



**NATIONAL ASSOCIATION OF BROADCASTERS'
SUBMISSION TO ICASA IN TERMS OF NOTICE 1149 OF
2007 OF ITS INTENTION TO PRESCRIBE REGULATIONS
IN RESPECT OF THE PRESCRIBED ANNUAL
CONTRIBUTIONS TO THE UNIVERSAL SERVICE AND
ACCESS FUND**

29 OCTOBER 2007

NAB'S WRITTEN SUBMISSION TO ICASA'S NOTICE PUBLISHED IN TERMS OF SECTION 4(4) OF THE ELECTRONIC COMMUNICATIONS ACT READ WITH SECTION 89, AND SECTION 95(1) OF THE ELECTRONIC COMMUNICATIONS ACT 36 OF 2005

1. INTRODUCTION

- 1.1 On 14 September 2007, the Independent Communications Authority of South Africa (the Authority), published in Government Gazette number 30304, Notice number 1149 (the Notice), a notice in terms of section 4(4) of the Electronic Communications Act 36 Of 2007 (the EC Act) read with section 89, and section 95(1) of the EC Act and section 4(3)(j) of the independent Communications Authority of South Africa Act 13 of 2000 as amended (the ICASA Act). In the Notice, the Authority published its intention to prescribe regulations in respect of the prescribed annual contributions of the licensee's licensed activities, to the Universal Service and Access Fund (the draft regulations).
- 1.2 The National Association of Broadcasters (the NAB) would like to thank the Authority for the opportunity of making its written submission in respect of the draft regulations.
- 1.3 The NAB would like to be given the opportunity to participate in oral representations, should the Authority deem it fit to hold oral representations in respect of this process.
- 1.4 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:
- Three television public broadcasting services, and eighteen sound public broadcasting services, of the South African Broadcasting Corporation of South Africa (the SABC);
 - All the commercial television and sound broadcasting licensees;
 - Both the licenced common carrier and the selective and preferential carrier broadcasting signal distributors;

- Over thirty community sound broadcasting licensees, and the first licensed community television broadcasting service, Trinity Broadcasting Network (TBN).

2. OBJECTS OF THE DRAFT REGULATIONS

2.1 The NAB supports the object of draft regulations, in as far as the Authority seeks to:

- 2.1.1 repeal the regulations in respect of the annual contributions to the fund by holders of telecommunications service licences;
- 2.1.2 prescribe the annual contributions to the fund by electronic communications service licensees, electronic communications network service licensees and broadcasting service licensees in terms of Chapter 3 of the EC Act, and;
- 2.1.3 specify the date when such contributions become payable and the manner in which they may be paid.

2.2 The draft regulations require broadcasting service licensees to also make contributions to Universal Service Fund (the USF). It is important to point out that this process is going to create a conundrum for broadcasters. Prior to the coming into effect of the EC Act, broadcasting licensees have already been contributing financially to the Media Development and Diversity Agency (MDDA), whose objects are similar to those of the Universal Service and Access Agency of South Africa (USAASA).

2.3 In terms of section 3 of the Media Development and Diversity Agency Act 14 of 2002 (the MDDA Act),

“the objective of the MDDA is to promote development and diversity in the South African media throughout the country, consistent with the right to freedom of expression as entrenched in section 16(1) of the Constitution in particular-

- (a) freedom of the press and other media; and*
 - (b) freedom to receive and impart information or ideas,*
- and for that purpose to-*

- i. *encourage ownership and control of, and access to, media by historically disadvantaged communities as well as by historically diminished indigenous languages and cultural groups;*
- ii. *encourage the development of human resources and training, and capacity building, within the media industry, especially amongst historically disadvantaged groups;*
- iii. *encourage the channeling of recourses to the community media and small commercial media sector*
- iv. *raise public awareness with regard to media development and diversity issues;*
- v. *support initiatives which promote literacy and culture of reading;*
- vi. *encourage research reading media development and diversity...*

2.4 The MDDA Act defines “media” as *“all forms of mass communication, including printed publications, radio, television and new electronic platforms for delivering content”*¹. In other words, the objectives of the MDDA, as articulated in section 3 of the MDDA extend to providing support for broadcasting services licensees.

2.5 Section 21(1) of the MDDA Act further provides that the Board of the MDDA may enter into agreements with any organisation in terms of which financial or non-financial assistance is given to the MDDA for the furtherance of the objects of the Act.

2.6 In 2004, broadcasting service licensees entered into five-year funding agreements with the MDDA, with levels of performance clearly outlined, in terms of which broadcasters are required to provide financial support to the MDDA in furtherance of the objects of the MDDA. These agreements expire in two years’ time, after the proposed effective date for the USF contributions.

¹ Section 1(viii) of the MDDA Act.

3. COMMENTS ON THE DRAFT REGULATIONS

3.1 GENERAL

The NAB wishes to begin its submission by commenting on the objectives of the EC Act as there is presently no other existing policy framework in relation to the purpose and goals of the Authority and the Minister. Section 2 requires ICASA –

- to “promote the universal provision of electronic communications networks and electronic communications services and connectivity for all” at (c)
- to promote “an environment of open, fair and non-discriminatory access to broadcasting services, electronic communications networks and electronic communications services” under (g)
- to “encourage research and development within the ICT sector” under (i)
- to “provide assistance with human resource development within the ICT sector” under (l)
- to “develop and promote SMMEs and co-operatives” under (p)
- to “protect the integrity and viability of public broadcasting services” under (t)
- to “promote stability in the ICT sector” under (z)

There is no specific definition of either “universal service” or “universal access” in Chapter 14, despite the provisions of section 1 which require the Minister to determine the meaning of the phrases in terms of Chapter 14. The Minister is required under section 3, to give policy guidance to the Authority in relation to the nature and purpose of universal service, but the NAB is not aware that this policy guidance has yet been published.

It is difficult, in the absence of this guidance and in the absence of a more holistic strategy for universal service in South Africa in relation to broadcasting, for the NAB and its members to comment more constructively on the draft regulation. We urge the Authority to consult more broadly on the nature and purpose of universal service for broadcasting licensees, and the implications of the contributions sought from broadcasting licensees in the

draft regulation. We have set out our submission on this latter point in more detail below.

3.2 AD PARA 3(1)

The Authority stipulates that licensees must pay an annual contribution of 0.2% of their annual turnover to the fund, derived from the licensee's licensed activities. The NAB is concerned that the terms "annual turnover" and "licensed activities" have not been defined in the draft regulations, or under the EC Act. The NAB therefore recommends that the Authority should provide a definition of each of "annual turnover" and "licensed activities".

Furthermore, it is not clear to us whether broadcasting licensees who also apply for and receive an electronic communications network licence (ECNS licence) will be required to make payment in relation to their activities licensed by this licence. This might imply that broadcasting service licensees are required to make two payments, and to delineate their activities in relation to the operation of such a network and the provision of broadcasting services. We do not believe it is the intention of the Authority to impose a financial burden of this magnitude and complexity on broadcasting service licensees. We therefore request the Authority to clarify its intentions in this regard.

3.3 AD PARA 4(1)

The draft regulations state that the first payment of the contributions to the Fund shall be due on 1st July 2008. It is the NAB's submission that the Authority should use the discretion afforded by the EC Act, section 89(2)(b), to extend the due date until such time as the current funding agreements between MDDA and broadcasting service licensees have lapsed. It is the NAB's view that this will afford broadcasting service licensees the opportunity to re-negotiate their agreements with the MDDA, and exercise reasonable discretion in electing the fund they wish to contribute to, determined by the level of benefits which broadcasting as a whole and licensees in particular, might receive. In this regard the NAB notes that community broadcasting licensees ought not to be required to make a contribution at all, and we comment further on this below.

Furthermore, we are also concerned that broadcasting licensees are in general, subject to a number of financial obligations, whether direct or indirect, in that they are also required to provide a certain level of local content. This itself requires that broadcasting licensees invest themselves in content of a local nature, in order to ensure that the minimum regulatory requirements are met. In many cases the obligations in relation to local content are included as licence conditions, and in other cases, the regulations published under the previous legislation remain in place until such time as the Authority replaces and/or repeals them.

Licence fees are to be paid on an initial and possibly, ongoing or annual basis. The licence fee framework has yet to be determined, but the NAB submits that its members may find themselves subject to yet another “tax” related to their activities, increasing the financial burden on these licensees.

Finally, additional levies are payable by members in that they must also pay South African Music Rights Organisation (SAMRO) a certain percentage of revenue called “tariff fees” or “blanket licence royalties” in order to replay soundtracks which are otherwise subject to copyright. SAMRO, as the Authority will be aware, is the collecting agency for its members who are composers, songwriters and music publishers. In relation to sound broadcasters, a further ‘Needletime’ levy is also payable to collecting societies for the use of music.

NAB repeats its concerns that its members are already taxed in relation to their activities, and submits that it would be useful to discuss with the Authority what percentage commitment or indeed, whether alternative forms of universal service might be appropriate, in relation to broadcasting licensees.

3.4 AD PARA 5(1)

By their nature, community and in some cases, class broadcasting service licensees are not profit-making entities. It is therefore nonsensical to require these licensees to contribute to the Fund. The funds contributed to the MDDA and the former USF are amongst other things, intended to be dedicated to the upliftment of certain classes of broadcasting service licensees. The NAB therefore recommends

that the draft regulations should not apply to class or community broadcasting service licensees.

4. CONCLUSION

The NAB would again like to thank the Authority for the opportunity to comment on the proposed regulations. The NAB trusts that the Authority will take cognisance of the submissions made in this representation, in formulating a regulatory framework for broadcasting in South Africa.