



**THE INDEPENDENT
COMMUNICATIONS AUTHORITY OF
SOUTH AFRICA – NOTICE 346 OF 2011**

**NOTICE IN TERMS OF SECTIONS 4,
and 67 OF THE ELECTRONIC
COMMUNICATIONS ACT 36 OF 2005**

**ICASA REGULATORY FRAMEWORK
FOR BROADCASTING TRANSMISSION
SERVICES**

Submission

13 September 2011

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Section 1: Introduction and background

The MDDA welcomes the Discussion Paper: ICASA REGULATORY FRAMEWORK FOR BROADCASTING TRANSMISSION SERVICES, as published by the Authority on the 15th June 2011 in order to outline the Authority's initial views on a number of aspects of the broadcasting transmission market in South Africa. This follows the Independent Communications Authority of South Africa (ICASA) publishing a notice in Government Gazette No 33599 on the 10th of September 2010, of its intention embark on section 4B inquiry on wholesale transmission services in terms of the ICASA Act, and the Authority's analysis of its questionnaire, released on 6 October 2010 to all licensees, which requested relevant information so that the authority can, amongst others:

- Define the market for wholesale transmission services;
- Evaluate the effectiveness of competition in the wholesale transmission services market/s
- Declare those licensees with significant market power, where necessary

Further, the MDDA (the Agency) appreciates the democratic and participatory nature of policy making in our country.

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 MDDA was established by an act of Parliament (the MDDA Act No 13 of 2002) to create an enabling environment for the development of media development and diversity in South Africa. 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 marginalization 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 channeling 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 in addition to its participating in the processes for promoting media development and diversity through a number of capacity building programmes, research, etc has supported and worked closely with the community broadcasting sector including both radio stations and television initiatives (often in liaison with and/or together with ICASA) in pursuit of the objects of both the MDDA Act and ECA Act.

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”. 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 Agency provides both financial and other support (including capacity building, research, mentoring, exchange programmes, etc.) to media projects across South Africa. In terms of the MDDA Act, the Minister in the Presidency, published regulations (Government Gazette No 25570 on the 10th of October 2003) outlining the criteria that the MDDA will consider when deciding on applications. Many of these are similar to those considered by ICASA; however having an ICASA license does not automatically guarantee support from the Agency. The Agency has therefore developed guidelines outlining what can be supported and what is not possible due to the limited resources available. 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, etc.)
- Provide ongoing support for up to three years for non-profit organizations
- 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. As at the July 2011, the Board has approved more than 353 different projects, with approximately more than R136m in grants accumulatively.

However, the sector has grown fast, further facilitated by the environment created by the ECA. By way of illustration, the Agency has receives more than R150m worth of applications for funding support.

The MDDA commits –

- to ensure diversity of media in each and every municipal district of our country.
- to ensure increased media in different indigenous languages, reflecting unity in diversity,
- to ensure rural communities are empowered, jobs are created, poverty is alleviated and we have an informed society.

Accordingly in its plan, the Agency has set itself the following indicators for the years ahead, in terms of its mandate in the promotion and strengthening small commercial print and community media:

- ✚ At least 1 community radio per district municipality funded
- ✚ At least 1 community newspaper per district municipality funded
- ✚ At least 1 community television per province funded
- ✚ 1 media co-operative per district funded guided by the feasibility study on the viability of co-operatives
- ✚ at least 1 hub per province (print & radio) funded
- ✚ number & range of student media funded
- ✚ number & range of atypical media funded
- ✚ number & range of new media funded
- ✚ number & range of content development initiatives
- ✚ Number and spread of small commercial newspapers, magazines, online newspapers or magazines funded

The MDDA therefore welcome this discussion, as it adds value to all our legislative mandates as organs of state but also generally guiding the growth, promotion of investment and innovation in the communications sector.

Section 2: Nature and Scope of the Submission

The MDDA notes that the discussion document sets out the Authority's initial views on the market definition, operator (s) that may have significant market power (SMP) in these markets and possible pro – competitive measures that might be applied in these markets where competition may be found to be ineffective

The Electronic Communications Act No 36 of 2005 promotes convergence in the broadcasting, broadcasting signal distribution and telecommunications sectors and provides the legal framework for convergence of these sectors. The Agency notes that this is a very significant broadcasting regulatory framework that will shape the environment in which broadcast service licensees operate for years.

The Agency draws the attention of the Authority to Section 33 of the Broadcasting Act No. 4 of 1999 which provides that the Authority must conduct an inquiry to determine the licence conditions, obligations, and tariff structure for signal distribution including the regulatory regime for multi-channel distribution services and convergence.

Subsequently, Section 62 of the Electronic Communications Act No 36 of 2005 (ECA), whose objectives in regard to signal distribution provides that:

62. (1) Where an electronic communications network service licensee provides broadcasting signal distribution or multi-channel distribution services, such provider must, subject to the general terms and conditions of its licence as determined by the Authority—

- (a) give priority to the carriage of South African broadcasting channels, which includes local programming where the Authority considers it appropriate;
- (b) provide **universal access for all South Africans to broadcasting services**;
- (c) provide a **diversity of type of broadcasting services**;
- (d) be open, interoperable and harmonised with the Southern African region, and be able to meet international distribution standards.

(2) An electronic communications network service licensee that provides broadcasting signal distribution or multi-channel distribution services must—

- (a) comply with the provisions of this Act and the frequency plan of the Authority;
- (b) provide broadcasting signal distribution only to a broadcasting service provided under an appropriate and valid broadcasting licence; and
- (c) take due cognisance of the environmental impact of his or her operational activities and comply with all applicable laws relating to the protection of the environment.

(3) **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.

Self provisioning by broadcasting service licensees

63. (1) Broadcasting service licensees may self provide their broadcasting signal distribution upon obtaining an electronic communications network services licence.

(2) A broadcasting service licensee may also provide any electronic communications service upon obtaining an electronic communications services licence.

(3) A broadcasting service licensee may not provide a broadcasting service utilising any portion of the radio frequency spectrum without first obtaining a radio frequency spectrum licence in terms of this Act.

Further, the Authorities **POSITION PAPER ON REGULATING BROADCASTING SIGNAL DISTRIBUTION**, October 3, 1997 provides that broadcasting signal distribution be regulated in the public interest. Also, the Position Paper provides that the responsibility of the common carrier is greater than that of the other two categories of signal distribution licensees, in that the service which it provides has to ensure that no person or organisation is excluded from providing a broadcasting service.

Whereas, the Agency understands that the Authority is conducting this process in terms of Chapter 10 of the ECA to introduce pro-competition remedies to address problems in defined markets where competition is ineffective and licenses have been identified as having significant market power, the Agency would like the Authority to note the intentions of the provisions in the Broadcasting Act of 1999 and subsequently the ECA.

In this regard, it is also worth noting that the structure of the broadcasting system in SA in respect of three-tiers (public, commercial/private and community broadcasting) by its very nature promotes competition and media diversity. The allowance for a common carrier, provision on selective & preferential basis and self-provisioning were also intended to diversify the signal distribution market. It must also be noted that services can be regarded as 'essential facilities'. The ECA defines 'essential facility' as "an electronic communications facility or combination of electronic communications or other facilities that is exclusively or predominantly provide by a single or limited number or licenses and that cannot (whether economically, environmentally or technically) be substituted or duplicated in order to provide a service in terms of this Act". The Authority has not to date found any

licencees to be providing 'essential facilities' and many have argued that this ought to have been addressed.

It appears that the discussion paper has not appreciated the uniqueness of the broadcasting industry or considered previous position papers policy statements or the Broadcasting Act of 1999. Furthermore, it seems that certain concepts and definitions lend themselves more to a telecommunications infrastructure environment and some international benchmarks would require further analysis for possible introduction in South Africa. The Agency therefore submits that this process be premised on the understanding of broadcasting as defined in the Act.

In terms of the Electronic Communications Act, broadcasting" means any form of unidirectional electronic communications intended for reception by:

- (a) the public;
- (b) sections of the public; or
- (c) subscribers to any broadcasting service,

whether conveyed by means of radio frequency spectrum or any electronic communications network or any combination thereof, and "broadcast" is construed accordingly.

Broadcasting signal distribution means the process whereby the output signal of a broadcasting service is taken from the point of origin, being the point where such signal is made available in its final content format, from where it is conveyed, to any broadcast target area, by means of electronic communications and includes multi-channel distribution. The Authority has interpreted this definition to mean the establishment of transmission infrastructure, maintenance and operation of signal distribution facilities by or on behalf of broadcasters. The Authority has always required that signal distributors provide coverage prediction and planning facilities to broadcasters.

Section 3: The Discussion Paper

The Authority had initially published a notice in a Government Gazette No. 33599 on the 30th of September 2010, of its intention to embark on a section 4B inquiry on wholesale transmission services in terms of the ICASA Act.

Subsequent to the Notice the Authority published a questionnaire on its website on the 6th of October 2010 and also circulated the questionnaire directly to licensees, to the extent possible. The Agency met with the Authority's consultants and provided detailed input. The Discussion Paper: Regulatory Framework for Broadcasting Transmission Services was published on the 15th of June 2011 in order to solicit further inputs from stakeholders. This process will no doubt be protracted given the administrative requirements of a Chapter 10 process.

The MDDA advises that the proposed regulatory framework by the Authority should respond to the challenges created by technological convergence by establishing a common, harmonized framework for the regulation of all electronic communications services and networks, as well as facilities associated with such networks and the broadcasting industry. Technology is converging at a rapid pace. The convergence process opens up opportunities to provide varied types of services to different segments of the South African population over the existing and new transmission networks. Technology already offers an opportunity to meet the different needs of society and most importantly in new and cost effective ways.

The MDDA submits that regulatory framework for broadcasting services should reinforce the current mandate of the three-tier (being public, commercial and community broadcasting) system including striving to fulfill and address national goals, ensuring access to choice, quality programming, and accessibility of a range of services. Accordingly the framework should be development oriented and prioritize rural development in the roll-out of the infrastructure, as it is unacceptable that 15 years post democracy; some rural areas cannot access television services and some even radio services. This approach should have regard to the development state priorities, including universal service, universal access and public interest. The public interest imperative as it relates specifically to broadcasting, includes provisions which compel the Authority to encourage and ensure the provision of a diversity of broadcasting services, the ownership of broadcasting assets by historically disadvantaged persons, and the promotion of fair competition in the broadcasting industry.

Having regard to the above, the regulatory framework should discourage any unfair competitive advantage by any existing licensees over all other licensees..

Digital migration and in particular with the introduction of the new generation digital video broadcasting standard (DVB-T2) which allows multiple channels, up to 20 channels per frequency, provides for more opportunity for the growth of the community broadcasting sector. There has to be a consideration that's made particularly for the community TV landscape. The regulator needs to look at legal imperatives that can be placed on the industry so as to insist on lower tariffs for community broadcasters, so that the three-tier system is not compromised under the digital future.

The Authority needs to anticipate the digital and affordable broadband connectivity era and streamline signal distribution regulatory framework to enable growth and development of all the three-tiers of broadcasting. Regulation should drive access to the broadband market, because its impact means there now will be many ways outside of the traditional methods to access radio and TV.

Section 4: Responses to Discussion Paper questions under Sections 3, 4, 5, & 6

4.1 SECTION 2 BACKGROUND AND LEGAL FRAMEWORK

The ECA changed the face of regulation of broadcasting and telecommunications with different opportunities. The Act provides for convergence between broadcasting and ICTs and puts in place mechanisms for issuing individual and class licenses. Community radio and television stations no longer have to go through protracted applications for licenses but merely need to seek authorization for a class license. This though does pose a challenge, as strict consideration of compliance with regulatory requirements for a community broadcasting license is more needed now than ever before, otherwise, we run a risk of many licenses issued of entities that do not comply and therefore create more problems than empowering communities.

The MDDA confirms that the Authority's discussion paper is in line with chapter 10 of the ECA, section 67 which is applicable in this discussion paper, more specifically subsection (4) where it states the following: ***The Authority must prescribe regulations defining the relevant market and market segments, as applicable, that pro – competitive conditions may be imposed upon licensees***

having significant market power where the Authority determines such markets or market segments have ineffective competition.


The South African Constitution (Act No. 108 of 1996) guarantees fundamental rights to all South Africans; including the right to participate in an informed way in all social and political processes. The right to freedom of expression is also guaranteed. Broadcasting is a pervasive means of providing news and information, and as such is fundamental to the realization of these fundamental rights. The Agency therefore supports the view that pro-competitive conditions must be developed for those licensees found to have SMP so that the rights as discussed above are further enabled through affordable and accessible broadcasting platforms.

4.2 CHAPTER 3 – BROADCASTING TRANSMISSION SERVICES MARKET IN SA

The Agency notes the developments in the market leading to the introductions of satellite radio, Internet TV, IPTV, mobile TV, etc.

Do you agree with the Authority's characteristics of the Broadcasting Market in South Africa? Please provide any additional information that can be used by the Authority in order to understand in more details the structure of the market.

 Yes, the Agency agrees with the Authority, and wishes to add that strengthening and expanding African media markets is part of what can be termed “media development”. The terminology used in describing the broadcasting transmission market discussed in the paper may need to be aligned with the ECA.

 A closer look of the South African broadcasting sector will reveal that it is characterized by a market structure that has, to a great extent been dominated by monopolies and an oligopoly. Only until recently, with the advent of some degree of liberalization has there been a release of the pent up competitive spirit in some sectors. It is an industry in which the evolution of the delivery of content services in Radio and Television has been the defining factor of the market structure.

Do you agree that retail and wholesale leased lines provided for broadcasting transmission conveyance should be considered in a

separate market review by the Authority at some point in the future? If, not please provide a detailed response and rationale for your review.

- ✚ Leased lines are a primary input and cost factor for mobile network operators, value-added and Internet service providers and are the basic building blocks of corporate networks.
- ✚ There should be reasonable certainty of ongoing supply of wholesale leased lines on reasonable terms in order to give competitors confidence to enter the market.
- ✚ Where this approach is judged insufficient, The Authority should consider whether a special form of non-discrimination obligation, namely ex-ante controls on the introduction of downstream services by the SMP player, should be imposed in order to ensure that the wholesale leased lines services which would permit effective competition in the downstream markets are made available and are fit for purpose in a timely way.
- ✚ An appropriate method of control could be an obligation not to make available to itself the wholesale inputs which permit introduction of a new or enhanced downstream service until the corresponding wholesale service components required to deliver an equivalent competitive downstream service are available and fit for purpose

Has the Authority correctly characterized the broadcasting value chain in South Africa? If not, please provide additional information.

Signal distribution value chain should be understood in the context and guided by the three-tier broadcasting system.

Has the Authority correctly characterized the potential competitive dynamics of alternative distribution platforms in South Africa?

The discussion paper has characterized the distribution platforms beyond the historical understanding in terms of the existing law. The Agency agrees with the conclusion that the alternative technologies to deliver broadcast content are not relevant in the definition of markets.

How do the transmission requirements of broadcasters differ, depending on the geographic footprint of the license?

It depends on technical specifications applied for and approved by the Authority in terms of ERP, the topography and the geography community intended to be served / targeted.

Do you agree that the type of sites required by broadcasters will differ according to the geographic footprint of their license? The larger the footprint of the license, the greater the likelihood that broadcasters will need to transmit from purpose built transmission sites.

Yes

4.3 CHAPTER 4 – MARKET DEFINITION ISSUES

Broadcasting exists in a framework of identified national goals of democracy, development and nation building. It is vital that a market structure exists wherein broadcasters are able to further these national goals within the context of a healthy, balanced and vibrant industry.

Again, the terminology used in describing the market discussed in the paper may need to be aligned with the ECA. For example, references to local and non-local are not in line with the ECA in terms of the three-tier broadcasting system. The introduction of terms such as these will confuse the market.

Do you agree that the appropriate wholesale broadcasting transmission service is a Managed Transmission Service? If not, please provide information on an alternative product definition.

The Agency notes that 'MTS' is also used in other jurisdictions such as the UK (Ofcom). It is therefore submitted that any new terms be guided by input made by the signal distributors themselves.

Do you agree with the list of retail markets that have been identified by the Authority?

Yes

Do you agree with the list of wholesale markets for MTS that have been identified by the Authority?

It appears ideal based on approaches from other countries but not relating easily to the existing broadcasting market structure in SA.

Do you agree that MTS for satellite and for terrestrial are in separate markets?

Yes

Do you agree that MTS for Radio and MTS for Television are in separate markets?

Yes

Do you agree that MTS for local radio broadcasting is in separate market to MTS for national and / or regional radio broadcasting (i.e. non-local radio broadcasting)?

As stated above, the introduction of terms such as 'local' and 'non-local' is not derived from the broadcasting sector as understood in terms of the ECA and will confuse the market.

Do you agree that MTS for Analogue and Digital broadcasting should be considered in the same market?

This would depend on whether it is via terrestrial or satellite.

Do respondents agree that the geographic markets for all markets defined for MTS on the terrestrial network are national in scope?

No

Do respondents have any views on the correct geographic market definition for satellite broadcasting services? Should it be defined as national or transmission services?

Unclear, however where satellite is used, it is purely for the delivery of services within the borders of South Africa.

4.3 CHAPTER 5 - ASSESSMENT OF MARKET POWER AND IDENTIFICATION OF LICENSEES WITH SMP

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 structure for signal distribution and that community broadcasting should pay lesser than commercial broadcasting.

In the context of the mandate provided for in the Broadcasting Act and subsequently outlined in the ECA, the Authority must further conduct an inquiry to determine the licence conditions, obligations and tariff structure for signal distribution including the regulatory regime for multi-channel distribution services, digital broadcasting and convergence, guided by the mandate discussed above. SENTECH should comply with the mandate in the ECA to differentiate its tariff structure having regard to the three tiers of the broadcasting system, and more specifically noting that community broadcasting is not for profit and therefore cannot be required to pay the same tariff as the commercial broadcastings services.

Community Broadcasting sector continuously faces challenges in respect of signal distribution tariffs which have an impact on their sustainability efforts. The MDDA proposes that the Authority must ensure that meaning is given to section 62 (3) of the ECA, which provides that “A common carrier must: (a) subject to its

technological capacity to do so and to the provisions of paragraph (b), provides broadcasting signal distribution to broadcasting licensees upon their request on an equitable, reasonable, non-preferential and non-discriminatory basis.

There is an expectation from broadcasters that state-owned Sentech as a common carrier must be enabled and compelled to provide low-cost, ideally free, digital transmission during the dual illumination period. There is a danger of the aforementioned technical issues distracting attention from what is the most important requirement for digital migration: new service offerings. Given that the state is not in a position to pay 100% of the cost of set-top boxes and aerials necessary to convert analogue free-to-air homes into digital free-to-air homes, then some degree of incentivisation is necessary through additional service offerings via DTT.

The three-tier broadcasting system provides and promotes competition, diversity and choice in line with the objectives of the ECA and MDDA Act. The SMP or a dominant market player can inhibit diversity and competition through unfair prices, etc.

Finally the tariff structure should be cost-based. It is hoped that the approach taken by the Authority in terms of the inquiry is not going to be a lengthy admin process and not assist in the immediate implementation of Section 62 of the ECA.

Do you agree with the initial views of the Authority that Sentech has SMP in the market for MTS for national terrestrial television broadcasting?

Yes

Do you agree with the initial views of the Authority that Sentech has SMP in the market for MTS for the purpose of national terrestrial radio broadcasting (non-local)?

Yes, Sentech has SMP and as stated above, the term non-local is not in line with the law.

Do you agree with the initial views of the Authority that Sentech has SMP in the market for MTS for the purpose of national terrestrial radio broadcasting (local)?

Yes, Sentech has SMP and as stated above, the term local is not in line with the law.

Do you agree with the initial views of the Authority that the market for MTS for the purpose of satellite broadcasting is effectively competitive and falls outside of its jurisdiction due to its trans-national nature?

No, the Authority has not considered this in the context of the objects of the Act. Furthermore, the Authority is required to analyse the satellite broadcasting market more robustly before taking a view on this.

Do you have any data regarding the market, other than that used by the Authority to make its initial views?

No

4.4 CHAPTER 6 THE CONSEQUENCES OF MARKET POWER AND INITIAL VIEWS ON PRO-COMPETITIVE REMEDIES

The Agency is concerned that Sentech's market power has already impacted negatively on the community broadcasting sector due to its seemingly high tariffs. This issue has been widely reported on and the Authority is aware of the ongoing challenges in this regard. In addition, apart from Orbicom (sole provider for Mnet and Multichoice) and a few small self-providing companies (engineers mainly and some community radio stations), Sentech does not have any real competition and maintains its dominance of high sites across the entire country. As a state-owned entity it has failed to proactively interpret the underpinning legislation for non-profit community broadcasting and as a common-carrier provide the services in the public interest.

(A) TRANSPARENCY

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

No

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).

Separate regulations would need to be developed as the facilities leasing regulations do not cater for a standard approach for 'non-profit' licensees.

Is access an appropriate remedy in light of structural concerns with the market (high sunk costs, no possibly of a new entrant in the short term, etc?

It is appropriate as one of the remedies, but not the only one.

Is the proposed Transparency Obligation appropriate, proportionate and justifiable?

Yes.

If the obligations is adopted, should be the Authority provide a Model RO, or should the obligation rest on the SMP Operator to initiate the RO?

The Authority ought to provide a model RO.

What is the most efficient and effective way to make an RO available to all affected operators to use as they enter into negotiations with the SMP Operator (i.e. website, Library, etc)?

All, including awareness programmes.

Should existing agreements be amended to bring them into line with the terms of the published RO? If not, how should existing agreements be treated?

Yes

(B) NON-DISCRIMINATION

Is the proposed Non-Discrimination Obligation appropriate, proportionate and justifiable? Please explain your views?

- ❖ A traditional obligation not to discriminate against third parties may be sufficient to alleviate the concern opposite but the Authority should not rely on an assumption that it will be sufficient (even in combination with an access obligation), unless there is evidence of this.
- ❖ The Authority should therefore consider whether additional measures are necessary to ensure that a strong incentive for compliance is provided as it will often prove unsatisfactory to plan to deal with each new problem by enforcement or dispute settlement.
- ❖ A number of techniques for achieving this are available. For example, the Authority could attempt to clarify, as far as possible, how a non-discrimination remedy will be interpreted in practice, via identification of forms of behavior which will be considered to be discriminatory.

Having answered the above, the Authority should note that Section 62 of the Electronic Communications Act No 36 of 2005 (ECA) provides that:

- (1) Where an electronic communications network service licensee provides broadcasting signal distribution or multi-channel distribution services, such provider must, subject to the general terms and conditions of its licence as determined by the Authority—
- (a) give priority to the carriage of South African broadcasting channels, which includes local programming where the Authority considers it appropriate;
 - (b) provide **universal access for all South Africans to broadcasting services**;
 - (c) provide a **diversity of type of broadcasting services**;
 - (d) be open, interoperable and harmonised with the Southern African region, and be able to meet international distribution standards.
- (3) 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.

Are there other areas in addition to pricing and QoS whether there are concerns relating to non-discrimination?

- ❖ There should be reasonable certainty that entrants will be able to compete on a level playing field. This implies that effective measures are in place:
 - (a) to ensure that the SMP player does not have an unfair unmatchable advantage, by virtue of its economies of scale and scope, especially if derived from a position of incumbency;
 - (b) to prohibit the SMP player from discriminating in favour of its own group business, either on price or non-price issues;
 - (c) to provide an effective deterrent to obstructive and foot dragging behaviour;

(d) to ensure that the policies adopted by the SMP player towards the commissioning of new infrastructure which may be necessary for provision of new retail services, allows all market players the same opportunity to compete for the new business.

Should existing agreements be amended ; and, if so, how?

Yes, aligned to the regulatory framework.

(C) PRICE CONTROL OBLIGATION

Is the proposed Pricing Obligation appropriate, proportionate and justifiable?

- ❖ Prices should be cost-based and based on the most efficient means of satisfying the demand. Where, for convenience, the SMP player supplies a line using an “expensive” technology where a cheaper technology would be satisfactory, the price should be based on the use of the corresponding cheaper technology. Any explicit charge for the provision of new infrastructure should be reasonable, taking account of the need to facilitate effective competition in downstream markets.
- ❖ Where prices are implicitly or explicitly required to be cost-oriented, an appropriate methodology should be in place so that costs can be justified robustly. In that case, prices for services which are technically similar should be priced similarly to facilitate the maximum degree of competition.

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

No. the Authority should ensure compliance with ECA by all licensees.

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

Yes

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

Yes, aligned to the regulatory framework and ECA.

Conclusion

The MDDA remains committed –

- to ensure diversity of media in each and every municipal district of our country.
- to ensure increased media in different indigenous languages, reflecting unity in diversity,
- to ensure rural communities are empowered, jobs are created, poverty is alleviated and we have an informed society.
- to supporting the development and growth of the three-tier broadcasting system in SA.

In conclusion, the MDDA would like to participate in any further processes aimed at achieving the purpose of this discussion paper. 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

13 September 2011