

1. INTRODUCTION

1.1 On 30 April 2004 an application by the South African Broadcasting Corporation (“SABC”) to the Independent Communications Authority of South Africa (“the Authority”) for an amendment to its licence conditions (“the SABC application”) was published in the Government Gazette.

1.2 Midi TV (Pty) Ltd (“e.tv”) sets out herein its submission on the SABC application.

1.3 e.tv’s submission will focus on the television environment and will address the public service obligations of the SABC, as well as the creation of a fair competitive television environment in South Africa.

1.4 e.tv submits that, in evaluating the SABC application, the Authority must have regard to the following legislative provisions:

1.4.1 The objects of the IBA Act as set out in Section 2, in particular, sections 2(d), 2(e), 2(h), 2(o) and 2(r);

1.4.2 The provisions of Section 52(1) (c) and (d) of the IBA Act relating to the amendment of broadcasting licences;

1.4.3 The objects of the Broadcasting Act of 1999 (Act No. 4 of 1999) (“the Broadcasting Act”) as set out in Section 2, in particular, sections 2(h) and 2(l); and,

1.4.4 The provisions set out at Chapter IV of the Broadcasting Act relating to public service broadcasting.

1.5 e.tv further submits that the Authority has, over the past ten years, engaged in extensive policy formulation which should inform its decision on the SABC application. Such policies are set out in the following documents:

1.5.1 The Triple Inquiry Report of 1995; and

1.5.2 The Position Paper for the Introduction of the First Free-to-Air Private Television Service in South Africa (“The Position Paper”).

1.6 The White Paper on Broadcasting Policy published in May 1998 (“the White Paper”) deals specifically with public broadcasting policy and the creation of a fair competitive environment.

1.7 e.tv’s submissions on the SABC application will be made in the context of the above-mentioned legislation and policies which have established the regulatory framework for broadcasting in South Africa.

2. REGULATORY BACKGROUND

2.1 Triple Inquiry Report

2.1.1 In 1994 the Independent Broadcasting Authority was created to regulate broadcasting in the public interest. In 1995 the Triple Inquiry Report of the Authority was adopted by the National Assembly. The consequence of this was that this report constitutes the basis of the country’s broadcasting policy. This report guided the activities and ethos of the regulated environment and was entrenched in the White Paper which led to the promulgation of the Broadcasting Act.

2.1.2 The Triple Inquiry Report addressed two important policy matters which are relevant to the SABC’s amendment application – the protection and viability of public broadcasting services and conditions regarding local television content and

South African music. In its approach to broadcasting regulation, the Authority set out the following principles:

2.1.2.1 “Firstly, the Authority must encourage and create the conditions for public, private and community radio and television stations to be licensed and to thrive at both national and regional level. In doing so, the Authority must ensure that in shaping the broadcasting environment, the integrity and viability of public broadcasting is protected. The Authority would equally however, have failed in its task if it creates an environment in which private and community broadcasters do not have the incentive to enter the industry or provide reasonable conditions for their success;

2.1.2.2 “Secondly, the Authority must ensure that the South African public is well served by broadcasting and that broadcasting plays an appropriate and meaningful role in addressing the public interest goals of democracy, nation-building and development. From the point of view of the public, the broadcasting environment should provide maximum diversity and choice of quality entertaining, educative and informative services. From the point of view of broadcasters, the environment should be, as far as possible, "a level playing field" in which broadcasters compete fairly with one another for audiences and, where appropriate, for revenue.”¹

2.1.3 With respect to the licensing of public, community and private broadcasting, the Authority stated the following:

¹ Paragraph 7.2 of the Triple Inquiry Report

2.1.3.1 “The Authority's decisions about the protection and viability of public broadcasting are inextricably connected to the number, nature and obligations of its competitors. This would be the case even if the national PBS were entirely publicly funded, but is even more so given the continued reliance of the national PBS on commercial revenue.

2.1.3.2 “The Act suggests that, in fulfilling many of the objects of the Act, the Authority should view all broadcasters collectively. In considering the public service requirements of the public broadcasters, it is imperative for the Authority to examine what the private and community broadcasters can and should be expected to contribute.”²

2.1.4 In defining the public service broadcaster, the Authority stated:

“While public broadcasting services have become associated with state controlled or funded operations, the Authority believes it is best defined in relation to its ownership by, and accountability to, the public and its commitment to a set of service principles. The public, served by this form of broadcasting is the totality of all citizens irrespective of sex, gender, age, race or culture. **The services provided should bring to the greatest number of homes the fullest possible range of programmes, including minority interests, and should address their needs as citizens primarily, rather than their preference as consumers.**”³ (emphasis added)

² Paragraph 7.3 of the Triple Inquiry Report

³ Paragraph 8.3 of the Triple Inquiry Report

2.1.5 The Authority also established a basis for determining the competitive environment in broadcasting:

“To protect the viability of public broadcasting services, the Authority will need to regulate the broadcasting environment as a whole, to ensure that each sector is viable and can compete fairly.”

and

“As conditions for fair competition between broadcasters for audiences and revenue will be determined to a large degree by the programming service they offer and to whom, the programming, language and local content obligations placed on public and private broadcasters have to be delicately balanced.”⁴

2.1.6 The principles which the Authority determined in respect of local content included the following⁵:

- broadcasters will be required to provide a full range of informative, entertaining and educative local television programming **throughout the schedule and at prime time**;
- higher local content quotas will be set for public and community stations than for private stations.
- the national public broadcaster, in line with its specific mandate and responsibilities, will carry higher local content obligations than their private competitors;

⁴ Paragraph 8.4 of the Triple Inquiry Report

⁵ Paragraph 16.2.2.1 of the Triple Inquiry Report

- television broadcasters must meet an overall local television content quota as well as quotas within prescribed specific programme categories and **in prescribed viewing times**;
- the national public broadcaster must ensure that, within three years of the coming into effect of the local content regulations, 50% of its programming during the South African television performance period (as prescribed) **and at prime time** consists of local television content ...;
- In complying with the overall quotas and the programme category quotas, no single national public broadcasting channel should have less local content than that prescribed in respect of private terrestrial free-to-air stations.

2.2 Position Paper for the Introduction of the First Free-To-Air Private Television Service in South Africa

2.2.1 The market research conducted by the Authority for the Position Paper determined that the market was ready for a new national commercial television broadcaster.⁶

2.2.2 In its introduction to the Position Paper, the Authority stated “the essence of the problem which the Authority has considered is the creation of a television environment in which private broadcasters co-exist through fair competition and equity with the public broadcaster”.⁷

⁶ Annexure 5 of the Position Paper

⁷ Page 5 of the Position Paper (website version)

2.2.3 The Authority maintained the 50% local television content quota for the SABC as set out in the Triple Inquiry Report but extended the timeframe for its implementation.⁸

2.2.4 The Authority also reiterated that it could not hold the private broadcaster to greater public service obligations than the public broadcaster.⁹

2.2.5 The Authority imposed the following minimum obligations on the new private free-to-air broadcaster:

2.2.5.1 20% local content increasing to 30% after five years¹⁰;

2.2.5.2 One hour of news per day¹¹;

2.2.5.3 ½ hour of **prime time** news every day¹²;

2.2.5.4 14 hours of information programming per week¹³;

2.2.5.5 2 hours of **prime time** information programming per week¹⁴;

2.2.5.6 12 hours of children's programming per week¹⁵;

2.2.5.7 3 hours of South African drama per week of which 2 hours 20 minutes must be in **prime time**¹⁶.

2.2.6 The Authority further limited the new entrant to an average of 10 minutes advertising per hour with a maximum of 12 minutes in any one hour.¹⁷

⁸ Paragraph 5.1.1 of the Position Paper

⁹ Paragraph 5.1.2 of the Position Paper

¹⁰ Paragraph 5.1.2 of the Position Paper

¹¹ Paragraph 6.2.2.1 of the Position Paper

¹² Paragraph 6.2.2.1 of the Position Paper

¹³ Paragraph 6.2.2.2 of the Position Paper

¹⁴ Paragraph 6.2.2.2 of the Position Paper

¹⁵ Paragraph 6.2.3 of the Position Paper

¹⁶ Paragraph 6.2.4 of the Position Paper

¹⁷ Paragraph 10.2 of the Position Paper

2.2.7 The Authority also imposed on the new licensee an annual licence fee of 2% of turnover less agency fees and other deductions to a maximum of 20% of 2%.¹⁸

2.2.8 In respect of the Promise of Performance by applicants for the licence, the Authority stated as follows:

“In assessing applicants the Authority will look for the applicant who may best contribute to delivering a quality service which reaches most South Africans and is relevant and attractive to them. This will require that the applicant demonstrates its ability to meet more than the Authority’s minimum requirements... Any additional undertakings the applicant makes in this regard ... will be treated as its promise of performance and will be included in the conditions of the new licence.”¹⁹

2.3 Local Content Regulations 1997

2.3.1 Pursuant to the publication of the Position Paper the Authority made the Regulations Relating to the Imposition of Specific Broadcasting Licence Conditions Regarding Local Television Content for Public and Private Television Broadcasting Services of 1997 (“the local content regulations (1997)”)²⁰.

2.3.2 At Clause 3.1 these regulations provided that, after five years of the regulations coming into effect, a public television licensee must ensure that at least 50% of its programming during the South African television performance period **and during prime time** consists of local television content.

¹⁸ Paragraph 13 of the Position Paper

¹⁹ Paragraph 9 of the Position Paper

²⁰ Government Gazette 17981, 2 May 1997

2.3.3 At Clause 4.2 the regulations provided that, after two years of the regulations coming into effect ... a weekly average of 20% of its programming in the South African Performance Period consists of local television content.

2.4 White Paper on Broadcasting Policy 1998 and Broadcasting Act of 1999

2.4.1 The White Paper on Broadcasting Policy set out government's objectives for broadcasting in South Africa.

2.4.2 It made provision for the division of the SABC into a commercial division and a public broadcasting division.

2.4.3 With respect to the public broadcasting division, it stated that "such a service should cater for the needs and aspirations of all sections of our society, particularly the under-privileged and historically disadvantaged"²¹.

2.4.4 The Broadcasting Act brought about legislation based on the principles of the White Paper. It provided for the conversion of the SABC into a public company and the restructuring of the Corporation into a public service division and a commercial service division. The broad objectives of the public service division are set out at Part 3 of the Broadcasting Act and include the following requirements:

- to make services available to South Africans in all the official languages;
- to reflect both the unity and diverse cultural and multilingual nature of South Africa and all of its cultures and regions to audiences;

²¹ Paragraph 1.3.3 (page 15) of the White Paper

- to provide significant news and public affairs programming;
- to include significant amounts of educational programming;
- to provide support for traditional and contemporary artistic expression;
- to strive to offer a broad range of services targeting, particularly, children, women, the youth and the disabled

2.4.5 The regulatory principles relating to the commercial service division are set out at Part 4 of the Broadcasting Act and include the following requirements:

Section 11(1): “The commercial services provided by the Corporation must-

- (a) be subject to the same policy and regulatory structures as outlined in this Act for commercial broadcasting services;
- (b) comply with the values of the public broadcasting service in the provisions of programmes and service.”

2.4.6 Section 30(1) of the Broadcasting Act includes the requirements that commercial broadcasting services, viewed collectively:

2.4.6.1 Must as a whole provide a diverse range of programming addressing a wide section of the South African public; and,

2.4.6.2 Must provide, as a whole, programming in all South African official languages;

2.4.7 Section 30(2) of the Broadcasting Act requires that the programming provided by free-to-air broadcasting services must as a whole:

2.4.7.1 Reflect the culture, character, religion, needs and aspirations of the people in the regions that they are licensed to serve subject to licence conditions;

2.4.7.2 Provide an appropriate significant amount of South African programming according to the regulations of the Authority;

2.4.7.3 Include news and information programmes on a regular basis, including discussion on matters of national and regional and, where appropriate local significance; and,

2.4.7.4 Meet the highest standards of journalistic professionalism.

2.4.8 Section 30(4) of the Broadcast Act further requires that the programming provided by free-to-air television broadcasting services must as a whole include levels of South African drama, documentaries and children's programmes that reflect South African themes, literature and historical events, as prescribed by regulation.

2.5 Amendment of Regulations: Local Content Regulations 2002

2.5.1 In 2002, the Authority published an amendment to the Local Content Regulations of 1997.²²

2.5.2 The key amendments were as follows:

²² Government Gazette 23614, 12 July 2002

2.5.2.1 The local content quota for public television broadcasting services was increased to 55% during the performance period and during **prime time**²³;

2.5.2.2 The local content quota for commercial television broadcasting licences was revised to 35% - this applied also to the commercial television channel of the SABC which previously was subject to a 50% local content quota.

2.5.3 In 2004 further amendments were proposed to the Local Content Regulations 2002 including a proposal that the prime time requirement applicable to the public broadcasting services be deleted.

2.5.4 e.tv submitted an objection to the proposed amendment on the basis that it was contrary to broadcasting policy and that it would entrench an unfair competitive environment.²⁴

3. e.tv's LICENCE CONDITIONS

3.1 In applying for its licence, e.tv set out certain Promises of Performance which, in accordance with the Position Paper, were incorporated into its licence conditions.

3.2 Specifically, e.tv made the following undertakings which exceeded the minimum requirements set by the Authority:

3.2.1 45% local content quota during the Performance Period;

3.2.2 19 hours of information programming per week;

²³ Clause 3.1 of the Local Content Regulations (2002)

²⁴ e.tv submitted objections to these proposed amendments in a letter to ICASA dated 6 April 2004.

- 3.2.3 16 hours of children’s programming per week;
- 3.2.4 4 hours of prime time South African drama per week;
- 3.2.5 6 hours of programming per week in official languages other than English.

3.3 It was reasonably expected at the time that the SABC would be subject to public service obligations appropriate to a public broadcaster operating in a competitive environment. In this context, e.tv was certain that it could make such Promises of Performance while maintaining its competitiveness in the South African television market.

3.4 In particular, e.tv understood that the SABC’s obligations – in the South African Performance Period and specifically in prime time - would be greater than those of e.tv²⁵.

3.5 In 1998 it was envisaged that all SABC television channels would be subject to a minimum local content of 50% - across the performance period and in prime time - by 2002²⁶. In 2002, the local content obligation for the CBS (SABC3) was reduced to 35% - 10% lower than e.tv’s commitment²⁷. This is despite the fact that the Broadcasting Act²⁸ requires that the licence conditions applicable to the CBS should be equivalent to those applicable to the private commercial channel.

3.6 In addition, while e.tv is subject to an advertising restriction of a maximum of twelve minutes per hour, no such limitation applies to any of the SABC channels. This is despite the fact that e.tv relies on a

²⁵ See Section 5.1.2 of the Position Paper for the introduction of the First Free-To-Air Private Television Service. In particular it says that: “The Authority cannot hold the private broadcaster to greater public service obligations than the public broadcaster”.

²⁶ Section 3.1 of the IBA Local Television Content Regulations of 1997

²⁷ Section 4.1 of the ICASA South African Television Content Regulations of 2002

²⁸ Section 11 (a) of the Broadcasting Act No. 4 of 1999

single source of revenue (advertising), while the SABC has multiple sources of revenue (advertising, state funding and licence fees).

3.7 For the duration of e.tv's licence, it has operated in the anomalous situation where its licence conditions are more onerous than those of the public broadcaster. This is evident in the following table:

Public service obligation	e.tv's obligation	SABC's obligation
Children's programming	Minimum requirement of 16 hours per week of children's programming 20% of local children's programming must be in languages other than English (with preference to African languages).	No minimum requirement concerning children's programming. No language obligation.
Information programming	19 hours of information programming per week including 2 hours in prime time	No requirements.
News	Two hours of news per day including 1/2 hour prime time	No requirements.

Languages in news & information programming	Two hours per week of news and information programming in languages other than English (with preference to African languages).	No requirements.
Languages in programming other than news and information	Four hours per week of languages other than English (with preference to African languages) in programmes other than news and information.	No requirements.
South African drama	Four hours per week in prime time.	No prime time requirement. Only requirement is that S1&2 must broadcast 35% local drama and S3 20% local drama.
Languages in drama programming	10% of drama programming to be in languages other than English (with preference to African languages)	No requirements
Overall local content	45%	35% for SABC3 and 55% for SABC1 and 2 (proposed amendment to regulations which relieves SABC 1 and 2 of prime time local content requirement)
Advertising restrictions	Maximum of 12 minutes in any one hour	No restrictions

3.8 e.tv submits that the imposition of specific licence conditions on the SABC in relation to its programming obligations across the performance period and particularly in prime time will ensure that it delivers on its public service mandate while contributing to the creation of a fairer competitive market environment.

4. LEGALCONTEXT OF THE SABC AMENDMENT APPLICATION

4.1 SABC's Request for Confidentiality

- 4.1.1 In a letter dated 28 April 2004, the SABC requested confidentiality in respect of those parts of its application which dealt with the financial aspects of the SABC's operations.
- 4.1.2 e.tv submitted an objection to this request on 10 May 2004. On 14 May 2004 the Authority advised e.tv that it had granted the SABC confidentiality on information that includes future forecasts and that separate financial information would be made available by the SABC for public scrutiny.
- 4.1.3 The information subsequently provided by the SABC does not assist the e.tv in making its submission on the SABC's position within the current market environment as it deals only with licence fees payable by members of the public.
- 4.1.4 e.tv accepts that, as a commercial broadcaster which is intended to compete directly with e.tv, SABC3 should not be required to provide information relating to financial forecasts.
- 4.1.5 However, as SABC1 and SABC2 are public broadcasters, the financial information submitted by these channels should be available for public comment.
- 4.1.6 The Authority is urged to reconsider the SABC's application for confidentiality on the following basis:
- 4.1.6.1 The SABC made no attempt to motivate its case for confidentiality. A mere reference to the relevant

legislation is wholly insufficient for the Authority to consider the request.

- 4.1.6.2 As far as e.tv is aware, the SABC furnished no information to persuade the Authority that the information it seeks to protect is capable of separation from its application. The SABC is required to show that the exclusion of the information does not prejudice members of the public who wish to make representations.
- 4.1.6.3 The Corporation is a creature of statute which accords it the status of a “public broadcaster”. The financial information of the public broadcaster is subject to public scrutiny, especially as it is difficult to make meaningful representations without access to the Corporation’s financial information. In addition, as a result of the exclusion of the financial section no proper evaluation can be made of Section 5 of the SABC application (Market Conditions). Access to the financial information is essential if the market conditions are to be evaluated.
- 4.1.6.4 The concept of “fair competition”, which is one of the pillars of this representation, cannot be properly advanced without reference to the financial information of the Corporation.
- 4.1.6.5 The failure to motivate for confidentiality coupled with the statutory requirement of public disclosure are compelling factors militating against the SABC’s request for protection.

4.1.6.6 The fact that the information is considered by the SABC to be sensitive is not sufficient as a motivation for its exclusion.

4.1.7 The SABC has evidently based its submissions to the Authority on its future forecasts of the television market. e.tv submits that the exclusion of this information from the public process is severely prejudicial to e.tv.

4.2 Power of the Authority to make Licence Conditions for the SABC

4.2.1 The Authority has the power to make particular licence conditions for all broadcasting licencees including the SABC.

4.2.2 The SABC's application is made in terms of Section 22 of the Broadcasting Act and it is being heard in terms of Section 52 of the IBA Act. Section 22 of the Broadcasting Act directs the public broadcaster to submit an application for two separate licences to the ICASA. The licences which the Broadcasting Act envisages are:

- free-to-air public television and sound broadcasting service (PBS); and,
- free-to-air commercial broadcasting service (CBS).

4.2.3 The licences which are being sought by the SABC are for terrestrial free-to-air public and commercial broadcasting services.

4.2.4 Section 22 (1) of the Broadcasting Act demands that the licences reflect the "re-organisation of the Corporation into the public service division and the commercial service division and

its **related obligations** in terms of this Act and the IBA Act”.
(emphasis added)

4.2.5 Section 22 (2) provides:

“The relevant provisions of the IBA Act apply with the necessary changes to the applications referred to in sub-section (1) but, irrespective of the contents of the application of the Corporation, the Authority may impose any **appropriate** licence conditions which are necessary in order to reflect the re-organisation of the corporation into the public service division and the commercial service division **and its related obligations in terms of this Act and the IBA Act.**” (emphasis added)

4.2.6 Section 22 (2) envisages three distinct and different sets of licence conditions:

- The Authority may impose licence conditions to reflect the PBS; and,
- The CBS; and,
- The Authority may impose licence conditions to reflect the obligations of the PBS and the CBS in terms of the Broadcasting Act and the IBA Act.

4.2.7 In addition to these specific powers to impose licence conditions on the SABC, the general powers of the Authority to impose licence conditions on the public broadcaster are to be found in the ICASA Act, the IBA Act and the Broadcasting Act. Specifically:

4.2.7.1 Section 13(1)(d) of the IBA Act gives the Authority the power “to design and implement broadcasting conditions

of licence consistent with the objectives set out in section 2 of the Broadcasting Act, 1999, for different categories of broadcasting service, including, but not limited to conditions relating to-

- (i) local content requirements;
- (ii) programme requirements;
- (iii) coverage obligations;
- (iv) language service provision;
- (v) ownership and control compliance;
- (vi) compliance with the Code of Conduct for Broadcasting Services; and,
- (vii) empowerment of historically disadvantaged groups.”

4.2.7.2 Section 5(1) of the Broadcasting Act provides as follows:

“Subject to the provisions of this Act, the Authority may, on such conditions as it may determine, issue a sound or television broadcasting service licence for a specified area in the following broadcasting service categories:

- (a) A public broadcasting service;
- (b) A commercial broadcasting service; and,
- (c) A community broadcasting service.”

4.2.7.3 Section 4(1)(b) of the ICASA Act²⁹ provides that the Authority “may exercise the powers conferred upon the former authorities by or under the underlying statutes”.

4.2.8 On page 40 of its application the SABC says:

²⁹ Independent Communications Authority Act 13 of 2000

“The question arises as to the extent to which licence conditions ought to particularise the manner in which the SABC complies with its obligations in terms of sections 10 and 11. In particular, are the licence conditions obliged to set out the detail of the programming, thereby illustrating the manner in which the SABC complies with those obligations, or is it sufficient merely for the licence conditions to reflect the obligations as a statement of principle?”

4.2.9 The SABC claims that the various instruments which the Broadcasting Act obliges the SABC to formulate are to be submitted to the Authority and the Authority’s role is no more than to enforce compliance with these instruments. This is only partly true. The Authority’s power to issue licences includes the power to impose conditions on the licence. Sections 10 (1) and 11 (1) of the Broadcasting Act establish the legislative framework within which such licence conditions should be determined:

4.2.9.1 Section 10 (1)(a) orders the PBS to make services available to South Africans in all the official languages. This statutory demand is a matter for the Authority to translate into a specific licence condition which would set out, for example:

- the time periods (prime or daytime) within which languages are to be broadcast;
- the minimum quota in respect of each language;
- the language to be used in specified programme categories (e.g. news, drama, children’s programming, etc).

4.2.9.2 Section 10 (1)(b) requires the PBS to reflect the unity and diverse cultural and multilingual nature of South Africa and all of its cultures and regions. It is for the Authority to determine licence conditions which give effect to this provision, for example:

- the minimum number of programming minutes that each region should be accorded each day;
- the time periods (prime or daytime) in which such programmes are to be broadcast.

4.2.9.3 Section 10 (1)(c) requires that the service should strive to be of high quality in all of the languages served. Specific and quantifiable licence conditions will ensure that some languages are not marginalised.

4.2.9.4 Section 10 (1)(d) requires significant news and public affairs programming which must meet certain criteria. It is for the Authority to determine appropriate licence conditions which determine the minimum number of minutes of news during specified times and to give meaning to the word “significant”.

4.2.9.5 Section 10 (1)(e) requires that the PBS includes significant amounts of educational programming and lists some of the areas that must be included in the PBS. Licence conditions set by the Authority will determine the minimum number of minutes per day of curriculum-based education and the scheduled times, the minimum number of minutes of formal educative topics and the broadcast time periods as well as the interest-areas and

the minimum number of minutes to be allocated to each of these areas.

4.2.9.6 Section 10(1)(f) requires that the PBS enriches the cultural heritage of South Africa by providing support for traditional and contemporary artistic expression. Licence conditions will set out quantifiable measures to ensure that this objective is met.

4.2.9.7 Section 10 (1)(g) requires that the PBS offers a broad range of services targeting specific groups, e.g., children, women, youth, the disabled. Licence conditions will specify the quantities and broadcast time periods of the programmes to serve these specialist needs.

4.2.9.8 Section 10 (1)(h) requires the inclusion of programmes made by the Corporation as well as those commissioned from the independent production sector. Licence conditions are necessary to specify the minimum amount of programming that must be commissioned from the independent production sector and the quantity which the SABC will produce.

4.2.9.9 Section 10(1)(i) requires the PBS to broadcast national sports programming as well as developmental and minority sports. Specific and quantifiable licence conditions in each of these areas are necessary to give effect to the statutory provision.

4.2.10 Insofar as the CBS is concerned, section 11 (1)(a) – (e) of the Broadcasting Act creates the framework within which the licence is to be issued:

4.2.10.1 Section 11 (1)(a) requires that the CBS must be subject to the same policy and regulatory structures as outlined in the Broadcasting Act for commercial broadcasting services. These policy and regulatory structures are to be found in section 30 of the Broadcasting Act. This section states that “viewed collectively” commercial broadcasting services must as a whole provide a diverse range of programming addressing a wide section of the South African public. In addition, commercial services:

- must provide, as a whole, programming in all South African official languages;
- must within a reasonable period of time be extended to all South Africans and provide comprehensive coverage of the areas which they are licensed to serve.

4.2.10.2 The programming provided by free-to-air broadcasting services must as a whole:

- reflect the culture, character, needs and aspirations of the people in the regions that they are licensed to serve subject to licence conditions;
- provide an appropriate significant amount of South African programming according to the regulations of the Authority;
- include news and information programmes on a regular basis, including discussion on matters of national and regional, and, where appropriate local, significance;
- meet the highest standards of journalistic professionalism; and,
- include levels of South African drama, documentaries and children's programmes that reflect South African

themes, literature and historical events, as prescribed by regulation.

4.2.10.3 Specific and quantifiable licence conditions will ensure that the CBS operates under similar conditions to those set out for private commercial licensees.

4.2.10.4 Section 11 (1)(b) states that CBS must **comply with the values of the public broadcasting service** in the provision of programmes and service. From this provision it is clear that the legislature requires that the CBS must base its programming on the values that define the PBS. On this basis, it is for the Authority to determine the types of programmes that are required to be broadcast by CBS, the minimum number of minutes of these programmes each day, and the time periods for broadcast.

4.2.10.5 Section 11 (1)(c) demands that the CBS commission significant amounts of its programming from the independent sector. Specific and quantifiable licence conditions are necessary to determine the meaning of “significant”. Unlike section 10 (1)(h) (which sets out the PBS commitment to independent production), this provision requires “significant” commissioning from the independent sector. Licence conditions are necessary to specify the minimum amount of programming that must be commissioned from the independent production sector and the quantity which the SABC will produce.

4.2.11 Section 4 (1) of the Broadcasting Act requires that any person who intends to provide a broadcasting service, including distribution services whether satellite or terrestrial, or any other

form of distribution which offer programming to the public is required to obtain **a licence in accordance with the conditions which the Authority may determine from time to time.**

4.2.12 The objectives of the SABC, set out at Section 8 of the Broadcasting Act includes the objective, at sub-section (c) “to acquire from time to time a licence or licences for such period and subject to such regulations, provisions **and licence conditions** as may be prescribed by the Authority.” (emphasis added)

4.2.13 It appears that the correct approach is for the Authority to set out detailed licence conditions which give effect to the provisions of section 10 (1)(a) – (h) for PBS and the provisions of section 30 for CBS. The SABC’s view that the licence conditions should reflect the statutory provisions as “a statement of principle”³⁰ would create regulatory uncertainty and would undermine the Authority’s role as regulator in terms of Section 2 of the IBA Act.

4.2.14 From this it follows that the SABC’s application for PBS and CBS licences is misconceived. The main problem with the applications for both PBS and CBS is that the SABC requests licence conditions which state that it shall comply with its obligations in terms of section 10 (1)(a) – (i) and 11 (1)(a) – (e), respectively. These “licence conditions” which it applies for are misconceived because they are anything but licence conditions.

4.2.15 The SABC submits that licence conditions imposed by the Authority would have the effect that the Authority would

³⁰ Page 40 of the SABC application

“prescribe the SABC’s programmes” and that this would infringe the rights of the SABC “to enjoy freedom of expression and journalistic, creative and programming independence as referred to in section 6(3) [of the Broadcasting Act] and more importantly as enshrined in section 16(1)(a), (b) and (c) of the Constitution.”³¹

4.2.16 This is an absurd contention. Section 16 of the Constitution is the freedom of expression clause in the Bill of Rights. It affords no greater protection to the SABC than to any other person including other broadcasters. Section 6(3) of the Broadcasting Act simply reaffirms that the right to freedom of expression applies also to the public broadcaster. Moreover, the Broadcasting Act reiterates this right in respect of all broadcasters. In the introduction to Chapter 1 it states as follows:

“Freedom of expression and the journalistic, creative and programming independence of the broadcasters and independence of regulation are identified as guaranteed by the Constitution.”

4.2.17 Section 1(2) of the Broadcasting Act states that “any interpretation of the provisions of the Act must be construed and implied in a manner which is consistent with freedom of expression and the journalistic, creative and programming independence of the broadcasters guaranteed by the Constitution”. This provision applies to all broadcasters.

4.2.18 If the SABC’s argument prevailed, this would mean that the imposition of licence conditions on any broadcaster would be an

³¹ Paragraph 2 on Page 43 of the SABC submission

infringement of the constitutional right to freedom of expression. This would undermine the basis of the entire regulatory system and undermine the very existence of the Authority. Given that the Authority's power to regulate broadcasting in the public interest is protected in the Constitution³², a prohibition on the Authority's power to impose licence conditions may constitute an infringement of the powers conferred on the Authority by the Constitution.

4.2.19 In any event, the argument that the imposition of licence conditions amounts to the determination of programming content is fanciful and serves merely to advance a position where the SABC would essentially be subject to self-regulation. The imposition of quantifiable licence conditions specifying number of minutes and broad schedule times (e.g. prime time) cannot possibly be construed to infringe the right of freedom of expression.

4.2.20 The SABC submits that the Authority's role is to "receive and review the written instruments by means of which the SABC itself complies with its own obligations, and enjoys its own freedoms. The written instruments are ... the policies, the licence conditions, and the code of practice. But it is the SABC itself that determines the content of these instruments."³³

4.2.21 In effect, what the SABC is proposing, is a self-regulatory system in terms of which it will determine its own licence conditions – and, as an inevitable consequence, its own

³² Section 192 of the Constitution: National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.

³³ Pages 43 and 44 of SABC application

compliance with its licence conditions – while the rest of the broadcasting industry is subject to regulation by the Authority.

4.2.22 The policies published by the SABC may be useful in assisting the Corporation in communicating its public interest objectives but they are wholly inadequate as a basis for licence conditions. They do not provide measurable objectives and, by their very nature, do not address the competitive position of the SABC in the market vis-à-vis other broadcasters.

4.2.23 The SABC's proposal would not only infringe the Authority's powers to regulate public service programming on the SABC. It would also inevitably serve to entrench the unfair competitive environment in a broadcasting market which is already dominated by the SABC's television and radio services.

4.2.24 The Authority's duty to ensure a fair competitive broadcasting environment is statutorily entrenched:

4.2.24.1 Section 192 of the Constitution requires that national legislation must establish an independent authority to regulate broadcasting in the public interest, and **to ensure fairness** and a diversity of views broadly representing South African society.

4.2.24.2 Section 2(o) of the IBA Act, requires the Authority to ensure **fair competition** between broadcasting licensees;

4.2.24.3 Section 2(r) of the IBA Act requires the Authority to promote the stability of the broadcasting industry;

4.2.24.4 Section 2(h) of the Broadcasting Act requires that broadcasting policy must ensure **fair competition** in the broadcasting sector.

4.2.25 The Authority cannot comply with these obligations in the circumstances proposed by the SABC in its amendment application. If the SABC's argument against the imposition of licence conditions were to prevail, it would have the following effect:

4.2.25.1 It would be impossible for the Authority to monitor and enforce compliance with the SABC's policies as they merely contain broad statements of principle without any measurable performance indicators. For example:

4.2.25.1.1 The SABC's Education Policy states that it will "air a significant amount of educational programming ...".³⁴ How is "significant programming" to be measured? How will the Authority determine whether the SABC has complied with this aspect of its obligations?

4.2.25.1.2 The SABC states that it is committed to treating all the official languages equitably on television.³⁵ How will it be determined whether languages have been "equitably" treated?

4.2.25.2 The SABC argues that it is the SABC itself which must determine the content of its policies and that the Authority's role is to "review" such policies and not

³⁴ Page 50 of SABC Editorial Policies

³⁵ Page 29 of SABC Editorial Policies

programming content. The effect of such an argument would be that the SABC could:

4.2.25.2.1 Amend its policies at any time without the prior approval of the regulator; and,

4.2.25.2.2 Determine for itself how its programming should be measured against its policies to determine compliance.

4.2.25.3 The SABC would effectively become a self-regulated institution without any independent regulatory oversight in a market where it dominates advertising revenue share.

4.2.25.4 Given the size of the SABC and its impact in the broadcasting market, the absence of appropriate licence conditions for the Corporation would undermine the entire basis of independent regulation and deny the opportunity for the creation of fair market conditions.

4.2.26 It is evident from what has been set out above that the Authority's power to make licence conditions for the SABC is in no way limited by the provision of any legislation. In fact, it is clear that the Authority may make any conditions which are not inconsistent with the relevant legislation. It follows that the Authority may impose conditions in the same way as it has done for private commercial broadcasters in the following areas:

- Programming: genres (e.g. children's, religious, information, drama), quotas over a defined period, local

content percentages, prime time versus daytime requirements;

- Advertising and sponsorship: limitations on number of minutes and number of breaks;
- Human resources;
- News and current affairs: broadcast time, language, number of minutes over a defined period;
- Official languages – description of languages to be used on any one service, number of minutes, broadcast times;
- Payment of annual licence fees (in respect of the CBS);
- Independent production quotas.

5. THE TELEVISION MARKET

5.1 Audience

5.1.1 Until 1998, the SABC was the only provider of free-to-air national television broadcasting services in South Africa, aside from M-Net's daily two-hour Open Window.

5.1.2 When e.tv was licensed in 1998, competition was introduced for the first time in the free-to-air television market. e.tv was licensed as a broad spectrum free-to-air channel and it is required by its licence conditions to serve "the universal television audience"³⁶.

5.1.3 e.tv's 24-hour audience share grew from 3.3% in January 1999 to 27% in July 2003³⁷. Since July 2003 its audience share has declined to 22.5%.³⁸ During e.tv's growth phase (from 1999 to

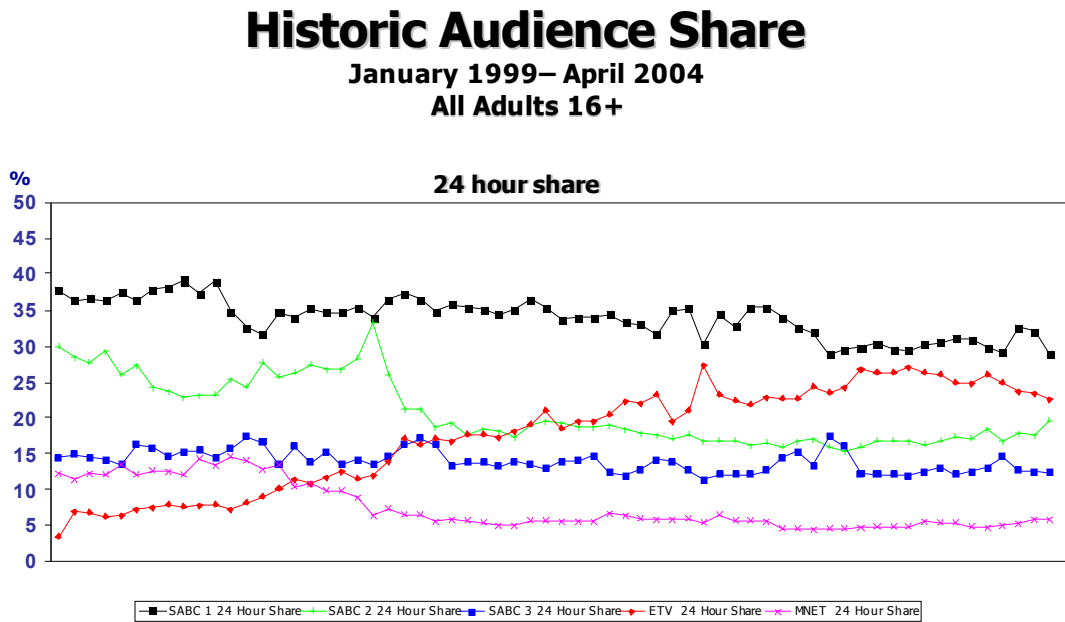
³⁶ Clause 10 of Midi TV Licence Conditions

³⁷ The peak in June 2002 reflects audience share during the World Cup.

³⁸ The peak in audience share during the holiday season (December and January) is not taken into account here as the schedule consists primarily of movies during this time.

2003), the SABC lost audience share across all channels. However, since early 2004, SABC2 and SABC1 have shown gains against e.tv's audience share. See Graph 1.

Graph 1



Source: Transmit (Quarter Hours)

5.1.4 e.tv's prime time market share has followed a similar pattern. It grew from 4.8% in January 1999 to 22.1% in April 2003. By April 2004 it had declined to 19.2%.³⁹ See Graph 2.

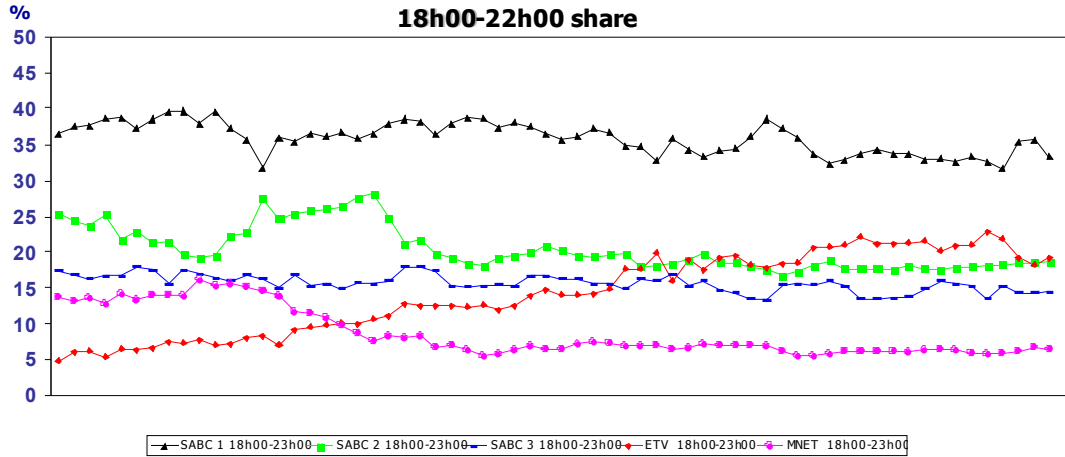
³⁹ The peak in audience share during the holiday season (December and January) is not taken into account here as the schedule consists primarily of movies during this time.

Graph 2

Historic Audience Share

January 1999 – April 2004

All Adults 16+



Source: Transmit (Quarter Hours)

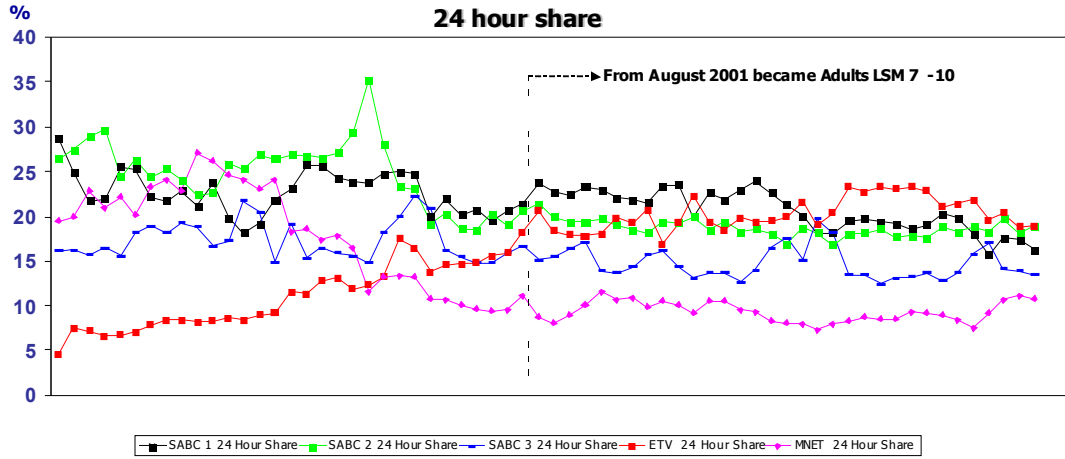
5.1.5 e.tv's share of the upper income (LSM 7 to 10) audience peaked at over 23% between June and August 2003. Since then it has steadily declined to 18.9%. Its prime time share of the LSM 7 to 10 audience is equal to the prime time LSM 7 to 10 share of SABC1 and SABC3, and is significantly lower than that of SABC2. See Graphs 3 and 4.

Graph 3

Historic Audience Share

January 1999– April 2004

*Adults LSM 7-8 / 7-10



Source: Transmit (Quarter Hours)

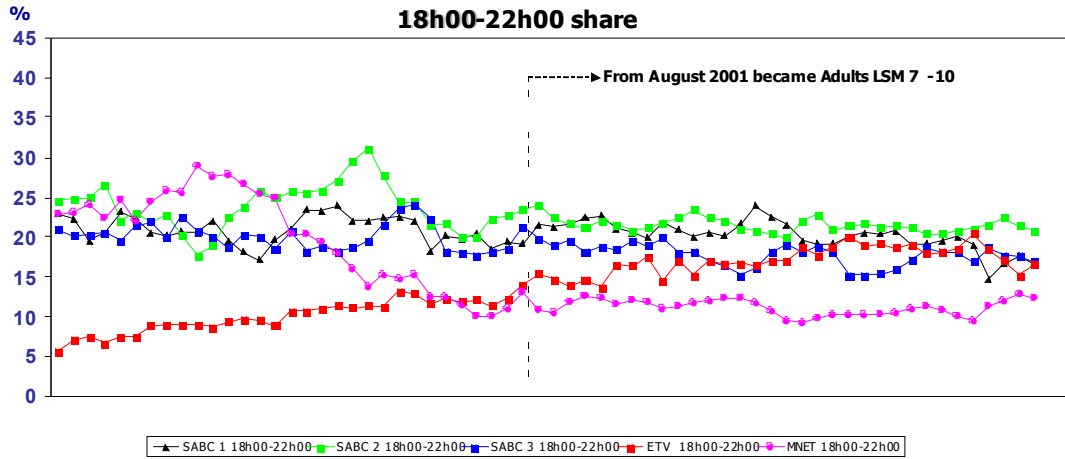
*Adults LSM 7-8 was split into Adults LSM 7-10 from August 2001

Graph 4

Historic Audience Share

January 1999– April 2004

*Adults LSM 7-8 / 7-10



Source: Transmit (Quarter Hours)

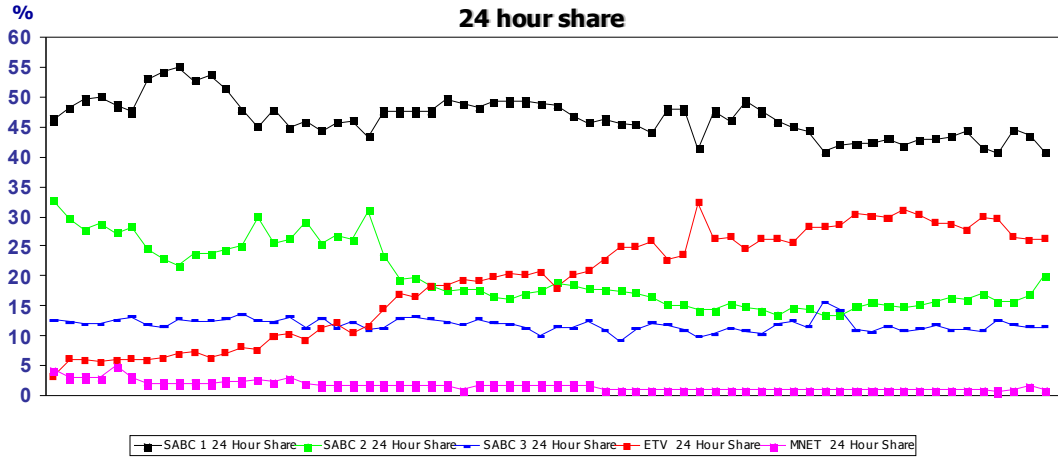
*Adults LSM 7-8 was split into Adults LSM 7-10 from August 2001

5.1.6 Simultaneously, e.tv’s share of the lower income (LSM 5 to 6) audience has increased and is significantly higher than both SABC2 and SABC3. See Graph 5.

Graph 5

Historic Audience Share

January 1999– April 2004
Adults LSM 5-6



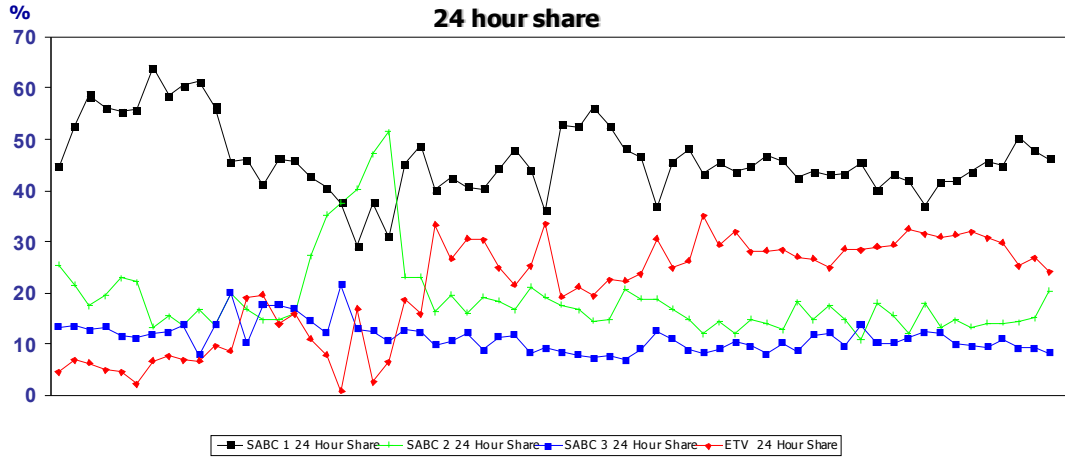
Source: Transmit (Quarter Hours)

5.1.7 e.tv’s share of the lowest income groups – LSM 1 to 4 – is higher than both SABC2 and SABC3. See Graph 6.

Graph 6

Historic Audience Share

January 1999– April 2004
LSM 1-4



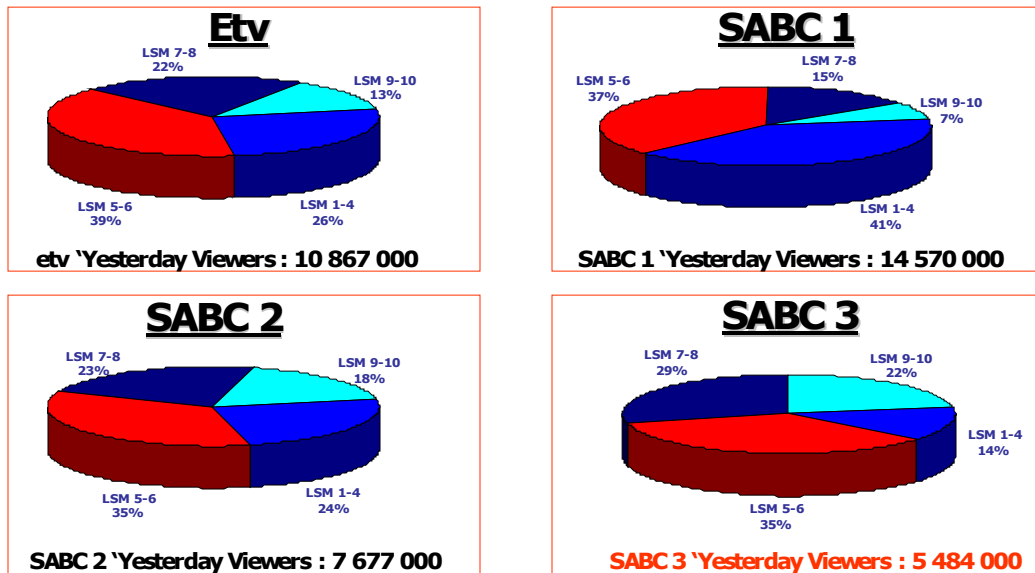
Source: Transmit (Quarter Hours)

5.1.8 e.tv’s viewership profile is dominated by low-income viewers. 65% of e.tv’s audience consists of LSMs 1 to 6. Only 59% of SABC2’s audience is made up of LSM 1 to 6. SABC3’s

audience profile consists of only 49% LSM 1 to 6. On e.tv, only 13 % of the LSM 9 and 10 audience forms part of the audience profile as compared to 18% on SABC2 and 22% on SABC3. See Graph 7.

Graph 7

Channels' AMPS LSM Profiles



Source: AMPS 2003B

5.1.9 The essence of the SABC's argument insofar as audience is concerned, is that it serves a greater proportion of the lower income market than its commercial competitors. The information set out above proves that this is not the case. e.tv serves a substantially higher proportion of the lower income audience than any SABC channel other than SABC1. The SABC claims that its lower LSM profile makes it less attractive to advertisers than its commercial competitors as advertisers are attracted to higher LSMs. However, the figures set out

above show that in prime time – during which broadcasters earn most of their advertising revenue – e.tv’s share of the LSM 7 to 10 audience is the same as that of SABC1 and SABC3 and is significantly lower than the LSM 7 to 10 share of SABC2.

5.1.10 The following statements by the SABC with regard to audience share are therefore either incorrect or apply equally to e.tv and the SABC:

5.1.10.1 “As the public broadcaster, the SABC is obliged to inform, educate and entertain all South Africans. The result is that audience profiles on most of the SABC’s channels ... include a mix of both high and low LSM groupings, which tends to dilute the value of these audiences for many advertisers.”⁴⁰ As indicated above, e.tv’s profile also includes a mix of LSM groupings and e.tv’s audience is made up of a higher number of lower income viewers than both SABC2 and SABC3.

5.1.10.2 “As the public broadcaster with a duty to serve all the people of South Africa, the SABC has a large share of the lower LSM audiences.”⁴¹ e.tv’s licence conditions also require it to serve the “universal audience”. Its audience profile proves that it is doing so. Serving lower LSM audiences is not unique to the SABC and e.tv serves a higher share of the lower LSM audience than either SABC1 or SABC2.

5.1.10.3 “... the SABC has a disproportionately higher share of the lower LSM audience than its commercial

⁴⁰ Page 61 of the SABC application

⁴¹ Page 65 of the SABC application

competitors.”⁴² This statement may be true in the radio market or in respect of M-Net and DSTV but the research set out above shows that this is not true in the case of e.tv.

5.1.10.4 “In the South African market, large audiences do not necessarily mean a large share of revenue. In fact, revenue does not track size of audience but quality of audience.”⁴³ This is correct but this applies equally to a channel such as e.tv, which attracts a large lower income viewership. This situation is not unique to the SABC as a public broadcaster.

5.1.10.5 “Channels and stations that target upper LSM groups, then, have a disproportionate share of revenue owing to the high value of the audience.”⁴⁴ This is correct. However, this benefit applies to the SABC as well. Graph 4 (above) shows that in prime time SABC2 dominates the upper LSM market share while e.tv, SABC1 and SABC3 all attract an equal share of this lucrative market.

5.1.10.6 “As a public broadcaster, the SABC targets all the LSM groups, from LSM 1 to 10. However, in comparison with commercial broadcasters, it has a far higher share of the lower LSM groups (LSMs 1 – 5) ...”⁴⁵ This is incorrect as has been shown above.

5.1.11 It is evident that the SABC cannot argue that it attracts a higher share of the lower income market and that this adversely affects

⁴² Page 80 of the SABC application

⁴³ Page 81 of SABC application

⁴⁴ Page 82 of SABC application

⁴⁵ The chart on Page 82 of the SABC application which is used in support of this statement actually demonstrates that e.tv has a higher share of LSMs 1 to 5 than all SABC channels other than SABC1.

its position vis-à-vis its competitors. On the contrary, e.tv attracts the highest share of lower LSM audiences on all channels other than SABC1. During the time period where most revenue is generated – 18h00 to 22h00 - e.tv also attracts the same or lower market share than the SABC channels in respect of the lucrative LSM 7 to 10 market.

5.1.12 It is evident that the growth in audience share demonstrated by e.tv in its first five years has leveled off. It is unlikely that e.tv will be in a position to maintain the year-on-year growth rate which has characterized its audience share since 1999.

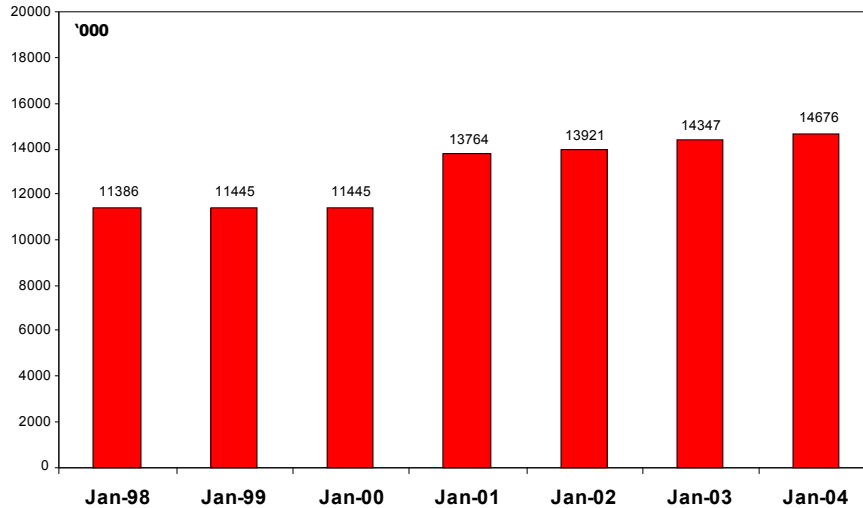
5.1.13 The SABC's loss of audience share is also not as dramatic as set out in its application. In supplying information concerning its drop in audience share⁴⁶ the SABC has not taken account of the increase in the adult universe since 1999. According to TAMS, the adult universe increased over the time frame by 22%. While the figures in the SABC application reflect a 20% reduction in

⁴⁶ See Pages 72 and 73 of the SABC application

share, the average daily 24-hour audience dropped only by 8%.
See Graph 8.

Graph 8

TAMS UNIVERSE All Adults



Source: Transmit Jan 1998 - January 2004



5.1.14 Considering that until 1999, SABC Television monopolized free-to-air audiences, e.tv's current share of approximately 23% reasonably represents a fairer competitive market than was the case five years ago. Contrary to the SABC's assertion that e.tv's entry has resulted in fragmentation of the market⁴⁷, the current market share of e.tv reflects the increased normalization of the television environment.

5.1.15 The SABC's loss of share was inevitable as South African broadcasting policy corrected the market by shifting it from a monopolistic environment totally dominated by the SABC to a more competitive framework. This inevitable loss of audience

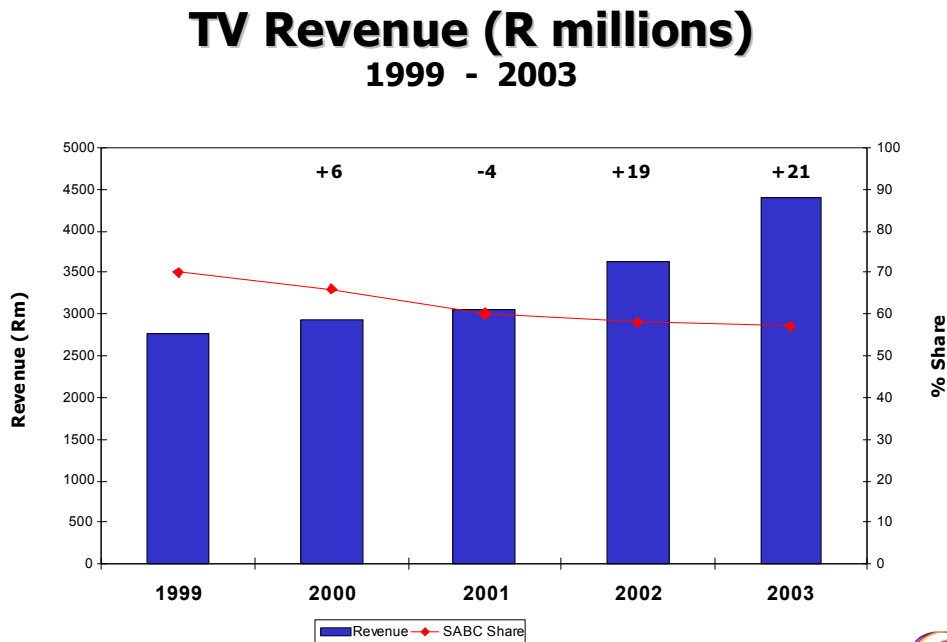
⁴⁷ See Pages 67 and 73 of the SABC's application

share cannot be used by the SABC to justify leniency in the imposition of licence conditions particularly considering the fact that it still occupies a dominant position in the market.

5.2 Advertising

5.2.1 Television advertising revenue has grown in double digits over the past two years. See Graph 9.

Graph 9

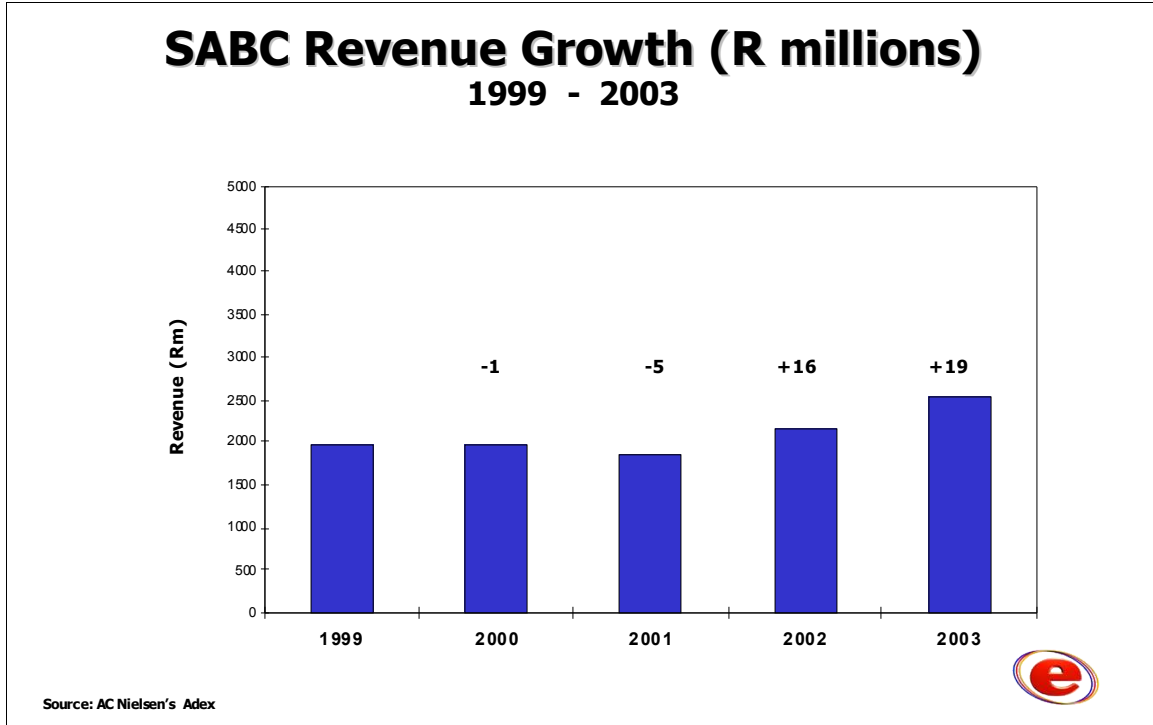


Source: AC Nielsen's Adex



5.2.2 SABC's television advertising revenue has also grown by double digits over the past two years. See Graph 10.

Graph 10

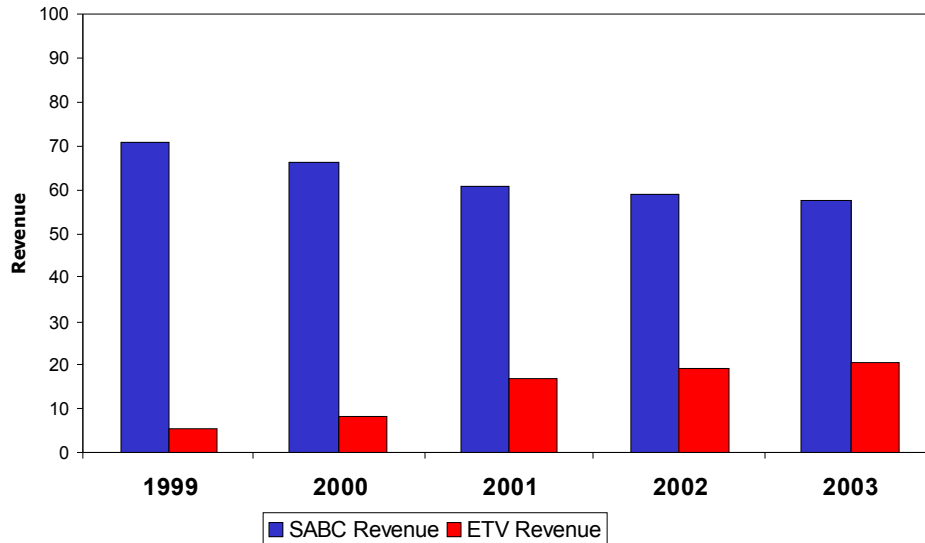


5.2.3 e.tv's share of total television revenue has grown from 5.6% in 1999 to 20.5% in 2003. It should be noted that this falls significantly short of the Authority's projected revenue share for the new private player in the Position Paper. The Authority predicted that the new entrant would capture between 15% and 20% of adspend in its first year, rising to a maximum of 30% at the end of the licence term.⁴⁸ It took five years for e.tv to attract a 20.5% revenue share and it is highly unlikely that it will reach 30% by the end of its licence term in 2006.

5.2.4 The SABC's share of total television adspend has decreased from 71% in 1999 to 58% in 2003.⁴⁹ However, this must be viewed in the context that its actual revenue has grown significantly since 2002 as is evident in Graph 10 (above). e.tv's share of revenue remains low in comparison to the SABC. See Graph 11.

⁴⁸ Paragraph 3 of Annexure 5 in the Position Paper

⁴⁹ Figures based on Adex are before discounts but include agency commission and SAARF and MIT levies.

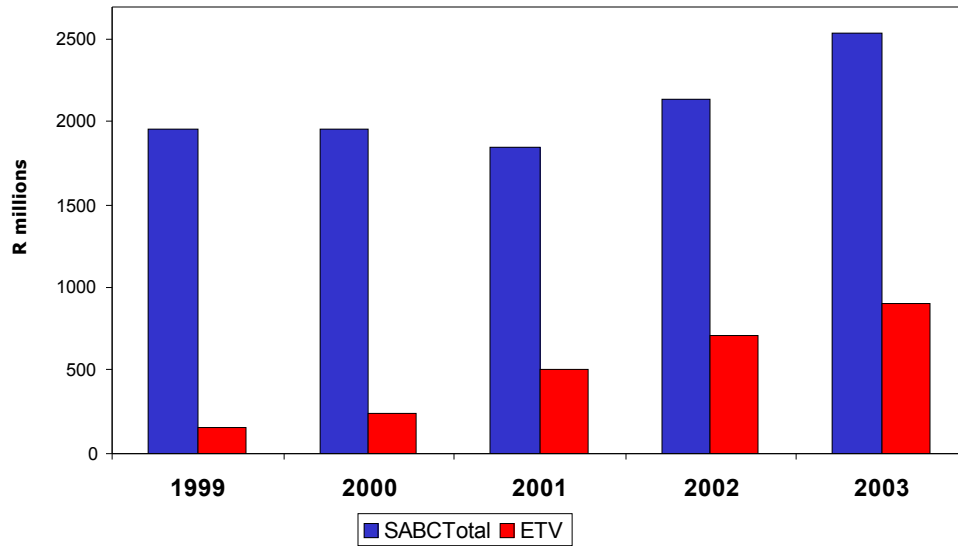
Graph 11**Comparative Revenue Share**

Source: AC Nielsen's Adex

5.2.5 As a start-up channel, e.tv's actual revenue growth was off a small base. Even in 2003, e.tv's revenue of R900 million is dwarfed by the growth in SABC revenue and the R2.5 billion earned by SABC Television. See Graph 12.

Graph 12

Television Revenue by Channel (Rms)

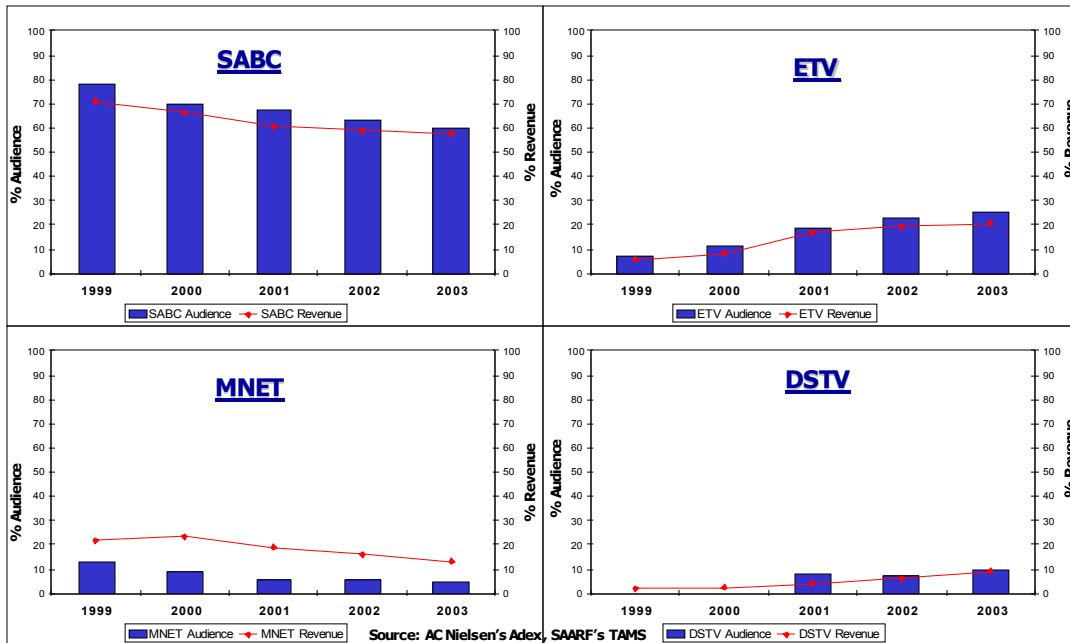


Source: AC Nielsen's Adex

5.2.6 Despite the decline in SABC audiences over the past five years, the ratio of its revenue share compared to its audience share (power ratio) has increased from 91% in 1999 to 97% in 2003. This indicates that its loss in revenue share has been significantly lower than its loss in audience share. See Graph 13.

Graph 13

Revenue vs. Audience Share All Adults - 24 hour Share



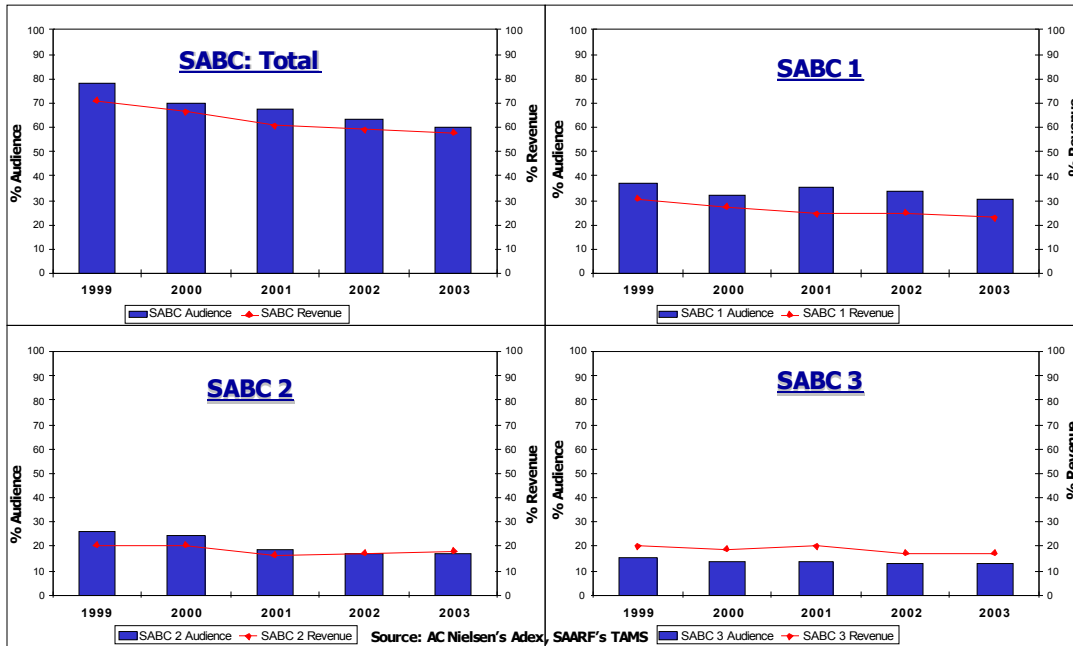
5.2.7 e.tv, on the other hand, demonstrates a declining power ratio. Its growth in audience has not been accompanied by a concomitant growth in revenue share. Despite its consistent year-on-year growth over the past five years, e.tv achieved only an 80% power ratio in 2003, down from 86% in 2001.

5.2.8 An analysis of the individual SABC TV channels shows that SABC2's power ratio grew dramatically from 79% in 1999 to 108% in 2003. While SABC3's power ratio dropped slightly, it remains well over 100%, moving from 135% in 1999 to 130% in 2003. It is noteworthy that e.tv's power ratio is closer to that of SABC1 than to SABC2 or SABC3. See Graph 14.

Graph 14

SABC: Revenue vs. Audience Share (individual channels)

All Adults - 24 hour Share



5.2.9 e.tv submits that the following factors explain the fact that the decrease in SABC's revenue share has been significantly less than its decrease in audience share and the fact that its power ratio has improved over the past five years:

5.2.9.1 The SABC has operated as a single entity in selling airtime to advertisers. This has created a virtual monopoly trading position for the SABC in which its market dominance has a determining effect on the decision-making of advertisers. While e.tv has shown audience growth against the SABC, it is unable to trade at a premium (or even to match its revenue share to its audience share), as it cannot compete with SABC TV's dominance of revenue share. (See Chapter 6: Unfair Competitive Practices (below)).

5.2.9.2 Contrary to the impression that the SABC attempts to create in its application, its channels are attracting a large proportion of the upper income market which is attractive to advertisers. Therefore, despite the decrease in audience share, the availability of LSM 7 to 10 audiences across the SABC channels makes the Corporation an attractive prospect for advertisers. e.tv is unable to compete fairly with three channels which work together to sell airtime as a single entity, particularly in circumstances where the SABC's LSM 7 to 10 market share in prime time is equal to or greater than e.tv's share.

5.2.10 The following statements by the SABC with regard to revenue share are therefore either incorrect or apply equally to e.tv and the SABC:

5.2.10.1 "Although some adspend has gravitated to television from print, share has also shifted between television broadcasters. This trend, which shows that e.tv has grown at the expense of the public broadcaster, places the SABC in a weakened position to deliver on its mandate while relying on commercial revenue."⁵⁰ e.tv has not increased its revenues at the expense of the SABC. e.tv has merely secured a higher share of the increased television adspend available in the market. If e.tv had grown at the expense of the SABC, this would reflect in the decline of actual revenue for the SABC. However, SABC's actual revenue has increased significantly in 2002 and 2003 – a period during which e.tv's start-up revenue growth started to taper off.

⁵⁰ Page 76 of the SABC application

5.2.10.2 “ ... newcomers have increased fragmentation, not the absolute market size. Fragmentation has largely been at the SABC’s expense... Erosion of the SABC’s audience and revenue share through increased competition threatens its ability to perform its public broadcasting role in South Africa.”⁵¹ This statement is incorrect considering the growth in total TV adspend during the past two years and the significant actual growth in SABC revenue.

5.2.10.3 “As a result of increased competition in the TV market, the SABC has lost advertising revenue to new player e.tv. Whereas the SABC has shown very little growth in advertising revenue, e.tv has achieved 100% growth per annum since its inception to November 2003, albeit off a low base. If this trend continued at the current rate, the implication for the SABC would be decreasing levels of resources that could be allocated to mandate delivery.”⁵² While its year-on-year growth has been greater than that of the SABC, this can be solely attributed to the fact that it was in a growth phase starting from a zero base. It is illogical for the SABC to speculate that this growth rate could continue into the future. e.tv’s revenue growth started to level off in 2003 and its power ratio has dropped since 2001. e.tv’s audience share has shown negative growth in early 2004. These factors, combined with the SABC’s dominance of LSM 7 to 10 audiences in prime time, indicate that further growth for e.tv is highly unlikely.

⁵¹ Page 77 of the SABC application

⁵² Pages 78 and 79 of the SABC application

- 5.2.10.4 “The SABC’s share of advertising revenue declined from 66.4% in 2000 to 57.8% in 2003, whereas e.tv’s share increased from 8.1% to 20.5%. It is clear that a significant amount of revenue has shifted from SABC channels to e.tv”.⁵³ See comments in 5.2.10.1 and 5.2.10.3 (above).
- 5.2.10.5 “In the South African market, large audiences do not necessarily mean a large share of revenue. In fact, revenue does not track size of audience but quality of audience ...”⁵⁴ This is borne out by SABC2’s and SABC3’s share of the LSM 7 to 10 audience which ensures that they operate at power ratios over 100%. e.tv, on the other hand attracts a greater share of the low-income market and operates at a power ratio of less than 100%.
- 5.2.10.6 “Channels ... that target upper LSM groupings, then, have a disproportionate share of revenue owing to the high value of the audience.”⁵⁵ See comments in 5.2.10.5 (above).
- 5.2.10.7 “ ... whereas the SABC may continue to command the biggest share of advertising revenue (even though it may be declining), its cost structure as the national public broadcaster, and mandate requirements (such as sport, local content and language) is part of the burden borne by the national public broadcaster. A large share of revenue is essential to servicing these public service

⁵³ Page 79 of the SABC application

⁵⁴ Page 81 of the SABC application

⁵⁵ Page 82 of the SABC application

obligations.”⁵⁶ It is noteworthy that e.tv also has public service obligations which it must fund from its revenue. However, unlike the SABC, e.tv earns revenue only from advertising. For the past five years e.tv has operated under stricter public service obligations than the SABC which has continued to broadcast in a regulatory vacuum.

5.2.10.8 “An increasingly competitive media environment in recent years has put pressure on the SABC’s audience and revenue generating capacity, and this is set to intensify in the future.”⁵⁷ The SABC provides no information to support its contention that competition will intensify in the future. e.tv’s audience growth has leveled off in 2004 and its power ratio is declining. In the circumstances it is difficult to understand on what basis the SABC makes such an assertion.

5.2.10.9 The fact that the SABC’s future forecasts have been granted confidentiality hampers e.tv in countering the SABC’s submission as e.tv is not aware of the facts which the SABC has placed before the Authority in support of its contention. e.tv submits that as the future market is a crucial factor in the Authority’s determination of the SABC’s licence conditions, the failure to disclose this information publicly is severely prejudicial to e.tv.

5.2.11 The SABC is evidently conscious that the growth in its power ratio dilutes the basis of its audience and revenue share

⁵⁶ Page 87 of the SABC application

⁵⁷ Page 89 of the SABC application

arguments. It therefore attributes its increase in power ratio to “effective sales and marketing efforts”.⁵⁸

6. UNFAIR COMPETITIVE PRACTICES

6.1 In Section 3 (above), e.tv set out the unfair regulatory environment which has prevailed over the past five years. This resulted from the imposition of extensive public service obligations on e.tv while no such requirements were imposed on the SABC. In addition, e.tv is subject to a maximum of twelve minutes of advertising per hour while the SABC has no such restrictions. Yet e.tv relies solely on advertising revenue for its survival while the SABC has access to advertising revenue, licence fees and state funding.

6.2 The absence of licence conditions for the SABC has contributed significantly to the current unfair competitive environment and e.tv hopes that this amendment application process will address and resolve this regulatory anomaly.

6.3 However, this is not the only factor which has contributed to an uneven competitive environment. The SABC’s unfair advantage in operating what are effectively commercial services in a regulatory vacuum has been exacerbated by the Corporation’s monopoly. This enables the SABC to engage in the following uncompetitive practices:

6.3.1 Cross promotion of SABC programming on its three television channels and 18 radio stations.

6.3.1.1 SABC television channels air promotions which market other SABC television channels. This is not restricted to generic channel promotions but also includes

⁵⁸ Page 87 of the SABC application

programme-specific promotions which drive audiences on one channel to particular programmes at particular times on another channel.

6.3.1.2 These on-air promotions are regarded as promotional material and therefore do not count towards the number of minutes of advertising in any one hour. In the event that limitations were placed on the SABC in respect of advertising minutes per hour, these promotions may not fall within the definition of advertising, depending on whether the Authority views SABC television as a single entity or as distinct channels.

6.3.1.3 No other South African broadcaster has such vast marketing resources at its disposal. It is impossible for e.tv or any private radio service to compete fairly in such an environment.

6.3.2 Cross-scheduling of television programmes

6.3.2.1 SABC television channels schedule repeats of programmes from other channels. This occurs primarily with the daily soaps as well as movies. This constitutes an unfair advantage in that:

6.3.2.1.1 It enables one SABC television channel to use another to promote its programming;

6.3.2.1.2 It provides free programming to SABC television across the channels;

6.3.2.1.3 Most importantly, it unfairly contributes towards the compliance by the SABC with its local content obligations. e.tv requests that the Authority requires the SABC to disclose whether any one channel counts towards its local content quota the repeat programmes of another channel, e.g. whether the repeat of Generations (an SABC1 show) on SABC3, is counted towards SABC3's local content quota.

6.3.3 Joint acquisition of programming

6.3.3.1 SABC television channels operate as a single entity when purchasing international programmes. This provides the SABC with an unfair advantage as it is able to utilize the budgets of all three channels in its programme acquisitions.

6.3.3.2 As the SABC licences programmes as a single entity, it is able to acquire a greater volume of programmes from international distributors and thereby secure lower pricing.

6.3.3.3 As a single channel, e.tv is compelled to operate in a highly uncompetitive environment where it is unable to accommodate the same volumes of international material. To remain competitive e.tv is compelled either to purchase product which it cannot schedule (and which it therefore writes off without broadcasting) or to pay higher prices for a lower volume of product.

6.3.4 Provision of high discounts to advertisers in exchange for budget commitments.

- 6.3.4.1 The SABC is not prohibited from engaging in such uncompetitive practices as, for example, requiring advertisers to spend 100% of their marketing budgets on the SABC in exchange for airtime on a range of channels and stations and at high discounts.
 - 6.3.4.2 Airtime is sold across all channels and, because the SABC has a large available airtime inventory across its channels and stations, it is able to provide significant discounts to advertisers which e.tv cannot match. No other broadcaster is in a position to compete fairly with the SABC's monopoly over television revenue.
 - 6.3.4.3 In addition to this, e.tv relies on a single source of revenue while the SABC has access to advertising, licence fees and state funding.
 - 6.3.4.4 e.tv is further prejudiced by the limitations on its hourly advertising minutes while the SABC has no such limits.
- 6.3.5 The issues set out above indicate the current uncompetitive advantages of the SABC. The SABC's application indicates that the SABC has no intention of ceasing such practices and that, despite the fact that the Corporation is to be divided into PBS and CBS divisions, it will continue to operate as a single entity.
- 6.3.6 The Authority is required to ensure fair competition among broadcasting licensees. If SABC3 is to operate as a commercial broadcaster, it must compete fairly against e.tv. Unless SABC3 operates independently of the two PBS channels, it is evident that the creation of a fair competitive environment is impossible.

6.3.7 In such circumstances, SABC3 would enjoy the lower public service obligations of a commercial broadcaster but would be able to operate together with the two PBS channels to strengthen its position in the market.

6.3.8 It is essential that these matters are addressed during the course of this amendment application. If they remain unresolved, the entire basis of the division of the SABC into PBS and CBS will be undermined. If SABC television channels continue to operate as a single entity in a manner inconsistent with fair competitive practices, e.tv's viability will be severely threatened.

7. REORGANISATION

7.1 The manner in which the SABC effects the reorganization into a PBS and CBS division is crucial to rectifying the current unfair competitive environment and to ensuring that SABC3 competes fairly with e.tv.

7.2 The Broadcasting Act requires that the SABC must consist of two separate operational divisions – a public service division and a commercial service division.⁵⁹ The divisions must be separately administered and a separate set of financial records and accounts must be kept in respect of each division.⁶⁰

7.3 In this regard, the White Paper on Broadcasting Policy stated as follows:

“The Government does not wish to leave the commercial activities of the SABC unregulated, with the attendant risk that it will have

⁵⁹ Section 9(1) of the Broadcasting Act

⁶⁰ Section 9(2) of the Broadcasting Act

considerable advantages over other private broadcasters. Accordingly, the Government will restructure the SABC **in order to achieve tangible internal separation of commercial from public broadcasting activities.**⁶¹ (emphasis added)

7.4 The White Paper added:

“In order to ensure that the proposed separation of activities of the SABC will lead to distinct, definite and different management of each arm, separate management teams will take key responsibilities within each arm.”⁶²

7.5 e.tv submits that the SABC’s submissions on the reorganization fall significantly short of the letter and spirit of the legislative requirements.

7.6 The SABC’s proposed reorganization effectively relegates the division of PBS and CBS to a departmental level.⁶³ The line functions of the PBS and CBS “divisions” are subordinate to a TV division and a Radio division. The PBS and CBS Excos have no management authority over the operational aspects of their respective “divisions” and the TV and Radio divisions (each of which controls both PBS and CBS services) report directly to the Group CEO without any reference to the PBS and CBS Excos. Aside from the fact that this structure appears unworkable, it effectively ensures a continuation of the SABC as a single operational entity despite the requirements of the legislation.

7.7 This is clearly the SABC’s intention. In the application it states that the structure addresses the requirement that “the Corporation’s operations are also managed from a strategy or operational delivery perspective” and further addresses “the need to drive synergies and efficiencies

⁶¹ Pages 19 and 20 of White Paper on Broadcasting 1998

⁶² Page 20 of White Paper on Broadcasting 1998

⁶³ See organogram at Page 104 of the SABC application

from both a cost and a revenue perspective”.⁶⁴ These statements contradict the requirements of the legislation and the White Paper which clearly enjoin the SABC to create separate operational divisions. It is evident that the SABC’s proposed organizational structure does not lead to “distinct, definite and different management” of each division.

7.8 e.tv submits that a proper interpretation of the legislation requires that the entire PBS portfolio – incorporating radio and television – is situated under a single operational division while the entire CBS portfolio is situated under another division. The head of each division should report directly to the SABC Board.

7.9 Unless a “tangible internal separation” is achieved, the structure proposed by the SABC will serve merely to entrench its uncompetitive position and this will be aggravated by the commercialisation of the CBS channel and stations.

8. APPROACH TO THE AMENDMENT APPLICATION

8.1 The Concept of Public Broadcasting

8.1.1 The Triple Inquiry Report identified the main principles of public broadcasting and contains the underlying values which define the public broadcaster. The values and concepts which guide and define the public broadcaster are important for the purpose of the SABC’s application because these values are central to the statutory provisions of the IBA Act and the Broadcasting Act. Identifying these values will assist in distinguishing the concept of public broadcasting from commercial broadcasting.

⁶⁴ Page 105 of SABC application

8.1.2 An appropriate and workable description of the distinction between public and commercial broadcasting is to be found in the study by Trevor Barr in his study on *The Changing Face of Australia's Media and Communications*:

“The foundations of public broadcasting are situated in how a democracy caters for its cultural and political diversity. Commercial broadcasters have to deliver the largest possible audiences to their advertisers, as measured in each quarter of an hour by the ratings. However, the role of the public broadcaster is that they must relate to audiences as a public, rather than as a market.”⁶⁵

8.1.3 The distinction between public and commercial is based on the difference between “audience as a public” and “audience as a market”.

8.1.4 Where the broadcasting service appeals to the audience as a public, effect is given to public service programming contributions which enhance and promote the public benefit. Education and information are the key drivers but entertainment is also provided. Audience ratings matter little where the public interest is at stake. Advertisers who wish to associate their products or services with public-interest programmes do so generally to obtain benefits of cause-related marketing or to appeal to a specific section of the public. Advertisers cannot always find mass markets and attractive LSMs in public service programming.

⁶⁵ Page 62 *Newmedia.com.au – The Changing face of Australia's media and communications*, Trevor Barr (Allen Unwin 2 000)

- 8.1.5 Programming that promotes and advances the public benefit includes but is not limited to education, the environment, languages, news and current affairs, children's and youth programming and programmes aimed at women and the disabled. These groups are specifically identified in the section 10 (1)(g) of the Broadcasting Act.
- 8.1.6 The PBS is required to schedule programmes aimed specifically at these public groups, irrespective of audience ratings. This principle was reinforced in the Triple Inquiry Report and the White Paper (see Chapter 2: Regulatory Background (above)). As the majority of the public is available between 6pm and 10pm (prime time), the PBS is required to schedule these programmes in time slots within prime time. The PBS is not required to achieve any level of audience ratings or market share. It is sufficient that the programmes aimed at these specified groups give concrete expression to the statutory provisions for these provisions encapsulate the values of public broadcasting as enunciated in the Triple Inquiry Report and the White Paper which form the basis of broadcasting policy in the country.
- 8.1.7 The application by the SABC neglects the "audience as a public"; instead, the SABC's section on the market demonstrates only its view of the "audience as a market". The application is therefore skewed in favour of the CBS, completely ignoring the PBS. Unlike commercial broadcasting, market conditions should neither influence nor determine PBS programming.
- 8.1.8 The application consistently refers to the SABC as a single entity. In fact, the Broadcasting Act requires that two separate

divisions be considered. The SABC distorts the analysis of the market by seeking to promote a single entity. The SABC should rely on two separate concepts: the market in relation to the CBS and the public in relation to the PBS.

8.1.9 This conceptual distinction permits two separate sets of consequences. The SABC as PBS must serve the public. It is not required to attract audiences which it sells to advertisers. It is furthermore not required to schedule those programmes which attract advertisers to sell their products. It is required to promote the public good as exemplified in the Reithian model which advances education, information and entertainment. The CBS, on the other hand, may compete commercially with other commercial broadcasters provided certain conditions are met.

8.1.10 The categories of public service obligations which the PBS is required to broadcast are contained in the Broadcasting Act and include but are not limited to:

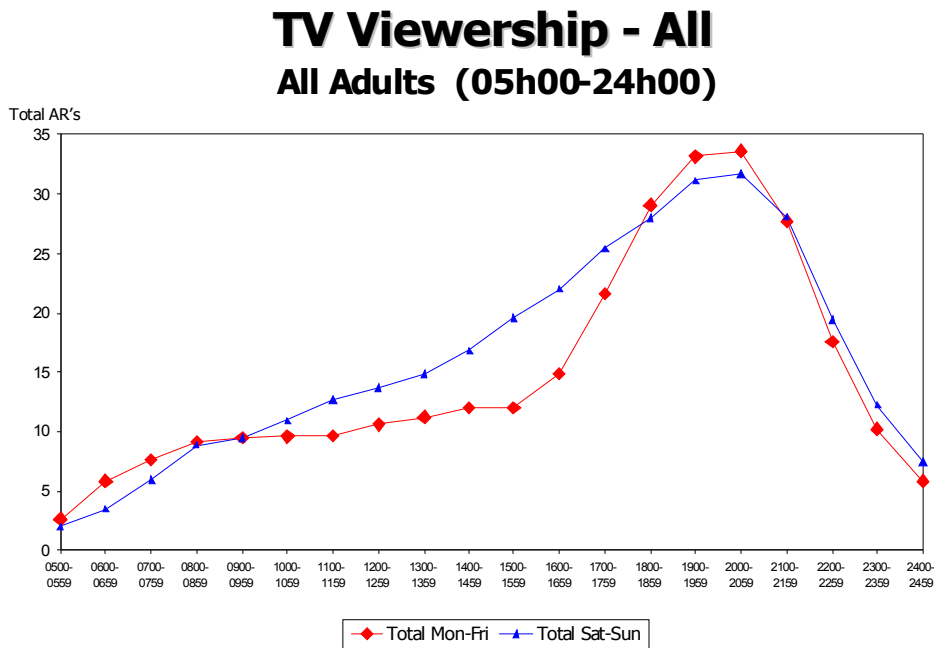
- Programmes in all official languages
- Programmes reflecting cultural and regional diversity
- Significant news and public affairs
- Significant educational programming including curriculum-based and informal education
- Programmes reflecting traditional and contemporary artistic expression;
- Broad range of services targeting children, women, youth and the disabled;
- Programmes commissioned from the independent production sector
- Developmental and minority sports programming.⁶⁶

⁶⁶ Clause 10(1) of the Broadcasting Act

8.1.11 e.tv submits that the Authority should impose licence conditions on the PBS to give effect to its public service obligations by setting measurable programming goals and quotas and specifying the time periods within which such programmes should be broadcast.

8.1.12 As the PBS is required to serve the public interest, it must provide public interest programming at times when the South African television audience is available in large numbers. The majority of South African television viewers are available between the hours of 17h00 and 22h00. See Graph 15.

Graph 15



Source: Transmit – QH Analysis (Average by half hour) - TOTAL
 Period: January – December 2003

8.1.13 SABC1 and SABC2 would fail as PBS broadcasters if they were to operate as commercial channels during prime time and shift the bulk of their PBS obligations to daytime.

8.1.14 In the circumstances, the programming obligations set out at 8.1.10 (above) should be met in large part during prime time on each day.

8.2 Fair Competition

8.2.1 Section 2 of the IBA Act imposes a duty on the Authority to regulate broadcasting in the public interest and to this end, among others, to ensure fair competition among broadcasters.⁶⁷

8.2.2 The creation of “fair competition” is linked to the concept “viewed collectively” contained in the provisions of the Broadcasting Act and the IBA Act. In the present circumstances, it would appear that the creation of a fair and competitive commercial broadcasting environment must take account of the nature and extent of the programming and other obligations imposed on the existing commercial broadcaster. This approach would seek to avoid the prejudice of an amendment of a current broadcasting licence in the same category in terms of section 52 of the IBA Act.

8.2.3 Competition between CBS and e.tv is based on two different criteria. The first is the framework set out in section 30(1) of the Broadcasting Act and the second provides for the commercial licence category to be determined in terms of the concept “viewed collectively” as referred to in various objects in Section

⁶⁷ Section 2(o) of the IBA Act

2 of the IBA Act as well as in section 30(1) and (2) of the Broadcasting Act. This concept is significant because it means that licence conditions are imposed on broadcasters in a manner which, when all the broadcasters are viewed collectively, the objectives of section 30 of the Broadcasting Act is achieved. No one broadcaster is expected to fulfill all the conditions of the legislation.

8.2.4 Viewed collectively, therefore, e.tv and the CBS should:

- provide a diverse range of programming addressing a wide section of the South African public;
- provide programming in all South African official languages;
- ensure comprehensive coverage of the areas which they are licensed to serve.⁶⁸

8.2.5 With regard to the PBS, public and commercial broadcasters cannot compete for audiences and advertising revenue. Indeed, this approach to competition will result in the SABC's PBS division competing for audiences and revenue against its CBS division. Therefore, the Broadcasting Act specifically provides different broadcasting frameworks for the PBS and the CBS. Insofar as the CBS is concerned, it will compete directly with e.tv. Such competition is welcomed provided that the licence conditions create an environment in which e.tv is not prejudiced.

8.2.6 In addition, to ensure fair competition, the CBS should be subject to the same level of programming obligations and limitations as are applicable to e.tv. e.tv's public service obligations provide the minimum conditions for the CBS and no preference should be given to this broadcaster. This would be

⁶⁸ Section 30(1) of the Broadcasting Act

indispensable to the creation of a fair competitive environment and to ensuring compliance with the requirement in section 52 of the IBA Act that an amendment application may not prejudice any other broadcasting licensee.⁶⁹

8.2.7 The licence conditions for the CBS should therefore reflect the following minimum conditions:

- 45% local content quota across the performance period;
- Four hours prime time (18h00 to 22h00) South African drama per week of which 10% must be in official languages other than English with preference to African languages;
- Two hours news per day including a half-hour bulletin in prime time;
- Nineteen hours of information programming per week of which two hours should be in prime time;
- Two hours per week of news and information programming in official languages other than English, with preference to African languages;
- Four hours per week of programming other than news and information in official languages other than English, with preference to African languages;
- Sixteen hours per week of children's programming (during times when children are available in large numbers to watch) of which:
 - 20% must be South African children's programming;
 - and,
 - 20% of the South African children's programming must be in official languages other than English with preference to African languages;

⁶⁹ Section 52(1)(c) of the IBA Act

- Advertising must be limited to an average of ten minutes per hour and must not exceed twelve minutes in any one hour;
- 100% of local programmes, other than news and current affairs, must be commissioned from the independent production sector
- An annual licence fee of 2% of turnover on the same terms and conditions as e.tv

8.2.8 It follows that the public service obligations and limitations on the PBS should be significantly higher than the conditions imposed on the CBS. This includes programming obligations as set out above, but also, in the interests of a fair competitive environment, would involve a greater limitation on advertising than imposed on e.tv and the CBS.

8.2.9 e.tv submits that the licence conditions for each PBS channel should reflect the following:

- 55% local content across the Performance Period;
- A minimum of 80% local content in prime time;
- A minimum of 50% of prime-time programmes in official languages other than English. The languages should be fairly represented across the two channels;
- A minimum of three hours news per day (during the Performance Period) including sixty minutes of prime time news per day in official languages other than English;
- A minimum of eight hours of prime time South African drama per week;
- A minimum of 21 hours of children's programmes (during times when children are available in large numbers to watch) of which:

- 55% should consist of South African children's programming; and,
- 50% of the South African children's programming should be in official languages other than English;
- A minimum of 25 hours of information programming per week (during the performance period) of which:
 - 50% should be broadcast in prime time
 - 50% should be local, except for current affairs in respect of which 80% should constitute local programming
 - 50% should be in official languages other than English
- A minimum of four hours of educational programming per day during the performance period and during a time when the target audience for the particular educational programme (e.g. adults for adult literacy and children for curriculum-based education) is available in large numbers to watch.
- A minimum of five hours of religious programmes per week during the performance period;
- A maximum of six minutes of advertising in any one hour.

8.2.10 To ensure a fair competitive environment, the relationship between the PBS and CBS must be subject to regulation. In this regard, e.tv submits that the Authority must ensure an appropriate separation of the PBS and CBS which would include the following:

8.2.10.1 The two PBS channels may cross-promote each other's programming. The CBS channel may promote the two PBS channels provided that any such on-air promotions are counted as advertisements and therefore contribute towards the calculation of the total number of

advertisements in any one hour. However, the PBS channels may not promote the CBS channel or its programming.⁷⁰

8.2.10.2 If a programme is aired first on a particular SABC channel and repeated on the same channel, both the original airing and the repeat may count towards the regulatory quota for that category of programming. However, if a programme is aired first on one channel and then repeated on another channel, the repeat may not count towards the regulatory quota for that programming category for the channel on which the programme was repeated. This applies individually to all three SABC channels.

8.2.10.3 The divisional restructuring of the SABC must be such that:

8.2.10.3.1 The airtime sales for the two PBS channels operate as one entity while the airtime sales for the CBS channel operate as another entity. For the purposes of the sale of commercial airtime, the CBS and PBS channels may not be packaged or marketed as a single entity.

8.2.10.3.2 The programme acquisitions for the two PBS channels operate independently of the programme acquisitions for the CBS, i.e. should SABC1 and SABC2 licence a programme from a distributor, such licence will extend only to SABC1 and SABC2 and may not be “shared” by SABC3.

⁷⁰ Allowing the PBS channels to cross-promote each other and the CBS channels to promote the PBS will be fair only if the PBS is subject to the minimum public service obligations set out at 8.2.11 (above).

8.2.10.4 If the reorganization gives effect to the requirements of the Broadcasting Act and the White Paper, there should be no difficulty in achieving operational independence for the two entities in respect of airtime sales and programme acquisitions.

9. Conclusion

e.tv stresses that the decision on this amendment application is crucial to the future of the South African broadcasting industry and the creation of a fair competitive environment.

e.tv looks forward to supplementing this submission at the oral hearing on a date to be advised by the Authority. Given e.tv's interest in this matter, e.tv would appreciate it if the Authority would grant it at least two hours for its oral presentation.