



INTRODUCTION

- 1 Electronic Media Network Ltd (“M-Net”) would like to thank the Independent Communications Authority of South Africa (“the Authority”) for the opportunity to make written representations in response to the application by the South African Broadcasting Corporation (“SABC”) to the Authority to amend its broadcasting licences (“the SABC’s application”).
- 2 M-Net will confine itself to the SABC’s application to the extent that it relates to its three television broadcasting licences, namely the licences for SABC 1, SABC 2, and SABC 3. The principles and the basis of the objections raised by M-Net apply with equal force to the SABC’s application in relation to all its sound broadcasting licences.
- 3 M-Net would like an opportunity to make oral representations to the Authority at the forthcoming public hearings.

DISTINCTION BETWEEN PUBLIC, COMMERCIAL FREE-TO-AIR, SUBSCRIPTION AND COMMUNITY BROADCASTING SERVICES

- 4 South Africa’s broadcasting legislation (the Independent Broadcasting Authority Act, No 153 of 1993 and the Broadcasting Act, No 4 of 1999) and broadcasting policies recognise that there are significant differences between public, commercial free-to-air, subscription and community broadcasting services. The nature, mandate, public service obligations and funding of these services differ, as do their licensing and regulation. The recognition of these differences exists in most jurisdictions.

THE ROLE OF PUBLIC BROADCASTING SERVICES

- 5 The *Triple Inquiry Report*¹ contains numerous policy statements on the role of the public broadcaster :

“Public broadcasters will be expected to carry the primary responsibility for addressing the needs of the public and for delivering specific public service programming.”²

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The protection and viability of public broadcasting services, cross media control of broadcasting services, and local television content and South African music, Independent Broadcasting Authority, August 1995 (“the *Triple Inquiry Report*”)

² *Triple Inquiry Report*, pgs 50 and 70

At pages 55 to 62 of the *Triple Inquiry Report*, the Authority deals at length with the mandate of public broadcasting services, and their programming obligations. These relate to news and information programming, entertainment, music, drama, arts and culture, feature films, information knowledge building programming, documentary, educational programming, sports and leisure, religion, children's programming, youth programmes and language. At pages 78 to 81 of the *Triple Inquiry Report*, the Authority deals in further detail with the obligations which ought to be imposed on public broadcasting services.

6 Internationally, some of the clearest indications of the role of public broadcasting services emanate from the United Kingdom. The communications regulator in the UK, the Office of Communications ("Ofcom"), in an April 2004 document entitled *Ofcom review of public service television broadcasting*, considered the definition and purpose of public service broadcasting. Ofcom states that there were two simple aims behind the regulation of public service broadcasting :

- “● Helping the broadcasting market work more effectively to deliver what **consumers** want to watch or want to have an option to watch.
- Providing the programming that as **citizens** we want to be widely available for as many people as possible to watch. Such programming secures the wider social objectives of UK citizens by making available TV which has broad support across the UK, but which would be underprovided or not provided at all by an unregulated market.”³ (Their emphasis)

The document goes on to state :

“Bridging the shortfall between what a well-functioning broadcasting market would provide and the wider ambitions of UK citizens is our definition of the enduring purposes of public service broadcasting.”⁴

³ *Ofcom review of public service television broadcasting*, Ofcom, April 2004, pg 8

⁴ *Ofcom review of public service television broadcasting*, Ofcom, April 2004, pg 9

Whilst all the public broadcasting services in the UK are subject to the same basic regulatory standards as other UK broadcasters, “In addition, each ‘PSB’ channel has its own place in a hierarchy of additional programming and production obligations.”⁵ (our emphasis). On pages 71 to 73 of the document, Ofcom indicates the six areas where unfettered television broadcasting might fail. As a result, a “hierarchy of additional programming and production obligations” is imposed on public broadcasting services. Ofcom emphasised that the consumer-focused objectives of public broadcasting services have been to address the shortcomings of advertiser-funded television, and to ensure that as a result of the regulation of public broadcasting services, they give citizens “access to programming of wider social value”.⁶

- 7 In the European Union, a March 2004 document entitled *A White Paper on the Financing and Regulation of Publicly Funded Broadcasters*⁷ concluded that in order to safeguard Europe’s audiovisual future, numerous measures had to be taken, including the imposition of “clearly defined remits on each channel and/or station operated by a Publicly Funded Broadcaster which must include specific programming obligations which are not also imposed on other broadcasters”.⁸
- 8 What emerges clearly both from South African broadcasting policies and legislation, and internationally, is that public broadcasting services are to bear the primary responsibility for addressing the needs of the public and for delivering public service programming, and that in order to ensure these objectives, these services must be regulated according to a specific remit and detailed obligations.

CURRENT SABC LICENCES AND KEY PROVISIONS OF BROADCASTING LEGISLATION

⁵ *Ofcom review of public service television broadcasting*, Ofcom, April 2004, pg 18

⁶ *Ofcom review of public service television broadcasting*, Ofcom, April 2004, pg 72

⁷ European Publishers Council, March 2004

⁸ *A White Paper on the Financing and Regulation of Publicly Funded Broadcasters*, European Publishers Council, March 2004, pg 27

- 9 The SABC's three television licences were renewed earlier this year and commenced on 23 March 2004. Each licence is essentially one page long. Attached to each licence are general terms and conditions. Although the Authority obviously has these licences, for ease of reference and for the purposes of the oral hearings M-Net attaches the licence for SABC 1, as well as the general terms conditions, as Annexure A.
- 10 These licence conditions impose minimal obligations on the SABC. This is in stark contrast with the licences of Midi Television (Pty) Ltd as regards e.tv, and M-Net's licence.
- 11 For example, the licence for e.tv contains an extensive list of definitions and then deals in detail with the following issues –
- 11.1 name and station identification;
 - 11.2 coverage;
 - 11.3 broadcast hours;
 - 11.4 provincial diversity;
 - 11.5 target audience;
 - 11.6 language;
 - 11.7 local content;
 - 11.8 news;
 - 11.9 information programming
 - 11.10 children's programming;
 - 11.11 South African drama;
 - 11.12 ownership and control;
 - 11.13 employment equity, human resource development and training;
 - 11.14 finances;
 - 11.15 fees;
 - 11.16 records;
 - 11.17 advertisements;

11.18 complaints; and

11.19 information to be furnished to the Authority.

A schedule and an annexure deal in detail with the technical specifications with which e.tv has to comply.

12 Similar, although not nearly as extensive, licence conditions are imposed on M-Net.

13 The broadcasting service which ought to bear the most public service obligations and the most detailed remit, namely the SABC, is able to continue its broadcasting activities unfettered by detailed regulation.

14 Chapter 4 of the Broadcasting Act was passed by the legislature with the intention of regulating the public broadcaster, the SABC, in a manner which was far more rigorous and detailed than the statutory provisions which applied to the SABC in terms of the old Broadcasting Act of 1976.

15 s8A, s12 to s20, s23 to s26, and s28 deal with the conversion of the SABC, the SABC board, management and financial issues, the staff of the Corporation and reporting requirements. s21 deals with rights and obligations, whilst s22A deals with regional television services. s27 deals with licence fees.

16 s6 of the Broadcasting Act deals with the Charter of the SABC. However, what the section in fact contains, is a set of objectives similar to the objectives set out in s2 of the IBA Act and s2 of the Broadcasting Act. The section requires the SABC to develop a Code of Practice to ensure compliance with certain general principles.

17 s8 is similar to s6 – it deals with the objectives of the SABC, and again, these are set out in general terms.

18 s9 deals with the creation of two operational divisions, namely a public service division, and a commercial service division.

19 s10 and s11 impose general obligations on the public service division and the commercial service division respectively. There is nothing equivalent to the detailed obligations contained in the licences for M-Net and e.tv.

20 s22, which is the section crucial to these amendment proceedings provides :

“(1) The Corporation must, within six months after the date of commencement of the Broadcasting Amendment Act, 2002, or the conversion date, whichever is the later, apply to the Authority for such amendments to its existing licences as 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.

(2) The relevant provisions of the IBA Act apply with the necessary changes to the applications referred to in subsection (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 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.”

21 The purpose of s22 was to empower the Authority to amend the licences of the SABC to give effect to the general obligations contained in the IBA Act and the Broadcasting Act, the relevant policy statements made by the Authority in the course of its inquiries over the years, and the relevant provisions of the regulations made by the Authority in terms of the two statutes. The licences are to provide the detailed remit and obligations of the SABC. They are to be amended to accord with the level of detail in the licences of e.tv, M-Net and other broadcasting licencees. Thus, the conditions imposed on SABC 3 ought to be similar to those imposed on e.tv, whilst the conditions imposed on SABC 1 and SABC 2, as the public broadcasting services, ought to be more onerous to ensure compliance with the mandate of a true public broadcasting service, as described in the Ofcom document in paragraph 6 of these representations.

- 22 Bearing in mind the above-quoted statements made by Ofcom as to why public broadcasting services ought to have additional and detailed, obligations imposed on them, and given the fact that the SABC relies so extensively on advertising revenue (approximately 85% of its revenue is derived from advertising and sponsorships), it is particularly important, if the public service objectives of public broadcasting services are to be met, that detailed programming obligations and appropriate limitations on advertising revenue are imposed on the SABC.

SUMMARY OF SABC'S APPLICATION TO AMEND ITS LICENCES

- 23 The approach adopted by the SABC in its application is deceptively simple :

23.1 It is suggested that the application for amendment “relates only to those changes that have to be brought about in the administration of the SABC in consequence of giving effect to section 9 of the Broadcasting Act”,⁹ and “that the application for amendment of the licence and any conditions imposed will revolve around ensuring that the SABC’s licence adequately reflects the statutory requirements in s9 of its operations being divided into two divisions that are to be administered separately”.¹⁰

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SABC’s application, pg 36

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SABC’s application, pg 36

23.2 The SABC suggests that the amendment to the licences must simply “indicate which of the services will be public broadcasting services, and which will be commercially operated broadcasting services, thereby inviting the obligations contained respectively in sections 10 and 11. ... In each instance the licence conditions must impose upon the SABC, in the case of its public broadcasting services, the obligations set out in s10(1), and in the case of its commercially operated broadcasting services, the obligations set out in s11(1).”¹¹ What is proposed is that the only amendments to be made to the licence for SABC 1, are to the definition of the licensee, so that it is defined as “South African Broadcasting Corporation Limited (Public Service Division)”, and by inserting the following condition : “The licensee shall at all times comply with its obligations in terms of s10(1)(a)–(i) of the Broadcasting Act.” Identical amendments are proposed to the licence for SABC 2. As regards SABC 3, the licensee is to be defined as the “South African Broadcasting Corporation Limited (Commercial Service Division), and the following new condition is to be inserted : “The licensee shall at all times comply with its obligations in terms of s11 (1)(a)–(e) of the Broadcasting Act.”¹²

23.3 The SABC boldly asserts that “the rights of the SABC to enjoy freedom of expression and journalistic, creative and programming independence as referred to in s6(3), and more importantly as enshrined in s16(1)(a), (b) and (c) of the Constitution, will be infringed and denied if it were suggested that the Authority had any entitlement to approve programming content. ...[The Authority] considers only the policies, within which the SABC ... functions, enjoying its freedom and fulfilling its obligations through varying and fluctuating programme content.”¹³ How these conclusions are arrived at is not explained.

¹¹ SABC’s application, pg 39

¹² SABC’s application, pgs 47-48

¹³ SABC’s application, pgs 42-44. We doubt anyone is suggesting that the Authority is entitled “to approve programming content”. This is a distortion on the part of the SABC

23.4 The remaining, and most of the rest of the application, contains an anecdotal description of what the SABC claims it has achieved in the past ten years.

COMMENTS ON THE SABC'S APPLICATION TO AMEND ITS LICENCES

- 24 First, M-Net disagrees with the SABC's interpretation of s22 of the Broadcasting Act and its understanding of its mandate generally.
- 25 Second, it is submitted that the SABC's television broadcasting licences ought to be extensively amended along the lines indicated in paragraph 21 of these representations.
- 26 Third, it is wrong for the SABC to suggest that the imposition of licence conditions along the lines proposed by M-Net, would infringe its constitutional right to freedom of expression. All three television broadcasting services of the SABC use terrestrial broadcasting frequencies. Furthermore, the SABC proposes that two of its services be true public broadcasting services, whilst the third to be a commercial broadcasting service. In these circumstances the imposition of detailed licence conditions upon the SABC is mandated by statute and would be appropriate.
- 27 Fourth, the licence conditions of SABC 1, 2 and 3 will need to deal in detail with the fact that SABC 3 may subsidise SABC 1 and 2, but not the other way round. The licence conditions will need to detail the basis upon which the three services are to be funded, and to specifically state that SABC 3 may not be funded from any grants from the State or from licence fees levied in respect of the licensing of persons in relation to television sets. The provisions of s9(2) and the rest of Chapter IV of the Broadcasting Act do not address these permutations.
- 28 Further argument concerning the above points will be addressed at the public hearings.
- 29 To the extent that other sections of the SABC's application are not addressed, the correctness of these sections is not to be assumed to be accepted.