



**The NAB submission on the draft interconnection
regulations pursuant to chapter 7 of the Electronic
Communications Act**

1. Background

- 1.1. On 10 July 2009, the Authority published in Notice number 941, Government Gazette number 32370, dated 10 July 2009, its intention to prescribe Interconnection Regulations (the draft regulations) in terms of section 4 and 38 of the Electronic Communications Act 36 of 2005 (the EC Act), read with section 4(3) (j) of the Independent Communications Authority of South Africa Act 13 of 2000 as amended (the ICASA Act). The draft regulations are accompanied by Annexure A, containing the explanatory notes for the draft regulations.
- 1.2. The Authority commenced the process of draft Interconnection Regulations in 2007, when on 24 July 2007 the Authority published, in notice number 898 of 2007, in government gazette number 30091, a notice inviting interested persons to submit written representations to its intention to prescribe interconnection regulations.
- 1.3. This process culminated in the Authority publishing the second draft of the interconnection regulations on 24 December 2007, which were open for public comment, however, no oral hearings were held in respect of this draft of the interconnection regulations.
- 1.4. The outcome of the second draft of the draft regulations was satisfactory to the National Association of Broadcasters (the NAB), and the broadcasting sector as a whole, as the second draft had captured the key concerns of the broadcasting sector on interconnection¹.
- 1.5. The NAB welcomes the opportunity to make its written representation on this, the third draft of the proposed interconnection regulations. The NAB would like to be given the opportunity to participate in oral representations, should these take place.
- 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 Interconnection Regulations Notice number 1795 Government Gazette 30611 dated 24 December 2007, at page 7

- 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 licensed common carrier and the selective and preferential carrier broadcasting signal distributors;
- Over thirty community sound broadcasting licensees, and one community television broadcasting licensee, Trinity Broadcasting Network (TBN)

2. The NAB position

2.1. The NAB requests that when reading this submission, the Authority should do so in conjunction with the NAB submission dated 03 September 2007. In its written submission dated 03 September 2007, the NAB outlined its position and understanding of the concept of interconnection. Furthermore, the NAB demonstrated in oral hearings that, pursuant to the provisions of section 37(3)(a)(b) of the EC Act,² it is not technically and logically feasible for broadcasting services to interconnect, nor is it physically or logically possible to link broadcasting services.

2.2. As a result of the submissions made by stakeholders, the Authority reconsidered its position when drafting the second draft of the interconnection regulations. Draft regulation 2.1 of the second draft interconnection regulations expressly excluded broadcasting service licencees from the obligation to interconnect.³ The draft regulations read as follows:

“All licensees excluding broadcasting services licensees have an obligation to interconnect upon request, to all persons licensed in terms of the Act and persons providing service pursuant to a licence exemption, unless such request is unreasonable.” (our emphasis)

² S 37 For purposes of subsection (1) a request is reasonable where the Authority determines that the requested interconnection

(a) Is technically and financially feasible; and

(b) Will promote the efficient use of electronic communications networks and services.

³ Ibid page 7

2.3. Consequently, in the third draft of the interconnection regulations, the provisions of draft regulations 2.1 have been excluded. The rationale the Authority provides ⁴ for the exclusion of draft regulation 2.1 in the third draft of the interconnection regulations is that *“the inclusion of broadcasters in the scope of the regulations is necessary legally, given the definition of “interconnection” in the Act includes broadcasting service licencees”*

2.4. The NAB is of the view that the rationale provided is vague and needs further clarification.

3. Legal issues

3.1. When interpreted literally and strictly, the provisions of section 1 (definition of interconnection) and section 37 of the EC Act will produce absurd, and unintended results.

3.2. Courts of law have on several occasions departed from the literal rule of interpretation of pieces of legislation, particularly in instances where the ordinary grammatical language of the piece of legislation gives rise to an obvious absurdity. In such a case, the court is justified in departing from the ordinary effect of the words to the extent necessary in attempting to establish the intention of the legislature, even in cases where the words appear clear and unambiguous.

3.3. Similarly, the purported interpretation the Authority is imposing on section 37 of the EC Act, by requiring broadcasting service licencees to interconnect leads to absurdity. As a result of the technical impossibility for broadcasting service licencees to interconnect, the chances of an electronic communications network service licensee (ECNS licencees) or even another broadcasting service licensee approaching a broadcasting service licensee to request interconnection are minimal if not nonexistent.

3.4. As a result, the NAB sees no point in including broadcasting service licencees in the regulations that cannot apply to them, in the short to medium term at least, given the technical and logical impossibilities of interconnecting. As a result, the NAB is of the view that the Authority should exclude broadcasting service licencees from the

⁴ The Explanatory Note: Draft Interconnection Regulations at page 35, para 2.3.3.

application of the interconnection regulations, as was the case in the second draft of the interconnection regulations.

4. Conclusion

- 4.1. The NAB would like to thank the Authority for the opportunity of making its written representation to the third draft of the interconnection regulations.
- 4.2. The NAB requests the Authority to adopt a purposive interpretation approach rather than a literal interpretation approach when interpreting section 1 and section 37 of the EC Act.
- 4.3. The NAB believes that its written representation will add value to the final outcome of this process.