



**MINISTER OF COMMUNICATIONS – NOTICE
32663 OF 2009**

**NOTICE IN TERMS OF SECTION 3 (1) OF THE
ELECTRONIC COMMUNICATIONS ACT 36 OF
2005**

Public Service Broadcasting Bill

Submission

15 January 2010



Section 1: Introduction and background

The MDDA welcomes this opportunity to make comments on the Public Service Broadcasting Bill as published by the Minister on the 28th October 2009. Further, the Agency appreciates the democratic and participatory nature of policy making in our country and also the Agency welcomes the sense of urgency and energy behind the Proposed Bill.

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 that is conducive to public discourse and which reflects the needs and aspirations of all South Africans.*
- *Redress exclusion and marginalisation of disadvantaged communities and persons from access to the media and the media industry.*
- *Promote media development and diversity by providing support primarily to community and small commercial media projects*

(Preamble MDDA 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.

Section 2: Nature and Scope of the Submission

The Agency understand the Notice as **a consultation on a DRAFT Bill**, as such do not see this as the Bill itself, rather a consultation on drafting a Bill which is as a result of the Ministry's commitment to public participation. If the Agency is correct, we welcome the opportunity presented by the Minister to the South African citizenry.

On the 20th July 2009, a discussion paper, *Public Service Broadcasting: Repositioning Broadcasting for National Development* (Discussion Paper), was published in *Government Gazette* No. 32420, soliciting input on public service broadcasting.

On the 28th of October 2009, the draft Public Service Broadcasting Bill, was released by the Department of Communications (DoC), after the consultative process through the Discussion Paper referred above, seeking to wholly repeal the Broadcasting Act No.4 of 1999, so as to (amongst others) "align the broadcasting system to the developmental goals of the Republic".

Further, the Public Service Broadcasting Bill seeks to:

- provide Charters for Community Broadcasting Services and the SABC;
- establish a Public Service Broadcasting (PSB) Fund for public service broadcasting in the Republic;



- abolish television license fees;
- establish within the Corporation International Broadcasting Services and transfer Channel Africa to the International Broadcasting Services;
- clarify the role of the Corporation's International Broadcasting Services;
- revise the composition of the Board of the SABC;
- introduce performance management system for the Board;
- outline the mandate of Sentech as a common carrier;
- clarifies the powers of the Minister in respect of public service broadcasting;
- provide Charters for the Corporation and Community Broadcasting Services;
- create a competitive local content industry and for this purpose, establish the Local Content Advisory Body;
- amend the Income Tax Act of 1962, and the Electronic Communications Act of 2005; and
- to provide for matters connected therewith.

The Agency notes therefore that this is a very significant broadcasting legislation that will shape the environment in which we operate for years.

Further, the Agency understand that one of the purpose of the Bill or consequential purpose should be to amend the MDDA Act to mandate it to administer, manage and distribute funds of the Public Service Broadcasting Fund.

The Agency would like to seek clarity from the Ministry regarding whether there are "policy change" implications arising from the Bill and if so would there be amendments to the White Paper on Broadcasting of 1998 which reflects the broadcasting policy for South Africa, as the former Minister Jay Naidoo writes in the Foreword (White Paper on Broadcasting of 1998, 04 June 1998).

Section 3: COMMENTS TO THE PUBLIC BROADCASTING SERVICE BILL

- In Notice No. 1409 published in Government Gazette No. 32663 dated 28 October 2009, the Department of Communications ("DOC") published its "Public Service Broadcasting





Bill. Written comments are invited to be submitted by 07th December 2009, this deadline was extended to Friday, 15 January 2010.

- The MDDA (the Agency) welcomes this effort by the Ministry towards a comprehensive review of the broadcasting system. The Agency draw the Ministry to the attention that given the omnibus nature of the draft Bill (addressing many aspects of the broadcasting industry), regard had to be taken to ensure that it consequentially amends (through the legislative amendment schedule) sections dealing with matters covered in related legislations like Sentech Act, ICASA Act, MDDA Act, Money Bill, etc. The Agency assumes that once the draft Bill is tabled to Cabinet, the financial matter of whether the proposal on tax collected by SARS will be dealt with and if approved an appropriate process in terms of the national legislative process set out in Chapter 4 of the Constitution Act No. 108 of 1996 will be instituted.
- The Agency notes that there is quite a number of spelling and drafting errors in the Bill, and will attempt to draw the attention of drafters to the same. By way of a summary, the table below illustrates these referred “drafting errors” which are in direct conflict with the noble intentions of the Bill and other legislative basis for the regulation of the broadcasting industry in South Africa:

Drafting errors in direct conflict with the intentions of the Bill, the Constitution Act, other Legislative framework in S.A. (ICASA Act of 2000, Electronic Communications Act of 2005) and International best practise in respect of right to the freedom of access to information, freedom of expression (African Charter on Human and Peoples’ Rights (ACHPR); Article 19 of the International Covenant on Civil and Political Rights (ICCPR); African Commission on Human and Peoples’ Rights which adopted a Declaration of Principles on Freedom of Expression in Africa (African Declaration) in October 2002; African Charter on Broadcasting 2001 (African Charter) adopted under the auspices of UNESCO; etc.)

Issues	Sections	Implications	Actions proposed
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<p>Wide powers given to the Minister regarding PSB, including the power to direct the Board of SABC</p>	<p>Section 14(3) Section 15(1)(c) Section 15(2)(a) Section 36 Section 38 Section 39 Section 47 (1)</p> <p>Charter – clause 1.3(2); clause 3.10.3(2); clause 3.11.1(8); clause 4.3(2); clause 6(1)(b) clause 3.10</p>	<p>Conflicting roles between policy making and regulator</p>	<p>These should be given to the Authority, ICASA.</p> <p>Instead of the SABC International Services being required to promote foreign policy, they may be required to operate having regard to foreign policy and their editorial policy will determine that independently.</p> <p>Editorial policy of the SABC must be subject to regulator's (ICASA) approval not the Minister.</p>
<p>The Minister also exercises some control over the appointment of the executive management of SABC, through the requirement that the</p>	<p>Charter - clause 3.11.1(2)</p>	<p>Conflicting responsibility between the Board and the Minister</p>	<p>Responsibility should be that of the Board.</p>



Board consult with him or her when appointing the Group Chief Executive Officer, the Chief Operations Officer and the Chief Financial Officer.			
The Minister may direct any of the entities specified in this Act to take any action pursuant [sic] to Public Service Broadcasting if the entity is unable to perform its actions as prescribed in this Act.	section 38(1)	Misunderstanding of PSB as a form of broadcasting or programming genre and as an obligation which should be imposed by the Authority, ICASA	Regulatory responsibility must remain ICASA's not Minister's. Enforcing compliance to law and regulations is the Authority's responsibility not the Minister.
Prescriptive language about the new Governing Councils	Section 22 Section 23 Charter – clauses 2, clause 3 clause 3.12, clause 4.1 clause 4.3	Too prescriptive and maybe impractical and unnecessary	The Bill or Charter should require ICASA to prescribe these as guidelines.
Community	Section 24	That can mean a lot	delete



<p>broadcasting to comply strictly with the Public Finance Management Act 1999 (PFMA)</p>	<p>Charter – clauses 3.2(1) clause 7</p>	<p>of difficult and onerous responsibilities expected from the community broadcasting sector</p>	
<p>Partnership with municipalities</p>	<p>Section 20 (d) Section 25</p> <p>Charter – Clause 5.4</p>	<p>The use of words like “must” and “shall”.</p> <p>Under “flow of information about development” – the use of “to by” local municipalities appears to be an error causing confusion regarding who is the beneficiary.</p>	<p>The Bill should not use “must” as this contradicts the noble protections provided in the Charter - clause 1.5.</p> <p>The Bill should require municipalities to offer the benefits listed to community broadcasters.</p>
<p>Participation of municipal officials in the Governance of Community Broadcasting</p>	<p>Section 3.2 (2)</p>	<p>This may lead to conflict of interest, as the “officials” referred to are not defined. There is currently a regulation prescribed by ICASA that regulates this matter in line with Section 52 of the</p>	<p>Delete</p>



		Electronic Communications Act of 2005.	
ICASA is also tasked with holding public hearings into MDDA's performance and investigating complaints regarding the Fund	Section 35 (1) (a) and (b)	Confusion of roles of the Minister, Parliament and ICASA	This could simply be Parliaments' responsibility.

- Further, the Agency notes which it assumes as drafting error, the non-alignment of matters covered in terms of related legislations like Electronic Communications Act (ECA) of 2005 and the Media Development and Diversity Agency Act of 2002. For example, Section 89 (3) of ECA provides that Broadcasting Service Licensees contributing to the MDDA will have their annual MDDA contributions set off against their prescribed annual contributions to the USAF. Accordingly, Independent Communications Authority of South Africa (ICASA) prescribed a Regulation on annual contributions for universal service and access fund. This Regulation, in line with Section 89 (3) of ECA recognised the contributions already being made by Broadcast Service Licensees to the MDDA. Subsequently, most broadcasters have signed a Funding Agreement with the MDDA in accordance with this Regulation.
- The draft Bill appears to suggest additional contributions by the Broadcast Service Licensees to the PSB Fund. **It is our conclusion that this is a drafting error and therefore the Broadcast Service Licensees will not be required to contribute to the PSB Fund as they already contribute to the MDDA in terms of the ECA and MDDA Act.** The Agency notes though that the definition of Community Broadcasting Service explains the intentions of the draft Bill.





- The Agency further would suggest that the Department consider the submission of amendments to the Act made by ICASA to the Minister in May 2004 after the public process reviewing ownership and control of broadcasting services.
- The above drafting errors are beside the many grammatical errors and related mistakes (for example, the definitions section does not have a section number and there are two provisions numbered section 14(2)) page 13; mistaken references (for example, in section 9, which addresses the accounts of the Fund, section 9(3) refers to the audited accounts of the Corporation, instead of MDDA; section 9 (3) refers to the submission of balance sheet and accounts to the Minister (clarity is needed regarding which Minister, the MDDA Act defines the Minister as the Minister in the Presidency, this Bill is not clear which Minister.
- Other mistakes are in respect of cross-references (for example, section 36(5) refers to the Local Content Advisory Body established in terms of section 28, whereas the Body is in fact established in terms of section 42); repeated definitions (for example, the important term “Public broadcasting service” is defined twice, differently in page 6); and definitions referring to Appointing Authority and Appointing Body which are not referred to in the body of the Bill.

General Explanatory Notes

As discussed above, the Agency notes that consequential purpose of the Bill would be to amend the MDDA Act mandate it to administer, manage and distribute funds of the Public Service Broadcasting Fund. This will be required in order to clearly provide for this mandate, which is currently not explicitly provided for in the MDDA Act.

Chapter 1: Definitions and Interpretation

- The Agency is of the view that the Department should either use **Appointing Authority** or **Appointing body** since these words both have the same meaning



- **Appointing Authority** – *(often refers to as Appointing body), means the body charged with the appointment (not appoint) of members of the Board in terms of this Act*
- **Broadcasting Service License** means *(not mean)*
- **Broadcasting Service Licensee** - all three words should start with capital letters.

The Agency notes that the term “**Developmental state**” has not been defined. Having said so, the Agency is of the view that the term is not defined anywhere in South African policy framework or law, the definition should be derived from such policy documents as the Reconstruction and Development Programme (RDP) which is premised on people- driven development.

Chapter 2: Objects of the Act

1. *Objects*

The draft Bill seeks to repeal the Broadcasting Act of 1999. If so, the Agency suggest the Bill should have regard to some of the Objects of the Broadcasting Act of 1999 even though they may be covered in the ECA, like, whilst aligning the broadcasting services to the developmental goals of the Republic in the public interest, for that purpose the Objects should include, to:

- (a) encourage ownership and control of broadcasting services through participation by persons from historically disadvantaged groups;
- (b) establish a strong and committed public broadcasting service which will service the needs of all South African society;
- (c) ensure that the commercial and community licences, viewed collectively, are controlled by persons or groups of persons from a diverse range of communities in South Africa;
- (d) ensure that broadcasting services are effectively controlled by South Africans;



- (e) provide access to signal distribution services for content providers;
- (f) provide access to signal distribution services for broadcast content receivers;
- (g) encourage the development of local programming content.

In the main, the point the Agency is making, is this draft Bill should not take away the key elements of the Broadcasting system that are enshrined in both the White Paper and the Broadcasting Act, like the vision of broadcasting for South Africa which is underpinned by constitutional principles of freedom of expression, equality, equality of all languages, multiculturalism, choice and diversity within a framework of national unity.

Also, critical in the White Paper on Broadcasting of 1998, is the establishment of a three-tier system for the broadcasting industry; namely:

- policy formulation and development for the government,
- licensing and regulation for the independent broadcasting authority, and
- service provision by broadcasters.

Chapter 3: The South African Broadcasting System

Sections

2. The South African Broadcasting System

This Chapter is of central significance to the Act, as it lays the basis that the South African broadcasting system is owned and controlled by South Africans.

The Agency would like to highlight the omission of subsection (7) of the Broadcasting Act where it states that *“The human resources development strategy from the broadcasting sector must be viewed holistically in terms of qualification standards, skills development, teaching, inter-relationships with the complementary sectors and the funding of the training system”*.



3. *Applications for licenses in respect of Public Service Broadcasting*

The Bill should categorically clarify that licensing and regulation should be determined by ICASA in terms of the ECA Act section 4 and section 5(7). ICASA's role includes monitoring of licensees, ensuring adherence and compliance to:

- the ECA and related laws
- the Charter
- the programming and editorial policies
- license terms and conditions
- regulations etc.

Chapter 4: Funding for Development Broadcasting: PSB FUND

Sections

4. *Establishment of Public Service Broadcasting Fund*

The Agency is fully supportive of the PSB Fund proposal, it believes that a central fund that covers funding for the public broadcaster, community broadcasting, content development, signal distribution for community broadcasting (radio and TV) and the museum is a positive development.

- The Agency notes that funding public broadcasting through special taxes or licensee fees is an international phenomenon.
- The Agency acknowledges that SARS is an efficient organ of state and therefore will be an efficient way of collecting funds for the PSB Fund.
- The question that arises from the Bill is whether the tax deducted will be the part of PAYE or will it be a separate tax like SDL.
- The Agency further supports proposal that the PSB Fund will also comprise the money appropriated by Parliament.



- The Agency would like to point out that Section 4(2)(d) contribution from business, is unclear, therefore the Department should specify which kind of business is the draft Bill referring to.
- As argued in page 5 above (Section 3 (4 and 5)), the draft Bill appears to suggest additional contributions by the Broadcast Service Licensees to the PSB Fund. **It is our conclusion that this is a drafting error and therefore the Broadcast Service Licensees will not be required to contribute to the PSB Fund as they already contribute to the MDDA in terms of the ECA and MDDA Act.** The Agency notes though that the definition of Community Broadcasting Service explains the intentions of the draft Bill.
- It is worth noting that when dealing with the question of the TV license payments that these have not been increased for years. Therefore, when consideration is made on phasing out TV license fees, regard should be made to a feasibility of the newly proposed funding model in terms of exact revenue projections. As such the Bill should provide for a transitional arrangement.

5. *Administration of Public Service Broadcasting Fund*

The Agency's mandate broadly is to support, encourage and promote media development and diversity. This mandate conforms to international practise for example in the case of Europe, the Council of Europe Recommendation 2007(2) on Media Pluralism and Diversity of Media Content and African Charter of Broadcasting of 2001.

The Agency appreciates the responsibility proposed to it, to administer and distribute the PSB Fund. This additional responsibility is in line with the objectives of the MDDA Act. The Agency understands the principle behind the proposal as part of MDDA's mandate relates to media development and diversity. Having said so, the Agency submits that its capacity will have to be enhanced in order to administer this additional Fund. The Agency acknowledges that there will be a need to increase its human resources in order to manage this additional mandate, enhance some of its procedures and systems etc.



The MDDA as an organ of state is required to comply with the Public Finance Management Act (PFMA) and National Treasury Regulations. Whereas the size of its budget may be small, the accountability requirements, regulatory compliance requirements are the same as those affecting entities with big budgets in terms of the PFMA. Accordingly, the Agency has set systems and procedures governing the management of its Fund, including the Grant Funding Cycle and the Projects Tracking and Management System. It has clear criteria for funding prescribed through a Regulation to provide a framework for its funding model. It has always received unqualified audit reports from the Auditor General since its inception.

Therefore, the Agency can administer the PSB Fund, the only condition is simply to enhance its capacity.

6. *Uses of money in Public Services Broadcasting Fund*

The Agency submits that section 6 (1) (d) may need to be clarified, in terms of whether it refers to signal distribution activities provided by the Public Broadcaster and Community Broadcasters only, or it includes commercial broadcasters. In this regard, the Agency would propose that this be limited to Public Broadcaster and Community Broadcasters.

Section 6 (1) (g) may lead to blurring of roles and responsibilities. It should either be in consultation with the Agency to avoid adding new uses without regard to budget implications.

7. *Criteria for allocation of money in PSB Fund*

In deciding on the criteria for allocation of money in the PSB Fund, regard had to be taken of the principles enshrined in the Constitution Act of 1996, White Paper on Broadcasting of 1998 and Section 2 of the ICASA Act which provides that: ***“the Object of this Act is to establish an independent Authority which is to regulate broadcasting in the public interest and to ensure fairness and diversity of views broadly representing South African society as***



required by Section 192 of the Constitution.” Therefore, any decision should not be in conflict with the roles and responsibilities defined in Section 1.3.5 of the White Paper on Broadcasting of 1998.

Further, in line with Promotion of Administrative Justice Act, the development of the criteria should be through a public, transparent and participatory process.

Section 7 (1), provides that **“The MDDA must develop criteria for allocation of PSB Funds for approval by the Minister in consultation with the Minister of Finance.”**

The Agency suggest that it be given a mandate to make regulation with regard to any matter which in terms of this Bill or related legislation must or may be prescribed, governed or determined by regulation.

The Agency, in exercising its powers and performing its duties in terms of this Bill and the related legislation must consider policies made by the Minister. The Authority must, not less than thirty (30) days before any regulation is made, publish such regulation in the Gazette, together with a notice:

- (a) declaring the Agency’s intention to make that regulation; and
- (b) inviting interested parties to make written representations on the regulation.

The Agency must, not less than 30 days prior to making regulations, inform the Minister in writing of its intention and the subject matter of the regulations. The Agency may conduct public hearings in respect of a draft regulation.

The Bill should provide a guide in respect of the specific proportion of money to be allocated to each applicant / beneficiary, for an example the percentage that should be given to Public Broadcasting, Community Broadcasting, Content Development, Signal Distribution etc. which



the regulation on criteria will follow. The PSB Fund Regulation can be designed to follow a prescribed formula like for instance (this is an example):

- a) 50% - SABC
- b) 20% - Community Broadcasting
- c) 20% - Content Development / Independent producers
- d) 5% - Signal distribution
- e) 5% - other

Further, the Bill / Regulation should provide a different dispensation for distributing funds to the Public Broadcaster, for example, that on submission of its application, the Agency be required to within 60 to 90 days approve and transfer the funds to the SABC, given that the Public Broadcaster is also subject to the PFMA.

The Bill should guarantee the SABC adequate and stable funding to discharge its public service obligations, in a manner which is protected against political interference, and the MDDA will need to take that into account when funding the SABC.

Section 7 (6) provides for accountability and financial management. The current system at the MDDA is that it is the Agency that is subject to the PFMA, not the beneficiaries. The Agency then enters into a contract with the beneficiaries in a manner that ensures prudence in financial management. It is going to be difficult to subject all beneficiaries including non-governmental organisations like independent producers, community broadcasters to the PFMA.

8. Access to PSB Fund

The proposed Regulations (above) should prescribe the criteria for access to the Fund.

9. Accounts of PSB Fund



The Agency supports these provisions regarding the PSB Fund accounts proposed by the Department. The Minister referred in the MDDA Act is the Minister in the Presidency. The draft Bill refers to Minister but this Minister has not been defined under definitions. The Bill will need to clarify this point to avoid conflict between the Bill and the MDDA Act.

Chapter 5: Public Broadcasting Services

Sections

10. *Public Broadcasting Services*

The Bill should provide that, the Corporation, in pursuit of its objectives and in the exercise of its powers, enjoys freedom of expression and editorial, journalistic, creative and programming independence as enshrined in the Constitution.

It is worth noting that Clause 1.5 of the Charter does provide formal protection for the editorial and programming independence of the SABC, in accordance with the Constitution. The Agency would suggest that this provision be emphatically stated also in the Bill.

11. *Organisation*

The experience of public and commercial divisions of the Public Broadcaster has not born the fruits as intended in terms of the Broadcasting Act. This proposal does not to be revisited.

The Agency supports the International Broadcasting Division proposal and its intentions to continue and strengthen services like SABC International, Channel Africa, etc.

12. *Public Service Division*

The Agency notes and support the proposals in this section including the imperatives to ensure all official languages are covered by the broadcasting service, that all citizens should have access to public broadcasting, that sports of national importance should be available on the public broadcasting, more sports channels, youth channels and the proposal for a Parliamentary



channel for all citizens to have a choice to watch a parliamentary television or listen to a parliamentary radio. Digital broadcasting provides an opportunity for the above to be achievable. The proposal for the PSB Fund to fund the proposed additional services, assume that the Fund will have enough funding.

13. *Funding Public Broadcasting Service*

Further, the regulation proposed above should indicate whether funds from PSB Fund can be used by the Public Broadcaster for operational costs or should it be used for infrastructure rollout, public service programming and local content in general.

14. *Commercial Service Division*

The arrangement (as argued above) has not proved success in the past. Further, the Bill should provide that this division will also be subject to additional public service obligations as imposed by the Authority in terms of License Terms and Conditions.

15. *Establishment of International Broadcasting Services*

The Agency supports this division. Section 15 (1) (c) provides that International Broadcasting Services promote South Africa's foreign policy. This provision need to be rewritten, either to provide that the programming of the services should be in line with the South Africa's foreign policy and that the services will be subject to the editorial independence principles like the other divisions.

The proposal for the PSB Fund to fund these services, assume that the Fund will have enough funding.

16. *Transfer of Channel Africa to the Corporation*



The Agency supports the transfer of Channel Africa to the Corporation's International Broadcasting Service.

17. Governance

In finalising this section, regard should be taken to the new principles of good governance proposed in terms of King III.

18. Members of the Board

The Agency notes that the Bill excludes the Chief Executive Officer, Chief Financial Officer and the Chief Operations Officer as members of the Board. The Agency is of the view that the above three officials should be recognised as part of the Board on ex-officio basis.

19. Charter of the Corporation

The Bill should categorically provide that the Authority must monitor and enforce compliance with the Charter by the Corporation.

Provisions like clauses 3.8(1)(b) and (c) of the Community Broadcasting Charter excluding office bearers or officials of political parties, and members of Parliament, provincial legislatures and municipal councils from being appointed to the Governing Councils of community broadcasters, should be extended to apply to members of the SABC Board.

Chapter 6: Community Broadcasting Services

Sections

20. Objects of Community Broadcasting Services



The Agency proposes an addition that Community Broadcasting Services must be managed and controlled by a board which must be democratically elected, from members of the community in the licensed geographic area.

The Agency agrees with this section specifically section 20 (2) (d), it is of the view that this partnership is not only exclusive to municipalities and that the intentions of this Bill are to facilitate a relationship with municipalities that does not compromise the community broadcaster's independence. Such partnership would for instance extend to other public institutions like schools, Thusong Services Centre, etc.

It is worth noting that the Bill does not repeal Section 52 of the ECA which prohibit granting of a broadcast service licensee to any party, movement, organisation, body or alliance which is of a party-political nature; nor does it repeal Section 50 of the ECA which provides for who should control and own a community broadcasting service.

ICASA further imposes License Terms and Conditions to licenses that will protect the community broadcasters from control by municipalities. Municipalities are subject to the laws of the country, including ECA, ICASA, etc and therefore do understand and respect the Constitution Act of 1996 in particular Section 192.

This proposal will facilitate development of communication strategies by municipalities that will lead to monies spent on community media as opposed to an audience irrelevant to the targeted communication. It will also encourage municipalities to provide accommodation for community broadcasting services to use facilities that are in most cases available in such municipalities, without interfering with the running of the services.

Community broadcasting has to partner with organs of civil society (CBOs, NGO's, etc) in its operations; including ownership and control mechanisms (membership), selectioning and provisioning of programming, for it to remain relevant to the mission it was set for. The strength of this partnership contributes to sustainability and community driven service.



21. *The organisation*

The provision should allow community broadcasting service to provide any multimedia service and therefore provides clarity that community broadcasting services are not to be limited by the cross-media ownership provisions of the ECA.

22. *Governance*

The Agency agrees with the proposals as they will provide a guide for community broadcasters when they structure their constitutions and provide clarity for those that are registered in terms of Company Act.

23. *Filling of Vacancies*

Section 23 (4) of the Bill refers to Broadcasting Amendment Act of 2008 and the Governing Council, this need to be clarified.

24. *Funding Community Broadcasting Services*

The Agency agrees with the proposal for the PSB Fund to complement the funding of Community Broadcasting Services.

Section 24 (1) of the Bill appears to limit sources of funding from the ones described in Chapter 1 of the Bill, White Paper on Broadcasting of 1998, Broadcasting Act of 1999 and ECA which includes donations, grants, sponsorships or advertising or membership fees, or by any combination of the aforementioned.

Section 24 (2) (a) of the Bill provides for accountability and financial management. The current system at the MDDA is that it is the Agency that is subject to the PFMA, not the beneficiaries. The Agency then enters into a contract with the beneficiaries in a manner that ensures prudence



in financial management. It is going to be difficult to subject all beneficiaries including non-governmental organisations like independent producers, community broadcasters to the PFMA.

Section 24 (2) (b) of the Bill provides for limitations in advertising revenue. Whereas this is in the interest of community broadcasting, no limitations exist in current legislation. The power is given to the Authority to determine whether the programming format, schedule, etc. Meets the needs of the community the broadcasting service intend serving.

25. Community Broadcasting Services and development

As discussed under section 20 above, the Agency agrees with the proposal of a partnership with municipalities, CBO's, NGO's, etc. With editorial independence enshrined in the broadcasting service and ownership and control enshrined in community hands, therefore allowing no interference from the municipalities.

The proposed Standard terms of Agreement Framework may not be necessary if regard is taken to Sections 50 and 52 of the ECA, read with the Constitution Act of 1996 and the objects of the Bill. If the framework is developed, it must be guided by the principles enshrined in the laws guarding editorial independence, ownership and control, and the community centrality in running a community broadcasting service.

26. Charter of Community Broadcasting Services

The Charter should be a regulatory instrument than legislative one. It should be prescribed by the Authority. Further, it should use the word shall only in instances that either provides for legislative obligations. To the extent possible, the Charter should not confine communities to one option; it should provide range in order to ensure implementability.

27. Commercial Broadcasting Services



The Bill should clarify the kind of public service programming that would require support from the PSB Fund. In general, the Fund should be more accessible to the Public Broadcaster and Community Broadcasters.

Chapter 7: Ensuring Universal Access to Broadcasting Services

Sections

28. *Objects of a common carrier*

The Agency supports the objectives of the “common carrier” provided in the Bill.

Sentech own and operate a large number of terrestrial broadcasting transmission sites, which accommodating the short-wave, medium wave, FM, television and MMDS transmitters that serve most broadcasters in South Africa, including public, private and community services and international broadcasters providing services to Africa.

29. *Obligations and powers of Sentech*

Sentech as a common carrier should be obliged to provide the differentiated tariffs structure guided by the three tier broadcasting system and the enabling regulatory environment provided for community broadcasting as a non-profit making entity.

Section 33 (1) of the Broadcasting Act of 1999 and Section 4.4 of the White Paper on Broadcasting provides that ICASA must conduct an inquiry to determine the tariff’s structure for signal distribution and that community broadcasting should pay lesser than commercial broadcasting. The Bill should reinforce this mandate and obligation.

30. *Annual reporting by Sentech*

The Agency notes that this is in line with all organs of state and parastatals.



Chapter 8: The Functions of the Authority in Public Service Broadcasting

Sections

31. *General Functions*

These functions by the Authority are in line with section 4 of the ICASA Act.

32. *Functions of the Authority in relation to the Public Broadcasting Services*

The provision should not be read in a way that may appear to suggest these are the only ICASA functions and responsibilities in relation to the Public Broadcaster. ICASA is the licensing and regulatory Authority and its roles and responsibilities in this regard are outlined in the ICASA Act.

33. *Functions of the Authority in the relation to Community Broadcasting Services*

The provision should not be read in a way that may appear to suggest these are the only ICASA functions and responsibilities in relation to the Community Broadcasting. ICASA is the licensing and regulatory Authority and its roles and responsibilities in this regard are outlined in the ICASA Act.

34. *Functions of the Authority in relation to a Common Carrier*

The provision should not be read in a way that may appear to suggest these are the only ICASA functions and responsibilities in relation to the Signal Distributors. ICASA is the licensing and regulatory Authority and its roles and responsibilities in this regard are outlined in the ICASA Act.

35. *Functions of the Authority in relation to MDDA and PSB Fund*



The proposal tabled by the Bill regarding the functions of the Authority in relation to MDDA and PSB Fund may be in conflict with ICASA responsibility as a licensing and regulatory authority. It may present a conflict wherein ICASA may be seen as a referee and a player. The mandate of MDDA is very distinct from that of ICASA, MDDA funds, support, promote and encourage media development and diversity in terms of the MDDA Act No. 14 of 2002. ICASA cannot be a funding body nor should it unduly interfere with the operational activities of the licensees. Similarly, even the MDDA is limited by law in terms of its supporting role and it does not at all play a regulatory or licensing role as that is ICASA's mandate in terms of the Constitution Act No. 108 of 1996 and ICASA Act No. 13 of 2000.

The Agency is accountable to the Minister (administratively) and functionally to Parliament. Therefore, Parliament is better placed to hold the MDDA accountable in its running and administration of the PSB Fund, having regard to the specifically determined objectives in the PSB Bill and the Regulations to be prescribed by the MDDA.

Chapter 9: The role of the Minister

Sections

36. The role of the Minister

In line with the White Paper on Broadcasting of 1998 and ICASA Act, the Agency is of the view that the role of the Minister should be that of policymaking.

37. Regulations by the Minister

The Agency suggest that it be given a mandate to make regulation with regard to any matter which in terms of this Bill or related legislation must or may be prescribed, governed or determined by regulation.



The Agency, in exercising its powers and performing its duties in terms of this Bill and the related legislation must consider policies made by the Minister. The Authority must, not less than thirty (30) days before any regulation is made, publish such regulation in the Gazette, together with a notice:

- (a) declaring the Agency's intention to make that regulation; and
- (b) inviting interested parties to make written representations on the regulation.

The Agency must, not less than 30 days prior to making regulations, inform the Minister in writing of its intention and the subject matter of the regulations.

38. *Interventions by the Minister*

The Bill may need to provide for protection against undue political interference.

39. *Interventions by the Minister in respect of the Corporation*

The Bill may need to provide for protection against undue political interference.

Chapter 10: Establishment of Broadcasting and Signal Distribution Museum

Sections

40. *Establishment of Broadcasting and Signal-distribution Museum*

The Agency supports the proposal for a museum which is in line with Section 72 (1) of the ECA. It is unclear whether the SABC and SENTECH will be able to assume this responsibility, as they are not the sole sources of museum information. For example, there is a rich history of community broadcasting that neither the two would have information of.

The Agency would suggest that either the Department or any other institution be given this mandate, with all the service providers assisting in providing that historical information.



Chapter 11: Local Content Industry and the Advisory Body to the Minister

Sections

41. *Specialist Channels*

Local content development and production is critical not only for economic development but most importantly to ensure that South Africans (in the midst of globalisation) are not just consumers of information but produce content, information and actively participate in the global communication. This is critical for the transfer of power from the traditional conglomerate approach towards the creative ability of our communities.

The Agency submits that according to the Broadcasting White Paper of June 1998 (Part 2), priority should be given to local content. Further the White Paper on Broadcasting promotes the establishment of a non-statutory Agency to support the production of quality South African broadcasting content.

42. *Local Content Advisory Body*

This body should have regard to the advisory information provided by previous similar body to the Minister in the early 2000s.

Chapter 12: Transitional Provisions

Sections

43. *Compliance with the Charters*

Unless otherwise, the Charter for community broadcasting is amended, 12 months to align operations may be unrealistic.

44. *Existing licenses*



- Supported and should be read with the ECA Act section 4.

45. Existing TV licenses

- Supported

46. Existing regulations

- supported

47. New regulations

The provision should take into account the proposals made above.

48. Application of the Act

- Supported.

49. Repeal and amendment of laws

- Supported

50. Short title and commencement

- The Agency fully support the name for this Bill



A Charter Community Broadcasting Services

1. The Agency proposes that the Department should refrain from using shall in the Charter for this might cause a lot of confusion to the public, therefore the Agency proposes that the words like may, might should be used instead of shall unless the provision provides for a legislated mandate.
2. There seem to be frequent mistaken numbering references in the Charters, and some provisions are not in line with the Bill.
3. The draft Charter for Community broadcasting includes sections which are almost cut and pasted from the SABC Charter or similar (in many cases key references – for example to “the Corporation” – have not been changed).
4. Main categories set out for the Community Broadcasting Charter are identical to those for SABC, despite the radical differences between these types of broadcasters. As a result some are inappropriate for community broadcasters and may not be necessary.
5. The Charter should be a regulatory tool rather than a legislative tool. This is further made important by the need to align (from time to time) the Charter with regulatory changes.



Section 4: Conclusion

The Agency commends the Ministry for this initiative and hopes that the process will lead to enhancement of the goals and vision of a broadcasting system serving the people of South Africa.

Critically, the draft Bill proposes a shift from direct reliance on commercial funding for the Public Broadcaster and instead replaces it with public funding model. This is welcomed by the Agency, except that whatever funding model adopted should ensure that Public Broadcasting is promoted and protected, funding should be assured and not subjected to uncertainty. The draft Bill also proposes strengthening support and public funding for community broadcasting and also the MDDA (set out for this purpose by the MDDA Act) itself. This intention of the Bill will ensure that the objectives of the MDDA Act are met. A number of different researches conducted independently did make this recommendation, from:

- i. Meeting their Mandate? A critical Analysis of South African Media Statutory Bodies (Open Society Foundation for S.A.) 2007
- ii. Trends of ownership and control of media in S.A. (MDDA) June 2009
- iii. Libby Lloyd, Jane Duncan, et al ; Public Broadcasting in Africa – A Survey; (Afrimap, OSF-SA & OSMP), Jan. 2010
- iv. Etc.

The draft Bill's intentions in respect of transforming broadcasting in S.A., promoting media diversity, promoting South African content and culture, ensuring a developmental broadcasting system, strengthening the broadcasting system, etc. are noble. The Ministry should therefore deal with the unfortunate provisions in the draft Bill (drafting errors) that may appear to compromise noble principles of editorial independence, independent broadcasting system and vibrant community broadcasting sector.



In conclusion, the MDDA would like to participate in any further processes aimed at achieving the purpose of this draft Bill. This submission should be seen as working contributions of the MDDA to this public discourse.

Submitted for and on behalf of:

MDDA

Lumko Mtimde

Chief Executive Officer

15 January 2010