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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  
(DTT) Regulations

02 October 2009

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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 (DTT) Regulations - September 2009.

This submission will address the following areas:

1. MMA's Constitutional Assumptions.
2. The relationship with the MMA and the Save our SABC (SOS)-Reclaiming our Public Broadcaster Coalition.
3. MMA's basic assumptions of digitalisation.
4. Areas of concern relating to the draft regulations.
5. Summary of recommendations.
6. Conclusion.

Also, MMA understands that the Authority has not decided whether or not to hold public hearings on the draft regulations, however MMA would like to express its desire to make an oral submission to the Authority should it choose to hold public hearings.

### 1. MMA's Constitutional Assumptions

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 1999)

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.

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)

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.

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:

1. Digitalisation of our media has the ability to enable diversity, facilitate niche audiences and meet popular demands.
2. One of the central purposes behind the digitisation process should be to meet the needs of all South Africans through diversity of content, including through for example language diversity, sports, documentary, news, music, children’s programming etc. As a limited public resource meeting the diverse needs of all South Africans, should not fall exclusively to SABC. Other broadcasters in using the limited resource should also to a lesser degree, have public interest obligations.
3. MMA does not understand why M-net should be placed in the exception position of having Digital terrestrial licence. Accordingly MMA submits that M-net should not be given any of the available resources as it gives them an unfair advantage.
4. The current regulatory and legislative environment is rapidly changing with the Department of Communications (DOC) set to release the new Broadcasting Act in October 2009. 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.

5. Key to the success of digitalisation is public participation of this finite public resource, thus MMA welcomes clause 7(d), as argued in the submission. However public participation should be adopted for all the Multiplexes.

### **3. MMA and the Save our SABC – Reclaiming Our Public**

#### **Broadcaster (SOS Coalition)**

MMA is a founding member of a civil society coalition, **Save our SABC – Reclaiming Our Public Broadcaster (SOS Coalition)**. This submission is to be read in conjunction with the SOS Coalition Submission, and MMA fully supports the content and aims of the SOS Submission.

#### **4. Areas of concern relating to the draft regulations**

MMA welcomes a particular element of the DTT regulations:

The entrenchment of public hearings in section 7 (d), for the application by the SABC to broadcast a digital incentive channel. MMA notes with concern however, that public hearings are only enshrined for the SABC's application and not for Multiplex 2 and Multiplex 3. Public hearings should not be made exclusive to the public service broadcaster, the public has the right to be provided with an opportunity to give input to all applications for all Multiplexes, since allocation of this finite resource has repercussions for the diversity of content for the public.

MMA submits that the limited levels of public participation in the other multiplexes are counter productive, potentially anti-democratic, and contradict the spirit and intention of the Constitution and foundation of the Authority.

MMA would therefore suggest that section (7d) be added to section 8 as 8 (g):

*7(d) conduct a public hearing in relation to the application, where the Authority deems it to be in the public interest to do so.*

##### **4. 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 remained unchanged. No substantial rationale is presented for M-net's allocation of a Multiplex. MMA requests the regulator to provide clarity on this issue.

MMA would like to re-iterate the arguments presented in its previous submission that it remains quite extraordinary that M-net should be allocated 50% of a multiplex when the very basis for M-net and CSN as terrestrial licences have been superceded by Multichoice's satellite broadcasting bouquet. MMA is not aware of any other broadcaster internationally that has both terrestrial subscription broadcast and satellite subscription broadcast licences.

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 continues to beg the question as to whether M-net should be given any of the available resources. 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 and any other potential new entrants to the market.

#### **4.2 Regulations “X-files”- Trinity Broadcasting Network?**

As noted in MMA’s previous submission ICASA has once again omitted to substantiate and provide a rationale as to TBN’s allocation of 10% of Multiplex 1. Public and interested parties have the right to know why TBN has been privileged with this allocation, this remains an unexplained phenomenon. If it is the case that there is clear motivation for TBN being given preferential treatment over any other community broadcaster, it is still not clear why TBN has been allocated to the public service Multiplex 1.

MMA would like to reiterate the position adopted in its previous submission. MMA welcomes the inclusion of community television in the regulations but remains concerned about the special provision made for Trinity Broadcasting Network (TBN). Despite TBN’s prominence on the continent and its potential ability to satisfy the financial implications of digital broadcasting it is not clear why TBN has been included as the only community television broadcaster. MMA respectfully requests reasons for TBN’s inclusion over and above any other community broadcast service.

It is also noted that by affording special status to TBN on the public service multiplex it seems likely that not only will their social status potentially expose the Authority to allegations of bias but it may also result in legal challenges.

In addition the reason for the 10% capacity allocation of the public service multiplex is not clear. MMA recommends rather that, should there be clear existing evidence as to why TBN should be so favoured, that bandwidth in Multiplex 3 be allocated, and if the Authority so decides to allocate space specifically for religious broadcasting there would be sufficient space on this multiplex for more than one broadcaster. 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.

#### **4.3 Market Impact Analysis: An appropriate tool?**

MMA notes with concern the adoption of “market impact analysis” (see section 7(2)) in the Draft DTT regulations as the only substantial tool to determine the authorisation for a digital incentive channels that will fall under the 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 (section 7(2) and 7(3)).

Since the tool is based on “market impact analysis” the SABC 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, or niche programming could suffer according to the “market impact analysis” tool, hence a failure “market impact analysis” for the public service.

Another failure of “market impact analysis” is that it will have a tendency to only focus on higher, LSM’s and not all citizens and thus has serious repercussions for public service programming. For example, should children’s programming be assessed according to “market impact analysis” the types of children’s programming that would likely dominate would be those, largely foreign, cheaper programmes similar to those broadcast on “Cartoon Network” as this has would likely have the most significant market impact.

MMA submits that the Regulations must ensure that the desires of all audiences are met, even the marginalised groups, including children, people with disabilities and the poor. “Market impact analysis” does not ensure this, for example a commercial children’s channel such as “Cartoon Network” or “Nickelodeon” may well pass the test for market viability however, it is unlikely that they can be viewed as meeting the needs of South Africa’s children.

The DTT regulations stipulate that the “market impact analysis” must include “the implications of the proposed channels for diversity of programming” (section 7(2)). In addition, section 7(3) says that in deciding the authorisation of the digital incentive channel the Authority shall take into account the extent to which the channel will achieve the requirements met by the SABC as set out in section 10 (1) of the Broadcasting Act and the objectives set out in section 2 of the Act.

MMA welcomes the provision for the public service requirements and objectives of the SABC for inclusion in the “market impact analysis”. However, these clauses lack detail, are too generic and inadequate as they do not provide substantial criteria for applicants to follow, in providing implications for “diversity of programming” as well as “public service value”.

Further, these tools for assessment rely heavily on the current Broadcasting Act, which is soon to be replaced by new legislation (set to be released by the DOC in October 2009), hence this method is not appropriate and does not make provision for the rapidly changing media policy environment.

MMA therefore submits that in their current form, the Draft DTT regulations fail to provide a substantial tool to determine the “public service value” of the application and have the current Broadcasting Act as its basis. It seems that the current DTT regulations lock the regulator into a system that deals with the SABC and public service broadcasting in its current form and not for the future. Given the rapidly changing environment of the SABC, and the new legislation this method is clearly inappropriate.

It is on the basis of these key points that MMA calls for the re-introduction of the “public value test” to the regulations. MMA would like to reiterate the position adopted in both MMA’s previous submissions as well as that of the SOS Coalition, on the adoption of a “public value test” for the authorisation of channels. MMA would like to reiterate its former

submission and recommend that when applying for any channel all broadcasters comply with a public value test, the limits and precise terms need to be clarified but in the interest of meeting the needs of South Africa's public it is essential that this is incorporated into the regulations. Surely as a limited public resource, and in order to make the most effective and valuable use of the limited resource, it is essential that the public value test is applied to all broadcasters.

Below are the details of the public value test, as included in MMA and the SOS's previous submissions.

### **4.3.1 The Public Value 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. The BBC Trust must consider the outcome of both these assessments and must publish the assessments. The Trust must “consult about its provisional conclusions (based on consideration of both assessments)... and then proceed to reach a final conclusion about whether the proposed change should be made”. In particular, the Trust must be satisfied that “any likely adverse impact on the market is justified by the likely public value of the change before concluding that the proposed change should be made”. The Agreement furthermore defines what is exactly required in both the public value assessment and the market assessment – and how these should be conducted.

In terms of public value assessments the purpose of the assessment is to ascertain the likely public value of the proposed change. In general terms, according to the BBC Agreement, a public value assessment should include an assessment of the following factors:

- The value which licence fee payers would place on the proposed change as individuals
- The value the proposed change would deliver to society as a whole through its contribution to the BBC's Public Purposes
- The value for money of the proposed change and its cost (including the potential financial implications if the proposed changes were not made)

The documents then go on to say that, as the nature of likely or potential public value may differ widely according to the nature of the change proposed, the Trust must at the outset consider very carefully: the aspects of public value which may be relevant, and how these aspects should be explored and evaluated (but always including public consultation).

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.

#### **4.4 Diversity and Incentive-critical to DTT broadcasting**

Regulations must ensure that there is enhanced television for all viewers, therefore commercial broadcasters should have public service obligations, to ensure greater diversity and therefore incentive for migration to DTT.

MMA recommends the inclusion in the DTT regulations of public service obligations for commercial operators. In their current form, the Draft DTT regulations require applicants for a digital incentive channel in Multiplex 2 and 3 to provide:

*8(b) a market impact analysis, including the implications of the proposed channel for diversity of programming and other DTT services; and*

*8(e) provide a programming plan, including local content.*

Commercial operators should have public service obligations however the SABC's public service obligations should be more stringent. The current DTT regulation in its current form do not place any public service obligations on commercial operators, which is extremely important in ensuring that there is diversity and "public service" oriented programming across all Multiplexes. This requirement is in line with MMA's basic assumption of digitalisation (see earlier section 2(2) of submission) that one of the central purposes behind the digitisation process should be to meet the needs of all South Africans through diversity of content.

The advent of digitalisation has meant a greater plurality of content and thus more services available to audiences. This increase in the amount of services and content does not guarantee that audiences will be receiving quality and diverse content that will cater for a diversity of audiences. Thus public service obligations across broadcasters are essential in the age of digitalisation to ensure that citizens receive quality and diverse content that will meet their needs. A failure to issue public service obligations to all broadcasters could result in greater plurality of content however no guarantees of diversity for DTT.

In addition, it is imperative that the DTT regulations create an incentive to ordinary members of the public as to why they should migrate to DTT. Therefore, more diversity of programming must be amongst the incentives. This is in line with MMA's basic assumption of digitalisation (section 2(2)) that the one of the central purposes behind the digitisation process should be to meet the needs of all South Africans through diversity of content, including through for example language diversity, sports, documentary, news, music, children's programming etc. As a limited public resource meeting the diverse needs of all

South Africans, should not fall exclusively to SABC. Other broadcasters in using the limited resource should also to a lesser degree, have public interest obligations.

The only reference to “diversity” for Multiplex 2 and Multiplex 3 is section 8(b), and absent from this clause is how diversity of programming must be achieved and the criteria to be followed for assessment of this.

#### **4.5 Obsolete regulatory methods- changing structure of the SABC**

The current DTT regulations locks ICASA in a system that deals with the SABC currently and not in the future, given the rapidly changing environment of the SABC this method is clearly inappropriate. Section 4 (5), 4(6) and 7 (2), 7(3) 7(4), 7(5) makes reference to the current Broadcasting Act, in particular the commercial and public division of the SABC, therefore assumes that the SABC’s current division is to be long term and thus does not consider the changing structure of the SABC. Upon the adoption of the new Broadcasting Act the regulator will have an unnecessary amount of work, hence the irrelevance and ineffectiveness of this regulation method.

#### **4.6 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.

## 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:

5.1 That M-nets unfair advantage is removed, or failing this that its DTT capabilities are on similar levels to those of community broadcasters.

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

5.3 That the Public Value Test is applied to all broadcasters to varying degrees replacing the “market impact analysis”. This is a more relevant criteria than that of the “market impact analysis” reliance on the Broadcasting Act, which is set to be replaced shortly by the new Broadcasting Act.

5.4 That elements of the Public Value Test are applied to the proposed channel and that the channel is then viewed as forming part of a bouquet channels on offer from the broadcaster that satisfies the public value test more broadly. In addition MMA recommends that public service obligations currently only applied to the SABC’s should be applied to the commercial broadcasters as well, in less stringent forms. Specifically MMA recommends that commercial broadcasters are also expected to provide, proof of fulfilment of public service obligations.

5.5 Regulations be made adjustable and relevant to the changing structure of the SABC, and not be based on its current structure- commercial and public division.

5.6 That measures are put into place to ensure effective monitoring and adherence to the broadcasters’ commitments.

5.7 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 due to be replaced shortly, offers little "diversity" incentive to members of the public to migrate to DTT, and uses a method of assessment that privileges commercial value over public value. 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.

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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