

**NATIONAL ASSOCIATION OF BROADCASTERS
SUBMISSION ON DISCUSSION PAPER ON SATELLITE
BROADCASTING**

1. **INTRODUCTION**

- a. On 4 May 1999 the Independent Broadcasting Authority (the Authority) released a Discussion Paper on Satellite Broadcasting (Athe Discussion Paper) to solicit input from the role players in the broadcasting industry and the public at large on how satellite broadcasting should be regulated. In response to the Authority=s invitation to make submissions, the National Association of Broadcasters (Athe NAB=), on behalf of its members, hereby respectively submits to the Authority this submission.

- b. The NAB, in this submission, has not followed the exact sequence of issues raised in the Discussion Paper nor has it answered all of the questions posed directly. Rather, it has attempted to identify and discuss the core issues that need to be addressed by the Authority and, in some cases, by Parliament, in the form of legislation. However, for reference purposes, throughout this submission the NAB has indicated in square brackets, at the end of a paragraph or section, the number of the question(s) in the Discussion Paper that is answered by that particular paragraph or section.

- c. From the outset, the NAB wishes to bring to the attention of the Authority that it is not completely clear what is the intended outcome of the Discussion Paper. A further cause of uncertainty is that it is unclear what will be the relationship between an eventual Position Paper on Satellite Broadcasting and the various prescribed statutory inquiries contained in the Broadcasting Act, 1999 (the Broadcasting Act), namely section 31(1) which requires an inquiry into the economic feasibility of the provision of additional subscription television services, and section 33 which requires an enquiry to determine the licence conditions, obligations and tariff structure for signal distribution, including the regulatory regime for multi-channel distribution services and convergence.
- d. However, the NAB submits that the procedure to be followed by the Authority in regulating the industry ought to be a holistic one. In this regard, the NAB agrees with the Authority that satellite broadcasting regulation should be seen as part of the broader process of establishing a policy and regulatory framework for information and communication in the era of technological convergence and networked economies. The NAB also submits that the Authority should take a holistic approach in this proceeding. Therefore, although the Discussion Paper purports to be only about satellite broadcasting, it should be a launching vehicle for the

IBA to make policy to regulate the industry in a holistic manner. In fact it may be that this proceeding alone cannot produce a policy document that should regulate satellite broadcasting, but will be only the starting point.

- e. The NAB has respectfully proceeded to address the issue of satellite broadcasting as well as other issues not directly addressed in the paper, such as multi-channel broadcasting and digital terrestrial broadcasting. In addition, the NAB has proceeded on the basis that this Discussion Paper will lead to a holistic approach to regulating broadcasting. Finally, the NAB believes that the technology platform used for broadcasting is not a fundamental distinction to be made with regard to most issues of regulation.

2. **PRINCIPLES OF REGULATING THE BROADCASTING INDUSTRY**

- a. Before proceeding to specific issues of broadcasting regulation, the NAB will address certain questions of the Authority that go to the principles of regulation of the industry.
- b. **Economic Framework**
 - i. The Authority asks how it should balance the sometimes contradictory roles of encouraging growth while at the same time ensuring universal access and redress of historical inequalities.

The NAB submits that in order to realise the goals stated, the Authority=s regulation in general and the policy adopted in regard to the Discussion Paper in particular should be both considered and flexible.

ii. It is important for regulation to encourage both new investment and growth of existing players in the market. However, the NAB submits that to do so effectively in the South African market, where there are existing players, both in broadcasting generally and in satellite broadcasting specifically, and where it is important to redress historical imbalances, the Authority must know more about the size and scope of the potential market. Thus, the NAB encourages the Authority to complete, as soon as possible, the necessary and statutorily required studies and consultations in order to determine the potential market size and scope. Any regulation in turn should take such realities into account.

iii. With regard to flexibility, the NAB makes some concrete proposals with regard to licensing and licence conditions below. The NAB submits that flexibility should be a thread running through regulation of the industry. This is necessary

to encourage investment and growth and achieve universal access and empowerment of historically disadvantaged persons and communities.

[Q.3.a]

c. **Social Framework**

- i. The Authority states that the purpose of licensing satellite broadcasting should be to offer diversity and choice for audiences in South Africa, to encourage contribution to the development of quality local content, to facilitate a fair competitive environment to contribute to a strong industry and to encourage investment. It then requests comment on how and in what way the licensing of satellite broadcasting can contribute to the objectives.

- ii. The NAB submits that the licensing of satellite broadcasting can contribute to the objectives. Specific examples will be apparent from the discussion throughout this submission as those objectives underlie many of the comments made herein. By way of example, the NAB sets out the following pointed ways in which satellite broadcasting can contribute to the objectives.

- (1) Satellite broadcasting by its nature offers choice and potentially, diversity, to audiences in South Africa. In the context of multi-channel broadcasting the facilitation of niche channels will go towards meeting the objective of choice and diversity.
- (2) With regard to local content, the NAB believes that satellite broadcasting will contribute to quality local production and content. This is so because satellite broadcasting can serve to showcase local content in South Africa and internationally.
- (3) The licensing of satellite broadcasting offers a unique opportunity to encourage investment in the industry. This is so for a number of reasons not least of which is the international or regional nature of satellite broadcasting. Because of that nature, if encouraged and promoted effectively by our regulatory environment, South Africa could become the hub of satellite broadcasting in Africa.

[Q.4.a]

d. **Competition Issues**

- i. The Authority asks a range of questions with regard to regulating for competition. The answer to those questions depends on a complete analysis of the provisions of the new competition legislation as compared to the IBA and Broadcasting Acts. The NAB submits that such analysis should be completed before the adoption of the Position Paper by the Authority. Although specific comments are not included herein in this regard, the NAB would request the indulgence to be permitted to look into this issue more carefully and address the Authority on this issue at oral hearings.

3. THE REGULATORY FRAMEWORK FOR THE BROADCASTING INDUSTRY

- a. The NAB agrees with the Authority's analysis of the current legal/regulatory framework as set out in the Discussion Paper. For ease of reference, it is worthwhile to repeat the salient features thereof here. In this regard, the following Acts will be highlighted: the Independent Broadcasting Authority Act, 1993 (Athe IBA Act≅), the Broadcasting Act, the Telecommunications Act, 1996 (Athe Telecommunications Act≅) and the Space Affairs Act, 1993 (Athe Space Affairs Act≅).

b. **The IBA Act**

i. The IBA Act regulates broadcasting by setting out the means of issuing and exercising control over -

- (1) broadcasting licences; and
- (2) broadcasting signal distribution licences.

ii. Second, the IBA Act sets out provisions regarding control over the broadcasting frequency spectrum.

c. **The Broadcasting Act**

Although not part of the current regulatory framework for broadcasting, the NAB agrees that the Act is of importance and should be considered in this proceeding since its promulgation will result in various amendments to the IBA Act. The NAB agrees with the Authority that there is potential confusion created by the promulgation of the Broadcasting Act. In particular, the NAB is concerned that in some provisions, multi-channel broadcasters are treated as signal distributors, when, in fact, they are and should be treated as broadcasters. In addition, the Broadcasting Act implies that multi-channel broadcasting may require fundamentally different regulatory treatment than single-channel broadcasting. The NAB submits that whether a broadcaster is a multi-channel broadcaster or a single-channel broadcaster is

not a fundamental distinguishing characteristic to be made with regard to most issues of regulation.

d. **The Telecommunications Act**

i. This Act establishes the South African Telecommunications Regulatory Authority (ASATRA), which regulates telecommunications, *inter alia*, by means of issuing and exercising control over -

(1) telecommunications service licences;

and

(2) licences for the use of frequencies.

ii. SATRA is also vested with control over the radio frequency spectrum. The range of frequencies regulated in terms of the Telecommunications Act covers all frequencies, except for the broadcasting frequencies regulated by the Authority in accordance with the IBA Act.

e. **The Space Affairs Act**

This Act, together with the provisions of the ITU which have been adopted by South Africa, regulate the launching of satellites. This Act empowers the Minister for Trade and Industry to determine general policy in respect of space affairs.

f. **Recommendations in respect of the regulatory framework**

i. The NAB recognises that certain of its recommendations cannot be carried out by the Authority, but must be carried out by the Minister for Posts, Telecommunications and Broadcasting or by Parliament, respectively. The NAB is also aware that the Department of Communications has several proceedings pending wherein it is considering amendments to existing legislation, including legislation with regard to a proposed merger of the Authority and SATRA.

In addition, the NAB is aware of the fact that the Department of Communications has commissioned a study on convergence of telecommunications, broadcasting and computing.

The NAB however, takes the liberty of setting out its proposals in regard to regulating broadcasting in a converged context, which includes certain recommendations that must be carried out by entities other than the Authority.

ii. Effective regulation of the South African telecommunications and broadcasting industries and the radio frequency spectrum requires a single Act covering telecommunications, broadcasting and related matters and a single independent regulator with the requisite powers

and discretion to regulate in an increasingly changing industry. The Act could consist of various chapters, with each chapter dealing with separate issues, including the creation and operation of a single regulatory authority; licencing of telecommunications services; licencing of broadcasting services; frequency spectrum planning; licensing of frequency use; licencing of broadcasting signal distribution services; space affairs; programming issues; ownership and control provisions; and empowerment provisions, among others. However, one of the underlying premises of such an Act should be to regulate similar activities, similarly, thus, not prejudicing any player in the industry based on irrelevant issues, such as technology platforms.

4. **FREQUENCY MANAGEMENT FOR TELECOMMUNICATIONS AND BROADCASTING**

- a. In addition to the power of the Authority and SATRA with regard to frequency management for broadcasting and telecommunications, the Joint Liaison Committee (AJLC≡) as well as the Frequency Spectrum Directorate (AFSD≡) within the Department of Communications are clothed with certain powers with regard to frequency management.

i. **Joint Liaison Committee**

The Joint Liaison Committee is established by SATRA and the Authority in terms of section 28(3) of the Telecommunications Act. It is responsible for the planning and use of the radio frequency spectrum and the determination of which parts of the spectrum shall, from time to time, be transferred to the broadcasting service frequency band to be regulated by the Authority.

ii. **Frequency Spectrum Directorate within the Department of Communications**

Section 37 of the Broadcasting Act will establish a Frequency Spectrum Directorate within the Department of Communications. The FSD will be vested with the authority to develop policy for the radio frequency spectrum. Furthermore, the FSD will undertake technological and economic research of the radio frequency spectrum to ensure the efficient use of the spectrum.

b. **Recommendations**

It is not completely clear what the relationship between the Authority, SATRA, the JLC and the FSD will be once the Broadcasting Act comes into operation. All are entrusted with aspects of frequency management, but it is unclear exactly where the functional demarcations lie.

The NAB respectfully submits that clarity be determined by the Authority, SATRA and the Department of Communications in conformity with the various legislative provisions and, if necessary, legislative amendments be effected. In this regard, the NAB suggests that the Broadcasting Act be amended to clarify that the FSD has powers only in respect of research and not in respect of frequency planning or use. This amendment would eliminate confusion caused by the new Broadcasting Act which seems to create overlapping jurisdictions between the Authority and SATRA on the one hand and the FSD on the other hand, with regard to frequency planning.

[Q.2.d]

c. **Broadcasting Services/Frequencies: Uplinking and downlinking**

i. First, the NAB submits that the *de facto* situation in terms of which all satellite broadcast uplinking is licenced by SATRA, is incorrect in law. Satellite transmission is a one way process consisting of two elements, uplinking and downlinking, which are inextricably linked. It is simply incorrect in law to separate out satellite broadcast uplinking as a telecommunications service, as is being done currently.

- ii. The NAB respectfully submits that the current confusion in this regard stems from an inaccurate claim by Telkom that it has an exclusive right to provide all uplinking services in South Africa. The NAB respectfully submits that neither the Telecommunications Act nor the IBA Act supports that claim. The NAB furthermore submits that the Authority should make its position clear to Telkom and SATRA in this regard.

- iii. In terms of the Telecommunications Act, Telkom's exclusive right to provide certain Public Switched Telecommunications Services (APSTS) for a limited period of time is set out in its licence. In terms of the licence, the exclusive period is five years or until 7 May 2002, or, if Telkom meets certain performance targets, until 7 May 2003.

- iv. The PSTS for which Telkom has an exclusive right to provide, are defined by s36(3) at the Telecommunications Act. That section states that, during the exclusive period, no one may provide a similar service to the certain exclusive services provided by Telkom, except if an alternative service is provided. This provision means that if an alternative service

is provided, and was being provided immediately before the coming into force of the Telecommunications Act, then such service can still be provided in terms of the Telecommunications Act and any licence conditions applicable thereto.

- v. The services that fall within Telkom=s exclusivity are services that meet three criteria. The first criterion is that the service has to be a PSTS contemplated in s78(1) of the now repealed Post Office Act, 1958. The Post Office Act contemplated almost any service. The second criterion is that the service must have been provided by Telkom at the commencement of the Telecommunications Act. It is not clear that Telkom was providing broadcast uplinking services at the commencement of the Act. The third criterion is that the service must be specified in Telkom=s licence. Telkom=s licence specifies the following elements of the PSTS:

- (1) the National Long Distance Telecommunication Service;
- (2) the International Telecommunication Service;

(3) the Local Access Telecommunication Service;

(4) the Public Pay-telephone Service.

vi. Telkom=s licence also provides Telkom with an exclusive right to provide telecommunication facilities, but only to value added network service providers and private telecommunications network operators, as well as fixed line telecommunications facilities to mobile telecommunications service providers. Although these facilities are listed as elements of the PSTS in Telkom=s licence, they are mischaracterised as such. However, Telkom does have an exclusive right to provide such facilities, until a date fixed by the Minister, in terms of ss37(2)(d), 40(2) and 41(2)(a) of the Telecommunications Act.

vii. Telkom, however, *does not* have an exclusive right to provide telecommunications facilities to broadcasters. Neither does Telkom have a right to provide facilities or services as a broadcaster as it is not licenced as a broadcaster (or a signal distributor) in terms of the IBA Act.

viii. **Recommendations**

(1) The NAB recommends that this issue be clarified as a matter of urgency and that the JLC commence with transferring broadcasting frequencies to the jurisdiction of the Authority as is required to be done in terms of the obligations of the JLC. The frequency bands that should be considered for transference to the Authority are the BSS bands as well as those parts of the FSS KU-band, L-band, KA-band and X-band allocated at the international level and planned at the national level, including both uplinking and downlinking frequencies.

(2) There is, however, an additional consideration to be taken into account by the JLC in transferring jurisdiction of the frequencies. The first issue is that certain of the bands are planned for use by broadcasters as well as telecommunications providers. Thus, SATRA and the Authority must look carefully at each band or part thereof, as the case may be, and

determine which portion of that band or part thereof should be transferred to the Authority, if any, for assignment to and use by broadcasters.

- (3) Yet another issue, however, is that Telkom may be assigned use of certain frequencies that are planned for the exclusive use of broadcasting or not planned for the exclusive use of broadcasting, but necessary for broadcasting operations in South Africa. In certain circumstances, Telkom may be using the assigned frequencies and in others, it may be holding the frequencies. The JLC must also look carefully at these issues in relation to all of the relevant frequency bands or parts thereof and take appropriate action, even if that requires ordering migration of Telkom as a telecommunications provider to other frequencies planned for telecommunications.

d. **Telecommunications services ancillary to broadcasting:**

SNG service and Back-haul service

i. Satellite News Gathering (ASNG≡) service

(1) SNG service is primarily provided by broadcasters and appears sometimes to be part and parcel of a broadcasting service. However, there is little dispute that SNG is a telecommunications service and that it should be licenced as such by SATRA.

(2) SATRA has yet to prescribe SNG as a telecommunications service that can be licenced, however, and make regulations for appropriate licensing. The NAB submits that SATRA ought to prescribe SNG as a service, promulgate appropriate regulations for the licensing of SNG service and frequencies and begin licensing operators as a matter of urgency. In regard to licensing, the NAB submits that broadcasters should be entitled to obtain a licence on the same basis as any other person.

- (3) Although Telkom claims otherwise, it simply cannot be the case that Telkom has an exclusive right to provide SNG service, because it does not meet the criteria as set out in the Telecommunications Act. In this regard, see the discussion above beginning at paragraph 3.3.3;

ii. Back-haul service

- (1) As is the case with SNG service, the NAB submits that back-haul is a telecommunications service. Back-haul is a point-to-point telecommunications service which is used as a tool in providing broadcasting services in various ways.
- (2) The NAB submits that SATRA ought to proceed to prescribe, promulgate necessary regulations and to licence back-haul as a telecommunications service as a matter of urgency. In addition, the NAB submits that broadcasters and broadcasting signal distributors be able to be licenced

to provide these services on the same basis as any other person.

- (3) In line with the discussion above, this telecommunications service does not fall within Telkom=s exclusivity.

[Q.5.n, Q.5.o, Q.5.p, and Q.5.q]

5. **LICENSING OF BROADCASTERS AND BROADCASTING SIGNAL DISTRIBUTORS**

- a. In many jurisdictions, no distinction is made between broadcasting and broadcasting signal distribution. In such cases, a broadcasting licence covers the broadcasting signal distribution function as well. However, in South Africa, broadcasting signal distribution is done by licenced broadcasting signal distributors. In some cases, a broadcaster is responsible for its own broadcasting signal distribution, but in such cases, the broadcaster must, in addition to obtaining a broadcasting licence, also obtain a broadcasting signal distribution licence. Therefore, in South Africa, provision is made for two types of licences in the broadcasting industry, namely broadcasting licences and broadcasting signal distribution licences.
- b. **Broadcasting licences**

i. In terms of the IBA Act, regarding categorisation of licences, the first distinction is between sound and television licences and the second between public, private and community licences.

ii. In terms of the Broadcasting Act, there are *categories* of licences, the distinctions between them being public, commercial and community. There are also *classes* of licences which concern other distinguishing factors such as the technology platform, nature of service (radio or television) and whether the services is subscription or free-to-air. Delivery services are also distinguished. Unfortunately, these classes have not been determined systematically in that, for example, subscription radio services have been omitted. In addition, there is overlap between, for example, the definition of satellite free-to-air television service and direct-to-home delivery service.

iii. Recommendations in respect of broadcasting licences

(1) The NAB submits that the Broadcasting Act should be amended in order to simplify and establish a rational categorisation of broadcasting licences. Fundamental to this

recommendation is that the technology platform that is utilised in delivering a broadcasting service is not a distinction in regards to licensing.

(2) The NAB approves of the categorisation of licences provided for in section 5(1) of the Broadcasting Act. However, it recommends the abolition of the classes of licences provided for in section 5(2). This could take the form of a complete abolition of the classes or alternatively a listing of the *defining characteristics* of the licence, namely:

(a) multi- or single-channel;

(b) free or subscription;

(c) the technology platform, i.e. terrestrial analog, terrestrial digital, satellite, cable or any other platform;

(d) the nature of the service, i.e. radio or television; and

(e) geographic coverage area, i.e. local, regional or national.

(3) Further, the Broadcasting Act may need to be amended to ensure that it is clear that multi-channel broadcasting operators must obtain a broadcasting licence rather than a broadcasting signal distribution licence. The entity distributing the multi-channel broadcaster=s signal, must on the other hand, be licenced as a broadcasting signal distributor, whether this entity is the multi-channel broadcaster itself or some other entity.

(4) The NAB proposes that, pending the necessary legislative intervention, the Authority make use of the provision of section 5(2)(k) of the Broadcasting Act, that indicates that other classes of licences will be prescribed, to attempt to make the

clarifications required, as discussed above.

[Q.2.b, Q.2.c, Q.2.d, Q.7.a, Q.7.h, Q.7.m, Q.7.o, Q.7.q, Q.7.s and Q.7.u]

c. **Broadcasting signal distribution licences**

i. In terms of the IBA Act, three types of broadcasting signal distribution licences are provided for:

- (1) common carrier licences;
- (2) preferential carrier licences; and
- (3) own carrier licences.

ii. The NAB=s interpretation of the current regulatory regime is as follows:

- (1) in applying for a broadcasting licence a would-be broadcaster makes a determination as to whether it will provide its own broadcasting signal distribution or enter into a contract with a common or preferential carrier for the provision of the signal distribution;

(2) in the event that a broadcaster is awarded a broadcasting licence, the relevant frequency is assigned to the broadcaster in the licence;

(3) the broadcasting signal distributor will not use any frequencies of its own to distribute the signals of the broadcaster, but merely will piggy-back on the frequencies assigned to the broadcaster in terms of the broadcasting licence.

iii. The NAB submits that the regulatory regime set out for broadcasting signal distribution licencing in the IBA Act should not be changed. However, the NAB submits that the Authority should encourage and promote competition in the broadcasting distribution segment of the industry.. Competition should encourage innovation, better service and lower prices and will avoid artificial needs to regulate that segment of the industry.

[Q.5.1, Q.5.m and Q.10.e]

d. **Examples of how the licencing regime proposed will work**

i. Multi-channel broadcasting: Using the hypothetical company called ANumerous-Choice, one can identify the various role players as follows:

(1) Numerous-Choice: assembles a bouquet of channels (for example SABC 3, CNN, e-tv and Highveld Stereo). The service is multi-channel, subscription, satellite, radio and television, with a national coverage. Numerous-Choice is the broadcaster.

(2) Satellite Signal Distributer X (ASSDX) distributes the signal via satellite for ultimate reception by various viewers and listeners. SSDX is the broadcasting signal distributor.

(3) SABC 3, CNN, e-tv and Highveld Stereo are the channel providers. They do not require a broadcasting licence. The responsibilities of the broadcaster for programming rest with the multi-channel broadcaster, Numerous-Choice, and not with the channel providers.

ii. Numerous-Choice should be licenced as the broadcaster. Furthermore, only one broadcasting licence should be issued for the bouquet of channels, and not a licence for each channel in the bouquet. The channels will, however, individually be approved by the Authority in terms of section 35(2) of the Broadcasting Act.

It is not clear from the Act what such approval would entail. The NAB suggests that it certainly should not be a licensing process, but that approval should be implemented in such a way as to encourage and promote the objectives of licencing broadcasting as set out by the Authority in the Discussion Paper. This suggests as well that the Authority should consider mechanisms to assist multi-channel broadcasters in meeting their licensing obligations. In this regard, the Authority could explore the requirement that channel providers be required to sign a code of conduct.

Finally, SSDX should be licenced as the broadcasting signal distributor.

[Q.7.h and Q.10.e]

iii. Depending on the circumstances, Numerous-Choice may offer more than one package of channels to a

consumer. For example, it may offer the entire bouquet of services which includes both subscription and free services for a certain subscription fee. It may offer, in the case of a subscription service, only three of twenty-seven channels as package A, twenty-seven channels as package B and nine of the twenty-seven channels as package C. In addition, Numerous-Choice may offer a package of three of the channels to be resold by Mr Reseller. Mr Reseller is referred to as a niche broadcaster by the Authority in the Discussion Paper. However, Mr Reseller is indeed not a broadcaster at all and therefore should not be licensed. The responsibilities of the broadcaster with regard to, for example, programming rests with the multi-channel broadcaster, Numerous-Choice and not with Mr Reseller.

[Q.5.c and Q.5.d]

- iv. Single-channel broadcasting: Using B-TV as a hypothetical company providing a single-channel, terrestrial, free, television service with national coverage, the following players can be identified:

(1) B-TV will be the broadcaster.

(2) The entity providing the signal distribution of the broadcasting service will be the broadcasting signal distributor.

e. The fundamental principle of broadcast licensing should be that there is one level of distinction which is between public, community and commercial broadcasting. A licence granted by the Authority, however, may have any combination of the defining characteristics of a licence, which are set out at paragraph 4.2.3.2 above. The overall approach to licensing of commercial broadcasters should be the same no matter what are the defining characteristics of the licence. However, as will be discussed below, the defining characteristics may have an impact on the licence conditions set by the Authority in certain circumstances.

f. **Regulating transmissions originating from outside South Africa**

i. The IBA in the Discussion Paper rightly recognises that it is difficult, if not impossible, to regulate satellite broadcasting that originates from outside of South Africa. The first recommendation that the NAB makes in this regard is that South Africa needs to embark

on cross-border negotiations with its neighbouring countries as a matter of priority.

ii0 However, the NAB recognises and agrees that South Africa has the sovereign authority to set out its own regulatory and licensing regime in regard to broadcasting. In this regard, the NAB believes that, generally, the regulatory framework and licensing requirements be set to balance two seemingly contradictory goals. The first is that the South African environment must be attractive to foreign broadcasters so that they will invest in the industry rather than simply taking their business across the border where it would be difficult, if not impossible, to control transmissions. The second is that local broadcasters should not be disadvantaged as compared to international broadcasters because of disparate rules and regulations applying in regard to licensing or licence conditions.

[Q.7.b , Q.7.d, Q.7.e and Q.7.f]

6 **PRINCIPLED APPROACH TO LICENCE CONDITIONS**

a **Introduction**

i0 Licence conditions, such as local content requirements and restrictions on foreign

ownership, are not goals. They are tools used to achieve certain goals. Thus, in laying down the licence conditions for each broadcasting licence, the Authority needs to implement a flexible approach which will ensure that a broadcasting licensee participates in achieving certain stated goals.

ii0 The current approach where specific requirements are prescribed, such as percentages for local content, restrictions on foreign ownership for example, in either legislation or by the Authority, should be reconsidered to make place for a flexible approach in any future regulatory environment, that achieves the stated goals, such as empowerment, development of local industry and investment in the broadcasting industry.

b **The NAB proposes the following approach to licence conditions**

i0 First, the legislation should set out the goals to be achieved in the South African broadcasting industry, whether it be empowerment, the development of the local industry, the prevention of foreign persons having control over the dissemination of information, or any combination of these or others.

ii0 Second, the legislation should set out an overall approach for the Authority to use in setting licence conditions for the achievement of the identified goals. The approach should be that the Authority will set licence conditions to meet the stated goals for each broadcasting licence on a case by case basis.

iii0 The Authority then should provide the necessary guidance to potential applicants on the process to be followed in using the approach to meet the stated goals. In addition to providing procedural guidance, the Authority must make known the criteria and variables it will take into account in setting licence conditions.

iv0 An applicant should then, in its application for a broadcasting licence, identify how it, in its attempt to achieve the stated goals, intends meeting those goals. In other words, the applicant sets out the tools it proposes to use.

For example, in achieving the goal of enhancing the local broadcasting industry, an applicant can propose to provide 10 percent local content and production, set up training programmes for management with specified targets, set up a work study programme for broadcast engineers. In

addition, the applicant is 60 percent South African owned.

v0 It is then for the Authority, taking into account the variables that have been established, to decide that it either approves or disapproves of the applicant=s proposal. If it approves, the Authority will grant the licence on those conditions. If it does not, the Authority can propose its own licence conditions appropriate to the applicant, and if not accepted by the latter, the licence application would be denied.

vi0 In implementing the above system, the Authority should seek to treat similarly situated broadcasters, similarly. In other words, the Authority should ensure that the system is established in such a way so that it will be implemented in a non-discriminatory way. The Authority must also ensure that it is in fact implemented in a non-discriminatory way.

[Q.3.a, Q.4.a, Q.4.b, Q.5.a, Q.5.b, Q.9.b and Q.9.e]

7 **PROGRAMMING**

a **Local content**

i0 The NAB believes that local content is a tool. The goals that the tool is intended to achieve are two-fold - development of the local broadcasting industry and ensuring that local ideas and culture are disseminated in South Africa. In line with the proposed overall approach outlined, but based on the prescription in Section 53(2) of the IBA Act, it is submitted that the rigid percentages for local content in the Triple Enquiry Report, should be reconsidered by the Authority. They should be replaced by the criteria, variables and mechanisms that will be used by the Authority to implement a flexible approach to setting local content, production and music requirements..

ii0 The NAB submits, however, that neither the technology platform of broadcasting (i.e., terrestrial, satellite, or any other platform) nor whether the service is free or subscription, should matter in determining the tools that should be set, including local content, in regard to achieving the stated goals. Thus, the NAB recommends that in determining local content requirements, the Authority reconsider the Triple Enquiry Report in a holistic manner to be applied to all broadcasters in a non-discriminatory way.

iii0 The NAB also suggests that the Authority could set a range of percentages as the minimum and maximum to be set in any licence with regard to local content, production and music requirements.

iv0 In practice how the foregoing work is as follows: The Authority would prescribe the local content requirement for commercial broadcasters at, for example, between 10 percent and 20 percent. In a licence application the Authority would, based on the criteria and variables established, set a specific percentage as a licence condition for that licensee for example, 15 percent. However, because the maximum of 20 percent was not set, the Authority could also require the licensee to establish a training programme for production engineers, for example.

v0 The NAB submits that the variables that should be taken into account in determining local content are the following:

- (1) the audience of the broadcaster -
 local, national or also
 international;

- (2) the nature of broadcasting - radio, television or both; and

[Q.5.k]

- (3) the format of the service. With respect to similar broadcasting formats, the NAB submits that there should be parity in implementation. Thus, the local content requirement for two adult contemporary radio stations in one geographic market, should be the same.

vi0 Variables that should not be considered in determining local content are the following:

- (1) the technology platform of broadcasting - terrestrial, satellite, cable or any other platform; and
- (2) whether the service is free or subscription.

[Q.5.i]

[Q.9.b]

vii0 Play or pay principle

(1) The NAB believes that the current use of the play or pay principle is not necessarily conducive to the goals that are stated with regard to local content, namely, the development of the local broadcasting industry and ensuring that local ideas and culture are disseminated. Thus, the NAB is opposed to a system where a licensee is ~~Apenalised~~ for failure to meet the licence conditions with respect to local content. The NAB however, believes that the proposed approach to licence conditions as set out in this submission eliminates the need for the play or pay principle, if it is to be used as a tool for ~~Apenalising~~ broadcasters.

(2) However, the NAB does recognise that there may be circumstances where a licensee will propose that it pay into a fund for the achievement of the goals of local content, for example, the development of the local broadcasting industry, *in lieu* of

other tools that could be used to achieve those goals. The NAB is not opposed to this use of the pay or play principle. However, this system of the play or pay principle should not be confused with a penalty system as discussed above.

[Q.9.a]

viii0 Local content for multi-channel broadcasters

- (1) The NAB believes that local content for multi-channel broadcasters should be regulated across the bouquet of channels offered and not for individual channels. However, the NAB submits that local content should be regulated in such a manner that multi-channel broadcasters are required to spread local content reasonably across the bouquet and that it should not be permitted to carry all the local content on one channel in the bouquet.

[Q.5.h and Q.7.i]

(2) A more difficult issue, however, arises with regard to niche channels, as discussed previously. On the one hand, the NAB recognises that there is a place for niche channel providers as well as packages of channels which are less than the full bouquet, in the market place of broadcasting. However, the NAB submits that the Authority should consider several issues before determining that local content requirements should or should not apply to niche channel providers or packages of channels. The first issue is that, fundamentally, broadcasters should not be treated differently unless there is a compelling reason for treating such broadcasters differently. Second, by permitting niche channel providers and multi-channel broadcasters, who provide packages of channels to consumers, the ability to provide broadcasting services without local content requirements, could effectively undermine completely

local content requirements for multi-channel broadcasters. Thus, the NAB submits that the Authority should consider setting local content licence conditions with regard to multi-channel broadcasters packages as well as with regard to niche channel providers.

[Q.9.f]

[Q.7.i, Q.7.j, Q.7.n and Q.9.c]

ix0 The nature of local content

- (1) Currently the Authority sets out the parameters of local content in regard to both **Alocal television content** and **ASouth African music**. The NAB recommends that the legislation in this regard be reconsidered. First, the NAB believes that the nature or definition of local content should be decided by the Authority, rather than in legislation. In addition, the NAB submits that there is a need to determine more carefully the nature or definition of local content.

- (2) The NAB believes that the nature of local content, as set out in the Act, is inappropriate, because it does not recognise all forms of local content.
- The NAB does, however, recognise the concerns that seem to be inherent in the limitations of the definition of local content. In particular, the NAB recognises that local talk radio is not as important as playing on the radio South African music. Similarly, the NAB recognises that the local production of television drama or movies is of greater importance than the local production of talk television programmes. However, the NAB believes that the differences in the importance of local content can be recognised by the Authority by assigning different weights to different types of local content, rather than eliminating from the definition altogether certain types of local content. Thus, the recommendation is that the Authority explore such a flexible approach, should the Act be amended, to allow

it to define what is local content more appropriately.

- (3) However, until the Act is amended, the NAB suggests that such a system can be accommodated in the proposed overall approach, as set out above, by simply using a different characterisation for certain programming that has been excluded from the local content definitions as provided in the Act. Those things that have been excluded can be considered as alternative tools to meeting the stated goals, similar to, for example, setting up training programmes.

x0 Local content in regard to competing applications

The NAB also believes that local content as well as alternative tools should be criteria in a competing application process. In other words, if two applications are competing for a broadcasting licensee, the one proposing to broadcast 50 percent local content should be given preference over the one proposing to

broadcast only 10 percent local content, all other things being equal.

b **Other issues of programming**

i0 Teleshopping channels

(1) Restrictions in this respect have merit as far as public broadcasters are concerned. However, in respect of commercial broadcasters, it is submitted that there is no reason to place restrictions concerning teleshopping channels. Thus, the NAB submits that any such limits with regard to commercial broadcasters currently in place, should be reconsidered.

(2) In any event, the technology platform of broadcasting should not be used as a differentiating feature. However, whether the service is free or subscription, might be a factor to be taken into account. In addition, whether the broadcaster is a single- or multi-channel broadcaster may be a factor to be taken into account. In other words, a multi-channel broadcaster could get Authority to

broadcast a 24 hour teleshopping channel. But at the same time, the broadcaster would be restricted on its other channels the same way a single- channel broadcaster would be restricted.

[Q.5.h, Q.5.i, Q.7.n, Q.7.r and Q.7.t]

ii0 Advertising limits

- (1) The NAB submits that before the Authority makes any policy decisions with regards to advertising limitations, a comprehensive investigation should be conducted in order to assess the respective contributions of subscription fees and advertising revenues to the income stream of satellite broadcasters. The NAB submits that there should be no limits placed in legislation or by the Authority with regard to the amount of advertising permitted, where commercial broadcasting is concerned. The NAB also submits that this should be the case no matter what the technology platform or whether the broadcasting

licence is single-channel or multi-channel. With regard to whether a service is free or subscription, the NAB submits that, apart from the limits flowing from the Broadcasting Act, there should be no further limits.

- (2) The NAB also submits that the comments made above with regard to teleshopping channels also apply with regard to advertising generally.

iii0 Codes of Conduct

The NAB believes that current broadcasting Code of Conduct should apply to all broadcasters, irrespective of the technology platform of broadcasting. Some of the members of the NAB believe that there might be a distinction to be made, however, in regard to whether the service is free or subscription.

[Q.9.d]

iv0 Must carry rules

The NAB submits that it is not necessarily so that the technology of satellite or digital broadcasting is such that it locks out the receipt of free-to-air public broadcasting.

Thus, the NAB submits that it is not appropriate at this time to regulate with regard to must carry rules. However, the NAB would not oppose appropriate regulation in this area by the Authority, after proper consultation, if it were deemed necessary in order to protect public broadcasting.

[Q.9.g]

8 **RESTRICTIONS ON FOREIGN OWNERSHIP**

- a Like the local content requirement, the restriction on foreign ownership and control is a tool that is used to meet certain goals. The goals are not dissimilar to the goals of the local content requirement. They include the development of the local industry and the control of the dissemination of information by local persons as opposed to foreign persons.
- b Thus, the NAB submits that the IBA Act=s current restrictions with regard to foreign ownership should be deleted and that a provision be put in place setting out the goals and setting out the requisite power for the Authority to set as licence conditions, restrictions on ownership and control on a case by case basis. Limits must be set, however, in conjunction with setting other licence conditions. The outcome should be that all of the licence conditions together must adequately meet the

goals set out in the legislation *and* that they must be comparable across competing licensees or potentially competing licensees.

c The NAB also submits that it should not matter what is the technology platform used by a broadcaster with regard to restrictions on foreign ownership. This would be so whether the Act is amended or not. But the consequence of treating satellite broadcasters the same way commercial broadcasters are currently treated in the Act, would be to discourage investment in the industry. On the other hand, if the Act is not amended and there are no foreign ownership and control restrictions placed on satellite and multi-channel broadcasters, existing commercial broadcasters will be at a unfair competitive disadvantage. Thus, the NAB believes that it should be of importance to consider this issue holistically and amend the IBA Act as a matter of urgency.

d Similarly, the NAB submits that it should not matter in regard to broadcasters what are the other defining characteristics of a licence: multi- or single-channel, pay or subscription, the nature of the service or the geographic coverage area.

e In addition to the foregoing, the NAB submits that the issue of foreign ownership and control should be a comparative criterion in the consideration of competing applications. In other words, if applicant ONE is 95

percent owned by foreign persons and applicant TWO is 25 percent owned by foreign persons, all other things being equal, the Authority should grant application TWO.

[Q.11.g]

9 **EMPOWERMENT**

- a The NAB supports the existing approach to encouraging empowerment by setting licence conditions on a case by case basis with regard to the tools that are to be implemented to achieve the goals of empowerment. This approach is substantially similar to the approach suggested by the NAB with regard to all licence conditions. The NAB re-emphasises here, however, that the setting of licence conditions should be done holistically and based on the goals stated rather than based on stated tools. Applicants as well as the Authority should be left to be innovative and flexible with regard to the tools used that are proposed and ultimately set as licence conditions.
- b With respect to human resource development, the NAB respectfully submits that this issue is sufficiently dealt with in existing labour legislation. Therefore, the Authority should not introduce any further requirements other than what is already provided for in s2 of the IBA Act.

[Q.12.c]

[Q.12.a, Q.12.b and Q.12.d]

10 **CROSS OWNERSHIP - A COMPETITION ISSUE**

- a Fundamentally, the NAB views the issue of cross ownership and control, including limitations on ownership and control and limitations on cross-media ownership and control, as one of competition. In other words, limitations or restrictions on cross ownership or control are tools that are used to effect competition in the industry. The NAB, however, recognises that additional goals might be furthered with restrictions on cross ownership and control, including diversity as well as empowerment.
- b Currently, there are certain limitations in the IBA Act on cross ownership and control with regard to the same media and there are certain limitations on cross media ownership and control. The NAB submits that the existing restrictions with regard to cross ownership and control are not conducive to the development of the broadcasting industry in South Africa. In addition, the specific restrictions have not necessarily resulted in the promotion of a competitive industry. It is also questionable whether the restrictions have furthered the goals of diversity or empowerment.
- c The NAB proposes that the legislative approach that should be taken should be a flexible approach - that is,

an approach that will meet the goal of a competitive market in any particular situation. The NAB proposes that the Authority should be given the power in legislation to achieve the goals by being able to avoid or stop uncompetitive actions generally, not only in the licencing process but also in other ways. The NAB submits, however, that specific restrictions should not be legislated by Parliament. These suggestions, will require amendments to existing legislation.

- d. In addition, the NAB submits that limitations or restrictions on cross ownership and control, if there are to be any, must apply to all broadcasters similarly, whatever the technology platform. However, the addition of satellite and multi-channel broadcasters into the regulatory framework requires a complete re-evaluation of cross-ownership and control restrictions and appropriate amendments to the IBA Act as a matter of urgency, so that existing regulations do not unfairly disadvantage existing licensees.

- e With regard to multi-channel broadcasters, the NAB submits that the nature of multi-channel broadcasting and the fact that, as contemplated by the NAB, a multi-channel broadcaster may be licenced for both pay and subscription services, radio and television services, as well as more than one technology platform in a multi-channel broadcasting licence, may require different

restrictions, if restrictions are to be placed at all, on multi-channel broadcasters.

[Q.8.a, Q.8.c, Q.8.d, Q.8.e, Q.11.a, Q.11.b, Q.11.c, Q.11.d, Q.11.e and Q.11.f]

11 OTHER TECHNICAL ISSUES

a Technology standards

i0 The NAB submits that the IBA should not set technology standards with regard to the technology platforms used by broadcasters. To do so might have the effect of stifling innovation or of leaving South Africa behind when innovative technologies or types of technologies are developed.

ii0 The NAB, however, is in favour of the current requirements for both transmitting and receiving equipment to be accepted or approved on quality standards that are either set down internationally or in South Africa.

[Q.10.f and Q.10.h]

b Conditional Access (ACA)

i0 The NAB submits that CA receivers should not be required by legislation or the IBA to be compatible. Although the NAB recognises the possibility of doing so technologically and the

possible advantages of such, the development in this regard should be left to the market.

ii0 The NAB also submits that if a broadcaster is engaging in anti-competitive conduct with regard to CA operations, then the Competition Act would apply to that broadcaster and appropriate remedies could be effected in terms of that legislation which can be implemented in its own terms, in conjunction with the IBA where appropriate.

[Q.8.a, Q.8.b, Q.8.g, Q.10.i and Q.10.j]

c **Subscription Management Services (ASMS~~es~~)**

The NAB disagrees with the suggestion in the Discussion Paper that the IBA should introduce a requirement that SMS be shared. However, the NAB does recognise that, in practice, SMS must not be operated in an anti-competitive manner. In addition, the NAB recognises that SMS must not be operated in a manner that is in violation of privacy laws.

[Q.8.a and Q.10.k]