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Promoting human rights and democracy through the media since 1993

# Submission to Independent Communications Authority of South Africa (ICASA) on the Draft Broadcasting Digital Migration Framework Regulations

7 November 2008

Submission by the Media Monitoring Project

## Introduction

The Media Monitoring Project (MMP) welcomes the opportunity to make a submission to the Independent Communications Authority of South Africa (ICASA) on the Draft Broadcasting Digital Migration Framework Regulations, and request that we be allocated time to make oral representations as well, in order to elaborate on our submission.

This submission will address the following areas:

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

### 1. MMP's Constitutional Assumptions

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

“that the 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 MMP 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 MMP’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, MMP 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. MMP therefore welcomes the Migration Regulations as a means of ensuring the application of these principles during the digital migration period.

## 2 MMP and the Save our SABC – Reclaiming Our Public Broadcaster (SOS Coalition)

MMP is a founding member of the 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 thus MMP fully supports the content and aims of the Submission.

## 3. Areas of concern relating to the draft regulations

### 3.1 Review of Broadcasting Policy essential

We reiterate the position of the SOS Coalition Submission that all broadcasting policy and legislation needs to be reviewed. MMP also strongly supports the commonly held view that

the funding model of the SABC must as a matter of urgency be significantly reviewed and revised. The implications of this for the current regulations require a considerable review of the clauses relating to both public and “public commercial” services.

### 3.2 Regulations must be practical and protect the viability of broadcasters

MMP further wishes to reinforce the position that in addition to respecting and promoting the principles noted Point 1 above, any regulations relating to the broadcasting environment need to take into due consideration the operating environment and context of broadcasters in South Africa. In addition, the Authority has the challenging task of also ensuring that regulations are practical, fair and serve to protect the viability of broadcasters, and that they work to further ensure broadcasters’ offerings and incentivise the public to purchase set top boxes.

Currently, there appear to be certain clauses that are not only impractical but also place unreasonable conditions on broadcasters. For example:

“5(10) Where a digital incentive channel is authorized in terms of these regulations, the Licensee is required to commence broadcasting on the channel within ninety (90) days after the issue of the certification for authorisation by the Authority.”

(Draft Regulations)

It seems difficult to imagine how in this interim period, where set-top boxes are still being rolled out, and where advertising for commercial broadcasters will likely be cautious and limited, that broadcasters can be expected to start broadcasting within 90 days. By comparison, 5(9) allocates the same period of ninety days to the Authority to undertake one task, where as broadcasters are expected to launch entirely new channel/s. The 90 days time frame results in an unrealistic deadline for broadcasters, as it is highly unlikely that broadcasters would have all the necessary content, or at least most of the content they intend broadcasting, when they make their application for a licence. In the case of local content, unless the same content is to be simply re-broadcast across the applicants additional digital channels, it would also be grossly unfair to require broadcasters to broadcast local content 90 days after receiving their licence.

### 3.3 Diversity – critical to public broadcasting

In addition to the points raised in the SOS submission, MMP notes that the principle of diversity is entirely absent from the draft regulations. Not only is the principle essential in

terms of ensuring diversity of views and programming, but is also essential across the channels available and in ownership. The absence of diversity both in word and concept throughout the draft regulations strongly brings into question whether the Draft Regulations are consistent with ICASA's objectives.

### 3.4 Channel Allocation

The regulations appear silent as to the rationale used in determining the number of channels allocated to broadcasters. It would appear to be based on a simple pairing up of existing channels currently licensed to broadcasters. Three key issues arise for MMP in this regard:

#### 3.4.1 The need for research and public participation.

MMP supports the SOS Coalition's view that there needs to be appropriate research undertaken to determine the most effective utilisation of the limited resources available. It seems quite extraordinary that M-net should be given quite so many channels when the very basis for M-net and CSN as terrestrial licences have been superseded by Multichoice's satellite broadcasting bouquet. MMP 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 begs the question as to whether M-net should be given any of the available resources. It seems that the current allocation in the draft regulations works strongly to the advantage of M-Net while the opposite is the case with e-tv, which appears to be clearly disadvantaged.

Regarding the SABC, as noted in the SOS Coalition submission, it is not clear as to whether the SABC currently has the capacity and resources to operate on the basis envisioned in the draft regulations. Further, given the lack of clarity as to what conditions will have to be satisfied for the "public commercial channel" proposed for the SABC, and given the challenges already noted by the SOS Coalition with the SABC's funding model, it would seem that credible research is required before taking any decision on whether to allocate the SABC a public commercial channel.

MMP supports the SOS Coalition submission regarding the importance of public participation in the authorisation of channels. MMP submits that there is a clear need for greater levels of public participation, not only in the authorisation of channels, but also in assessing the allocation of resources to broadcasters. Not only is greater public

participation in these areas essential for basic democratic process, but it is also likely to yield beneficial material and views that may greatly assist the Authority in determining resource allocation.

#### 3.4.2 The importance of technology and need to allocate broadcast capacity

It should be noted that the draft regulations are designed to regulate an area which is not only technically challenging, but also, because it is focused on technology, the areas being regulated are intrinsically difficult to regulate because they are subject to continual change. The Authority does therefore have an incredibly challenging task to accomplish. The notion of channels as being fixed on a one-to-one basis with a specific amount of bandwidth, or radio waves, is no longer valid. Already it is clear that the same wires that were once used only for phone lines can now be used for data transfer. Similarly, the amount of bandwidth that previously may have been allocated to only one channel can now be used to carry two or three channels. Accordingly, MMP submits that the Draft Regulations, rather than referring to allocation of channels, should refer instead to allocation capacity or certain bandwidths. The advantage of doing so is that it would encourage broadcaster to utilise technology to offer greater diversity of services and channels with the same amount of bandwidth, where they may previously have been able to provide only one channel. Not only would doing so be more in line with technological advances, but it could be used to regulate the development of specific public service channels. For example, channels dedicated to children's programming.

#### 3.4.3 Money money money

Linked to the need for research in assigning capacity, is the issue of money. More precisely, the issue of where the money for the various channels, especially for the public broadcaster, is going to be coming from. The draft regulations are silent on the matter. Not only will broadcasters have to pay for double transmission, but there will also be substantial costs for new content. It is not clear, if the advertising pool is sufficiently large to cover all envisaged channels, especially with the possibility of a recession where advertising budgets are often the first to suffer cutbacks. In the case of the public broadcaster and with elections in 2009, it seems highly likely that the policies agreed upon by the ANC will form the basis for government policy. Should this be the case, it is clear that there will be a significant shift in the SABC's funding model. The ANC's Policy document states

“132 The state must substantially and urgently increase its funding of the public broadcaster from the current 2% to a minimum of 60% by 2010, so that the SABC can properly fulfil its public mandate. This is in accordance with the 51st Conference resolution which has not yet been implemented.”

(ANC 52<sup>nd</sup> National Conference 2007 Resolutions, Pg: 46)

While this policy may be translated into reality, it is not clear where government will source the money from. Further, even if the minimum 60% is sourced, there is still uncertainty as to where the remaining 40% of the necessary funding will come from.

### 3.5 The Public Value Test

MMP again endorses the critical points made on the Public Value Test in the SOS Submission. MMP welcomes the Public Value Test concept, but submits that in addition to the test needing to be clarified and properly fleshed out it, public participation should be explicitly integrated and not mentioned only as something that *may* be included. The notion of a Public Value Test is a useful one, but in its current form in the draft regulations, it is vague and open to radically different interpretations. Accordingly, MMP submits that rather than attempting to resolve the current difficulties with the Test as formulated in the draft regulations, that the Public Value Test itself forms the basis of a process of public participation. Doing so would enable members of the public to contribute to what in their view should be involved in such a test, how it should be formulated, and when it should be applied. Rather than simply copying a version of a Public Value Test from another country, a public participation process will enable people to take ownership and tailor the test to our South African context.

### 3.6 Public Participation

MMP notes with concern that the level of public participation in the Draft Regulations is not only limited to a few areas, namely, 5(3) and 5(5) but it is also conditional. MMP submits that, the limited levels of public participation counter productive, potentially anti democratic and counter the spirit and intention of the Constitution and foundation of the Authority. MMP also submits that this would fundamentally constitute poor and unfair regulatory practice in an area that involves the public broadcaster. One of the greatest advantages of the developments of communication technology is that it has enabled media to engage with audiences in ways never before imagined. It has enabled audiences to become producers of their own content and it has brought an explosion of content and information.

In their current form, the draft regulations do not take these factors into consideration. Instead, they seem to potentially operate on the basis of exclusion of members of the public, rather than seeing the public as integral to the process that the regulations have been designed to address. A quick review of South Africa's democratic legislation and policy would appear to support a view that those pieces of legislation and policy that have the greatest buy in, that are indeed the most workable and often most progressive, all had high levels of public participation. Some examples include the Children's Act and Sexual Offences Act. Admittedly, these still have their flaws, though they are primarily the result of last minute changes and not the public participation process. Similarly, those that have seen limited public participation often have significant practical challenges, and in the worst case have been sent back to the legislature by the president (for example, the Broadcasting Amendment Bill). More recently we have witnessed the Protection of Information Bill being sent back to the legislature to resolve constitutional concerns, concerns that were pointed out during public hearings.

### 3.7 Conditional Access

MMP notes that in the definitions Conditional Access (CA) is defined as:

- i. "the protection of content by requiring certain criteria to be met before granting access to this content;
- ii. a plug-in software applications configured in conjunction with the operating system of a Set Top Box with which broadcasters can restrict access to all or part of their service to a particular group of viewers;
- iii. a method of blocking access to programming, access only being allowed with the correct codes or card to "unlock" the programming ; or
- iv. a system that provides access to users when specific requirements are met, which requirements may include identification, authenticity, registration, payment or combination of all these and other factors."

(Draft Regulations)

While the necessity of such Conditional Access can be understood in some circumstances, including preventing children having access to adult-material channels, MMP submits that this Conditional Access should not be simply extended to the SABC or other free to air broadcasters. While in the case of the public broadcaster it may be reasonable for some access to be limited, it seems to allow for a situation where access to broadcasting becomes denied over un-related issues such as failure to pay TV licences. However frustrating the

collection of licence fees may be, (MMP submits this aspect of the SABC's funding model also needs to be reviewed), it would be a violation of a person's right to access to information if access was denied due to non payment. The role of the public broadcaster in informing people is crucial to South Africa's democracy. It is essential therefore that the Draft Regulations are amended to ensure that, in the case of the SABC or other free-to-air broadcasters, access cannot be denied to any person for non-payment of licence fees.

#### 4. Summary of recommendations

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

##### 4.1 Broadcasting environment:

4.1.1 It is essential that there is a full review and overhaul of broadcast policy and legislation;

4.1.2 Equally important, a review of the funding model of the SABC and the impact of the revised model on these regulations is required;

4.2 An addition to the objectives of the regulations to entrench the regulations serving the public interest as well as entrenching the need for public participation;

4.3 The inclusion in the regulations of the concepts of diversity, fairness, human rights-related issues, and viability both in terms of the incorporation of the words and terms in the regulations;

4.4 That the allocation of licences and channels is based on thorough research and is the result of a consultative public process;

4.5 That the Public Value Test is fully fleshed out and developed through a public process to ensure greater buy-in to not only the test, but also to digital broadcasting and the process of digital migration;

4.6 That a clause is inserted in the Regulations to ensure that Conditional Access cannot be used by the public broadcaster or other free to air broadcaster to prevent access to programming and information, as a result of non-payment of a licence fee or any other punitive reason;

4.7 That rather than allocating channels, the authority is strongly encouraged to allocate broadcast capacity, to allow and encourage broadcasters to make the most effective and efficient use of the limited resource;

4.8 That the authority engage in a public process together with all key stakeholders to investigate and devise solutions to the financial implications of digital migration.

#### 4. Conclusion

In conclusion, it is perhaps worth considering what the implications would be if the concerns contained in MMP'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 have the capacity to lead to confusion in interpretation as well as a number of legal challenges. 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.

MMP thanks the Authority for the opportunity to make this submission, and hereby requests 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.

Yours sincerely,

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