



Presentation to

Independent Communications Authority
of South Africa

SABC Licence Amendment
Application

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1.0 Introduction and Context

1.1 A bit about MMP

The Media Monitoring Project (MMP) is an independent Non-Governmental Organisation (NGO) that has been monitoring the South African media since 1993.

Mission

MMP aims to promote the development of a free, fair, ethical and critical media culture in South Africa and the rest of the continent.

Objectives

The core objectives of the organisation are as follows:

- To be the pre-eminent media 'watchdog' in Africa.
- To inform and engage media professionals and other key stakeholders to improve the quality and ethics of news reporting in Africa.
- To influence the development of robust and effective communication legislation and media codes of conduct in Africa.

Activities

MMP offers a wide range of services to Civil Society Organisations (CSOs), media, government and NGOs in South Africa and other African countries, including:

- Reviewing and analysing the content, selection process and presentation of news reporting to monitor the quality and ethical practices of broadcast, print and online media.
- Distributing regular reports on research findings and highlighting infringements to media duties and responsibilities.
- Conducting in depth-research on specific issues (commissioned reports).
- Developing training materials, tools and best practices on ethical and fair media reporting.
- Submitting proposals and other material for the development or amendment of policies and laws.

MMP has made several submissions to ICASA, including the local content hearings and the inquiry into local and regional television.

MMP applies internationally recognised, state of the art monitoring and research methodologies.

MMP is the only independent NGO in South Africa that monitors the representation of human rights issues in the media, and the only organisation that conducts in-depth qualitative and comparative research in this field. Its expertise is widely acknowledged by the parties at stake, and MMP is regularly invited to provide comments and presentations on the subject.

1.2 Context of MMP's submission

In the last three years the SABC has taken some very positive steps in relation to their role as a public service broadcaster.

- The emergence of some world-class programmes – such as Takalani Sesame as well as potential world class programmes like the soon to be launched children's news programme.
- In an about turn on a previous seeming disregard for the public, the SABC engaged them on the formation of its editorial policies, they conducted stakeholder interviews, and the SABC hosted gender focused and child focused events including the launch of the MMP & Unicef book all sides of the story.
- SABC has also recently started to invest in African language services both on radio and on television.
- SABC also started to refer to serving the public and citizens and not clients.

The MMP has great respect for many of those at the SABC including, board members, senior management, the heads of news for radio and tv, the CEO, members of policy and several people working at the SABC who work under often extremely trying circumstances.

In making this presentation MMP would like to draw the Authority's attention as well as that of the SABC, to MMP's practice of giving credit when it is due.

MMP's most recent election monitoring project found for example:

- SABC1 came in second in the MMP's overall election coverage ratings.
- SAfm performed best in the elections in terms of dept of coverage; and
- Radio Sonder Grense came first overall in one week's elections ratings

These and other positive findings were communicated to the SABC as well as a host of other media.

The comments and concerns that follow are not directed at any individual.

The licence amendment application as it stands represents a near complete divergence from the aims ideas and principles of the SABC especially in terms of accountability and public service.

1.3 Summary of Presentation

- To address the SABC's response to the MMP's submission regarding the SABC's licence amendment application.
- To illustrate that the SABC is attempting to become self-regulatory.
- To provide the statutory bases on why the SABC should not be allowed to self-regulate.
- To reaffirm that ICASA is the sole regulatory authority of the South African broadcasting industry.
- To provide policy reasons why the SABC should not be allowed to self-regulate.

- To provide solutions on how to better equip the South African broadcasting industry with the ability to provide public service programming to promote constitutional democracy.

As a proud, young democracy seeking to strengthen its institutions and include all citizens in the political process, South Africa is at a crucial point in its history. With its unique characteristics, including eleven official languages, and broad regional and cultural diversity, the extent to which all South Africans participate in the creation of a national identity is directly tied to the access its citizens have to information and the media.

The Constitution mandates that all citizens, without regard to language, race, or the region in which they live, have an equal right to participate in the development of a democratic South Africa. The media, especially the public broadcaster, plays a vital role in empowering South African citizens, reinforcing their culture, and supplying them with the information they need to effectively participate in the South African experience.

This duty of the public broadcaster is too important. Nothing should impede the broadcaster from vigorously following this mandate. To do so may alienate entire groups of people; effectively shutting them out of the political process regardless of their Constitutional rights.

The SABC seeks to satisfy its public mandate while, at the same time, claiming the power to aggressively compete in the commercial broadcasting sector. The Media Monitoring Project ("MMP") agrees that this may be a long term solution to provide the most diverse and appropriate programming to all South Africans. However, in the short to intermediate term, with a limited number of market participants and a broadcasting infrastructure still a work in progress, such a move would have a devastating effect on the people of South Africa and on the burgeoning broadcasting industry.

The MMP, therefore, recommends that the SABC be strictly regulated by the Independent Communications Authority of South Africa ("ICASA") as it enters the competitive commercial services market. With this in mind, we will first discuss both the legal and policy reasons that render such strict regulation necessary. Then, in recognition of the industry pressures the SABC claims, the MMP provides several proposals that we believe will make it feasible for the SABC to readjust its focus to where it should be – on its public service mandate.

2.0 A case for self regulation

In its licence amendment application, the SABC repeatedly contend that it needs additional sources of revenue because of financial constraints. The cited principal financial constraint is that the total amount of advertising revenue in the broadcasting sector is limited. As new participants enter the market, those participants are eating into the share of advertising revenue that once belonged to the SABC.

Consequentially, the SABC is losing revenue and is, therefore, having difficulty fulfilling its public service mandate. Notwithstanding its financial difficulty, the SABC has maintained that it has continued to fulfil its public service mandate. The SABC suggests that because of its own internal regulations, its obligation to abide by the SABC Charter, the SABC Mandate, and the SABC's editorial policy, that licence conditions specifically setting forth programming requirements ensuring that the SABC fulfils its public service mandate are unnecessary.

On page 100 of its licence amendment application, the SABC stated that "[t]he [editorial] policies, which come fully into effect on 1 April 2004, represent how the Board gives shape to and interprets the SABC's public broadcasting mandate, and provide editorial staff with a framework within which to take decisions. In doing this, they represent a benchmark against which the SABC can be monitored and held accountable." In addition, on page 3 of their response to the MMP's submission, for example, the SABC stated that it is a false assumption "that licence conditions are required to ensure the SABC delivers on its public mandate."

However, the editorial policy, including the Mandate, is meaningless unless the SABC can be held accountable on an independent basis. The SABC Charter and the other SABC instruments by which the SABC is required to abide would also be just as meaningless.

The SABC is attempting to be held accountable by its own internal "benchmark" which the SABC alleges it may set at will. This should not be the case. An independent regulatory authority such as ICASA must have their own independent standards that are clear to the SABC. Otherwise, the SABC can say that it is meeting its benchmark which it may set as low as it wants. It is quite notable that none of the documents by which the SABC indicates that it is required to abide include any quantifiable terms by which the SABC can be measured.

What the SABC is trying to do is buy itself flexibility in its programming content. The SABC is attempting to do this by virtue of indicating that it will fulfil the public mandate and the requirements in the SABC instruments.

Given its extensive public mandate and largely market driven funding arrangements, the SABC needs a measure of flexibility in order to remain competitive and viable while delivering on its mandate. The SABC does not have the luxury of a secure public funding base. The effect of having to rely on commercial sources of revenue means the SABC must constantly balance its obligation to deliver public interest programming against providing commercially competitive schedules. (SABC Licence Amendment Application, page 101)

The SABC also stated that "licence conditions must be applied carefully to *allow for flexibility* so that, if necessary, *the public broadcaster can respond quickly to the changing environment.*" SABC license Amendment Application, page 101; emphasis added.

We know that if the SABC is setting the standard in its own internal documents that it may manipulate the language in those documents to create a veil that it is achieving the standard that the SABC itself has set. This is entirely illusory.

By setting its own benchmark requirements for fulfilment of the public service mandate - and without regulatory intervention - the SABC can set the benchmark as high or low as it wants so that, in practice, the SABC fulfils its mandate. The SABC contends that it is entitled to broadcast whatever programming they like – and if they are precluded from doing so their journalistic freedom is unconstitutionally impeded. This is not the case.

To deter amendment or introduction of particular licence requirements, the SABC principally relies on their constitutional “freedom of expression and journalistic, creative and programming independence” as set forth in Section 6.2 of the Broadcasting Act. This immediately raises a flag. The SABC states that “[ICASA] considers only the policies, within which the SABC thereafter functions, enjoying its freedom and fulfilling its obligations through varying and fluctuating programme content. Any different view, suggesting that ICASA is required to approve programme content, would deny the SABC its Constitutional rights and its journalistic independence.”¹

The SABC is trying to “bootstrap” regulatory powers out of the Constitutionally protected right to freedom of speech and journalistic integrity. However, this is inconsistent with, *inter alia*, the Constitution of South Africa, the ICASA Act, the Broadcasting Act, the SABC Mandate, the SABC Charter, the Promotion of Access to Information Act, Anti-Competition law, International Best Practice, and the legislative intent of the Constitution makers and broadcasting legislation drafters.

The SABC essentially states that they have journalistic and creative freedom and that therefore, because of this freedom they are allowed to put on whatever programme content they want. Couple this with the fact that the SABC suggests that they are *bound only by their own written instruments* indicates that they are in essence self-regulatory.

3.0 Challenging the Authority's limits

The SABC argues that it is in a position to be self-regulatory because of checks already in place to monitor their public service obligations. The SABC cites its editorial policy, internal regulatory policies, internal accountability, and that its self-assessment of its programming and which programs satisfy the mandate is accurate.

1 The conditions sought to be imposed on SABC are entirely content neutral and viewpoint neutral. Under such conditions, SABC would retain freedom of expression in creative enterprises. No attempt is made to control the message or tone of SABC's content. Hence, SABC has complete freedom of expression and journalistic, creative and programming independence, as guaranteed by Sec. 6.3 of the Broadcasting Act and the Constitution.

Freedom of expression prevents the State from controlling the content or the viewpoint of the public broadcaster. Clearly, SABC can deliver diverse programming guaranteed by specific conditions without espousing the views of the government.

To ensure that the SABC is held accountable, an independent authority must ensure that the SABC abides by those regulations that are put in place for the SABC. The SABC cannot be left alone to hold itself accountable. If the SABC were to hold itself accountable, the temptation to thwart its obligations would be too great. Indeed, the SABC is, in the current licence amendment application, attempting to thwart any attempt at any additional licence requirements being imposed upon it and from having quantifiable terms in its licence set forth.

In its licence amendment application, the SABC has indicated that quantifiable licence terms are not necessary for the SABC. In fact, the SABC has spent fifteen pages out of twenty-five in its response to the MMP's submission arguing that it does not need to be bound by licence conditions and that licence conditions cannot be introduced into its licence.

The SABC indicates that "[w]hether [its] obligations are also reflected in the form of licence conditions is in the final analysis immaterial as the SABC must in any event fulfil them." However, unless these obligations are reflected in the licence conditions that preside over the SABC, the SABC may then be able to do as it pleases.

It is clear from the SABC Licence Amendment application and its response to the MMP's submission that the SABC is attempting to become self-regulatory by bootstrapping complete control over their programme content by way of the Constitutionally protected journalistic independence. If this were not enough, the SABC is attempting to protect its alleged power to deliver whatever content it would like from a different angle. In this regard, the SABC is trying to limit the realm of programming that ICASA can regulate.

If the SABC were truly committed to the public and delivering on its mandate as the public service provider, there would be no need for the SABC to be so vigorously challenging the introduction by ICASA (a Chapter 9 institution) of additional constraints on its licence. In fact, the SABC has taken so much hardship in guaranteeing itself this liberty that the SABC's contention for prohibiting ICASA from introducing additional restraints appears to rely on just a single word – "reorganization."

The SABC fears the introduction of additional terms on its licence. This is very telling. From this, we can glean that the SABC is more interested in competing than it is in delivering on its public service mandate. The SABC sees additional terms as constraints. That is, these additional terms would make it more difficult for the SABC to compete. In contrast, if the SABC were truly committed to delivering on the public service mandate they would see any additional terms introduced into their licence as additional guidance to better serve the public.

In its licence amendment application, the SABC heralded the creation of the Independent Broadcast Authority and stated that "[t]he appointment of a regulator with constitutionally guaranteed independence was a *significant step forward* for the industry." Page 58; emphasis added. Deductive reasoning indicates that for the SABC to self-regulate or to attempt to limit ICASA's regulatory authority is a *significant step backward* for the industry.

4.0 Legal provisions preventing the SABC from becoming self regulatory

4.1 Constitutionally mandated provisions

The Bill of Rights also ensures that "everyone has the right to freedom of expression ... including the freedom to receive or impart information or ideas." Constitution, Section 16(1)(b). "[T]his right would be impossible to operationalise *without regulation in the public interest*, especially the right of people actively to propagate information, through broadcasting or any other media, as a component of freedom's expression." *The Independent Broadcasting Authority: Independence vs. Accountability*, 14 May 1999; emphasis added.

Furthermore, the Constitution sets forth provisions in Chapter 9 for an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society. This suggests that it was the intention of the Constitution-makers for ICASA to be considered an independent authority, subject only to the Constitution and law. *The Independent Broadcasting Authority: Independence vs. Accountability*, 14 May 1999.

4.2 Promotion of Access to Information Act

The Promotion of Access to Information Act No. 2 of 2000 was a clear statement by Parliament that the nation would never return to a past in which the media was controlled by the government to the detriment of the people. Examples of past abuses include:

- the 1982 Protection of Information Act which made reporting on large areas of government activity impossible, and made it very difficult to report on prison conditions and government security operations;
- the 1985 State of Emergency which banned film and video footage of all political violence, and curtailed coverage of violence by print media; and
- the SABC, which prior to the mid 1990's, propagated government policies in a biased manner. <http://journ.ru.ac.za/amd/safrica.htm>.

Among the Objects of the Act are, "to promote transparency, accountability and effective governance of all public and private bodies including, but not limited to, empowering and educating everyone –

- to understand their rights in terms of this act in order to exercise their rights in relation to public and private bodies;
- to understand the functions and operations of public bodies; and
- to effectively scrutinize, and participate in, decision-making by public bodies that affects their rights."

In carrying out the objectives of this Act, the SABC plays a unique and important role in providing access to information to all people throughout the nation.

4.3 ICASA

As a Chapter 9 institution, ICASA is to be “independent, and subject only to the Constitution and the law, and [it] must be impartial and *must exercise [its] powers and perform [its]r functions* without fear, favour or prejudice. Constitution, section 181(2); emphasis added. Chapter 9 institutions are institutions aimed at strengthening constitutional democracy.

The Independent Communications Authority of South Africa Act (“ICASA Act”) was drafted with acknowledgement “that the establishment of an independent body to regulate broadcasting and telecommunications *is required.*” ICASA Act, preamble; emphasis added.

ICASA was established to “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.” ICASA Act, Section 2(a). In addition, ICASA “must function without any political or commercial interference” (Section 3(4)). Furthermore, ICASA “*must perform* the duties imposed upon the former authorities by or under the underlying statutes.” ICASA Act, Section 4(1); emphasis added.

The SABC licence amendment application is challenging the independent regulatory nature of ICASA. ICASA must remain the sole regulatory authority and cannot allow for the SABC to self-regulate. If the SABC is allowed to set their own standards, and then can determine themselves whether they are meeting those standards, not only would this prevent them being checked by an authority independent of the SABC, it would mean that the only interests the SABC would be truly answerable to would be those of the advertisers who would hold the purse strings.

The statutory mandate of ICASA is clear: ICASA is the sole regulatory authority and is bound by only the Constitution and the law. The SABC cannot tie ICASA’s hands together and preclude the reach of ICASA from regulating the SABC. ICASA “must perform [its] duties.” ICASA Act, Section 4(1).

4.4 Broadcasting Act No. 4 Of 1999

As the SABC is becoming more commercial, and increasingly more competitive, the SABC will concentrate more on their commercial service instead of their public service. This is inherent in the SABC’s stated purposes of their licence amendment application – to generate revenue using the commercial arm of the Corporation. This contravenes Section 2(11) of the Broadcast Act. By the SABC becoming more competitive, there will be less focus on *encouraging* local programming content. Instead of concentrating on the South African audience and local programming content, the SABC, by virtue of becoming more competitive, would instead concentrate on those particular audiences that would generate more revenue for the SABC. Thus, *discouraging* local programming content in contrast to Section 2(11).

4.5 The SABC mandate

The SABC has stated that “[i]n discharging their editorial responsibilities, SABC management and staff are accountable to the SABC Board, which is charged with ensuring that the corporation complies with the Charter.” SABC Mandate. This is listed as a core editorial value. The implication here is that this “accountability” is solely internal accountability – that is, the staff of the SABC attempt to ensure (via internal pressures, etc.) that their staff is held accountable.

In line with this purported accountability, the SABC Mandate also states that “[t]he SABC ensures that the principles of honesty, openness and transparency govern every aspect of its relationships with shareholder, stakeholders, suppliers and the public.” However, of particular import in this regard is that in connection with this Mandate there is no external regulator or watchdog to monitor the SABC. The SABC therefore cannot say that they are accountable based solely on their Mandate.

If this were the case, the SABC could, in theory, keep internal accountability problems quiet and not public. The MMP therefore calls on the SABC to ensure that all of their records are open to the public, that all policy decisions are made public, and that the SABC be held accountable by an independent regulator such as ICASA in accordance with the SABC’s Mandate.

5.0 Policy reasons why the SABC should not self-regulate

5.1 The SABC cannot assess itself properly

In reference to its delivery on its public service mandate, the SABC noted. “[R]epresentations have no [*sic*; not] put forward any persuasive evident [*sic*; evidence] to contest this delivery, but yet the argument is made that specific licence conditions are required to guarantee future delivery.” SABC Response, page 9.

Their response raises two issues. Firstly, surely it is not for the SABC to decide what constitutes “persuasive evidence.” Is this not similar to the infamous tennis player John McEnroe constantly declaring the ball was in?

Secondly, the SABC is unable to accurately and objectively assess its own performance as pointed out in the MMP’s submission.

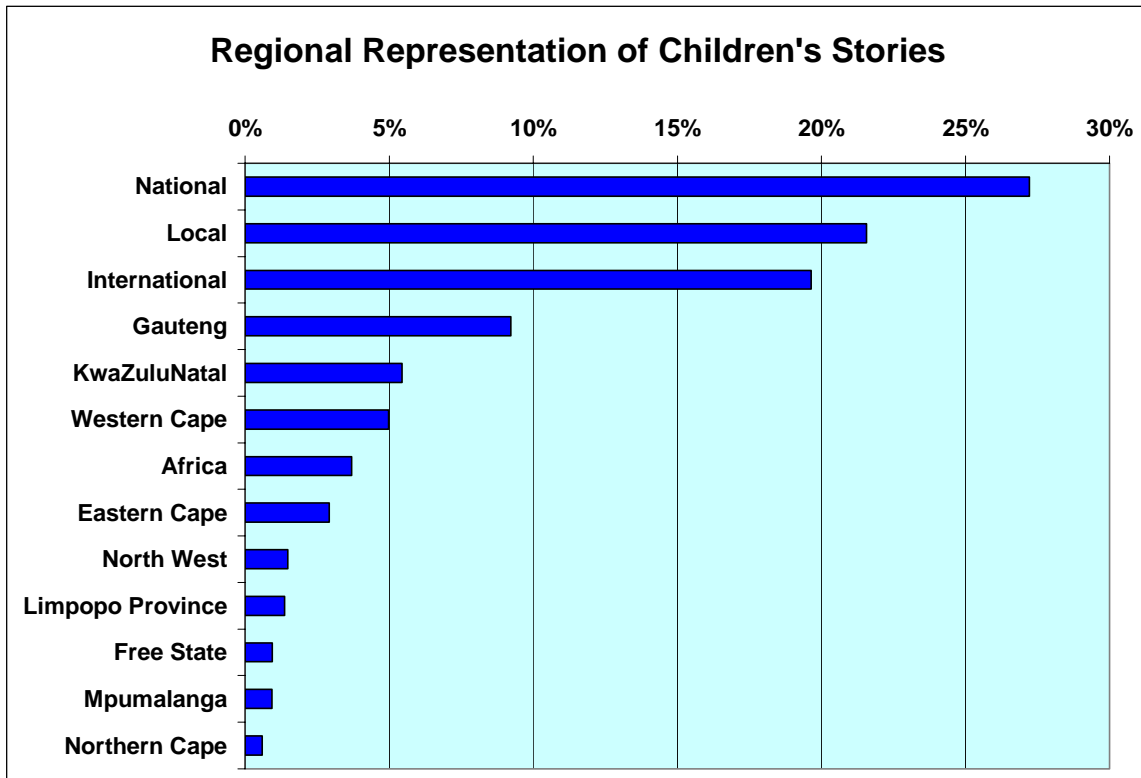
In their application, the SABC provided graphical evidence that claims that they are improving their regional spread; away from the major metropolitan areas and into the marginalised parts of South Africa. The viewpoint implied, is that news and current affairs now reflect a wider range of coverage, from international, national and provincial locations, and from South Africa’s nine provinces (p.117-118).

A closer reading of the accompanying graphs, however, leads to the conclusion that regional diversity has not improved to the extent claimed by the SABC. The

fact that a quarter of all South African stories are provincial in their focus does not prove that the SABC has instituted measures to lower the disparity in regional coverage. Such figures, in fact, seem to suggest exactly the opposite; that coverage is still dominated to a large extent by stories of national and international importance, to the detriment of airing news with provincial events and significance.

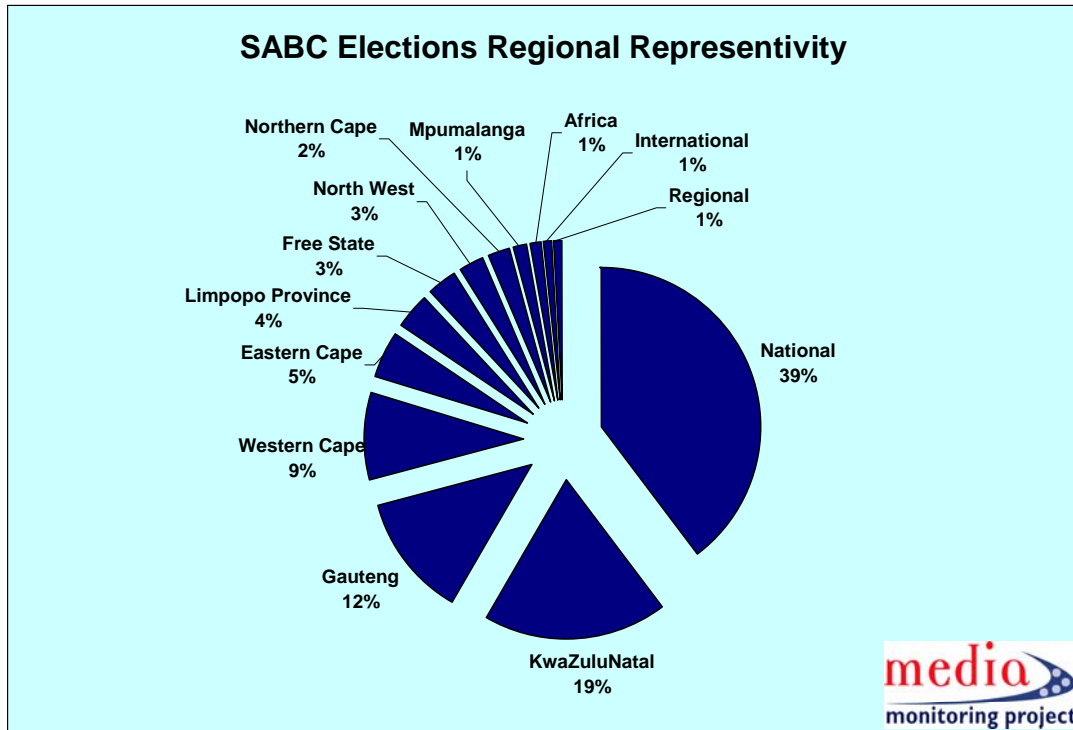
While the report maintains that an average of 25% of all the South African stories on television news are provincial in origin, this breakdown is not accompanied by further examination of the provinces from which these stories emanate. Regional diversity is not merely about comparing the proportion of stories that are international, national or provincial, but should also include an evaluation of which provinces receive the most attention and which are negligibly covered.

During the course of our extensive monitoring exercises, the MMP has found that within regional (provincial) coverage, it is still the three major metropolitan regions of the country (Gauteng, Western Cape and KwaZulu-Natal) that continue to be prioritised to the virtual total exclusion of the rest of the country. MMP's research, undertaken while monitoring the 1994 and 1999 general elections, as well as the 1995 and 2000 local government elections, clearly points to the regional bias apparent across SABC coverage. These patterns have been replicated to a large extent in the findings of the Gender Media Baseline Study, conducted in 2002, and the Empowering Children and Media Project, completed in 2003. Such trends from the latter project are clearly apparent in the accompanying graph, which reflects the regional breakdown of those stories involving children.



The problem of provincial imbalance has been so acute that the SABC 's news and current affairs programmes made clear attempts to cover a greater diversity of provinces in the period leading up to the 2004 national elections. This is reflected in the graph below. While KwaZulu-Natal, Gauteng and the Western Cape continued to be the provinces that received the highest amount of coverage, it would appear that the SABC has made a concerted effort to expand their coverage across a wider range of provinces, on both their radio stations and on their television channels.

The high numbers noted for KwaZulu-Natal and the Western Cape in this instance do not represent a pattern of undue inequitable attention, but rather illustrate the fact that these two regions were the two provinces where the elections were most highly contested. The high amount of coverage accorded to these provinces is thus justified within the context of the 2004 elections.



Racial Diversity

In a similar manner, the SABC maintains that current patterns of racial representation closely reflect the demographics of South Africa. However, the evidence provided, as gauged from the graphs in the report, fails to support such claims. Even a cursory glance at the findings shows that current practices of representation do not even remotely approximate reality.

The SABC licence amendment report maintains:

“In a study of South African Television News content done by Media Tenor, SABC news bulletins showed representivity in terms of race, irrespective of the language of the bulletins.” (p.117)

However, the graph provided shows that whites continue to account for 40% of representation on English and Afrikaans news bulletins. Such figures can hardly be honestly presented as approximating the demographic racial make-up of the population, where whites account for no more than 10% of the total population. While the numbers in the graphs for Zulu/Xhosa and Sotho news are more reasonable, whites continue to be over-represented to a disturbing extent (between 20 to 30%).

More recently the SABC's Annual Report highlights its successes in its educational programming. The SABC's approach to having a clear educational programming policy is a welcome change where, "previously the SABC's mandate had been addressed in an adhoc manner leaving gaps in areas such as adult literacy and genres such as drama" (SABC Annual Report p90) MMP also congratulates the SABC for programmes like Take 5, Soul Buddyz and Isidingo and also commend the SABC for the 20% improvements in their educational programming.

The figures quoted do however make for interesting reading, not least because the report states, "The SABC's public service mandate provides that its radio and television services must include *significant* amounts of educational material" (SABC Annual Report p92 emphasis added)

The figures provided are:

Genre breakdown:

Children	25 532 minutes
Schooling	60 374 minutes
Youth	33 143 minutes
Adult/Public	10 866 minutes

Across all three television channels.

If we use the standard performance period as a broadcast day (so 18 hours) and we calculate the broadcast hours per channel per year it adds up to 6570 hours. For three channels this is 19 710 hours or 1 182 600 minutes. If we then calculate the time for educational television across all stated genres it works out to be 10.9%.

If we look at radio the report states that, "[R]adio output remained constant at 150 000 minutes in all the official languages, broadcast across the ten public service stations." (SABC Annual Report p93). Again using the performance period it translates into 6570 hours per station and therefore across ten it means a total time of 65 700 hours. The time on radio translates to 3.8% of radio airtime. If we look at percentage of airtime per genre across the channels the figure is almost doubled to average at 7.2% educational programming across the channels. (See SABC Annual report p56) Obviously the calculation excludes news and other current affairs that serve to inform but given that radio is the most accessed media in South Africa is it sufficient to suggest that the SABC is delivering on its public services if 3.8% or 7.2% constitutes a significant amount of programming.

How then can the SABC be expected to fulfil its public service mandate, which the SABC states in more than one instance "is wide and complex" (SABC Response, pages 4, 7) if it cannot achieve a simple task?

The SABC argues that it is accountable: "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. ... [P]ublic 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." (SABC Response, page 8; emphasis added).

The SABC argues that because of ever-changing revenue streams it needs to maintain a degree of flexibility in setting a benchmark against which it will measure itself. As a clear matter, if the SABC is setting this benchmark, it can set it to the level they want to ensure that it is always meeting its public service mandate and fulfilling the obligations set forth in the SABC instruments by which it is bound.

5.2 Seeking some financial answers

The SABC has not indicated in its licence amendment application or its response to the MMP's submission the minimum amount of money required to ensure that it delivers on its public service mandate. This is peculiar especially because the purpose of the licence amendment application is for the SABC to create a commercial service arm to cross-subsidize the public service arm.

To the contrary, the SABC has stated time and time again that it needs increased flexibility in programming because of a changing revenue stream. From this we can gather the SABC is interested in flexibility not for an enhanced ability to deliver on its public service mandate, but to compete. The SABC must be held accountable and it must be made public where they are spending South African citizen's money.

The MMP suggests that all monies received by SABC 3 (e.g., from advertising revenue) in excess of the funds required to provide quality public service programming on SABC 1 and SABC 2 should be devoted to developing the broadcasting infrastructure of South Africa. This is in line with Section 8(a) of the Broadcasting Act which sets out, "mak[ing] service available throughout the Republic," as an objective. The SABC can better fulfil their public service mandate if more South Africans had access to the public broadcasting services.

5.3 Population demographics

In their licence amendment application, the SABC indicates that, based on the GINI coefficient (a universal measure of inequality), South Africa is the 112th worst out of 116 measured countries when it comes to inequality in income and consumption. It is therefore imperative that the SABC strive to promote constitutional democracy and equality of all South African citizens.

If the SABC were allowed to self-regulate, or even if the SABC were to become increasingly competitive, the SABC would compete for wealthier viewership such that the SABC could generate more advertising revenue. This would not lead to

equality. For the SABC to self-regulate would be promoting the historical imbalance SA has strived so long to break down.

5.4 The SABC and international best practices

At several points, the SABC claims that its proposed approach is in line with international best practice in terms of regulating and governing public broadcasters:

- The SABC states that the role of the public broadcaster is unique and, thus, it should be regulated differently than commercial broadcasters.
- The SABC claims that public broadcasters have multiple levels of accountability, and various instruments are available to ensure accountability.
- The SABC claims that public broadcasters are generally given flexibility of obligations and license conditions, as opposed to onerous conditions on program quantity and specificity.
- The SABC relies on the international practice of consultation between the public broadcaster and the public to justify its claim that it doesn't need strict, independent regulation.

A recent article regarding the telecommunications industry stated that, "[t]he appropriate procedures for one country, however, are not necessarily the best procedures for another country. Each country has its own unique circumstances. Each country has to carry out the process in a way that allows it to adapt to its own realities." 13 Am. U. Int'l L. Rev. 971, 982.

The SABC makes false assumptions when claiming that its proposed amendment will bring them in line with international best practices. The SABC seeks to compare itself with larger, more mature and more firmly established markets in which public broadcasters compete. This is an unfair comparison. The South African market is easily distinguishable from such markets.

From a policy perspective, South Africa is distinguishable because it is still not yet a mature democracy, and is still developing media markets and a media infrastructure. It is a young democracy claiming its identity and seeking to firm up its political institutions. It has few market participants in its broadcast industry. In addition, it is a nation with eleven different official languages and many diverse cultures that seek to preserve their unique cultural characteristics while building a national identity. It is vital that all citizens and cultural groups achieve true political power so that they are adequately represented on the national level. It is also of the utmost importance that they are able to celebrate their cultural differences in order to maintain their unique identities.

Public service broadcasting has proven itself to be an efficient, and in some cases the only, vehicle to carry out these tasks. It has shown the potential to transcend language diversity, regional diversity, and cultural diversity that make South Africa the dynamic nation that it is.

While nations with older democracies and more established institutions may no longer have such a great need for the service provided by public broadcasting because of their mature institutions and diverse media, all South Africans need access to information provided by the public broadcaster regardless of language, culture or region where they reside.

These policy values are enshrined in specific legal principles which govern the conduct of the SABC. In the Broadcasting Act No. 4 of 1999, for example, Section 2 states, *inter alia*, that, "[t]he object of the Act is to establish and develop a broadcasting policy in the Republic in the public interest and for that purpose to –

- contribute to democracy, development of society, gender equality, nation building;
- safeguard, enrich and strengthen the cultural, political social and economic fabric of South Africa; and
- establish a strong and committed public broadcasting service which will serve the needs of all South African society."

Clearly, requirements are imposed on the South African broadcasting community that would not be imposed on more mature democracies.

This is because South Africa is a country that as recently as a decade ago was struggling to create free institutions in which all people are able to participate.

The public broadcaster plays a much more important role in South Africa than it does in the countries that the SABC would compare it to. There is therefore no basis to compare the SABC with other countries' public broadcasters.

Even if one were to accept the SABC's argument that it should be compared to other nations' public broadcasters, as a claim that its actions are within international best practices, evidence shows that other public broadcasters aren't fulfilling their mandate. If these other public broadcasters aren't fulfilling their mandate, why should the SABC follow their lead?

Israel is a proper example. Should the SABC follow Israel's "best practices," the likely result would be that the SABC would not comply with its public mandate, and entire groups of South Africans would be shut out.

Israel follows a similar model as South Africa, using the license fee approach. In 1991, Israel started a second public television channel to supplement its first public channel. Similar to SABC 3, the second Israeli public channel was to be financed by advertising revenue.

The second public channel subsequently brushed aside its supposedly public character, and currently "behaves like a commercial channel in every way." It aims at the "lowest common denominator" in scheduling its programming. www.museum.tv/archives/ctv/1/html/israel/israel.htm.

As competition became more intense, Israel's public channel strayed further away from its public mandate until it was completely unrecognisable as a public broadcaster. The SABC is headed down a similar road. One should expect that, if a properly diverse media market with many more market participants does in fact develop in South Africa, competition is only going to become much tougher than it is presently.

Should ICASA allow the SABC to follow "international best practice" and focus on competition, the SABC will only be forced to stray further away from its mandate as Israel's second public channel has done. This will effectively prevent the SABC from satisfying its very important public service, as it will be forced to allocate its revenue from SABC 3 back into SABC 3 to enhance competition, rather than to subsidize its public service providers.

Likewise, Britain's BBC has been accused of focusing on competition at the sacrifice of its public mandate. ITV, a commercial broadcaster in Britain, has argued that the BBC has, "in recent years ... been going in the wrong direction, seeking to respond to the dramatic change taking place around it by rolling its tanks on to every battlefield and seeking to expand its scope and remit far beyond its initial role." Memo by ITV House of Commons Select Committee on Culture, Media and Sport.

ITV has also noted that, "the appointment of a Director General who had spent his entire career in the commercial sector has resulted in an expansionist and commercially aggressive mindset at the BBC that has undermined its public purposes." ITV has accused BBC of departing "from its traditional approach to public service values in favour of an approach characterised by determination to win the ratings war at all costs. What is needed is a level regulatory playing field in which the scope and remit of the BBC's service as a whole and each of its channels individually are clearly set out and agreed with an independent external regulator."

In fact, ITV argues that, "the gaps in regulation that remain will permit the BBC to continue playing fast and loose with interpretations of its remit." The SABC is proposing to create similar gaps in the law here.

In 1999, the House of Commons Select Committee on Culture, Media and Sport concluded, "[t]he BBC's self-regulatory position separate from the rest of broadcasting is no longer sustainable. The case for a single regulator of the market as a whole, which we made last year, has been reinforced by the rapid development of the market." Memo by ITV, 3.1. "The current arrangements for governance and regulation of the BBC are inadequate. They are not serving the public interest, nor are they serving the BBC's best interests." Memo By ITV, 3.2.

Again, if the SABC seeks to follow "international best practice," such as BBC's practice, the results may be devastating to the young democracy seeking to include all people. In fact, the best international practice that the SABC should seek to emulate would force it to severely restrict its commercial activity, rather than allow it to expand. In Germany, for example, public television is held in extremely high regard as delivering broadcasting in line with its public mandate.

The German public television is funded by a license fee, with additional revenue coming from strictly limited air time for advertisers. No commercial pressures exist because the air time for advertisers is so strictly regulated and cannot be increased at the broadcaster's whim. Under this model, German public broadcasters have been noted for delivering serious and socially responsible programming. SABC should seek to emulate this model, instead of seeking to broaden its commercial programming. 16 Cardozo Arts & Ent. L.J. 527, 548.

The German Federal Constitutional Court has weighed in on this argument. In its "Eighth Broadcasting Ruling" of February 22, 1994, the Court has categorically stated that the public broadcaster's role was all the more important in view of the evident shortcomings of the commercial broadcaster. 16 Cardozo Arts & Ent L.J. 527, 548.

The warning signs could not be more clear. While SABC says that its proposed amendment is in line with international best practices, this is not the case. Best practices internationally are those that follow strict, tight regulation of commercial services, with the main focus always on the public mandate. Therefore, SABC should be strictly regulated by ICASA. Should SABC seek to follow Israel or the BBC, for example, the likely result would be a sharp decrease in public services provided at a time when the nation needs such public services so vitally.

5.5 The SABC and anti-competition

The SABC must be restrained in its ability to compete in the commercial broadcasting market. Such limitation is necessary in order to achieve an open, diverse and flourishing media industry in the long run. A diverse media industry should be a main goal for South Africa. Such a diverse media industry is crucial, since too much media concentration has the danger of representing a singular viewpoint. Instead, the goal should be to build an industry that broadcasts a broad range of fair and objective information and programming. 16 Cardozo Arts & Ent L.J. 527, 549-50.

According to the Competition Act of 1998, "an efficient, competitive economic environment ... will benefit all South Africans" and "will provide markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire." According to the Broadcast Act No. 4 of 1999, the object of the Act is to establish and develop a broadcasting policy in the Republic in the public interest and for that purpose of ensuring fair competition in the broadcasting sector. The competition theme is obviously prevalent in the mind of legislators.

In accordance with an amendment to the Competition Act, which allowed concurrent jurisdiction between regulatory bodies and the Competition Commission, the Competition Commission and ICASA reached a Memorandum of Agreement to address such concerns. The agreement was structured to allow the two regulators to form a working partnership to oversee the telecommunications and broadcasting industries. Specifically, the agreement is "sounding a warning to those who abuse their dominant positions in these sectors. This agreement should be seen as another indication of ICASA's

commitment of promoting competitive markets in the broadcasting and telecommunications sectors." Comp. Com. Media Release 7 of 2002.

This is direct evidence of a clear intent of ICASA and the Competition Commission to foster competition in the broadcasting industry. "Diversity of sources of info and opinion is most likely to be served by diversity in ownership of broadcasting companies, and by competition. Restrictions on the entry of new television stations ... should possibly be reconsidered. South Africa Comp. Com. – Regulation and Competition in the Broadcasting Industry

As it becomes apparent that the intent of the legislature is to create a competitive broadcasting industry, it is important to understand the obstacles to achieving such competition. According to the South African Committee on Competition, public broadcasters hold a privileged position with respect to their competitors. South Africa Comp. Com. – Regulation and Competition in the Broadcasting Industry. This privileged position is result of the public broadcaster's unique entitlement to the public subsidy known as the license fee, as well as its virtual monopoly of industry talent, resources and infrastructure over several decades.

By allowing the public broadcaster to exploit its dominant position, South Africa's broadcasting industry could be devastated forever. In essence, the intermediate to long term effects of allowing the public broadcaster, the SABC, to exploit its dominant position by allowing it to push forward, on its own terms, into commercial broadcasting will serve to restrict new entrants and to suffocate a potentially vibrant industry in its infancy.

The SABC's competitors are already feeling the impact. Noting the challenges of a relatively new competitor entering the broadcasting market, Marcel Golding, CEO of ETV has stated, "In my present position in the broadcasting sector, I see a rather large public service monopoly dominating the landscape behind a mirage which appears to be broadcasting regulation." Golding noted that an independent SABC is crucial in providing the diverse language, education and cultural needs of South Africa in order to aid in nation building. For these reasons, he states that the "SABC should focus on the delivery of such public interest objectives and its role in competing with commercial licensees be strictly regulated. This has not happened. ... The sheer size of SABC provides it with a distinct competitive advantage. ... It is able to monopolise its audience by using multiple channels to promote its service."

The inherent unfairness to competition, according to Golding, lies in the SABC's access to license fees, state funding and advertising. Commercial broadcasters, on the other hand, must survive solely on advertising. The major concerns, Golding states, are SABC's dominant position and the lack of effective regulatory control over SABC. Golding concludes that "the absence of regulation of the public broadcaster has resulted in a serious market imbalance which negates the social and economic objectives of diversity. ... Creating new broadcasters in an environment where the monopoly of the public sector player is not regulated or reviewed, is a recipe for disaster in an already uncompetitive market environment."

In the spirit of the Competition Act and the Memorandum of Agreement with the Competition Commission, ICASA should seek to aggressively promote competition. While the SABC may dismiss Mr. Golding's comments because they view him as a competitor, it would be unwise for ICASA to do so. Evidence of the devastating outcome that Mr. Golding speaks of is already surfacing, both here and in more mature markets overseas. If competitors in mature markets aren't able to effectively absorb the expansion of the public broadcaster into the commercial realm, it would be disastrous to assume that competitors in the young and expanding South African broadcasting industry will ever be able to thrive.

The rate of growth of advertising revenue available to broadcasters in South Africa is fairly subdued. This means that as new competitors enter the market, they must compete for a somewhat finite revenue pool just to survive. If the SABC is able to use its established advantages to aggressively compete for this pool, the less established players clearly will be shut out. The result will be concentration, rather than diversity, in the broadcasting sector. This is in clear opposition to the intent of the Competition Act.

In addition, the White Paper states that "[t]here should be fair and sustainable competition in the provision of services. New services should be added to increase diversity in the programming mix available to the public in a manner such that the ability of existing services to meet their public service obligations will not be unduly jeopardized." Broadcast Policy White Paper, page 22.

Even in a market as mature as the U.K.'s, the assertive entry of the well established public broadcaster into commercial broadcasting is having a detrimental effect on competition. According to ITV, a private commercial broadcaster in the U.K., "the BBC has strayed from its traditional approach to public service values in favor of an approach characterized by determination to win the ratings war at all costs."

Advertising on the BBC would have a very negative impact on the rest of the private commercial broadcasting industry. In all previous studies conducted, from Peacock in the 1980s to the Davies Review in 1999, data shows that allowing advertising on the BBC at a level necessary to make a major contribution to its funding would not result in a significant increase in overall advertising money spent. As such, the BBC would simply cannibalise revenues currently available to the commercial sector

At the extreme it is estimated that, even if BBC1 and BBC2 were allowed to show as much advertising as their commercial rivals, the result would be only a 5% rise in Total TV Net Advertising Revenue. Forecasts suggest that, by 2007, ITV1's revenues would collapse by £600 million and Channel 4's by £300 million. This is money that would simply be taken out of the broadcasting system, decimating investment in original UK production. Memorandum submitted on Behalf of ITV Company, a competitor of BBC.

The South African Committee on Competition agrees that, in the long run, regulations on public broadcasters may not be necessary. Also, in the long term, a more pure form of competition may be able to eliminate the public broadcasting distinction entirely through alternative means of providing public services discussed below. But, for now, as there is a great Constitutional need for the delivery of the information provided by the public broadcaster, and while the broadcasting market and infrastructure are still in development, the Committee acknowledges the need for regulating measures in order to achieve specific public interest objectives. Comp. Com. Report.

Therefore, before an adequate number of market participants with diverse views and alternative solutions to providing public services exist, the privileged position of the public broadcaster must be strictly regulated in order to achieve this ideal marketplace. Otherwise, the goal of a potentially flourishing media industry with broad competition and diverse views may never be fulfilled.

6.0 Unpacking the SABC's response & position

Upon analysing the SABC's Application for Amendment and the Response to the MMP's Submission on SABC Amendment Application it is apparent that the SABC's arguments are based on false assumptions and superficial legal analysis.

6.1 In its response to the MMP's submission, the SABC states that it is "patently untrue" that it will have fewer obligations than commercial operators without specific license conditions because it is bound by its Charter. The SABC also states that, because of the legislative framework in place, it would be wrong to assume that the SABC would not deliver on its public mandate without specific license conditions.

With the amendment application and an obvious desire to focus on commercial broadcasting, specific conditions have become a necessity. As the public broadcaster ventures more aggressively into the commercial market, a greater risk is created that the desire to compete will force the public broadcaster to stray from its mandate. As discussed above, this has already happened with public broadcasters in other nations. Specific conditions will prevent the SABC from replicating the errors of other public broadcasters. As South Africa is at a crucial period in its history, this is necessary to ensure that the needs of the people of this nation are met.

6.2 The SABC argues its "peculiar statutory position," uniquely burdens "the only broadcaster on which statutory obligations of public broadcasting are imposed." SABC Licence Amendment Application, page 33.

The SABC is the only broadcaster owned and controlled by the people of South Africa. One hundred percent of its shares are held by the government. This structure is in direct opposition to a private broadcaster, which is owned and controlled by private parties. It is true that the SABC is the only broadcaster in this "peculiar statutory position." However, these distinctions further justify strict regulation.

The people of South Africa have an unrestricted right to control the SABC. By imposing specific conditions on its broadcaster through ICASA, for example, the people of South Africa are clearly within their rights.

6.3 The SABC claims that the need for amendment cannot be taken to provide the occasion for complete review and revision of the SABC's licenses by the Authority. SABC's Response to the MMP's Submission, page 13.

In its claim that the scope of review of the amendment application must be extremely narrow, the SABC relies mainly on language from Section 22 of the Broadcasting Act. The SABC interprets the word 'reorganization' in Section 22(1) in a very specific context, and states that the term relates only to the SABC reorganizing from two separate entities under the previous Section 9 to two separate divisions under a single entity under the amended Section 9. The SABC claims that anything outside of this specific reorganization activity is not reviewable. The SABC argues that it will fulfil its requirements by complying with the broad requirements under Sections 10 and 11 regarding Public Service and Commercial Services as it reorganizes into two separate divisions. The SABC also claims that it is difficult to see how obligations under the IBA Act can be related to the SABC's reorganization, because no reference to separation of the SABC into public and private divisions under the Broadcast Act is made in the IBA Act.

The SABC devoted a relatively large portion of its submission to arguing the fact that it is not necessary to closely scrutinize their activity. Such behaviour should raise a red flag, especially from a public broadcaster owned and controlled by the people. In fact, such argument suggests that the SABC's true motivation in trying to avoid close regulation is that it wishes to aggressively venture into competitive commercial broadcasting with little specific oversight.

In any event, the MMP disagrees with the SABC's claim that the Article 22 amendment requirement prevents closer scrutiny of their license conditions.

The SABC claims that ICASA's jurisdiction is limited by Section 22. Section 22 is located under Chapter 4 of the Broadcasting Act which deals exclusively with Public Broadcasting and the SABC. Section 22 read alone, and in conjunction with surrounding sections, is clearly intended to place duties and limitations only on the SABC. Evidence of this can be found in the first three words of Sec. 22(1), which states "The Corporation *must...*" (emphasis added). The sole focus of Section 22 is the SABC. It does not limit any other party, such as ICASA, from carrying out its duties.

Therefore, the SABC cannot extend its argument that Section 22 limits its obligations with respect to Sections 6, 9, 10, and 11.

Likewise, Section 22(2) states that ICASA "may impose any appropriate license conditions which are necessary in order to reflect the reorganization of the corporation into the public service division and the commercial service division and its related obligation in terms of this Act and the IBA Act." Again, the SABC

views this clause as a limitation on ICASA's oversight authority. This section does not state that this is the only power that ICASA has over SABC. In other words, it does not have the effect of limiting ICASA's power.

In fact, Section 22(2) recognizes ICASA's broad power to impose license conditions on the SABC, not only in the context of this reorganization, but also in context of any related obligations found in the Broadcast Act and IBA. There is no evidence to support the contention that "related obligations" refers only to SABC's obligations under Sections 10 and 11, as the SABC claims, especially when noting the fact that Section 22 does not limit ICASA's oversight in any way. In fact, it would be just as reasonable to argue that the term "related obligations" refer to other powers of ICASA under the Broadcast Act.

The SABC claims that the phrase "which are necessary" in Section 22(2) also limits ICASA's ability "to scrutinize the amendment application only to the extent appropriate to reflect the reorganization of the Corporation." What the SABC fails to contemplate is the fact that, as the SABC ventures more aggressively into commercial services, its ability to deviate from its mandate will increase greatly. Thus, very detailed scrutiny, including the imposition of specific licensing conditions is necessary under Section 22(2) to reflect the reorganization of the Corporation.

Furthermore, Section 30(5) states that, "the authority may make regulations on the amount of South African programming and other matters which reflect these circumstances, bearing in mind the objects of this Act." Circumstances referred to include services that: (a) reflect the culture, character, needs and aspirations of the people in the regions that they are licensed to serve subject to license conditions; and (b) provide an appropriate significant amount of South African programming according to the Regulations of the Authority.

In addition, ICASA is granted broad power to regulate the SABC in the Independent Communications Authority of South Africa Act of 2000. Specifically, in Section 2, the Authority is granted the power to both "regulate broadcasting in the public interest" and to "achieve the objectives contemplated in the underlying statutes," which are specifically referred to as the Broadcast Act, the Independent Broadcast Authority Act, and the Telecommunications Act.

6.4 SABC argues that their obligations as a public broadcaster should be viewed collectively (3 channels combined) rather than individually (on a per channel basis)

A grave danger exists that the SABC will subordinate its public mandate to its desire to compete.

The SABC claims that it needs to compete so that SABC 3 can cross subsidize SABC 1 and 2. But, in order to better compete with ETV and other market participants, it is logical to conclude that SABC 3 will need to receive a disproportionate amount of funding for better programming on SABC 3. The amount of revenue needed by SABC 3 to compete will only increase as new competitors enter the market. A logical conclusion will be that programming on

SABC 1 and 2 will deteriorate and the public service mandate will be harder to fulfil.

By viewing the SABC's obligations as a public broadcaster individually (on a per channel basis), and imposing strict conditions, the SABC will be less able to allocate a disproportionate amount of funding to SABC 3 as competition increases.

Also, from a competitive standpoint, by imposing obligations on each SABC channel individually, the SABC will be less able to use its dominant position to block new broadcasters from entering the market. Otherwise, SABC 3 may be able to abuse its dominant position and its lack of specific obligations to destroy ETV and other competitors. This would ruin the playing field, which is clearly not an objective.

From the point of view of broadcasters, the environment should be, as far as possible, 'a level playing field' in which broadcasters compete fairly with one another for audiences and, where appropriate, for revenue. (Triple Inquiry Report).

On the other hand, having individual obligations imposed on each SABC channel will have a positive effect of fostering competition and increasing broadcasting diversity.

7.0 Alternative public service funding proposals

7.1 Alternatives to licence fees and cross subsidization are necessary

The MMP recognizes the financial burdens that the SABC must navigate. The MMP also recognizes that no matter how convincingly we argue that the SABC must be strictly regulated in order to properly satisfy its mandate, the SABC can always revert back to the excuse that it needs increased advertising revenue in order to survive.

The easy way out is to sacrifice its mandate and seek the always-lucrative advertising revenue. The SABC has a higher burden, though, which is to provide a vital public service to the people of South Africa, not to inflate its income statement and crush its competition. Therefore, the SABC must be more resourceful in finding ways to satisfy its mandate. That is the duty of the Board of the SABC.

The license fee system, as imposed on the people of South Africa, is not working. The bulk of the SABC's revenue is derived from advertising. Only about 17% of revenue is derived from television licensing fees. SABC Audience Services Article, <http://www.sabc.com.za>. These figures are in direct contrast to the funding mix of other nations' public service broadcasters, who derive most of their revenue from license fees. SABC Audience Services Article; <http://www.sabc.com.za>.

In addition, the license fee is basically a regressive tax. Being, for the most part, a flat fee, the license fee absorbs a larger percentage of income from South Africans with lower incomes than it does from those with higher incomes. This is clearly unjust. The result of this regressive structure is that lower income earners have considerably less access to television than higher income earners. Less access to television results in less access to information and less ability for one's Constitutional rights to be satisfied.

Therefore, alternatives to the current licensing regime should be considered. Such changes will have several major beneficial effects. Most importantly, a goal of such a change would be to greatly increase access to television for lower income earners, which will significantly increase access to information for the people of South Africa. Also, a change should seek to increase non-advertising revenues to the public broadcaster, providing the broadcaster with the necessary funds to fulfil its mandate.

7.2 Broadcasting tax vs. licence system

SABC has complained about the rate of pirate viewing - the viewing of television without a license - for years. As of 2000, the piracy rate in South Africa was approximately 35% (SABC Audience Services Article, <http://www.sabc.com.za>), as opposed to 5% in the United Kingdom, for example. A report in the Business Day (15/09/04 p18) quotes the latest figure at 32% (but the SABC's 2004 Annual Report shows that licence fees account for 15% of total SABC revenue compared to 16% in 2000 (p46)). SABC has stated that if it were able to collect license revenue from all South Africans who are liable to pay the fee, "that would enable the SABC to fund itself completely." SABC Television Licenses Article, <http://www.sabc.com.za>. Hence, the SABC concedes that, if the license system were revised, there would be no justifiable need for it to aggressively enter the commercial market. It follows, then, that the SABC can concentrate its efforts where it should have all along – on delivery of the public service mandate.

In the article, *Independent Broadcasting Authority: Independence vs. Accountability*, further support for this argument is found. The article states that, "[the license process] is an underdeveloped area for financing the broadcasting system. The collection system has proved inefficient. Receiver fees constitute about 20% of the SABC funds. Potentially, license fees could generate R1 billion, which could be approximately 80% of the budget." Therefore, the funds that the SABC needs to thrive as a public service broadcaster are out there. SABC just needs a more efficient way to obtain them.

By levying a tax, the percentage of the population that pays their share of the tax would be commensurate with the percentage of the population that currently pays their taxes. This is obviously a much higher percentage of the population than the percentage of the population that currently pays their license fees in full.

In addition to reducing license piracy, there will be no need for the SABC to maintain a register of licenses (Section 27(9) of the Broadcasting Act), nor will they have to expend time and money to collect license fees (Section 27(3) of the Broadcasting Act). In addition, this plan would increase regional and local

coverage, and ratings would soar substantially, as so many more South Africans would have access to television. This would increase advertising revenue and have the effect of boosting the entire industry.

The MMP proposes, therefore, that the license system be replaced by a national broadcasting tax. The burden of the tax would be on an individual, household or commercial basis, and would depend on income. Essentially, it would be based on the ability to pay, thus, it would not be regressive and would allow more lower income South Africans earners access to television. *Independent Broadcasting Authority: Independence vs. Accountability.*

In order to ensure that the tax is appropriate to subsidize public broadcasting, ICASA would have the duty of recommending the amount of the tax to the National Revenue Fund. To prevent the funds from being utilized by government for unrelated programs, the National Revenue Fund would then grant the amount of tax collected directly to ICASA. As the independent authority with the duty of overseeing the broadcasting industry, ICASA is in the most reasonable position to ensure that the funds are distributed only in the interest of providing suitable public broadcasting to the people of South Africa.

The funds would first be distributed to the public service arm of SABC to ensure that they properly satisfy their public mandate. Any extra funds held by ICASA could then be utilized to further develop the broadcasting infrastructure throughout South Africa and, possibly, to grant to commercial broadcasters to aid them in developing local content.

The results of such a system would be dramatic. SABC would benefit from increased revenue derived from the tax, allowing it to properly fulfil its mandate. The SABC would, therefore, no longer have to aggressively seek out advertising revenue, a course which would have eventually eroded its purpose. Also, the tax system would ensure that everyone who should pay and can afford to pay does, in fact, pay to support public broadcasting. The poorest classes will not have to pay, yet they will be able to legally access television. The richest classes may have to pay more to subsidize the poor, but the amount will remain a relatively miniscule percentage of income, and will almost certainly be substantially less than they are paying now in the form of the license fee.

7.3 Subsidization based on advertising revenue

Alternatively, or in addition to the proposed national broadcasting tax, the MMP proposes that a percentage of advertising revenue of all commercial broadcasters, including SABC 3, be diverted to ICASA to ultimately supplement the public broadcaster. Such a plan would allow the public broadcaster access to additional funds to fulfil its mandate. Also, it will remove the need of the public broadcaster to compete, which will, in turn, benefit the commercial broadcasters.

Again, ICASA, as the independent authority, will have the responsibility of determining the percentage of the subsidy as is necessary to provide for

satisfactory public broadcasting. As more entrants come into the market, and as advertising revenue increases, the percentage of the subsidy from the commercial broadcasters would decrease.

Also, new commercial entrants to the market can be exempted from providing a subsidy for as long as the authority determines it will take for the entrant to create a stable revenue base. This will ensure that there are no additional anticompetitive barriers to entry in the market.

In addition, commercial broadcasters could be allowed to request grants to provide public interest broadcasting from this public subsidy pool. This would further enhance the satisfaction of the public service mandate throughout South Africa.

7.4 Reducing commercial broadcasters' public obligations in exchange for subsidising the public broadcaster

The MMP proposes yet another alternative to increase funds to SABC to provide quality public broadcasting. Commercial broadcasters could be given the option of being exempted from satisfying their public service obligations by further subsidizing the public broadcaster.

Such a possibility has been proposed in the United States Congress. In the U.S., commercial broadcasters have obligations that they must fulfil, including airing certain amounts of children's programming or offering free political air time to candidates during election seasons. The proposal aimed to give the commercial broadcaster the option to subsidize public television, rather than fulfil these obligations. 17 Cardozo Arts & Ent.L.J. 417, 433-34.

Such a proposal could be considered here. It would have the effect of satisfying the commercial broadcaster by removing a public obligation, while bolstering the public broadcaster by providing additional funding.

The MMP believes that the enactment of any of the above proposals, either alone or in combination, will greatly strengthen SABC's source of funds and its ability to deliver the quality and quantity of public programming that South Africa needs at this crucial point in its history. In addition, many more South Africans will have access to television and information. Finally, funding of the public broadcaster will be streamlined and made entirely transparent, thereby reducing burdens on both the SABC and the government. SABC has many reasonable alternatives available at its disposal, which it should seek to implement. Their claim that they so desperately need advertising revenue should be dismissed, as it is clearly the SABC's own self interests that prompted such a claim, not the interests of the people of South Africa.