



**THE NATIONAL ASSOCIATION OF BROADCASTERS'
WRITTEN REPRESENTATIONS TO THE DEPARTMENT OF
COMMUNICATIONS' DRAFT PUBLIC SERVICE
BROADCASTING BILL: CHARTER OF THE CORPORATION
AND CHARTER OF COMMUNITY BROADCASTING
SERVICES**

15 January 2010

1. INTRODUCTION

- 1.1. On 28 October 2009, the Department of Communications (the Department) published in Notice number 1409 (the Notice), Government Gazette number 32663, the Public Service Broadcasting Bill (the draft Bill), the Charter of the Corporation (the draft SABC Charter) and the Charter of Community Broadcasting Services (the draft Community Broadcasting Charter). The Notice is drafted in terms of section 3(1) of the Electronic Communications Act 36 of 2005 (the EC Act). The Department is undertaking this process in order to repeal the Broadcasting Act 4 of 1999 (the BA). Interested parties are invited to furnish written comments within thirty days of the publication of the notice in the government gazette.
- 1.2. The NAB is of the humble view that policy of this nature, proposing a total overhaul and major amendments to existing legislation, such as the BA, the EC Act, the Income Tax Act 58 of 1962, (the Tax Act), and the Sentech Act 63 of 1996 (the Sentech Act)¹ and further introducing new funding models for the public service broadcaster must not be rushed, but rather be done over a considerable amount of time, affording the government, key stakeholders and interested parties ample time to apply their minds and make meaningful inputs to the Notice. However the NAB appreciates the extension of time granted by the Department for the submission of written comments from 07 December 2009 to 15 January 2010, as this will afford respondents extra time to consider their submissions.
- 1.3. This Notice was preceded by the drafting of a Public Service Broadcasting Discussion paper (the discussion paper) by the department, on 20 July 2009, in government gazette 32420, Government Notice 755 of 2009 (the first Notice). The discussion document was open for public comment, and the closing date for the submission of written representations was 31 August 2009. The National Association of Broadcasters (the NAB) submitted its written representation on the discussion paper.
- 1.4. In its written representation dated 31 August 2009, the NAB raised some principle issues around the proposed amendments to the BA, and the proposed Charter for Community Broadcasting services. Notably, the Department has not heeded the NAB's concerns, as these are not reflected in the Bill and the draft Community

¹ Notice 1409 published in government gazette 32663, dated 28 October 2009, at pages 24 to 27

Broadcasting Charter. In this written representation, the NAB will among others, reiterate its position on these principle issues, as from the NAB point of view they are pertinent, and worth consideration by the Department. Further, it does not appear that the Department has taken into consideration the NAB's representations on other matters. These include the NAB's comments regarding the scope of the draft Bill, the policy processes that should precede a review of policy of such magnitude and the inclusion of matters relating to commercial broadcasting services, that do not belong in the draft Bill designed to govern public broadcasting services, or specifically the SABC as the public service broadcaster.

- 1.5. The NAB welcomes the opportunity to make its written representation on the draft Bill, and would like to be afforded the opportunity to participate in oral representations, should the Department conduct same.
- 1.6. 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:
 - 1.6.1. Three television public broadcasting services, and eighteen sound public broadcasting services, of the South African Broadcasting Corporation of South Africa (the SABC);
 - 1.6.2. All the commercial television and sound broadcasting licensees;
 - 1.6.3. Both the major licenced signal distributors (electronic communications network service operators), namely Sentech and Orbicom;
 - 1.6.4. Over thirty community sound broadcasting licensees, and one community television broadcasting licensee, namely, Trinity Broadcasting Network (TBN).

2. ISSUES OF PRINCIPLE PREVIOUSLY RAISED

2.1. The Public Service Broadcasting Bill

- 2.2. In its written representation to the Department, in response to the Public Service Broadcasting discussion paper to amend the BA, the NAB proposed that the draft Bill seeking to amend the BA should be termed the SABC Bill. Currently, the BA broadly addresses matters related to the Public Broadcasting Service licensee, the SABC,

together with the Charter.² The NAB therefore proposes that when amending the BA, all issues pertaining to the SABC should be covered by the SABC Bill, including the SABC Charter. This will avoid a myriad of provisions addressing the same issues. All other provisions relating to community broadcasting services and commercial broadcasting services must be dealt with under the EC Act.

2.3. The Community Broadcasting Service Charter

- 2.4. The NAB maintains its initial position regarding the promulgation of the proposed Community Broadcasting Charter. The NAB's view is that the introduction of the Community Broadcasting charter is an unnecessary step, as the charter seeks to duplicate the already existing processes,³ and touches on issues that are already catered for either by the EC Act, ICASA regulations or individual broadcaster's licence conditions. Hence the NAB discourages the promulgation of the charter, as in our view it will not resolve the problems facing community broadcasting service licencees, but will rather perpetuate the problems.
- 2.5. In its current form, the proposed charter seeks to unduly interfere, and micro-manage the community broadcasting service sector. This in our view is in violation of section 2(y) of the EC Act, which prohibits the undue interference in commercial activities of licencees.
- 2.6. Furthermore, the independence of the Community broadcasting sector is being curtailed by the introduction of the charter, and the provisions of clause 20(20(d) of the draft Bill which compels community broadcasting services licencees to forge partnerships with local municipalities.
- 2.7. The NAB will make further representations on the community broadcasting service sector in due course.
- 2.8. Should the Department deem it necessary to promulgate the Charter, the NAB recommends that the department should deal with it in the following manner:

² NAB written submission to the DoC's notice inviting comments on the Public Service Broadcasting discussion paper to amend the Broadcasting Act as amended, at page 3-4

³ pages 5-6 of the NAB submission

- 2.8.1. The Authority has drafted two different position papers, one on community sound and the other on television broadcasting services, which outline guidelines to be followed by community broadcasting licencees. In order not to undermine the efforts employed in the drafting of the two ICASA policy documents, the Department should align its community broadcasting charter with the ICASA position papers on community sound and television broadcasting services;
- 2.8.2. As opposed to a charter, the Department should promulgate guidelines and codes of good practice which will provide a yardstick and not create hard and fast rules that will hamper flexibility within the community broadcasting sector;
- 2.8.3. These guidelines should be published as a notice under the EC Act, and not as a schedule or appendix to the draft Bill;
- 2.8.4. The guidelines must be overseen by the Authority and not the Minister as envisaged in the draft Bill.

2.9. EXISTING LEGISLATION TO BE IMPACTED BY THE DRAFT BILL

2.9.1. The Electronic Communications Act 36 of 2005

2.9.2. Public Service Broadcasting

- 2.9.3. The EC Act was promulgated in 2006, with the objective among others of promoting the development of public, commercial and community broadcasting services which are responsive to the needs of the public. The EC Act further aims to achieve the following:

“Ensure that broadcasting services viewed collectively-

- (i) *promote the provision and development of a diverse range of sound and television broadcasting services on a national, regional and local level, that cater for all languages and cultural groups and provide entertainment, education and information*
- (ii) *provide for regular*
 - a. *news services;*
 - b. *actuality programmes on matters of public interests;*
 - c. *programmes on political issues of public interest ; and*
 - d. *programmes on matters of international , national, regional and local significance*

(iii) *cater for a broad range of services and specifically for the programming needs of children, women, the youth and the disabled;*⁴

- 2.10. The entrenchment of section 2(s) in the EC Act signifies the importance of public service broadcasting, in the Republic. In order to ensure that licencees comply with the provisions of the EC Act, section 4(1) of the EC Act empowers the Authority to “make regulations with regard to any matter which in terms of this Act or other related legislation must or may be prescribed, governed or determined by regulation...”
- 2.11. The Authority has, since the coming into effect of the EC Act, embarked on amending existing regulations, in order to align them with the EC Act. Pertinent regulations that the Authority has passed, which seek to fulfil the provisions of section 2(s) of the EC Act include:
- 2.11.1. the ICASA Television Content Regulations⁵
 - 2.11.2. The ICASA Sound Broadcasting Content Regulations
 - 2.11.3. The Community Sound Broadcasting Position Paper⁶
 - 2.11.4. Community Television Broadcasting Services Position Paper⁷
- 2.12. In addition to the regulations, when licencing broadcasting service applicants, the Authority inserts public service obligations and other obligations in the licence, and these form terms and conditions of the broadcasting service licence. Among others, the Authority prescribes minimum local content quotas licencees must meet, together with universal service and access targets the licencees needs to observe. Further any further commitments made by the applicant regarding for example, the broadcasting of additional local content, in support of its application to ICASA, are added into the licence as promises of performance, and are binding on the applicant.
- 2.13. It is therefore clear that the issue of public service broadcasting is not a new phenomenon in the sector; hence seeking to promulgate yet another piece of legislation that seeks to entrench public service broadcasting is seen as undermining

⁴ Electronic Communication Act 36 of 2005, notice number 364, government gazette 28743, section 2(s)

⁵ ICASA Television Content Regulations 31 January 2006, notice number 154 of 2006, government gazette 28454.

⁶ Community Sound Broadcasting Position Paper, 6 June 2006, notice number 757 of 2006, government gazette 28917.

⁷ Community Television Broadcasting Services Position Paper 30 November 2004.

efforts and recourses already employed in enhancing public service broadcasting, and overburdening community broadcasters with more regulation.

2.14. The Department should aim at improving on the already existing structures rather than seeking to re-invent processes.

2.15. It is therefore the NAB view that, the issues pertaining to the commercial and community broadcasting services, dealt with in the draft Bill, should be dealt with under the EC Act.

2.16. **Public Service Broadcasting Fund**

2.17. The draft Bill proposes the need to establish the PSB Fund, which will among others, exist to fund the public service division of the SABC, the development of content, community broadcasting and other services as stated in clause 6 of the draft Bill.

2.18. Similarly, section 87 of the EC Act recognises the existence of the Universal Service Fund (the USF), a fund established to provide subsidies to eligible licencees, for providing universal service and access to people and communities deprived of access to broadcasting and electronic communications services.⁸

2.19. Although not established by the EC Act, the EC Act recognises the existence of the Media and Development and Diversity Agency (MDDA), and provides for broadcasting service licencees contributing to the MDDA to off-set their annual contributions to the MDDA against the prescribe annual USF contributions. The MDDA is primarily established to promote development and diversity in the South African media.⁹

2.20. Both the MDDA and the US Fund aim to further the objects of the EC Act¹⁰. The NAB therefore does not see the need to establish yet another fund i.e. the PSB Fund. The Department should rather aim at strengthening the already existing funds in order to further the PSB objectives in the draft Bill. Both the US Fund and the MDDA Fund can adequately deal with public service broadcasting and universal service and access.

⁸ Section 88 of the EC Act

⁹ MDDA Act 14 of 2002, 24 June 2002, published in government gazette 23541

¹⁰ Section 2(c) and (s) of the EC Act

- 2.21. Currently, measures for funding and subsidising community broadcasting services licencees are already in place, as community broadcasting service licencees are beneficiaries of subsidies from the MDDA, hence doing away with the idea of a PSB Fund will not cripple the community broadcasting service sector.
- 2.22. Undoubtedly, the current funding model for the SABC is unworkable, hence there is a need to devise new funding mechanisms for the SABC. However, the Department must be cognisant not to mingle the SABC funding with the PSB funding. The SABC funding mechanisms can be established and administered in terms of the Draft Bill, as our proposal has been that the draft Bill should focus only on the SABC. This will alleviate having multiple pieces of legislation establishing various funds, while the funds may be catered for under a single piece of legislation.
- 2.23. The Sentech Act 63 of 1996**
- 2.24. In order to be consistent and for purposes of easy access, the NAB proposes that any proposed amendments affecting Sentech covered by the draft Bill should be dealt with in the Sentech Act. The draft Bill seeks to reintroduce the common carrier status of Sentech. The NAB is of the view that such provisions are misplaced in the draft Bill, and should therefore be dealt with in the Sentech Act.
- 2.25. In addition, section 62(3) of the EC Act deals with a common carrier, and the common carrier status. It is therefore our view that common carrier provisions around common carrier status should rather form part of section 62(3) of the EC Act.
- 2.26. The Income Tax Act 58 of 1962**
- 2.27. The draft Bill stipulates that the PSB Fund shall comprise amongst other things, contributions from personal income tax collected in terms of the Income Tax Act, 1962.¹¹ Indeed, the South African Revenue Service (SARS) has well established and organised tax collection mechanisms, and further has a strong and efficient tax collection system across a seven million tax base consisting of individuals and organisations.
- 2.28. In terms of section 77(1) of the Constitution; *A money Bill is a Bill that appropriates money; imposes national taxes, levies, duties or surcharges, abolishes or reduces, or*

¹¹ Section 4(2)(a) of the draft Bill.

grants exemptions from, any national taxes, levies, duties or surcharges, or authorises direct charges against the National Revenue Fund. A money Bill may not deal with any other matter except a subordinate matter incidental to the appropriation of money or the imposition of taxes, levies or duties.”..

- 2.29. The section goes further to outline the process to be followed when introducing a money Bill, and stipulates that the money Bill must follow a Parliamentary process. It is worth pointing out that the draft Bill is not a money Bill, hence it has no powers to introduce a personal income tax as stipulated in the draft Bill.
- 2.30. When the broadcasting industry responded to the Department’s discussion document, the proposal was not that taxes be earmarked for a general PSB fund, but rather that SARS should offer a better television licence fee collecting model than the current one which is based on television ownership for the efficient funding of the SABC. The view was that the SABC and SARS could potentially conclude an agreement for the collection of a general television licence fee or levy by SARS in terms of section 4(b) of the SARS Act. ¹²Furthermore, it must be pointed out that this proposal is not the only means to an end, as it was brought up as one of the many funding mechanisms the Department could consider to fund the SABC.
- 2.31. Various workable funding models have been outlined by respondents to the position paper¹³, demonstrating how other jurisdictions have successfully implemented alternative funding models for the public broadcasting service. The NAB therefore proposes that the Department should look to these and carry out an independent benchmarking exercise on other models that have been employed by other countries.
- 2.32. As much as tax collection has been identified as a means for funding the PSB services, the Department must be cognisant of the fact that the proposed contribution from personal income tax is ultra-vires the powers of the Department, as income tax matters reside with the Department of Finance and SARS.

¹² South African Revenue Service, Act No. 34 of 1997. “4. **Functions.**—(1) To achieve its objectives SARS must— (a) secure the efficient and effective, and widest possible, enforcement of— (i) the national legislation listed in Schedule 1; and (ii) any other legislation concerning the collection of revenue or the control over the import, export, manufacture, movement, storage or use of certain goods that may be assigned to SARS in terms of either legislation or an agreement between SARS and the organ of state or institution concerned.”

¹³ For instance the Multichoice and M-net written submission on pages 5 to 10.

2.33. In the next section, the NAB will outline its comments on the specific sections of the draft Bill that require the Department's attention.

3. COMMENTS ON THE SPECIFIC PROVISIONS OF THE BILL

3.1. Chapter 1: Definitions and Interpretations

3.2. The NAB proposes that for purposes of uniformity and clarity, the terms defined in the draft Bill should be consistent with the EC Act, the ICASA Act and the ICASA regulations. As a general principle, when a term is already defined in a principal Act it is not necessary to provide the definition again in related legislation, if such is provided it must be in conformity with the definitions in the principal Act. In this regard, one simply refers to the definition as contained in the principal Act. For instance broadcasting means broadcasting as defined in section 1 of the EC Act contained in the EC Act.

3.3. In this section the NAB seeks to propose appropriate definitions, and where necessary the NAB will suggest drafting changes. Consequently, the NAB proposes that the following terms defined in the draft Bill be re-evaluated:

3.3.1. **Broadcasting:** To avoid confusion and conflict in interpretation, broadcasting must be defined as follows:

Broadcasting means broadcasting as defined in section 1 of the EC Act

3.3.2. **Broadcasting licence:** The NAB proposes that this term be deleted from the draft Bill, as the EC Act does not recognise such a licence category. In terms of section 5(2) the Authority is authorised to grant individual licences for, electronic communications network services (ECNS), broadcasting services (BS), and electronic communications services (ECS). Furthermore, the Authority is authorised to grant licences upon registration of a class licences for ECNS, BS and ECS. Section 5 of the EC Act does not make mention of any individual or class licence category called broadcasting licence. The inclusion of this term is therefore confusing, and should be deleted from the draft Bill. The EC Act definition of broadcasting service licence must therefore be adopted.

3.3.3. **Dual illumination:** The NAB proposes the following insertions in the proposed definition:

*Dual illumination means the simulcast broadcasting of a television channel in both analogue and digital format*¹⁴

3.3.4. **Licence:** The NAB proposes the following insertions in the proposed definition: *means a broadcasting service licence, electronic communications service licence, and or electronic communications network service licence issued in accordance with chapter three of the Electronic Communications Act.*

3.3.5. **Local content:** In defining local content it is important for the Department to distinguish between television broadcasting content and sound broadcasting content, as this is in-keeping with the EC Act. The NAB therefore proposes that the following definitions be included in the draft Bill:

Local television content: has the same meaning as local television content as defined in section 61(2)(a) of the EC Act

South African music: has the same meaning as local musical works as defined in section 61(a)(c) of the EC Act.

3.3.6. **Public Service Broadcasting:** Having regard to the fact that the draft Bill focuses on PSB, it is our view that the definition provided is vague, and does not adequately define PSB. When looking to the Broadcasting Act, public service is defined in the context of the public broadcaster¹⁵. It is our view that when defining PSB, the Department must look to the definition in the BA, AND take into account the salient features of PSB which include:

3.3.6.1. **Independence from political, government and commercial interference or influence:** Freedom from government and commercial interference or influence is fundamental in guaranteeing politically unbiased broadcasting. The Department must guard against imposing any

¹⁴ Draft ICASA Terrestrial Television Regulations published in government gazette no 32559, dated 4 September 2009, clause 1

¹⁵ Broadcasting Act 4 of 1999, section 10

policy that will allow for political or commercial interference and influence on the PSB service to be delivered.

- 3.3.6.2. **Accountability to the public served:** the public service broadcasting licensee must be accountable to the public it serves. The checks and balances introduced through effective corporate governance must be exercised through the board of directors, that will exercise oversight powers over the broadcasting licensee, ensuring adherence to the PSB obligations.
- 3.3.6.3. **Adequately funded:** In order for the public service broadcasting licensee to produce quality programming, the public broadcasting service licensee mandate needs to be adequately funded.
- 3.3.7. **Metro content:** The NAB proposes that this definition be deleted from the draft Bill. This is because ICASA's local content regulations already make allowance for regional content, and the Department is introducing a new and foreign concept.

4. CHAPTER 3: The South African Broadcasting System

- 4.1. Clause 2 of the draft Bill deals with the whole South African broadcasting system, and not just public service broadcasting. It is therefore a concern for commercial broadcasters that the wording in clause 2(4) (c) of the draft Bill differs from the wording in the BA. The BA states in section 3(5) (c) that programming "*must be drawn from local, regional, national and international sources*". In contrast, clause 2(4)(c) of the draft Bill states that the programming provided by the South African broadcasting system must "be predominantly local and drawn from local, regional and national sources".
- 4.2. The use of the term "predominantly local" and the removal of "international sources" suggest that local programming be more than 50% local. Whilst this is in line with the existing South African Television and Music Content Regulations for public and community broadcasting services, the provisions of clause 2(4) (c) of the draft Bill appear to ignore the fact that commercial broadcasting service licensees targeting specific market segments may, because of consumer demand, feature predominantly international programming, while not compromising their local content obligations.

4.3. It is proposed that the Department must be cognizant of the local content quotas prescribed by the Authority, as these are fair and equitable. Furthermore, the wording in clause (4) (c) should revert to the original wording contained in the BA.

5. CHAPTER 4: Funding for development Broadcasting: The Public Service Broadcasting Fund

5.1. Chapter 4 of the draft Bill establishes the PSB fund, and states among others that money collected in the fund should be utilised exclusively to fund the public service division of the corporation, including regional television and international broadcasting services¹⁶. The MDDA is further empowered to manage and distribute money collected in the PSB Fund.

5.2. Both the MDDA and the SABC are autonomous bodies, whose powers are determined and limited by statute, and both report to Parliament. In our view the draft Bill is introducing some supremacy of the MDDA over the SABC's content decisions, by requiring the SABC to plead for funding from another government agency, and the model has a potential of presenting triple reporting obligations on the part of the SABC, as the SABC will be required to report to Parliament, the Department as the shareholder as well as the MDDA. This weakens the strength of an appropriation model where the SABC is funded by monies appropriated by Parliament based on the medium Term Expenditure Framework.

5.3. The objectives of the MDDA are clearly outlined in section 3 of the MDDA Act¹⁷, and they do not include providing funding for the public broadcasting services.

5.4. The NAB is therefore of the view that the funding of the public broadcaster should not be the responsibility of the MDDA. Rather than rushing this matter, the Department must apply its mind and study the various models that have been adopted in other jurisdictions, and assess how suitable they are in the South African scenario. It should also conduct research locally to determine the most suitable model for South Africa as a developmental state.

5.5. The draft Bill further states that part of the money to be contributed into the PSB Fund shall come from personal income tax, collected in terms of the Income Tax Act 1962. In

¹⁶ Section 4 of the draft Bill

¹⁷ MDDA Act 14 of 2002, published in Notice no 849, government gazette no23541

terms of the law personal income tax collections fall under the jurisdiction of SARS, whose duties are to collect and administer all national taxes, duties and levies. The Department has no powers to introduce a new tax through the draft Bill as this duty lies with the Minister of Finance.

- 5.6. In terms of the draft Bill, the PSB Fund is further earmarked to fund signal distribution activities by a common carrier to ensure universal service¹⁸. In our view, the need for broadcasting signal distribution activities to be funded through the PSB Fund is misplaced in the draft Bill.

6. CHAPTER 5

- 6.1. Clause 12(3)(e) proposes the need for the promulgation of regulations to prescribe the percentage of out-of-metro content that the Corporation must carry in its regional services. However, the provision is not clear as to whether the “Regulations” are to be prescribed by the Authority or if they are regulations to be prescribed by the Minister in terms of section 37 of the draft Bill. The NAB suggests that such Regulations fall within the jurisdiction of the Authority under section 61 of the EC Act. However the NAB is opposed to the introduction of the new concept namely metro and out of metro content. Throughout the history of the broadcasting sector in South Africa policy and regulations have been silent on the issue the geographic origination of content. If the Department deems it fit to distinguish between metro and out of metro content, the Department must first of all undertake an exercise of defining these concepts and determining their relevance in the South African context. The NAB therefore proposes that the Department must revert to the terminology used in the ICASA regulations i.e. local content.
- 6.2. In terms of the technology neutral licensing framework put in place by EC Act and the Authority, a broadcasting service licensee does not have to apply for a broadcasting licence each time it launches a new programme channel. A broadcasting service licensee is licensed once as a broadcasting service and thereafter applies to the Authority for authorization to launch new programme channels in the digital multi-channel broadcasting environment. It is not necessary therefore in clause 12(4)(a) to require the Corporation to apply to the Authority for licences to provide additional channels, the word “licence” should be replaced with “authorise”.

¹⁸ Section 6(1)(d) of the draft Bill

6.3. Clause 13 of the draft Bill determines the funding models for public broadcasting services of the SABC. Clause 13(3) thereof empowers the Minister, by regulation, to determine the percentage of advertising and further limit this revenue on certain programmes where advertising should be prohibited. In addition to this clause 12(3) (c) and 12(4) (c) of the draft Bill, empowers the Authority to determine the extent to which the regional public broadcasting services and the additional channels of the SABC may derive revenue from advertising. The draft Bill therefore provides for both the Minister and the Authority to limit advertising on the SABC. In the NAB's view this is likely to cause confusion. From the NAB point of view, the role outlined in clause 13(3) best lies with ICASA and not the Minister as it is ICASA that has embarked on drafting regulations of advertising practices.¹⁹

6.4. On a related matter, the draft Bill provides for the commercial division of the SABC to provide subsidies to the public broadcasting division of the SABC. In this respect clause 14(3) suggests that the amounts used in respect of clause 14(2)(d) shall be determined by the Minister. This is a different arrangement to the one contemplated in the current BA where section 11(1)(d) proposes that the commercial arm shall subsidize the public services to the extent recommended by the Board and approved by the Minister. The new provision does not contemplate such a role for the Board. It is proposed that clause 14(3) read as follows to ensure that the Minister's decision is based upon counsel received from the Board:

"the amounts used in respect of subsection 2(d) shall be determined by the Minister after receiving recommendations from the Board."

7. CHAPTER 6: COMMUNITY BROADCASTING SERVICES

7.1. Community Television Broadcasting Services Position Paper

7.2. On 30 November 2004, the Authority published its position paper for Community television broadcasting. The discussion paper was published with the aim to determine public demand for, and the financial sustainability of local television services. The scope of the position paper is broad, and touches on key factors that make up community television services. The Authority went further to recognise the need for

¹⁹ Draft regulations and code of advertising practice setting out the standards, practice and prohibitions in advertising, sponsorships and other forms of commercial promotion by radio and television broadcasting service licensees published in general notice 172, government gazette 31903, dated 13 February 2009.

community television broadcasting services to participate in public service broadcasting, by providing programming that reflects the needs of the people in the community, which must include among others, culture, religious, language and geographic needs.²⁰

- 7.3. Similarly, in 2006, the Authority published its position paper on Community Sound Broadcasting. The position paper proposed a code of good practice for community sound broadcasting which dealt with issues of governance²¹ with the aim of not being overly prescriptive, and not to be seen to be interfering in the management of community broadcasting services.
- 7.4. The Authority in consultation with stakeholders has gone a long way to pave the way for the smooth running of community broadcasting services, what remains is the question of whether community broadcasting services have heeded the Authority's initiatives, and implemented the relevant recommendations that were made in the ICASA policies. The NAB's concern is whether there is a need to further legislate on issues that have already been dealt with.
- 7.5. In this regard, the NAB recommends that the Authority, in conjunction with the Department, must conduct an analysis determining the extent to which the abovementioned ICASA policies have been implemented by the community broadcasting sector, their effectiveness, and further assess the effectiveness of the Authority in ensuring compliance by the community broadcasting sector. It is well and good to prescribe policy, it is another thing if the policy is not well implemented, and the monitoring systems are poor and ineffective.
- 7.6. Based on the background provided above, the NAB is of the view that the provisions of chapter 6 be deleted from the draft Bill, as these are adequately covered by the position papers discussed.
- 7.7. However, should the Department deem it fit to retain chapter 6 in the draft Bill, the NAB has the following comments to make on chapter 6 of the draft Bill:

²⁰ At page 18 of the Position Paper

²¹ At page 25 of the Position Paper

7.8. Objectives of Community Broadcasting Services

7.9. Clause 20(d) of the draft Bill requires community broadcasting services to forge partnerships with local municipalities as locus of development. The NAB perceives this requirement as a good and noble principle, as it aims to provide some financial stability in the community broadcasting services industry. Furthermore, its final report²² following a Community Media Reflection Conference, organized by the National Community Radio Forum (the NCRF) in conjunction with Alternative Information Development Centre (AIDC), the Community media representatives attending the conference recognized that no project can realise its goals without collaborating with other institutions through forming partnerships²³. However it was recognized that there cannot be a one-size-fits all model to be applied because each community differs. It was stressed that, the model adopted by a community radio station needs to be based on common principles and values shared in the community.²⁴ The NAB has identified the following flaws in the proposed draft Bill:

- 7.9.1. It opens up scope for political influence over the licensee;
- 7.9.2. It compromises the independence of the community broadcasting service;
- 7.9.3. It compromises the freedom of expression,
- 7.9.4. It shifts financial dependence from the DoC to the municipalities;
- 7.9.5. It creates undue expectations and some uncertainties for multiple stations falling under a single municipal area as it is questionable as to whether the municipality will be able to partner with all community broadcasting services, given their budgetary constraints. The same applies to community broadcasting services serving multiple municipalities within their coverage areas as this presents problems on which municipality to partner with.

7.10. As opposed to confining funding streams for community broadcasting services to partnerships with municipalities, the draft Bill should be broad enough and enable community broadcasting services to partner with other institutions such as churches, schools and interest groups. This comes from the fact that not all community broadcasting services are defined by municipal or geographic boundaries. The EC Act also recognises community of interest broadcasting services. It therefore makes good

²² Community Media Reflection Conference Report 2009.

²³ At page 15 of the Report.

²⁴ At page 16 of the Report.

sense for the draft Bill to encourage partnerships with institutions and groups whose interests are being catered for by the community broadcasting service.

7.11. The NAB is therefore of the view that onerous obligations on the community broadcasting sector and forcing them to partner with local municipalities do not only stifle development and innovation, but also compromise the independence of the community broadcasting service licensee. When the Authority introduced five year licence tenure for the community sound broadcasting services, the rationale was that at the end of the five year period, the community broadcasting service would be financially sustainable and not dependent on the Department for financial support. However with most community broadcasting services this has not been the case. Despite the fact that the Department continues to fund these broadcasting services, they are still undergoing some financial difficulties and failing to become financially sustainable. It is therefore clear from the current position that the problem is not related to funding. The NAB is therefore of the view that the bulk of problems faced by community broadcasting service licensees are not finance related, as there are other contributing factors that the Department needs to identify and address.

7.12. **Governance**

7.13. Clause 22 of the draft Bill proposes the formation of a Governing Council, which shall run the affairs of the community broadcasting service licensee. The section goes further to prescribe the number of people that should form part of the Governing Council. The NAB is not convinced that by imposing governance principles on the community broadcasting service sector will correct the problems. In our view, the provisions of clause 22 are overly prescriptive, and interfere in the affairs of a broadcasting service licensee, hence violating the provisions of section 2(y) of the EC Act²⁵.

7.14. Clause 17 of the Community Sound Broadcasting Policy Position Paper²⁶ on the other hand introduces a light touch approach, and merely recommends that community sound broadcasting service licensees must clearly define roles of management and the board of directors, and these must be stipulated in their respective contracts of service.

²⁵ Section 2(y) provides as such: "refrain from undue interference in the commercial activities of licensees while taking into account the electronic communications needs of the public"

²⁶ At page 33 of the Position Paper

- 7.15. Governance issues are dealt with in terms of company laws while employment issues are governed by labour laws. As a result these areas should not be tampered with by the Department. Furthermore, when submitting a registration for a community broadcasting service licence, an applicant submits its constitution and articles of incorporation, for the approval of ICASA. Included in the application are governance issues, proposed office bearers of the broadcasting service, their credentials and detailed curriculum vitae.
- 7.16. The Community Media Reflection Conference did recognise bottlenecks created by board members who occupy positions indefinitely; hence not giving opportunities for new people with fresh ideas to occupy board positions. However entrenching governance principles in the draft Bill will not alleviate the bottlenecks. The Conference resolved that one of the ways in which this can be alleviated would be that the tenure of key office bearers must be defined in the constitution of community radio stations. It was recognized that a maximum period of four years with the option of resignation is an acceptable period. It was further resolved that when rotating, at least 50% of outgoing board members must stay on the board to orientate and ensure continuity.²⁷
- 7.17. The NAB is therefore of the view that the Department should guard against prescribing additional hurdles for the community broadcasting sector introduced in the draft Bill. Currently, the community broadcasting sector is inundated with legislation, the various ICASA regulations, licence conditions and other instruments that require compliance. The NAB therefore re-iterates its recommendations per its written representations in response to the discussion document²⁸:
- 7.17.1. The Authority needs to place some importance on monitoring and enforcement, as this is part of their core duties.
 - 7.17.2. The Authority to re-instate its regional offices in order to monitor compliance in the remote and unreachable communities and de-concentrate the focus on the metropolitan areas.

²⁷ At pages 15 and 16 of the Final Report

²⁸ At page 6 of the NAB submission

7.18. Funding Community Broadcasting Services

7.19. Clause 24(1) outlines funding streams through which community broadcasting services can be funded. However this provision has omitted some of the funding mechanism for community broadcasting, as outlined in definition of community broadcasting service in chapter 1 of the draft Bill, and these are :

7.19.1. Advertising or sponsorships;

7.19.2. Membership fees.

7.20. The NAB therefore proposes that for purposes of uniformity, the wording used in chapter 1 be adopted in clause 24 (1).

8. CHAPTER 7: Ensuring universal access to broadcasting services

8.1. The NAB is of the view that universal service and access issues fall outside the scope of the draft Bill. Funding for universal service and access is administered by USAASA, in terms of section 88(1) of the EC Act.

8.2. Provisions around common carrier status should rather form part of section 62(3) of the EC Act which deals with a common carrier. The NAB is therefore of the view that chapter 7 be deleted from the draft Bill.

9. CHAPTER 8: Functions of the Authority in PSB

9.1. The provision of section 33 duplicate ICASA's powers stipulated in terms of the ICASA Act and the EC Act. The NAB therefore recommends that this section be deleted from the draft Bill.

9.2. As stated, provisions relating to broadcasting signal distribution and the common carrier are misplaced in the draft Bill. The NAB therefore recommends that section 34 of the draft Bill be deleted.

9.3. Functions of the Authority in relation to MDDA and PSB Fund

9.4. The Authority is an independent body that derives its powers from the ICASA Act. ICASA's powers are outlined in section 4 of the ICASA Act, among others, ICASA's duties are to regulate and monitor entities licenced in terms of the EC Act. The MDDA is an independent body that derives its powers from the MDDA Act. The MDDA is not an entity licenced in terms of the EC Act, hence it does not fall under the jurisdiction of

ICASA. In terms of the MDDA Act, the MDDA is by no means enjoined to do financial reporting to any entity other than Parliament. As a result, the provisions of section 35 of the draft Bill are ultra vires the provisions of both the ICASA Act and the MDDA Act. The MDDA Act adequately outlines reporting procedures to be followed by the board. The MDDA reports to the Minister, which report must then be tabled before Parliament by the Minister²⁹.

9.5. The MDDA board has powers to evaluate projects funded by the MDDA, and the board has the right to request the funded parties to rectify whatever discrepancies they have detected in the project, and where the board deems it fit, it has the right to discontinue the project³⁰. Hence bestowing monitoring and complaints investigation powers on ICASA over MDDA projects will be undermining the legislated systems.

9.6. In order to accommodate the proposals introduced by section 35 of the draft Bill the MDDA Act will need to be amended, to reflect the additional reporting powers the MDDA board needs to undertake in respect of PSB, other than seeking to erode the powers of the MDDA board and bestowing them on the Authority.

10. CHAPTER 9: The role of the Minister

10.1. Section 192 of the Constitution mandates national legislation to establish an independent authority to regulate broadcasting in the public interest. In pursuance of section 192 of the Constitution, section 3 of the ICASA Act establishes the independent Authority, ICASA.

10.2. In recognition of the independence of ICASA, and the need for government not to interfere in the affairs of the Authority, chapter 2 of the EC Act sets apart the various roles of the Minister as a policy maker, as opposed to those of ICASA as an independent regulator.

10.3. Clause 38(1) of the draft Bill empowers the Minister to direct any of the entities specified in the Bill to take action in pursuance of PSB if that entity is unable to perform its functions. It is worth noting that this provision goes against the independence of

²⁹ Section 16 of the MDDA Act

³⁰ Section 20 of the MDDA Act

ICASA, as enunciated by section 192 of the Constitution, and is therefore ultra vires the Minister's powers.

- 10.4. Provisions of section 39(1) empower the Minister to instruct the SABC board to take any action specified by the Minister. In terms of the BA this role was entrusted with Parliament, as the SABC board is answerable to Parliament. From the NAB point of view, the provisions of chapter 9 of the draft Bill, do not only cross the demarcation between the two distinct bodies, but goes further to undermine and erode the powers of Parliament over the SABC.

11. CHAPTER 11: Local Content Industry and the Advisory Body to Minister

11.1. Specialist Channels

- 11.2. Section 41 of the draft Bill states that within nine months after the digital switch-over, the Authority must issue an invitation to apply (ITA) for specialist channels. The NAB notes that no provision has been made for community broadcasting services to also participate in the specialist channel space. The NAB requests the Department equally to outline criteria for community broadcasting services to participate in the broadcasting of specialised channels.

11.3. Local content Advisory Body

- 11.4. Section 42 of the draft Bill proposes the establishment of a Local Content Advisory Body. The NAB does not see the necessity to establish yet another advisory body, as the Authority enjoys this role. Section 4(3)(a) of the EC Act enjoins the Authority to make recommendations to the Minister on policy matters and amendments to the law which accord with the objects of the ICASA Act, and the underlying statutes to promote development in the communications sector.

- 11.5. ICASA is further enjoined by section 61 of the EC Act to prescribe regulations regarding the commissioning of independently commissioned programming for the preservation of South African programming. The Authority is further required by the EC Act, to specify conditions that prescribe a specified minimum percentage of local television content and music works which qualify as South African music. If at all, a body to be entrusted with advising the Minister with local content matters, it is the Authority, as establishing a separate advisory body will not only erode ICASA's powers, but will undermine the autonomy of ICASA.

12. THE COMMUNITY BROADCASTING CHARTER

- 12.1. In its preliminary comments, the NAB pointed out that the establishment of a community broadcasting charter is an unnecessary step. The proposed charter is overly prescriptive, and seeks to micromanage community broadcasting service licencees.
- 12.2. In our view, the proposed charter duplicates already existing statutory and regulatory instruments.
- 12.3. However, should the Department deem it fit to promulgating a charter, despite the NAB's recommendation, the NAB recommends that the charter should adopt a light touch approach. The charter should be drafted in the form of guidelines and codes of good practice, rather than a rigid over-arching document that restricts flexibility in the community broadcasting sector.

13. SCHEDULE: ELECTRONIC COMMUNICATIONS ACT

- 13.1. The NAB is of the view that the proposed amendment clause 48A (2) contained in the Schedule of the draft Bill is in conflict with the technology neutral objects of the EC Act. There is generally common cause that section 5(2) of the BA, which is being ported across to the EC Act by this amendment, is an oversight that should have been repealed when the EC Act was enacted. The object of the EC Act is to provide for the regulation of electronic communications in South Africa and for that purpose "to promote and facilitate convergence in the broadcasting, broadcasting signal distribution framework".
- 13.2. Currently, the EC Act provides for three broad types of services in chapter 3, namely electronic communication network services, electronic communication services and broadcasting services. The Act envisages that these services will be granted individual or class licencees, alternatively, some of them may be exempt from requiring a licence. In the case of broadcasting, chapter 9 provides for three classes of broadcasting licencees namely public broadcasting service licencees³¹, community broadcasting

³¹ Ibid Section 49

service licences³² and commercial broadcasting service licences³³. Section 60, implies that another distinction that will be applied to further distinguish between broadcasting service licences, is subscription broadcasting and free-to-air broadcasting.

13.3. In line with the objects of the Act and the licensing framework, an entity applying for a service licence would be granted a technologically neutral service licence, i.e. a licence which is not specific to the platform (e.g. satellite, cable, wireless, etc) by which the service will be transmitted. This approach allows a licensee to offer its service on multiple platforms without having to re-apply each time for a service licence when it rolls out such a service on a new platform. However, the licensee would be obliged to apply for a radio frequency spectrum licence, if the service is conveyed using the radio frequency spectrum. In the specific case of broadcasting service licencees, the licensee would have to apply to ICASA for authorisation, in terms of regulations, each time it added a broadcasting programme channel to its licensed broadcasting service.

13.4. It was in line with the objects of the EC Act, that ICASA when converting all broadcasting licences in terms of section 93 of the EC Act took the view that section 5(2) of the BA conflicts with section 2(a) and (b) of the EC Act. Section 94 of the EC Act states that, where there is conflict between the EC Act and other legislation the EC Act prevails and therefore ICASA did not apply section 5(2) of the BA when converting broadcasting service licences. Consequently, all broadcasting licences converted in terms of section 93 of the EC Act are technology neutral and do not specify the platform on which the service is provided.

13.5. The NAB is of the view that if clause 48(a)(2) of the draft Bill is inserted in the EC Act it will undermine the conversion of broadcasting licences that took place in terms of section 93, together with the objects of the EC Act to create a technologically neutral licensing framework. Accordingly, the NAB proposes a complete deletion of the Schedule. Consequentially, the proposed platform definitions should also be deleted.

14. CONCLUSION

14.1. The NAB would like to thank the Department for the opportunity to make its written representations.

³² Ibid section 50

³³ Ibid section 51

14.2. The NAB supports the draft Bill in so far as it seeks to amend the Broadcasting Act. However the NAB is of the view that in its current state the draft Bill presents some problems which should be resolved prior to finalising the Bill. The NAB has made the following proposals:

14.2.1. The draft Bill should be termed the SABC Bill, wherein all provisions relating to the SABC including the SABC charter will be addressed, while issues related to other classes of broadcasting services will be addressed in the EC Act;

14.2.2. Provisions pertaining to Sentech, outlining the common carrier status of Sentech should be dealt with in the EC Act, and by way of amending the Sentech Act;

14.2.3. The Community broadcasting charter is irrelevant, as it seeks to duplicate already existing policies, while at the same time it seeks to micromanage the community broadcasting sector. However, if promulgated, the charter should adopt a light touch approach, and be drafted as guidelines and codes of good practice;

14.2.4. Provisions pertaining to universal service and access should be dealt with by the EC Act, while funding for universal service and access subsidies should be administered in terms of the US Fund;

14.2.5. The draft Bill must strive to maintain some consistency with the EC Act in so far as defining terms is concerned.

14.3. The NAB is committed to this process, and hopes its inputs will assist the Department in achieving its objectives of amending the BA.

14.4. The NAB hopes its inputs will assist in creating a fair and equitable legislation that will achieve developmental and democratic goals of the country. The NAB is available to assist the Department in whatever way the Department may require.