



**THE NATIONAL ASSOCIATION OF BROADCASTER'S  
WRITTEN SUBMISSION ON THE INDEPENDENT COMMUNICATIONS AUTHORITY OF  
SOUTH AFRICA'S REGULATIONS IN RESPECT OF PROCEDURAL RULES FOR THE  
ADJUDICATION OF COMPLAINTS AND RESOLUTION OF DISPUTES REFERRED TO  
THE COMPLAINTS AND COMPLIANCE COMMITTEE**

**5 MARCH 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:
  - 1.1.1 Three television public broadcasting services, and eighteen sound public broadcasting services, of the South African Broadcasting Corporation of South Africa (**“the SABC”**);
  - 1.1.2 All the commercial television and sound broadcasting licensees;
  - 1.1.3 Both the major licenced signal distributors (electronic communications network service operators), namely Sentech and Orbicom;
  - 1.1.4 Over thirty community sound broadcasting licensees, and one community television broadcasting licensee, namely, Trinity Broadcasting Network (**“TBN”**).
- 1.2 On 22 January 2010, the Independent Communications Authority of South Africa (**“ICASA”**), published in Notice 45 of 2010, Government Gazette 32884, its intention to prescribe regulations in respect of procedural rules for the adjudication of complaints and resolution of disputes that are filed with or referred to the Complaints and Compliance Committee (**“CCC”**), and to provide for matters related thereto (**“draft rules and procedures”**). The draft rules and procedures are drafted in terms of sections 4(1) and (4) of the Electronic Communications Act 36 of 2005 (**“the EC Act”**) read in conjunction with section 4(3)(j) of the Independent Communications Authority Act 13 of 2000 (**“the ICASA Act”**). Interested parties are invited to submit their written representations on the draft rules and procedures on 05 March 2010.
- 1.3 The NAB recognizes that clear rules and procedures will ensure that complaints concerning alleged non-compliance by licensees are dealt with in a fair manner. The NAB supports the need for clarity regarding the rules and procedures of the CCC and welcome the publication of the draft regulations by the Authority. The NAB does not have extensive comments on the draft regulations.
- 1.4 The NAB does not believe this matter will require oral hearings, however if the Authority elects to hold such hearings, we would like an opportunity to make oral representations.

- 1.5 The NAB's primary concern with the draft regulations is that they do not align with the provisions of the ICASA Act.
- 1.6 As the Authority is, no doubt aware, the CCC is a creature of statute and its powers and functions are limited to those conferred on it in the ICASA Act. The draft regulations must therefore be consistent with the empowering provisions of the ICASA Act.
- 1.7 Sections 17A to D of the ICASA Act deal with various matters related to the establishment, functioning and procedures of the CCC. The NAB notes the following instances where the draft regulations do not accord with the provisions of the ICASA Act.

## **2 Powers to make regulations**

- 2.1 In its draft rules and procedures, the Authority cites sections 4(1)(4) of the EC Act and section 4(3)(j) of the ICASA Act as the enabling sections. Both Section 4(1) of the EC Act and section 4(3)(j) empower the Authority to make regulations with regard to any matter in terms of the ICASA Act and any underlying legislation. The sections provide that the Authority may make regulations.
- 2.2 Further when perusing the EC Act and the ICASA Act, there is no specific provision requiring the Authority to promulgate regulations on the rules and procedures for the CCC, save for the ones mentioned above. As is envisaged in section 4(1)(4) of the EC Act and section 4(3)(j) that the Authority may make regulations when it deems fit, this power is discretionary and should be exercised with caution. However section 17(5) stipulates that the Authority may prescribe procedures for the handling of urgent complaints and non compliance matters.
- 2.3 The NAB is therefore of the view that if the Authority sees the need to promulgate regulations, it should be drafting regulations in relation to urgent complaints and non compliance issues. It is our view that sections 17B to 17E of the ICASA Act clearly outline the processes and procedures that the CCC should follow.

## **3 Filing of complaints**

- 3.1 The NAB's particular concern relates to allegations of non-compliance with terms and conditions of a licence or any relevant statutes, section 17C(1)(a) of the ICASA Act is

clear that a complaint of non-compliance must be lodged with the Authority within a specified time period. Section 17C(1)(b) then clarifies that in respect of such a complaint, it is the Authority who may then direct a complaint to the CCC for consideration.

- 3.2 The legislature has given the Authority a discretion to determine which complaints should be investigated. This discretion is critical as it would allow the Authority to dismiss a complaint in instances where such complaint is frivolous, vexatious or beyond the jurisdiction of the Authority. It is therefore not correct for a complaint to be lodged with a coordinator of the CCC, as proposed in the draft regulations, since the CCC does not enjoy the same discretion as the Authority and may not refuse to investigate a complaint.
- 3.3 Furthermore, the draft rules and procedures lack clarity on the procedure to be followed in instances where a complaint is not lodged by a third party, but comes as a result of ICASA's monitoring investigations and there being proof of non-compliance. Section 17(F) (5)(d) of the ICASA Act empowers inspectors to lodge complaints of non-compliance by licencees with the CCC, however the draft rules and procedures do not outline the process to be followed under these circumstances. From the NAB point of view, the draft rules and procedures should clearly spell out the process to be followed.
- 3.4 Accordingly, the NAB submits as follows:
  - 3.4.1 As set out in the legislation, complaints regarding non-compliance must be submitted to the Authority and the Authority should then decide whether or not a complaint should be directed to the CCC for consideration.
  - 3.4.2 The draft rules and procedures should also clarify the procedure in instances where the Authority either dismisses a complaint or elects not to refer it to the CCC for consideration.
  - 3.4.3 The draft rules and procedures must clarify the process to be followed where a complaint is lodged by an inspector.

#### **4 Time periods**

- 4.1 The regulations are silent on time frames. In order to ensure procedural fairness in the investigation and hearing of all complaints, the NAB proposes that the regulations

should set out timeframes which will apply to all complaints and processes by the CCC.

- 4.2 In proposing timeframes, we urge the Authority to consider the provisions of the Promotion of Administrative Justice Act, 2000 (“**PAJA**”). Any timeframes proposed must be consistent with PAJA. PAJA requires that the affected licensee must be given adequate notice of the nature and purpose of the CCC proceedings, and must be provided with a reasonable opportunity to make representations to the CCC.<sup>1</sup>
- 4.3 To the extent that timeframes have been set out in section 17C of the ICASA Act, it is unnecessary for the draft Regulations to repeat or overlap with the provisions of the ICASA Act.

## **5 Conclusion**

- 5.1 The NAB reiterates the importance of certainty for licensees and adherence to the principles of fair administrative action by the Authority and the CCC. We thank the Authority for this opportunity to comment and trust our submission will be favourably considered.

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<sup>1</sup> s3(b)(i) and (ii) of PAJA