



ON DIGITAL MEDIA ANNUAL COMPLIANCE REPORT

MARCH 2017

2015/2016 ANNUAL COMPLIANCE REPORT

ON DIGITAL MEDIA (ODM) / 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 Constitution¹, the ICASA Act² and the Electronic Communications Act³ (ECA) and the Broadcasting Act⁴ to regulate broadcasting activities in South Africa in the public interest. One of the main tasks of the Authority, is to ensure compliance by broadcasters with the terms and conditions of their licence, the three Acts mentioned already and any relevant legislation and regulations.

The purpose of the report is to give an account of On Digital Media (Pty) Ltd's performance for the 2015/2016 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.

2. BACKGROUND

On 09 July 2008, the Authority issued an Individual Commercial Subscription Television and Sound Broadcasting Service licence to On

¹ The Constitution of the Republic of South Africa Act No 108, 1996.

² ICASA Act No 13, 2000 as amended.

³ Electronic Communications Act No 36, 2005.

⁴ Act No. 4 of 1999.

Digital Media (Propriety) Limited broadcasting as Top TV. The shareholders as reflected in the licence are as follows:⁵

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%

The Licensee reported that its shareholding has changed. ODM's shareholding structure is as follows:

(i) Hantex International Company Limited	= 20%
(ii) Digital Landmark (Pty) Ltd	= 28%
(iii) Industrial Development Corporation of South Africa Limited	= 22%
(iv) National Empowerment Fund	= 19.48
(v) Diduscan (Pty) Ltd	= 9.6%
(vi) A. N. Moodley	= 0.123%

The Authority's records indicate that the Licensee's notification to change its shareholding was not processed by the Authority because of the Licensee's withdrawal of the shareholders agreement document.⁶ This withdrawal was preceded by the Authority's decision not to grant confidentiality in this regard. Without the shareholders agreement, the Authority's Compliance and Consumer Affairs Division (CCA) was unable to scrutinise the shareholder's changes and satisfy itself that changes made were not in contravention of sections 64, 65 and 66 of the ECA.

CCA has advised the Licensee that these changes have not been effected because the Licensee's decision to withdraw its shareholder's agreement. The Licensee has stated that it was not aware that these were not dealt with and that the Authority needs to advise of the way forward. Accordingly, the Licensee has been advised to lodge a notification, accordingly.

⁵ Appendix B: On Digital Media's Report.

⁶ Appendix C: On Digital Media's Letter Withdrawing Amendments to its shareholding.

Based on the above, the Authority's shareholding is as currently reflected in the Licence.

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/StarSat.⁷

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 coverage of its broadcasting service through satellite in the Republic of South Africa.⁸

The Licensee was found to be compliant with clause 2 of the schedule to its licence.

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 the output signal of its subscription broadcasting service is encrypted.

⁷ Appendix B: On Digital Media's Report.

⁸ Ibid

The Licensee was found to be compliant 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 licensee".

The Licensee confirms that its signal is carried by ODM's Electronic Communications Network Service Licence, which was transferred by ICASA to Star Times Media (South Africa) Proprietary Limited in 2015⁹.

The Licensee was found to be compliant with clause 3.2 of the schedule to its licence.

3.3 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 was found to be compliant with clause 4 of the schedule to its licence.

3.4 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".

⁹ Appendix B: On Digital Media's Report

The Licensee reported that its target market are persons in the LSM Brackets 6-9, as well as, the general population that wish to acquire the Top TV service.

The Licensee was found to be compliant with clause 5 of its licence.

3.5 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 30th of June each year".

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

The Licensee was found to be compliant with clause 6.1 of the schedule to 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."

The Licensee submitted its workplace skills plan and its annual training report for the period under review.

The Licensee was found to be compliant with clause 6.2 of the schedule to its licence.

3.6 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 was found to be compliant with clause 7.1 of the schedule to its licence.

3.7 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 6-9, as well as the general population that wish to acquire the Top TV service (See 3.5 above).

The Licensee was found to be compliant with clause 8 of its licence.

3.8 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%".

The Licensee states that ownership by persons from historically disadvantaged groups constitutes 57.97%.¹⁰

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

3.9 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".

¹⁰ Appendix B: On Digital Media's Report.

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 was found to be compliant with clauses 10.1 and 10.2 of the schedule to its licence.

4. REGULATIONS

4.1 Complaints Received

The Licensee is required, in terms of the Compliance Procedure Manual Regulations, to submit a Form 12A¹¹ which reports on all complaints received during the financial year under review. The complaints that were received by ODM were regarding billing, technical and poor service. The ODM submitted its complaints report in accordance with the Regulations regarding the Code of Conduct for Broadcasting Service Licensees.

During the year under review, the Licensee was found to be compliant with Compliance Procedure Manual Regulations.

4.2 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.

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:

¹¹ SABC Form 12A

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

Regulation 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. Although the Licensee has not submitted its Audited Financial Statements, the Licensee has paid its licence fees based on the draft statements. An amount of R335 676.95 which is an equivalent of 1.5% of its annual turn-over was paid.

The Licensee was found to be compliant with Regulation 3 (4) (d) of the General Licence Fees Regulations.

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 end is February each year. The Licensee paid its USAF's contribution of R63 006.49 as required by Regulations 3(1) and 3(3) of Universal Service and Access Fund Regulations. The Licensee's proof of payment was duly submitted to the Authority.

The Licensee was found to be compliant 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.

4.5 Subscription Broadcasting Services Regulations

Regulation 3.1 Subscription Broadcasting Services Regulations states that:

"A subscription broadcasting service licensee may not add a channel to its service unless the Authority, on application by the licensee, has authorised the channel".

ODM's channels are all approved by the Authority. Further, the Licensee applies for ICASA's channel authorisation before adding any channel on its bouquet.

The Licensee was found to be compliant with Regulation 3.1 above.

4.6 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).

The Licensee was found to be compliant with Regulation 4 of the Must Carry Regulations.

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 the 2010/2011 financial year, the Licensee submitted its agreement with the SABC.

The Licensee was found to be compliant with Regulation 8 of the Must Carry Regulations.

4.7 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 submitted its Commissioning Protocols and these were approved by the Authority.

The Licensee was found to be compliant with regulation 3(a) (i) of the Commissioning Protocol Regulations.

Regulation 3 (a) (iii) of the Commissioning Protocol Regulations 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".

The Licensee has confirmed that the copy of the Commissioning Protocols is available on its website.

The Licensee was found to be compliant with Regulation 2 of the Regulations on Commissioning of Independent Producers.

4.8 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".

The Licensee states that it does not produce/ commission the production of local or international content. Further, ODM states that content is acquired and scheduled as is.

The Licensee was found to be non-compliant with Regulation 5.4 of the South African Television Content Regulations.

4.9 Sports Rights Regulations

Regulation 9 (2) of the Sports Broadcasting Rights Regulation as published in the Government Gazette, no 33079, 7 April 2010 requires that:

"A broadcaster, who is involved in broadcasting national sporting events, shall file the records of its broadcasts one hundred and twenty (120) days from the date of the publication of these regulations and after every year from the date of the first filing".¹²

The Licensee indicated that it does not broadcast any sporting events of national interest.

The Licensee was found to be compliant with Sports Rights Regulations.

4.10 Code on People with Disabilities

Regulation 3.1(a) of Regulations on the Code on People with Disabilities read with Form 7C of Compliance Procedure Manual Regulations require

¹² Appendix K: Sports Broadcasting Regulations

broadcasting service licensees to ensure that their services are made available and are accessible to people with disabilities”.

ODM submitted Form 7C of Compliance Procedure Manual Regulations indicating that it has improved subtitles to benefit people with disabilities. ODM states that people with disabilities have access to programme support such as fact sheets. Further, the Licensee states that its website has been developed to offer a range of formats in order benefit people with disabilities.

The Licensee was found to be compliant with clause 3.1(a) of Regulations on the Code on People with Disabilities.

Regulation 3.1(c) of Regulations on the Code on People with Disabilities states that:

“Broadcasting service licensees must monitor the effectiveness of their service through surveys as well as contact with organisations of and for people with disability and stakeholders”.

The Licensee’s submission indicate that it does not engage organisations of people with disabilities regarding programming because it sources most channels as they are, and does not have studios.

The Licensee was found to be non-compliant with Regulation 3.1(c) of Regulations on the Code on People with Disabilities.

5. CONCLUSION

For the 2015/2016 financial year, the Licensee has generally complied with its licence terms and conditions; applicable legislation and some regulations. However, the Licensee has failed to comply with Regulation 1 of its licence and the South African Television Content Regulations.

Further, it was noted that the problem experienced by the Licensee in the 2010/2011, 2011/2012, 2013/2014 and 2014/2015 financial years regarding its financial status extended to 2015/2016 financial year. The difference is that the 2015/16 report indicates that the Licensee will submit audited financial statements once they have received same from the auditors. Furthermore, the Licensee indicates that the Business

Rescue Practitioner has managed to move ODM out of Business Rescue status. The Licensee has also been able to pay its licence fees and USAF obligations using the draft statements.

Lastly, the issue of the changes to its shareholding as submitted in 2014 remains unresolved. The Licensee has been advised that it needs lodge the notice in this regard, accordingly.

6. TERMS OF REFERENCE

Appendix A: Top TV licence conditions.

Appendix B: On Digital Media's Report.

Appendix C: On Digital Media's Letter Withdrawing Amendments to its shareholding.