

## **TO BE TRANSCRIBED ONTO Y-FM LETTERHEAD**

Thabo Ndhlovu,  
Manager: Licensing Unit  
Independent Communications Authority of SA  
Block D, Pinmill Farm,  
164 Katherine Street, Sandton  
Private Bag X10002,  
Sandton, 2146

Fax no. (011) 448 2186

Dear Sirs

### **APPLICATION BY THE SOUTH AFRICAN BROADCASTING CORPORATION (SABC) FOR THE AMENDMENT OF ITS LICENCES IN TERMS OF SECTION 22 OF THE BROADCASTING ACT**

We refer to the application for the amendment of the South African Broadcasting Corporation's ("**SABC**") broadcasting licences in terms of section 22 of the Broadcasting Act, 4 of 1999 ("**the Broadcasting Act**") published in the Government Gazette No 26318 on Friday 30 April 2004 and the Independent Communications Authority of South Africa ("**ICASA**") Notice 849 OF 2004 published in the Government Gazette No 26380 on 19 May 2004.

#### **1. Introduction**

Y-FM is a commercial youth music radio station operating in the greater Johannesburg metropolitan districts and surrounding areas in Gauteng. The station operates in terms of a private sound broadcasting licence ("**the Y-FM licence**") issued to the Youth Radio Consortium in terms of section 43 of the Independent Broadcasting Authority Act, 153 of 1993 ("**the IBA Act**") on 1 October 1997.

As a radio station competing with at least two of SABC's commercial radio stations (Metro FM and, more recently, Radio 5), Y-FM has a direct interest in ensuring a fair competitive environment in the relevant commercial radio market and our submissions in respect of the present amendment application are made in this context.

Although we are primarily concerned with the SABC's amendment application as it applies to its commercial service radio stations which compete with Y-FM and other private broadcasting radio stations, the principles and points made in this submission are apply equally to many of SABC's public service radio stations as well as the television stations, which are all run on a commercial basis and often compete directly with private broadcasting services.

## 2. The competitive environment

Before turning to the legal and regulatory issues raised by the SABC's amendment application we wish to briefly address some of the points made by the SABC in pages 58-89 of its submission under the heading of 'Market Conditions'. First, we must congratulate the SABC on its comprehensive analysis of the conditions faced by media owners in South Africa. It is our opinion that such analysis adds considerably to the debate about the development of South Africa's media industry. However, we believe that the analysis presented in the SABC's document – while not being inaccurate – is partial in the sense that it shies away from presenting the entire picture. Accordingly in the interests of adding to the good work started by the SABC we wish to address particular issues raised in their submission in the hope of strengthening the process of policy development for the electronic media industry.

The SABC notes that there has been a dramatic increase in the number of radio stations over the period 1991-2002 (SABC 2004, p.66) and makes a strong case for increasing fragmentation in the radio market. However, we respectfully submit that it has been private commercial radio stations, subject to comprehensive license conditions, and community radio stations that have borne the heaviest burden of the increasingly competitive environment. Indeed the SABC (2004, p.80) goes on to note "Its share of the total market, however, has remained fairly constant over the past four years at approximately 47%". In other words, notwithstanding the proliferation of radio stations and increasing competition the SABC has maintained a dominant position in radio advertising revenues. Thus it seems fair to conclude that fragmentation has impacted most severely on new private and community radio stations rather than the well-established SABC brands. The SABC has after all maintained market share at nearly half of total radio advertising revenue. Although we develop this argument below, we wish to respectfully submit at this point that given the intense levels of competition faced by commercial radio stations it would be substantively unfair if the SABC commercial radio stations were licensed without license conditions at least commensurate to those carried by private commercial broadcasters. Should the SABC's commercial radio stations not have similar obligations they would *per force* be placed at an advantage *vis a vis* private commercial radio stations who already operate in the most hotly contested sphere of the market.

Further, the SABC's (2004, p.80-7) submission notes that media outlets that deliver higher LSM audiences enjoy a higher power ratio (i.e. share of advertising revenue versus share of audience) than those that deliver lower LSM audiences. Although we concur with this analysis, we respectfully submit that the use of a series of relative measures such as power ratios obscures the absolute power that the SABC derives from its multiple media assets.

SABC African Language Services command a staggering 91.6% of the total radio LSM 1-4 audience (Rams 2004-1, one week cume). The SABC further commands 75% of total radio LSM 5 and 6 audiences (Rams 2004-1, one week cume). While there is no doubt that one commands a significantly lower rand per listener in these demographics and that less overall adspend is targeted at LSM 1-6, the SABC's almost total dominance of this market means that it can effectively command the majority of adspend targeted at this radio market. The SABC's (2004, p.81) analysis presented in the graph LSM vs. Adspend Mapping (2002) shows that 41% of all adspend is targeted at the LSM 1-6 categories. While this graph clearly refers to all adspend and not just radio spend, we respectfully submit that it is likely that an equally substantial amount of radio adspend is targeted at the LSM 1-6. This then places the SABC in the enviable position of commanding near complete dominance in a mass market that attracts a substantial amount of advertising spend. This is not a commercially unattractive position to be in. Compare this to commercial players that by virtue of their smaller urban footprints are compelled to battle for considerably smaller LSM 6+ audiences. It is clearly and demonstrably true that LSM 6+ audiences command a demonstrably

higher percentage of overall ad revenue. However to ignore the fact that the SABC enjoys near dominance in lower LSM categories, in which there is almost no competition and that do attract considerable absolute revenues obscures the fact that LSM 1-6 audience are indeed valuable. It is imperative that the Amendment process recognizes that the SABC enjoys near complete dominance of LSM 1-6 (at least in a radio context) and that these audiences do attract a considerable amount of revenue.

### 3. Statutory background

As we illustrate below, our concern for fair competition in the broadcasting sector is enshrined in both the IBA Act and the Broadcasting Act, which apply to ICASA in the fulfillment of its constitutional and statutory mandate to regulate broadcasting in the public interest.

ICASA's special broadcasting authority and the constitutional obligation to ensure fairness in the broadcasting sector ultimately derives from section 192 of the Constitution of the Republic of South Africa, Act 108 of 1996 ("**the Constitution**") which provides

*"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" (our emphasis added).*

This mandate is reiterated in the statutory objects provisions in both the IBA and Broadcasting Acts. Section 2 of the IBA Act provides

*"The primary object of this Act is to provide for the regulation of broadcasting activities in the Republic in the public interest through the... Authority... and for that purpose to—: ... (o) **ensure fair competition between broadcasting licensees**" (our emphasis added).*

Similarly section 2 of the Broadcasting Act provides

*"The object of this Act is to establish and develop a broadcasting policy in the Republic in the public interest and for that purpose to—: ... (h) **ensure fair competition in the broadcasting sector**" (our emphasis added).*

And again section 3(1) of the Broadcasting Act mandates that

*"The South African broadcasting system—*

*...  
(d) **encourages fair competition** in the provision of programmes and services" (our emphasis added).*

SABC is a broadcasting licensee under both the IBA and Broadcasting Act. It operates its radio and television stations in the broadcasting sector. It follows that the statutory principles of fair competition apply equally to SABC and that the constitutional mandate to ensure fairness in the regulation of broadcasting applies to ICASA in the regulation of SABC.

The Constitution and applicable broadcasting legislation are clear. As the largest provider of public and commercial broadcasting services in South Africa, the SABC cannot regulate itself and ICASA has the constitutional and legislative authority to regulate the SABC. Accordingly, SABC is not exempt from the principles of fairness and fair competition enshrined in our Constitution and broadcasting legislation referred to above.

ICASA regulates broadcasting licensees primarily through the imposition of licence conditions. This principle is recognised in the clear terms of section 22(2) of the Broadcasting Act, which provides that

*"... 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 reorganisation 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.**"*

For the reasons stated below, we believe that the effect of SABC's present amendment application is to request from ICASA that no substantive licence conditions be imposed on SABC's services (whether commercial or public) and that effectively SABC should be entitled to regulate itself.

Moreover, in so far as other commercial sound broadcasting radio station services are required to operate under extensive licence conditions affecting programming and local music content, SABC is effectively requesting that its commercial radio station broadcasting services be exempted from the statutory principles of fair competition set out in the Broadcasting and IBA Act.

With regard to the establishment of SABC's Commercial Services, section 11(1)(a) of the Broadcasting Act specifically provides that the commercial services provided by the Corporation must *"be subject to the same policy and regulatory structures as outlined in this Act for commercial broadcasting services."*

The requirement to hold a broadcasting service licence with substantive licence conditions imposing specific licence conditions must therefore also be applied to SABC's commercial broadcasting service division' radio stations (and television stations).

#### **4. SABC's amendment application**

At present, SABC provides all of its radio stations and television channels in terms of public sound and television broadcasting licences grand-fathered from the pre-Constitutional era in terms of section 45(3) and renewed in terms of section 44, read together with sections 41, 42 and 43 of the IBA Act.<sup>1</sup>

The notice of renewal of the public sound broadcasting licences comprise simple one paragraph sections for each station, setting out in the most general terms the programming format, the target audience, the broadcasting hours and the areas of coverage.

The broadcasting licences themselves comprise simple one page documents with four paragraphs setting out the name of the station, the programming content in the most broad and general descriptive terms, the frequencies and technical parameters of the station and the broadcasting area and times.

In addition, every licence is subject to the GENERAL TERMS, CONDITIONS AND OBLIGATIONS APPLICABLE TO THE PUBLIC BROADCASTING LICENCES ISSUED TO THE SOUTH AFRICAN BROADCASTING CORPORATION, 1995, a two

---

<sup>1</sup> In this regard, we point out that Y-FM participated in the applicable renewal processes which included various written and oral submissions to ICASA in terms of the applicable provisions of the IBA Act. Section 42(6) provides that *"Upon having reached a decision on any application, the Authority shall by notice in the Gazette and by written notice addressed to the applicant make known the outcome thereof."* We note that no notice of the renewal was published in the Gazette. Y-FM has no idea of the terms and conditions of renewal of such licences and must accordingly reserve all of its rights in this regard.

and a half page document setting out further licence conditions of general application in the most general terms relating for example to the obligation not to cause harmful interference, obligations to comply with regulations, emergency announcements, keeping or records, use of the station's call sign and non-discrimination.

There are no specific programming conditions or obligations in either the specific licences for each radio station or in the general terms and conditions referred to above.

**In other words, *SABC's present public and commercial sound and television broadcasting service licences contain no substantive licence conditions through which ICASA is able to regulate the SABC's individual radio station (or television channel) broadcasting services and thereby enforce the applicable obligations provisions or either the IBA or Broadcasting Act.***

An examination of the licence conditions proposed by SABC in section 4 of their amendment application reveals that, save for mere descriptive reference to either the Public or Commercial Service Division of the applicable station and reference to section 10 or 11 of the Broadcasting Act, the SABC is proposing that no new licence conditions be imposed on any of its radio or television services at all.

Given that of the two changes proposed by SABC, one is descriptive and the other is unnecessary and redundant (the relevant provisions of the Broadcasting Act apply to SABC regardless whether these are incorporated in the licences or not), SABC is proposing that no substantive new licence conditions be imposed on any of its radio stations or television channels.

This could never have been the intention of Parliament in enacting section 22 of the Broadcasting Act and flies in the face of clear legislative intention set out in the objects sections contained in section 2 of the IBA and Broadcasting Act as well as the policy objectives underlying the enactment of these provisions.

The relevant provisions of section 10 (for public broadcasting services) and section 11 (for commercial broadcasting services) are general policy guidelines and alone are too general to constitute enforceable licence conditions. Parliament's intention in enacting section 22 of the Broadcasting Act was to oblige the SABC to apply for new licence conditions in order to give effect to the broad policy objectives contained in sections 9 and 10 of the Broadcasting Act.<sup>2</sup>

It is evident from the White Paper on Broadcasting and the structure and content of the Broadcasting Act itself that one of the primary policy objectives underlying the splitting of the Corporation into separate public broadcasting service and commercial broadcasting service divisions is to ensure that the SABC's public commercial services no longer enjoy unfair competitive advantage over other private commercial broadcasting services licensed under the applicable broadcasting legislation.

Ensuring a fair and level competitive playing field is also the reason for ensuring separate financial management and the prohibition of cross subsidization of the commercial division by the public division in the provisions sub-sections (14) and (15) of section 8 of the Broadcasting Act.

Any failure to introduce substantive licence conditions specifying the details of the SABC's commercial (and public) broadcasting service obligations in the relevant

<sup>2</sup> We cannot agree with SABC's contention that the language in section 22 of the Broadcasting Act which states that the Authority may impose appropriate licence conditions which are necessary in respect of "*its related obligations in terms of this Act and the IBA Act*" amounts to "drafting surplusage" (*sic*). We are advised that this is not a recognised principle of statutory interpretation in South African law. There are many obligations in the IBA Act which may require appropriate licence conditions, such as the provisions relating to local content and adjudication of complaints.

licences would therefore undermine the entire legislative project in mandating the separation of SABC into distinct public and commercial broadcasting services.

## 5. Fair competition

Y-FM operates under a broadcasting service licence containing various substantive licence conditions imposing a wide variety of specific and onerous obligations, from broadcasting hours, ownership and control, finances, fees, programming, complaints, information to be provided the Authority, employment practices, public announcements and local content requirements.

The most important of these licence conditions are those relating to Y-FM's obligation to carry no less than 50% of its programming as local content music. In Y-FM's view, all of SABC's commercial radio stations should be subject to the same 50% local content obligations in order to promote South African music.

While Y-FM appreciates the strides that SABC has made in the provision of local content programming in *television* and certain of the language vernacular radio stations operating under the public broadcasting services division, the same cannot be said for SABC's programming in its commercial broadcasting service radio stations such as Radio 5, Metro FM and Radio Good Hope (or Radio 2000 which applied for renewal as a commercial broadcasting service but is now classified by SABC as a public broadcasting service).

In terms of the current local content regulations, holders of Public Commercial and Private Commercial Sound Broadcasting licences only have an obligation to broadcast at least 25% of South African music.<sup>3</sup> This is half of the obligation imposed on Y-FM and is unfair in so far as it gives SABC's radio stations the unfair advantage of significantly increased programming flexibility.

Even if Radio 5, Metro FM and the other competing channels are complying with this 25% South African music obligation, they still enjoy a substantial competitive advantage over Y-FM in so far as they enjoy an effective programming flexibility which is double that of Y-FM's.

Y-FM submits that in order to ensure a fair competitive playing field in the relevant broadcasting markets, SABC's commercial broadcasting service radio stations should be obliged to carry South African music content which is no less than those of Y-FM.

In other words, the amended licence conditions should be imposed in terms of section 22 of the Broadcasting Act which oblige all competing SABC radio stations which primarily carry music content to play no less than 50% of South African music in their programming.

## 6. Conclusion

For the reasons stated above, Y-FM submits that granting the SABC the minimal and zero effect amendments requested in their amendment application would be contrary to the language as well as the spirit and intention of the applicable broadcasting legislation. It would amount to abdication by ICASA of its constitutional duty to ensure fairness in the regulation of broadcasting in South Africa.

---

<sup>3</sup> See Regulation 3.2 in the ICASA South African Music Content Regulations, Notice 245 of 2002, published in Government Gazette No. 23135 of 22 February 2002.

Moreover, granting of the amendment application as it stands would entrench SABC's unfair competitive advantage over other smaller commercial broadcasters in direct contravention of the objects of fair competition enshrined in the IBA and Broadcasting Acts.

The references to sections 10 and 11 of the Broadcasting Act are insufficient, too general and impossible to enforce. Without the imposition of substantive licence conditions imposing specific obligations on the broadcaster, ICASA's ability to regulate and enforce applicable broadcasting law and policy will be severely circumscribed.

Sections 10 and 11 need to be fleshed out into substantive and enforceable licence conditions and we believe that this is exactly what Parliament had in mind when it enacted section 22 of the Broadcasting Act requiring SABC to amend its licences accordingly.

Y-FM therefore submits that the Authority should reject the minimal zero content amendments proposed in section 4 of SABC's amendment application.

Y-FM, as a competing broadcasting service provider in the relevant markets, cannot prescribe the content of the competing commercial broadcasting service radio stations such as Metro FM and Radio 5.

However we believe that ICASA should either impose or require SABC to supplement or resubmit its application containing proposed new substantive licence conditions under the same or similar licence condition headings contained in Y-FM and other commercial broadcasters' licences (such as specific conditions relating to broadcasting hours, finances, fees, programming content, complaints, information to be provided the Authority, employment practices, public announcements and, not least of all, local content requirements).

We thank ICASA for the opportunity to make these representations and wish to reserve our right to supplement our written submission with further representations, including oral representations, should the opportunity arise in the future.

Yours sincerely

Greg Maloka  
Station Manager

CC: Mr. Peter Matlare  
SABC: Group Chief Executive  
Radio Park, Henley Road, Auckland Park, 2092  
Private Bag X1 Auckland Park, 2006  
Fax : (011) 714 4869  
Acknowledgment of copy received: