic feasibility of subscription TV	ICASA	31(1) Broadcasting Act	No	No
License conditions, obligations and tariff structure for signal distribution (including multi-channel distribution)	ICASA	33(1) Broadcasting Act	No	No
South African music forum – guidelines for promoting development of South Africa music	ICASA	28 IBA Act (to be Icasa initiated according to business plan to March 2004)	No	Amended
Commissioning procedures forum – standards for commissioning independent production	ICASA	28 IBA Act (Icasa initiated according to business plan to March 2004)	No	Amended
Introduction of digital technologies into broadcasting in South Africa	Digital Broadcasting Advisory Body – advise Minister	n/a – 1998 White Paper on Broadcasting Policy	Advise to Minister not made public yet	n/a
Review of ownership and control of broadcasting services and review of commercial radio services	ICASA	28 IBA Act – (Icasa initiated)	Yes, but not in respect of digital technologies - comment period pending on proposal for legislative amendments	Amended

2.2. A phased approach to convergence

2.2.1. The NAB generally supports convergence legislation, to promote and facilitate the convergence of telecommunications, broadcasting and broadcasting signal distribution, as stated as the first of many objects in section 2 of the draft bill. The NAB, however, is concerned that the bill as currently drafted falls short of this goal.

2.2.2. The NAB sees convergence as a process and not as an end product. However, a cursory look at the bill would lead one to believe that convergence is an end product that can be legislated today and implemented tomorrow. The NAB believes that a more gradual approach to convergence legislation is more appropriate.

2.2.3. This is especially true with regard to broadcasting (as opposed to telecommunications and signal distribution). Traditionally, broadcasting has been regulated in terms of content, rather than in terms of the means of conveying that content.

2.2.4. In the draft bill, there is not even a mention of the regulation of content. And although the provisions of the existing broadcasting legislation regarding content are not repealed, it is unclear how those provisions will apply to the new categorisation of licenses, if at all. It is the opinion of the NAB that this is inappropriate for South Africa at this point in time. Convergence legislation should attempt to come to grips with the interplay between content and the means of conveying it, and should not necessarily subjugate one to the other.

2.2.5. Other issues that need to be considered from a traditional broadcasting point of view are issues of empowerment and control over cross-media and foreign ownership. As discussed more fully below, the NAB suggests neither a complete repeal of the provisions in the existing legislation nor the complete retention of those provisions is appropriate. The NAB suggests that the broadcasting sector should continue to be regulated in terms of existing broadcasting legislation, with certain changes.

2.2.6. Finally, the main driver to technology convergence, which in turn is the main driver for the draft bill, is the

move to the utilisation of digital technologies. This is especially true in the telecommunications arena. However, in the broadcasting arena, the move to the utilisation of digital technologies (in particular in respect of receivers used by customers) has been and will continue to be much slower. In fact, almost all broadcasters currently still operate in an analogue environment.

2.2.7. The draft bill seems more in line with how telecommunications has traditionally been regulated. In the telecommunications arena, steps to full convergence might include convergence of voice and data telecommunication services, and convergence of mobile and fixed services. The NAB is of the opinion that it would be more appropriate to take these first steps while at the same time, more carefully examining the appropriate regulatory response to full broadcasting and telecommunications convergence. However, the immediate elimination of all regulatory differences between traditional broadcasting services on the one hand and telecommunication services on the other must take a more thought out approach, with all of the issues considered.

2.2.8. It is the NAB's opinion that a more considered approach should be taken in that first, convergence within the broadcasting industry on the one hand and the telecommunications industry on the other, should first take place. This will move South Africa closer to a more comfortable point where a regulatory framework for converged broadcasting and telecommunications industry can be promulgated and implemented.

2.2.9. Thus, there is no need to chose between a whole new framework for regulating a converged industry and maintaining the status quo. The NAB believes that a more considered approach as discussed herein is the correct approach.

2.2.10. Similar approaches are being taken by others, for example, the European Union (a regulatory framework has been adopted in order to deal with the convergence of networks and services but does not deal with or cover content services), the United States of America (the Telecommunications Act of 1996 dealt with the convergence within the telecommunications industry but not between the telecommunications industry and the broadcasting industry), and Canada (as in the USA, in Canada, regulating for competition

and convergence in the telecommunications industry has preceded legislation dealing with the convergence of the broadcasting and telecommunications industries, where policies are currently being considered).

2.3. Codification of legislation

2.3.1. Some of the stated objects of the draft bill include encouraging investment, innovation and competition and also promoting universal service, empowerment and diversity. One of the pre-conditions for reaching these goals is a clear and fair legislative framework.

2.3.2. One of the fundamental criticisms of the current legislative framework is that there are numerous pieces of legislation, with inherent contradictions and gaps.

2.3.3. Any opportunity to consolidate legislation and eliminate such contradictions and uncertainties should be taken up. The concept of convergence lends logically to a more holistic and less disparate approach to legislation. It is the opinion of the NAB that in the drafting of convergence legislation there should be an attempt made to consolidate legislation as much as possible rather than to exacerbate the existing problems.

2.3.4. In line with the NAB's suggested phased approach to convergence, it probably is not appropriate to draft one piece of convergence legislation. The NAB however believes that it is appropriate to consolidate the broadcasting legislation into one piece of legislation, to sit along side telecommunications/convergence legislation as well as Icasa legislation.

2.3.5. The NAB also believes that the ICASA legislation should be amended to deal with issues that should be dealt with the same way in the broadcasting and telecommunications industries, for example, ministerial directions, regulations, inquiries, monitoring, complaints and dispute resolution, offences, spectrum planning and licensing, and equipment approval and standards.

2.3.6. At the same time, the problems of contradictions, confusions and gaps in the existing legislation should be systematically identified and rectified.

3. **Chapter 1, Section 1 – Definitions**

3.1. The definitions set out in section 1 contain some uncertainties. The NAB suggests amendments to the definitions, which are set out in Annexure 1 hereto.

3.2. The NAB also suggests the deletion of the definition of "broadband" because the term is not used in the draft bill and because it is inappropriate in that one of the premises of convergence legislation is that it should be technology neutral.

4. **Chapter 2 – Independent Communications Authority, and Other Issues**

4.1. Inquiries

4.1.1. Section 5(3) provides Icasa with the discretion whether to consult the public in the conduct of inquiries. It is the NAB's opinion that this matter should not be one of discretion. The public should always be consulted (although the question whether to hold oral hearings should be left to Icasa's discretion). This is not only good policy, it will also result in more informed decisions being made in the context of inquiries. It is also required by the Constitution and in particular the right to just administrative action set out in section 33 of the Constitution which requires administrative action that is, among other things, procedurally fair.

Procedurally fairness requires that interested parties have the opportunity to be heard.

4.1.2. In addition, the Act should not put an outer limit on the number of days for consultation (in section 5(3)(b)). Some issues may be more complex than others and require additional consultation time. Thus, outer time limits should be left to the discretion of ICASA to determine in the event.

4.1.3. Finally, it is not clear whether findings made by Icasa in terms of inquiries will be binding and if so to what extent. Some findings might lead to the promulgation of regulations, which would become binding. However, if such findings do not lead to regulations, the issue of binding effect of those findings needs to be clarified.

4.2. Regulations

4.2.1. Under the existing regulatory regime, Icasa can make regulations necessary to regulate broadcasting in terms of the broadcasting legislation. In terms of the telecommunications legislation, the power of ICASA to make regulations is not so clear. Under the draft bill, section 1(e) seems to give ICASA the necessary power to make all necessary regulations for effectively

regulating the industry. But then, section 6 circumscribes this power and only gives ICASA such power in “technical matters”. The NAB believes that the existing regime in this regard set out in the broadcasting legislation is more appropriate and should be retained and extended to all regulations made by ICASA.

4.2.2. The NAB also supports the inclusion in the draft bill the provision that requires a consultative process (by Icasa) for the making of regulations.

4.3. Ministerial powers

4.3.1. In terms of both existing legislative regimes, for broadcasting and telecommunications, policy directions can only be issued by the Minister to ICASA after consultation with ICASA, the public and Parliament. In terms of the draft bill, the Minister is permitted to choose not to consult. The NAB believes that the existing regimes requiring consultation are more appropriate and should be retained.

4.3.2. The Act also should not put an outer limit on the number of days for consultation (in section 7(7)(b)(ii)). Some issues may be complex and require additional

consultation time. Thus, outer time limits should be left to the discretion of the Minister to determine in any particular circumstance.

4.3.3. In terms of section 7(11) of the draft bill, in addition to the Minister's powers to issue policy directions to ICASA, the Minister also has the power to issue "determinations" with regard to under-serviced areas and SMMEs. It is not clear what a determination is or what binding effect is has and on whom (ie, Icasa only or all parties). Further, it seems to encroach unnecessarily on ICASA's powers in regard to regulating the industry, thereby undermining the independence of ICASA. As it appears to give the Minister powers that overlap those of ICASA, it will also create unnecessary instability for the industry. It is the NAB's opinion that it should not be included.

4.4. Funding of the regulator (Schedule 1)

4.4.1. The draft bill amends the ICASA Act with regard to Icasa funding. No longer does ICASA obtain funding from Parliament. However, it seems to have to continue to prepare a budget and have it approved by DoC and/or Parliament. This should be clarified. In this regard, the NAB supports the notion of responsible

spending and that ICASA should be answerable in that regard.

4.4.2. The stability and strength of the industry relies, inter alia, on the proper funding of the independent regulator. Although the NAB generally supports the proposals made to have ICASA receive funding from license fees, questions remain whether the proposals affectively contribute to the independence of the regulator and therefore the uncertainties mentioned should be clarified.

4.5. Self regulation within the broadcasting industry

4.5.1. Section 56, 57, and 65 of the IBA Act recognise self-regulatory bodies for broadcasters. Section 56 and 57 are not repealed, but it is unclear whether the sections will apply to the new categories of licenses (presumably communications content applications) and if so to what extent – in other words, only to old licensees or to new ones as well? This issue should be clarified. The NAB is of the opinion that the provisions in the IBA Act regarding self-regulation of the broadcasting industry should remain intact.

4.5.2. It is also not clear why section 65, which deals with Icasa's handling of decisions of the Advertising Standards Authority, has been repealed. The NAB is of the opinion that this provision is still appropriate and should not be repealed.

5. **Chapter 3 – Licensing**

5.1. Under the proposed licensing regime, there seem to be either three, four or five categories of licenses depending on how one reads the draft bill. A strict reading of section 13 of the bill reveals five categories:

Individual
Infrastructure
Communications network
Communications application

Class
Communications application
Communications content

5.2. However, there appear to be errors in section 13 and if the bill is read in its entirety, there might be only four categories:

Individual
Infrastructure
Communications network

Class
Communications applications
Communications applications content

5.3. Note that communications applications services seem to be similar to existing Van or multi-media services and as such would

fall under class licensing and not individual licensing. Also, “communications content” is not defined, but “communications applications content” is defined.

5.4. There may be however only three categories. In particular, “infrastructure” services are not defined. Therefore, it is not clear what is the distinction between infrastructure services and communications network services, if any. The only further reference is made to infrastructure services licenses in subsections 4-6 of section 13, which provides that the granting of such licenses rests with the Minister and not ICASA.

5.5. There is also reference in section 43(4) to “different network services”, implying that there may in practice be more than one type of communications network services license types.

5.6. The result is that the picture is not at all clear. Definitions and parameters must be clear and fair in order to attract and retain necessary investment in the converged industries. Clarity is essential for the creation of the required stability for the industry.

5.7. The confusion is especially stark with regard to existing broadcasters. Where will existing broadcasting licenses fall? In terms of the definition communications applications content services, all old broadcasting licenses fall there. Are existing

licensee rights protected (as they are required to be in chapter 12 of the draft bill)? How? The answer to this later question is critical.

5.8. The NAB is of the opinion that currently and at least for an adequate transition period, traditional broadcasters should not be licensed as “class” licensees, but rather as individual licensees. Existing licensees have applied for and obtained their licenses based on a delicate set of obligations and rights, which has augured well for the industry for the past decade, wherein the industry has seen unprecedented growth and growth in diversity. Existing licenses cannot be converted without those rights being protected. Nor can new entrants be allowed to enter the arena as class licenses, without causing irreparable harm to the industry to the detriment of diversity, empowerment and many of the other objects set out in chapter 1 of the draft bill.

5.9. Furthermore, the important social imperatives, such as empowerment, control over cross-media and foreign ownership and local content, that existed when existing licenses were granted, remain. It would be unwise to summarily abandon completely the regulatory framework in these regards (although certain suggested amendments are set out more fully below herein).

5.10. The situation for broadcasting signal distributors is also not clear. Where will signal distribution licenses fall? Infrastructure? Communications network services? There is no indication in the draft bill. Broadcasting signal distribution is actually more like a traditional telecommunication service than a broadcasting service. The NAB believes that existing signal distributors should be licensed under the draft bill just as telecommunication services providers will be. However, because the categories are not clearly defined or demarcated it is difficult to ascertain what category any existing licenses will be converted to.

5.11. Finally, because broadcasting will continue to be transmitted using analogue technology (by broadcasting signal distributors), the existing rights of broadcasters to use certain frequencies must be protected. Also, the transition from this current licensing regime also must be considered and catered for more specifically when the time comes.

5.12. With regard to broadcasting, it might be that what is really intended in the draft bill, is that it is not supposed to legislate with regard to broadcasting at all (although this seems unlikely given that many of the provisions specifically refer to broadcasting). It might be that the draft bill is intended to only regulate traditional telecommunication services and broadcasting signal distribution services.

5.13. The NAB believes this to be the correct approach and that references to broadcasting in the draft bill should be excised. In that event, the NAB suggests amendments to the broadcasting licensing regime that would serve as an early phase to full-on convergence legislation. This first phase would see a more converged broadcasting regulatory environment, but would not see a converged broadcasting and telecommunications environment.

5.14. In this regard, the NAB suggests that the categories and types of licenses set out in the IBA and Broadcasting Acts be amended by simplification. Fundamental in this recommendation is that the technology platform used for delivering broadcasting should not be a distinguishing factor with regard to other rules, such as licensing, empowerment, ownership and local content.

5.15. In regard to these latter issues, more complete proposals are set out below.

6. Chapters 7 and 8 – Access, Interconnection and Facilities Leasing

6.1. The draft bill does not make it clear who has to provide access and facilities leasing. First, according to chapters 7 and 8, communications network services licensees must provide access and facilities in terms of the draft bill, but it is not clear who fits

under this category. Further, what is the status of infrastructure services licensees? Are they also required to provide access? These issues need to be clarified.

6.2. Also, the provisions on access set out in the draft bill appear only to be applicable to telecommunication services. It is unclear how existing broadcasting licensees will fit into the new access regime, if at all. The issues unique to broadcasters are access to signal distributors and access to multi-channel distributors, including "must carry" issues. These issues should be clarified. And access issues that relate to traditional broadcasters must be considered and appropriate regulatory responses made part of convergence legislation.

7. **Chapter 9 – Monitoring, Complaints and Dispute Resolution**

7.1. This chapter sets out a committee to investigate violations and complaints in both broadcasting and telecommunications industries. This is welcomed. However, the NAB believes that it should be called the complaints and dispute resolution committee and that any reference to monitoring should be excised as monitoring is the responsibility of ICASA and should not be the sole responsibility of a dispute resolution committee.

7.2. Section 56 is also welcomed to the extent that a deadline is placed on the resolution of matters. However, it is inadequate

because it stems from the date of a hearing, which also could be considerably delayed. It is also not clear what happens if the deadline is not met. All avenues that would allow a party to delay the timely resolution of complaints should be closed, including deadlines on the time it takes ICASA to make a decision regarding sanctions.

7.3. Under current broadcasting legislation complaints and dispute resolution are dealt in terms of specific rules. Although many of these rules have been transferred to these provisions of the draft bill, it is unclear why some rules have not been transferred. Clarity is sought on this issue. The NAB suggests that a thorough audit of both the telecommunications and broadcasting procedures and whether they work or not should precede and inform the setting out of new procedures.

7.4. Finally, it is not certain that it is correct in law that the complaint committee should only make recommendations to ICASA and then ICASA decides the appropriate sanction. It may be that the party that hears a dispute must be the party that decides the dispute. This issue should be considered and clarified.

8. **Unique Broadcasting Industry Issues – Regulation of Ownership and Content**

8.1. Restrictions and obligations with regard to empowerment, cross-media ownership, foreign ownership, local content and independent production, are tools that have been established to right the wrongs of past discrimination in regard to ownership, control and participation in the broadcasting industry, to restrict the concentration of media and encourage diversity, to prohibit foreign entities from colonising South Africa's airways, and to encourage a local content and independent production industry.

8.2. Regarding ownership and control restrictions, sections 48 (limitations of foreign control), 49 (limitations of cross control), 50 (limitations of cross-media control), and 51 (limitations on control by political parties) of the IBA Act are not repealed. However, the categories of licenses to which these restrictions apply may not be (after the transition) applicable. Assuming all broadcasters will become communications content application service providers, will the restrictions remain for them? Will they apply to new licensees, such as Internet content providers, that were not traditional broadcasters? How will existing rights be protected (given that the transition provisions guarantee that they will be)?

8.3. Similarly, section 53 of the IBA Act concerning local and independent content production is not repealed. Again, the categories of licenses to which these restrictions apply may not be (after the transition) applicable. Will the restrictions remain for communications content applications service providers? Will they apply to new licensees, such as Internet content providers, that were not traditional broadcasters? How will existing rights be protected?

8.4. It seems as if these issues have been ignored in the drafting of the draft bill. The NAB believes that this is not only unfortunate but will be detrimental to both the broadcasting industry as well as a converged industry.

8.5. The NAB makes two fundamental suggestions in regard to license obligations, such as empowerment, local content and cross-media and foreign ownership. First, if new entrants are allowed into the traditional broadcasting arena, then they must be made to abide by the same type of obligations that traditional broadcasters have to abide, in regard to empowerment, ownership and local content. One of the fundamental requirements of an effective regulatory regime is that similarly situated persons must be treated similarly. This is difficult in the implementation of convergence. The question arises whether restrictions and obligations in one industry that has been

traditional highly regulated (broadcasting) will be also applied to those in industries where traditionally there has been little regulation (Internet). It seems as if these questions have not been explored in any detail, with reference to fairness as well as the continued development of the industries. In order for convergence to work, these issues must be explored and more appropriate regulatory responses enacted.

8.6. The second fundamental is that given the *status quo* in South Africa - the need to ensure empowerment, that there is no concentration of media ownership and that the local content and independent production industries survive and thrive - it seems inappropriate to dismantle in one swoop all of the current regulatory framework without knowing what the impact will be on the industry and without knowing whether the alternative (complete competition) will actually meet the goals that the current regulatory framework is intended to meet.

8.7. The required studies have not been done. The assumption seems to have been made that South Africa has a mature content market and the economies of scale are such that local content, independent production, empowerment and diversity of ownership will automatically flow from full blown regulatory convergence. However, given South Africa's market size and the remaining legacies of years of institutionalised discrimination as

well as protectionist policies for certain industry players, it is not so clear that a fully converged regulatory framework won't indeed work against certain goals such as local content and diversity. A properly considered policy will not only ensure that legislation creates the possibility for diversity, but puts in place the right mechanisms to ensure that the appropriate goals are indeed being met.

8.8. In line with the NAB's suggestion above that first, the broadcasting industry must be converged (from a regulatory point of view) prior to converging the broadcasting industry with the telecommunications and information technology industries, the NAB suggests changes to the existing broadcasting legislation as a first phase to full convergence. The NAB suggests that the legislation should not spell out specific restrictions as it does now, but instead it should set out the goals (rather than the tools) meant to be served and allow ICASA to set out the specific restrictions either in regulations or in license conditions. The goals might include empowerment, development of local content, development of local industry, development of an independent (non-vertically integration) production industry, etc. This suggesting is also in line with ICASA's recommendation in its Position Paper in respect of "The Review of Ownership and Control of Broadcasting Services and Existing Commercial

Sound Broadcasting Licences", dated 13 January 2004, at paragraph 14.

8.9. Another aspect of the NAB's recommendation will eventually lead to full convergence. The NAB is of the opinion that the technology platform used should not matter in determining whether and what tools should be established to meet the stated goals. On the other hand, the variables that could be taken into account might include, the nature of the audience, local, regional, national, the nature of the nature of the broadcasting, ie audio v video.

8.10. It is also important that South Africa's convergence policy and resultant legislation is consistent with other industry policies, such as South Africa's empowerment policy, general policies with regard to direct foreign investment as well as policies with regard to South Africa's position as an African hub (economically as well specifically with regard to broadcasting). The question should be raised and addressed whether South Africa has a policy that would allow it to take advantage of its position in Africa as a broadcasting or content hub? And if so, what does this mean? Is the goal to attract foreign distributors or to develop a strong local content base for distribution elsewhere, or both?

8.11. Not only other policies but also other regulatory instruments should be examined when decisions are made as to the way forward. For example, has the Media Development and Diversity Agency Act and the implementation thereof been analysed as part of the development of the convergence policy process? Are there others instruments that are important, such as the Electronic Communications and Transactions Act and the proposed legislation regarding privacy and data protection.

8.12. The NAB urges the DoC to consider the issues raised herein and make the necessary amendments to the draft convergence legislation.

9. **Chapter 12 – Transitional Provisions**

9.1. The transition to the new regime (whatever it is) is not clear. The chapter on transition indicates that all existing licenses must be converted to the new categories. However, the old legislation regarding the specific existing types, is not repealed. What does this mean in practice? Will the existing licenses continue to exist? Will the existing restrictions and obligations exist in the new licensing regime for new licenses? How? Will two (or more) licensing regimes exist side by side? It is also not clear whether in the transition period pending license conversion, whether new entrants will be allowed to be licensed under the new licensing regime. These issues should be clarified.

9.2. Furthermore, the deadline for converting licenses is six months, which seems an inadequate period of time. However, ICASA can extend the time at its discretion. This, however, only creates further uncertainty for the industry. The time period for the process of convergence must be established and not left to anyone's discretion, whether the Minister's or ICASA's.

9.3. With specific regard to traditional broadcasters, for the reasons discussed above, the transition period should be extended. The correct period is more in the region of ten years, rather than six months. Furthermore, the NAB believes strongly that a phased approach is a more appropriate approach to convergence legislation and recommends that the legislation be amended holistically in accordance with the suggestions made herein.

9.4. Finally, the transition chapter indicates that the new licenses may not be granted on terms less favourable and on the other hand it states that the provisions of the draft bill do not confer additional rights (although additional rights may be applied for). How will these prescripts be carried out in practice? How will existing rights be protected? What new rights may be applied for and how? These issues should be clarified.

9.5. The transitional provisions are not only unclear, they do not take into account the rights of existing licenses, nor do they take account of the many and varied issues particular to the broadcasting industry. Accordingly, the NAB suggests that a more considered approach should be worked out before convergence legislation is promulgated.

10. Conclusion

10.1. In conclusion, the NAB supports the DoC's efforts to amend the existing broadcasting and telecommunications regulatory frameworks to take into account convergence. The NAB urges the DoC to continue the process of doing so by taking action allowed currently by existing legislation and by encouraging all parties to complete the required investigations into the various issues that must be examined in order to effectively regulate for convergence.

10.2. The NAB also urges the DoC to take a considered and phased approach to convergence taking into account all of the realities of the telecommunications, information technology and broadcasting industries and taking into account all of the imperatives for each of those industries.

10.3. Finally, the NAB urges the DoC to take the opportunity of the drafting of convergence legislation to simplify the legislation,

identify and correct contradictions and confusions and fill gaps where they are apparent.

10.4. The NAB's main recommendations are summarised in Annexure 2.

10.5. The NAB supports the DoC's efforts in regard to developing communications convergence policy and legislation and urges the DoC to use the process initiated by the publication of the draft bill to articulate the policy for convergence, and to establish a process that will lead ultimately to a converged industry for the benefit of South Africa.

Annexure 1 - Definitions

"access" – means the provision of access to a communications network through the selling, leasing or sharing of communication network facilities, to another person, for the purpose of providing communications services;

"class licence" – means a licence issued for a prescribed class of communication service on standard terms and conditions for which the required frequencies are available (if applicable), an invitation to apply is not necessary and which is not an individual licence;

"communications" – means the emission, transmission or reception, of voice, sound, data, text, visual images, video, signals or a combination thereof, by means of wire, radio, optical, electromagnetic systems or any other agency of a like nature;

"communications network facility" – means any element that forms part of a communications network and includes any wire, cable, antenna, mast, equipment or other thing which is or may be used for or in connection with communications;

"communications network" – means a combination of any communication network facilities used principally for or in connection with the provision of communication services, but does not include consumer or customer equipment;

"communications content applications service" – means a communications application service which provides content to consumers by means of a communications service;

"harmful interference" – means interference which seriously degrades, obstructs, or repeatedly interrupts a radiocommunication service licensed by the Authority and operating in accordance with the International Telecommunication Union Radio Regulations;

"interference" – means the effect of unwanted energy or excessive energy when specified limits are exceeded, due to one or a combination of emissions, radiations, or inductions upon reception in a radiocommunication system, manifested by any performance degradation, misinterpretation, or loss of information which could be extracted in the absence of such unwanted energy;

"radio frequency spectrum" – means the entire range of frequencies of electromagnetic radiation that is used for radiocommunication;

Annexure 2 – Summary of Recommendations

- Convergence is a reality that needs to be addressed in the development of new policy followed by adjustments to the regulatory framework

- Although convergence is a reality, it is a process, and therefore needs to be addressed in a more considered and a phased approach.

- The IBA Act and the Broadcasting Act should be consolidated and amended to accommodate convergence issues from the point of view of broadcasters. Broadcasters should continue to be licensed and controlled in terms of broadcasting legislation.

- Broadcasting signal distribution should be incorporated under telecommunications and/or convergence legislation and such legislation should be amended to accommodate convergence issues from the point of view of telecommunication services providers.

- The ICASA Act should be amended to include administrative procedures for matters such as ministerial policy directions, regulations, inquiries, monitoring, complaints and dispute resolution, contraventions, offences, enforcement, control of the radio frequency spectrum and licensing, and equipment approval and standards.