



**NAB WRITTEN SUBMISSION TO THE DTI
ON AMENDED BROAD-BASED BLACK ECONOMIC
EMPOWERMENT ICT SECTOR CODE
29 APRIL 2016**

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1. Introduction

- 1.1. The National Association of Broadcasters (“the NAB”) is a leading representative of South Africa’s broadcasting industry, established in 1993. The NAB aims to further the interests of the broadcasting industry in South Africa, by contributing to its development. The NAB members include:
 - 1.1.1. the three television services and 18 radio services of the SABC;
 - 1.1.2. licensed commercial radio broadcasters (including media groups and independents: Primedia, Kagiso Media, Tsiya Group, AME, MSG Afrika, Classic FM, Kaya FM, YFM, Smile FM and Times Media Ltd-Vuma FM);
 - 1.1.3. licensed commercial television broadcasters (e.tv, Multichoice, M-Net, StarSat-ODM);
 - 1.1.4. a host of community radio broadcasters and community television broadcaster, Faith Terrestrial;
 - 1.1.5. both the licensed broadcast signal distributor and the selective and preferential common carrier broadcast signal distributors, Sentech and Orbicom;
 - 1.1.6. a range of associate members, including training institutions.
- 1.2. On 24 February 2016, the Department of Trade and Industry (“the DTI”) published in government gazette number 397226, in terms of section 9(5) of the Broad Based Black Economic Empowerment Act 53 of 2003 (“the B-BBEE Act”) a notice inviting interested parties to make written submissions to its Draft Amended Broad-Based Black Economic Empowerment ICT Sector Code (“the draft Code”). The notice invited written comments within 80 days from the date of publication of the notice in a government gazette. The notice was subsequently amended on 29 February 2016, to stipulate the closing date for written comments as 60 days from publication of the notice in a government gazette. The NAB received confirmation from the DTI that the closing date is 29 April 2016. The NAB welcomes the opportunity to make this written submission and would like to be given an opportunity to participate in oral hearings should the DTI be holding any, as part of the public consultation process.

2. Background

- 2.1. Over the last two decades of its existence, the NAB has made a wide range of written and oral submissions on policy and regulatory matters emanating from various government departments that impact on the broadcasting sector. The NAB has also participated in a number of ministerial fora responsible for developing national policy, and we are also represented on the B-BBEE ICT Sector Council (“the ICT Sector Council”).
- 2.2. The NAB submitted its written representations to the ICT Sector Council on 13 November 2015, raising among others, its concerns regarding the rushed manner in which the DTI is proceeding with the draft Codes. The NAB was also concerned that the unique and specific broadcasting issues were not adequately addressed in earlier drafts. While we note that the ICT Sector Council has incorporated some of our concerns in revising the draft Code prior to the current publication, we note that there are still critical issues that the draft Code fails to address adequately. At the onset the NAB wishes to point out that generally the percentages applicable for the ICT sector appear to be more onerous than those imposed in other sectors of the economy.
- 2.3. The NAB welcomes the opportunity to make its further written comments on the draft Codes and as an industry body of a highly regulated sector, the focus of the NAB’s submission will be on principle issues affecting its members and not on technical issues *per se*. It must be noted that individual members of the NAB are likely to address specific technical matters in this public consultation process.

3. Legislative and regulatory contributions

- 3.1. As a regulated sector, broadcasting service licensees serve both national and social objectives in carrying out their business. These objectives are set either by the Electronic Communications Act “36 of 2005 as amended (“the ECA”) the Independent Communications Authority of South Africa Act 13 of 2000 as amended (“the ICASA Act”), licensees licence conditions and all applicable regulations. Furthermore, in upholding the principles and objects of the ECA broadcasting service licensees have obligations to make financial contributions to a number of entities,

and in our view, these should be added to the broadcasters' scoring for B-BBEE compliance. These include:

3.1.1. Universal Service and Access Fund (USAF): the ECA¹ requires every licensee to make a contribution not exceed 1% of the licensee's annual turnover into the Universal Service Fund (the USAF). On 10 February 2011, ICASA published its Regulations in Respect of the Prescribed Annual Contributions of Licensees to the Universal Service and Access Fund. In terms of the regulation licensees are required to pay an annual contribution of 0.2% of its annual turnover into the USAF.

3.1.2. Media Development and Diversity Agency: in addition, in terms of the ECA, broadcasting service licensees have a choice of whether to pay their contributions into the USAF or the MDDA Fund. For a broadcaster who elects to make its contributions into the MDDA Fund, such broadcasting service licensee must off-set their contributions into the USAF.

3.1.3. Music Rights and Royalties: Broadcasting service licensees pay a portion of their annual turnover to the South African Music Rights Organisation (SAMRO), for the sound recordings they broadcast.

3.2. While the broadcasting sector is committed to the objectives of broad-based black economic empowerment and the transformation agenda, we believe that due to the unique regulatory environment broadcasters operate within and as a matter of principle these contributions should count towards broadcasters' compliance with relevant sections of the Code.

4. Submission

4.1. Alignment and harmonisation with sector specific legislation

4.1.1. In 2014, when introducing amendments to the ECA and the ICASA Act, the legislature to some extent sought to align these pieces of legislation with the B-BBEE Act. In these amendments, the definition of broad based black

¹ Section 89 of the ECA.

economic empowerment has been incorporated into both the ECA and the ICASA Act². Likewise, section 4(3) (k) of the ICASA Act has been amended to empower the Authority to make regulations on empowerment in terms of the B-BBEE Act, and promote B-BBEE.

- 4.1.2. Section 9(2) (b) of the ECA on the other hand which sets out the requirements for an invitation to apply (ITA) for an individual licence, requires that when ICASA issues an ITA, such an application must include the percentage of equity ownership to be held by persons from historically disadvantaged groups (“HDGs”), which must not be less than 30% or such other conditions or higher percentage as may be prescribed by ICASA.
- 4.1.3. While the ECA and the ICASA Act have to a certain extent aligned with the B-BBEE Act, the concept of the empowerment of HDGs is still embedded in the ECA. This demonstrates the difficulty and challenge the draft Code will potentially bring to broadcasters in seeking to comply with B-BBEE reporting.
- 4.1.4. The NAB further notes that there is recognition by ICASA on harmonising the various pieces of legislation (as conceded in its Reasons Document on Ownership and Control³) to address the inconsistencies in legislation that require legislative amendments. The NAB therefore recommends that the ICT Sector Council should collaborate with the Department of Communications (DOC) and ICASA to facilitate legislative alignment which will ensure a harmonised B-BBEE compliance mechanism for all licensees.

² "**broad-based black economic empowerment**" means the viable economic empowerment of all black people, in particular women, workers, youth, people with disabilities and people living in rural areas, through diverse but integrated socio-economic strategies that include, but are not limited to-

- (a) increasing the number of black people that manage, own and control enterprises and productive assets;
- (b) facilitating ownership and management of enterprises and productive assets by communities, workers, co-operatives and other collective enterprises;
- (c) human resource and skills development;
- (d) achieving equitable representation in all occupational categories and levels in the workforce;
- (e) preferential procurement from enterprises that are owned or managed by black people; and
- (f) investment in enterprises that are owned or managed by black people;

³ Published on 15 September 2011, in government gazette number 34601.

4.2. Enterprise and supplier development, socio-economic development and sector specific contribution elements

4.2.1. In its submission to the ICT Sector Council on 13 November 2015 the NAB raised a concern regarding the requirement for entities to support ICT specific socio economic development (SED) initiatives. As indicated, one of the principles of B-BBEE is to develop and support small, medium and micro enterprises. As it were, limiting the contributions to ICT sector specific initiatives is detrimental to the whole economy, and will benefit only a small portion in the ICT sector, as every licensee will be limited to contributing towards these. While it may seem the DTI attempted to accommodate the NAB's concern by incorporating the word "general" in clause 4.5⁴ which states:

"the socio-economic development and Sector Specific Contributions Element, as set out in Code series 500, measures the extent to which enterprises carry out general and ICT sector specific initiatives that contribute towards socio economic development and that promote access to the economy for black people...."

4.2.2. In our view the insertion is confusing and adds some ambiguity to the context of the clause. Furthermore, elements of the draft Code still continue to limit the ability of broadcasters to reach diverse SMME's by restricting it to empowering suppliers and enterprise development ("EDs") that is ICT specific. This negates the core principle of B-BBEE and does not accord with the diverse range of industries that broadcasters procure from, develop and support. Furthermore, clause 4.2 of Statement 500 penalises the failure to support ICT related SEDs. It provides:

"Where the recognised contributions in respect of ICT Sector specific initiatives represent less than two-thirds of the total Socio-Economic Development contributions, then the non-ICT Sector specific contributions are not to be recognised for the purpose of the calculation of the Socio-Economic Development score"

⁴ At page 14, of the draft Code.

4.2.3. The DTI is reminded that broadcasters play a unique role in that they are required, to serve the education, information and entertainment needs of citizens from across a multiplicity of economic sectors, by virtue of their wide reach. As a result, they should not be limited to empowering ICT enterprises and beneficiaries. Furthermore, some of the NAB members have licence conditions that require them to support non-ICT relate initiatives. We are therefore of the view that non-ICT sector specific contributions that are made, should count towards their overall SED and ED scoring. To the extent possible, Generic Codes should be applied to the broadcasting service licensees.

4.2.4. The NAB further notes that an attempt was made to make provision for this submission in clause 11.3 of Statement 400 of the draft ICT Code⁵. However, this was not properly captured since it makes provision for the exemption for a beneficiary entity instead of making such a provision for a measured entity. Clause 11.3 of statement 400 of the draft ICT Code should thus read as follows:

“Where a [beneficiary] Measured Entity was, before 24 October 2014, measured under the B-BBEE Generic Codes of Good Practice or any other valid B-BBEE Sector Code, instead of the B-BBEE ICT Sector Code, the measurement and recognition of enterprise development and socio-economic development contributions under the Amended ICT Sector Code shall not be limited to only black owned ICT entities or ICT programmes. The Measured Entity shall be entitled to weighting points as if the beneficiary entity was measured strictly under the ICT Sector. In addition, the entity must submit proof that it was rated under the Generic Codes or any other B-BBEE Sector Code immediately before the coming into effect of Section 10(3) of the B-BBEE Act, 2013.”

4.2.5. The NAB therefore submits that the last sentence of this provision which states that “The provision is valid until the future review of the B-BBEE ICT Sector Code” should be deleted. As already stated, members of the NAB

⁵ At page 69, of the draft Code

have a wide and deep mandate that goes beyond the confines of the ICT Sector.

4.3. Review and monitoring timelines

4.3.1. Section 9 of the B-BBEE Act recognises the need for the review of Sector Codes, and stipulates that a code of practice remains in effect until amended, replaced or repealed. Section 12 of the Generic Codes on the other hand, provides that the Minister may review the Codes at any stage, and regular reviews will take place to monitor the implementation of B-BBEE throughout the economy.

4.3.2. The draft Code empowers the Minister of Telecommunications and Postal Services together with the ICT Sector Council to review the draft Codes on the tenth year of their coming into effect. The draft Code further provides for annual reviews to monitor the implementation of B-BBEE throughout the economy.

4.3.3. In our view the provisions of the Generic Codes addressing the review and monitoring of the Codes are broad and flexible enough to allow for the Ministerial intervention for timely reviews. The DTI ought to consider the feasibility of conducting annual monitoring reviews as the associated costs and resources could be onerous. The NAB therefore proposes that the wording in the Generic Codes be adopted.

4.3.4. It is also proposed that a review of the Code be separated from the monitoring of compliance with the Code. These are two separate processes that could be conducted at different intervals.

4.4. Subminimum and discounting principles

4.4.1. In terms of the draft Codes, a measured entity must achieve a minimum of 40% of the total targets set out on ownership, skills development⁶ and enterprise supplier development. The draft Code further provides that non-compliance with this subminimum requirement will result in the measured

⁶ Pages 51-54, of the draft Code.

entity's B-BBEE status level being discounted by one level down until the next applicable verification period in which the measured entity can demonstrate compliance with the 40% sub-minimum requirement at which point the recorded level will become the applicable ratings level for the measured entity in that verification period.⁷

4.4.2. While the NAB understands the importance of according priority to ownership, skills development, and enterprise development, our concern is that this could have unintended consequence. In our understanding, irrespective of how well an entity has performed in other elements of empowerment⁸, an entity that is non-compliant on the three priority elements⁹ is likely to be down-graded by three (3) levels. For example an entity that would ordinarily have been a level one contributor would for that period be down-graded to level four. The NAB seeks more clarity on how the discounting principle will be administered and requests the DTI to carefully reconsider the impact of the discounting principles in its current form.

4.5. Economically Active Population

The NAB's understating is that the Economically Active Population ("EAP") criteria in line with the draft Code will be based on either National or Provincial criteria which essentially sets targets for all persons in Employment Equity. For example the profile of the national EAP by race requires 40.3% of economically active population to be African males, and 5.9% of coloured males etc. On the other hand, the provincial target is based on the population within the province and then pro-rated to the population in the province. While we are aware that these statistics are updated annually, we believe the proposal overlooks the fact that people migrate from province to province and this potentially poses a challenge to an entity's scoring. The NAB therefore seeks clarification from the ICT Sector Council on how it intends addressing these anomalies.

⁷ Paragraph 3.3 of statement 000 of Amended Code Series 000 published in government gazette 36928.

⁸ I.e. management control element and socio economic development.

⁹ I.e. Ownership, skills development and enterprise supplier development.

5. Conclusion

- 5.1. The NAB welcomes the opportunity to make its written representations, and we believe our inputs will add value to the DTI and the ICT Sector Council's final deliberations of the draft Code.
- 5.2. The broadcasting sector makes contributions to other entities, such as the MDDA, USAASA and SAMORA to name but a few, and we believe these contributions should count towards broadcasters' B-BBEE scoring.
- 5.3. We would like to indicate that it is critical for the draft Code to be aligned with existing ICT legislation and to this end the NAB proposes collaboration and adequate consultation between the ICT Sector Council, ICASA and the DOC.
- 5.4. The NAB proposes that consideration be had for broadcasting service licensees' support for non-ICT related EDs and SEDs, as broadcasting service licensees primarily support public service related initiatives, and in our view, these should also count towards the scoring.
- 5.5. While the NAB concurs that periodic monitoring and reviews of the Code is necessary, the NAB proposes that the review and monitoring clause of the draft Code be reconsidered and possibly be aligned with the Generic Codes to allow for uniformity.
- 5.6. The NAB team is available to provide any further clarification to the DTI and the ICT Sector Council should we be called on to assist in that regard.