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Promoting human rights and democracy through the media since 1993

Submission to Independent
Communication Authority of South
Africa (ICASA) on the

Draft Digital Terrestrial Television
Regulations

10 November 2011

Submission by Media Monitoring Africa

Introduction

Media Monitoring Africa (MMA, formerly the Media Monitoring Project) welcomes the opportunity to make a submission to the Independent Communications Authority of South Africa (ICASA) on the Draft Digital Terrestrial Television Regulations – 10 November 2011.

This submission will address the following areas:

1. MMA's Constitutional Assumptions.
2. MMA's basic assumptions of digitalisation.
3. Areas of concern relating to the draft regulations.
4. Summary of recommendations.
5. Conclusion.
6. Appendix One: Presentation given by William Bird – Highway Africa Conference 2011.

Also, MMA understands that the Authority has decided they may hold public hearings on the draft regulations however MMA would like to express the absolute need for the public hearing. MMA would also like to express its desire to make an oral submission to the Authority as and when the public hearings take place.

1. MMA's Constitutional Assumptions

1.1 As a human-rights based NGO, MMA approaches all broadcasting regulation within a human rights-based framework. MMA's point of departure therefore includes similar values to those originally contained in the Broadcasting Act, where in the preamble it noted that,

“[T]he South African broadcasting system comprises public, commercial and community elements, and the system makes use of radio frequencies that are public property and provides, through its programming, a public service necessary for the maintenance of a South African identity, universal access, equality, unity and diversity”
(Broadcasting Act No.4, section 3, 1999)

1.2 Within this rights-based framework, MMA understands the institutional role of the SABC as fundamental not only to fulfilling its role as a public broadcaster but also to realising citizen's constitutional right to receive and impart information. Further, as a key public institution and core component of the media environment in South Africa, the SABC's role in entrenching South Africa's democracy cannot be underestimated.

1.3 Given its function and purpose as a public broadcaster, when the SABC's ability to fulfil its role as public broadcaster is being discussed, or when related regulations face potential significant change, South Africa's democracy is also under the spotlight. In this light, we respectfully draw attention to the core objectives of the Authority ICASA, as the constitutionally established body, in terms of the ICASA Act:

“(a) regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society, as required by section 192 of the Constitution;
(b) regulate telecommunications in the public interest;”

(ICASA ACT 2000)

1.4 As such, ICASA has a clear and fundamental obligation to adhere to principles of diversity, and fairness, and to act in the public interest in all matters relating to the SABC and the broader broadcasting environment. In MMA's view, the Authority also has an equally clear responsibility to ensure all relevant regulations and legislation clearly and unambiguously entrenches and protects the independence, integrity and the public mandate of the SABC, as well as the broader broadcasting environment. Therefore, MMA respectfully submits that any regulations relating to the SABC must be written to serve the best interests of the people of South Africa and should also respect the fundamental principles of diversity and fairness.

1.5 The current proposed regulations, while clearly only focused on a transitory period, have immense significance for our broadcasting environment. MMA therefore welcomes the Draft DTT Regulations as a means of ensuring the application of these principles during the digital migration period.

2. MMA's basic assumptions of digitalisation

Within this human-rights based framework, MMA views digitalisation on the basis of the following assumptions:

2.1 Digitalisation allows for diversity, facilitates niche audiences and meets popular demands.

2.2 The purpose of digitalisation is meeting the needs of all South Africans through diversity of content, for example in terms of language, sports, documentary, news, music etc. Therefore other broadcasters should have public service obligations, and M-net should not be given any of the available resources as it gives them an unfair advantage.

2.3 The current regulatory and legislative environment is rapidly changing with the Department of Communications (DOC) set to review the current Broadcasting Act. Therefore any reference to the current Broadcasting Act in the Draft DTT regulations is ineffectual and will cause unnecessary work for the regulator upon the adoption of the new Broadcasting Act.

2.4 Key to the success of digitalisation is public participation of this finite public resource however public participation should be adopted for all the Multiplexes and this will be subject to legal issue.

3. Areas of concern relating to the draft regulations

MMA is in agreement with the Authority for making use of DVB-T2 instead of the initial DVB-T1, for greater capacity and better quality of the digital signal. MMA would also like to commend the Authority for allocating the SABC 80% of Multiplex 1. This shows a particular willingness to further public broadcasting and the public interest.

3.1. Giving M-net an Unfair advantage

In MMA's previous submission it was argued that M-net is given an unfair advantage by being allocated 50 % of a multiplex. In the current Draft Digital Terrestrial Television Regulations this clause has been altered allocating M-net 30% of Multiplex 2. There is no substantial rationale presented for M-net's allocation of a Multiplex, especially given that they are, in doing so, given an unfair competitive advantage. MMA requests the regulator to provide clarity on this issue.

Given that these resources are limited and the apparent success of Multi-Choice in the satellite market, and considering that these resources should be utilised in the public interest, it seems it would be only fair that all existing broadcast licensees are allocated space on the other multiplexes. It seems that the current allocation in the DTT regulations, together with Multi choices existing satellite subscription service works strongly to the advantage of M-Net and gives them an unfair advantage over e-tv.

3.2 Community Television

MMA would like to reiterate the position adopted in its previous submission. MMA welcomes the inclusion of community television in the regulations.

The reason for the 10% capacity allocation of the public service multiplex is not clear. MMA recommends rather that bandwidth in Multiplex 3 be allocated for community broadcasting networks. Given the dramatic changes in technology it seems fair to assume that while financial considerations may currently exclude most community broadcasters this may well change. As the regulations stand a minimum of 50% bandwidth is still available in this multiplex.

3.3 Digital Incentive Channels

MMA notes with concern the adoption of "market impact analysis" (see section 7(1)) in the Draft DTT regulations as the only substantial tool to determine the authorisation for a digital incentive channels, especially in the case of SABC's public service division. Whilst, MMA believes that "market impact analysis" is an important tool to determine the viability of a channel, the relevant clauses fail to enshrine a substantial tool for determining authorisation of a public service channel.

Limiting it to "market impact analysis" means a broadcaster could argue that local content is expensive to produce and not freely available and therefore is not a viable and sustainable

form of programming. This means that local content does not pass the “market impact analysis” test in terms of sustainability. Hence, local content could suffer according to the “market impact analysis” tool, hence a failure “market impact analysis” for the public service. Alternatively broadcasters, the SABC in particular could argue that offering programming for the poor and or marginalised groupings is not sustainable from a market impact perspective.

MMA suggests that the “market impact analysis” should also include an “audience impact analysis” as well as show how it contributes to media diversity.

3.4 Public Service Test

The Public Value Test is presumed to be drawn from that contained in the British Broadcasting Corporation (BBC) Charter and Agreement. These documents provide detail on what exactly is required by broadcasters and the Regulator. We would suggest that in a multi-channel environment the SABC would not have to prove it was fulfilling these obligations for each channel – but rather it should show how additional public value could be created across the bouquet. The BBC Agreement defines its public value test as a “means by which public value and market impact are taken into account”. The application of the Public Value Test involves several elements: the first is a public value assessment, and the second a market impact assessment.

As regards the market assessment, the documents specify the need for this to be conducted by the Regulator, which in the case of the United Kingdom is Ofcom, or by a body determined by the Regulator that is independent of the BBC. Whilst the relationship between the BBC and Ofcom and that between the SABC and ICASA is very different, the principle of a market assessment being conducted independently of the broadcaster may still be relevant and something ICASA should consider. In the UK both Ofcom and the BBC Trust agree on the terms of reference for such a market impact assessment.

MMA, supports the input of SOS submission in this regard and further suggests that a committee is established consisting of academics, experts, NGO’s as well as the Authority. It is crucial that this committee is not dominated by industry players and the mandate should be to ensure that a well developed Public Value test is developed and agreed.

3.5 Monitoring and Compliance

MMA notes with concern that the Draft DTT regulations are silent as to whether the reporting, monitoring and compliance requirement currently in place through broadcasters licence conditions, local content regulations and other relevant regulations and conditions will simply be transferred or if the Authority plans on introducing new ways and means of monitoring compliance.

It would seem preferable, given that these regulations are for a transitional period only that a clause is inserted into these regulations that all existing monitoring, compliance and

reporting requirements as stipulated in licence conditions, local content regulations and other relevant conditions are applicable for each digital channel being broadcast.

MMA respectfully requests monitoring and evaluation of compliance with regulations and compliance in terms of, for example programming schedules.

Further, to address future developments in the digital environment MMA would like to urge the authority to establish a Monitoring and Compliance Advisory Group to ensure that the framework set up in these regulations, can be effectively monitored and adhered to and that monitoring and compliance meets public interest and fair/reasonable/ and effective monitoring and compliance takes place.

The DT environment presents a range of exciting opportunities and challenges, particularly with regard to the monitoring of compliance by licensees. MMA was privileged to participate in a recent session hosted by the Authority during the Highway Africa 2011. A copy of the input by the Director, William Bird is attached assist outlines some of the potential challenges the Authority may face in the new digital environment and supports MMA's call for the establishment of a Monitoring and Compliance Advisory Group.

4. Summary of recommendations

MMA submits that there are a number of challenges that need to be overcome in order for the DTT Regulations to fulfil their objectives. MMA submits the following recommendations which arise from the points raised above. MMA Recommends:

4.1 M-nets unfair advantage is mitigated through the allocation of bandwidth to all existing broadcast licensees.

4.2 Provision is made for a broader range of community television broadcasters and that capacity is allocated on the third multiplex.

4.5 The definition of 'market impact analysis' be expanded to include 'audience impact analysis' and other factors such as media diversity, as a more effective tool.

4.6 In relation to a public value test, MMA suggests that an advisory group is established consisting of academics, experts, NGO's as well as the Authority. The group while including industry stakeholders cannot be dominated by them.

4.7 That measures are put into place to ensure effective monitoring and adherence to the broadcasters' commitments, specifically MMA strongly urges the Authority to establish a Monitoring and Compliance advisory group that would develop an appropriate mechanism to allow for the effective monitoring and compliance in the digital environment.

4.8 Public participation, as critical not only to the success of digital migration but also to principles of diversity is clearly and unambiguously entrenched in the DTT regulations for all the Multiplexes.

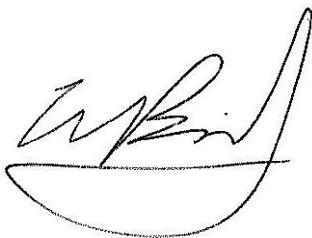
5. Conclusion

In conclusion, it is perhaps worth considering what the implications would be if the concerns contained in MMA's submission as well as those of the SOS Coalition are not addressed. In the first instance, it is likely that the regulations will fail to fulfil their main objectives to see a smooth transition of analogue to digital transmission. This will likely be the case, as the regulations in their current form significantly utilise and make reference to the current Broadcasting Act and the current structure of the SABC, which is in desperate need of an a complete overhaul, offers little "diversity" incentive to members of the public to migrate to DTT. Secondly, failure to address the concerns raised will result in watered down and potentially non existent public participation in subsequent processes. This would not only be anti democratic, but would also be contrary to the principles of the Authority. Thirdly, it will significantly undermine the positive initiative being taken to regulate digital migration. In order for the process to be successful, buy-in from a range of key stakeholders, including ordinary members of the public, is essential. In their current form, the regulations would serve to alienate people from the Authority as well as the process of digital migration. Finally if implemented in their current form the absence of mechanisms of monitoring and compliance mean that the Authority would not be able monitor compliance with the regulations, and hence the entire period of dual illumination could be at risk.

MMA thanks the Authority for the opportunity to make this submission, and hereby requests, that if there are to be further public hearings that MMA is allocated time for an oral presentation to expand further on the importance of this submission.

Please do not hesitate to contact me at the numbers below should there be any queries over our submission, or if we can be of assistance in developing any of the recommendations further.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'W. Bird', written over a horizontal line.

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6. Appendix One

Reflections on how ICASA could or can improve the Monitoring and Compliance capabilities in the digital era

Or

**From Railway Tracks to Spider Webs
Input Highway Africa: Discussion Review of ICASA**

Thank you for giving me opportunity to speak to this issue.

About Media Monitoring Africa

Formerly the Media Monitoring Project

Vision: A responsible media that enables an informed and engaged citizenry in Africa and across the world.

Promoting Human Rights and Democracy through the media since 1993

Human rights NGO monitoring the media since 1993 – celebrating 18 years;

Conducted over 120 media monitoring projects:

Race (SAHRC, CSV), Elections;

Gender (GMBS, GMMP);

Children (ECM);

HIV (WITS, MAP), and more!

One of few organisations to have consistently engaged with IBA and ICASA

A Little context:

This comes at crucial time where our Minister of Communications has announced comprehensive review,

Time of our public broadcaster being in flux and disaster;

And

Our regulator is in need ...

Media Freedom concerns:

ICASA Amendment Bill – deeply, deeply flawed for a variety of reasons but fundamentally because it seeks to undermine the independence of the institution and not strengthen it.

Why is monitoring so vital?

Many reasons, but in this case, primarily because it forms the backbone of accountability of the licensees to the authority.

If not monitoring how do we know they are doing what they should be? How can we hold them accountable?

Sadly we know this is not happening at the moment

We together with SOS met with ICASA council and this became clear.

When asked why they aren't monitoring they say they don't have the resources. When pushed on this they asked us to cost it for them. They acknowledged they weren't monitoring.

Now I tell you these things because if we talk about a new digital world, if ICASA cannot cope currently how on earth will they do so in the future?

The DOC had plans – which we must all pray they have abandoned in their entirety – of placing ICASA under the thumb of the Minister. This is bad.

So what's our idea?

We don't have time now to go into much of it but part of the answer is go back to basics:

Ensure that ICASA is fully recognised as Chapter 9 Institution. Some argue that this isn't the case at the moment – and while there is any legal doubt we must all –especially ICASA do whatever it takes to ensure that it is – if we lose this – we can kiss all sincere attempts at effective regulation and monitoring goodbye;

The aim of ICASA:

in terms of the ICASA Act:

“(a) regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society, as required by section 192 of the Constitution;

(b) regulate telecommunications in the public interest;”
(ICASA ACT 2000)

The public interest – is a powerful concept it means that not only must ICASA be strengthened to be able to operate efficiently and with sufficient budget it must also be able to do so when it might go against the wishes of commercial, state or other interests.

There are many aspects to this that I cannot go into now but crucially the public interest is essential for monitoring and accountability.

What does it mean?

It means they must ensure the provision of public service content and meeting needs of all in South Africa. The “independent regulator” and its effectiveness are imperative to the SABC functioning as a public service broadcaster that acts in the public interest. The media landscape is continuously changing, causing the public interest to be under threat. In the face of plurality posed by digitisation and increased desire to cash in on its monetary benefits and consumerism, the “independent’ regulator” is pivotal in protecting the public service broadcaster and the public interests represented by citizens. Therefore, with the advent of new technological and commercial media, the “independent regulator” is crucial in ensuring that the traditional principles of public service broadcasting are upheld and not neglected.

We are pleased to see that while not specifically stated, intimately related concepts are contained in the discussion paper issue by ICASA:

“3.6. The overall objective is to promote the development of public, commercial and community broadcasting services which, in the context of digital convergence and migration, are responsive to the needs of the public, which ***promote a plurality of news, views and information and provide a wide range of entertainment and educational programmes, a proportion of which are locally produced***

Take stock and seek views on how broadcasters can ***promote social cohesion, moral regeneration and combat xenophobia***; reflect on how broadcasters can contribute to societal issues, through its public announcements and raising awareness, during the outbreak of epidemics and national disasters on radio and television;

4.1.4. Seek views on how to further **promote a strong, diversified and independent production and distribution industry** through pro-active content-based regulatory frameworks, and the best way to improve the current regulatory frameworks that deal with South Africa’s local content quotas that reflects and contributes to the development of national and cultural identity? “

So, the really big battle is for the independence and strengthening of ICASA. Again if we lose this – the rest of the discussion is merely a farce.

So assuming we get the basics right – independent, adequately resourced, effective operationally ICASA,

What are our new challenges?

With analogue it was relatively easy to monitor compliance. License conditions would stipulate x% of hours, dedicated to certain types of programmes. For example public service channels have to have over 50% local content at least 20 hours of children’s programming, news programming per week etc.

All you needed to do was sit down and through various techniques calculate if this was in fact being done. Monitoring sample content, comparing that against the schedule and double cross-checking that against the FCC sheets of what was actually broadcast. Then do this over a period of time and hey presto you have your answer. (Of course already this is a bridge too far for ICASA – but the principles are easy – goes back to the effectiveness of the regulator)

Digital multi-channel environment changes the whole thing

Under DTT SABC will have up to eight channels – this means they can or at least in our view must absolutely have a number of dedicated channels, one for news almost certainly, another for education, children, sports, entertainment etc.

So if we have the old model present how do we monitor? On a simple level merely having the channel will mean they would meet it – instead do 20 hours children programming or education they have an entire channel. Soon a level they would be meeting it. But what about our local content quotas? How would we meet these, how could we tell?

So we need a new model for monitoring and accountability

Adopting a new approach

Here are the railway tracks and spiders web!

If we apply a visual image the old form of monitoring and compliance may have looked a little like a set of railways tracks. The broadcaster monitors and does reports on hours or % of programmes, and parallel to this the Authority does a similar thing – the sleepers act as cross checks to that – the end being meeting the public interest. If either side doesn't fill its end the train goes off the tracks as we have now.

For our new regime image a spiders web – the centre being meeting the public interest and then all the different points being new ways of monitoring and accountability.

This also means a simple but complicated means of monitoring – simple in that each aspect can be easily understood and interrogated, but as the web goes to the final question of meeting the meeting the public interest, it will necessarily become more complicated. This is similar to the actual environment – it is on any levels very simple, but its diversity and multiplicity of variables makes it complicated and the monitoring, compliance and accountability needs to be similar to that.

So outer radius would be:

Need the web itself to be made of strong stuff, or else it will simply blow away. In addition to that also need the web to be anchored, need the support of the various players, broadcaster, telecoms, government and citizens, or no matter how strong if there isn't anything there you cannot have a web to begin with.

Then in terms of monitoring – need to look at the bouquet as a whole – does it meet the needs as determined by the license conditions – i.e. fundamentally does it contribute to meeting the public interest? So taken together, each of the aspects, over a period of time is there sufficient local content, children's programming, educational programming, entertainment

Then still need monitoring within each of the channels to see what is actually being broadcast. Is there sufficient diversity within the channels? How do they each speak to each other? How do they encourage diversity?

Crucially how do their public engage with the channels? What is their feedback on content?

How do these issues speak to broader national aims? Are they all in line with broadcasting policy and regime?

Taken together then – weighting system may be used to bring them together to assess if complying with conditions.

The next key would be accountability.

ICASA currently has in our significant powers, they are seldom exercised though – and for this aspect to be present – we need to go back to my starting point of a strong, independent effective functioning regulator. So again assuming we have won this crucial battle – which we absolutely have to win:

The authority can exercise its authority, and through regular engagement can ensure effective accountability.

Here we can use the speed, and simplicity aspects to help provide indicators and raise alerts with broadcasters or telecoms operators.

For example: Aspects of public engagement could easily be tallied on a monthly basis, in terms of viewer/listener engagement and surveys. Similarly some of the information which is also digital could be easily assessed, e.g. schedule analysis.

We have a very exciting future for our regulator and huge, huge potential in terms of better, more comprehensive, diverse and effective monitoring – all we need to do now is make sure we have a strong, independent, effective regulator to help realize our potential. Our diversity, and democracy depends on it.