



RESPONSE TO

E.TV's SUBMISSION

ON

SABC's SECTION 22 LICENCE

AMENDMENT APPLICATION

19 JULY 2004

1 Introduction

- 1.1 On 30 April 2004 the Independent Communications Authority of South Africa (ICASA) published in Government Gazette no. 26318 the South African Broadcasting Corporation (SABC) application for an amendment to its broadcasting licences (licence amendment application) as required in terms of section 22 of the Broadcasting Act no. of 1999, as amended (the Broadcasting Act).
- 1.2 On 19 May 2004 ICASA published a subsequent Government Gazette no. 26380 inviting interested parties to make submissions on the SABC's licence amendment application including the financial information that was not included for scrutiny by interested parties during the period prescribed in the above-mentioned Government Gazette.
- 1.3 Interested parties had until 9 June 2004 to submit their representations to ICASA and the SABC.
- 1.4 We set out hereunder our comments in respect of the representation received from e.tv. We shall first set out general comments on the policy framework and legal context of the SABC's application. Thereafter we will address some specific comments made by e.tv.

2 Policy framework for public broadcasting

The policy framework for public broadcasting in South Africa has been under development for over a decade. This policy framework seeks to establish the role and values of the public broadcaster within the South African broadcasting environment.

Many of the submissions address this policy framework. The key argument in these submissions is in essence the following: broadcasting policy places extraordinary obligations on the SABC because it is a public broadcaster and in order to ensure these obligations are met, the Authority should impose specific licence conditions on the SABC, in excess of what is contained in the licences of commercial operators.

Leaving aside for the moment the parameters of section 22 of the Broadcasting Act, which requires that any licence conditions imposed during this process must be those which are necessary to reflect reorganisation, let us consider the link which is drawn between the SABC's mandate and proposed licence conditions, for it is here that false assumptions are made by various representors. These are:

- that without specific licence conditions, the SABC will have fewer obligations than commercial operators and that it is in the interests of fair competition to set such licence conditions for the SABC
- that licence conditions are required to ensure the SABC delivers on its public mandate.

We will address these in turn.

2.1 SABC vs. commercial sector obligations

The first of these assumptions is that without specific licence conditions, the SABC will somehow have fewer obligations than commercial operators. This is patently untrue as with or without specific licence conditions, the SABC's obligations as a public broadcaster far exceed the requirements of the commercial sector.

The SABC agrees with the representations when they cite the Triple Inquiry Report and the White Paper on Broadcasting Policy to demonstrate what is expected of the SABC as a public broadcaster. We are in agreement that our mandate is wide and complex and that more is expected of the SABC than of commercial operators.

The SABC is bound by its Charter to fulfil a wide range of obligations including the following:

- to make services available in all official languages and to be of high quality in all languages
- to reflect the diverse cultural and multilingual nature of South Africa
- to provide significant news and public affairs programming
- to support traditional and contemporary artistic expression
- to provide significant educational programming on topics such as human rights, health, early childhood development, agriculture, culture, religion, justice and commerce.
- to advance the national and public interest
- to include national sports programming as well as minority and developmental sports
- to cater for the spiritual needs of South Africans
- to provide for the needs of the disabled
- to provide programming for children

- to provide programming for youth
- to provide programming for women
- to extend its services throughout the country

No commercial operator is required to fulfil such a broad mandate.

It is, however, precisely because of this mandate that the SABC is granted a unique status, including a somewhat different regulatory regime from other broadcasters, as is captured in the Broadcasting Act.

In this context, the arguments that specific licence conditions are required to ensure fair competition or “balance” the obligations made by the commercial sector, are misleading and ignore the statutory obligations which the SABC is, in law, enjoined to discharge. The SABC’s ability to compete “unfairly” with the commercial sector is curtailed by its extensive programming obligations and its obligation to provide programming for all audience segments.

It is also worth noting that the model of licensing which commercial operators are seeking to impose on the SABC, is a model which they themselves have in the past argued is not always appropriate.

E.tv, for instance, has on a number of occasions appeared in front of the Authority arguing that certain of its licence conditions unduly constrain its ability to compete effectively. The commercial sector now wishes to see these sort of conditions imposed on the public broadcaster, in addition to its extensive legislative obligations, thereby seeking to limit the potential of the public broadcaster to compete.

2.2 Ensuring delivery

A second assumption in the representations which must be addressed is that without licence conditions such as those which

are imposed on commercial operators, the SABC will not deliver on its public mandate. Again this is false and seeks to ignore the SABC's delivery to date as well as the multitude of checks and balances which are built into the legislative framework which governs the SABC. This legislative framework is distinct from that which commercial broadcasters operate within. For commercial broadcasters, the licence issued by ICASA is virtually the only mechanism through which the Authority can ensure compliance. For the SABC, the Broadcasting Act contemplates a number of mechanisms:

- A Charter is set and the Authority is empowered to monitor and enforce compliance with the Charter
- A Board, consisting of representatives acting in the public interest, is appointed
- The SABC is required to develop editorial policies and a Code of Practice
- The SABC is required to allow the public to comment regularly on its services.
- In addition the SABC must also comply with the PFMA, and the Shareholder compact.

In this context, the regulatory regime which is appropriate for commercial broadcasters cannot simply be transplanted to the public broadcaster. To do so would be to ignore the unique status granted the public broadcaster. This unique status is mirrored internationally. As detailed in the SABC's application key lessons from international best practice include the following:

- The public broadcaster is viewed as unique, having different roles and responsibilities from commercial broadcasters. The public broadcaster's mandate is wide and complex. It cannot

be quantified easily and it cannot be met wholly on individual services. The nature of its mandate means that fulfilment of the mandate is not necessarily measurable over a limited period. The public broadcaster is thus treated differently by governments and regulators, who do not necessarily impose the approach taken with commercial broadcasters on the public broadcaster.

- The boards of governors of these public broadcasters are entrusted with ensuring the broadcaster's compliance and responsiveness to the public. This reduces the need for detailed licence conditions to govern the broadcaster, which is encouraged to be accountable through its internal policies, set and overseen by its board. In contrast to commercial broadcasters, whose only mechanism of public accountability is through the regulator, public broadcasters have multiple levels of accountability and various instruments available to ensure this accountability.

These may include annual reports, dialogue with parliament and the regulator, and public consultation. Public broadcasters are bound to account to the public for their performance, so they often set targets or make promises annually.

- Generally, public broadcasters are given flexibility of obligations/licence conditions and are not faced with extensive and onerous conditions on programme quantity and specificity. Where there is specificity, this is negotiated and agreed by the regulator/government and the public broadcaster.
- There is an approach of building consensus between the

board, stakeholders, parliament and regulator on the roles and responsibilities of the public broadcaster, and achievement of the public mandate.

- Public consultation by the public broadcaster is given high priority by governments and regulators, and this assists in ensuring that the broadcaster is responsive to the needs and interests of the public.

In South Africa, this unique status is also reflected in the fact that the SABC is granted a statutory right to programming independence, not given to other broadcasters.

The SABC's unique status is already reflected in its existing licence conditions which were renewed in March 2004. Despite the protests by commercial operators and other groups, contained in the representations on the section 22 application, none of these parties articulated their concerns about the SABC's licences during the renewal process. Nor did the Authority make any finding that the SABC had not delivered on its mandate to date or that the existing licence conditions are insufficient to allow for such delivery.

The SABC in its application also sets out in some detail its public service delivery to date. Representations have not put forward any persuasive evidence to contest this delivery, but yet the argument is made that specific licence conditions are required to guarantee future delivery.

2.3 Conclusion

The Broadcasting Act, as amended, is the legislative conclusion of many years of discussion and consultation on the appropriate

policy framework for public broadcasting. This legislative framework was preceded by a number of policy papers and is consistent with the principles established in those papers. In the final analysis, however, it is the legislative framework and not the policy papers which inform it, with which the SABC must comply.

In its section 22 amendment application, the SABC has set out a model for this compliance, having regard to its extensive public mandate and its unique status as a public broadcaster. The representations have failed to demonstrate in what respect this model is out of keeping with the policy framework for public broadcasting. The SABC maintains that it is fully consistent with this framework.

3 Legal context

3.1 Introduction

3.1.2 In paragraph 1.4 of its submissions, e.tv submits that in evaluating the SABC amendment application, ICASA is obliged to have regard to certain legislative provisions. The legislative provisions there set out do not include section 22, or section 29 of the Broadcasting Act by way of specific reference. There is a general reference to *"the provisions set out at Chapter IV of the Broadcasting Act relating to public service broadcasting."*

3.1.3 It is submitted that in so doing e.tv has misdirected itself concerning the essential thrust of the amendment application as prescribed in section 22(1) of the Broadcasting Act.

3.1.4 The licence amendment application has a very particular statutory context. It is that the amendment applications have been necessitated by the new section 22 of the Broadcasting Act, 4 of 1999, introduced in terms of the Broadcasting Amendment Act, 64 of 2002.

- 3.1.5 That section requires that the SABC makes application for "such amendments" to its existing licences as are necessary "in order to reflect their re-organisation of the corporation in to the public service division and the commercial service division and its related obligations in terms of this Act and the IBA Act."
- 3.1.6 There can be little doubt that ICASA has jurisdiction, in the present proceedings, to consider only such amendments by the SABC which are brought in terms of section 22(1) of the Act; and that, in turn, is limited to an application to amend the existing licences, only to the extent that is necessary in order, by means of such amendments, to reflect their re-organisation of the SABC, and its "*related*" obligations.
- 3.1.7 Before the amendments effected by the Broadcasting Amendment Act no. 64 Of 2002, section 9(1) of the Broadcasting Act, 4 of 1999, provided that the SABC had to consist of two separate operational "*entities*", being a public service, and a commercial service.
- 3.1.8 After its amendment, section 9 provides that the SABC must consist of two separate operational "*divisions*", namely a public service "*division*", and a commercial service "*division*".
- 3.1.9 Before the amendment, section 9(2) provided: "The public and commercial services of the Corporation must be separately administered." After the amendment, section 9 (2) provides: "The public and commercial service divisions must be separately administered and a separate set of financial records and accounts are to be kept in respect of each such division."
- 3.1.10 Plainly the application for the licence amendment application is required to deal with the change within the

SABC of its public service, to a public service division; its commercial service to a commercial service division; and the requirement that now, as distinct from before, a separate set of financial records and accounts are to be kept in respect of each of these two divisions.

3.2 **The scope of section 22**

3.2.1 The scope of the application is expressly limited by the terms of section 22(1) of the Broadcasting Act. It is not a general application for a new licence. Nor is it a general application for the amendment of licensing conditions. This application is restricted in its terms to being one for “**necessary**” amendments to the existing licences in order to reflect the statutorily required reorganisation of SABC into two divisions. The changes that may be sought in an application under this provision are those that are required by the situation. In other words without them the separation between the two divisions will not be reflected in the SABC’s licences. What this means is that the application contemplated by section 22 is not intended to deal with related or incidental or merely potentially beneficial matters. It must be confined to those changes that a separation between the two divisions demands.

3.2.2 The notion that the application for amendment is limited in this fashion is similarly reflected in the provisions of section 22(2) of the Broadcasting Act. Whilst that makes the provisions of the Independent Broadcasting Authority Act (the IBA Act) applicable to the application that is qualified by the emphatic word of reservation “but” and goes on to provide 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.”

3.2.3 In other words the powers of the Authority to impose licence conditions are limited in precisely the same language as the obligation of the SABC to apply for amendments to its existing licences.

3.2.4 When one relates that back to the application for amendment of the existing licences and the power of the Authority to impose appropriate licence conditions one sees that the application for amendment of the licence and any conditions imposed will revolve around ensuring that the SABC licences adequately reflect the statutory requirement in section 9 of its operations being divided into two divisions that are to be administered separately.

3.2.5 The licences must simply reflect what the statute in any event requires. Of course if there are provisions in the existing licences that are incompatible with such a division then it would be necessary to amend the licences to remove them or alter them in a manner that would render them compatible with the requirements of the statute, which in our view is not the case.

In either event the need for amendment cannot be taken to provide the occasion for a complete review and revision of the SABC’s licences by the Authority.

3.2.6 Section 22(2), however, is concerned with the situation where the Authority seeks to impose additional conditions

over and above the amendments sought by the SABC. It may only do so where it believes that the amendments proposed by the SABC do not go far enough to reflect the requisite purpose. In our view the SABC has fully discharged with this obligation in its licence amendment application.

3.3 **Re-organisation**

3.3.1 The meaning of the word “reorganisation” as contemplated in section 22(1) 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. The underlying assumption is that the old corporation was operated and administered as a single entity. In terms of section 9 the SABC is now required to have two separate operational divisions, namely the public service division and the commercial service division and to administer these separately.

3.3.2 To achieve that result the Legislature contemplated that some levels of reorganisation of SABC would have occurred. Section 22 refers to that reorganisation, namely, the reorganisation consequent upon the division of the SABC into two separate divisions.

3.3.3 Section 9(1) contemplates that the public service division and the commercial service division will be “operational” divisions. In other words it is concerned not with the administration of SABC’s activities as a whole but solely with the operational aspects thereof. What it contemplates is that the provision of the public service, that is the service that is required to operate in terms of section 10 of the Broadcasting Act, shall for operational purposes be separated from the commercial service

which operates in terms of section 11 of the Broadcasting Act. These operational divisions are to be “separately administered” and a separate set of financial records and accounts is to be kept in respect of each such division. That does not, however, mean that the broadcasting activities of the SABC must be separated into two hermetically sealed divisions.

3.3.4 Taking the matter of separate sets of financial records by way of example, there is no reason to create two separate accounts departments. It suffices for the accounts to be kept in such a way that separate financial records and accounts may be produced in respect of each operational division. Presumably the purpose of this is to identify on the one hand what the costs are of providing the public service and on the other whether the commercial services are being run profitably. The purpose cannot be to prevent cross-subsidisation of the public service by the commercial service because section 11(1) (d) specifically provides that such cross-subsidisation is to take place.

3.3.5 What is required is that the accounts that the Board is required to keep in respect of each division sections 10(4) (a) and 11(3)(a) must be in such a form that they are capable of being audited separately from those of the other division and the SABC as a whole.

3.3.6 There are other areas of the SABC’s activities which will likewise necessarily have to remain on a consolidated basis. The legal department provides an example of this. So does the Human Resources Department. The fact that the operational activities of SABC are divided in the manner required by the Broadcasting Act does not mean that the persons employed in the different divisions are to be treated as being employed by different employers.

They will be employed by the SABC and their terms and conditions of employment will in many cases no doubt be determined by way of collective bargaining between SABC and their representative trade unions. The Broadcasting Act does not require that these activities be divided and apportioned between the divisions. All of this is clear from section 26 of the Broadcasting Act.

3.3.7 The SABC is a company and as such its management is vested in its Board constituted in terms of section 12 of the Broadcasting Act. Its day to day operations are to be dealt with by the three executive officers referred to in section 12(b). Therefore each operating division must report to the Board via the appropriate executive, who would presumably be the Chief Operations Officer and ultimately the Group Chief Executive Officer.

3.3.8 As with any organisation there must be appropriate levels of interaction between different divisions and appropriate levels of executive authority to resolve disputes, ensure decisions are taken and oversee their implementation. The executive responsibilities for co-operation and coordination between the services are vested in a functionary below the level of the Chief Operations Officer and the Group Chief Executive Officer but ultimately reporting to them, either directly or indirectly through a person in a superior position.

3.4 **The term "related obligations"**

3.4.1 Sections 22(1) and (2) go on to refer to "its related obligations in terms of this Act and the IBA Act". When one construes the language of section 22 this is something distinct from the reorganisation of the SABC into two separate divisions. The section says that the amendments to the SABC's existing licences must be

those which are necessary in order to reflect two things. The first is the reorganisation as discussed above. The second is the “related obligations” of SABC in terms of the Broadcasting Act and the IBA Act. They are not defined in section 1 of the Broadcasting Act. The “related” obligations are those obligations imposed under the Broadcasting Act and the IBA Act that relate to the reorganisation of SABC into a public service division and a commercial service division.

3.4.2

The IBA Act pre-dates the amendment to the Broadcasting Act brought about by the Broadcasting Amendment Act 64 of 2002. It is difficult to see therefore how any obligations under the IBA Act can be related to SABC’s reorganisation, bearing in mind that the obligations under the latter Act did not contemplate such a reorganisation. The IBA Act makes no reference to the division of SABC’s activities into a public service division and a commercial service division. It simply provides in section 1 under the definition of “public broadcasting service” that this means any broadcasting service provided by the old Corporation and “shall include a commercially operated broadcasting service” provided by the old Corporation. There is some difficulty therefore in seeing what obligations may be imposed by the IBA Act that are related to the reorganisation of SABC into two divisions.

3.4.3

Under the IBA Act the SABC provides a public broadcasting service, including its commercial operations, and is the holder of public broadcasting licences. There are no obligations owed by SABC under the IBA Act that relate to its reorganisation into two operational divisions

under the Broadcasting Act. It seems that the reference to this in terms of section 22 is drafting superfluous.

3.4.4 In other words the draftsmen inserted this provision *ex abundante cautela* simply to cover the situation that if there were provisions of the IBA Act that bore upon the separation of SABC's operations into two operational divisions then there should be consequential amendments to SABC's public broadcasting licence under the IBA Act in order to reflect that situation.

3.4.5 This is a well-established canon of construction that a statute should not be construed, if that can be prevented, in such a way that its provisions are superfluous, void or significant. However, the rule is not absolute and one is not entitled in the search for meaning to read into the statute some power or provision that is not there.

Commissioner for Inland Revenue v Shell Southern Africa Pension Fund 1984 (1) SA 672 (AD) at 678C-F.

As has been pointed out there are examples where words or a provision are inserted in a statute simply in order to avoid doubt.

Maphosa v Wilke en andere 1990 (3) SA 789 (T) at 799B-D.

3.4.6 It seems that these words were simply inserted to ensure that if there is a provision of the IBA Act that bears upon the situation of separating SABC's activities into two divisions then consequential amendments to SABC's licence will have to be made to accommodate that.

However, there does not appear to be any provision in

the IBA Act that has such an effect.

3.5 **The Process**

3.5.1 Reverting to the procedure that must be followed in regard to the amendment of the SABC's licences contemplated in terms of section 22 it is expressly provided in section 22(1) that SABC must apply to the Authority for such an amendment. Of course, there is nothing in the IBA Act that deals with an amendment of a licence in these circumstances. For example the provisions of section 52(1) of the IBA Act contemplate amendments to licences in circumstances far removed from those under section 22 of the Broadcasting Act. It is for that reason that section 22(2) provides that the relevant provisions of the IBA Act apply to the application "with the necessary changes". The purpose of that is to make the procedures contemplated under section 52 applicable to the application for amendment without the Authority being constrained by the provisions of section 52(1) in its consideration of the application. That consideration must take place squarely within the framework and subject to the constraints provided by section 22 of the Broadcasting Act.

3.5.2 The SABC's licence amendment application of its broadcasting licences, is made in terms of section 52(1) (c) of the Independent Broadcasting Authority Act, 153 of 1993.

3.5.3 That sub-section provides as follows:

"52 Amendment of Broadcasting Licences

(1) A broadcasting licence may be amended by the Authority only –

- (a) ...
- (b) ...
- (c) *if requested thereto by the broadcasting licensee, and then only if and insofar as the proposed amendment –*
 - (i) *does not militate against orderly frequency management;*
 - (ii) *will not prejudice any other broadcasting licensee; and*
 - (iii) *will not be inconsistent with the provisions of this Act or with any agreement or convention contemplated in paragraph (b); ..."*

3.6 **Specific licence conditions**

3.6.1 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."

3.6.2 This submission does not address the basis on which the amendment application is made. It is a submission which would serve to enhance e.tv's competitive edge but would deny the unique position in which the SABC functions: in particular, even the SABC's commercial activities, are obliged to comply with sub-sections 11(1) (b) and 11(1) (d).

3.6.3 The submission made by e.tv contends, not surprisingly,

that ICASA should be imposing specific licence conditions that give detailed programming content to the SABC's statutory obligations in terms of sections 9 and 10 of the Broadcasting Act.

3.6.4 The representation by e.tv resists vehemently the notion that the SABC is in a unique statutory position. The proposal on detailed licence conditions that ought to be imposed on the SABC is inconsistent with the provisions of the Broadcasting Act.

3.6.5 This approach is not in accordance with the Broadcasting Act, the statutory instrument which ICASA is obliged to apply.

3.6.6 The main features of the structure established for the SABC in terms of the Broadcasting Act is as follows:

3.6.6.1 First, a Charter for the SABC is laid down in the Broadcasting Act. This is not provided for in respect of any of the other broadcasters. The Charter exacts from the SABC an extensive range of detailed obligations. These range from the range of programming that is to be provided (section 6(4)(a) – (d)), to a host of objectives (section 8) which include the obligation to provide services other than broadcasting services, to provide and disseminate information in a wide variety of media, to establish and maintain libraries and archives, to organise concerts and shows; to collect news and information from all over the world, to carry out research and development work, and amongst other things to develop and extend the SABC's services beyond the borders of South Africa.

3.6.6.2 No such obligations are imposed on any other

broadcasters.

- 3.6.6.3 Second, ICASA is obliged not only to monitor the SABC in relation to its compliance with the statutory Charter; it is also obliged to enforce compliance (section 6(2)).
- 3.6.6.4 No such extensive degree of statutory invasion exists in respect of any of the other broadcasters.
- 3.6.6.5 Third, the SABC is obliged to prepare and submit written policies dealing with seven different matters to ICASA that will show how the SABC intends complying with ICASA's code of conduct (section 6 (5) (a)).
- 3.6.6.6 No such statutory obligation exists in respect of the other broadcasters.
- 3.6.6.7 Fourth, the statutory mechanism established in terms of the Act for the control by ICASA of a wide range of the SABC's objectives by means of scrutiny and review of the written policies to be prepared and submitted to ICASA, is unique.
- 3.6.6.8 No such statutory mechanism exists in regard to the other broadcasters.
- 3.6.6.9 Fifth, the SABC is obliged to provide suitable means for regular inputs of public opinion on its services, and in addition to ensure that such public opinion is given due consideration (section 6(7)).
- 3.6.6.10 No such inroad exists in respect of any of the other broadcasters.
- 3.6.6.11 Sixth, in addition to providing written policies to ICASA, the SABC is obliged also to provide a code of practice which, being part of its Charter, is subject to monitoring and enforcement by ICASA

(section 6(8)).

- 3.6.6.12 Seventh, although the SABC is obliged in terms of section 11(1) (d) of the Broadcasting Act to subsidise its public services by means of its commercial services, this may not occur otherwise than on an arms length commercial basis (section 8A (13) – (15) of the Broadcasting Act).
- 3.6.6.13 No such financial constraint exists in regard to the commercial broadcasting services to be provided by the other broadcasters.
- 3.6.7 This extensive range of detailed obligations is imposed on the SABC as one juristic entity, and not on either one or the other of the two operational divisions specifically.
- 3.6.8 Whether the SABC discharges these obligations through its commercial service division or its public service division, or both, does not concern the legislature: it exacts simply that the SABC discharges those obligations.
- 3.6.9 It follows therefore that there can be little doubt that the position of the SABC is statutorily unique. A specific structure is established for it, which does not exist in respect of the other broadcasters, and whereby a wide variety of statutory obligations in the public interest is imposed on it. The Broadcasting Act establishes also a mechanism whereby the SABC's compliance with the obligations is monitored and enforced by ICASA.
- 3.6.10 On the other hand it is plain that the SABC is obliged, in pursuing its statutory obligations and objectives, to act on the basis of programming independence as provided for in section 6(3) of the Broadcasting Act.
- 3.6.11 The notion advanced by e.tv that the SABC licence

conditions ought to be imposed to the extent of specificity that applies in respect of the other broadcasters, is accordingly not only inconsistent with the structure established for the SABC in terms of the Broadcasting Act; it also renders it impossible for the SABC to discharge its statutory obligations.

3.6.12

From paragraph 4.2.8 onwards, to paragraph 4.2.26, e.tv advances the argument that ICASA is statutorily entitled to impose licence conditions on the SABC; that being so, ICASA is obliged to impose detailed licence conditions on the SABC; and that despite the fact that the SABC is obliged to comply with the Charter established for it in terms of the Broadcasting Act, and despite the fact that ICASA is obliged to monitor and enforce compliance with its Charter by the SABC, and despite the fact that the SABC must prepare and submit to ICASA policies that will ensure compliance with ICASA's code of conduct, and despite the fact that the SABC must develop a Code of Practice that ensures that the services and its personnel complies with certain standards laid down in the Broadcasting Act, nonetheless ICASA must yet go further and, in addition, determine the detailed licence conditions that would give effect to the statutory obligations imposed upon the SABC.

3.6.13

This approach is fundamentally and conceptually flawed. If it were correct, the detailed provisions of the Broadcasting Act whereby obligations imposed upon the SABC, and whereby a Charter is established for the SABC with monitoring authority vested in ICASA, would all be completely unnecessary.

3.6.14

It would likewise have been unnecessary to have imposed upon the SABC the detailed statutory obligations that are

to be found in the Broadcasting Act. The legislature could then simply have empowered ICASA to impose the detailed licence conditions for which e.tv contends in paragraphs 4.2.9.1 to 4.2.9.9 (by way of example) in its submissions.

3.6.15

This point is perhaps best illustrated by referring to paragraph 4.2.10.4 of e.tv's submission. There it is contended that section 11(1) (b) of the Broadcasting Act states that the SABC must comply with the values of the public broadcasting service in the provision of programmes and service; and that from this it follows that it is for ICASA to determine the types of programmes that are required to be broadcast by the SABC, the minimum number of minutes of these programmes each day, and the time periods for broadcast.

3.6.16

This is absurd. The very section imposes the obligation on the SABC to comply with those values. If e.tv were correct, the section would have provided that it is for the SABC to comply with the licence conditions imposed by ICASA, and that ICASA has the power and the obligation to impose upon the SABC licence conditions requiring of the SABC to comply with the values of the public broadcasting service in the provision of programmes and service.

3.7

Competition

3.7.1

Other sections of e.tv's submissions illustrate the same misconception under which it labours; that there is room at this application stage, i.e. for an amendment of existing licences, to raise the question of fair competition between licensees, an issue which is referred to in section 52(1)(d) of the Independent Broadcasting Authority Act.

That sub-section provides as follows:

"52 Amendment of broadcasting licences

(1) A broadcasting licence may be amended by the Authority only –

(b) ...

(d) to ensure fair competition between licensees, to comply with such of the terms, conditions and obligations as the Authority may at that time be generally applying to all licences issued in the same category."

3.7.2 This is not the basis upon which the present application is being made; if it were, then ICASA would have been required to set out those respects in which it is contended (by whoever) that the SABC licence conditions do not ensure fair competition between licensees in a particular category, so that the SABC could then pertinently address those.

3.7.3 Instead, the application is being made in terms of section 52(1) (c), quoted above, and read in the context of section 22, is limited to the question of the re-organisation of the SABC.

3.8 Constitutional matters

3.8.1 In section 4.2 of its submission e.tv contents that the SABC's arguments on its programming independence are absurd. The SABC maintains its view as articulated in its amendment application:

"In short, the rights of the SABC to enjoy freedom of expression and journalistic, creative and programming independence as referred to in section 6(3), and more importantly as enshrined in section 16(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 in this context is a regulator; it receives and reviews the written instruments by means of which the SABC itself complies with its own obligations, and enjoys its own freedoms. The written instruments are, as set out above, the policies, the licence conditions, and the code of practice. But it is the SABC itself that determines the content of these instruments."¹

3.8.2 These editorial policies are intended to enable ICASA to monitor and enforce compliance by the SABC of its Charter. With the statutory obligations imposed on the SABC by the Broadcasting Act sight must not be lost that the SABC in the pursuit of its objectives and the exercise of its powers in terms of the Act enjoys freedom of expression and journalistic, creative and programming independence. An attempt on the part of ICASA to prescribe programming conditions would not only compromise the SABC's journalistic, creative and programming independence, but would also constrain the SABC in carrying out its statutory obligations.

3.8.3 With regards to the argument that the SABC is seeking to undermine the Authority's power to regulate broadcasting as provided for in the constitution the SABC's response is detailed below.

3.8.4 ICASA is juristic person established in terms of Section 3 of the Independent Communications Authority of South Africa Act No. 13 of 2000 ("ICASA Act").

¹ Page 43 Application for amendment for SABC licences in terms of section 22 of the Broadcasting Act.

3.8.5 In terms of Section 3 (3) ICASA is a wholly independent body subject only to the Constitution and the law, and must be impartial and must perform its functions without fear, favour or prejudice.

3.8.6 In terms of Section 3(4) ICASA must function without any political or commercial interference. A careful consideration of the provisions of Section 3 of the ICASA Act demonstrates that the independence contemplated therein in relation to the discharge by ICASA of its obligations, or the performance of its functions relates to political and commercial interference. It is also clear from a reading of that section that whatever it does in the performance of its functions is subject only to the Constitution and the law. Consequently, ICASA, in the performance of its functions cannot act outside the provisions of either the Broadcasting Act, the IBA Act or the Constitution.

3.8.7 It is our considered view that notwithstanding its independence, in dealing with the SABC, ICASA is enjoined to recognise the unique statutory position in which the SABC is placed, and therefore do what it is required to do in terms of Section 6 (2) of the Broadcasting Act. In relation to the Section 22 Amendment Application, ICASA's powers may only be exercised in terms of what is contemplated in Section 22.

4. Responses to other issues

4.1 SABC Obligations

E.tv alleges on p15 and 16 of its representation that its obligations are greater than the SABC. This is untrue as is detailed below. The collective effect of the SABC's legislative obligations, licence conditions, editorial policy commitments and local content quotas, with which it currently complies, means that the SABC's public service obligations are far in excess of what is required of e.tv.

Public Service obligation	E-TV's obligation	SABC 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).	<p>Legislative obligation</p> <p>Section 10(1) (g) of the Broadcasting Act provides that the Corporation must strive to offer a broad range of services targeting, particularly, children, women, the youth and the disabled.</p> <p>Licence obligation</p> <p>Clause M of the SABC's General Terms, Conditions and Obligations states that the licensee must ensure that its broadcasting services, viewed collectively, provide enlightening, informative, educational and entertaining programming which is reasonably responsive to the broadcasting needs of the people of South Africa.</p> <p>Editorial policy commitments</p> <p>The following commitments on children's programming are contained in the SABC's editorial policies:</p> <ul style="list-style-type: none"> • To provide programmes for children on radio language services that specifically cater for their needs. • To broadcast on television a range of top quality educational, informative and entertaining programmes for children of different age groups that are responsive to their language needs. • To meet the needs of all our audience segments. This extends to young and old, urban and rural in all the provinces, speakers of all the official languages, and people of every religious persuasion. It is obviously impossible for the SABC to please everyone all the time, but we endeavour to offer a wide range of information, education and

Public Service obligation	E-TV's obligation	SABC obligation
Information programming	19 hours of information programming per week including 2 hours in prime time.	<p>Legislative obligation</p> <p>Section 6(4) of the Broadcasting Act states that the Corporation must encourage the development of South African expression by providing, in South African official languages, a wide range of programming that offers a plurality of views and a variety of news, information and analysis from a South African point of view.</p> <p>Section 6(8) of the Broadcasting Act states that the Corporation must develop a Code of Practice that ensures the services and personnel comply with the rights of all South Africans to receive and impart information and ideas.</p> <p>Section 8(l) of the Broadcasting Act states that it is an objective of the Corporation to collect news and information in any part of the world.</p> <p>Section 10(1)(d) of the Broadcasting Act states that the public service provided by the Corporation must provide significant news and public affairs programming which meets the highest standards of journalism, as well as fair and unbiased coverage, impartiality, balance and independence from government, commercial and other interests.</p> <p>Licence obligation</p> <p>Clause M of the SABC licence states that, viewed collectively, its broadcasting services must provide enlightening, informative, educational and entertaining programming which is reasonably responsive to the broadcasting needs of the people of South Africa.</p> <p>Editorial policy commitments</p> <p>The following commitments on information programming are contained in the SABC's editorial policies:</p> <ul style="list-style-type: none"> • To provide comprehensive radio news and information programming in all the official languages.

Public Service obligation	E-TV's obligation	SABC obligation
News	2 hours of News per day including ½ hour prime time.	<p>Legislative obligation</p> <p>Section 6(4) of the Broadcasting Act states that the Corporation must encourage the development of South African expression by providing, in South African official languages, a wide range of programming that offers a plurality of views and a variety of news, information and analysis from a South African point of view.</p> <p>Section 6(5)(i) of the Broadcasting Act states that the SABC must develop a news editorial policy.</p> <p>Section 6(8)(f) of the Broadcasting Act states that the Corporation must develop a Code of Practice that ensures the services and personnel comply with a high standard of accuracy, fairness and impartiality in news and programmes that deal with matters of public interest.</p> <p>Section 8(l) of the Broadcasting Act states that it is an objective of the Corporation to collect news and information in any part of the world.</p> <p>Section 10(1)(d) of the Broadcasting Act states that the public service provided by the Corporation must provide significant news and public affairs programming which meets the highest standards of journalism, as well as fair and unbiased coverage, impartiality, balance and independence from government, commercial and other interests.</p> <p>Editorial policy commitments</p> <p>The following commitments on news are contained in the SABC's editorial policies:</p> <ul style="list-style-type: none"> ● To screen television news bulletins in all the official languages and to be sensitive to audience availability in scheduling news programmes. ● To provide comprehensive radio news and information programming in all the official languages.

Public Service obligation	E-TV's obligation	SABC obligation
Languages in News & Information programming	2 hours per week of News & Information programming in languages other than English (with preference to African languages).	<p>Legislative obligation</p> <p>Section 6(4) of the Broadcasting Act states that the Corporation must encourage the development of South African expression by providing, in South African official languages, a wide range of programming...</p> <p>Section 6(5)(vi) of the Broadcasting Act states that the SABC must develop a language policy.</p> <p>Section 6(8)(f) of the Broadcasting Act states that the Corporation must develop a Code of Practice that ensures the services and personnel comply with the constitutional requirement of equitable treatment of all official languages.</p> <p>Section 10(1)(a) of the Broadcasting Act states that the public service of the Corporation must make services available to South Africans in all the official languages.</p> <p>Section 10(1)(b) of the Broadcasting Act states that the public service of the Corporation must reflect both the unity and diverse cultural and multi-lingual nature of South Africa and all of its cultures and regions to audiences.</p> <p>Section 10(1)(c) of the Broadcasting Act states that the public service of the Corporation must strive to be of high quality in all the languages served.</p> <p>Licence obligation</p> <p>Clause L of the SABC licence states that the licensee must ensure that its broadcasting services, viewed collectively, broadcast in all official languages, and take into account the cultural and spiritual diversity of the South African people and of the Constituent regions of the Republic and local communities.</p> <p>Clause 2 of the SABC 1 Licence Conditions provides that the channel should broadcast predominantly in the Nguni languages (isiZulu, isiXhosa,</p>

Public Service obligation	E-TV's obligation	SABC obligation
<p>Languages in programming other than News & Information</p>	<p>4 hours per week of languages other than English (with preference to African languages) in programmes other than News & Information.</p>	<p>Legislative obligation</p> <p>Section 6(4) of the Broadcasting Act states that the Corporation must encourage the development of South African expression by providing, in South African official languages, a wide range of programming....</p> <p>Section 6(5)(vi) of the Broadcasting Act states that the SABC must develop a language policy.</p> <p>Section 6(8)(f) of the Broadcasting Act states that the Corporation must develop a Code of Practice that ensures the services and personnel comply with the constitutional requirement of equitable treatment of all official languages.</p> <p>Section 10(1)(a) of the Broadcasting Act states that the public service of the Corporation must make services available to South Africans in all the official languages.</p> <p>Section 10(1)(b) of the Broadcasting Act states that the public service of the Corporation must reflect both the unity and diverse cultural and multi-lingual nature of South Africa and all of its cultures and regions to audiences.</p> <p>Section 10(1)(c) of the Broadcasting Act states that the public service of the Corporation must strive to be of high quality in all the languages served.</p> <p>Licence obligation</p> <p>Clause L of the SABC licence states that the licensee must ensure that its broadcasting services, viewed collectively, broadcast in all official languages, and take into account the cultural and spiritual diversity of the South African people and of the Constituent regions of the Republic and local communities.</p> <p>Clause 2 of the SABC 1 Licence Conditions provides that the channel should broadcast predominantly in the Nguni languages (isiZulu, isiXhosa,</p>

Public Service obligation	E-TV's obligation	SABC obligation
South African Drama	4 hours per week in Prime Time.	<p>Legislative obligation</p> <p>Section 6(4) of the Broadcasting Act states that the Corporation must encourage the development of South African expression by providing, in South African official languages, a wide range of programming that reflects South African attitudes, opinions, ideas, values and artistic creativity and that displays South African talent in education and entertainment programmes.</p> <p>Section 6(5)(iii) of the Broadcasting Act states that the SABC must develop a local content policy.</p> <p>Section 8(n) of the Broadcasting Act states that it is an objective of the Corporation to nurture South African talent.</p> <p>Section 10(1)(f) of the Broadcasting Act states that the public service provided by the Corporation must enrich the cultural heritage of South Africa by providing support for traditional and contemporary artistic expression.</p> <p>Editorial policy commitments</p> <p>The following commitments on South African drama are contained in the SABC's editorial policies:</p> <ul style="list-style-type: none"> • To broadcast top quality South African television dramas that in combination include and reflect South African languages and cultures. We also undertake to investigate innovative and creative ways of ensuring that such dramas are accessible to as wide a range of audiences as possible, such as multilingual productions, subtitling, and dubbing. • As the national public broadcaster it is our duty to encourage the development of South African expression. We therefore showcase for South African

Public Service obligation	E-TV's obligation	SABC obligation
Overall Local Content	45%	<p>Legislative obligation</p> <p>Section 6(4) of the Broadcasting Act states that the Corporation must encourage the development of South African expression by providing, in South African official languages, a wide range of programming that reflects South African attitudes, opinions, ideas, values and artistic creativity and that displays South African talent in education and entertainment programmes.</p> <p>Section 6(5)(iii) of the Broadcasting Act states that the SABC must develop a local content policy.</p> <p>Section 8(n) of the Broadcasting Act states that it is an objective of the Corporation to nurture South African talent.</p> <p>Section 10(1)(f) of the Broadcasting Act states that the public service provided by the Corporation must enrich the cultural heritage of South Africa by providing support for traditional and contemporary artistic expression.</p> <p>Editorial policy commitments</p> <p>The following commitments on Local Content are contained in the SABC's editorial policies:</p> <ul style="list-style-type: none"> • To broadcast a range of good quality local television productions. This means the television portfolio as a whole airs local content in a variety of genres and programme types, targeted at different audiences. Taken collectively across the SABC's television portfolio, this content should reflect South Africa's diversity of people, provinces, languages, cultures and religions, while also being aligned to the needs of the audience. • To broadcast good quality

In addition to the above, the SABC has obligations in a number of other areas, in which e.tv has none. These include:

- Obligation to provide significant educational programming on topics such as human rights, health, early childhood development, agriculture, culture, religion, justice and commerce.
- Obligation to advance the national and public interest
- Obligation to include national sports programming as well as minority and developmental sports
- Obligation to cater for the spiritual needs of South Africans
- Obligation to provide for the needs of the disabled
- Obligation to provide programming for youth
- Obligation to provide programming for women
- Obligation to support traditional and contemporary artistic expression
- Obligation to extend services throughout the country

4.2 Market overview

The SABC's market overview section contained in the amendment application was intended to provide a comprehensive description of the current broadcasting landscape in South Africa.

In particular, the SABC highlighted the following salient issues:

- Audience and revenue fragmentation in the broadcasting arena as new players have entered the South African media market place over recent years.
- Audience and revenue losses for the SABC, as a direct consequence of the increased competition

- Losses in audience and revenue share incurred by the SABC is characteristic of media markets worldwide which have been deregulated
- The vulnerability of the SABC, as the public services broadcaster, in the face of increased competition, due to its strong mandate obligations and heavy reliance on commercial revenue
- Additional competitive pressure on the SABC's audience and revenue generating capacity will place further strain on the SABC's ability to deliver across a number of performance areas, including mandate.
- The need for a sufficiently flexible regulatory environment that facilitates the SABC's ability to deliver on its mandate obligations and respond effectively and appropriately to competitive challenges was stressed in the Application.

4.2.1 Response to market analysis issues raised by e.tv

E.tv's response to the SABC's market overview analysis rested on three core issues; (i) audience growth rates, (ii) revenue growth and (iii) television profiles on terms of LSM.

4.2.1.1 Audience growth rates

The following issues relating to audience growth were raised in the e.tv submission (point 5.1 of the e.tv submission):

“e.tv's 24 hour audience share grew from 3.3% in January 1999 to 27% in July 2003. Since July 2003 its audience share has declined to 22.5%. During e.tv's growth phase (from 1999 to 2003), the SABC lost audience share across all channels. However, since early 2004, SABC2 and SABC1 have shown growth against e.tv's audience share (point 5.1.3 of e.tv's submission)”

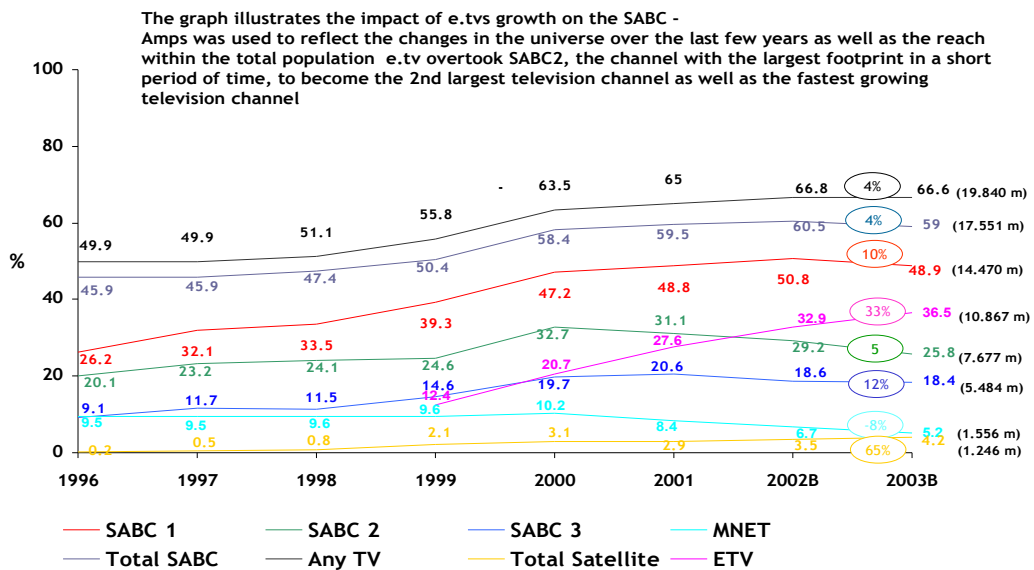
“e.tv’s prime time market share has followed a similar pattern. It grew from 4.8% in January 1999 to 22.1% in April 2003. By April 2004, it had declined to 19.2% (point 5.1.4 of e.tv submission)”

The SABC’s response to these comments is as follows:

The graph below, based on AMPS, illustrates the significant impact that e.tv has had on the television market and the SABC’s audience share since 1999. The graph also clearly shows a strong upward growth pattern for e.tv. E.tv overtook SABC2, the channel with the largest footprint in a short period of time, to become the 2nd largest television channel as well as the fastest growing television channel, with a compounded average growth rate in audiences since 1999 of 33%. By comparison, total television viewership only grew by 4%, and total SABC tracked this growth equally at 4%.

True impact of e.tv’s growth on SABC channels

Average Daily Reach of Television Audiences



Source: AMPS 1996-2003B

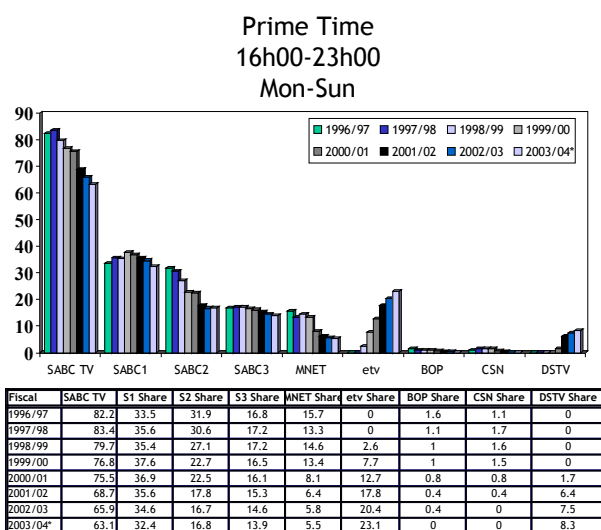
Note: This graph illustrates the reach (% of people who view television daily), and has taken account of increases in the adult universe over this period.

On the issue of television share, there has been a significant dip in the SABC’s television share over the past five years as a result of the competitive

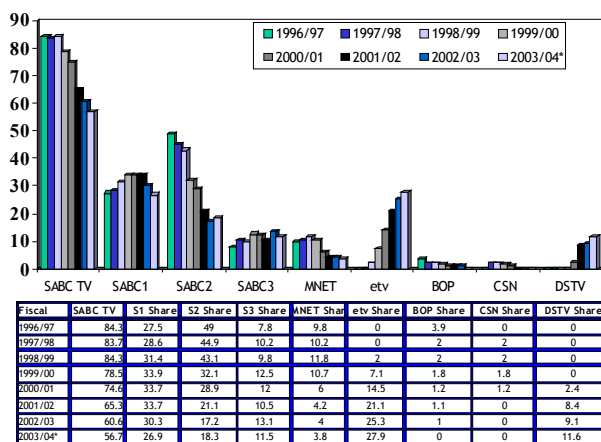
pressure brought to bear by deregulation. This is clearly illustrated in the charts that follow which draw on TAMS trended data. SABC's prime time audience share has decreased from 79.7% recorded in the 1998/1999 fiscal to 63.1% in the 2003/2004 fiscal. E.tv has enjoyed a strong increase in its prime time share, almost doubling its share from 12.7% in 2000/2001 to 23.1% in 2003/2004.

An analysis of day time share shows a similar trend with the SABC's share dropping from 84% in the 1998/1999 fiscal to 56.7% in the 2003/2004 fiscal. Once again, e.tv experienced significant growth with its share moving from 14.5% in 2000/2001 to 27.9% in 2003/04.

The charts below clearly illustrate e.tv's strong increase in television share and the corresponding decline in SABC's share.



Day Time
06h00-16h00 Mon to Sun



4.2.1.2 Revenue growth rates

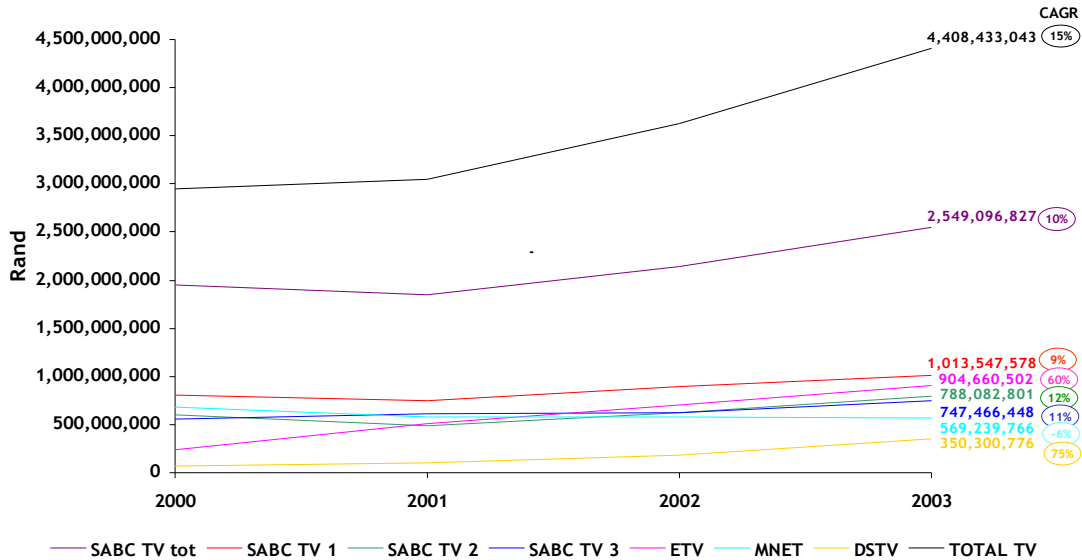
With reference to advertising revenue, e.tv's submission makes the following points:

“Television advertising revenue has grown in double digits over the past two years” (point 5.2.1 of e.tv's submission)

Whilst the SABC acknowledged that the television market has grown in double digits over the last two years, the SABC also understands that 2001 was characterised by poor media market conditions, and negative revenue growth. Therefore, the SABC asserts that by using 2001 as the base year, e.tv overstates the (double digit) growth in 2002 and 2003. The SABC believes that for a more accurate assessment of the television market, it would be necessary to assess the compounded average growth rate for revenue from 2000. This analysis is set out in the graph below:

The graph below shows the compound average growth rates for television revenue. Total TV grew by 15%, SABC TV grew by only 10%, while e.tv enjoyed a growth rate of 60%.

TV Revenue Performance (Excluding Self Promotion)



Source: Adex

In point 5.2.2 of their submission, e.tv also contends the following:

“SABC’s television advertising revenue has also grown by double digits over the past two years”

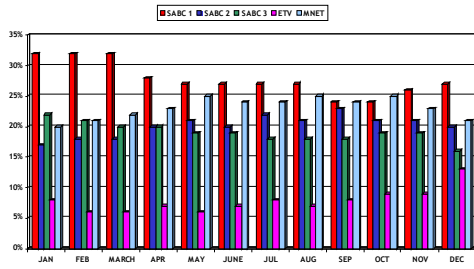
While SABC does not dispute this growth figure tabled by e.tv, it is important to note that this growth is below that experienced by e.tv over this period. As shown in the previous graph SABC’s growth rate in terms of revenue over the period from 2000 to 2003 was 10% over this period, while e.tv enjoyed an increase of 60%. If this growth for e.tv continues at the same pace over the next few years, the gap between e.tv revenue and SABC revenue will continue to narrow.

Although the SABC had the lion's share of revenue, an analysis from January to December 2000 up to January to May 2004 indicates a drop in the SABC's share of revenue from as early as December 2000. E.tv's impact on the SABC's share of revenue grew steadily from Dec 2000 and continues to impact on the SABC's revenue performance. An illustration of this is that, in terms of revenue, e.tv began outperforming SABC2 from 2001 and equaled M-Net's revenue share. In 2002 the impact of e.tv's revenue growth is mainly on SABC2, SABC3 and M-Net. In June 2002, e.tv outperformed all channels due to the flighting of the Soccer World Cup on the channel which drew significant revenue support. In 2003, e.tv continued to grow its revenue, impacting largely on SABC1. This growth pattern continues in 2004 and is set to continue in the future.

In order to clarify the issue of revenue share, the SABC has mapped out revenue patterns for e.tv and the SABC since 2000. This analysis, presented in the series of charts that follow show strong ongoing revenue growth for e.tv at the expense of the SABC and the narrowing of the gap in terms of revenue share:

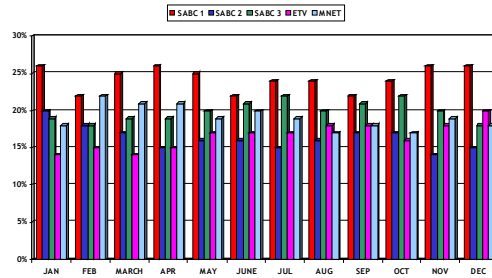
Share of Revenue

Jan- Dec 2000



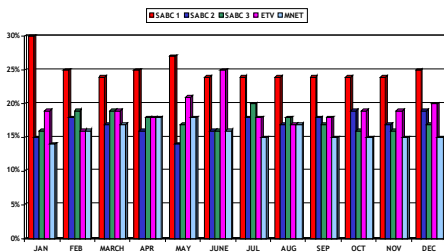
Share of Revenue

Jan- Dec 2001



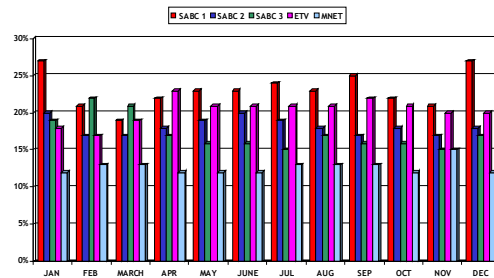
Share of Revenue

Jan- Dec 2002



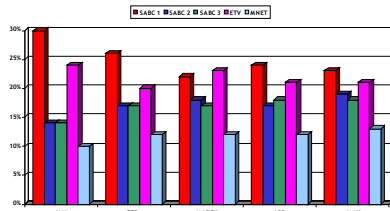
Share of Revenue

Jan- Dec 2003



Share of Revenue

Jan- May 2004



Source: AdEx AcNielsen

The SABC notes e.tv's acknowledgement of the fact that the SABC's share of adspend has fallen over the past few years

“The SABC's share of total television adspend has decreased from 71% in 1999 to 58% in 2003. However this must be viewed in the context that its actual revenue has grown significantly since 2002. E.tv's share of revenue remains low in comparison (point 5.2.4 of e.tv's response)”

The SABC feels that it is necessary to point out that an increase in the actual revenue for SABC in recent years is reflective of the growth in advertising expenditure over this period and is not specific to the SABC. Indeed, e.tv experienced a significant rise in revenue over this period, which was way ahead of the total television growth trend (as shown earlier in this section, e.tv's average compounded growth was 60%, compared to the total television figure of just 15%).

With reference to e.tv's revenue delivery, it is relevant to refer to the recently released HCI financial statements which demonstrate the profitability cycle e.tv is enjoying:

"As reported in the interim report to shareholders, the restructuring of the capital of Sabido Investments (Pty) Limited, e.tv's holding company, has been completed and HCI now effectively owns approximately 66% of e.tv.

Continued growth in revenue during the year and stable operating costs have enabled the station to record its first profit since inception. The station had contributed R21,02 million to the group headline profit.

– having declared headline profit of R21.7m for last FY"

[Source: Hosken Consolidated Investments Limited - Reviewed Group Results For The Year, 28 June 2004]

E.tv also makes reference to the SABC's increasing power ratio.

"Despite the decline in SABC audiences over the past 5 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" (point 5.2.6 of e.tv's response)

"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 5 years, e.tv achieved only an 80% power ratio in 2003, down from 86% in 2001” (point 5.2.7).

E.tv states that one factor that helps to explain the improvement of its power ratio is that:

“the SABC has operated as a single entity in selling airtime to advertisers. This has created a virtual monopoly trading position for the SABC” (point 5.2.9 of e.tv’s response)

During the period from April 2003 to April 2004, SABC1, the channel with the highest audience share had an average power ratio of 77. This is due to the channel attracting mainly lower LSMs. The average power ratio clearly indicates that SABC1 is unable to convert its audiences into revenue. Although SABC2 and SABC3 reflect a healthy power ratio, SABC1’s inability to balance its revenue and audience share places the channel and the SABC in a vulnerable position in terms of revenue.

Irrespective of SABC1’s low power ratio, the SABC has managed to grow revenue by gaining business confidence in the market and improving their business practices. This business practice and the strong positioning of the three SABC platforms servicing the full spectrum of target markets as required by its public and trade stakeholders has led to the improved revenue performance.

The tables that follow set out the revenue share and audience share for all television channels. It is clear that SABC1 and SABC2 have the lowest power ratios which is a factor of their audience profiles which bias towards the lower LSM’s.

SABC1

Month	Share of Audience	Share of Revenue	Power Ratio
Apr-03	31	22	72
May	31	23	75
June	31	23	74
July	30	24	82
Aug	30	23	77
Sept	31	25	81
Oct	31	22	71
Nov	32	21	67
Dec	30	26	85
Jan	29	30	102
Feb	33	26	80
Mar	33	22	66
Apr-04	33	24	73
Average	31	24	77

SABC2

Month	Share of Audience	Share of Revenue	Power Ratio
Apr-03	17	18	105
May	17	19	113
June	17	20	117
July	17	19	111
Aug	17	18	105
Sept	17	17	103
Oct	18	17	99
Nov	17	17	97
Dec	18	18	99
Jan	17	14	81
Feb	17	17	97
Mar	18	18	101
Apr-04	18	17	97
Average	17	18	102

SABC3

Month	Share of Audience	Share of Revenue	Power Ratio
Apr-03	13	17	131
May	12	16	138
June	12	16	134
July	12	15	126
Aug	12	17	137
Sept	14	16	117
Oct	12	16	132
Nov	13	15	119
Dec	14	17	124
Jan	15	14	97
Feb	13	17	134
Mar	13	17	134
Apr-04	14	18	133
Average	13	16	127

e.tv

Month	Share of Audience	Share of Revenue	Power Ratio
Apr-03	26	23	89
May	25	21	82
June	25	21	84
July	26	21	82
Aug	26	21	84
Sept	25	22	88
Oct	24	21	88
Nov	24	20	85
Dec	25	20	79
Jan	24	24	99
Feb	23	20	86
Mar	22	23	103
Average	24	21	88

Mnet

Month	Share of Audience	Share of Revenue	Power Ratio
Apr-03	5	12	269
May	5	12	264
June	5	12	267
July	5	13	245
Aug	5	13	256
Sept	5	13	255
Oct	5	12	243
Nov	5	15	296
Dec	5	12	274
Jan	5	10	205
Feb	6	12	212
Mar	6	12	224
Apr-04	6	12	197
Average	5	12	247

Source: TAMS/AdEx

4.2.1.3 LSM Profiles

E.tv makes a number of points regarding LSM profiles, including the following:

“e.tv’s share of the upper income (LSM 7-10) 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 7-10 audience is equal to the prime time LSM 7-10 share of SABC1 and SABC3, and is significant lower than that of SABC2. (point 5.1.5 of e.tv submission)”

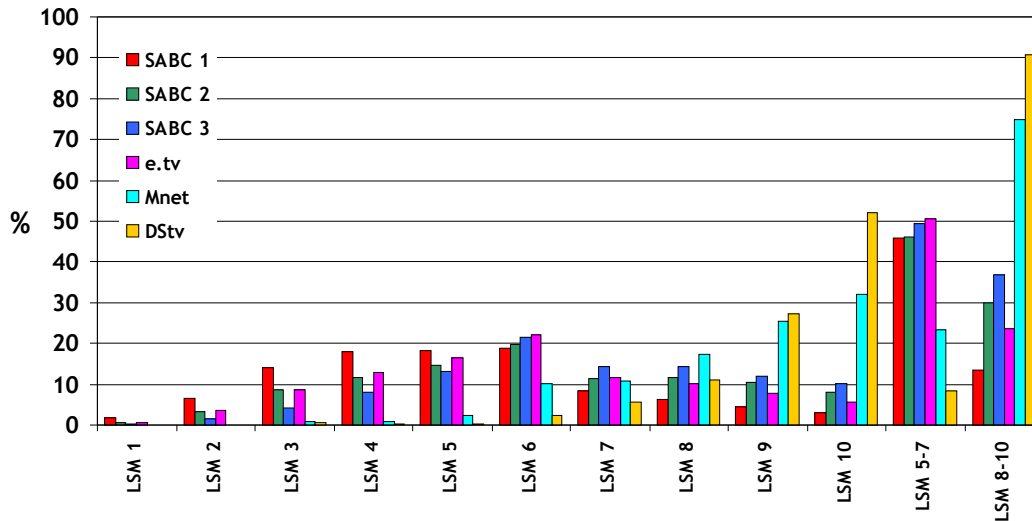
“Simultaneously, e.tv’s share of the lower income (LSM 5 to 6) audience has increased and is significantly higher than both SABC2 and SABC3. (point 5.1.6 of e.tv’s submission)”

”e.tv share of the lowest income groups – LSM 1 to 4 – is higher than both SABC2 and SABC 3” (point 5.1.7 of e.tv’s submission)”

“e.tv’s viewership profile is dominated by low-income viewers. 65% of e.tv;s audience consists of LSM 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” (point 5.1.8 of e.tv’s submission)

The SABC’s response on this issue of LSMs is that the SABC, and in particular SABC 1, has the largest proportion of lower LSM viewers, especially LSM’s 1 to 5. Commercial broadcasters, such as e.tv and MNET / DSTV target the more lucrative upper LSM markets, as is demonstrated in the graph below:

AUDIENCE PENETRATION INTO LSM GROUPS Adults



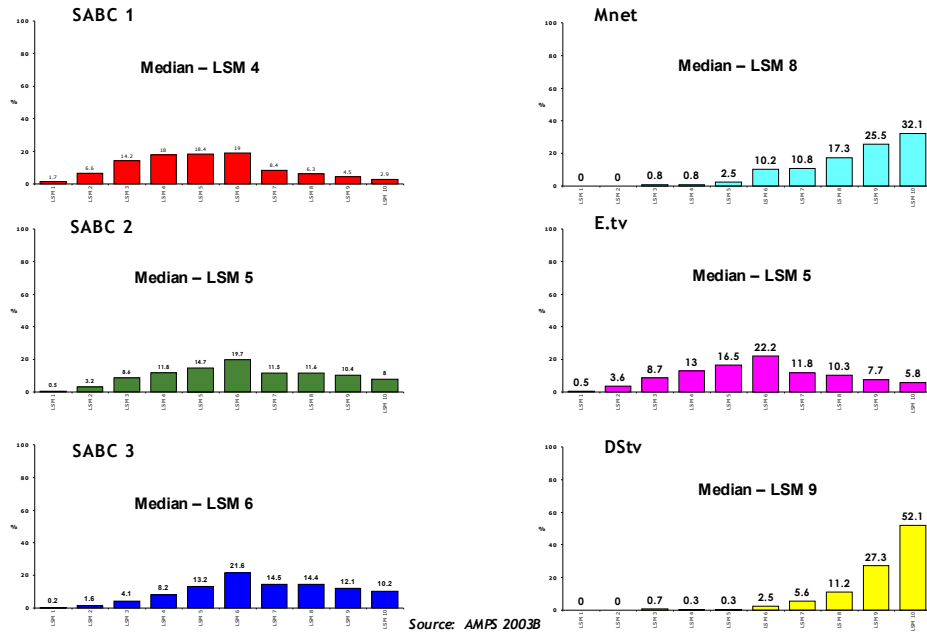
Although e.tv has a presence in the lower LSMs,
SABC 1's penetration in this market is higher

*e.tv assumption that they have a higher penetration in the lower LSMs - untrue

Source: AMPS 2003B

It is inaccurate to exclude SABC1 from any analysis of the SABC's LSM bias, as e.tv's response does, as SABC1 significantly targets the LSM 1 to 5 Market. This can also be demonstrated by comparing the median LSM.

Viewership profile by channel



It is clearly evident that the commercial broadcasters target higher LSM groupings, whilst the SABC, and in particular SABC1 is significantly biased towards the lower LSMs. The median LSM positions clearly illustrate that SABC1 is positioned in the lower LSMs 1-4, the mid point being 4. E.tvs mid point of LSM 5 indicates its appeal in the emergent market. SABC2s mid point is the same as e.tv, with SABC 3 at LSM 6. This clearly indicates that the SABC mainly targets the lower to middle LSMs across the 3 platforms and that the SABC cannot be compared to M-Net and Dstv which target the upper LSM spectrum

4.3 Re-organisation

On page 55 – 59 e.tv lays out an argument on SABC alleged unfair competitive practices related to the operation of the PBS and CBS divisions.

Many of the provisions relating to reorganization had to be complete on or before the date of conversion, which was 01 October 2003. The SABC is pleased to report that it has complied with all these provisions.

Among the most important steps taken by the SABC has been the implementation of an internal transfer pricing policy, which provides for an arms length commercial relationship between the PBS and CBS divisions.

The nature of the broadcasting business determines the need for a diverse range of services, the bulk of which are provided internally – primarily by the Technology, News and Sport divisions and Group Services.

The SABC has a decentralised structure by which business unit managers are expected to make local decisions and are held responsible for the performance of their units.

When a business unit renders a service internally to another business unit, it is important for some gain to be reflected in the economics of the service provider and some cost to be reflected in the unit receiving the service.

An effective transfer pricing/internal charge-out policy is providing the framework for calculation of charges for internal services in a manner that is simple and transparent, and that results in driving behaviour that optimises overall corporate value.

4.4 Structure

On page 61 of the e.tv submission e.tv states, that the SABC's proposed reorganisation "relegates the division PBS and CBS to a departmental level". We refer to paragraph 3.1.6, 3.1.7 and 3.3 above and specifically that reorganisation relates to two separate operational divisions not separate legal entities.

4.5 Proposed Licence Conditions

The SABC has in its application included proposed licence conditions. In our view, these amendments meet the requirements of section 22 of the Broadcasting Act.

In our view, e.tv's proposed licence conditions on pages 69 – 73 are not relevant in the context of this amendment application. It should also be noted that were such conditions to be imposed on the SABC they would severely impact on the financial viability of the Corporation.

4.6 Licensing structure for the SABC's Commercial Broadcasting Services

On page 68 of their submission, e.tv argues that the CBS services should be subject to the same programming obligations and limitations as e.tv.

It is the SABC's view as articulated earlier, that any programming licence conditions set during this process must be necessary to reflect re-organisation. In addition to this, the SABC maintains that there is a distinction between its commercial services and other commercial services.

The SABC stated on page 114 of its application the unique nature of our commercial services:

"With respect to the SABC's commercial services, it should be noted that the legislation is clear that these commercial services are distinct from other commercial services. It follows, then, that they should be licensed in a different manner from other commercial broadcasters, as is the case at present. In this regard it is noteworthy that the Broadcasting Act specifically excludes the SABC's commercial services from the definition of commercial broadcasters. Furthermore, although our commercial services are 'subject to the same policy and regulatory structures' outlined in the Broadcasting Act for other commercial services, they also have to 'comply with the values of the public

broadcasting service in the provision of programmes and service'. The requirement for amendment of the SABC's commercial service licences is therefore that they are licensed in a manner that reflects reorganization and their related obligations appropriately."