National Association of Broadcasters' submission

on the

Electronic Communications Amendment Bill, (B17-2013)

16 August 2013

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. The NAB members include:

(a) Three television public broadcasting services, and eighteen sound public broadcasting services, of the South African Broadcasting Corporation of South Africa ("the SABC");
(b) All the commercial television and sound broadcasting licensees;
(c) Both the major licensed signal distributors (electronic communications network service operators), namely Sentech and Orbicom;
(d) Over thirty community sound broadcasting licensees, and one community television broadcasting licensee, namely, Trinity Broadcasting Network ("TBN").

1.2 The NAB welcomes the opportunity to submit its written representations to the Parliamentary Portfolio Committee on Communications (PPCC) on the Electronic Communications Amendment Bill (B17-2013). The NAB hereby requests the opportunity to make oral representations in the event that the PPCC decides to hold hearings in respect of the Bill. The NAB will confine its comments on the Bill primarily to amendments that directly impact on broadcasters.

1.3 In 2012 the Department of Communications ("DoC") gazetted a draft Bill and requested stakeholders to make written representations. The NAB and other stakeholders, pointed out that there were a number of draft amendments, such as the proposed establishment of a Spectrum Management Agency, which raised constitutional and legal concerns. The NAB acknowledges that the DoC took into account many of the representations made at the time and that the Bill tabled in Parliament is a significant improvement on earlier drafts.

1.4 The NAB submission has been set out in the following way:

a) Broad-Based Black Economic Empowerment;
b) Licensing Framework;
c) Exclusion of Broadcasting from the USAAF;
d) Exemption for Community Broadcasters
e) Advertising and Sponsorship;
f) Universal Service and Universal Access;
g) Ownership and Control
h) Procedural issues; and
i) Specific drafting concerns.

2. BROAD-BASED BLACK ECONOMIC EMPOWERMENT

2.1 The NAB supports the proposals made in Sections 2(h) and 5(9)(b) of the Bill to replace the phrase "historically disadvantaged individuals" with the term "broad-based black economic empowerment". From the NAB point of view, this is in keeping with government policies on empowerment. Furthermore, section 4(3)(k) of the ICASA Amendment Bill empowers ICASA to formulate regulations on empowerment requirements in terms of the Broad-Based Black Economic Empowerment Act.

2.2 On the other hand, section 9(2)(b) of the Bill retains the term "historically disadvantaged groups". The NAB is respectfully concerned about the explanation provided by the Department that the "required ownership by historically disadvantaged groups…has been retained for the time being…." In the absence of the Department putting any time lines in place on when the term will be re-visited, the NAB is concerned that the amendment might be left unattended for an indefinite period of time, hence creating some uncertainty within the industry. The NAB therefore proposes that in the interest of uniformity the term in section 9(2)(b) be attended to during this process in line with all similar amendments.

3. LICENSING FRAMEWORK

3.1 The NAB is concerned that the insertion of the words “let” and “sublet” in section 13 which deals with the transfer of Individual Licenses and ownership create the impression that a form of “trading” in individual licenses would be considered. Such a step would totally undermine the existing model of individual licensing and the merits of the applications upon which those individual licenses were granted in the first place.

3.2 The current purpose of section 13(1) is to allow an individual license obtained for the activity of broadcasting to be transferred to another party in the case where a company is unable to continue broadcasting or where there is a change of ownership in the company. However, in the case of "let" or "sublet" there is no transfer of a license or change of ownership. Based on the common usage of the term “let”, the original licensee would act as a landlord allowing the use of the license by someone else in exchange for a regular payment. In the case of the term "sublet", the party whom the original licensee "let" the license to then themselves sublets all or part of the activities contained in the license to a third party for a regular payment. This is definitely not in line with the policy intent of section 13 of the Act and should not be raised as a mere technical amendment. Accordingly, the NAB is opposed to the insertion of these words in section 13 of the Act. A similar concern arises with regard to similar proposed insertions of these words in section 16(6) of the Act.

3.3 The words “let” and “sublet” are also proposed for insertion in section 31 of the Act as a new subsection (2A). The insertion of these terms certainly makes more sense in Chapter 5 as there is established precedent in other international jurisdictions for spectrum trading. However, the NAB notes that the issue of spectrum trading would be a significant policy change in the South African regulatory landscape that should first be adequately debated.

4. EXCLUSION OF BROADCASTERS FROM THE USAAF

4.1 The draft amendment Bill proposes amendments to section 88 of the EC Act, by deleting the phrase “broadcasting service licensee” from section 88(1)(b). In our

understanding the effect of the proposed amendment to section is that broadcasting service licensees will be excluded from obtaining subsidies from the USAAF for the purposes of financing the construction or extension of electronic communication networks in under-serviced areas, unless they are also an ECNS licensee. The problem with this is that it overlooks broadcasters who might legitimately by virtue of the kind of service they render and their financial status be deserving to have access to the fund. This is a matter that requires careful consideration from a policy perspective before it is entrenched in law.

5. EXEMPTION FOR COMMUNITY BROADCASTERS

5.1 In terms of section 89 of the EC Act, every holder of a license is obliged to contribute into the Universal Service and Access Fund (USAAF), in accordance with Regulations set by ICASA. Furthermore, the EC Act allows broadcasting service licensees contributing to the Media and Development and Diversity Agency (MDDA) to set off their MDDA contributions against their prescribed annual contributions into the USAAF.

5.2 The PPCC is aware that community radio stations depend on grants and subsidies from the DoC as well as donors for their financial viability. The obligation placed on them to contribute to the MDDA and/or the USAAF is therefore unduly onerous. Further, it is illogical to require community broadcasters to make contributions to a fund on which they rely for their sustenance.

5.3 In response to previous industry requests for exemptions by ICASA, when drafting its regulations on prescribed Annual Contributions of licensees in relation to Universal Service and Access Fund[1] (USAF Regulations), ICASA expressed in its Explanatory Memorandum on the amendments to the USAF Regulations that its inability to exempt community broadcasters was based purely on the wording of section 89 and no other reservation, as the section did not empower ICASA to provide any exemptions.

5.4 Furthermore, previous submissions and initiatives have been undertaken by key stakeholders such as the MDDA, where they canvassed the DoC and ICASA to exempt

[1] Final Regulations published on 11 February 2011, in Government Gazette 34010.

community radio broadcasters from contributing into the MDDA and the USAAF. The NAB is supportive of such initiatives.

5.5 The NAB therefore proposes that section 89 be amended, to exempt community broadcasting service licensees from contributing into both the USAAF and the MDDA Fund, as we believe the obligation for community broadcasters to contribute into the USAAF does not reflect the true intention of the legislature. Alternatively, the NAB would propose for the amendment of Section 89(2)(a) of the EC Act, to empower ICASA to exempt certain categories of holders of licenses granted or considered to have been granted in terms of Chapter 3, and class broadcasting service licensees should not be required to make any contributions. We strongly believe that this amendment can be done within this process as it is of a technical nature.

6. ADVERTISING AND SPONSORSHIP

6.1 The draft Bill proposes the amendment of section 55 for the purposes of providing ICASA with the power to prescribe regulations on the scheduling of advertisements, infomercials and programme sponsorships. The rationale provided in the Explanatory Memorandum is that this does fall within the ambit of the Advertising Standards Authority of South Africa (ASA) Code of Advertising Practice, and that it was previously regulated by the Advertising, Infomercials and Programme Sponsorship regulations.

6.2 Advertising is an inescapable part of commercial broadcasting, and in the case of commercial free-to-air broadcasting it is the primary revenue source. As such, viewers and listeners are aware that to receive programme content, they must also receive advertising. Regulation of advertising can be seen as a consumer protection measure, for example, regulation designed to ensure that advertising claims are truthful, not exaggerated or misleading, or to protect specific groups within the community who may be vulnerable, such as children. In South Africa, this has been done through self-regulation and the legal recognition of this self-regulation by the ASA in section 55(1) of the EC Act. The ASA does not regulate scheduling as this would unduly interfere in the commercial activities of licensees. The 1999 regulations mentioned in the Explanatory Memorandum also did not regulate the scheduling of advertisements and were

confined to the definition of advertisements and ensuring transparency and editorial control around the broadcast of programme sponsorships and infomercials. In fact, prior to the EC Act the average number of minutes for advertising per hour were dealt with in the form of license conditions and not regulation.

6.3 Broadcasters deliver audience to advertisers. If advertising becomes too excessive the audience stops watching and the broadcaster will start to fail on the basic premise of delivering audience to advertisers, so there is a natural limit to the amount of advertising that can be broadcast in any hour, whether or not there is regulation on the scheduling of advertising. The NAB are of the view that the scheduling of advertising is a commercial decision which is based on sound audience and marketing research and goes directly to the financial viability of broadcasting service. Therefore, there is no compelling need to provide ICASA with the power to interfere in the commercial activities of broadcasting services by regulating the scheduling of advertising.

7. UNIVERSAL SERVICE AND ACCESS

7.1 Currently, in the EC Act, broadcasting services are included in the definition of universal access and universal service, but are excluded from the ambit of section 82(3)(a)(i) where the Minister must determine what constitutes universal access. The exclusion is similarly in section 82(3)(a)(ii) where the Minister must determine what constitutes universal provision of services. The DoC proposes deleting the explicit references to electronic communication services and electronic communication network services the result of which would be to bring broadcasting services within the ambit of these two sections.

7.2 In the NAB's view, the current exclusion of broadcasting services from the ambit of section 82(3)(a)(i) and (ii) is not accidental. Instead the omission reflects the intention of the legislature that broadcasting services should not be captured in the ambit of these two sections. The NAB will explain in the following paragraphs why this omission is necessary and should not be amended to include broadcasting services.

7.3 Universal access and universal service policies and strategies do not traditionally include broadcasting. This is because broadcasting policies and regulatory frameworks have critically different objectives to universal service and universal access as developed in the traditional telecommunications sector, which go beyond affordable access and service. Their focus is on, amongst others, diversity of content, pluralism, choice, media freedom, and protection against illegal and harmful media content. This is why the obligations placed upon licensees in the broadcasting sector have been called public service obligations ("PSOs") rather than Universal Service Access Obligations (USAOs), which have traditionally been applied to only telecommunications licensees. In the EC Act, these PSOs are captured in Chapter 9 of the EC Act and ICASA is empowered to make regulations in this regard.

7.4 The terms "universal service" and "universal access" in the EC Act, unless the context indicates otherwise, must be interpreted in accordance with the definitions provided in section 1 of the Act. Universal service is defined as meaning "the universal provision of electronic communications services and broadcasting services as determined from time to time in terms of Chapter 14". Universal access is defined as meaning "universal access to electronic communications network services, electronic communication services and broadcasting services as determined from time to time in terms of Chapter 14".

7.5 The determinations referred to in these definitions, are those which are made in terms of the current section 82(3) of the EC Act by the Minister of Communications on what constitutes "universal access by all areas and communities in the Republic to electronic communications services and electronic communications network services" and "the universal provision for all persons in the Republic of electronic communications services and access to electronic communications networks, including any elements and attributes thereof".

7.6 The NAB holds the view that broadcasting services are not mentioned in section 82(3), as the focus of these determinations is intended to be on access to ECS and ECNS. Broadcasting Services are carried by ECNS licensees, thus broadcasting signal distribution falls within the ambit of section 82(3) in terms of network roll-out and access to broadcasting signal. However, the content elements of broadcasting services

remain under PSOs and the ambit of Chapter 9 of the EC Act, rather than becoming confused with the concepts of universal service and universal access. This problem was highlighted when the previous Minister of Communications attempted to set the level of South African content on broadcasting services using these sections, and in so doing usurping ICASA's powers to prescribe regulations in this regard in terms of section 61 of the EC Act.

7.7 The NAB recommends that section 82(3) should not be amended to avoid confusion between PSOs and USAOs.

8. OWNERSHIP AND CONTROL

8.1 While the NAB notes the Department's decision that issues such as limitations on ownership and control of broadcasting services [2] will be deferred to the ICT policy review panel, the NAB believes that such a step will not be necessary, particularly in respect of commercial sound broadcasting. In terms of sections 65 (7) the Authority has already submitted proposals for amendment of provisions to the Minister[3] that contemplate an increase in the number of commercial sound broadcasting services that can be controlled by a person.

8.2 Currently, the position is that one can control two FM and two AM commercial sound broadcasting services, permitting a person to control a total number of 4 commercial sound broadcasting service licenses. These provisions have been detrimental to growth in the commercial sound broadcasting sector.

8.3 The NAB recommends that the EC Act be amended so that the number of commercial sound broadcasting service licenses that can be controlled by a person be increased as proposed in the ICASA 2004 Ownership and Control recommendations submitted to the then Minister. These recommendations were based on a percentage being set and the recommended text by ICASA was as set out below:

[2] Section 65 and 66 of the EC Act

[3] Finding Document on the review of Ownership and Control of Commercial Services and Limitations on Broadcasting, Electronic Communications Services and Electronic Communications Network Services published in government gazette 34601, 15 September 2011

"(2) No person shall, directly or indirectly, exercise control over more than thirty five percent of the total number of licensed commercial sound broadcasting services provided that:

(a) when the calculation of the number of licensed commercial sound broadcasting services that a person may be in control of does not result in an integer and that when that number is rounded to the closest integer, that integer results in a percentage that is higher than the thirty-five percent limitation set out in subsection (2); and/or

(b) when a person exceeds the thirty-five percentage limitation set out in subsection (2) only because one or more other licensees have had their licenses suspended or revoked by the Authority, or one or more licensees have ceased broadcasting (temporarily or permanently), in which case the Authority shall consider an application by the relevant person for exemption from the limitations in terms of subsection (6)(a).

(3) Notwithstanding the provisions of subsection (2), no person shall, directly or indirectly, exercise control over more than two commercial sound broadcasting licenses which have the same license areas or substantially overlapping license areas."

9. PROCEDURAL ISSUES

9.1 Reduction of time periods

9.1.1 When making a presentation on the Bill before the PPCC on 6 August 2013, the DoC, indicated that one of the objectives of amendments is to "decrease the turn-around times for consultative processes". This means that periods for consultation and so forth in the EC Act would become considerably reduced. The NAB is of the view that this will negatively impact on the ability of stakeholders to make representations in a timeous and effective manner. Rather than speeding up processes it is more likely to lead to requests for extensions and condonation for late submissions which will be more of an administrative burden and actually lead to processes being prolonged more than 30 working days.

9.1.2 In line with the EC Act's definition for "days" which means working days unless otherwise specified, the NAB highly recommends the retention of the current time periods and avoiding any amendments which allow deviation from these timelines for consultation. For example, the Bill proposes to amend section 3(5)(b)(ii) so that the period within which interested persons may make written representations in response to a proposed policy direction to be made by the Minister is not less than 30 calendar days, whereas the Act currently provides for a period of not less than 30 working days. This is a considerable reduction in time for considered representations by the public, especially when one considers that proposed policy directions are likely to involve matters which may adversely impact on the rights of a number of licensees, potential entrants to the market and other stakeholders. Failure to provide adequate time for persons to make representations on these matters may result in policy directions being reviewed on the basis that the administrative action by the Minister was procedurally unfair. This is unlikely to contribute to the objective of reducing turn-around times.

9.2 Use of the term "impose" instead of "prescribed"

9.2.1 The draft Bill proposes the deletion of the term "prescribed" and the use of the term "impose" on a number of occasions, for example, section 8(3), section 8(4), section 9(6)(b), etc. The problem with this step is that the term "prescribed" is clearly defined in the EC Act as meaning the making of regulations, whereas the term 'impose" is not defined but clearly implies a process that does not involve making regulations.

9.2.2 This would mean that ICASA could potentially avoid the consultation process it is required to follow in terms of section 4(4) to 4(7) of the EC Act. However, as this imposition is clearly an administrative action that will affect the rights of licensees concerned it must comply with principles of administrative justice and provide procedural safeguards which is not the case here.

9.2.3 The NAB is of the view that the use of the term “prescribed” should remain as it provides procedural safeguards and mitigates against arbitrary action.

9.3 Empowering Minister to require provision of information and documents

9.3.1 The draft Bill proposes the insertion of a section 79B into the Act. The NAB is concerned that granting the Minister powers to compel ICASA to provide information and documents may infringe on ICASA’s independence as guaranteed in section 192 of the Constitution. Furthermore, granting the Minister such powers to compel other persons to provide information and documents is of grave concern as the State is either the sole shareholder or has significant stakes in major companies within the sector. Accordingly, the NAB proposes the deletion of section 79B from the Bill.

10. SPECIFIC DRAFTING COMMENTS

10.1 Definitions

10.1.1 The NAB has a minor concern with the proposed insertion of “broadcasting” in the definition of **“radio frequency spectrum”**. The definition already provides for “electronic communications”, which is an overarching term of which “broadcasting” (like electronic communications services and electronic communication network services) is a subset. The portion of the radio frequency spectrum set aside specifically for broadcasting is covered under the definition of “broadcasting service radio frequency bands”. There is accordingly no need to specifically refer to ”broadcasting" in this definition of radio frequency spectrum.

10.1.2 The NAB is concerned with the clearly un-intended impacts of some of the proposed changes to Chapter 3 and Chapter 5, which do away with the necessary regulatory distinctions the Act creates between service licenses and radio frequency spectrum licenses. The Bill proposes that the definition of **"licensee"** be amended so that it means "a person issued with a license to provide services in terms of Chapter 3 or Chapter 5 of this Act". The

concern with this amendment is that Chapter 5 of the EC Act does not issue a license to provide a service. It issues a license to use a radio frequency or frequencies, which in some cases may require as a prerequisite that one be holder of service license issued in terms of Chapter 3 of the Act. Another concern is that the term "licensee" is used throughout the EC Act in cases where it is clear that the reference is meant to apply to a service licensee and not to every holder of a radio frequency spectrum license.

10.1.3 A similar concern to that raised above for the proposed amendment of the definition of “licensee” arises with regard to the proposed definition of "radio frequency spectrum license". It is the NAB’s view that the existing definition of a "radio frequency spectrum license" is completely adequate, and any amendment would create confusion and uncertainty.

10.2 Substitution of the word “regional” with “provincial”

10.2.1 Section 5(3) of the Bill proposes for the substitution of “regional” with “provincial”. The explanatory notes state that "commercial broadcasting licenses should be provincial or national to require individual licenses". From the NAB point of view, this is a policy shift, which will require ICASA to revise its licencing framework. In the event that it gets adopted into law, it has the potential of prejudicing stations that are already licensed on a limited footprint. The reality is that very few commercial services have been licensed on the basis of a provincial coverage area. Some have coverage areas smaller than a province. The question that then arises is whether those stations having a smaller footprint will automatically qualify to extend their coverage to an entire province.

10.2.2 Another typical example is that of low power commercial radio services. By their nature, these services are meant to cover a specific area, usually a shopping centre, hospital or any commercial community, their footprint is usually limited to the facility they serve. Requiring such services to have a provincial coverage would defeat the purpose for which they were licensed.

10.3 The term "regional" provided ICASA with the discretion to set a particular coverage area according to feasibility and viability considerations as well as population distribution and urbanisation trends, rather than following provincial boundaries. Example: The Vaal Triangle sits on the Gauteng/Free State border – a literal interpretation of the proposed amendment requires a potential licensee who wishes to only cover this area to obtain provincial license(s) for either Gauteng or the Free State or both. Furthermore, the proposed amendment does not take account of technological or regulatory developments such as the introduction of mobile TV, Cable TV or city/metro TV and radio services. The unintended consequence of the proposed amendment is that ICASA will have very little control over coverage area and therefore spectrum management.

10.4 Coverage area and related spectrum allocation is a function of ICASA's licencing responsibilities and should not be interfered with.

11. CONCLUDING REMARKS

NAB supports the work of the PPCC to repeal obsolete or unnecessary provisions, remove anomalies, and ensure consistency with the Constitution and looks forward to constructive engagement on the issues raised in these representations to the PPCC.