

# **2011/2012 ANNUAL COMPLIANCE REPORT**

## **ON DIGITAL MEDIA / TOP TV**

**Licence Period: 09 July 2008 – 08 July 2023**

### **1. PREFACE**

The Independent Communications Authority of South Africa (“the Authority”) has a statutory mandate in terms of the Constitution<sup>1</sup>, the ICASA Act<sup>2</sup> and the Electronic Communications Act<sup>3</sup> (“EC Act”) to regulate broadcasting activities in South Africa in the public interest. The Authority is tasked with ensuring compliance by broadcasters with the ICASA Act, the EC Act, the terms and conditions of their Licence, any relevant legislation and regulations.

The following report is intended to give account of On Digital Media Pty (Ltd)’s performance for the 2011/2012 financial year. Aspects of compliance that are measured comprise of Geographic Coverage, Encryption of signal and use of licensed Electronic Communications Network Service (ECNS), Language(s), Format, Training and Skills Development Equity, Staff Development and Employment Equity Plan, Target market, Ownership by individuals from historical disadvantaged groups, Financial Year, Regulations Regarding Standard Terms and Conditions For Individual Licensees, Must Carry Regulations, General Licence Fees Regulations, Regulations In Respect of Prescribed Annual Contributions of Licensees to the Universal Service and Access Fund, Commissioning Protocols Regulations and South African Television Content Regulations.

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<sup>1</sup> The Constitution of the Republic of South Africa Act No 108, 1996

<sup>2</sup> ICASA Act No 13, 2000 as amended

<sup>3</sup> Electronic Communications Act No 36, 2005

## **2. BACKGROUND**

On 09 July 2008, the Authority issued an Individual Commercial Subscription Television and Sound Broadcasting Service licence to On Digital Media (Propriety) Limited broadcasting as Top TV. The shareholders as reflected in the licence are as follows:

First National Media Investment (Pty) Ltd	= 27.87%
Red Gold	= 20%
SES Astra	= 20%
Industrial Development Corporation of South Africa Ltd	= 11.13%
First Aone	= 10%
Morgan Moodley	= 1%
National Empowerment Fund Trust	= 10%

No changes were made to ODM's shareholding structure during the period under review (*See Appendix B*).

## **3. COMPLIANCE ASSESSMENT**

### **3.1 Service Name**

Clause 1 of the schedule to the licence provides that the service name is:

*"Top TV".*

The Licensee confirms that the service name is Top TV.

The Licensee complies with clause 1 of the schedule to its licence.

### **3.2 Geographic Coverage Area**

Clause 2 of the schedule to the licence provides that:

*"The Licensee shall provide a national coverage of its broadcasting services".*

The Licensee confirms that it provides a national coverage of its broadcasting service.

The Licensee complies with clause 2 of its licence.

### **3.2 Encryption of and signal and use of licensed electronic communications network service.**

Clause 3.1 of the schedule to the licence provides that:

*"The Licensee must ensure that the output signal of its subscription broadcasting service is encrypted".*

The Licensee confirms that output signal of its subscription broadcasting service is encrypted using technology provided by NDS through a combination of hardware and software based applications.

The Licensee complies with clause 3.1 of its licence.

Clause 3.2 of the schedule to the licence provides that:

*"The Licensee shall use the licensed communications network service of a licence".*

The Licensee confirms that its signal is carried by Globecast, a company duly licenced in South Africa with an ECNS licence (*See Appendix B*).

The Licensee complies with clause 3.2 of its licence.

### **3.4 Language**

Clause 4 of the schedule to the licence provides for Top TV to broadcast its activities as follows:

*"The Licensee has discretion to broadcast in any language/languages".*

The Licensee maintains that its programmes are broadcast predominantly in English. The Authority confirms that the Licensee broadcasts mainly in English.

The Licensee complies with clause 4 of its licence.

### **3.5 Format**

Clause 5 of the schedule to the licence provides that:

*"The Licensee shall provide a subscription broadcasting service aimed at the general and niche markets".*

During the period under review, the Licensee reported that its target market remains persons in the LSM Brackets 5-8, as well as, the general population that wish to acquire the Top TV service (*See appendix B*).

The Licensee complies with clause 5 of its licence.

### **3.6 Training and Skills Development Equity**

Clause 6.1 of the schedule to the licence provides that:

*"The Licensee shall submit its workplace skills plan to the Authority within a month of issuing of this licence and thereafter by the 30<sup>th</sup> of June each year".*

The Licensee submitted its workplace skills plan to the Authority, in accordance with the above requirement.

The Licensee complies with clause 6.1 of its licence.

Clause 6.2 of the schedule to the licence provides that:

*"The Licensee shall submit its workplace skills plan and its annual training report in the format prescribed by the Authority."*

As it appears in the above paragraph, the Licensee submitted its workplace skills plan and its annual training report for the period under review.

In view of the above, it is concluded that the Licensee complies with clause 6.2 of its licence (*A detailed report is attached as Appendix B*).

### **3.7 Staff Development and Employment Equity Plan**

Clause 7.1 of the schedule to the licence provides that:

*"The Licensee shall submit an annual compliance report in the format prescribed by the Authority".*

The Licensee submitted its annual compliance report (ACR) in line with Compliance Procedure Manual Regulations in a format as envisaged in clause 7.1 of the licence conditions.

In view of the above, it is concluded that the Licensee has complied with clause 7.1 of its licence (*See Appendix B*).

### **3.8 Target market**

Clause 8 of the schedule to the licence provides that:

*"The Licensee's primary target market is viewers in the LSM 6 to 9 bracket".*

The Licensee confirms that Top TV's target market remains persons in the LSM Brackets 5-8, as well as the general population that wish to acquire the Top TV service (See 3.5 above).

The Licensee complies with clause 8 of its licence.

### **3.9 Ownership by Individuals from Historically Disadvantaged groups**

Clause 9 of the schedule to the licence provides that:

*"Ownership by individuals from historically disadvantaged groups shall be no less than 30%".*

In its previous submissions to the Authority, the Licensee indicated that ownership by persons from historically disadvantaged groups constituted 68.87%. However, in its report submitted to the Authority during 2011/12 financial year, the Licensee submitted the report on its BBBEE status after verification by an independent agency indicating that ownership by persons from historically disadvantaged groups constitutes 47.1%.

Based on the above information, the Licensee complies with clause 9 of its licence.

### **3.10 Financial Year**

Clause 10.1 of the schedule to the licence provides that:

*"The Licensee's financial year end shall be the end of February".*

Clause 10.2 of the schedule to the licence provides that:

*"If this date changes, the licensee shall in writing notify the Authority thereof within seven business days of the change".*

The Licensee's financial year end has not changed, it is still end of February each year.

The Licensee has complied with clauses 10.1 and 10.2 of its licence.

#### **4. REGULATIONS**

##### **4.1 Standard Terms and Conditions for individual broadcasting licensees Regulations**

During the year under review, the Authority did not identify any non-compliance by the Licensee with the standard terms and conditions for individual Licensees (*See Regulations attached as Appendix C*).

##### **4.2 Must Carry Regulations**

Regulation 4 of the Must Carry Regulations as published in the Government Gazette No 31500 on 10 October 2008 provides that:

*"All Subscription broadcasting service licensees must carry the channels of the Public Broadcasting Service licensee, designated as must carry channels as part of the service offering, subject to Regulation 5".*

The Licensee has confirmed that it complies with this obligation as it carries all three channels of the South African Broadcasting Service Corporation ("SABC").

Regulation 8 provides that:

*"The subscription broadcasting service Licensee must submit a copy of the agreement within thirty (30) of such agreement being concluded and signed".*

During 2010/11 financial year, the Licensee submitted that the contract with the SABC had not been concluded due to a delay from the SABC. Further, the Licensee made an undertaking to submit the copy of the

agreement to the Authority once concluded. At the time of writing this report the Licensee had not submitted the copy of the contract.

In view of the alleged delay by the SABC, a conclusion on compliance with Regulation 8 of the Must Carry Regulations cannot be drawn.

#### **4.3 General Licence Fees Regulations**

Schedule 2 of the General Licence Fees Regulations as published in the Government Gazette, no 32084, 01 April 2009, provides for Individual Commercial Broadcasting Service Licensee's to pay annually to the Authority a licence fee of 1.5% of its gross profit.

Schedule 3 (4) (b) of the General Licence Fees Regulations provides that:

*"Annual payments are due and payable within 6 months from the end of the licensee's financial year".*

Schedule 3 (4) (d) of the General Licence Fees Regulations provides that:

*"Must be based on the:*

- (i) Audited Financial Statements of the licensee; or*
- (ii) Financial statements signed and sworn by the accounting officer of the licensee where the licensee is not legally obliged to provide audited financial statements"*

The Licensee's financial year end is February each year. The Licensee submitted its draft financial statements audited by KPMG. The reason for submitting draft financial statements are highlighted in detail in a motivational letter dated 25 October 2012 for the retention of broadcasting licence from its major shareholder, Industrial Development Corporation (IDC). IDC indicated that the reason for submitting draft financial statements for both 2010/11 and 2011/12 financial years was that the financial statements were not signed by ODM's auditors due to on-going concern issues in respect of ODM. Further, the IDC states that this is further indication that ODM is technically insolvent.

Further, the Licensee submitted its calculation of Annual Licence Fee showing that during the year under review the situation is similar to 2010/11 financial year; its operating costs exceeds its revenue. Therefore, there are no annual licence fees due. Accordingly, a conclusion on compliance with schedule 3 (4) (d) of the General Licence Fees Regulation cannot be drawn.

#### **4.4 Universal Service and Access Fund Regulations**

Regulation 3 (1) of the Regulations in respect of Prescribed Annual Contributions of Licensees to the Universal Service and Access Fund (USAF) as published in the Government Gazette No. 31499 of April 2009, provides that:

*"Every holder of the licence granted in terms of Chapter 3 or converted in terms of Chapter 15 of the Act, must pay an annual contribution of 0.2 % of the annual turnover, derived from the licensee's licence activity, to the Fund (the Fund)".*

Further, Regulation 3 (3) provides that:

*"A broadcasting service Licensee who has paid an annual contribution to the Media Development and Diversity Agency (MDDA) must set off that contribution against its prescribed annual contribution to the Fund" (See USAF Regulations attached as Appendix D)*

The Licensee's financial Year is February each year. The Licensee submitted its draft financial statements. The draft audited financial statements indicate that during the year in review, the licensee's operating costs exceeds its revenue. Therefore, there are no USAF funds due. Detailed information on ODM's financial status is provided in 4.3 above.

#### **4.5 Commissioning Protocols Regulations**

Regulation 3 (a) (i) of the Regulations on Commissioning Protocols published in the government gazette no 32767 on 01 December 2009 provides that:

*"A Licensee must compile and maintain a Commissioning Protocol for Independently Produced South African Programming" (referred to as "the Protocol").*

The Licensee had previously submitted its proposed protocol to the Authority within 120 days of the promulgation of the regulations. The Authority approved the Licensee's protocol subsequent to amendments being effected by ODM.

The Licensee has complied with regulation 3(a) (i) of Commissioning Protocol Regulations.

Regulation 3 (a) (iii) of Commissioning Protocol provides that:

*"A Licensee must ensure that copies of the Protocol are always available on their websites and to independent producers or their agents, a reasonable fee for the printing and/or copying thereof".*

A copy of the Protocol is available on the Licensee's website.

The Licensee complies with clause 2 of the regulations on Commissioning of Independent Producers.

#### **4.6 South African Television Content Regulations**

Regulation 5.4 of the South African Television Content Regulations published in the government gazette No 28454, dated 31 January 2006 provides that:

*"A subscription broadcasting licensee must spend a minimum of 10% of its content acquisition budget on acquisition of channels with local content which are compiled and uplinked from South Africa".*

Based on the draft audited financial statements it cannot be concluded that the Licensee complies with the above requirement.

## **5. CONCLUSION**

For the 2011/2012 financial year the Licensee has generally complied with its licence terms and conditions; applicable legislation and some regulations. However, it was noted that the problem experienced by the Licensee in 2010/11 financial year regarding its audited financial statements extended to 2011/12 financial year. The Licensee once again was not able to submit to the Authority the approved Audited financial statements, making it difficult for the Authority to ascertain compliance with Regulations 3(1) and 3(3) of the Regulations in respect of Prescribed Annual Contributions of Licensees to the Universal Service and Access Fund. Further, this made it difficult to conclude compliance with schedule 3 (4) (d) of the General Licence Fees Regulation.

There have been submissions made to the Authority outlining, in detail the financial status of the Licensee and proposals made. These however do not fall under this financial year reporting period.

Further, due to the alleged delay by the SABC to conclude the agreement in respect of the Must Carry Regulations, a conclusion on compliance could not be drawn.

## **6. APPENDICES**

Appendix A: Top TV licence conditions

Appendix B: On Digital Media's Reports

Appendix C: Regulations Regarding Standard Terms and Conditions

Appendix D: Must Carry Regulations

Appendix E: Licence Fees Regulations

Appendix E: USAF Regulations

Appendix F: Commissioning Protocols Regulations

Appendix G: South African Television Content Regulations