

**ICASA - NOTICE 349 OF 2007**

**NOTICE OF INTENTION TO PRESCRIBE  
REGULATIONS IN TERMS OF THE  
LICENSING FRAMEWORK APPLICABLE  
TO INDIVIDUAL AND CLASS LICENSES  
UNDER CHAPTER 3 OF THE ELECTRONIC  
COMMUNICATIONS ACT, NO. 36 of 2005**

**Submission**

**09 May 2007**

## Section 1: Introduction

In 1995, the community media sector met in Cape Town under the banner of a conference called “Community Media 2000”. Among its recommendations was a formation of an “Enabling Support Mechanism” or a “Media Development Agency”. This “Community Media 2000” conference followed a number of processes engaged by the community media sector, in response to the drying up of international donor funding, aimed at lobbying for support and creation of a sustainable enabling environment for community media in South Africa including provisions supporting the sector in the Reconstruction and Development Programme (RDP) document.

These advocacy processes led to amongst other achievements the recognition of three tiers of broadcasting<sup>1</sup> in South Africa which were legislated through the Independent Broadcasting Authority Act of 1993, which has been repealed and replaced with Electronic Communications Act of 2005. Other favourable achievements for the community media sector were the Authorities:

- ✚ Position Paper on Community Sound Broadcasting Services of 1997;
- ✚ the subsequent Community Sound Broadcasting Policy Position Paper of June 2006; and
- ✚ the Community Television Broadcasting Services Position Paper of November 2004.

In 1996, the then Deputy President Mbeki established a Task Group on Government Communications (COMTASK) led by Mr Mandla Langa. The community media sector led by the National Community Media Forum (NCMF) in its submission to the Comtask recommended the establishment of the Media Development Agency. In its report “Communications 2000 – A vision for government communications in South Africa”, COMTASK recommended that government facilitate the process of setting up a statutory

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<sup>1</sup> Community broadcasting, Commercial Broadcasting and Public Broadcasting.

recognised media development agency for the dispensing of subsidies to the sector. (Comtask Final Report, Recommendation 79).

The Constitution Act No. 108 of 1996 of South Africa provides for the freedom of expression and access to information, in its Section 16 and 32. The Media Development and Diversity Agency was established by legislation (the MDDA Act No 13 of 2002) to create an enabling environment for the development of media development and diversity in South Africa (including radio, television, newspapers, magazines and new media).

According to the MDDA Act, the MDDA is mandated, amongst other things, to:

*“Create an enabling environment for media development and diversity...*

*“Redress exclusion and marginalisation of disadvantaged communities....from access to the media....*

*“Promote media development and diversity by providing support primarily to community and small commercial media”*

**(Preamble MDDA Act)**

### **Objects of the Act**

The objective of the Agency is to promote development and diversity in the South African media throughout the country, consistent with the right to freedom of expression as entrenched in section 16 (1) of the Constitution, in particular –

- (a) freedom of the press and other media; and
- (b) freedom to receive and impart information or ideas.

For this purpose, the Agency is established to:

- Encourage ownership and control of, and access to, media by HDC as well as by historically diminished indigenous language and cultural groups,
- Encourage the development of human resources and training, and capacity building, within the media industry, especially amongst HDGs,
- Encourage the channelling of resources to the community media and small commercial media sectors,
- Raise public awareness with regard to media development and diversity issues,
- Support initiatives which promote literacy and a culture of reading,
- Encourage research regarding media development and diversity, and
- Liaise with other statutory bodies, such as ICASA and USAASA.

Accordingly, the Agency has supported and worked closely with community radio stations and television initiatives (often in liaison and/or together with ICASA) in pursuit of the object of the Act.

We therefore welcome the notice of the Authorities intention to develop a licensing framework for the communication sector, in terms of the Electronic Communications Act of 2005 (ECA).

## **About the MDDA**

### **Vision**

The vision of the MDDA is that “Each and every South African Citizen should have access to a choice of a diverse range of media”

### **Mission**

The MDDA “is a development agency that will assist in building an environment where a diverse, vibrant and creative media flourishes and reflects the needs of all South Africans.”

The MDDA provides both financial and other support (including capacity building, mentoring, exchange programmes, etc.) to media projects across South Africa.

In terms of the MDDA Act, the Minister in the Presidency, the Honourable Essop Pahad, has published regulations outlining the criteria that the MDDA will consider when deciding on applications. Many of these are similar to those considered by ICASA, however a licence does not guarantee support from the Agency.

The MDDA has in addition developed guidelines outlining what we will and won't support, in consideration of research into needs of both small commercial and community media projects and the resources available to us.

In terms of these, the MDDA will:

- Only provide support to licensed radio and TV stations
- Focus on mentoring to increase institutional capacity of projects
- Complement rather than duplicate support provided by other entities (including the Department of Communications and the Open Society Foundation of South Africa)
- Provide ongoing support for up to three years for non profit organisations
- Provide support for once off projects aimed at increasing sustainability of media projects.

The MDDA has achieved some major milestones, ever since its first grant decisions in January 2004. These include the awarding of grants to the amount of R45m to over 135 projects, the provision of 41 bursaries to different radio and print media. However, the growth of the sector, as also supported by the ECA and the need is huge, by way of illustration the Agency has received more than R150m worth of applications.

## **Nature of the Submission**

The MDDA submission is premised on recognizing (from our experience and research) how regulations and regulatory policy can strengthen the role community broadcasting plays in facilitating participatory and people driven democracy, providing a diverse range of programming to communities across South Africa and in pursuit of the broad objective of promoting media development and diversity.

In light of this, we have focused (in the main) on responding to those sections which relate directly to the implications of the draft Regulations to community broadcasting, and to a lesser extent to the general provisions proposed.

In compiling this submission, we have taken due regard and note of the following:

- Chapter 9 of the ECA, in particular Sections 49, 50 and 61.
- Position Paper of Community Sound Broadcasting Services, 1997
- Community Sound Broadcasting Services Policy Position Paper, June 2006
- Community Television Broadcasting Services Position paper, November 2004
- Regulations relating to the Applications for Special events Community Sound Broadcasting license or Temporary Community Television Broadcasting Licenses, August 2005 (Gazette No. 27973)
- Low Power Sound Broadcasting Services, Position Paper and Regulations
- Community Television Summit, Durban April 2007
- MDDA research conducted together with the HSRC and Mediaworks (now AMAC) in 2003
- Our interactions with projects that we support (including reports from mentors)
- Evaluations of interventions made by the MDDA
- International precedents and experiences

- Our interactions with organisations involved in the sector (including other grant makers, sector organisations and service organisations).

## **Premise to submissions**

We would like to emphasise the great achievements of the community broadcasting sector over the past thirteen years – despite facing huge challenges.

When the then Independent Broadcasting Agency first licensed about 60 community radio stations, there were pessimistic predictions that only a handful would survive. Thirteen years later, the overwhelming majority of those initially licensed are still on air, and with the four year licensing process there are now over 90 stations. In November 2004, the Authority also published the Community Television Broadcasting Services Position Paper and Regulations relating to the Applications for Special events Community Sound Broadcasting license or Temporary Community Television Broadcasting Licenses, August 2005 (Gazette No. 27973).

Not only have stations just survived, but they have contributed significantly to our democracy, media diversity, access to information by citizens, education, election education, the information society, capacity building in radio and media as a whole and the sector has grown. This is through a passionate commitment by many involved to their stations, their communities and the sector as a whole.

Of course this has not been without challenges. Many of those working in stations have been volunteers for years – earning no salaries. They have been committed to establishing stations, with little radio, management, marketing and/or advertising skills or experience and had to survive in a highly competitive media environment. At the same time (and unlike those involved in commercial or public broadcasting) the stations and managers involved have had to coordinate participation (in sometimes highly politically charged environments) – whilst ensuring that they are on air.

ICASA is very aware of the difficulties and challenges that have beset some stations as these inevitably end up having to be resolved by the regulator. In particular governance issues have plagued those stations in difficulties – resulting in a lack of clear focus and mandate and therefore creative content.

The development of any Licensing Framework therefore should be informed by these challenges and the nature of the community broadcasting sector. The framework should strengthen the achievement of the young democracy in empowering communities and ensuring that communities have a chance to own and control their own media, a chance to reflect and review how best to ensure the sector continues to grow. Accordingly, the Framework should ensure that all citizens can access information in a language of their choice and contributing to the transformation of media access, ownership and control patterns in South Africa. Regulations and regulatory policies play a very important role in facilitating this.

We acknowledge and note that ICASA has access to invaluable information (from applications for licenses, Reasons for Decisions taken by the Authority, annual financial statements individual stations experiences, monitoring reports and the BMCC processes) and that information will enable the Authority in understanding the nature of this particular sector recognized in terms of Section 50 of the ECA.

The MDDA has been in the forefront of supporting the sector, more so as the international support base has dried up. Any further burden imposed on the sector, will have huge implications on the Agency's budget. It is our hope that whereas the ECA (Section 89) provides for an opportunity for the Broadcasting Service Licensees to contribute on a sustainable basis to the Agency, through a Regulation to be prescribed by the Authority and that Broadcasting Service Licensees could already increase their contributions to the MDDA in line with ECA even prior to the Regulations being prescribed, the need from communities will mean that such increased contributions may not

accommodate additional demand by the Authority in the form of the proposed fees, Schedule 1 of the proposed Regulation.

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## **Comments to the Proposed Regulations**

### Section 2: Definitions and Generic Provisions

The Agency would like to propose that the Regulations do not deviate from the country's policy framework such as the White Paper on Broadcasting Policy. In that regard the MDDA would like to highlight the following:

- Regulatory definitions should emphasise that a community service should be defined as one owned by a not for profit organisation, the structure of which provides for membership, management, operation and programming by members of the community.
- There should be clarity about what is meant by non profit entities. For example it is important to highlight that stations can make profits, but that these must be either reinvested in the station itself or into other community projects.
- It is insufficient for a community broadcasting service licensee to merely technically meet the legislative definitions of community broadcasting. It is important in this regard to consider the intention of the law, and the reason for establishing a community broadcasting sector. In view of this, we believe that the Authority should in new regulations and policy documents emphasise:
  - That a community broadcasting service must be demonstrably
  - It must increase programme choice in both music and spoken word programming
  - Programming must be focused on the community and meet needs of people living in an identified community

- Programming must be relevant to the needs and expressed interests of the community
- The station must include the languages spoken by the community
- These criteria should be reflected in generic licence conditions, and the individual applicant be bound to promises of performance made in this regard.
- The final policies should define the different legal non profit entities that would be acceptable to ICASA and perhaps briefly describe the implications of each.

Therefore, Class Licenses should be divided between Non-profit and Commercial/Profit making entities. Accordingly, 2.7 (page 3) and 3.2 should also recognize these entities.

The framework should note the different legal forms that would be acceptable to ICASA (such as co-operative, non profit organisation, Section 21 company, trust, etc) and not only the close corporation, as 2.7 suggest.

The proposed regulations also do not differentiate between different definitions of community broadcasting as provided for in legislation, Chapter 1 of the ECA, as it relates to community broadcasting services and relevant regulations (i.e. Position Papers mentioned above,)<sup>2</sup>. Further the licensing framework should consider the requirements for a community broadcasting service as defined in the ECA.

### Section 3: Registration for Class Licenses

9.2 of the proposed regulation should also include the community the applicant intends to serve.

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<sup>2</sup> Community includes a geographically founded community or any group of persons or sector of the public having a specific, ascertainable common interest.

Registration should be informed by what the Act requires for any person or sector or community to provide a community broadcasting service<sup>3</sup>, similarly requirements for a broadcasting service license.

#### Section 4: Schedule 1

The Agency notes that some of the proposed fees in respect of Class Licensees are in line with the current regulatory framework, in terms of registration fees, renewal registrations.

We though note that together with fees for registering an electronic communication service license, the effect of the fees is an increase from the current regulatory framework which requires R3 250 as opposed to the new R7 000 to be paid, if this Regulation stands. Also, it is unclear whether the same fees apply in the context of Low Power Sound Broadcasting Services and Special Events licenses.

The Regulations only refer to the Special Temporary Authorizations contemplated in terms of Section 3 of the ECA, which are different to the Special Events and Temporary Licenses currently issued to Community Broadcasting Service.

The proposed Annual License Fees of 0.1% of the licensee's annual turnover is a deviation from the current regulatory framework for community broadcasting. Due regard should be taken to the obligation for the regulatory

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<sup>3</sup> ``community broadcasting service'' means a broadcasting service which-

(a) is fully controlled by a non-profit entity and carried on for non-profit purposes;

(b) serves a particular community;

(c) encourages members of the community served by it or persons associated with

or promoting the interests of such community, to participate in the selection

and provision of programmes to be broadcast in the course of such broadcasting service; and

(d) may be funded by donations, grants, sponsorships or advertising or

membership fees, or by any combination of the aforementioned;

framework to provide an enabling environment for media diversity, ensuring that communities from historically disadvantaged communities have access to media and information, and that such media is affordable to communities.

The proposed fees will negatively affect the growth of a sector that is non-profit in nature and will lead to a continued dependency on such support as that provided by the MDDA to projects. Currently, the projects may re-invest such additional resources if they so generate and plough them back into the growth of the licensee and therefore into the community.

## Section 5: Schedule 2

Differentiation must be provided for non-profit and profit class licenses. The Regulation must prescribe whether transfers and changes of ownership apply to community broadcasting, which surely should not apply, except in instances where it is changes / amendments to the legal entity as opposed to change and transfer of ownership.

Section 19 of the proposed regulation provides for contributions to the Universal Service and Access Fund and other fees. The Agency proposes that this provision should be aligned to Section 89 of the ECA.

Also, the Authority may move a step further (whether in this Regulation or in the relevant Regulation as envisaged in Section 89 of the ECA) and encourage that Broadcast Service Licensees make their contributions directly to the Media Development and Diversity Agency as contemplated in Section 89. The Agency may then be required to provide proof of such contributions to the Authority.

## Section 6: General and Conclusion

The Authority should ensure that all documents (including application forms, regulations and policies, and licence conditions) are written in plain English and in compliance with the Constitution Act of 1996 to assist all in the

community to be able to understand these documents (and facilitate thereby participation in the processes).

It is unclear whether there will be a specific Regulation for the different Licensee (whether Class or Individual) to enable the Authority to regulate the specific requirements that may be relevant to some services, like such services as broadcasting services in line with Chapter 9 of the ECA or whether the Authority will prescribe procedures and criteria for awarding radio frequency spectrum licenses for competing applications or instances where there is insufficient spectrum available to accommodate demand, in terms of Section 31(3) of the ECA.

The Agency believes it is critical for the Authority to prescribe these specific regulations and procedures providing criteria for awarding community broadcasting services, if ICASA is to ensure it meets its legislative mandate of ensuring broadcasting diversity and access by historically disadvantaged communities, in terms of Section 2 (Chapter 1) of the ECA, in particular Section 2 ( r ), (s), (v) and (w).

If ICASA does not, the opposite of the intention of the ECA will apply, where the “haves” will access broadcasting service and the “have not’s” will be deprived of these services. The licenses will be issued on a first come first served basis reversing all the gains of the thirteen years of our democracy, by advantaging the historically advantaged communities. It is also worth noting that the need for specific regulation is not only derived from frequency competing demands but also in pursuit of programming diversity required in terms of Section 2 of the ECA, community participation, ownership and control, media diversity, etc.

The Regulations should have a provision providing for the licensees to abide by any other Regulation prescribed in terms of the ECA. This provision will safe guard ICASA so that it is able to subject any one licensed in terms of this framework, to any other subsequent regulation provided in terms of the Act.

Beside Section 19 of the ECA which provides for license period of Class Licenses to be valid for a period not exceeding 10 (ten) years, it is unclear whether this will be determined by this Regulation or by the License Terms and Conditions. If the latter applies, then the question arises whether that will be guided by the specific regulation proposed by the Agency.

In conclusion, should the Authority decide to hold and conduct hearings into submissions made, the MDDA would like to participate in such hearings.

Submitted for and on behalf of:

MDDA

09 May 2007