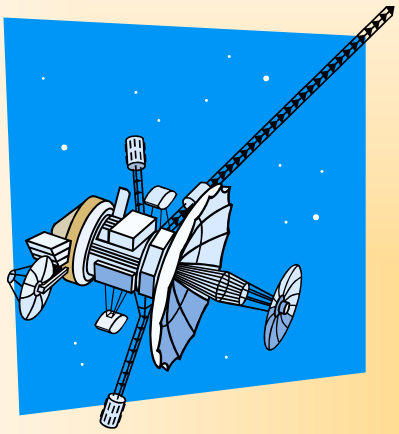
Independent Communications Authority of South Africa

SUBSCRIPTION BROADCASTING SERVICES

POSITION PAPER



01 June 2005

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PART A: INTRODUCTION

The Independent Communications Authority of South Africa ("the Authority") published a Discussion Paper ("the Discussion Paper") on the Inquiry into Subscription Broadcasting on 23 April 2004. The purpose of the Discussion Paper was to generate comment from all stakeholders on the introduction of a regulatory framework for subscription broadcasting in South Africa. Section 28 of the Independent Broadcasting Authority Act, Act No. 153 of 1993 ("the IBA Act"), provides that the Authority may from time to time conduct an inquiry into any matter relevant to the achievement and application of the principles of broadcasting as enunciated in section 2 of the Act.

The primary objective of the inquiry was to:

- solicit public participation and input in developing the regulatory framework for subscription broadcasting in South Africa; and
- generate discussion on the appropriate policy and licensing framework for existing subscription broadcasting services and the introduction of new entrants to subscription broadcasting markets.

In order to achieve this primary objective it was necessary that the Authority consider a number of provisions set out in the IBA Act and the Broadcasting Act, Act No. 4 of 1999 ("the Broadcasting Act"), that impact on the introduction and operation of subscription broadcasting services. The Authority stated in the Discussion Paper that in order to support the development of a regulatory framework for subscription broadcasting, the consideration of these provisions could lead to:

- the amendment of existing policy or regulations;
- the introduction of new regulations; and/or
- recommendations proposing amendments to enabling legislation to the Minister of Communications ("the Minister").

This was not the first time that the Authority had conducted an inquiry into issues pertaining to subscription broadcasting. In the Triple Inquiry Report published in 1995, the

Authority made some general policy decisions with regards to the approach it would take towards terrestrial and non-terrestrial subscription broadcasters.

Certain aspects of subscription broadcasting were again dealt with when the Authority published a Discussion Paper on Satellite Broadcasting in April 1999. Unfortunately, a number of factors led to the discontinuation of the satellite inquiry process. Firstly, the Authority's predecessor, the Independent Broadcasting Authority ("the IBA") was merged with the South African Telecommunications Regulatory Authority ("SATRA") in July 2000 and only one Councillor who presided on the original satellite inquiry was appointed to the new Council. From an administrative law point of view, this lack of continuity made it difficult to conclude the process. Secondly, by mid-2001 the Broadcasting Act had still not been amended to address various legal obstacles in the Act that were creating difficulties in finalising the satellite inquiry process. These legal obstacles were removed when the Broadcasting Amendment Act, Act No. 64 of 2002, came into effect in March 2003 and finally allowed the Authority to commence this process and deal with the key issues confronting subscription broadcasting. However, since this was a new inquiry, submissions that were made in terms of the discontinued Inquiry into Satellite Broadcasting were not taken into account in this process.

The Discussion Paper was divided into four sections. Section A detailed the guiding policy principles and legislative framework that needed to be taken into account for the regulation of subscription broadcasting in South Africa. Section B set out the background of subscription broadcasting. Section C described the various factors that needed to be considered when approaching the licensing and regulation of subscription broadcasting, and finally, Section D set out the expected outcomes of the inquiry.

The Discussion Paper was structured in the form of questions supported by explanatory and contextual discussion. The Authority invited interested parties, stakeholders, and the public to respond to the issues and questions raised in the Discussion Paper. The closing date for the receipt of representations was 14 June 2004. The Authority received

seventeen submissions. Oral hearings were held at the Authority's offices on 16, 17, 25 and 26 August 2004.

The Position Paper is divided into three parts, namely Introduction, Submissions, and Findings.

Part B: Submissions reflects questions posed by the Discussion Paper and also summarises the written and oral submissions on these and related questions.

Part C: Findings sets out the Authority's policy on subscription broadcasting services with respect to matters that were the subject of this inquiry. This includes the Authority's approach to amendments to the legislation, and plans for licensing subscription broadcasting services.

PART B: SUBMISSIONS

A summary of the views expressed by interested parties and stakeholders, in written and oral submissions, is set out below. This summary is not exhaustive and is merely reflective of some of the important arguments raised during the inquiry.

1. Policy Development Principles and Legislative Framework

1.1 Defining Subscription Broadcasting

Section 1 of the Broadcasting Act defines a subscription broadcasting service as a broadcasting service provided to an end user upon the payment of a fee. The Discussion Paper identified the commercial nature of subscription broadcasting and the implied contractual relationship, programming, licensing framework (whether terrestrial, satellite or cable), and encryption. Encryption is defined in the Broadcasting Act as a method for changing a broadcasting signal in a systematic way so that the signal would be unintelligible without suitable receiving equipment. The term “encoded” tends to be used interchangeably with the term encrypted and for the purposes of the Discussion Paper the terms “encoded” and “encrypted” had the same meaning.

The Authority stated in the Discussion Paper that it had taken a preliminary view that, prior to encryption, the bouquet offered by Vivid could be regarded as free-to-air, as a consumer only required a decoder and no fee was charged to render the signal intelligible for the receiving equipment. *“However, now that these channels are encrypted and the consumer is obligated to pay a fee for a smart card (as well as a television licence fee) so that the signal can be received in an intelligible form, the Authority has taken a preliminary view that this is a subscription broadcasting service. Sentech has indicated that the Vivid bouquet currently does not require a monthly subscription to view these channels,*

however the definition of a subscription broadcaster makes reference to a broadcasting service provided to the end-user upon the payment of a fee. The definition does not specify that the fee be monthly or yearly or even once-off and therefore includes all such payments made in order to view a service that otherwise would not be intelligible without suitable receiving equipment. While it could be argued that consumers are paying for the smartcard and not a service, this is semantic as the consumer only pays for the card in order to be able to receive the broadcast."[1]

The Discussion Paper asked if the were other elements to be taken into account when describing subscription broadcasting services.

Sentech Limited ("Sentech") submitted that the correct interpretation of the definition of subscription broadcasting service in the Broadcasting Act cannot be one that countenances the payment of a once-off fee only, such as the activation fee in respect of a smart card. *"Sentech is of the view that the fee referred to in section 1 of the Broadcasting Act means the payment that is necessary to ensure the provision of the actual broadcasting service. Thus the payment obligation is one that is on-going and indeed subsists for as long as the end user wishes to obtain the broadcasting service in question. There may be a myriad of reasons for requiring free-to-air service or free access end users to pay for and utilise a smart card, for example, where programming is required to be encrypted in certain geographic locations to ensure against intellectual property rights violations in respect of particular channels"*[2].

Orbicom (Proprietary) Limited ("Orbicom") submitted that a smart card is simply additional hardware which allows the user access to the service, in a similar fashion to the way in which a personal computer and a modem give a user access to the Internet. *"Orbicom submits that there is no reason to differentiate*

[1]. The Authority's Discussion Paper, Inquiry into Subscription Broadcasting, 23 April 2004, at page 19.
[2] Sentech's submission to ICASA, Inquiry into Subscription Broadcasting, at paragraph 5.10.

between a smart card and any other hardware facility, including set-top boxes or a satellite dish".[3]

The South African Broadcasting Corporation ("the SABC") submitted that the Authority should be careful not to adopt too broad a definition of what constitutes subscription broadcasting. *"If the purchase of additional receiving equipment, such as a smart card, is to constitute a subscription fee, then this may unwittingly classify all digital operators of the future as subscription broadcasters. This is clearly not desirable. A consequence of this interpretation would be that, current DTH tiers which are classified as free-to-air by programme rights holders will be deemed as subscription by the regulator. This may cause difficulties for the rights clearance of terrestrial free-to-air channels and may prohibit their distribution by DTH operators. The SABC submits that although the term "payment of a fee" is broad, it could not have been the intention of the legislature that the once off purchase of receiving equipment such as a smart card, should constitute a subscription fee. When considering the definition of subscription broadcasting, regard should also be had to the definition of free-to-air broadcasting in the Broadcasting Act, which refers to subscription fees rather than simply "payment of a fee", viz.*

> *"**free-to-air service**" means a service which is broadcast and capable of being received without payment of subscription fees"*.[4]

[3] Orbicom's submission to ICASA, Inquiry into Subscription Broadcasting, at paragraph 4.9.
[4] SABC's submission to ICASA, Inquiry into Subscription Broadcasting, at page 29.

1.2 Signal Distribution and Multi-Channel Distributions

The Broadcasting Act draws a distinction between broadcasting signal distribution and multi-channel distribution service.[5] Section 34(2) (c) of the Broadcasting Act states that subject to the licence conditions determined by the Authority the signal distribution sector must provide a diversity of type of broadcast services and content, while section 34(2) (d) states that subject to the licence conditions determined by the Authority the signal distribution sector must deliver public services, including educational, commercial and community services.

Sentech submitted that the provisions of section 34(2) (c) and (d) of the Broadcasting Act are inappropriate and that they confuse the conceptually distinct roles of broadcaster and signal distribution. *"It is inappropriate to impose conditions such as requiring the provision of 'a diversity of type of broadcasting services and content' and the delivery of 'public services, including educational, commercial and community services' on the signal distribution sector. Signal distribution by its very nature is concerned with the technical function of taking the broadcasters' content and ensuring that it is distributed to the end user and signal distributors are in no way responsible for content".*

Section 36 of the Broadcasting Act deals with the objectives of multi-channel distributors.[6] Section 36(1) states that the objectives of the multi-channel distribution system are (a) to give priority to the carriage of South African programming services and, in particular, to the carriage of South African

[5] Section 1 of the Broadcasting Act defines broadcasting signal distribution as 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 a telecommunication process and includes multi-channel distribution. A multi-channel channel distribution service is defined as a broadcasting signal distribution service that provides broadcasting signal distribution of more than one channel[5] at the same time on the same signal and multi-channel distributor is construed accordingly.

[6] Section 36(1) states that the objectives of the multi-channel delivery system are to (a) give priority to the carriage of South African programming services and, in particular, to the carriage of South African services; (c) carry original programming, including local programming, where the Authority considers it appropriate.

services, and (c) to carry original programming, including local programming, where the Authority considers it appropriate.

Sentech submitted that the provisions of section 36(1) (a) and (c) of the Broadcasting Act are inappropriate and that they confuse the conceptually distinct roles of broadcaster and signal distribution. *"There is no conceptually or theoretically key role for the multi-channel distributor. It is simply an aspect of signal distribution and should not be confused with the role of the multi-channel broadcaster. A multi-channel signal distributor is a broadcasting signal distribution service provider that provides broadcasting signal distribution of more than one channel at the same time on the same signal whilst a multi-channel broadcasting service involves the transmission of more than one channel at the same time by means of radio waves or telecommunications. Thus it is inappropriate for section 36(1) (c) to state that the objectives of the multi-channel delivery system are to carry original programming, including local programming. This is properly an objective of the broadcasting system and plays no role in respect of signal distribution".*[7]

Sentech suggested that section 36 of the Broadcasting Act be amended to correct the problems that have been identified.[8]

2. Licensing

2.1 Categories of Licence and Classes of Licence

The categorisation of broadcasting services is set out within the three-tier system of broadcasting in South Africa namely public, commercial and community. Section 5(2) requires the Authority to consider licences in the following classes:

(a) free-to-air broadcasting services;

[7] Sentech, at paragraph 3.1.5.
[8] Sentech, at paragraph 3.2.

(b) terrestrial subscription broadcasting service;
(c) satellite subscription broadcasting service;
(d) cable subscription broadcasting service;
(e) low power sound broadcasting service; and
(f) any other class of licence prescribed by the Authority from time to time.

Caxton submitted that the current classification system under section 5(2) of the Broadcasting Act is inappropriate and is based on distinctions between technologies which are no longer relevant. *"We are of the view that there should be one form of commercial broadcasting licence which is applicable to all commercial "broadcasters" as this is defined, and that ICASA should be afforded the discretion to designate licence conditions based on appropriate differentiating characteristics. The creation of definitions for the sake of describing current or possible market players will never support a comprehensive licensing framework which treats like parties in a like manner. An adequate licensing framework must rather be forward-looking, holistic and free of inappropriate distinctions"*.[9]

Caxton also submitted that like operators must be treated alike. *"Like should not be defined with reference to technology since this is irrelevant in the converged world. Like refers to the end product, the service that the operator is providing to the public, whether as a condition of subscription or free. In general, applications for licences should not be sought until and unless there is adequate spectrum availability which is determined once the requirements of satellite, broadcasting and telecommunications operators are taken into account. Licences should not be granted or confirmed (and any other provision of broadcasting services to the public ought not to be condoned) until the applicant's suitability to be a broadcaster is properly assessed through a transparent and, in some cases, public procedure. The characteristics of a broadcaster (whether single or multi-channel, free-to-air or subscription, terrestrial or non-terrestrial, radio or television and the area in which the service is offered) might determine certain licence*

[9] Caxton, at paragraphs 4.7 and 4.9.

conditions, for example, how local content is determined, in ICASA's discretion".[10]

Sentech submitted that the categories of licences set out in section 5(2) of the Broadcasting Act are problematic because they appear to suppose that a cable or satellite broadcasting service will, by definition, be a subscription service. *"This is not necessarily the case and indeed Sentech's Vivid platform, while encrypted, is not only a subscription broadcasting service as many of the channels are provided on a free-to-air basis. Sentech queries whether the various categories are helpful at all and suggests that the type of service be stated in the licence itself and in legislation and that only the three classes of licences that can be applied for a set out in existing clause 5(1) of the Broadcasting Act remain set out in legislation"*.[11]

Sentech also submitted that given the pace of technological developments it is impossible for a single piece of legislation such as the Broadcasting Act to prescribe a list of classes of licences. Sentech, therefore, suggested the deletion of classes of licences which are provided for in section 5(2) of the Broadcasting Act. *"Instead of having a system of classes of licences, Sentech suggests that the IBA and/or the Broadcasting Act be amended to set out the defining characteristics of any broadcasting service"*.[12]

Sentech suggested eight characteristics which it believes would be appropriate. These are: digital or analogue; multi or single channel; free-to-air or subscription or both, and whether or not pay-per-view and/or video-on-demand is to be part of a subscription service offering or not; the technology platform(s) to be used to provide the service (terrestrial, satellite, cable, or any other platform); the nature of the service (radio or television or both, and whether this will be provided with or without associated data services; geographical coverage area; whether or not

[10] Caxton, at paragraphs 4.16 - 417.
[11] Sentech, at paragraph 3.1.1.
[12] Sentech, at paragraph 4.3.4.

the service is aimed at the general public, a niche market or a closed user group; and frequency to be broadcast on, if any, including uplink frequency, if any.[13]

The SABC submitted that in the digital environment and/or where terrestrial frequencies are not being utilised, programming licence conditions such as minimum hour requirements for different genres of programmes, may not be feasible for subscription operators and should not be imposed.[14]

Orbicom suggested that two additional classes of licence be introduced: closed user groups and corporate broadcasting service.[15]

WorldSpace International Network Inc ("WorldSpace") submitted that the definitions and licence categories in the Broadcasting Act do not cater for the use of terrestrial gap fillers by satellite digital audio radio services ("SDARS") broadcasters. *"Under the current broadcasting regulatory regime, it is debatable whether the utilisation of terrestrial repeaters on the earth's surface to re-transmit satellite signals to end users in urban metropolitan areas has the effect of converting the satellite service to a terrestrial broadcasting service for the purpose of the Broadcasting Act"*.[16]

WorldSpace proposed two options for the authorisation of the use of terrestrial gap fillers by SDARS broadcasters: treating gap fillers as an integral part of SDARS service; and the prescription of a new class of licence under section 5(2)(f) of the Broadcasting Act, which would treat the use of terrestrial gap fillers by SDARS broadcasters as a hybrid terrestrial-satellite broadcasting service.[17]

Caxton and CTP Publishers and Printers Limited ("Caxton") proposed that section 5(2) of the Broadcasting Act be deleted or be replaced by a provision

[13] Sentech, at paragraphs 4.3.4.1–4.3.4.8.
[14] SABC's submission to ICASA, Inquiry into Subscription Broadcasting, at page 21.
[15] Orbicom's submission to ICASA, Inquiry into Subscription Broadcasting, at paragraph 4.2.
[16] WorlSpace's submission to ICASA, Inquiry into Subscription Broadcasting, at paragraph 5.1.6.
[17] WorldSpace, at paragraph 6.2.

which foresees that the Authority may grant a licence to provide public broadcasting services, commercial broadcasting services and community broadcasting services for a period specified in the licence. *"This provision might include a condition to the effect that broadcasting services may be provided using any technology, over any number of channels, for a fee or otherwise, as sound or television, and in a particular area, provided that these characteristics are disclosed in the licence application and that any changes are thereafter approved by ICASA"*.[18]

2.2 Term of Validity of Subscription Broadcasting Licences

The Discussion Paper stated that in approaching the categories of subscription broadcasting licences, the Authority could choose to licence a person to provide a sound broadcasting service or a television broadcasting service. "A third option could be to licence a person to provide both a sound and television service as one subscription broadcasting service. It can be argued that while the distinction between sound and television broadcasts may be relevant in an analogue environment, the need for this distinction falls away in a digital environment. DStv, for example, already provides a television and a sound broadcasting service (audio bouquet). Subscription services that will make use of, for example, Digital Audio Band (DAB) will also be in a position to send streaming video to consumer access devices that can take advantage of this feature".[19]

The Discussion Paper stated further that section 54 of the IBA Act could prove to be an obstacle to a single licensing approach to a subscription television and sound broadcasting service, as the term of validity of services differs depending on whether the service is classified as commercial television or commercial sound broadcasting.[20] In the case of television the term of validity of the licence is 8 years and for sound broadcasting it is 6 years.

[18] Caxton, at paragraph 21.3.3
[19] The Discussion Paper, at page 30.
[20] Ibid.

The Discussion Paper then asked if the Authority should make a distinction between television and sound subscription broadcasting services or if the Authority should issue a single subscription licence that caters for both services when necessary.

Multichoice Africa (Pty) Ltd ("Multichoice") submitted that where the service includes sound and television channels, a single composite subscription broadcasting service licence ought to be granted. *"There is nothing in the Broadcasting Act which would preclude this, since section 5(2) of the Broadcasting Act does not distinguish between sound and television broadcasting services. There is simply a reference in paragraph (c) to a satellite broadcasting service"*.[21]

Multichoice urged the Authority to consider a licence period of between 12 and 15 years for satellite subscription broadcasting services. *"When considering the term of a satellite subscription broadcasting service licence, the Authority should take into account the general operational costs, the extent of the risk involved in this type of investment, the length of the leases for transponder capacity, and the length of time before break-even point will be reached. Taking all these factors into account, a 12 to 15 year licence period would be appropriate"*.[22]

Multichoice submitted that *"if the Authority decides that the term of a licence for satellite subscription broadcasting services should be a period of twelve to fifteen years, it will be necessary to amend section 54 of the IBA Act, which regulates the current licence term applicable to broadcasting services. The section distinguishes between television, where the licence term is eight years, and sound, where the licence term is six years"*.[23]

[21] Multichoice's submission to ICASA , Inquiry into Subscription Broadcasting, at paragraphs 108-109.
[22] Multichoice, at paragraph 430.
[23] Multichoice, at paragraph 431.

The SABC submitted that the distinction between television and sound licences is relevant in an analogue environment but less necessary in a digital environment where both sound and television may be provided in one service provided by the licensee. *"With this in mind, it would appear that it may be unnecessarily cumbersome for licensees to have separate licences where it may be possible to combine the services in one. For purposes of administration and the regulation of a licensee, it makes practical sense to have a single licence that caters for both services"*.[24]

2.3 Licence Conditions

The Discussion Paper sought guidance on the licence conditions to be considered for subscription broadcasting.

Multichoice Africa (Pty) Ltd ("Multichoice") submitted that the licence conditions imposed upon digital satellite subscription broadcasting services ought to be minimal, and should be far less onerous than those imposed on terrestrial subscription broadcasting services. *"These conditions should be limited to the following, either by way of regulation, or as licence conditions – granting the licensee a licence to provide a national subscription broadcasting service; stating the term of the licence; setting out the licence fees to be paid, which ought to be minimal; requiring the licensee to spend 10% of its total annual costs of acquiring channel rights and their carriage and uplinking on channels compiled in and uplinked from South Africa; requiring the licensee to comply with codes of conduct concerning programming and advertising content prepared and enforced by the satellite subscription broadcasting industry; and requiring the service to carry SABC 1, 2 and 3, as well as e.tv, provided reciprocal must-offer rules are in place. To the extent that obligations or restrictions are imposed in the*

[24] SABC, at page 31.

broadcasting legislation, there is no need to repeat these in the licence conditions".[25]

Multichoice also submitted that it requested a legal opinion on the nature and extent to which the Authority may regulate broadcasting services, including digital satellite subscription broadcasting services. *"The conclusions of that opinion are the following:*

- *Whilst the Authority may regulate broadcasting services using terrestrial frequencies, this power is qualified: the nature and extent of the regulation must be reasonable and justifiable, and the least restrictive means should be used to achieve the purpose of the regulation;*
- *Given developments in technology, digitisation and convergence, the scarcity rationale, and thus the justification for the regulation of terrestrial broadcasting services, becomes less valid; and*
- *Finally, the regulation of digital satellite subscription broadcasting services, which do not use terrestrial frequencies, is only likely to be found to be reasonable and justifiable in limited circumstances"*.[26]

Multichoice argued that there is no shortage of satellite transponders having Ku-band capacity which could be used to provide digital satellite subscription broadcasting services in South Africa. *"Currently there are 85 such transponders. The spectrum scarcity rationale is not applicable in these circumstances.*[27] *The statement made by the Authority that satellite spectrum is equally scarce is thus not correct"*.[28]

[25] Multichoice's submission to ICASA, Inquiry into Subscription Broadcasting, at paragraphs 102 – 103.
[26] Multichoice, at paragraph 90.
[27] Multichoice, at paragraph 91.
[28] Multichoice, at paragraph 92.

2.4 Subscription Closed User Groups

With regards to whether there should be a different approach to subscription television broadcasting services offered only to corporate subscribers, Orbicom submitted that the Authority needs to distinguish between subscription services that are targeted at individual consumers and corporate users who employ technology to disseminate corporate information within their organisation. *"It would be inaccurate to define corporate users who employ technology to disseminate corporate information within their organisation as a corporate subscriber model. The reality is that corporate users will make use of the most appropriate technical environment to ensure that the corporate training and information is disseminated in the most effective manner possible. Orbicom is of the view that a separate class of licence should be introduced for corporate subscribers and that this should be regulated in line with light touch regulation"*.[29]

Caxton also submitted that in practical terms, the way in which licensing conditions such as local content apply may be different depending on the nature of the content proposed to be provided to corporate subscribers, if this is different from that provided to individual consumers. *"However, as a matter of principle, for purposes of licensing and regulation, we do not believe there should be a distinction on the basis that a broadcaster promotes services only to corporate customers"*.[30]

[29] Orbicom, at paragraph 4.14.
[30] Caxton, at paragraph 21.9.1.

2.5 Authorisation of Channels

Section 4(3) of the Broadcasting Act indicates that a licensed broadcasting service consisting of more than one channel may not include a channel in such a service unless the Authority, on application by such a person, has authorised the channel. The Broadcasting Act defines a "channel" as meaning *"a single defined programming service of a licensee other than a video on demand programming service*".

Section 4(4) of the Broadcasting Act states that the Authority must prescribe the procedure and the appropriate conditions for the authorisation of channels, which must include how channels are defined.

The Discussion Paper sought guidance on the administrative procedures and general conditions to be considered for the authorisation of channels for subscription broadcasting.

Caxton submitted that Broadcasters should notify the Authority prior to introducing new channels to advise the Authority of the nature of the channel and its content since content is key to broadcasting. *"An obligation to include local content will be central to licensing broadcasters, therefore notifying ICASA of the introduction of a new channel will also involve notification as to whether that channel should be counted towards the local content obligations of the broadcaster. An obligation to notify could be included in sections 4(4) or 4(5) or section 35 of the Broadcasting Act. Licence conditions for commercial broadcasting should determine to what extent each broadcaster should provide local content in programming, for example, how local content might be included across a bouquet, and how they should ensure diversity of service offerings"*.[31]

[31] Caxton's submission to ICASA, at paragraphs 21.1.2-21.2.1.

Caxton recommended that section 4(4) of the Broadcasting Act be amended to read as follows: *"The Authority may attach conditions to a licence, as may be appropriate and proportionate to the technology, including conditions relating to single and multi-channels, service area and market power of the broadcaster and having regard also to section 5(2) and the principles of non-discrimination"*.[32]
Multichoice submitted that an application for authorisation of one or more channels ought to be a simple prescribed form in which the applicant identifies itself as a satellite subscription broadcasting service licensee (no other details are required, since all the relevant details will already be in the possession of the Authority); and states the name, country of origin and genre of each channel. *"An application for authorisation may relate to one or more channels. The details required of an applicant, and the application procedure, ought to be the same for all channels, regardless of the nature of the channel. The Authority ought to be required to decide whether or not to grant an authorisation within 30 days of receipt of the application. If the Authority does not meet this schedule, the Authority will be deemed to have granted the authorisation. If the Authority is to charge an application fee for the authorisation of a channel, the fee ought to be nominal and sufficient only to cover the Authority's administration costs in processing the application"*.[33]

Multichoice also submitted that the Broadcasting Act imposes no limitations on the number of channels a satellite subscription broadcasting service may offer. *"This is in line with international trends. We know of no regulatory system that limits the number of channels that may be offered"*.[34]

[32] Caxton, at paragraph 21.3.4
[33] Multichoice, at paragraphs 122-128.
[34] Multichoice, at paragraph 119.

2.6 Licence Fees

The Discussion Paper stated that the determination of licence fees for subscription broadcasting would be made in terms of section 78 of the IBA Act.

Multichoice submitted that a reading of the section of the Discussion Paper dealing with licence fees suggests that the Authority intends, in relation to all subscription broadcasting service licensees, imposing licence fees identical to those imposed on commercial television broadcasting licensees. *"Multichoice opposes this approach for economic and policy reasons. Licence fees should be used for the purpose of funding the Authority, as opposed to contributing to the National Revenue Fund. Licence fees for satellite subscription broadcasting service licensees ought to be less than those imposed on terrestrial free-to-air broadcasting services, since satellite services do not use terrestrial frequencies"*.[35]

Multichoice also submitted that the payment of a broadcasting licence fee by satellite subscription broadcasting services does not exist in the USA, the United Kingdom or the European Union, since these services are not licensed as broadcasting services. *"In Australia, although fees are imposed for licences issued in terms of the Broadcasting Services Act, no annual broadcasting licence fees are imposed on subscription television broadcasting licensees. The only fee that is charged is an application fee. Even though a licence is issued per service, the Australian Broadcasting Authority only charges one fee per application, which may be for a single or multiple licences. The current application fee for one or more subscription television broadcasting licences is $1600. In Canada, licence fees are determined by the Broadcasting Licence Fee Regulations, 1997. These Regulations apply to all broadcasting licensees other than those specifically exempted. Each licensee must pay an annual licence fee to the CRTC which*

[35] Multichoice, at paragraphs 434-436.

consists of a Part I licence fee and a Part II licence fee. The Part I fee is based on the broadcasting regulatory costs incurred each year by the CRTC and other federal departments or agencies, excluding spectrum management costs, and is equal to the aggregate of the costs of the CRTC's broadcasting activities, and the share that is attributable to the CRTC's broadcasting activities of the costs of the CRTC's administrative activities; and the other costs that are taken into account to arrive at the net cost of the CRTC's programme, excluding the costs of regulating the broadcasting spectrum. There is an annual adjustment to the Part I fee to adjust estimate costs to actual expenditure. Any excess fees are credited to the licensee in the following year's invoice while shortfalls are charged to licensees. The Part II fee amounts to 1.365% of a licensee's gross revenue in excess of an applicable exemption limit (the exemption for BDUs is $175000; for television undertakings, which would include M-Net, for example, the exemption limit is $1.5 million). A portion of Part II fees is allocated to cover the expenses of Industry Canada for services provided through its Spectrum Management and Regional Operations Activities, including the certification of broadcast undertakings, the broadcast inspection programme and the investigation of complaints of interference to broadcast reception".[36]

Multichoice proposed that new regulations on licence fees for satellite subscription broadcasting services be made.

Orbicom submitted that it is important to establish the purpose of the licence fee and what the licence fee is to be used for. *"Orbicom's understanding of the licence fee is that it was initially designed to fund the Authority, and not limit or restrict those wishing to apply for a licence. It is Orbicom's understanding that the licence fees were originally used to fund the IBA. ICASA, however, is funded through a Parliamentary grant and not through licence fees. Accordingly, the*

[36] Multichoice, at paragraphs 451-455.

rationale behind imposing licence fees appears to have changed, especially given that these are not spectrum fees".[37]

Deukom submitted that since DTH satellite services are not using a scare resource, the licence fees applicable to them ought to be far less than those imposed on terrestrial broadcasting services. *"The fees ought to relate to the regulatory costs the regulator is likely to incur in licensing and regulating DTH satellite services"*.[38]

Bluestar Entertainment Network (Proprietary) Limited t/a DMX Africa ("DMX Africa") submitted that a distinction should be drawn between subscription broadcasting services utilising scarce terrestrial frequencies and non-terrestrial frequency based subscription broadcasting services broadcast via cable, satellite or other telecommunication means. *"The licence application and annual licence fees for a satellite subscription broadcasting service should accordingly not be as onerous as for terrestrial subscription broadcasting services"*.[39]

DMX Africa also submitted that annual licence fees for subscription sound broadcasting services should not be calculated as a percentage of turnover, but rather as a percentage of subscription revenue received less costs of any programming (including royalties payable of any nature for the use of such programming to institutions such as SAMRO); the costs of signal distribution services supporting the subscription sound broadcasting service; and collection and related costs incurred in collecting and administering the payment of subscription revenues by subscribers.[40]

[37] Orbicom, at paragraph 4.7.
[38] Deukom, at paragraph 24.
[39] DMX Africa's submission to ICASA on the Discussion Paper on the Inquiry into Subscription Broadcasting, at paragraph 7.1.
[40] DMX Africa, at paragraph 7.2.

2.7 Allowing the SABC to apply for a commercial subscription broadcasting service

The Discussion Paper also asked if the SABC should be allowed to apply for a commercial subscription broadcasting service, and the approach to be taken if such an application were made.

Sentech submitted that the SABC should be allowed to apply for a commercial subscription broadcasting licence provided that the service is digital and does not contribute to increasing analogue frequency scarcity, and the service is provided by the commercial arm of the SABC.[41]

Orbicom submitted that the SABC should be allowed to apply for a commercial subscription broadcasting licence. *"However, principles of fairness should govern how this is regulated, In this regard, the Authority would have to ensure that there is appropriate separation between this part of their business and that of the public broadcasting services, which the SABC is obliged to fulfil."*[42]

Multichoice submitted that it would be inappropriate and unprecedented to allow the SABC to apply for, and be granted and issued, a subscription broadcasting service licence.[43]

Caxton submitted that it seems inequitable to allow the SABC to provide other broadcasting services since that would tend to concentrate the market in the hands of the state effectively thereby precluding other parties from entering the market for private broadcasting services.[44]

The SABC submitted that the provision of subscription broadcasting services by the SABC is contemplated in legislation, in particular, the Broadcasting Act, which stipulates in section 8(b) that it is one of the objects of the Corporation to:

[41] Sentech, at paragraph 5.4.
[42] Orbicom, at paragraph 4.3.
[43] Multichoice, at paragraph 116.
[44] Caxton, at paragraph 21.4.1.

provide sound and television broadcasting services, whether by analogue or digital means, and to provide sound and television programmes of information, education and entertainment funded by advertisements, subscription, sponsorship, license fees or any other means of finance.

"The SABC's view is that it could, if it so desires, apply for a commercial subscription broadcasting licence. In terms of the universal access goals for the public broadcaster, it is the Corporation's submission that additional subscription broadcasting services offered by the SABC would not undermine these goals. The SABC, in operating a subscription service, would not take away from the access which people have to the public and commercial channels which are free-to-air".[45]

2.8 Allowing the Community Broadcasting Sector to apply for a Subscription Broadcasting Service Licence

The National Community Radio Forum ("the NCRF") submitted that the definition of subscription broadcasting service, as contained in section 1 of the Broadcasting Act, does not mean that only commercial operators can be licensed to provide subscription broadcasting services. The NCRF submitted that the community broadcasting sector should also be allowed to operate subscription broadcasting services.[46]

[45] SABC, at page 27.
[46] NCRF oral submission, 16 August 2004, at page 6.

3. Ownership and Control of Broadcasting Services

In terms of section 31(3) of the Broadcasting Act, the Authority is required to conduct an inquiry as to whether sections 49 and 50 of the IBA Act are applicable to subscription television broadcasting services carrying more than one channel and the extent and terms upon which such sections must apply. Section 49 of the IBA Act deals with limitations on control of commercial broadcasting services and section 50 deals with limitations on cross-media control of commercial broadcasting services. Furthermore, section 31(4) of the Broadcasting Act provides that sections 49 and 50 of the IBA Act must not apply to such subscription television broadcasting services until the Authority has issued such a recommendation and that recommendation has been submitted to the Minister for tabling in the National Assembly and has been adopted by the National Assembly.

The Authority published the Position Paper on the Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences on 13 January 2004. It was stated in the Position Paper that the legislative provisions under review only dealt with ownership and control of commercial broadcasting licences in an analogue environment. Furthermore, the Authority stated that it believed that a digital broadcasting environment would require a new regulatory regime with respect to ownership and control.[47]

On the same day as the publication of the Position Paper, the Authority published for written comment proposed amendments to the IBA Act. Although the Authority was not required by statute to publish these proposed amendments for comment, the Authority had decided to allow the public and stakeholders the opportunity to help shape legislative proposals to the Minister and Parliament. The closing date for written comment was 13 February 2004. The Authority

[47] Position Paper on the Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences, ICASA 2004, at page 35.

forwarded its final recommendations to the Minister on the amendment of sections 48, 49, 50 and Schedule 2 to the IBA Act on 06 May 2004.

The Discussion Paper sought guidance on whether the phrase 'broadcasting services carrying more than one channel' referred only to a digital broadcasting service with the capability of carrying more than one channel, and if sections 49 and 50 of the IBA Act should be applicable to all subscription television broadcasting services carrying more than one channel. The Discussion Paper also asked if the Authority needed to consider recommending that there be ownership and control provisions in the IBA act that are specifically tailored for subscription television and sound broadcasting services.

The SABC submitted that given the importance of the national goals which underpin the ownership and control limitations, it would be desirable if they applied to all forms of commercial broadcasting services, including subscription services. *"However, if there is a compelling reason why the rules should not apply, the operator should be able to apply for an exemption, as per the Authority's recommendations to the Minister on amendments to the ownership provisions of the IBA Act"*.[48]

The SABC also submitted that it is unlikely that the phrase "broadcasting service carrying more than one channel" was intended only to refer to a digital broadcasting service with the capability of carrying more than one channel.[49]

Sentech submitted that section 48 ought to be considerably relaxed, in respect of broadcasters with an international footprint, to allow foreign investors to acquire up to 49% of the issued share capital.[50]

[48] SABC, at page 28.
[49] Ibid.
[50] Sentech, at paragraph 5.5.3.1.

Deukom (Pty) Ltd ("Deukom") submitted that it was concerned about the limitations on the foreign control of private direct-to-home broadcasting services in a digital environment. *"In the event of such restrictions, Deukom may well be precluded from acquiring a licence. We would strongly urge the Authority to consider these issues. Deukom was unable to realise sufficient capital within South Africa to launch its DTH satellite service and was accordingly compelled to look for foreign financial backing. Had it not been for the said backing and involvement, the Deukom service would never have materialised".*[51]

Johnnic Communications Limited ("Johncom") submitted that limitations on ownership and control should apply to free-to-air broadcasters. *"This will promote the objects of the broadcasting legislation to develop the local industry and to control the dissemination of information by local persons. It is inappropriate to regulate subscription broadcasting in this way"*.[52]

Orbicom submitted that the phrase 'broadcasting services carrying more than one channel' refers to multiplied defined television programming services broadcast by a licensee to the public, sections of the public or to subscribers to such a broadcasting service. *"Orbicom therefore submits that this can only occur in a multiplexed environment, which implies a digital broadcasting environment"*.[53]

The National Association of Broadcasters ("the NAB") submitted that it is international practice to apply ownership and control restrictions to free-to-air broadcasting services and not to subscription services because of their limited influence over news and information dissemination. *"The NAB recognises the need to encourage foreign investment in broadcasting enterprises which will enhance the competitive nature of South Africa's broadcasting industry and enhance in its growth. This is particularly so in respect of subscription broadcasters with an international coverage area. The NAB therefore proposes*

[51] Deukom's submission to ICASA, at paragraph 19.
[52] Johnnic, at paragraph 3.1.
[53] Orbicom, at paragraph 4.4.

that the legislative approach to ownership and control should be a flexible one, judged on a case-by-case basis, and one which will be able to meet the objective of ensuring a competitive broadcasting market which encourages investment".[54]

Sentech submitted that it would be critical to examine whether or not section 48 of the IBA Act ought to apply to subscription broadcasters too. *"In any event, it would be important to reconsider sections 48 to 50 of the IBA Act in any discussion of free-to-air broadcasters with an international footprint as well as opposed to national or regional footprint as well subscription broadcasters. This is particularly relevant to international free-to-air satellite broadcasting"*.[55]

Multichoice submitted that an analysis of other jurisdictions indicates that historically the purpose of horizontal and cross-media limitations on the ownership and control of commercial broadcasting services was two-fold. *"The first objective was an economic one, namely to address concerns about market concentration and the risk of abuse associated with market power. The second objective was to ensure a plurality of voices and diversity of programming with a particular emphasis on news and current affairs programming. Legislatures sought to prevent the undue concentration of editorial power in the provision of news and current affairs programming by commercial free-to-air television broadcasting services. These limitations have been imposed on those broadcasting services which constitute a single channel, which use terrestrial frequencies, and which provide a universal access service in an analogue environment".*[56]

Multichoice provided an analysis of five jurisdictions, namely the EU, the UK, Canada, the USA, and Australia, in order to understand recent developments

[54] The NAB's submission to ICASA, Inquiry into Subscription Broadcasting, at paragraphs 3.2-3.3.
[55] Sentech, at paragraphs 3.1.3.1-3.1.3.2.
[56] Multichoice, at paragraph 133-135.

and the current position as regards horizontal and cross-media limitations on ownership and control.[57]

Multichoice also submitted that the right to freedom of expression includes the freedom of the press and of other media, which includes broadcasters. *"The Constitutional Court, in the Islamic Unity Convention[58] decision, emphasised the two-sided nature of the right, not only to impart information but also to receive it. If section 49 and/or section 50 were to apply to subscription broadcasting services providing more than one channel, this may result in forced divestiture (either of shares or of assets) in relation to certain media companies within South Africa. This would interfere with the means by which information, views and ideas are imparted, and would unreasonably and unjustifiably limit the right to freedom of expression on the part of these companies and their right to impart information, views and ideas, and the right of the public to freedom of expression and to receive information, views and ideas".*[59]

Multichoice argued further that section 25 of the Constitution contains the property clause. *"Newspaper titles and a broadcasting licence constitute property for the purposes of the property clause. Similarly, shares in a company owning a newspaper title, alternatively in a company which is a television broadcasting service licensee, would constitute property. Applying section 49 and/or section 50 of the IBA Act to compel divestiture along the lines described above would constitute deprivation. Given the complete absence of proportionality between the harm done by the infringement and the supposed beneficial purposes section 49(1) and section 50(2) are meant to achieve, the application of these provisions to subscription broadcasting services providing more than one channel would be held to be arbitrary, and would not survive analysis in terms of the limitations clause (s36) of the Constitution. If the deprivation were to pass scrutiny under section 25(1) of the Constitution, the question which would then arise is whether*

[57] See Multichoice, at paragraphs 148-159.
[58] See Annexure II – Legal Opinion received from Bowman Gilfillan on Freedom of Expression (The Review of Ownership and Control of Broadcasting Services & Existing Commercial Sound Broadcasting Licences 2003).
[59] Multichoice, at paragraphs 166-167.

it was an expropriation. MultiChoice submits that divestiture along the lines described above would constitute expropriation, which would not pass scrutiny under section 25(2) of the Constitution".[60]

Multchoice concluded that whilst the application of section 49(1) and section 50(2) of the IBA Act to commercial free-to-air television broadcasting services is likely to pass constitutional scrutiny, the application of these sections to subscription broadcasting services will not. *"The horizontal and the cross-media limitations on ownership and control should therefore not apply to subscription broadcasting services, and particularly subscription broadcasting services that provide more than one channel; and/or do not provide news and current affairs programming; and/or do not use terrestrial frequencies for their transmission"*.[61]
Caxton submitted that the restrictions (and possible exemptions) should apply to broadcasters regardless of the type of broadcasting service or programming provided. *"This is in line with our submission that regulation ought to be non-discriminatory. It is not appropriate to apply restrictions on ownership and control to all broadcasters other than subscription broadcasters when this distinction runs counter to competition law principles of non-discrimination and would be contrary to the obligations imposed on ICASA under the IBA Act, and the objectives of the Broadcasting Act. We do not regard competition law or market forces as sufficient, without appropriate sector legislation and licence conditions, to regulate either economic concentrations or diversity in a relatively young regulatory environment (the broadcasting market itself is not young but ICASA notes that its involvement in regulation has been relatively recent)"*.[62]

[60] Multichoice, at paragraphs 169-171.
[61] Multichoice, at paragraphs 173-175.
[62] Caxton, at paragraphs11-13.

4. Barriers to Entry

4.1. Issues Raised on Technological Barriers / Technology Standards

4.1.1 Set-Top-Box

The Discussion Paper sought guidance on the facilitation of the interoperability of STBs and the role to be played by the Authority. The Discussion Paper also sought guidance on ensuring that embedded conditional access systems be made available on fair, reasonable and non-discriminatory terms to third party broadcasters, and if the matter of the Service Information should be left to self-regulation by the industry or if it should be regulated.

4.1.2 Application Programme Interface

The Application Programme Interface ("the API") is the operating language that controls the operation of the STB and which applications (individual pieces of software that provide the consumer with services) need to interact with in order to deliver services. Examples of such software would be side channels, digital teletext or navigation software.

There are a number of ways in which the operator of the API could potentially restrict market entry:

- the procedure for getting applets checked and delivered to the STB could be restrictive and a source of delay;
- the API might be unable to support the desired service;
- the operator may refuse to provide access to the technical specifications required to interact with the API; and
- access may be provided but not on advantageous terms[63].

63 Ibid.

The Discussion Paper asked if it was possible for the Authority to address anti-competitive concerns raised by APIs.

4.1.3 Verification Software and Compression Technologies / Conditional Access systems

The primary purpose of a Conditional Access system ("CA system") is to ensure that there is an auditable means of ensuring that payment is received in return for the consumption of broadcasting programming. The technical system that enables this process to take place is called a CA system – access to certain programming is made conditional upon payment for the content received.

For new entrants the challenge will be whether to use the same CA as the incumbent or find an alternative CA.

The Discussion Paper asked if the limited supply of CA operational expertise combined with the high cost of CA compression technologies should be regarded as another potential barrier to market entry. The Discussion Paper also sought guidance on the approach to be taken in South Africa that would lead to the acceptance of an open standard.

4.1.4 Electronic Programme Guide

An Electronic Programme Guide ("EPG") is an information service which can include visual images relating to the promotion, listing or selection of television programmes or services. In practice, EPG's tend to be operated by service providers or digital bouquet operators. EPG's are the point of strategic control in a subscription television environment as they are the first service which the viewer encounters when a digital receiver is switched on. They are used to inform the viewer of programme/event schedules and they also are used to

display and sort lists of available services on the particular delivery system or bouquet providers' spectrum allocation.

There are a number of levels an EPG service may take, ranging from a simple TV listing guide to a sophisticated electronic magazine allowing the viewing of programme previews and featuring linkages with conditional access and subscriber management systems. The display characteristics of an EPG service and its function in the receiver will be determined not only by the information transmitted, but also by the receiver application software. An EPG is considered to have three elements;

- the assembly and packaging of television schedule and programme details;
- the transmitted signal, containing the EPG data, originated and transmitted by the EPG provider; and
- the receiver application, acting upon the transmitted information and displaying this to the viewer.

The Discussion Paper asked if the EPG needed to be regulated and if the conflict between EPG controller and third party broadcasters appearing within the bouquet should be left to contractual negotiations.

4.1.5 Subscriber Management Service

One of the biggest challenges of Subscriber Management Service ("SMS") apart from the technology is the human resources to manage subscribers. The role of an SMS is not only to record churn, but to strive to reduce it to the lowest level possible. Customer relationship programs are needed to run an efficient SMS operation. The biggest challenge is where to find the people to run a SMS without poaching from the incumbent operators.

The Discussion Paper asked if SMS should be regulated.

4.2 Responses to issues Pertaining to Technological Barriers

The SABC submitted that the regulatory approach to technology in the subscription broadcasting environment should be based on the following principles: competition should be based on content offerings and not on the technology platform being used; open standards approach for technology transmission platforms as it allows for the promotion of economies of scale, lower cost on receiving equipment and interoperability between systems; the technology choice for CA, API, EPG and SMS made by operators should work on any STB used by consumers; there should be a minimum receiver specification in order to allow for the provision of low cost STBs and the inter-operability of receivers on new digital platforms, Digital Terrestrial and Cable; and there should be a choice made by the regulator on the standards for digital broadcasting.[64]

The SABC also submitted that the STB should be able to accommodate at least two CA systems, one embedded and one via a PCMCIA card.

Sentech submitted that the Authority's role ought to be limited to specifying adherence to national transmission standards, based on international standards, as market forces ought to determine the appropriate standards for interoperability. *"By insisting on interoperability, Sentech is concerned that ICASA might well be unwittingly hampering new technological developments by broadcasters with long term negative impacts for consumers"*.[65]

Sentech also submitted that it is best not to regulate for open standards for conditional access and that market forces should determine which CA systems are used and how the decoder market develops.[66]

[64] SABC, at page 15.
[65] Sentech, at paragraph 5.29.
[66] Sentech, at paragraph 5.34.5.

Multichoice submitted that the Authority has jurisdiction over the licensing of broadcasting signal distribution and broadcasting services. *"Other than broadcasting signal distribution, not one of the technological items (transponder capacity, technical services, CA, API, EPG, STB and SMS) constitutes a broadcasting signal distribution service or a broadcasting service. They do not require to be licensed, nor is there any suggestion in the broadcasting legislation that the Authority's jurisdiction extends to their regulation"*.[67]

Multichoice concluded that the Authority would not be in a position to mandate standards and/or access and/or interoperability because the Authority had not determined the relevant market(s); the Authority misconceived the basis upon which it would be justified in mandating standards, access or interoperability; the Authority's approach did not accord with the approach adopted in other jurisdictions; and the Authority did not consider whether the ex ante mandating of standards, access or interoperability would be justified.[68]

5. Competition

The Discussion Paper asked if the Authority should rely upon competition law to deal with technical barriers and essential facilities.

M-Net and Multichoice submitted that the ability of subscription broadcasting services to acquire content on an exclusive basis is fundamental to the provision of these services. *"Given the availability of extensive free-to-air services, a person will only subscribe to a subscription television broadcasting service if it offers quality programming which is not available on free-to-air services – in other words, premium programming which is exclusive to subscription broadcasting services. For subscription broadcasting services, exclusivity is the primary basis on which these services will attract and retain subscribers. Fundamental to the*

[67] Multichoice, at paragraphs 180-181.
[68] Multichoice, at paragraph 219.

success of these services is the delivery of programming for which the customer is willing to pay. If free-to-air and subscription services were perfect substitutes for each other, there would be no incentive for subscribers to pay for subscription broadcasting services that merely replicate what is already available free-to-air".[69]

M-Net and Multichoice also submitted that exclusivity does not necessarily restrict competition. *"It might be thought at first blush that exclusive contracts, by their nature, restrict competition. The fact that a contract prevents a provider from supplying another operator might appear, on the face of it, to restrict competition. There are two reasons why such a view is simplistic. First, it is important to distinguish between competition ex ante – before the contract is signed – and ex post – after it is signed. An exclusive contract restricts competition ex post. However, ex ante competition for the contract is typically heightened. As long as there is sufficient opportunity to compete for the contract itself, the exclusive nature of the contract should not be regarded as anti-competitive. Second, the right that is sold as part of an exclusive contract may not itself carry any significant degree of market power. If the content that is provided (say, the output from a movie studio) competes with other content (here, the output of other movie studios), the right to broadcast that content exclusively does not confer any monopoly power. As long as there is sufficient competition within the content provision market itself, exclusive contractual arrangements are not anti-competitive"*.[70]

M-Net and Multichoice argued that any attempt to prohibit South African channel providers from selling their channels on an exclusive basis would impact negatively on the development of local programming. *"It would result in the direct competition for exclusive broadcasting rights between multi-channel subscription broadcasting services in South Africa being confined to the foreign channels on their bouquets. The absence of competition for exclusivity is likely to mean that*

[69] M-Net submission to ICASA , Inquiry into Subscription Broadcasting, at paragraph 31.
[70] M-Net, at paragraphs 41-43.

South African channels would be acquired for lower prices. This in turn would remove or dilute the incentive to produce them. For example, MultiChoice specifically commissions the creation of exclusive South African channels for its DStv bouquet. One such channel is the SABC Africa channel. MultiChoice would not commission these channels if it was precluded from doing so on an exclusive basis".[71]

M-Net and Multichoice submitted that exclusivity in relation to content offers the following advantages:

- it leads to greater investment in the creation of content.
- it ensures a variety of content being available to South African audiences. This in turn advances diversity and pluralism.
- it results in better quality programming.
- greater choice and improved quality of programming attract more subscribers, and permits a particular type of subscriber to be targeted.
- this in turn contributes to the financial viability of subscription broadcasting services, not only in South Africa, but across the African continent.
- ultimately, reliance on exclusive programming enhances the contribution of South African subscription broadcasting services to the national economy and to South Africa's ability to remain the hub of broadcasting for Africa.[72]

"Any attempt to undermine the principle of exclusivity will have the converse consequences: less investment, lower quality and less content, and ultimately a decrease in South Africa's role in African broadcasting. Exclusivity, and the advantages which flow from it, are important for future subscription broadcasting services who will have a strong need to differentiate themselves from one another to attract subscribers".[73]

[71] M-Net, at paragraphs 49-50.
[72] M-Net, at paragraph 51.
[73] M-Net, at paragraphs 53-54.

M-Net and Multichoice concluded that the Authority does not have jurisdiction to deal with competition concerns relating to the exclusive acquisition of content. *"Such matters should fall to be determined by the competition authorities under Chapter 2 of the Competition Act"*. Internationally, if any competition concerns arise in relation to the manner in which exclusivity is exercised, this is typically dealt with by the competition authorities in accordance with general competition law principles such as prohibited restrictive vertical practices and the abuse of dominant position, on a case by case basis".[74]

6. Programme Packaging / Tiering

The Discussion Paper asked if anti-competitive bundling should be regulated.

Multichoice submitted that the Authority does not have jurisdiction to regulate the packaging of bouquets, and that its analysis of other jurisdictions demonstrates that it would be exceptional to provide ex ante regulation of bouquets as a means of addressing competition concerns. *"Instead, competition concerns in this regard are typically dealt with by way of general competition law on a case by case basis"*.[75]

7. South African Content

In the Position Paper on South African Content on Television and Radio, 2002, the Authority set the South African content quotas for terrestrial analogue subscription television services. The South African content requirements for subscription broadcasting services are currently being implemented as:

- a minimum weekly average of 8% of the broadcaster's programming measured over the period of a year or some greater proportion as may be

[74] M-Net, at paragraph 71 and 63.
[75] Multichoice, at paragraph 238.

determined by the Authority consists of South African content with such categories as the Authority may determine from time to time;

- where a portion of the broadcast is un-encoded, then for the duration of the un-encoded period a minimum weekly average of 35% measured over the period of a year consists of South African content, within such categories as determined by the Authority; and
- in complying with its obligations for the un-encoded period 20% of drama programming must consist of South African drama and 15% of other programming must consist of South African programming.

The Authority may, in place of the obligations for the encoded period of 8% South African content, direct that a licensee spend a specified sum of money as may be determined by the Authority on programming which has South African television content.

No distinction is made between free-to-air commercial sound broadcasting services and subscription sound broadcasting services in the South African Music Content Regulations, 2002. The regulations provide that where sound broadcasting services devote 15% or more of their airtime schedule to the broadcasting of music they are required to comply with the South African music quota. Commercial sound broadcasting licensees are therefore required to broadcast a minimum of 25% South African music in the performance period.

The Discussion Paper asked if the regulations on South African content needed to be amended to cater for subscription sound and subscription television broadcasting services.

Sentech suggested that each applicant's proposal should be considered in respect of South African content to determine whether the amount of South African content is balanced by proposals that nevertheless achieve the goals behind South Africa content; the geographic coverage area of the applicant to

determine how appropriate South African content goals are in respect of a particular broadcaster; and the nature of the broadcasting service – radio, television or both.[76]

Sentech also suggested that South African content requirements for multi-channel broadcasters be measured across the broadcasting service as a whole and not in respect of individual channels.[77]

The NAB submitted that South African content should be regulated across the bouquet in a multi-channel environment. *"The Authority should however take care that such regulation for subscription broadcasters must be light touch seeing as the programme offering is based on a contractual agreement between the subscriber and the broadcaster. Specific local content requirements should be based on a process of negotiation between an applicant and the Authority and should be captured in the licence conditions of a broadcaster. The Authority should therefore review each application on a case-by-case basis. The Authority should, however, when determining these obligations, take into account whether the programme offering is broadcast nationally or internationally. The requirements need to be appropriate to the coverage area of the broadcasting service as a whole".*[78]

The NAB also submitted that the use of the play or pay principle is conducive to achieving the objectives of having subscription broadcasting services contributing to local content.[79]

The SABC submitted that the contribution by subscription broadcasters should either be in the form of airtime (a percentage of airtime across the bouquet of channels) provided that this is not linked to specific genres but rather South African content in general, or a financial contribution. *"The financial contribution could consist of payments to a South African Content Production funding body*

[76] Sentech, at paragraph 5.2.2.1.
[77] Sentech, at paragraph 5.2.2.3.
[78] NAB, at paragraph 4.3.2-4.3.3.
[79] NAB, at paragraph 4.3.5.1.

(such as the NFVF) and/or expenditure on local programming based on the operators' turnover figures".[80]

Caxton submitted that it may be more appropriate to describe in the regulations pursuant to section 30(5) of the Broadcasting Act, a number of different ways in which a broadcaster might meet local content obligations under its licence. *"Each of these options would attract a number of quota points. A broadcaster should be able to choose from the various options the ones which not only suit its business best, but which also gives it sufficient points to meet its local content obligations. Points may be determined on a different basis for sound and television (and within television, between multi-channel and single channel broadcasters), to ensure that this obligation is applied proportionately to the nature of the service offered. For example, ICASA might recommend that a broadcaster should do any one or more of the following to earn the relevant level of points as set out in their licence conditions: pay or play [points]; broadcast at least [hours] of programming with local content per day [points]; include at least [minutes] of local content in [programmes] [points]; finance the production of a local drama or educational programme [points]; play at least [minutes] South African music per day [points]; finance the production of a local movie [per period] [points]; host a local talk show debating only issues of local concern [per period] [points]. We suggest that applicants can themselves suggest how they will meet ICASA's policy objectives and that their suggestions can then be included as licence conditions".*[81]

Multichoice submitted that the manner in which subscription broadcasting services, and particularly a digital satellite subscription broadcasting service such as MultiChoice, are to contribute to the achievement of South African content objectives must be appropriate to the nature of these services.[82]

[80] SABC, at page 22.
[81] Caxton, at paragraphs 21.14.2 – 21.14.4
[82] Multichoice, at paragraph 267.

Multichoice also submitted that a distinction ought to be made between persons who create channels, on the one hand, and persons who package bouquets, on the other. *"International channels play an important role in a digital satellite broadcasting service's bouquet. For example, MultiChoice acquires many of its channels from the USA and the UK. Foreign channel suppliers craft their business models to suit multiple territories and the channels are packaged for international audiences, based on which audiences will provide the maximum revenue for each channel. The pre-packaged channels usually cannot be altered to suit each territory to which the channel is supplied due to economies of scale. MultiChoice is accordingly not able to determine or interfere with the business models of these international channel suppliers or the programming that constitutes these international channels. Similarly, the channels which are packaged in South Africa are packaged not only for a South African audience, but also for a pan- African audience. A digital satellite subscription broadcasting service designs its bouquet(s) for an international audience, as opposed to a national audience. Thus, the DStv bouquet, whilst it is a bouquet transmitted from South Africa, is designed to serve the programming needs of subscribers not only in South Africa, but also across the African continent. Furthermore, if the Authority in South Africa were to impose the "play" principle across an entire bouquet, and other countries in Africa were to follow suit, a digital satellite subscription broadcasting service such as MultiChoice would require MultiChoice to customise its bouquet for every country falling within each satellite's footprint".*[83]

Multichoice went further to state that a bouquet is a thematic environment where channels are devoted to a specific programming genre. *"Thus, for example, it would be impossible to fulfil local content obligations of any significance on a channel which screens animated children's programming 24 hours a day, or a channel which screens only movies 24 hours a day. Furthermore, it would be impossible for the thematic sports channels to comply, given that sport is*

[83] Multichoice, at paragraphs 273-276.

excluded from the definition of local content. If local content obligations were imposed on these thematic channels, this would place an impossible burden on these channels and on digital satellite subscription broadcasting services generally".[84]

Multichoice also submitted that a digital satellite subscription broadcasting service has virtually no control over the content of the channels which it acquires internationally and from within South Africa. *"The channels are pre-packaged for the highest financial return. Furthermore, channel suppliers do not allow content changes or insertions to a channel, since this would undermine the brand name of the channel through the insertion of different content".*[85]

Multichoice proposed that a maximum of 10% of a digital satellite subscription broadcasting service's total annual costs of acquiring channel rights and their carriage and uplinking be spent on channels compiled in and uplinked from South Africa. *"If MultiChoice's proposal finds acceptance with the Authority, this would require minor amendments to s53 of the IBA Act, and to the current regulations"*.86

Multichoice concluded that in the two jurisdictions where there is regulation in relation to local content obligations, namely Canada and Australia, the authorities have adopted a "pay" principle as opposed to a "play" principle.

Deukom submitted that the imposition of South African content obligations on Deukom would accordingly be inappropriate. *"If the Authority persists in imposing some kind of local content obligation, it ought to be the "pay" principle, as opposed to the "play" principle. Such obligation should, however not be imposed upon niche broadcasters. Furthermore, the financial contribution required to be made ought to be reasonable. In determining the extent of this contribution,*

[84] Multichoice, at paragraphs 279-280.
[85] Multichoice, at paragraph 281.
[86] Multichoice, at paragraphs 304-305.

consideration must be given to the target market and nature of the DTH satellite service. The contribution also has to be weighed against any licence fee that may be imposed on these services as well as the tax contribution to the fiscus made by these services. The overall financial contribution to be made must not be one that would inhibit the growth of the industry and/or to undermine investor confidence".[87]

8. Must Carry Programming Obligations

Most countries have must-carry obligations for broadcasters by requiring that subscription broadcasters carry free-to-air broadcasters on their satellite bouquet and in some cases that cable operators reserve a channel for free-to-air television broadcasters.

The advantage of must-carry rules is that they extend the reach of the public broadcaster and other free-to-air broadcasting services to areas where there may be no coverage, and therefore, serve the public interest by ensuring that viewers who use cable of satellite as a means of access to broadcasting services have access to, in particular, public service programming.

The Discussion Paper asked if subscription broadcasters should have must-carry obligations.

MultiChoice submitted that as a general rule it opposed the imposition of must carry rules. Multichoice is willing to accept a requirement that satellite subscription television broadcasting services carry all the South African national free-to-air terrestrial television broadcasting services, provided reciprocal must offer rules are imposed on these services. "If must carry rules are imposed, they ought to relate only to national free-to-air terrestrial television services, but not to

[87] Deukom, at paragraphs 22-23.

regional or local television broadcasting services. In other words, in the current context, the must carry rules ought to relate only to SABC1, 2, and 3, and e.tv".[88]

Multichoice welcomed the carrying of national free-to-air channels on condition that "must-offer" obligations were imposed.

Deukom submitted that it would make little sense, given the fact that almost all of Deukom's subscribers are German speaking, to compel Deukom to carry South African channels. "The costs of complying with this obligation would immediately make the services of Deukom uneconomical. The same would apply to most niche broadcasters".[89]

The SABC submitted that while wanting to ensure that audiences have access to free-to-air channels over subscription systems, free-to-air channels also need to be commercially compensated for the provision of content to subscription operators, who are essentially their competitors. *"A further consideration is that not all subscription operators may have the channel capacity to carry all free-to-air channels. In these circumstances and given the potential of must-carry rules to undermine commercial relationships between subscription and free-to-air operators, a blanket approach to must-carry rules may not be appropriate. The presence of free-to-air channels on subscription platforms may rather be something which is left to the different operators to negotiate and finalise or something which is considered when subscription operators are licensed and their licence conditions are set. As a general rule, however, the SABC must stress its view that if free-to-air channels are to be carried by subscription television the free-to-air channels must be remunerated for the provision of this content on commercial terms".*[90]

[88] Multichoice, at paragraphs 373-376.
[89] Deukom, at paragraph 21.
[90] SABC, at page 22.

The SABC also submitted that internationally "must carry" are applicable only in relation to the carrying of the public broadcasting services since they are fully publicly funded. *"If you look at all of those countries the channels or the programming of the national public broadcaster were more or less fully paid for through public funds which is the opposite in South Africa. As I indicated earlier the national public broadcaster is more than 80% funded through commercial income. In other words, the same commercial operator, the subscription operator is our competitor in the same market. There is no competition between a cable television network in Canada with the CBC, or a cable operator in the Netherlands with NOB. There is no competitor because they are funded through government funds and this is why the regulator could impose that those programmes or those channels that were funded through clear public funds or government funds must be carried without any commercial transaction going ahead. We cannot have that in this environment because the environment is totally different. We cannot just transpose that that notion even if it is a noble one. We have to customise it to our environment"*.[91]

The SABC opposed must-carry obligations and urged the Authority to stipulate "must-pay" obligations in the event of imposing must-carry obligations.

Sentech urged the Authority not to promote legislative must carry obligation. *"While Sentech agrees that it might be important for an appropriate subscription broadcaster to carry, for example, one or more of the SABC's channels on its bouquet, this ought to be done by way of appropriate licence conditions rather than blanket must carry obligations applicable to all subscription broadcasters irrespective of the essential characteristics of their broadcasting services"*.[92]

[91] SABC oral submission, 16 August 2004.
[92] Sentech, at page 5.54.

9. Empowerment

The Discussion Paper sought guidance on the mechanisms to be used to realise the Authority's empowerment objectives in subscription broadcasting.

Multichoice submitted that that the Authority should be guided by the ICT sector charter. *"However, once the industry has reached consensus on the Charter, the Task Team (assigned the role of drafting the Charter) should consult the Authority, given the Authority's statutory mandate in the regulation of the telecommunications and broadcasting sector. The National Association of Broadcasters currently has representation on the Task Team and has insisted that such consultation is critical. We are aware that the Task Team has prioritised consultations with the Authority once the industry negotiations are complete".*[93]

10. Employment Equity and Human Resources Development

The Discussion Paper sought guidance on the right approach for the realisation of the Authority's human resources and employment equity objectives.

Multichoice submitted that the current statutory and regulatory framework is adequate to achieve the employment and human resources objectives. *"No additional obligations ought to be imposed by the Authority upon subscription broadcasting services to achieve these objectives"*.[94]

The NCRF further submitted that the Employment Equity Act and the Skills Development Act will guide the employment equity and human resources development directives in the subscription broadcasting industry.[95]

[93] Multichoice, at paragraph 396.
[94] Multichoice, at paragraph 417.
[95] NCRF, at page 16.

Orbicom suggested that the Authority should ensure that relevant empowerment targets for licensees are part of the license terms and conditions when issued.[96]

SABC proposed that the approach already developed by the Authority in its licensing of terrestrial free-to-air players should be carried through to the subscription environment. The SABC further proposed that the Authority should ensure that it is not possible to change the control of a licensee nor reduce the percentage of shares held in that licensee by HDIs, without the Authority's prior approval. SABC suggested that the Authority should be guided by the Code of Practice promulgated under section 9 of the Broad-Based Black Economic Empowerment Act 53 of 2003 and the Black Employment Charter for the Information Communications and Telecommunications ("ICT") sector which is likely to come into effect in 2005, in relation to its formulation of policies on empowerment in the broadcasting sector.[97]

11. Code of Conduct for Broadcasters

The Discussion Paper asked if the Authority's Code of Conduct needed to be reviewed to take into consideration non-terrestrial subscription services.

Multichoice submitted that the approach ought to be that of self-regulation, in the form of a Code drawn up by and enforced by subscription broadcasting services and which meets with the approval of the Authority.[98] Multichoice also submitted that parents who have subscribed to a bouquet such as MultiChoice's DStv are able to implement the parental guidance system. *"The DStv service includes international and African channels which are broadcast across the African continent. As a consequence, whilst programming on a channel may be broadcast at an appropriate time from the perspective of the protection of minors in the country in which the channel was packaged, the channel may be broadcast*

[96] Orbicom, at paragraph 4.45.
[97] SABC, at page 33.
[98] Multichoice, at paragraph 322.

in South Africa and in other African countries (which cut across five time zones) at a time which may be inappropriate from the perspective of protecting minors. There is nothing a packager of bouquets such as MultiChoice can do to address this situation. A packager of bouquets such as MultiChoice has little or no control over the content of the channels concerning which it has acquired broadcast rights. In fact, the packager of the bouquet may have no prior knowledge of what is about to be broadcast. For example, CNN may include live feeds of scenes of war broadcast during hours when children in South Africa or other African countries may be watching the service". [99]

Multichoice proposed that an approach similar to the Australian approach be adopted in South Africa. *"In terms of section 56 of the IBA Act, all licensees must adhere to the statutory code of conduct unless they are members of a body which has proved to the satisfaction of the Authority that its members subscribe and adhere to a code, and that the code is acceptable to the Authority. The IBA Act would permit the drafting by the subscription broadcasting services industry of a code, along the lines of the ASTRA Programme Code, for such services, and to the industry enforcing the code. The Authority would have to be satisfied with the code and that members of that sector of the industry subscribe and adhere to the code. If this approach were to be acceptable, the current statutory Code of Conduct would have to be amended to make it clear that it does not apply to subscription broadcasting services. No other statutory amendments, either to the primary legislation, or to the secondary legislation, would be necessary"*.[100]

[99] Multichoice, at paragraphs 320.3-320.4.
[100] Multichoice, at paragraphs 337-339.

12. Advertising Limitations

Section 30(6) of the Broadcasting Act, states that "subscription broadcasting services may draw their revenues from subscriptions, advertising and sponsorships. In no case may advertising or sponsorships, or a combination thereof, be the largest source of revenue".[101]

The general principle for the establishment of advertising limits is to strike a balance between the financial interests of the broadcaster and advertisers on the one hand, and interests of the viewers on the other. In the Position Paper for the introduction of the first free-to-air commercial television service in South Africa the Authority took the position that protecting and growing free-to-air terrestrial broadcasting services beyond the introduction of a single commercial entrant requires the restriction of advertising on subscription broadcasting services. This position was based on the view that payment of subscriptions provides the primary revenue stream for subscription broadcasting services and therefore subscription broadcasters should not also have unrestricted access to advertising revenue. For this reason the Authority restricted advertising on the terrestrial subscription television broadcasting licensee. M-Net is permitted 8 minutes per hour in open time with a maximum of 12 minutes in any hour, this is in line with free-to-air television broadcasting advertising limits, and 6 minutes in encoded time with a maximum of 12 minutes in any hour.[102]

The Discussion Paper sought guidance on the advertising limits that would be appropriate for subscription broadcasting in general.

Multichoice submitted that the impact of subscription television broadcasting services, and particularly digital satellite subscription broadcasting services, on the advertising revenue of free-to-air terrestrial television broadcasting services

[101] Section 30(6) of the Broadcasting Act, No.4 of 1999.
[102] IBA - Position Paper on the Introduction of the First Free-to-air Private Television Service in South Africa, 1997.

has been minimal. *"It is therefore not surprising that the sector-specific authorities in these countries have not been overly concerned about this issue. Satellite subscription services have developed niche viewing opportunities and channels that have made it viable for certain products and services to advertise on television for the first time. This is due to the fact that these channels offer tightly targeted niche audiences and do so cost effectively. Advertising rates are a fraction of those to be found on free-to-air terrestrial television, even in prime time. Attracting new advertising investment such as this obviously enlarges the advertising cake and does so with no negative impact on free-to-air broadcasters advertising revenues"*.[103]

Multichoice concluded that whilst advertising revenue for digital satellite subscription television broadcasting services will increase commensurate with the growth in subscribers, it is unlikely that it will ever account for a similar percentage of revenue as that received by terrestrial subscription television broadcasting services. *"Similarly, it is unlikely that advertising revenue for subscription television broadcasting services as a whole will ever match the advertising revenue of terrestrial free-to-air television broadcasting services"*.[104]

Multichoice proposed that the self-regulatory approach adopted in relation to television broadcasting services, and particularly subscription television broadcasting services, in Australia be adopted in relation to advertising content. *"This will necessitate minor amendments to section 57 of the IBA Act, and to the Regulations on Infomercials and Programming Sponsorship, to indicate that those statutory obligations do not apply to satellite subscription broadcasting services. A new sub-section would have to be inserted in s57 encouraging satellite subscription broadcasting services to deal with the regulation of advertising content by way of self regulation which meets with the approval of the Authority, failing which the Authority would need to regulate this issue"*.[105]

[103] Multichoice, at paragraphs 344-345.
[104] Multichoice, at paragraph 347.
[105] Multichoice, at paragraphs 370-371.

Caxton submitted that advertising limits might apply particularly during peak viewing periods since that is when subscribers will be getting their money's worth from their subscription. *"It seems sensible that those periods should not also garner advertising revenue. Section 30(6) of the Broadcasting Act might be amended accordingly or licence conditions might be imposed in this regard".*[106]

The SABC submitted that the current advertising limits applicable to M-Net (average of 6 minutes and maximum of 12 minutes during encoded time) are not having the desired impact. *"Notwithstanding the limits on advertising, M-Net commands and average of 8% of All Adult audiences, but 14,5% (R590 446 163) of advertising revenue share. M-Net therefore derives a disproportionate share of revenue relative to audience, and therefore limits the revenue potential of the free to air broadcasters. Where DStv is concerned, their share of total advertising revenue has grown from approximately 2% in 1999 to 8% in 2003. As with M-Net, they hold a share of advertising revenue disproportionate to their audience share"*.[107]

The SABC proposed that more stringent limits on advertising for subscription operators be required. *"In addition, the Authority will need to give effect to the legislative requirement that advertising and sponsorship may not be the largest source of revenue for subscription operators"*.[108]

[106] Caxton, at paragraph 21.18.3.
[107] SABC, at page 11.
[108] Ibid.

PART C: FINDINGS

In analysing the framework for the regulation of subscription broadcasting services, the Authority has been guided by, amongst other things, section 2 of the IBA Act which sets out the primary objectives of the Act. The primary objectives of the IBA Act are stated, amongst others, as being "to provide for the regulation of broadcasting activities in the Republic in the public interest through the Authority established by section 3, and for that purpose to-

- promote the provision of a diverse range of sound and television broadcasting services on a national, regional and local level which, when viewed collectively, cater for all language and cultural groups and provide entertainment, education and information;
- promote the development of public, commercial and community broadcasting services which are responsive to the needs of the public;
- ensure that broadcasting services, viewed collectively, develop and protect a national and regional identity, culture and character;
- encourage ownership and control of broadcasting services by persons from historically disadvantaged groups;
- encourage equal opportunity employment practices by all licensees;
- promote the empowerment and advancement of women in the broadcasting services;
- ensure that broadcasting services are not controlled by foreign persons;
- impose limitations on cross-media control of commercial broadcasting services;
- ensure that commercial and community broadcasting licences, viewed collectively, are controlled by persons or groups of persons from a diverse range of communities in the Republic;
- ensure fair competition between broadcasting licensees;
- encourage investment in the broadcasting industry; and
- promote the stability of the broadcasting industry …"

The Authority believes that the regulation of subscription broadcasting services and the introduction of more subscription broadcasting services will result in a marked increase in investment opportunities in the broadcasting industry.

13. Policy Development Principles and Legislative Framework

13.1 Defining Subscription Broadcasting

In the Authority's view it could not have been the intention of the legislature that the once off purchase of receiving equipment such as a smart card constitutes a subscription fee. The Authority also shares the SABC's view that the definition of subscription broadcasting should be contrasted with the definition of free-to-air broadcasting in the Broadcasting Act. Section 1 of the Broadcasting Act defines a free-to-air service as a service which is broadcast and capable of being received without payment of subscription fees. The definition refers to subscription fees rather than simply the payment of a fee. The Authority has concluded that a smart card is an additional hardware which is part of signal distribution and which allows the user access to the service, but that it does not constitute the payment of a fee for the purposes of subscription. The Authority has concluded that the words *"broadcasting service provided to an end user upon the payment of a fee"*[109] refer to a subscription fee and not a once-off fee like the purchase of a satellite dish, set-to box and a smart card.

13.2 Signal Distribution and Multi-Channel Distributions

The Authority agrees with Sentech that the provisions of section 34(2)(c), section 34(2)(d), and section 36(1)(a) are inappropriate in that they confuse the conceptually distinct roles of broadcasting and signal distribution. The Authority has, therefore, decided to propose the deletion of section 34(2)(c) and section

[109] Section 1 of the Broadcasting Act.

36(1)(c) of the Broadcasting Act in their entirety since the objectives stated in there are the objectives of broadcasting services and not signal distribution services.[110]

14. Licensing

14.1 The Licensing Process

Applicants for the provision of subscription broadcasting licences shall be required to apply for licences in terms of sections 41, 42 and 46(1) of the IBA Act. Applicants shall be required to, amongst others demonstrate:

- the expected technical quality of the proposed service;
- the capability, expertise and experience of the applicant;
- the financial means and business record of the applicant;
- the business record of each person who, if a licence were granted to the applicant, is or would be in a position to control the operations of the applicant either in his or her individual capacity or as a member of the board of directors or top management structure; and
- the applicant's record and the record of each person who would be in a position to control the operations of the applicant either in his or her individual capacity or as a member of the board of directors or top management structure in relation to situations requiring trust and candour; and whether the applicant or the person who would be in a position to control the operations of the applicant either in his or her individual capacity or as a member of the board of directors or top management structure, has been convicted of an offence in terms of the IBA Act.[111]

[110] Some sections of the Broadcasting Act might be repealed when the Convergence Bill is passed by Parliament.
[111] In the event of the Convergence Bill becoming the Convergence Act the licensing process as outlined in the Convergence Act will apply.

Applicants shall also be required to demonstrate measures they intend taking to achieve participation by historically disadvantaged persons with respect to empowerment in the management and control structures, skills development, enterprise development, and procurement.

The Authority has also decided that the first round of licensing will be done by the issuing of the Invitation to Apply ("the ITA"). Thereafter mero motu applications shall be accepted.

14.2 Entities Prohibited from Holding a Broadcasting Licence

Any entity applying for a licence must satisfy the Authority that it is not of a party political nature. Section 51 of the IBA Act[112] states that no broadcasting licence shall be granted to any party, movement, organisation, body or alliance which is of a party political nature. In determining whether an applicant is in compliance with Section 51, the Authority will inter alia, consider the following: ownership; funding; board membership; management; programming; and, avoiding public identification with a particular political entity.

14.3 Licence Conditions

Licence conditions for subscription broadcasting services shall, amongst others:

- state compliance with national transmission standards (DVB-S, DVB-C and DVB-T);
- state the nature of the service provided (whether sound or television or both);
- state whether the service provides multi or single channel;
- state geographical coverage area;

[112] In the event of the Convergence Bill becoming the Convergence Act the prohibition on the ownership and control of broadcasting services as outlined in the Convergence Act will apply.

- state whether or not the service is aimed at the general public, a niche market or a closed user group;
- state the term of the licence;
- state the number of television and/or sound channels to be part of the bouquet, their names and genres;
- set out the licence fees to be paid (application fee, issue of licence fee, annual licence fee, amendment fee and renewal fee);
- set specific conditions regarding South African television content;
- require a licensee who provides a sound bouquet to ensure that at least 10% of the sound channels on the bouquet are of South African origin;
- state the frequency to be broadcast on, if any, including uplink frequency, if any;
- require the licensee to comply with the Code of Conduct for subscription broadcasting services;
- determine the extent to which the satellite/cable subscription television broadcasting licensee may carry the public service television channels of the SABC; and
- require a digital terrestrial subscription television licensee to reserve a channel for public access television.

14.4 Categories of Licence and Classes of Licence

The categorisation of broadcasting services is set out within the three-tier system of broadcasting in South Africa namely public, commercial and community. Section 5(2) requires the Authority to consider licences in the following classes:

(a) free-to-air broadcasting services;
(b) terrestrial subscription broadcasting service;
(c) satellite subscription broadcasting service;
(d) cable subscription broadcasting service;
(e) low power sound broadcasting service; and
(f) any other class of licence prescribed by the Authority from time to time.

Section 5(2) of the Broadcasting Act combines delivery platforms with whether the service provided is free-to-air or subscription. Section 5(2) should be dealing with whether the type of service provided is free-to-air or subscription without assuming that cable and satellite broadcasting services are necessarily subscription broadcasting services since there are satellite and cable free-to-air broadcasting services.

The Authority has decided to propose the amendment of section 5(2) of the Broadcasting Act to state three classes of broadcasting licences: free-to-air broadcasting services, subscription broadcasting services, and any other class of licence prescribed by the Authority from time to time. Delivery platforms, whether terrestrial, satellite, cable, etc; whether terrestrial gap fillers by satellite digital audio radio services are used; and whether the service is broadcast on analogue or digital, are not classes of broadcasting. Delivery platforms should be stated in the licensees' licence conditions. The process of amending the Broadcasting Act will, however, not stop the Authority from proceeding with the licensing of subscription broadcasting services.

14.5 Term of Validity of Subscription Broadcasting Licences

The Authority is going to recommend that section 54 of the IBA Act be amended to insert section 54(e) to read as follows:

> *"The term of validity of a broadcasting licence –*
>
> *(e) in the case of a subscription broadcasting licence shall be twelve years"*.[113]

This recommendation takes into account the general operational costs, the extent of the risk involved in subscription broadcasting, the length of the leases for transponder capacity, and the length of time before break-even point will be reached. The Authority believes that a term of validity of twelve years is appropriate. The amendment would also pave the way for the issuing of composite licences, where the service includes both sound and television channels.

The process of amending section 54 of the IBA Act and section 5(2) of the Broadcasting Act shall, however, not stop the Authority from proceeding with the licensing of subscription broadcasting services. Subscription broadcasting services will, in the interim, be licensed in terms of section 5(2)(b),(c), and (d) of the Broadcasting Act. The term of validity of the licence will be set in terms of section 54(a) and section 54(b) of the IBA Act. This means that subscription broadcasting services that provide both sound and television channels would require two separate licences, one for sound (six years) and one for television (eight years). The licences will be amended to form composite licences reflecting the term of validity of twelve years once section 54(e) has been inserted into the IBA Act.[114]

[113] In the event of the Convergence Bill becoming the Convergence Act the prohibition on the ownership and control of broadcasting services as outlined in the Convergence Act will apply.
[114] The Authority will not be licensing analogue terrestrial subscription broadcasting services.

14.6 Authorisation of Channels

Section 4(3) of the Broadcasting Act states that a licensed broadcasting service consisting of more than one channel may not include a channel in such a service unless the Authority, on application by such a person, has authorised the channel. The Broadcasting Act defines a "channel" as meaning "*a single defined programming service of a licensee other than a video on demand programming service"*.

Section 4(4) of the Broadcasting Act states that the Authority must prescribe the procedure and the appropriate conditions for the authorisation of channels, which must include how channels are defined. Subscription broadcasting services will, amongst others, be required to comply with the following requirements when applying for authorisation of channels:

- the applicant shall identify itself as a licensed satellite/cable or digital terrestrial subscription broadcasting service;
- the applicant shall state the nature of the channel (whether sound or television) and its content;
- the applicant shall state the title of the channel, country of origin and genre of the channel;
- the applicant shall state whether the channel complies with the subscription broadcasting services Code of Conduct; and
- the applicant shall state whether the channel is a temporary or permanent one, and the number of days the channel will be on the bouquet, in the case of temporary channels.

Subscription broadcasting licensees shall be required to apply for the authorisation of channels at least 90 days before the channel is to be introduced. The Authority shall make its decision within a period not exceeding 60 days of receipt of the application for the authorisation of channels.

Every application for authorisation of channels shall be accompanied by a fee of one thousand rand (R1000.00).

14.7 Licence Fees

Section 78(1) of the IBA Act states that the Council may make regulations, not inconsistent with the provisions of this Act in relation to-

(bB) payment to the Authority of charges and fees in respect of broadcasting licences, including applications of all descriptions, the issue, renewal, amendment, transfer or other disposal of broadcasting licences of any interest in broadcasting licences and the periodical maintenance of the force and effect of such licences;

(1A) different charges and fees may be prescribed under paragraph (bB) of subsection (1) in respect of different licensees and different categories and types of licensees based on any characteristic or criterion whatsoever, including the outcome, revenue or audience size of a licensee or the antenna height, power output, or radiation pattern

The Authority has decided on the following licence fees to be paid by subscription broadcasting services:

Licence application fee:	Sound:	**R30 000.00**
	Television:	**R70 000.00**
Issue of licence fee:	Sound:	**R5 000.00**
	Television:	**R5 000.00**
Application for amendment:	Sound:	**R30 000.00**
	Television:	**R70 000.00**
Application for renewal:	Sound:	**R30 000.00**
	Television:	**R70 000.00**

These fees are non-refundable.

Licence fees are based on the cost recovery method. Costs take into account the following expenditures: number of the Authority's officials involved in the analysis of applications; time spent on analysing applications; time spent at the hearings; and recording costs.

Subscription broadcasting services shall also be required to pay to the Authority an annual licence fee of 1,6% of turnover as per the audited financial statements.

14.8 Open Windows in Subscription Broadcasting

On 17 October 1985 the then Minister of Home Affairs issued a broadcasting licence to M-Net to provide a subscription broadcasting service with specific broadcasting regulations held within their terms of licensing. M-Net was given the right to provide viewing to non-subscribers with certain conditions. The licence gave M-Net the right to broadcast unencoded ("the Open Window") during the daily time slot of 18h00 to 19h00 until 31 December 1988 or until such time as a subscription figure of 150 000 was reached.[115] The licence was later amended to allow the Open Window to run from 17h00 to 19h00.

At the time of finalising this Position Paper and Regulations, the Authority was still conducting an amendment process with regard to the M-Net licence, dealing specifically with M-Net's Open Window. Since the inquiry into subscription broadcasting did not deal specifically with M-Net's Open Window, the decision regarding M-Net's Open Window cannot be articulated in this Position Paper.

The Discussion Paper noted that it would not be possible for new entrants to use 'open windows' to access free-to-air audiences. Firstly, spectrum scarcity would prevent the licensing of any new analogue terrestrial television subscription broadcasting services comparable to M-Net. Secondly, although migration from

[115] Section 1 of the M-Net Consolidated Licence Conditions, 1987.

analogue to digital transmission networks and multi-channelling/ multiplexing on a single frequency would address spectrum scarcity and allow the licensing of digital terrestrial television (DTT) subscription broadcasting services. This would in turn raise other technological obstacles to the provision of free-to-air open windows, namely, that set top boxes would be required to view the encoded/encrypted transmissions of such services and furthermore given the proprietary nature of set top boxes any open windows would be limited to previous subscribers of such services. Open windows in such a digital environment and one wherein set-top boxes are not interoperable could be used to combat churn, but would not be able to access free-to-air audiences.

Currently, there is no obstacle to licensing new digital satellite subscription broadcasting services as frequency scarcity does not impact on satellite, however as with DTT subscription services they would be limited to persons who have set top boxes that can access their services encoded or un-encoded. Therefore, any new entrants to this market operating in a digital environment would only be able to access viewers with the appropriate receiving equipment. The only reason that M-Net has been able to provide an 'open window' service is because it is terrestrial and operates in the same analogue environment as the current free-to-air broadcasting services.

This raises some competition concerns as new entrants to the subscription broadcasting market would not be able to have access to free-to-air audiences comparable to M-Net. This competition concern would only exist for a limited period of time as once the migration from analogue to digital transmission networks commences M-Net would find itself in the same position as other digital subscription broadcasters in terms of being limited to audiences with the appropriate receiving equipment (set top boxes).

The Discussion Paper also stated that another reason why it would not be appropriate to consider free-to-air windows for subscription broadcasters is the

definition of a subscription broadcaster. A subscription broadcaster provides a broadcasting service to sections of the public in return for the payment of a fee. It is clear that there is a principle involved here, namely that subscription broadcasting services are not free-to-air commercial broadcasting services and as such should not be providing any broadcasting services to free-to-air audiences.

Commercial free-to-air broadcasting services are solely dependent on advertising in order to generate revenue. The Broadcasting Act specifically defines 'free-to-air service' as a service which is broadcast and capable of being received without payment of subscription fees. Subscription broadcasting services in contrast are defined as meaning a broadcasting service provided to an end user upon the payment of a fee. Section 30(6) takes this further and states that subscription broadcasting services may draw their revenues from subscriptions, advertising and sponsorships. In no case may advertising or sponsorships, or a combination thereof, be the largest source of revenue. It is clear from a regulatory perspective therefore that a subscription broadcasting service should not be competing in the free-to-air market with a free-to-air service for free-to-air audience, as it would have the unfair advantage of access to subscriber fees in addition to advertising revenue gained in the free-to-air broadcast period. It would also be active in an area for which it was not licensed, that is, it is licensed as a subscription broadcaster not a free-to-air broadcaster.

The Authority has, based on the above, decided that there is the need for a clear regulatory distinction between free-to-air broadcasting and subscription broadcasting. No new subscription broadcaster, therefore, shall be afforded the opportunity to have free-to-air windows.

14.9 The South African Broadcasting Corporation

Section 8(b) of the Broadcasting Act states that one of the objectives of the SABC is to provide sound and television broadcasting services, whether by analogue or digital means, and to provide sound and television programmes of information, education and entertainment funded by advertisements, subscription, sponsorship, license fees or any other means of finance.

The implications of section 8(b) of the Broadcasting Act are that the SABC can apply for a commercial subscription broadcasting licence. The Authority has, therefore, decided that the SABC's commercial arm should be allowed to apply for a subscription broadcasting licence if it so wishes. The Authority will, however, only entertain such application if the service is digital terrestrial or if it is a satellite or a cable service.

The Authority has also decided that the concept of universal free-to-air access to all 21 public broadcasting services will continue to be maintained.

The SABC's subscription broadcasting service shall, in accordance with section 11(1)(a) of the Broadcasting Act, be subject to the same policy and regulatory structures for commercial broadcasting services.

14.10 The Community Broadcasting Sector

The Authority does not agree with the NCRF's view that the definition of subscription broadcasting service, as contained in section 1 of the Broadcasting Act, does not mean that only commercial operators can be licensed to provide subscription broadcasting services.

The IBA Act and the Broadcasting Act define a community broadcasting service as follows: *"a broadcasting service which* –

(a) *is fully controlled by a non-profit and carried on for non-profitable purposes;*

(b) *serves a particular community ;*

(c) *encourages members of the community served by it or persons associated with or promoting the interests of such community to participate in the selection and provision of programmes to be broadcast in the course of such broadcasting service; and*

(d) *may be funded by donations, grants, sponsorships or advertising or membership fees, or any combination of the afore-mentioned;"*

Subscription broadcasting service on the other hand is defined by section 1 of the Broadcasting Act as: *"a broadcasting service provided to an end user upon payment of a fee"*.

The definition of community broadcasting service specifically excludes subscription as an option through which a community broadcasting services may be funded. Had it been the intention of the legislation to include subscription, it would have done so.

Section 32 (1) of the Broadcasting Act is also very clear and unambiguous on this issue, and provides as follows:

"Despite the provisions of this Act or any other law, a community broadcasting service licence may be granted by the Authority in the following categories:

(a) *Free- to- air radio broadcasting service;*

(b) *Free- to– air television service."*

It is the Authority's considered opinion that the law never intended a community broadcasting service to operate a subscription broadcasting service and that such would totally contradict the purpose for which a community broadcasting service is intended.

15. Control of Commercial Broadcasting Services and Cross-Media Control of Commercial Broadcasting Services

The Authority is required, in terms of section 31(3) of the Broadcasting Act, to make a recommendation to the Minister as to whether sections 49 and 50 of the IBA Act are applicable to broadcasting services carrying more than one channel. The Minister is required to table that recommendation in the National Assembly. The recommendation to be made by the Authority must not only deal with the question whether sections 49 and 50 of the IBA Act apply to broadcasting services carrying more than one channel but also with the extent and terms upon which such sections must apply to such broadcasting services.

The purposes of the ownership limitation could be summarised as being the promotion of viewpoint diversity; the redressing of historical imbalances; economic and cultural protectionism; and the promotion of competition in the broadcasting sector.

The fact is that diversity of viewpoints will always remain threatened by concentrated and common ownership. The owner of the concentrated and commonly controlled media will always have the potential and power to control and manipulate the information released through his or her media outlets. It is the potential of the owner to exercise editorial control that threatens the right to freedom of expression and the goal of the widest possible dissemination of diverse views.

Newspaper and television are the most important tools for shaping public opinion on issues. News, current affairs, and issue-responsive programming enable citizens to become fully informed and strengthen participatory democracy. Given the fact that the IBA Act empowers the Authority to manage frequency spectrum it remains crucial for the Authority to administer this limited national asset and ensure that it benefits all citizens.

The fundamental point to note with denying any person the right to control and own a means of communication lies in the fact that control and ownership of a communication media carries with them the power to select, to edit, and choose, manner and emphasis of presentation and the content of the communication, all of which are a critical aspect of the Authority's mandate to regulate broadcasting in the public interest.[116]

Media concentration poses a threat to media pluralism and freedom of expression; it restricts access to the media for all marginal or different groups; it eliminates non-commercial expression , favours certain political (those of media owners) over others, turns journalistic reporting into PR articles and view individuals in terms of numbers, percentages, and fictitious audience shares sold to advertisers.[117]

The ownership limitations are meant, in addition to redressing the imbalances in ownership, to ensure that services are extended to under serviced and previously disadvantaged groups by owners who understand their needs. It is through diverse promotion of ownership of the broadcasting services can promote, protect and develop our national and regional identity, culture and character as well as ensuring that needs of various language, cultural and religious groups are taken into account.

The limitations are, however, more justifiable when imposed on terrestrial free-to-air broadcasting services. The Authority's Triple Inquiry Report proposed that subscription broadcasting services should be more lightly regulated than terrestrial free-to-air broadcasting services.[118] Although the proposals were made in relation to the imposition of South African content quotas, the same argument could be made for the regulation of subscription broadcasting services in general.

[116] Willington Ngwepe, "The Constitutionality of the Ownership Limitations in the IBA Act" 18 SAJHL 446, 2002.
[117] Sandra B. Hrvatin, "Concentration of media ownership and its impact on media freedom and pluralism" Regional conference for South–East European and new EU member countries, 11-12 June 2004, at paragraph 6
[118] IBA – Triple Inquiry Report, Johannesburg, 1995, at paragraph 16.2.2.2.

The distinction between free-to-air broadcasting services and subscription broadcasting services is an important distinction.

The Authority has decided to recommend that sections 49 and 50 of the IBA Act should not apply to subscription broadcasting services.[119]

16. Technology Standards

The Authority has decided to only emphasise adherence to national transmission standards. The DVB standard is a standard adopted by Region 2 (Africa and Europe) of the International Telecommunications Union. It is also a South African national standard for satellite broadcasting. There are synergies between the DVB-S (for satellite broadcasting), DVB-T (for DTT) and DVB-C for (cable broadcasting).

The Authority has decided to follow international best practice principle of technological neutrality. The Authority has also decided not to regulate API, EPG and SMS. The Authority will also not mandate a CA standard for broadcasting platforms.

The Authority is aware of the need to be flexible and to have policy and regulations that, while protecting the consumer, allow innovation and creativity to flourish and business to grow by, amongst other things, not implementing rules and procedures which may inhibit as yet unforeseen developments. The Authority would, however, like to encourage interoperability of the STBs and also encourage the industry to work together in finding ways to develop standards that permit different CA systems to inter-operate on the same broadcasting platform, without compromising the commercial integrity of broadcasting operations.

[119] In the event of the Convergence Bill becoming the Convergence Act the provisions on the ownership and control of commercial broadcasting services as outlined in the Convergence Act will apply.

17. Competition

The ability of subscription broadcasting services to acquire content on an exclusive basis is fundamental to the provision of these services. For subscription broadcasting services, exclusivity is the primary basis on which these services will attract and retain subscribers. Some forms of exclusive arrangements in the broadcasting industry are, therefore, both efficient and desirable.

The Authority published a Position Paper and Regulations on 25 July 2003 on Sports Broadcasting Rights. The Regulations identify and list national sporting events and state that such events cannot be acquired exclusively for broadcasting by subscription television broadcasting licensees and that they must be broadcast live and in full or delayed live and in full or delayed and in full by a free-to-air television broadcasting licensee.[120] The Authority has, therefore, already dealt with the availability of national sporting events on subscription television on an exclusive basis.

The Authority has, however, decided not to regulate the exclusive acquisition of programming, other than national sporting events. The Authority will, however, ensure that licensed free-to-air sound and television broadcasting services that belong to the public broadcaster are not exclusively made available to a particular subscription broadcasting service.

The Authority has also decided not to regulate programme packaging/tiering. Competition issues that arise need may be dealt with by way of general competition law.

[120] ICASA's Sports Broadcasting Rights Regulations, 2003.

18. South African Content

18.1 Subscription Television Service

Section 53(2)(a) of the IBA Act gives the Authority the powers to specify conditions requiring broadcasting licensees to annually expend a specified sum of money, subject to reasonable yearly escalation or, alternatively, a specified minimum percentage of his or her gross revenue, on programmes which have a South African television content.[121]

South African television content is vital to ensuring that South African television reflects and develops South Africa's local, regional and national identities, cultures and characters. The inclusion of South African programming in the bouquets of subscription television broadcasting services is both a social necessity and economic opportunity for South Africa. South African programming creates a sense of pride and it also creates a competitive edge that relates to the unique cultural heritage and identity of South Africa. The potential economic benefits from the production of South African programmes for the television industry are considerable.

The Authority has decided, based upon submissions received, to establish an expenditure requirement for subscription television services who provide television bouquets given the different nature of these services compared to free-to-air television broadcasting services. The Authority shall in due course publish amended South African Television Content Regulations, for public and industry comment. The Authority would also like to ensure the development and creation

[121] Section 53(2)(a) of the IBA Act.

of vibrant, dynamic, creative and economically productive South African industries whilst promoting, protecting and developing local, provincial and national identity, culture and character. The Authority would also like to ensure that the cultural benefit of the programming is available to the viewers.

The Authority shall amend the ICASA South African Television Content Regulations, 2002, to take into account the findings of this Position Paper.

18.2 Subscription Sound Broadcasting Services

Subscription sound broadcasting services shall be required to ensure that at least 10% of the sound channels on their bouquets are of South African origin. The Authority is confident that subscription sound broadcasting services can easily comply with this requirement by carrying free-to-air sound broadcasting services on their bouquets and by introducing channels that are dedicated to the promotion and the development of South African music.

The Authority shall amend the ICASA South African music content Regulations, 2002, to take into account the findings of this Position Paper.

19. Must Carry Programming Obligations

Must-carry obligations have long been in place in the USA and in the following EU countries: Austria, Belgium, Denmark, Finland, France, Ireland, Germany, Netherlands, Portugal, Spain, Sweden, and the United Kingdom have must carry obligations. Greece, Italy, and Luxembourg do not have must carry legislation.[122]

[122] European Commission – An inventory of EU must carry regulations. A report to the European Commission, Information Society Directorate.

Must-carry rules require certain television or radio channels to be carried over certain networks. The reasons invoked are typically the universal accessibility of certain radio and television programmes and the need to guarantee a pluralistic offer to the public. Must-carry obligations usually benefit broadcasters with a public service remit, but commercial broadcasters also benefit in certain countries.[123]

Must-carry rules were traditionally applicable to cable networks. Some EU countries have extended must-carry rules to satellite and DTT. The Authority is aware that must-carry obligations have a considerable impact on network operators, since they restrict the operators' ability to use their own capacity freely and in a competitive way. This impact is all the more important since competition, in particular broadband, has moved many cable operators from mere radio and television markets to the 'triple play', i.e. not only into broadcasting but also in internet access and voice telephony, where they compete with internet access providers and more traditional telecommunications companies. Must-carry obligations can also impose a cost burden on network operators which operate in a commercial environment.[124]

Taking the above into consideration, the Authority shall prescribe, in licence conditions, the extent to which satellite/cable subscription television broadcasting services may carry the public service television channels of the SABC. The SABC shall be required to offer its public service channels subject to agreed terms. Digital terrestrial subscription television services shall be required to reserve a channel for public access television.

[123] European Commission – Must-carry obligations under the 2003 regulatory framework for electronic communications networks and services, at page 2.
[124] European Commission – Must-carry obligations under the 2003 regulatory framework for electronic communications networks and services, at page 3.

20. Empowerment

Black economic empowerment is one of the corner stones of transformation and a vehicle to address the imbalances that exist in South Africa. For the purposes of analysing ownership and empowerment issues with respect to broadcasting services, the Authority defines 'historically disadvantaged persons' as follows:

"historically disadvantaged persons" means -

(a) South African citizens who are black people, women or people with disabilities and that black people are defined to include `Africans, Indians and Coloureds';
(b) an association, a majority of whose members are natural persons referred to in (a) above;
(c) a juristic person other than an association, whereby natural persons referred to in (a) and (b) have, directly or indirectly, more than twenty-five percent of such juristic person's issued share capital or members' interests and are able to control a majority of the juristic person's votes;
(d) a juristic person whereby natural persons, associations and/or juristic persons referred to in (a), (b) or (c) have, directly or indirectly, more than twenty-five percent of such juristic person's or association's issued share capital or member's interest and are able to control a majority of its votes;
(e) a juristic person whereby natural persons, associations and/or juristic persons referred to in (a), (b), (c) or (d) above possess the power to direct or cause the direction of the management and policies thereof whether through the direct or indirect ownership of issued share capital, by contract or otherwise.

The draft ICT BEE Charter submitted to the Minister of Communications recognises the Authority's jurisdiction with respect to the broadcasting and telecommunication sector. The Authority, in giving effect to the Broad Based

Black Economic Empowerment Act, has submitted proposals for amending its statutes, in line with draft ICT BEE Charter, as follows:

> *"The Authority may make regulations with regard to any matter necessary and incidental to the exercise of its power and functions, which are consistent with the objects of the Act or the related legislation. Without derogating from the generality of this subsection, the Authority may make regulations with regard to amongst others the Broad Based Black Economic Empowerment."*

These Regulations will provide a regulatory requirement for all licensees with respect to empowerment.

21. Employment Equity and Human Resources Development

Section 3(7) of the Broadcasting Act states that the human resources development strategy for 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. Section 39 of the Broadcasting Act states that all licensees licensed in terms of the IBA Act and the provisions of the Broadcasting Act must comply with the provisions of the national policy regarding skills development and specific human resource development conditions determined by the Authority.

The Authority has played an important role in ensuring that licensees submit reports on their training and development plans. Subscription broadcasting services shall be subject to the same rules. All licensees shall be required to demonstrate to the Authority how they intend to contribute to human resources development, job creation and economic development. In addition to this, a licensee shall be required to submit to the Authority their statistics/audit on race, gender and people with disabilities with regards to employment, promotion and training.

22. Code of Conduct for Broadcasters

The purpose of the Code of Conduct is to prevent offensive programming from being broadcast into South Africa. It is, however, difficult to enforce the current Code of Conduct on subscription broadcasting services which package foreign channels for viewing by subscribers, since programming on a channel may be broadcast at an appropriate time from the perspective of the protection of minors in the country in which the channel was packaged while, due to different time zones the channel may be broadcast in South Africa and in other African countries at a time which may be inappropriate from the perspective of protecting minors. The Authority's current Code of Conduct is suitable for an analogue environment.

Section 56(1) of the IBA Act states that all broadcasting licensees shall adhere to the Code of Conduct for Broadcasting services as prescribed. Section 56(2) provides that the provisions of section 56(1) shall not apply to any broadcasting licensee if he or she is a member of a body which has proved to the satisfaction of the Authority that its members subscribe and adhere to code of conduct enforced by that body by means of its own disciplinary mechanisms, and provided such a code of conduct and disciplinary mechanisms are acceptable to the Authority.

In light of the above and the fact that digital set-top-boxes allow the user to control the content viewed, subscription broadcasting services shall, pending a body contemplated in section 56(2) of the IBA Act, adhere to the Code of Conduct for Broadcasters promulgated from time to time by the Authority. A body contemplated in section 56(2) shall be afforded an opportunity to develop and adopt its own Code of Conduct for subscription broadcasting services within twelve months of the publication of the Position Paper. The Authority will need to be satisfied that members of the subscription broadcasting services industry subscribe and adhere to the Code. The Authority will then amend the current

Code of Conduct to make it clear that it applies to free-to-air broadcasting services and not to subscription broadcasting services.

23. Advertising Limitations

The Authority has decided not to impose advertising limitations on multi-channel subscription broadcasting services. It is easier to stipulate advertising limits for an analogue television subscription service with a single channel, but difficult for multi-channel subscription broadcasting services in a digital environment. Regulating advertising on multi-channel subscription broadcasting services could mean stipulating advertising limits for individual channels on the bouquet. This would defeat the intention of section 30(6) of the Broadcasting Act since it would mean more advertising minutes per hour for subscription broadcasting services, when the individual channels are viewed collectively. Stipulating advertising limits would also restrict subscription broadcasting services' freedom of placing advertisements on channels of their choice.

Subscription broadcasting services shall, however, be required to ensure compliance with section 30(6) of the Broadcasting Act. Subscription broadcasting services shall be required to submit annual audited statements to the Authority indicating their different sources of revenue and the revenue generated through advertising and sponsorship. This would give effect to the legislative requirement that advertising or sponsorships, or a combination thereof, should not be the largest source of revenue.

24. Conclusion

The Authority would like to thank all stakeholders, interested parties and everyone who made submissions and participated in this inquiry. Written and oral submissions reflected a high level of expertise and knowledge and contributed to a better understanding of the subscription broadcasting industry. The Authority has been mindful of the need to, amongst others, ensure fair competition between broadcasting licensees, encourage investment in the South African broadcasting industry, and to promote stability of the broadcasting industry. The Authority is confident that the regulation of subscription broadcasting and the introduction of new entrants into the subscription broadcasting market will dramatically change the way the market is structured, introduce competition, address niche market needs and provide consumers with choice and diversity in programming.

The first round of licensing subscription broadcasting services will be done by the issuing of the ITA in the last quarter of the 2005/2006 financial year, and thereafter mero motu applications shall be accepted.

The Authority would like to urge the subscription broadcasting services industry to ensure that the code of conduct for subscription broadcasting services is drafted and presented to the Authority for approval by 01 June 2006.

This Position Paper is also available on the Authority's website www.icasa.org.za. The Position Paper will also be available in Sepedi, Sesotho, Setswana, Siswati, isiNdebele, Tshivenda, isiXhosa, Xitsonga, isiZulu, and Afrikaans.

Questions should be directed to Pfanani Lishivha: Projects Manager, Policy Development and Research Department, ICASA, at (011) 321 – 8200, or e-mail: plishivha@icasa.org.za.

BIBLIOGRAPHY

Statutes

1. The Broadcasting Act, Act No.4 of 1999.
2. The Constitution of the Republic of South Africa, 1996.
3. The Independent Broadcasting Authority Act, Act No.153 of 1993.
4. The Independent Communications Authority of South Africa Act, No.13 of 2000.

Regulations

5. IBA Private Sound Broadcasting Service Licence Fees Regulations, May 1997.
6. IBA Regulations Regarding Television Licence Fees, September 1997.
7. Code of Conduct for Broadcasting Services, 7 March 2003.
8. ICASA South African Content on Television and Radio, 2002.
9. ICASA South African Music Content Regulations, 2002.

Journals

10. Ngwepe, W – "The Constitutionality of the Ownership Limitations in the Independent Authority Broadcasting Act", in the 18 SAJHR 462 (2002).

Newsletters

11. Australian Broadcasting Authority Update, Number 132, June 2004.

Policy Papers

12. Australian Broadcasting Authority – Review of Australian Content on Subscription Television. Discussion Paper. Australian Broadcasting Authority, Sydney, (2002).
13. Department of Communications - White Paper on Broadcasting Policy. DoC Pretoria, (1998).
14. European Commission – An inventory of EU 'must carry' regulations. A report to the European Commission, Information Society Directorate. February 2001.
15. European Commission – The Development of the Market for Digital Television in the European Union. Report in the context of Directive 95/47/EC of the European Parliament and of Council of 24th October 1995 on the use of standards for the transmission of television signals. European Commission. Brussels. 9 November 1999.
16. European Commission – Green Paper on the convergence of telecommunications, media and information technology, and the implications for regulation towards an information society approach. European Commission. Brussels. 3 December 1997.
17. Goldsmith, B; Thomas, J; O'Regan, T; Cunningham, S – Cultural and Social Policy Objectives for Broadcasting in Converging Media Systems. Australia Key Centre for Cultural and Media Policy. May 2001.
18. Independent Broadcasting Authority - Triple Inquiry Report. IBA. Johannesburg, (1995).
19. Independent Broadcasting Authority - Position Paper on the Introduction of the First Free-to-Air Private Television Service in South Africa. IBA. Johannesburg, (1997)
20. Independent Broadcasting Authority - Position Paper on a Definition of Advertising, the Regulation of Infomercials and the Regulation of Programme Sponsorship. IBA. Johannesburg, (1999).

21. Independent Communications Authority of South Africa - Position Paper on the Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences. ICASA. Johannesburg, (2004).
22. Office of the Director of Telecommunications Regulation, Ireland – Licensing Digital Terrestrial Television. Consultation Paper. Dublin, Ireland. 7 October 1999.

Unpublished Research Papers

23. Castejon, L.; Feijoo, L; Perez, J – "Telecommunications: the Bridge to Globalisation in the Information Society", a paper presented at the XIII Biennial Conference. Beunos Aires, Argentina. 2-5 July 2000.
24. Hrvatin, S.B – "Concentration of media ownership and its impact on media freedom and pluralism", a paper presented at the Regional Conference for South-East European and new EU member countries. Bled, Slovenia. 11-12 June 2004.

Websites

25. http://www.audiovizual.ro/reglemantarieuropene.htm
26. http://www.bild.net/dir954Ec.htm
27. http://www.ofcom.org.uk
28. http://www.pc.gov.au/inquiry/broadcast/finalreport/chapter10.pdf
29. http://www.pjb.co.uk/dbt/Chapter2.htm

Submissions

30. Bluestar Entertainment Network (Proprietary) Limited.
31. Caxton and CTP Publishers and Printers LTD.
32. Malcolm Ramsay.
33. M-Net.

34. Multichoice Africa (Pty) Ltd.
35. National Film and Video Foundation.
36. National Community Radio Forum.
37. Orbicom (Proprietary) Limited.
38. South African Broadcasting Corporation.
39. Sentech Limited.
40. Johnnic Communications Limited.
41. National Association of Broadcasters.
42. WorldSpace (Pty) Ltd.