

Submission on the ICASA Regulatory Framework for Broadcasting Transmission Services Discussion Document

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Introduction

The community television sector welcomes this opportunity to comment on ICASA's Broadcasting Transmission Discussion Paper.

The Authority has identified the fact that Sentech holds significant Market Power (SMP) in the terrestrial television broadcasting market¹ and consequently has arrived at potential pro-competitive remedies for this situation. We propose that particular remedies among these be structured to address the sustainability of the community television sector.

In examining inefficient and excessive pricing of MTS, the Authority states that the purpose of its proposed market regulation is "to ensure that consumers of MTS can secure it on reasonable terms". It goes on to say that benefits to consumers would accrue through mechanisms such as "the flow-on effects of lower input costs to broadcasters, which could lead to better quality programmes as well as greater broadcasting content offered."

The Authority wishes to "promote an environment of open, fair and non-discriminatory access to broadcasting services... taking into account the needs of the public", and to "provide access to broadcasting signal distribution and encourage the development of multi-channel distribution systems in the broadcasting framework". To achieve these ends, it must impose specific obligations based on the nature of the problem identified, which must then be "proportionate and justified".

With regard to the community broadcast sector, Sentech has almost single-handedly distorted the broadcasting dispensation by forcing community broadcasters to shift into a commercial mode to ensure financial sustainability through advertising and sponsorship. Effectively this means that increasingly due to the Sentech's high charges and the absence of regulated guaranteed state subsidy, community broadcasters have evolved into commercial ones – thereby undermining the legal policy framework for three tiers of broadcasting. Community broadcasters therefore have to compete with commercial ones for adspend and sponsorship, areas where they are severely disadvantaged through a range of factors including audience reach relative to commercial channels, visibility in the advertising media spectrum, audience measurement etc. More importantly the content of community broadcasters becomes distorted in favour of commercial interests instead of community concerns.

Suggested remedies

In the light of the above factors, we argue that the Authority should consider the imposition of transmission fee restrictions on Sentech in order to promote the sustainability of community broadcasters, who are faced with significant financial challenges because of their non-profit nature, lack of access to capital markets, exclusion from the mainstream advertising industry² and public service broadcasting mandate.

¹ With regard to the provision of Managed Transmission Services (MTS).

² Due to a range of factors including lack of audience measurement mechanisms and non-inclusion in digital media bookings systems, as well as poor market reach and low-tech ability.

The Authority is at liberty to impose price controls such as cost orientation on MTS provider. We suggest that the Authority consider imposing a price control mechanism on Sentech, as the SMP holder, that will limit the fees that it can charge to community broadcasters, and in particular community television broadcasters. This is because while transmission costs are onerous for both community radio and community television, the former sector has recourse to other remedies in the face of Sentech's position of market dominance. Community radio can draw on the DoC's Community Radio Support Programme which subsidizes transmission costs; it is relatively easy for the sector to self-provision, as ICASA has noted in its findings on this market segment³. In addition, community television stations commonly cover much larger geographic areas than do community radio stations, which can have significant cost implications.

The Authority has at its disposal several behavioural remedies that may be the most appropriate to apply in the MTS markets where the Authority considers competition is ineffective. We believe that the pertinent conditions include:

1. An access obligation: because Sentech is at present the sole provider of MTS for community television, the company should be obliged to do this in a way that promotes the sustainability of the community sector rather than privileging Sentech's ability to carry on a commercial operation;
2. A non-discrimination obligation, including non-discrimination on pricing: this provision is intended to protect the users of MTS and not the provider's ability to charge the same rates across different tiers of users, as is the case at present. Community broadcasters pay Sentech on the same scale of fees as all other clients of this SMP operator.
3. A related wholesale price control obligation, where charges for network access would be reasonably derived from the costs of provision: while we do not oppose Sentech's right to cost recovery for its provision of MTS to community broadcasters, we hold that this should be reasonably evaluated in relation to the funding realities of community broadcasters and not just Sentech's ability to cover its overall operating expenses and profit-making activities.
4. A cost accounting obligation to support the price control obligation: this should be structured in accord with the considerations outlined above.

Obligations on Sentech

We note that Section 43 of the ECA and the Facilities Leasing Regulations made in terms of section 44(1) of the ECA imposes a broad range of obligations for wholesale broadcasting transmission markets, including the obligation to:

- negotiate in good faith;
- maintain supply;
- specify technical requirements;
- abide by fairness conditions
- abide by reasonableness conditions (technical and financial feasibility, and promotion of the efficient use of electronic communication networks and services)

³ About 40% of community radio stations do not purchase their MTS from Sentech and hence are assumed to be self-provisioning (p44).

We submit that Sentech is currently not abiding by these provisions in that it:

- a) fails to maintain supply to community channels that do not keep up with its strict payment regimen; it has closed down many community broadcasters and constantly threatens others with closure;
- b) is not abiding by fairness provisions in not making allowances for the particular funding challenges faced by the non-profit community sector; and
- c) is consequently not abiding by the reasonableness conditions.

It may be possible to build competition to Sentech at the level of local television broadcasting by making use of the access obligations with regard to other owners of transmission facilities, such as Telkom and wireless service providers, at least in certain areas. This poses the question of how the digital broadcasting environment will be legislated with regard to the provision and assignment of multiplexes. Can a local broadcaster self-provision by establishing its own MUX, possibly with the help of the afore-mentioned providers? It seems from the proposed Amendment of Broadcasting Digital Migration Policy states that “community TV should be accommodated in the existing DTT multiplexes” (6.1.10), which have been assigned to Sentech as the sole provider of DTT services for the public service and community broadcasting sectors, which further entrenches its monopoly position.

Questions on Transparency

The Authority has posed some questions on transparency in its market survey. We provide some answers below.

Question 22: Do the existing Facilities Leasing Regulations adequately address the potential challenges with respect to entering into a Master Service Agreement with Sentech?

Answer: No, because they do not differentiate fees charged to community broadcasters from those charged to other clients.

Question 23: Are any amendments to the regulations needed to better cater for the potential consequences of SMP in the defined markets, or are separate regulations needed? (Please explain)?

Answer: Yes, the regulations can be amended to include specific provision of price controls for community broadcasters; and for community television in particular.

Sustainability of community broadcasters and price control

We note that sections of the ECA back the right of community broadcasters to remain on the airwaves. These include Section 62(1)(c) which obliges MTS operators to “provide a diversity of type of broadcasting services”; and Section 62(3), which states that a common carrier must:

- (a) subject to its technological capacity to do so and to the provisions of paragraph (b), provide broadcasting signal distribution to broadcasting licensees upon their request on an equitable, reasonable, non-preferential and non-discriminatory basis;
- (b) in determining its tariffs, duly take into account the following:

- (i) the different categories of broadcasting service licenses referred to in sections 49, 50 and 51; and
 - (ii) the nature and technical parameters of the service provided to each broadcasting licensee with a view to ensuring that the different tariffs are appropriate to and commensurate with the various broadcasting services to which they relate;
- (c) carry public broadcasting services, including educational, commercial and community services.

We contend that in the light of the above provisions, the Authority is obliged to protect the existence of community broadcasters on the airwaves. Because transmission costs are a major burden on community broadcasters – a position that the NCRF has advanced over many years⁴ – one mechanism to overcome this would be to the above-mentioned price control. Section 6.5.6 of the Policy establishes the Authority’s jurisdiction over imposing price control obligations on the SMP operator in markets where ineffective competition has been found.

While the Authority must balance the needs of the public, broadcasters and operators in assessing price control mechanisms, we suggest that one mechanism for achieving this in the context of sustaining community television is to use a benchmark level, which can be ascertained by examining best-practice situations in comparable countries. Another would be to assess Sentech’s actual costs of transmission provision and to evaluate these in a spirit of building the sustainability of the community broadcast sector, that is to say that in a sense community broadcasting may be subsidized by other income streams rather than being treated as just another commercial customer.

The Authority has taken the view that “setting such an obligation (a price control mechanism) at this stage would be a burdensome approach, and may not be proportionate” (p73), but in reaching this conclusion it may not have taken into account the particular situation of community broadcasters.

It would not be a big step to include a clause in the final legislation that specifically protects the public’s right to receive developmental, educational and other socially beneficial content through the medium of community television, which can be secured through setting a cap on the amount that Sentech can charge community broadcasters. This rate should be such that it is subsidized by the broadcasters that are making huge profits out of pursuing a commercial model of content provision, including the SABC. In this way Sentech will remain competitive in the face of possible future self-provision by community broadcasters, as well as securing the public interest in maintaining a community television presence on the airwaves.

The Authority has decided not to deal with the pricing of each specific service provided as part of the managed service separately and instead to “require that the MTS charge be reasonably derived from the costs of provision” (p74). This approach is designed to

⁴ National Community Radio Forum (NCRF) Report to MDDA for the Analysis of the Broadcasting Signal Distribution Environment for Community Broadcasting in South Africa (2005)

provide “a basis for investigating such prices in the event of necessary regulatory intervention” (Ibid), a notion which must then be invoked for the Authority to assess a fair costing for non-profit community channels.

We also welcome the idea that the Authority put in place measures to enable licensees to appeal a proposed price; however we submit that this should apply to existing pricing as well.

Questions on Price Control Obligation

Further questions on price control obligation contained in the Authority’s survey are answered as follows:

Question 32: Is the proposed Pricing Obligation appropriate, proportionate and justifiable?

Answer: No, because it does not deal with the specific case of community broadcasting.

Question 33: Do you agree with the ‘light touch’ approach that the Authority proposes relating to cost orientation?

Answer: No, the issue of sustaining community broadcasting requires a more robust intervention.

Question 34: Do you believe that a Regulatory Accounting obligation would be proportionate to the harm that the remedy seeks to address?

Answer: This is not in itself sufficient to protect the interests of community broadcasters from the market effects of Sentech’s SMP position.

Question 35: Should existing agreements be considered for amendment with respect to price? Please provide justification in support of your view?

Answer: Yes. Sentech’s unfair transmission fee pricing structure must be urgently reviewed to relieve the burden currently imposed on the community broadcast sector.

Conclusion

This submission contends that Sentech’s transmission fee structure is inappropriate to the needs and realities of the community broadcasting sector, and that within this sector community television occupies a special place. At present the community TV sector is still struggling to emerge; only two stations in the major urban areas of Johannesburg and Cape Town have remained on air for the majority of their license period, and some have gone off air for months at a time – a situation that diminishes the sustainability of the sector.

Sentech’s transmission costs are a significant barrier to entry of the sector, particularly in the rural areas where commercial revenues are very scarce. South African government policy is directed towards the achievement of a developmental state and community broadcasting is one mechanism that has been identified as a means to this end. But this policy direction is undermined by the sector’s structural weaknesses and the existing regimen of transmission costs is hampering its development.

In order to address these concerns, we propose that the Authority undertake the following:

- (i) Review its proposed regulation of the MTS sector in the light of the concerns raised in this document;
- (ii) Assess Sentech's transmission fee structure and payment regimen for community broadcasters with a view to establishing a fair and equitable situation where Sentech's capital costs are recouped through transmission fees, while community broadcasters are empowered through reduced fees and more flexible payment mechanisms.
- (iii) Benchmark fee structures for community broadcasters against those in other comparable countries.
- (iv) Set a cap on the fees payable by community broadcasters to Sentech based on the above-mentioned assessments and the need to ensure community presence on the airwaves.

We further encourage both ICASA and Sentech to give inputs into deliberations around government's public service broadcasting policy, the review of which has been mooted by Minister of Communications Roy Padayachee in November 2010, in favour of establishing other funding mechanisms to support the community broadcasting sectors. It is abundantly clear that the sector is in need of permanent, legislated mechanisms of financial support that will on the one hand secure its ability to deliver developmental, educational and socially uplifting content to the public, while on the other provide for the operational costs of the common carrier through sustaining fair and equitable transmission fees.