



## **Broadcasting Regulation in South Africa, circa 2010**

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The Electronic Communications Act (EC Act) came into force in 2006. The driving force behind the legislation was the convergence of networks and services. It was originally called the Convergence Bill.

The EC Act replaced the then Telecommunications Act and the Independent Communications Authority of South Africa Act (IBA Act), which had regulated the broadcasting segment of the industry. The Broadcasting Act, however, which regulates the state-owned South African Broadcasting Corporation, was left largely intact.

The EC Act includes provisions regulating telecommunications on the one hand and broadcasting on the other. However, the market segments are still regulated separately and differently, albeit under the same piece of legislation. Many of the provisions regarding broadcasting were copied verbatim from the IBA Act.

In a recent wave of activity coming from the Minister of Communications (Minister) and the Independent Communications Authority of South Africa (ICASA), it seems that the stage is being set for an altered regulatory landscape for the broadcasting industry.

ICASA has recently published Digital Migration Regulations. It also has initiated public debate on regulations for IPTV and Mobile TV, as well as issued proposed amendments to regulations regarding ownership and control and sports broadcasting rights.

The Minister has published draft legislation regarding public broadcasting, which would replace the Broadcasting Act, as well as a Strategy on Local and Digital Content Development and a call for nominations to the Production Advisory Body.

In this article, we look briefly at this flurry of activity and try to answer the question whether it will lead to a more effectively and efficiently regulated industry.

### **Digital Migration Regulations**

On 15 Feb 2010, ICASA published final Digital Migration Regulations following an aborted attempt to finalise the regulations in July 2009. ICASA considered the Broadcasting Digital Migration Policy published by the Minister in September 2008, although it did not follow it completely.

The publication of the Digital Migration Regulations was accompanied by a Reasons Document on Digital Migration (Notice 132 of 2010), detailing the process and ICASA's reasoning.

Back in 2008 when the Minister published the Digital Migration Policy, it was expected that the process would be 100 percent complete by 2011. The Digital Migration Regulations set roll-out targets of 50 percent coverage by 2011, 80 percent by 2012 and 90 percent by 2013, pushing the date for full implementation back indefinitely.

## **IPTV**

On 16 February 2010, ICASA published a Discussion Document on the Regulation of Internet Protocol TV (Notice 142 of 2010), for public comment, due 26 March 2010. ICASA indicates that the Discussion Document will lead to a regulatory framework for IPTV. It sets out comparative regulatory frameworks in various other jurisdictions and concludes with some questions regarding the appropriate manner (if at all) to regulate IPTV in South Africa.

This Discussion Document is not likely to have any real impact in the short term. It asks fundamental questions like whether the EC Act should be amended to treat electronic communications and broadcasting licensees similarly. Although the answer to this question is arguably yes (but not necessarily or only because of IPTV), this will not likely come about anytime soon.

A further question is whether this should be a priority area for ICASA to be focusing its resources, given that IPTV is happening anyway, outside of the broadcasting regulatory framework. An Internet access provider (over which IPTV is delivered) must be licensed as an electronic communications and electronic communications network provider. The IP content provider does not have to be licensed at all in South Africa.

In any event, there is a severe lack of broadband network that is available in South Africa. Without a ubiquitous broadband network, IPTV will not be available to the majority of South Africans anytime soon.

## **Mobile TV**

On 17 November 2009, ICASA published draft regulations (Notice 1536 of 2009) relating to the use and application procedures and criteria for the licensing of radio frequency spectrum for the provision of mobile TV broadcasting services.

The draft regulations propose to assign two sets of frequencies to be licensed to two separate entities. Only those that already have TV service licenses or have an agreement with a TV service licensee will be able to apply for the frequencies.

It is proposed that a licensee must carry the SABC channels on at least 20 percent of the spectrum, and may carry other broadcasters programming but not in excess of its own programmes.

To date, ICASA has not finalised these regulations despite that it was anticipated at one point that the licensing would precede the 2010 Soccer World Cup.

### **Sports Broadcasting Rights**

On 12 February 2010, ICASA gave notice of its intention to review the 2003 Sports Broadcasting Rights Regulations, setting out new criteria for determining national sporting events (Notice 125 of 2010). These draft regulations follow a Discussion Document published in October 2008.

In addition to setting out new criteria for determining national sporting events, the draft regulations will require licensees that enter into commercial arrangements to include alternative dispute resolution procedures, which must precede any complaint filed with ICASA. ICASA, however, abandoned all issues related to competition preferring to leave those issues to a separate proceeding (not yet underway).

Given the elapse of more than 15 months between the publication of the Discussion Document and the draft regulations, it is unlikely that the regulations will be finalised with any great urgency. In any event, the most important competition issues are left for another day.

### **Ownership and Control**

ICASA published a Discussion Document on Ownership and Control on 17 November 2009 (Notice 1532 of 2009).

On the broadcasting side, the discussion is pretty much a repeat of the review process that was carried out beginning in 2002 by ICASA. ICASA proposed some relaxation of the rules on foreign and cross ownership (originally set out in the IBA Act). Those

recommendations, however, were ignored by the Department of Communications and Parliament in the enactment of the EC Act.

Given the passage of time and changes in the industry, it is not clear why the foreign and cross ownership restrictions are still in force. One of the original reasons behind the limitations was the scarcity of radio frequency spectrum. However, the issue will be less important with the coming of digital migration, IPTV and Mobile TV.

In any event, ICASA has the authority to grant exemptions under the EC Act in respect of foreign and cross ownership and control issues. Perhaps ICASA should be working on criteria for that to happen systematically rather than embarking on a second exercise to recommend changes to the EC Act.

### **Public Service Broadcasting Bill**

The Minister of Communications published a Notice inviting comments on a draft Public Broadcasting Service Bill, a Charter for the South African Broadcasting Corporation and a Charter for Community Broadcasters. The document was published in Government Gazette 32663 dated 28 October 2009. A Discussion Paper was previously published on 20 July 2009.

The Bill introduces a Public Service Broadcasting Fund (PSB Fund). The Bill would do away with TV licence fees and increase personal income tax by up to one percent to be set aside for broadcasting. Although no amendment to the Income Tax Act has been proposed, the Income Tax Act would have to be amended to effect this change. The PSB Fund is to be administered by the Media Development and Diversity Agency (MDDA), also requiring amendment to the Media Development and Diversity Act.

The money in the PSB Fund would be used for the public service division of the SABC, content development, subsidies for other public service broadcasting, such as the SABC's international division, and signal distribution.

The Bill also re-conceptualises community broadcasting as partnerships between community broadcasters and municipalities, requiring municipalities to contribute access to facilities and infrastructure and financial support. It has been argued that this fundamentally undermines the independence of community broadcasting.

Perhaps due to recent difficulties experienced at the SABC in terms of governance, the Bill introduces new powers for the Minister of Communications. The powers have been criticized as extraordinary, turning the public broadcaster into a state broadcaster.

The Bill has also been criticised because it attempts to align public service broadcasting to “the development goals” of South Africa. Although there can be little criticism in promoting development, the main criticism is the lack of clarity and definition of concepts and terms.

Indeed, the Bill seems to have been hastily put together, with numerous typographical, grammatical and other inadvertent errors, creating a confusing piece of legislation. For example, there are two separate definitions of “public broadcasting service” in the Bill as well as a definition of “public service broadcasting”. The Bill also has a full chapter on “the South African broadcasting system”, a concept which is not defined.

Although it is likely that new public service broadcasting legislation will emerge, it will not likely happen this year. When it does, it is hoped that many of the problematic issues will be dealt with to avoid a new crises in public service broadcasting.

### **Strategy on Local and Digital Content Development**

On 4 September 2009, the Minister of Communications invited the public to comment on a draft Local and Digital Content Development Strategy (Notice 1218 of 2009). The strategy was developed in anticipation of the multichannel broadcasting environment to be brought about by digital migration.

The Strategy, among other things, proposes the establishment of a Digital Content Fund and Content Generation Hubs. The document states that the Strategy focuses on funding and infrastructure development to address developmental goals relating to imbalances of the past around access, national identity, and social cohesion, and building competitiveness in the content industry.

The Strategy also proposes replacing the South African Production Advisory Body with a Local Content Advisory Body. Meanwhile, the Minister has called for nominations to the South African Production Advisory Body (General Notice No 68 dated 5 February 2010).

### **CONCLUSION**

The flurry of regulatory and policy activity mentioned herein likely will not have significant impact on the broadcasting industry in South Africa in the short term. However, some items will have an impact in the medium term, such as the planned 90 percent completion of digital migration by 2013. It is likely that the regulations for awarding mobile TV spectrum will be finalised within a couple of years, with licensing to follow. As for the ownership and control changes, given its history, it is not likely that any changes will be effected timeously. This might be due to inefficiencies in the regulatory

framework, or it might stem from the governments dual interests - in regulating the industry in the public's interest and at the same time owning the SABC (which has not only a public broadcasting, but also commercial and international divisions). Finally, it is likely that the PSB Bill will be passed in the next couple of years. However, without significant work, dealing with some very real issues raised by commenters, as well as tightening up the language of the Bill to avoid a confusing piece of legislation, it is not likely to have a positive impact.

In conclusion, although recent regulatory activity is appropriate and should be welcomed, it is not likely to have any real impact on the industry in the immediate future, but will likely change the regulatory landscape in the medium and longer term.

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