



NAB
National Association of Broadcasters

**The NAB written submission to ICASA Draft Regulations
on Processes and Procedures:
Class and Individual Licences**

11 August 2015

1. Background

- 1.1. On 26 June 2015, the Independent Communications Authority of South Africa (“ICASA”), published draft regulations for public comment, and these related to:
 - 1.1.1. Processes and Procedures Regulations for Individual Licences (“draft Individual Regulations”)¹.
 - 1.1.2. Processes and Procedures Regulations for Class Licences (“draft Class Regulations”)² (“hereto referred to as both draft Regulations”).
- 1.2. Both draft Amendment Regulations are introduced to amend the 2010 Processes and Procedures Regulations for both Individual and Class licences (“the 2010 Regulations”). The closing date for written comments is 11 August 2015. In the event that ICASA decides to hold oral hearings for this process, the National Association of Broadcasters (“the NAB”) would like to be given the opportunity to participate.
- 1.3. The NAB is the leading representative of South Africa’s Broadcasting industry. The NAB aims to further the interests of the broadcasting industry in South Africa by contributing to its development. The NAB membership includes all three tiers of broadcasting as well as signal distributors and associate members, these include:
 - 1.3.1. Three television public broadcasting services, and nineteen sound broadcasting services of the South African Broadcasting Corporation of South Africa (“the SABC”);
 - 1.3.2. The commercial television broadcasters (e.tv, DStv, M-Net and ODM) and sound broadcasting licensees (that include media groups Primedia, Tsiya, Kagiso, MSG Afrika and AME);
 - 1.3.3. Both the licensed common carrier and the selective and preferential carrier broadcasting signal distributors;
 - 1.3.4. Over thirty community sound broadcasting licensees and a community television broadcasting service, Trinity Broadcasting Network (trading as Faith Terrestrial);

¹ Published in government gazette number 38921

² Published in government gazette number 38917

- 1.3.5. A range of industry Associates, including training institutions.

2. General Overview

ICASA does not provide the rationale for the proposed amendments to both draft Regulations. On the face of it however, the amendments seem to among others align both draft Amendment Regulations with the Electronic Communications Amendment Act 1 of 2014 (“the ECA”)³. Having considered the draft Regulations, the NAB is of the view that should these be adopted in their current state, they could yield undesired consequences. The NAB will therefore address specific sections of both draft Regulations that are concerning. The most critical of these being the transfer of control provisions and the definitions related thereto. The NAB will also address non- payment of fees and the issuing of ITA’s for both class sound and television services.

3. Processes and Procedures Regulations for Individual Licences⁴

3.1. Definition of Control

- 3.1.1. The draft Regulations seek to amend the definitions section of the 2010 Regulations to include the definition of “control”.

- 3.1.2 The NAB’s understanding is that control, as referred to in these draft Regulations, relates to transfer of licences, and therefore does not warrant a detailed comment of its understanding of “control” as defined in the broadcasting sense. However if our understanding is incorrect, the NAB wishes to set out the following:

- 3.1.3 While the ECA does recognise the concept of control, it is worth noting that the ECA does not define the term. On the other hand, the repealed Independent Broadcasting Act (“the IBA Act”), in section 1 of Schedule 2 thereto provided a definition of deemed control of a commercial broadcasting service, and this definition was abandoned with the promulgation of the ECA in 2006.

3.1.4 ICASA Ownership and Control Findings:

³ Clause 11 which requires that a licence transfer or licence transfer of control application will be evaluated on the basis of...equity ownership by HDP’s.

⁴ Members were not unanimous on the positions set out in paragraphs 3.1 and 3.2. In particular, these paragraphs are not endorsed by M-Net, Multichoice and Orbicom who will make an individual submission to the Authority on these matters.

3.1.5 In 2011, and in view of the lack of clarity around control, ICASA issued its Findings Document on the Review of Ownership and Control of Electronic Services and Limitations on Broadcasting, Electronic Communications Services and Electronic Communications Network Services (“the Ownership Findings”) and ICASA had the following to say on control:

The Authority’s position is that control should be viewed from a multidimensional perspective..., not simply on the basis of financial interest..[ICASA] is of the view that control should comprise 25% of the shareholding or the right or the ability to direct or otherwise control the majority of the votes attached to the shareholders’ issued shares, or the right or ability to appoint or remove directors holding a majority of voting rights at meetings of the Board of directors, or the right to control the management of the enterprise.

3.1.6 The position ICASA adopted in its Ownership Findings simply reflected the position advocated for by the IBA Act. As we understand the provision, a person would, in effect, be deemed to control a company whenever such person:

3.1.6.1 held 25% of the shareholding in a company;

3.1.6.2 had the right or the ability to direct or otherwise control the majority of votes attached to company’s issued share capital;

3.1.6.3 had the right or the ability to appoint or remove directors holding a majority of voting rights at Board level; or

3.1.6.4 had the right to control the management of the enterprise.

3.1.7 Furthermore, in 2013, in its Final Report on The Review of Broadcasting Regulatory Framework Towards a Digitally Converged Environment in South Africa, ICASA confirmed that it will be pursuing its 2011 recommendations regarding ownership and control.

3.1.8 The NAB is of the view that it is necessary for the Authority to clarify in the draft Regulations if the proposed definition of "control" will only apply for the purposes of regulation 11 and 12 of these Regulations (specific to the issue of an application to transfer control of an individual licence) and that the

definition will have no impact on the concept of control as dealt with in various provisions of the ECA.

3.1.9 Draft Regulations Proposals:

3.1.10 The draft Regulations propose the following definition for control: *“control” is as contemplated in the Companies Act No 71 of 2008, as amended”*.

3.1.11 The NAB is of the understanding that the Companies Act concept of "control" is outlined in section 2(2) of the Companies Act, as read together with section 3(1)(a) with the present control threshold being 50%.

3.1.12 The NAB submits that to the extent that ICASA seeks to introduce the definition of control, this needs to be done via a legislative amendment process, and not by regulation as it is a policy issue. The NAB therefore proposes that ICASA deletes the proposed definition of control in the draft Regulations in its entirety.

3.1.13 The NAB wishes to further remind the Authority that in the National Integrated ICT Policy Review Report of 2015, it has been recommended that proposals made by ICASA on issues of ownership and control be formally tabled to Parliament through the Minister.

3.1.14 The NAB therefore reiterates the need to address the current policy vacuum and humbly submits that the Authority reviews the proposed definition section of the draft Regulations as well as sections 11 and 12 to provide greater certainty.

3.2 Definition of Transfer of Control

3.1.1 The draft Regulations propose a definition for Transfer of Control. Yet again, in our view, the definition proposed by the Authority defines control for a specific administrative purpose. However, if our understanding is incorrect, then the definition for Transfer of Control is unnecessary and may undermine a clear reading of section 13(1) of the ECA. Accordingly, we submit that if this definition is deleted then consequently any reference to the phrase “transfer of control” in the draft Regulations should also be deleted. The NAB looks forward to the Authority clarifying that control, as defined in the regulations, relates only to the process of transferring a license.

3.1.2 In paragraph 6.2.1 of the draft Regulations, ICASA seeks to amend Regulation 12, and substitute the term “may” (as was originally the case in the 2010 Regulations), and replace it with “must”. The NAB proposes that the status quo be retained (“may”), as we believe ICASA should have the flexibility and discretion to refuse or allow the renewal or transfer of an individual Licence based on the merits of the application.

3.2 Non-payment of fees

3.2.1 The draft Regulations seek to amend Regulation 14 to empower ICASA to refuse to consider an application for a renewal, change of information or transference of a license if the applicant is in arrears on any fees prescribed or legislated in terms of the Act.

3.2.2 While the NAB does not condone non-payment for any fees due to ICASA by its members, the NAB believes that the decision to withhold services should not be arbitrary, but must be premised on some sound accounting practices. Before any services could be withheld, ICASA ought to ensure that proper communication has been had with the licensee in question, informing the licensee of its indebtedness.

4 Processes and Procedures Regulations for Class Licences

4.1 Non-payment of fees

4.1.1 Similarly, the draft Regulations seek to amend Regulation 5 of the 2010 Regulations to empower the Authority to refuse to consider an application for a renewal, change of information or transfer of a license if the applicant is in arrears on any fees prescribed or legislated in terms of the Act.

4.1.2 Likewise, the NAB does not condone non-payment for any fees due to ICASA by its members, the NAB believes that the decision to withhold services must be premised on some sound accounting practices. Before any services could be withheld, ICASA ought to ensure that proper communication has been had with the licensee in question, informing the licensee of its indebtedness.

4.2 Invitation to apply for class broadcasting licences

4.2.1 Upon its promulgation in 2006, the ECA introduced a registration process for class licences. Sections 16 and 17 of the ECA, have over the years opened up ICASA to a flurry of registrations of class licences, as registrations for class licences could be submitted at any time to ICASA⁵. In the advent of spectrum scarcity particularly in the FM frequency band, in the metropolitan areas, and in the interest of efficiencies in the administration processes of ICASA, it is critical that interventions be introduced. To this end, ICASA seeks to introduce the following amendments to regulation 7 of the 2010 Regulation which:

4.2.1.1 Empower ICASA to restrict the receipt of class community broadcasting service registrations to February and October. The NAB believes the limitation should apply to both class sound and class television licence registration. As it stands in the draft Regulations, the limitations apply only to class sound broadcasting licence registrations;

4.2.1.2 Empower ICASA to publish a notice inviting registrations for class broadcasting services in provinces/areas which the authority deems fit. Yet again, this provision should apply not only to class sound broadcasting licences but to class television licences as well.

5 Conclusion

5.1 The NAB welcomes the opportunity to make its written representation to the draft Regulations and we trust our inputs will assist the Authority in finalising the proposed Regulations.

⁵ Section 16(2) of the ECA.