



**THE NATIONAL ASSOCIATION OF BROADCASTER'S  
WRITTEN SUBMISSION TO THE DEPARTMENT OF COMMUNICATION'S  
NOTICE, INVITING COMMENTS ON  
THE PUBLIC BROADCASTING SERVICE DISCUSSION PAPER  
TO AMEND THE BROADCASTING ACT 1999,  
AS AMENDED**

**31 AUGUST 2009**

## **1. INTRODUCTION**

- 1.1 On 20 July 2009, in government gazette 32420, Government Notice 755 of 2009 (the Notice), the Department of Communications (the DoC) published in terms of section 3(1) of the Electronic Communications Act 36 of 2005 (the EC Act), a notice inviting interested persons to furnish comments on the Public Service Broadcasting discussion paper (the discussion paper), to amend the Broadcasting Act 4 of 1999 as amended (the Broadcasting Act).
- 1.2 The National Association of Broadcasters (the NAB) welcomes the opportunity to respond to the discussion document, and believes the findings of the discussion document will inform the impending amendment to the Broadcasting Act.
- 1.3 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 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. NAB SUBMISSION**

- 2.1 The NAB in principle supports the DoC's objectives of introducing the discussion document, as it seeks to pave the way for amending the Broadcasting Act. Furthermore, this is in line with the legislative imperatives which empower the Minister to make policies on matters of national policy applicable to the ICT sector<sup>1</sup>.

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<sup>1</sup> Section 3(1) of the EC Act

2.2 In a highly technical environment such as the communications sector, it is important for policy not to lag behind, but rather to keep pace with the rapid evolution that takes place within the sector.

2.3 The proposed amendment of the Broadcasting Act comes at an opportune time when, the broadcasting landscape has evolved. The coming into effect of the EC Act in 2006 introduced an overhaul of the communications sector, when convergence was introduced. The broadcasting sector is currently undergoing its teething phase in re-aligning itself to meet up with the challenges brought about by this piece of legislation. It will therefore be unfortunate if the proposed amendments introduce yet another hurdle for the broadcasting sector.

2.4 The discussion paper among others seeks to re-visit the public service mandate of the SABC. The DoC must be cognizant of the fact that it is not only the SABC that possesses this mandate, but, other broadcasting service licencees do have public service obligations imposed on them through regulations such as local content regulations, universal service obligations, language obligations, and licence conditions etc.

2.5 Therefore the NAB believes that there is no further need for the DoC to introduce legislation in this regard. ICASA is equipped with adequate regulations and policies, however, what is lacking, is for the Authority to enhance its compliance and enforcement mechanisms as this is an important tool that will ensure that these policies are implemented. The NAB will expound further on these issues in the body of the submission.

2.6 In responding to the discussion document, the NAB will not answer question by question, but will tackle principle issues that emerge from the discussion document.

### **3. LEGISLATIVE BACKGROUND**

3.1 When enacted, the objectives of the Broadcasting Act was to among others, “provide for other classes of broadcasting activities in the public interest and for that purpose: to provide a Charter for the South African Broadcasting Corporation

Ltd (the SABC), to establish the South African Broadcasting Production Advisory Body and to establish a human resource capacity in the policy development.”

3.2 Consequently, the coming into effect of the EC Act repealed a large number of the Broadcasting Act provisions which dealt with “other classes of broadcasting activities”<sup>2</sup>, and this had the consequence of the legislature enacting among others, sections 16, 17, 18, 19 and Chapter 9 of the EC Act, which focus on broadcasting services. Currently, the Broadcasting Act comprises mainly of those provisions that relate directly to the SABC.

3.3 It is therefore our view that the broadcasting Act should then be amended to be called the SABC Act and any provisions not related to the SABC should be repealed.

3.4 Having said that, upon perusing the discussion paper, the NAB has come to realise that the discussion paper makes mention of repealed sections of the Broadcasting Act relating to other classes of broadcasting activities as though they are still in operation.<sup>3</sup> This therefore raises a concern for the NAB, as the DoC’s intention is not clear in this regard.

3.5 If the intention is to reinstate these provisions back into legislation, then the DoC should clearly indicate that. However, the NAB’s proposal is that the DoC should be cautious in doing so.

#### **4. PART A: PUBLIC SERVICE BROADCASTING SERVICES**

##### **4.1 Role of the Regulator in respect of the Public Broadcaster**

4.1.1 According to the discussion document, the regulator has two sets of responsibilities: Monitoring and enforcing compliance.<sup>4</sup> The discussion paper goes further to pose a question “has the delegated function of ICASA to an industry body further diluted its role as the regulator”<sup>5</sup>.

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<sup>2</sup> Repealed sections: 4,29,30,31,32,33,34,35,36,37,39 and 40(1)(a),(b)and (2)

<sup>3</sup> Discussion Paper: Part B Community Broadcasting Services: pages 18-20 reference is made to section 32 and 34 of the Broadcasting Act

<sup>4</sup> Ibid page 16

<sup>5</sup> Ibid, question 45 at page 16

- 4.1.2 The NAB is an independent self-regulatory body envisaged by section 54(3) of the EC Act. Broadcasting service licencees, who are members of the NAB, gain an automatic membership to the Broadcasting Complaints Commission of South Africa, (the BCCSA). The BCCSA operates independently from the NAB and the regulator, hence the Authority has no influence in the proceedings or outcome of the adjudication processes of the BCCSA.
- 4.1.3 The BCCSA administers a code of conduct for free-to-air broadcasting service licencees, and a code of conduct for subscription broadcasting service licencees, and members need to adhere to either of these codes.
- 4.1.4 The NAB would like to bring it to the attention of the DoC that by empowering a body such as the BCCSA to administer a code of conduct, the EC Act has not delegated the powers of the Authority to the NAB. Conversely, the NAB/BCCSA and the Authority work independently, in administering their respective codes of conduct. It is noteworthy that, not all broadcasting service licencees fall under the jurisdiction of the BCCSA, and such broadcasters are adjudicated over in terms of the ICASA broadcasting code of conduct.
- 4.1.5 Furthermore, the BCCSA adjudicates only on matters pertaining to the broadcast content. The monitoring and enforcement of the ICASA regulations, editorial policies, license conditions and legislative requirements, falls under the sole jurisdiction of ICASA, and the Complaints and Compliance Committee (CCC).The SABC, or any other broadcasting service licencee's membership to the NAB, does not exonerate it from the jurisdiction of the Authority.

## **5. PART B: COMMUNITY BROADCASTING SERVICES**

- 5.1 In the discussion paper, the DoC states that it intends to establish a Community Broadcasting Charter<sup>6</sup>. The discussion paper further tabulates aspects that the charter will cover.
- 5.2 Undoubtedly, there are some inadequacies within the EC Act in as far as community broadcasting services are concerned. However these inadequacies cannot be corrected by way of promulgating a charter, but rather by introducing

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<sup>6</sup> Ibid, Page 18

amendments to the existing pieces of legislation. Over and above the provisions of the EC Act, ICASA has introduced a number of regulations addressing the community broadcasting service sector<sup>7</sup>.

5.3 In addition, the Authority published a Community Sound Broadcasting Policy Position Paper<sup>8</sup> and a Community Television Broadcasting Service Position Paper (the ICASA position papers),<sup>9</sup> which adequately set out ICASA's policy framework, that the DoC is now trying to re-create through a charter. The ICASA position papers address the areas identified as lacking by the discussion paper, and these are: licencing processes for community broadcasters, ownership and management structures, funding and finance, staffing and training of personnel etc. The content of the ICASA position papers were researched, and underwent proper consultative process. As such, re-doing the whole process is and unnecessary exercise, and will undermine the efforts already undertaken.

5.4 From the NAB's point of view, enacting a Community Broadcasting Charter will not only amount to the cluttering of systems already in place, but will further amount to an administrative and monitoring nightmare to the Authority.

5.5 In our view introducing policy is one thing but that policy is of no use if it is not adequately monitored and administered. As such the NAB is strongly opposed to the promulgation of a charter, as this will perpetuate the existing problem. Rather, the Authority should focus its attention on the monitoring of compliance and enforcement of existing policies and regulations. The Authority needs to be capacitated in order to strengthen its enforcement arm. The problems identified in the discussion paper are genuine, and need to be dealt with adequately.

5.6 One of the ways the Authority can employ carrying out the proposals above, would be for the Authority to re-instate the regional offices in order to monitor compliance in the local context and de-concentrate the focus on the metropolitan areas.

## **6. PART D: SIGNAL DISTRIBUTION**

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<sup>7</sup> For instance, on 31 March 2008, the Authority published Regulations regarding the processes and procedures for registration, amendment, renewal, transfer and surrender of a class licence.

<sup>8</sup> ICASA Community Sound Broadcasting Policy Position Paper 05 June 2006

<sup>9</sup> Community Television Broadcasting Service Position Paper 30 November 2004

6.1 The broadcasting sector requires an efficiently and well run broadcasting signal distributor, however, throughout the discussion paper, what becomes apparent is the fact that the funding model for state-owned entities i.e. the SABC and Sentech is of paramount concern for the DoC as the shareholder. Conversely, of paramount concern for the broadcasting sector in relation to broadcasting signal distribution, is the issue of broadcasting signal distribution tariffs. As the shareholder, the DoC should be seen to be taking a leading role through policy in creating stability amongst broadcasting service licencees and broadcasting signal distribution licencees.

6.2 ICASA should fulfill its role as a referee, and conduct a review and inquiry<sup>10</sup> into broadcasting signal distribution tariffs in South Africa. The NAB is of the view that many of the concerns and issues raised under part D of the discussion paper can be addressed through availing a stable and predictable broadcasting signal distribution tariff regime.

## **7. CONCLUSION**

7.1 The NAB welcomes the opportunity to make its written representation to the discussion paper. In conclusion, the NAB would like to highlight the following points:

7.1.1 Broadcasting service licencees currently have public service obligations imposed on them, hence the proposed amendments to the Broadcasting Acts should not add to these;

7.1.2 Section 54(3) of the EC Act does not seek to delegate ICASA's duties on a self-regulatory body such as the NAB, ICASA and the NAB/BCCSA operate independently from one another;

7.1.3 The proposed community broadcasting services charter is unworkable, as it only adds to the existing conundrum, the Authority should rather focus on tightening its compliance monitoring mechanisms;

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<sup>10</sup> Section 4B of the ICASA Act.

7.1.4 In order to balance the interests of the broadcasting signal distribution licencees and those of broadcasting service licencees, the Authority should engage in a signal distribution tariff review.