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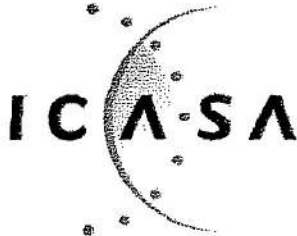
Independent Communications Authority of South Africa

General Notice

1594 ICASA Act (13/2000): Findings Document on the Commissioning of Independently Produced South African Programming in terms of the Act	3	32762
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GENERAL NOTICE

NOTICE 1594 OF 2009



Independent Communications Authority of South Africa

Pinmill Farm, 164 Katherine Street, Sandton

Private Bag X10002, Sandton, 2146

**FINDINGS DOCUMENT ON THE COMMISSIONING OF INDEPENDENTLY
PRODUCED SOUTH AFRICAN PROGRAMMING IN TERMS OF SECTION 4(C)
OF THE ICASA ACT NO 13 OF 2000, READ WITH SECTION 61(1) OF THE
ELECTRONIC COMMUNICATIONS ACT NO 36 OF 2005.**

I, Mr. Paris Mashile, Chairperson of the Independent Communications Authority of South Africa ("the Authority"), hereby confirm that the findings contained herein were made in terms of section of 4(C) the ICASA Act No 13 of 2000, read with section 61(1) of the Electronic Communications Act No 36 of 2005, and approved for final publication by the Council of the Authority.



**PARIS MASHILE
CHAIRPERSON**

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ACKNOWLEDGEMENTS

The Independent Communications Authority for South Africa ("the Authority") would like to acknowledge the contributions of various stakeholders and other members of the public who participated in the discussion document, public hearings and draft regulations to develop and finalise the regulations on Commissioning of Independently Produced South African Programming.

The consultation was undertaken by a Council delegated committee comprising the following ICASA officials:

- | | |
|-------------------------|--------------------------|
| 1) Mr. Robert Nkuna | Councillor (Chairperson) |
| 2) Ms. Nomvuyiso Batyi | Councillor |
| 3) Ms. Mamedupe Kgatshe | Project Leader |
| 4) Mr. Siphwe Hlongwane | Researcher |
| 5) Mr. Paseka Maleka | Licensing Officer |
| 6) Mr. Sean Rankin | Licensing Officer |
| 7) Mr. Fumani Baloyi | Legal Adviser |

The following stakeholders participated in the consultation process:

- 1) Independent Producers Organisation (IPO)
- 2) M-NET
- 3) On Digital Media (ODM)
- 4) South African Screen Federation (SASFED)
- 5) South African Broadcasting Corporation (SABC)
- 6) Walking On Water Television (WOWtv)
- 7) e.TV
- 8) National Film and Video Foundation (NFVF)
- 9) Telkom Media
- 10) National Association of Broadcasters (NAB)

SECTION A: INTRODUCTION AND BACKGROUND

1. INTRODUCTION

- 1.1. The Authority had a number of consultations on Commissioning of Independently Produced South African Programming to solicit information from the industry players which will assist in determining the appropriate regulatory mechanisms to be applied in addressing the problems in relation to commissioning.
- 1.2. On 7 November 2008 the Independent Communications Authority of South Africa ("**the Authority**") published the Discussion Document on Commissioning of Independently Produced South African Programming ("**the Discussion Document**¹") in the Government Gazette ("**the Notice**").
- 1.3. Hearings were held on 23 and 24 February 2009, in which the broadcasting service licensees (SABC, e.tv, M-NET, WOW Tv, Telkom Media and ODM), the IPO, SASFED, and NFVF presented their submissions in response to the matters raised in the Discussion Document.
- 1.4. The Authority further published a Position Paper and Draft Regulations on the 19th of June 2009 in the Notice with the closing date for submissions as the 4th of August 2009. Most of the submissions on the Draft Regulations did not raise new issues addressed in the submissions on the discussion document. Where new issues were raised in the submission to the draft regulations, they are reflected in this document.
- 1.5. This report sets out the submissions of the various participants and the findings and conclusions. It also sets out the approach the Authority followed in addressing the matters as raised in the Discussion Document, Hearings and Draft Regulations.

¹ Government Gazette, no. 31580, 7 November 2008

2. LEGISLATIVE FRAMEWORK

- 2.1. The Authority is empowered in terms of Section 61(1) of the Electronic Communications Act, 36 of 2005 ("**EC Act**") to prescribe regulations regarding the commissioning of independently produced South African programming. Section 61 (1) states that:

"The Authority may prescribe regulations applicable to broadcasting service licensees regarding the commissioning of independently produced South African programming."

- 2.2. The South African Television Content Regulations ("**Television Content Regulations**") define "Independent Television Production²" as:

"a production of South African television content by a person not directly or indirectly employed by any broadcasting licensee or by a person who is not controlled by or is not in control of any broadcasting licensee".

- 2.3. The Copyright Act 98 of 1978 ("**Copyright Act**") regulates aspects of intellectual property pertaining to copyright. Section 21(1) (a) thereof provides the general rule regarding the ownership of copyright. In terms of this section the author of the work will be the first author of the copyright. However, there is an exception to the general rule, namely where the making of a cinematographic film has been commissioned by a third party. In such event the ownership of the copyright in the cinematographic film may belong to the commissioning party³.

- 2.4. In order to discharge the above objects, the Authority has appointed a committee in terms of section 17 of the Independent Communications Authority of South Africa Act, 2000 Act, No 13 of 2000 ("**ICASA Act**")⁴. The tasks of the

² See Government Notice No. 28454, 31 January 2006

³ Section 21(1)(c) Copyright Act

⁴ Sections 17(1) and (2), ICASA Act

committee were to develop the discussion document, hold hearings and draft and finalise the regulations.

2.5. We set out below summaries of the submissions by the various participants.

SECTION B: SUBMISSIONS

3. ANALYSIS OF SUBMISSIONS PRESENTED ON THE DISCUSSION DOCUMENT AND DRAFT REGULATIONS

It is noted that the conventional way of analysing submissions is to deal with each submission received in its totality. However, for the purposes hereof the Authority will depart from this convention and rather deal with each question raised in the Discussion Document followed by an analysis of each party's submission in respect to the question posed. To the extent that any of the participants did not respond to a specific question posed by the Authority, no response in respect of such question shall be recorded against that participant. The Discussion Document raised thirty eight pertinent questions and in analysing the submissions the order followed in the Discussion Document will be adhered to. Furthermore the analysis will include new issues that are raised in the submissions to the Draft Regulations. The analysis of all the questions raised follows hereunder.

3.1. WHAT ARE THE MAIN CHALLENGES CONFRONTING A POSSIBILITY FOR A SMOOTH COLLABORATION BETWEEN BROADCASTING SERVICE LICENSEES AND INDEPENDENT PRODUCERS?

3.1.1. NFVF submits the following are the challenges facing the industry:

- 3.1.1.1. insufficient budgets;
- 3.1.1.2. licensing of South African programs based on the dumping prices of foreign programs;
- 3.1.1.3. full ownership of intellectual property rights on all/most platforms by the broadcasters means that independent producers are un-able to secure ancillary revenue from other platforms;
- 3.1.1.4. extensive bureaucratic contractual processes;
- 3.1.1.5. continuous use of "one budget fits all" approach; and
- 3.1.1.6. continued resistance by broadcasters to use seasons for programming.

3.1.2. ODM is of the view that the current challenges would be the undue and unnecessary regulatory burden that would prevail if regulations were to be introduced.

3.1.3. SASFED identifies the following challenges:

- 3.1.3.1. a lack of negotiating strength by the independent producers;
- 3.1.3.2. extreme delay in the signing of contracts;
- 3.1.3.3. lack of transparency;
- 3.1.3.4. very poor budgets;
- 3.1.3.5. poor internal communication within the SABC; and
- 3.1.3.6. unethical use of intellectual property by the SABC.

3.1.4. IPO contends that there is currently no independent framework that monitors and intervenes to ensure that terms of trade are fair and commissioning procedures and management by broadcast service licensees of independent producers are in keeping with the definition of independent production. IPO contends further that the current terms of trade are one sided and oppressive and that there is no latitude ability for the independent sector to realistically negotiate with broadcasters. Accordingly, the independent producer is left vulnerable as there is no legislation to protect him or her from exploitation.

3.1.5. e.tv states that it has not encountered any difficulties in its collaboration with independent producers.

3.1.6. According to the SABC, the main challenge for smooth collaboration between broadcasters and independent producers is the failure by the independent producers to acknowledge the current legislative regime that governs intellectual property rights and its (SABC) limitations on funding. Other challenges relate to the sourcing of funding for producers. This apparently affects mostly small to medium size black companies. In an attempt to

address these challenges the SABC encourages a practice of co-productions within the industry.

- 3.1.7. WOW identifies as main challenges lack of resources by independent producers to provide quality productions within the required time frames, lack of understanding by independent producer of WOW TV's programme taste and core values and lack of financial resources on the part of independent producers to finance their productions without assistance of the broadcaster.

3.2. SHOULD THE AUTHORITY INTERVENE, THROUGH REGULATION, TO ENHANCE THE COLLABORATION BETWEEN THE TWO, OR SHOULD THE COUNTRY OPT FOR A SELF REGULATORY MECHANISM?

- 3.2.1. MNET is of the view that a self-regulating environment would be more appropriate. However, it submits that the Authority could restrict its involvement through a set of guidelines whose primary focus would be on the public broadcaster and whose principles could be observed/taken into account by commercial and subscription broadcasters in their own commissioning practices. MNET is further of the view that the regulations could include a provision requiring broadcasting service licensees to draw up and publish Codes of Practice, settling out the principles that they will apply when agreeing terms for the commissioning of independent programmes. The Codes of Practice would comprise a set of guiding principles that will govern the relationship between broadcasting service licensees and independent producers. The regulations would provide for the drafts Codes of Practice or any revisions thereof to be submitted to the Authority for approval. In the alternative, MNET submits that the Authority could issue a set of non-binding guidelines which would set out the broad principles that broadcasting service licensees may include in their Codes of Practice.

- 3.2.2. The NFVF has mixed views in respect to this issue, being a combination of both self regulation and regulatory intervention by the Authority.

- 3.2.3. ODM was of the view that self regulation would be more appropriate for the industry, and that market forces would provide for growth and a more vibrant broadcasting and independent production sector.
- 3.2.4. SASFED proposes a combination of self regulation and regulation by the Authority. However, they further state that any regulation by the Authority should take a light touch approach.
- 3.2.5. NAB is of the view that the Authority should not intervene through regulations, but should rather adopt the existing independent commissioning policies that individual broadcasting licensees have devised as these have proved to be workable in the past.
- 3.2.6. IPO prefers self regulation in the long term. However, it argues that there is a need for intervention by the Authority to create an equitable environment for both independent producers and broadcasters as the current standard commissioning agreements give all the intellectual property rights and ownership to broadcasters. In addition to the concerns raised above, IPO argues that the public broadcaster's micromanagement of all aspects of production should be reviewed in the light of the definition of 'independent producer'. It submits that the Authority has an important role to play in setting the framework for fair play and equitable terms of trade and monitoring.
- 3.2.7. e.tv does not see the need for the Authority to intervene in the relationship between broadcasters and independent producers as it contends these issues are a matter for commercial negotiations.
- 3.2.8. SABC submits that the Authority's intervention in this regard may be viewed as undue interference in the commercial dealings of the broadcasters. It argues that the commercial agreements between broadcasters and producers should be left to those parties as they do not fall within the jurisdiction of the Authority. SABC prefers self regulation which it says will lessen the administrative burden to be incurred by the Authority. SABC argues further that the Authority's intervention should be limited to monitoring compliance

with the commissioning procedures. It submits that any dispute arising there from should be referred to the Copyright Tribunal.

- 3.2.9. WOW prefers self regulation because, in its view, the relationship between independent producer and broadcasters is purely a commercial one. It urges the Authority not to intervene through regulations but rather to produce general non-binding guidelines which provide a framework of accepted commissioning policies.

3.3. IS SELF REGULATION, THOUGH DESIRABLE, FEASIBLE WITHOUT THE GUIDANCE OF THE AUTHORITY? FOR EXAMPLE CAN SELF-REGULATION BE TRUSTED TO ENHANCE THE EMPOWERMENT OF HISTORICALLY DISADVANTAGED PEOPLE, INCLUDING THE PRACTICE OF PREFERRING FEW EMPOWERED COMPANIES AT THE EXPENSE OF THE GROWING INTEREST FROM UPCOMING INDEPENDENT PRODUCTION COMPANIES?

- 3.3.1. NFVF is of the view that the national programmes in place on Preferential Procurement do facilitate the procurement of programming from previously disadvantaged people. However, the NFVF highlights that the role of the Authority will always be necessary to ensure compliance.
- 3.3.2. ODM is of the view that the current national Preferential Procurement Policy caters sufficiently for the empowerment of historically disadvantaged people.
- 3.3.3. IPO states that self regulation and discussions between the public broadcaster and the independent sector have achieved some positive results in that many more companies are now empowered and the number of new entrants has increased. However, it believes that self regulation is not viable at this present time as the relationship between the broadcaster and the independent sector has deteriorated. IPO contends that commissioning alone does not sustain independent producers; hence the Authority has to consider the sustainability of these companies.

- 3.3.4. e.tv submits that its licence conditions already require it to promote the development of historically disadvantaged people. Furthermore, e.tv submits that it has a preferential procurement policy which prefers historically disadvantaged producers in the commissioning of local content programmes. e.tv states that it requires all producers commissioned by it to institute training programmes which results in the development of young historically disadvantaged television professionals.
- 3.3.5. It argues that the onus for the empowerment of historically disadvantaged producers cannot be entirely placed on broadcasters. State intervention is required.
- 3.3.6. e.tv disagrees with the Authority's statement that there is a practice of preferring few empowered companies at the expense of the growing interest from upcoming companies. It supports its arguments by stating that the two production companies that produce its daily dramas have provided new opportunities to existing producers. It has undertaken to promote the empowerment of previously disadvantaged communities with specific focus on the provinces that have previously been overlooked.
- 3.3.7. SABC prefers self regulation. It supports its position by stating that its commissioning policies and procedures demonstrate the viability of self regulation.
- 3.3.8. WOW points out that self regulation is feasible. It says that historically disadvantaged producers have to step up to the market requirements. However, it acknowledges that these producers might require some form of assistance from broadcasters.

3.4. IF SELF REGULATION IS PREFERRED, WHAT SHOULD REMAIN THE ROLE OF THE AUTHORITY IN THE ADJUDICATION OF CONFLICTS?

- 3.4.1. MNET was of the view that the Authority should have no role to play in adjudicating conflict between broadcasting licensees and the independent

producers. MNET submits that conflict resolution is governed by contract and should be left to the parties to determine.

3.4.2. NFVF submits that the role of the Authority leans more towards ensuring and enforcing compliance by broadcasting service licensees as opposed to the adjudication of disputes.

3.4.3. ODM is of the view that the role of the Authority should be restricted to its functions as outlined in respect of the Complaints and Compliance Committee⁵ ("CCC"), and that the Authority should act as an arbiter of last resort only where the dispute fails to be resolved through the appointed industry body.

3.4.4. SASFED proposes that the Authority's role should remain that of enforcing and monitoring regulations, as well as acting as an (intervener) in disputes.

3.4.5. NAB is of the view that the role of the Authority in the adjudication of conflict should be confined to those issues for which it has jurisdiction i.e. allegations of non-compliance in terms of the ICASA Act and the EC Act. This view is shared by the SABC.

3.4.6. IPO submits that the Authority should play the role of a mediator to ensure that broadcasters institute fair and transparent terms of trade and commissioning agreements. It further submits that the Authority should oversee the implementation of fair commissioning agreements and procedures.

3.4.7. e.tv submits that the relationship between independent producers and the broadcasters is a commercial one and that it is therefore undesirable for the Authority to play any role in this relationship in the event of conflict. In view of the existing BBBEE requirements, e.tv argues that any involvement by the Authority in the contractual relationship between broadcasters and

⁵ See Section 17A, ICASA Act

independent producers would constitute over-regulation of the broadcasting sector.

- 3.4.8. WOW suggests that the Authority should limit its role to formulation of a general guideline to commissioning briefs without interfering with negotiations between the parties.

3.5. WHAT ARE THE QUALITY ISSUES THAT CONFRONT THE COMMERCIAL FEASIBILITY OF MOST INDEPENDENTLY PRODUCED PROGRAMMES FROM HISTORICALLY DISADVANTAGED COMMUNITIES?

- 3.5.1. MNET's submission does not directly address this issue. However, it does highlight steps that have been taken by organisations such as the Department of Arts and Culture ("DAC"), Department of Trade and Industry ("DTI"), the Industrial Development Corporation ("IDC") and the NFVF towards assisting the independent production sector and correspondingly programming from historically disadvantaged communities.
- 3.5.2. NFVF highlighted insufficient funds/small budgets as having an adverse effect on the production value as a quality issue facing the industry. However, the NFVF did indicate that this issue should not be viewed in isolation without taking into account contributory factors. Another quality issue, it argues, would be the irregularity of commissions especially for new entrants.
- 3.5.3. SASFED identified the following quality issues:
- 3.5.3.1. lack of funds and insufficient profits means that independent producers cannot respond to Request For Proposal (RFP's) or develop unsolicited concepts as these require substantial investment, time and resources;
 - 3.5.3.2. lack of funds to invest in the more expensive HD/HDV format which produces better quality programming;
 - 3.5.3.3. high usage of local languages means that the programming is not commercially viable for the international market;

- 3.5.3.4. limited availability of further local funding; and
- 3.5.3.5. lack of training, skills, experience and understanding of technology which increase barriers to entry.
- 3.5.4. IPO opines that budgets, coupled with experience and talent determine technical and creative standards and these together impacts on commercial feasibility. Consequently all local content producers struggle to deliver quality on very tight budgets. It contends that the biggest challenge to quality is the irregularity of work. This irregularity of work results in many companies becoming unsustainable. IPO suggests that mechanisms such as ownership of intellectual property have to be reviewed to encourage independent sustainability.
- 3.5.5. e.tv points out that there is mainly a lack of easily accessible quality and professional facilities such as studios and post houses. It argues that many disadvantaged producers cannot afford the latest equipment that complies with its technical requirement. Furthermore, it argues that it does not make good business sense to establish production companies in areas where there are limited opportunities.
- 3.5.6. SABC submits that it mitigates challenges on quality by ensuring that all companies are contracted on the basis of having gone through workshops on quality benchmarks set up for each programme commissioned.
- 3.5.7. According to WOW quality issues that confront the commercial feasibility of most independently produced programmes from historically disadvantaged communities is a result of lack of funding.
- 3.6. **SHOULD THE AUTHORITY REGULATE COMMISSIONING AS PART OF THE BBBEE FRAMEWORK AND THE PREFERENTIAL PROCUREMENT POLICY TO ENSURE THAT COMMISSIONING FULFILS THOSE REQUIREMENTS?**

- 3.6.1. MNET is of the view that matters concerning preferential procurement and black economic empowerment of the independent production sector are adequately provided for in the Preferential Procurement Policy Framework Act 5 of 2000 and the Broad Based Black Economic Empowerment Act 53 of 2003, and that the Authority need not regulate this further in the commissioning guidelines.
- 3.6.2. The NFVF does not state whether their position is one in favour of regulation or otherwise, but they do state that any such regulations should be in line with the national Preferential Procurement Policy.
- 3.6.3. ODM is of the view, that there is no legislation empowering the Authority to regulate the commissioning practices to ensure compliance with BBBEE. ODM argues that the national Procurement Policy provides an adequate framework within which the broadcasters and independent producers should operate.
- 3.6.4. SASFED submits that the current national Preferential Procurement Policy framework should be sufficient to facilitate BBBEE within the production industry. However, SASFED is of the view that the Authority should impose this framework upon the broadcasters, and production companies that have an average turnover of R 15 million per year. SASFED's proposal is based on the view that imposing the requirement on the entire industry would be an added cost which would be a further barrier for new companies from historically disadvantaged communities.
- 3.6.5. IPO is of the opinion that the public broadcaster does fulfil the requirements and that this is not where the key challenges lies. However, IPO fails to address this question in relation to commercial broadcasters.
- 3.6.6. e.tv argues that it is already subjected to BBBEE requirements in relation to preferential procurement and any further regulation by the Authority would constitute over-regulation.

3.6.7. SABC contends that it already reports to the Authority on employment equity and commissioning as part of the compliance with BBBEE requirements and does not appreciate the need for further regulation in this regard.

3.6.8. WOW submits that the Authority should provide guidelines in this regard without making statutory obligations.

3.7. WHAT HAVE BEEN THE LESSONS LEARNT IN REGARD TO THE EMPOWERMENT OF HISTORICALLY DISADVANTAGED COMMUNITIES IN THE LAST FEW YEARS, SINCE THE PUBLICATION OF THE 2000 DISCUSSION DOCUMENT ON DIVERSITY IN THE INDEPENDENT PRODUCTION SECTOR?

3.7.1. NFVF advise that they were unable to source the 2000 Discussion Document, and could therefore not accurately determine what the lessons have been learnt since its publication. However, they did highlight that the growth in production companies warrants that the broadcasting licensees should treat production companies differently, depending on their size, experience, and according to their needs.

3.7.2. SASFED identified the following as the lessons which have been learnt since the 2000 Discussion Document:

3.7.2.1. that the poor administration at the SABC has a profound negative impact in that it hampers producers from effectively planning their respective businesses;

3.7.2.2. poor budgets have contributed to the continued poor quality productions;

3.7.2.3. the SABC's dependence on advertising revenue results in more emphasis being given to audience sizes rather than audience appreciation;

3.7.2.4. the lack of growth in the industry has resulted in black talent being drawn towards areas of work that produce job satisfaction and provide healthy career prospects. The industry's inability to retain and or draw in sufficient numbers means that the demographic make-up is not shifting from its highly skewed past fast enough;

3.7.2.5. the unprecedented increase in local content has left the Content Hub at the SABC functioning under constraints due to the frequently new and inexperienced staff; and

3.7.2.6. a lack of centralised decision making at the Content Hub.

3.7.3. With regard to ownership and equity, IPO's understanding is that almost all the bigger production entities are now BBBEE compliant. It submits that the coming together of practitioners from previously disadvantaged communities and the skilled ones should be encouraged as it results in transformation and positive results for broadcasters. IPO believes that empowerment needs to run much deeper than ownership if sustainability is to be built. It argues that this requires assistance through innovative funding mechanisms. Budgets, it suggests, need to take training into account.

3.7.4. The identity of the story teller, their language, and the region the story emanates from and the producer's background are some of the lessons learnt by the SABC since the publication of the 2000 Discussion Document.

3.8. GENERALLY, HOW CAN THE RELATIONSHIP BETWEEN THE BROADCASTERS AND LOCAL INDEPENDENT PRODUCERS BE IMPROVED?

3.8.1. The NFVF submits that the following would be ideal in improving the relationship between the parties: terms of trade; fair commissioning practices; and the existence of a strong industry representation.

3.8.2. ODM agrees that an improvement in the relationship between broadcasters and independent producers is required. It states that the following could assist in achieving this: transparent and predictable commissioning processes; fair terms of trade that reward risk taking by both parties; and more equitable sharing of ownership in intellectual property rights.

3.8.3. SASFED is of the view that a change in the way intellectual property rights are shared, as well as changes to the current commissioning processes as further

highlighted in the MHA Report would go a long way in improving the relationship between the broadcasters and the independent producers.

- 3.8.4. IPO is of the view that fair terms of trade, efficient operational systems, efficient and timely contracting and payment process will contribute towards improving the relationship between broadcasters and local independent producers. According to IPO the increasing tension in the relationship is the result of unfair terms of trade. It argues that negotiations for fair terms of trade and intellectual property rights failed to yield positive results for independent producers as the broadcaster has increasingly made terms of trade more onerous, reduced budgets and secure tighter intellectual property right control. This, it argues, results in the lack of trust between broadcasters and independent producers. IPO further argues that commissioning agreements need to be brought in line with international examples cited in the Discussion Document. Primary rights and secondary rights need to be separated. The commissioning agreements need to facilitate the independent sector rather than over regulate the functions of the independent producer.
- 3.8.5. e.tv submits that it has had no difficulties in its relationships with independent producers.
- 3.8.6. SABC states that it has started a stakeholder management forum to build smooth relations with local independent producers.
- 3.8.7. WOW submits that the relationship between broadcasters and local independent producers can be improved by having an unregulated environment where commissioning briefs are based on generally acceptable guidelines that afford the broadcaster the liberty to select the producer based on quality and workmanship of each independent producer.
- 3.9. **SHOULD THE AUTHORITY ASK THE BROADCASTING SERVICE LICENSEES TO DEVELOP AND PUBLISH A STANDARD COMMISSIONING POLICY WHILE AT THE SAME TIME ALLOWING**

**SCOPE FOR LICENSEES TO ADD OTHER REQUIREMENTS PROVIDED
THEY DO NOT CONFLICT WITH THE REGULATORY FRAMEWORK?**

- 3.9.1. MNET argues for the introduction of Guidelines, which would stipulate the minimum requirements to be addressed by each broadcaster in its Code of Practice. The Codes of Practice would set out a broad framework within which the details of the commissioning process may be established. The Draft Codes of Practice would be submitted to the Authority for approval. MNET further argues that over and above such Codes of Practice providing a standard framework, they should be informed by the nature, mandate, funding and respective degrees of influence of the broadcasting service licensee. With regards to the draft regulations MNET submits that broadcasters not involved in commissioning must notify the Authority of this in writing within the 120 day period specified in this clause.⁶
- 3.9.2. NFVF is of the view that a standard commissioning policy should be developed by the Authority in consultation with broadcasting licensees and the independent production sector.
- 3.9.3. ODM submits that the publishing of standard commissioning policies would encourage the transparency required in the industry. However, ODM felt that a heavier burden to publish detailed commissioning policies should be placed on the public broadcaster which has a broader mandate than other commercial free to air and subscription broadcasters. ODM is of the view that whilst the latter should also publish such policies, they should have the flexibility to amend and customise these as the market would dictate.
- 3.9.4. SASFED is of the view that the best approach would be for the Authority to develop (in consultation between industry stakeholders) genre specific policies.

⁶ Mnet submission to the draft regulations

3.9.5. IPO answers this question in the affirmative. It suggests that the Authority should facilitate the commissioning process and put forward a framework within which to negotiate.

3.9.6. e.tv contends that it has standard commissioning requirements which are published each and every time it issues an invitation for programming proposals.

3.9.7. The SABC cautions that the Authority should avoid over regulating the industry as this may have unintended consequences despite its good intentions. In response to the draft regulations SABC suggest that the commissioning protocols be submitted for monitoring and compliance as the SABC consults before finalising their protocols.

3.9.8. WOW suggests that the Authority should develop, with the involvement of all stakeholders, a standard commissioning policy as a general rule.

3.10. WHAT METHODS OF PUBLICITY SHOULD BE USED TO COMMUNICATE WITH INDEPENDENT PRODUCERS? SHOULD THIS BE INCLUDED IN THE REGULATORY FRAMEWORK, OR SHOULD THIS BE LEFT TO THE LICENSEES?

3.10.1. NFVF submits that whatever methods are chosen, they should be informed by principles of accessibility, equitability and transparency. NFVF further states that this issue should be left to the broadcasting service licensees and the independent producers to determine.

3.10.2. ODM submits that broadcasters should be left to determine the most appropriate means of communicating with independent producers. It feels, however, that a heavier burden should be placed on the public broadcaster in this regard.

- 3.10.3. SASFED submits that the Authority could impose a levy which would be paid by the broadcasters to SASFED, or any other like organisation, which would use the funds to disseminate information to the industry.
- 3.10.4. IPO suggests that website, mass emails, trade publications and industry forums should be used as a means of communication. It submits that communication should be easily and widely accessible.
- 3.10.5. e.tv states that it posts invitations for proposals on its website and uses on-air promotions to publicise such invitations. It submits that the means of communicating with independent producers should be left to broadcasting licensees as it has significant financial implications for licensees. This latter view is shared by the SABC and WOW.

**3.11. ARE THESE THE ONLY METHODS OF COMMISSIONING
INDEPENDENTLY PRODUCED LOCAL CONTENT?**

- 3.11.1. SASFED identified pre-sale agreements as the other means through which programming is acquired. They however point out that it would be beneficial for the Authority to define relevant commissioning methods.
- 3.11.2. IPO answered this question in the negative. It submits that there are co-production opportunities and licensing of product when a programme is made.
- 3.11.3. e.tv, NFVF, SABC and WOW stated that apart from the commissioning methods highlighted in the discussion document, they are not aware of any other method of commissioning independently produced local content.

**3.12. WHAT ARE THE OPPORTUNITIES AND CHALLENGES THAT GO WITH
THE CHOICE OF ANY OF THE HIGHLIGHTED COMMISSIONING
METHODS?**

- 3.12.1. The NFVF identified the following opportunities: the size of the industry means that there are many independent production houses from which to source programming. The NFVF identified the following challenges: limited knowledge by commissioning officers at the national broadcaster, irregular system of briefs; and a lack of transparency on the procedures used to accept unsolicited briefs.
- 3.12.2. SASFED submits that the challenges that go with commissioning are: administrative red tape; problems with getting hold of the right people; and no clear processes for taking unsolicited proposals forward.
- 3.12.3. IPO is of the view that the current practice has become overly bureaucratic and is not geared towards the reward of experience or talent. It believes that the current brief system is open to abuse and overly prescriptive. It argues that the challenge for producers is that they are expected to provide programming that fits an imagined, middle-class view of the world that sees the South African society as homogenous.
- 3.12.4. According to e.tv, the choice of methods is not about challenges and opportunities, but about what is appropriate for the broadcaster. It submits that it is critical that broadcasters are allowed the maximum flexibility in employing the different commissioning methods appropriate to the broadcaster's own strategy.
- 3.12.5. SABC submits that the opportunities and challenges will always hinge on its funding model.
- 3.12.6. WOW sees the existing programmes as a challenge in the sense that they may require further editing in order to fit the broadcaster's requirements. With regard to opportunities, WOW's view is that the broadcaster's increased control over the production results in a quicker realisation of the desired outcomes.

3.13. WHAT IS THE DEFINITION OF AN INDEPENDENT PRODUCER FOR THE PURPOSES OF THIS REGULATORY DISCUSSION?

- 3.13.1. The NFVF argues that the definition of an independent producer as highlighted in the Discussion Document bears no resemblance to the reality of what an independent producer is in South Africa. The NFVF therefore proposes that international best practice should be researched and adopted appropriately before the proposed definition is adopted.
- 3.13.2. ODM makes reference to the definition of "*independent television production*" in section 61(2) (b) of the ECA and states that this definition is sufficient for the purposes of the Discussion Document.
- 3.13.3. SASFED agrees with the proposed definition of an "*independent producer*" as highlighted in the Discussion Document. They do however propose that the definition be modified and amended to include that the independent producer hold a majority of the intellectual property rights in any specific programming.
- 3.13.4. IPO agrees to the definition of 'independent producer' contemplated in paragraph 6.1 of the Discussion Document. It believes that central decision making, ownership of copyright, control of rights and licensing should be core elements in the definition of independent producer. It is of the view that the current terms of trade produced by the SABC contravene the foundation of independence.
- 3.13.5. e.tv submits that an independent producer is one that is not controlled by the broadcasting licensee.
- 3.13.6. The SABC prefers the definition of the independent television production as contained in the Local Content Regulations. It defines an independent producer as the person not directly or indirectly employed by any broadcasting licensee and who has the overall creative responsibility for a programme from beginning to end.

3.13.7. WOW argues that the definition of an 'independent producer' used in the Discussion Document goes far beyond what an independent producer does in South Africa. It suggests the following definition: *"an independent producer is a person who is involved in overseeing and supervising the actual production activities to ensure that the output meets the desired objects concept as originally developed"*.

3.14. SHOULD THE AUTHORITY MAKE IT MANDATORY FOR INDEPENDENT PRODUCERS TO BE REGISTERED EITHER IN THE FORM OF A REGULATORY REQUIREMENT OR THROUGH A SELF REGULATION ARRANGEMENT?

3.14.1. The NFVF states that registration would be beneficial for the industry. However, it is of the view that against such proposed registration, international best practice should be researched to see how similar arrangements work elsewhere.

3.14.2. ODM states that it does not think registration of independent producers is necessary. It further states that the current representation of independent producers is sufficient.

3.14.3. SASFED is of the view that it should not be mandatory for independent producers to be registered as a form of regulatory requirement. However, it proposes that independent producers register themselves with organisations such as SASFED, and that the SABC could then meet its local content quota only with independent producers already registered with such organisations.

3.14.4. According to IPO some form of regulation on this aspect is necessary, but self regulation remains preferable to them.

3.14.5. e.tv submits that it is not necessary or desirable to have independent producers registered in the form of a regulatory environment. It prefers a light touch approach instead.

3.14.6. The SABC argues that the Authority does not have authority over independent producers hence it rejects this proposal.

3.14.7. WOW argues that there is no need for the Authority to make it mandatory for the registration of independent producers as it is the broadcaster's prerogative to perform sufficient background verification on any producer prior to engaging them.

3.15. WHAT ROLE SHOULD THE AUTHORITY PLAY IN THE REGULATION OF INTELLECTUAL PROPERTY RIGHTS, TAKING INTO CONSIDERATION THE ROLE CURRENTLY PLAYED BY THE DTI AND CIPRO?

3.15.1. MNET is of the view that that the Authority should not play any role in regulating intellectual property rights as the regulation of these issues fall outside the mandate of the Authority as provided for in the EC Act and the ICASA Act.

3.15.2. The NFVF is of the view that the Authority should assist in creating an enabling environment for the exercise of intellectual property rights that is mutually beneficial for all the parties involved. It is noted however, that the difficulty with achieving this, is the current broadcasting service licensees' failure to leverage other revenue streams other than those derived from the commissioning of programming.

3.15.3. ODM is of the view that the Authority does not have any rôle to play in the regulation of intellectual property. It contends that these issues fall under the purview of the DTI and CIPRO only. This view is shared by WOW.

3.15.4. SASFED proposes that the role the Authority could play would be to deal with intellectual property rights in the code of commissioning practice.

- 3.15.5. IPO refers to the Recommendations proposed in the MHA Report ⁷ on this question. However, it goes further to say that there is a need for the Authority to provide a regulatory framework on the issue of intellectual property rights as this issue is central to creating a more equitable relationship with broadcasters.
- 3.15.6. e.tv contends that the Authority does not have legislative authority to regulate intellectual property rights as such matter is one for negotiations between the parties. It argues that should the Authority do so, it would be in contravention of the principle that the Authority should refrain from unreasonable intervention in the commercial activities of licensees.
- 3.15.7. SABC strongly argues that the Authority has no role to play in the regulation of intellectual property rights. It submits that intellectual property rights should be adjudicated upon by the Copyright Tribunal.

3.16. IS THERE AN EXPLICIT LEGISLATIVE BASIS FOR THE AUTHORITY TO REGULATE INTELLECTUAL PROPERTY RIGHTS? PLEASE ELABORATE.

- 3.16.1. MNET expressly submits that there is no explicit legislation that allows for the Authority to regulate intellectual property rights.
- 3.16.2. ODM is of the view that the Authority does not have any role to play in the regulation of intellectual property. It maintains that these issues fall under the purview of the DTI and CIPRO only.
- 3.16.3. SASFED was of the view that although there was no legislative grounds for the Authority to change the Copyright Act, the Authority should nonetheless support any industry initiatives to make the necessary changes to the Copyright Act, interpret all possible changes to commissioning regulations

⁷ Unlocking The Creative and Economic Potential of the South African Television Sector-Recommendations for Legal, regulatory and Commissioning Practice Changes, Pg 145-147, November 2008.

in terms of the ECA and the Discussion Document in a manner that will benefit all industry players, and support the proposition that intellectual property rights be contractually negotiated between the parties.

- 3.16.4. The NAB contends that the Authority has no jurisdiction to deal with intellectual property rights and should therefore have no authority to deal with intellectual property issues. This view is shared by WOW:
- 3.16.5. IPO refers to the Recommendations proposed in the MHA Report on this question. The submission of SASFED and IPO on the draft regulations suggest that the Authority give effect to the Copyright Act through regulations to provide for a robust and proactive approach to Intellectual Property.
- 3.16.6. e.tv contends that there is no basis for the Authority to regulate intellectual property rights.
- 3.16.7. SABC contends that the Authority has no role to play in the regulation of intellectual property rights. It maintains that intellectual property should be adjudicated by the Copyright Tribunal.

3.17. IS INTELLECTUAL PROPERTY RIGHT NOT SUPPOSED TO BE BASED ON A COMMERCIAL AGREEMENT BETWEEN THE COMMISSIONING PARTIES?

- 3.17.1. MNET argues that the copyright laws of South Africa allow for the variation in the ownership of copyright in terms of a contractual agreement. However, MNET does not indicate whether this is something they would be prepared to consider. MNET further submits that the high cost of production in South Africa, and the fact that broadcasters pay for the production of programming is the only reason that all the rights to the intellectual property are held by the broadcasters.

- 3.17.2. The NFVF agrees that intellectual property rights arrangements should be based on commercial agreements between the parties. This view is shared by ODM.
- 3.17.3. SASFED agrees that intellectual property rights can be contractually negotiated, but because of the reluctance of the broadcasters to do this, SASFED feels that support for this from the Authority may have some influence on how intellectual property rights are negotiated.
- 3.17.4. IPO agrees with the question posed and argues that the current Copyright Act is narrowly interpreted to protect the self interest of the broadcaster. It refers to Recommendations proposed in the MHA Report.
- 3.17.5. e.tv reiterates that the matter of intellectual property rights is one for negotiations between the parties and that the Authority does not have the legislative authority to regulate such matters. e.tv contends further that should the Authority play a role in regulating intellectual property it would be acting contrary to the principle that the Authority should refrain from unreasonable intervention in the commercial activities of licensees.
- 3.17.6. SABC submits that intellectual property rights should be based on the existing legislative framework and agreement between the parties.
- 3.17.7. WOW disagrees with this question. It argues that it is the commercial agreement that is prepared on the basis of which party is the holder of intellectual property rights and not vice versa. In other words WOW submits that the holder of intellectual property rights determines the terms of commercial agreement.

3.18. HOW SHOULD CONFLICT RELATED TO INTELLECTUAL PROPERTY RIGHTS BE ADJUDICATED?

- 3.18.1. MNET is of the view that the Authority should have no role in the resolution of conflicts, and that conflict resolution should be left to the parties to determine by agreement.
- 3.18.2. The NFVF states that disputes around intellectual property rights should be resolved by the parties as provided for in the contractual terms agreed to by the parties. However, they also felt that the Authority should have an opportunity to investigate complaints against broadcasters arising out of such disputes.
- 3.18.3. SASFED proposed that the Authority should set up a complaints office which could deal with all complaints and unfair practices arising from intellectual property. The Authority would then take up these complaints with the broadcasters.
- 3.18.4. The NAB stated that intellectual property disputes should be adjudicated as provided for in the Copyright Act, which provides for what constitutes infringement of copyright, and stipulates appropriate remedies. This view is shared by ODM, SABC and WOW.
- 3.18.5. IPO refers to the Recommendations proposed in the MHA Report on this question.
- 3.18.6. e.tv argues that conflicts between the parties arising from intellectual property rights must be resolved between the parties. If parties could not reach agreement then the conflict should be referred to the appropriate court.

3.19. SHOULD THE AUTHORITY REQUIRE THE BROADCASTING SERVICE LICENSEES TO PUBLISH GENERIC PRICING SCHEDULES IN THEIR COMMISSIONING POLICIES?

- 3.19.1. MNET did not directly address this issue. However, they have indicated that the Authority could, through regulations, require broadcasters to draw up

and publish codes of practice setting out the principles that would apply, including terms for the commissioning of independent programming.

- 3.19.2. The NFVF did not feel that there is a need for such a requirement, but that broadcasters should make it known what they were prepared to pay.
- 3.19.3. ODM agrees that this practice would be beneficial in improving the transparency required for the industry. However, they felt that a heavier burden should be placed on the public broadcaster.
- 3.19.4. SASFED states that this practice would be of benefit in promoting transparency in the industry. It contends that such pricing schedules should cite the price ranges per genre, should be in line with international standards, and be amended annually in accordance with inflation. It submits that detailed line by line costing practices should be done away with and left up to the producers to work out within budgetary constraints.
- 3.19.5. IPO does not believe that it is relevant for the broadcasting service licensees to publish generic pricing schedules in their commissioning policies. It suggests that projects should be priced on their specific merits, requirements and viability and that viability should be measured by commercial terms alone.
- 3.19.6. e.tv is vehemently opposed to the idea that licensees be required to publish generic pricing schedules in their commissioning policies. It argues that pricing is a commercially sensitive matter and as such it would be prejudiced if its competitors had access to its local production costs. In response to the draft regulations the broadcaster further submits that the costs of commissioning a programme are dependent on numerous factors arising on a case-by-case basis and that it is impossible to provide an exhaustive list of factors which will inform programme "pricing"⁸

⁸ e.tv submission on the draft regulations

3.19.7. SABC rejects the Authority's suggestion of requiring the broadcasters to publish generic pricing schedules in their commissioning policies as there is, in its view, no basis for such generic pricing.

3.19.8. WOW contends that pricing varies from one production to the other and that, it is highly subjective. It therefore argues that publishing generic prices on a policy document would be futile as there are many drivers that determine the pricing of productions.

3.20. SHOULD THE AUTHORITY BE INVOLVED IN THE COMMERCIAL NEGOTIATIONS OR LEAVE THOSE TO THE PARTIES? IF YES, TO WHAT EXTENT AND IF NO WHY?

3.20.1. MNET is of the view that the Authority should not get involved in negotiating the commercial terms of the agreement between broadcasters and independent producers, as this would negate the principles of the freedom of contract. This view is shared by NFVF and ODM.

3.20.2. SASFED is of the view that it would not be ideal for the Authority to get involved in the commercial negotiations between the parties. It however states that through the use of a levy paid to independent producer organisations such as SASFED, free legal advice could be offered to independent producers to assist them negotiate better terms. It further proposes that such contracts could be lodged with the Authority for transparency, and to monitor any favouritism given to any independent producer.

3.20.3. IPO agrees to the Authority's involvement in commercial negotiations. It suggests that the extent of the Authority's involvement should be limited to mediation or facilitation of the process between the independent producer organisations and the broadcasters. It argues, however, that it is not necessary for the Authority to be involved in individual commercial negotiations. This, it argues, should be left to the parties once the legislative framework has been put in place.

- 3.20.4. e.tv submits that any involvement by the Authority in commercial negotiations should not take place as this would constitute unreasonable interference in the commercial activities of licensees. This view is also expressed by NAB and SABC. In addition, argues e.tv, such involvement would be contrary to the parties' rights to freedom of contract.
- 3.20.5. With regard to the impact of commissioning policies, e.tv submits that in any consideration of local production and commissioning, the Authority must take cognisance of the potential prejudice to broadcasters' vis-à-vis the potential benefit of the independent production sector. For the fact that the broadcaster pays the entire costs of the production and thereby carrying the risk of the production failing, e.tv argues that it is entirely fair and reasonable that broadcaster retain all rights to the production.
- 3.20.6. WOW submits that the negotiations between the parties are commercial negotiations and only in the event of disputes should a third party be involved.

3.21. WHAT WOULD BE REASONABLE TIME TO SECURE A COMMISSIONING CONTRACT?

- 3.21.1. ODM is of the view that taking international best practice into account, duration of six months would be ideal.
- 3.21.2. SASFED proposed duration of not more than 2 months.
- 3.21.3. The NAB did not respond to this issue.
- 3.21.4. IPO opines that a period within which to secure a contract should be negotiated between the parties. However it recommends that a maximum of six months should be set from brief to contract.

3.21.5. e.tv failed to address questions 25-38 directly. It reserved the right to deal with these questions fully at the hearing and after it has had the opportunity to consider in detail other international examples. However, it made few points which appear to be a response to some of the questions mentioned above. *These points will be discussed under the specific question to which they relate.*

3.21.6. According to the SABC, a reasonable time to secure a commissioning contract depends on the nature of the contract in question.

3.21.7. WOW opines that this would depend on the nature of the commissioning brief. However, it submits that a reasonable time frame could be three months.

3.22. ARE THE PRODUCERS CLEAR ABOUT DIFFERENT RIGHTS THAT THE BROADCASTERS SEEK TO SECURE AND THE DURATION?

3.22.1. The NFVF was not able to make a determination on this issue, but contend that this should be agreed to and clearly set out in the contract between the parties.

3.22.2. ODM is of the view that the producers as well as the broadcasters are clear about the different rights to be secured.

3.22.3. SASFED states that independent producers are usually clear about the different rights that the broadcasters secure, as this is recorded in the commercial agreements. However, it argues that one negative aspect of how these rights are secured is that broadcasters secure all secondary rights, which prevents the independent producers from exploiting any of these rights. SASFED proposes that secondary rights should be separated from primary rights as opposed to lumping them all together, and the duration for which they are held by the broadcaster should not be in perpetuity.

3.22.4. IPO argues that there are no negotiations on the issue of rights as the broadcasters take all the rights.

3.22.5. The SABC states that its policy and procedures for the procurement of local content television programmes put the rights issue in clear terms.

3.23. WHAT LESSONS CAN BE ADOPTED FROM CHANNEL 4?

3.23.1. The NFVF identified the following as the lessons that can be learnt from Channel 4: Clarity over different categories of right; the duration for which a broadcaster seeks to secure such categories of rights; clarity over prices that a broadcaster is willing to pay for the different categories of rights; clear commissioning processes with reasonable timelines for negotiations and provision for monitoring and dispute resolution.

3.23.2. ODM is of the view that the lessons to be learnt from Channel 4 were more relevant and applicable to the public broadcaster. It submits that the major lesson to be learnt is transparency.

3.23.3. SASFED states that they are in agreement with the practices cited in the Discussion Document as being worth noting for the South African industry. SASFED also indicated that a funded and strong independent regulatory body would also be beneficial to the South African industry. They also highlighted the following as lessons learnt:

3.23.3.1. clear commissioning processes;

3.23.3.2. mentoring of producers to editorial guidelines; and

3.23.3.3. increased revenue enjoyed by Channel 4.

3.23.4. SABC failed to address this question. Instead it refers to number 22 of its submission which does not have any relevance to this question.

3.24. WHAT SHOULD BE THE BASIS FOR ASSESSING THE INDEPENDENT PRODUCERS BY BROADCASTERS TO PROCURE THE RIGHT PROGRAMME?

- 3.24.1. ODM and SASFED are of the view that an independent producer's track record should be the gauge used to assess a producer's ability and to determine whether to procure programming from them.
- 3.24.2. SABC submits that it sets out the criteria for each genre in the RFP book. It is of the view that models differ from country to country, hence it rejects the Native American Public Telecommunications context because it differs from theirs.
- 3.24.3. e.tv states that its assessment of proposals submitted by independent producers is approached on a case by case basis in accordance with its own procurement policy. Issues such as the independent producer's capacity to fulfil his or her obligations, budgetary requirements and the like are taken into consideration during assessment.
- 3.24.4. WOW suggests that experience, ability to fund the production, and ability to understand the values of the broadcasters and translate them into a production is the basis for assessing independent producers.

3.25. WHAT WILL BE A FAIR TIME PERIOD FOR BROADCASTERS TO COME UP WITH THEIR POLICIES FOR COMMISSIONING OF INDEPENDENTLY PRODUCED SOUTH AFRICAN PROGRAMMING?

- 3.25.1. The NFVF is of the view that the broadcasting service licensees and the independent producers should agree between themselves on this issue.
- 3.25.2. ODM indicated that one year would be ideal as it would provide sufficient time for engagement with all stakeholders.

3.25.3. SASFED is of the view that a period of six months from the date of mandate. It submits that such policies should be developed in consultation with SASFED and the IPO.

3.25.4. e.tv contends that it already has a preferential procurement policy and thus it is unable to comment on any timing issues regarding the development of such a policy. However, it believes that the development of a preferential procurement policy and the conclusion of any agreement with independent producers is a private matter in which the Authority should not in any way intervene in this regard.

3.25.5. The SABC suggests that, considering the administrative work involved in this process, 18 months would be ideal.

3.25.6. WOW suggests a minimum of six months.

3.26. LEARNING FROM INTERNATIONAL EXPERIENCE, WHICH COMMISSIONING METHOD(S) WILL BE PREFERABLE IN SOUTH AFRICA AND WHY?

3.26.1. MNET submits that the international practice leans towards a light touch approach, and is therefore not regulated. It submits further that only the United Kingdom regulates commissioning procedures and terms of trade, but these regulations are not imposed on commercial free-to-air broadcasters and subscription broadcasters. MNET does not specifically identify or recommend any of the international trends for application in South Africa. It does however point out that any international practices should be viewed in light of empowering legislation in those countries, and which practices may not be applicable in South Africa due to the lack of similar empowering legislation. Overall, on this issue, MNET advocates for a light touch approach.

3.26.2. SASFED is of the view, that there are lessons to be learnt from all three modes of commissioning practices – BBC, CBC and PBS. However, it

argues that the British and Canadian models seem to suit South Africa better.

3.26.3. The SABC contends that the terms of trade are unique from one country to another and that none of the methods presented in the Discussion Document matches the South African commissioning environment.

3.26.4. WOW prefers a combination of Channel 4 commissioning methods and the Native American Public Telecom PBS. It prefers the adoption of the following points from Channel 4: commissioning guidelines, editorial guidelines, and proposal development. With regard to PBS commissioning method, WOW prefers the adoption of program rights.

3.27. WHAT EXAMPLES CAN BE EXTRACTED FROM THE ABOVE INTERNATIONAL CASES TO HAVE EFFECTIVE TERMS OF TRADE?

3.27.1. MNET submits that the Codes of Practice used in the United Kingdom are exemplary for developing effective terms of trade for South Africa.

3.27.2. The NFVF submits that what can be learnt from Channel 4 is that they have effective terms of trade.

3.27.3. SASFED indicated that the following would allow for better terms of trade for the South African industry:

3.27.3.1. reasonable time frames for delivery of programmes;

3.27.3.2. reasonable time frames for contract negotiations;

3.27.3.3. clear commissioning process with a reasonable timetable for negotiations;

3.27.3.4. clarity of prices for different rights;

3.27.3.5. clarity of different categories of rights;

3.27.3.6. mentoring and financial commitment to the developmental stage of creating a programme; and

3.27.3.7. the broadcaster only acquire the rights that it needs to broadcast the programme.

3.27.4. SABC submits that BBC's co-production models and turnaround time and frameworks for contracts may be followed.

3.28. SHOULD THE AUTHORITY REQUIRE BROADCASTERS TO SUBMIT THEIR COMMISSIONING POLICIES FOR APPROVAL OR FILLING?

3.28.1. MNET submits that the Authority should require that broadcasters submit their commissioning policies for approval with the Authority. MNET is of the view that this would ensure that relations between broadcasting service licensees and independent producers are conducted on a fair and transparent basis.

3.28.2. The NFVF supports the filling of such policies with the Authority, but not the approval thereof. In their submission to the draft regulations NFVF changed their view by suggesting that there should be approval.

3.28.3. ODM argues that this would constitute undue interference by the Authority in the commercial activities of the broadcasters. However, they contend that this obligation could be imposed on the public broadcaster given its public service remit.

3.28.4. SASFED is of the view that broadcasters should submit their policies for approval with the Authority.

3.28.5. e.tv believes that the development of a preferential procurement policy and the conclusion of any agreement with independent producers is a private matter and that the Authority should not in any way intervene. Accordingly requiring the Authority to approve any policy should not be considered. However, e.tv says that it has no objection to providing the Authority with any of its policies should it so require.

3.28.6. The SABC does not address this question directly. Instead it states that it believes the policies should only be submitted in so far as they give effect to provisions of the regulations.

3.28.7. WOW is of the view that it is not necessary to require broadcasters to submit their commissioning policies to the Authority for approval or filing.

3.29. SHOULD THE AUTHORITY ASK BROADCASTERS' TO KEEP THE FILES OF PROCURED INDEPENDENT PRODUCERS FOR SUBMISSION WHENEVER THE AUTHORITY REQUIRES THOSE?

3.29.1. The NFVF is in favour of such a practice being encouraged and adopted. This view is shared by SASFED.

3.29.2. ODM is of the view that this practice could be imposed on the public broadcaster as it has a larger local content quota.

3.29.3. Given that the relationship between e.tv and any independent producer with which it contracts is a private matter, e.tv submits that it should not be required to submit any such confidential information to the Authority. However, e.tv is prepared to make available to the Authority information relating to the identity of the producers it uses, the extent of local content it produced and such similar information.

3.29.4. The SABC concedes to this question. It points out that this may assist in case there is suspicion that a licensee has not complied with its commissioning procedures.

3.29.5. WOW submits that the Authority should request broadcasters for information only under the guide provided by the Promotion of Access to Information Act No 2 of 2000 ("PAIA").

3.30. CAN THIS INFORMATION BE CONTAINED IN THE WEBSITES OF THE BROADCASTERS FOR PUBLIC INSPECTION TO PROMOTE CONSUMER INVOLVEMENT?

- 3.30.1. The NFVF is in favour of such practice, and indicated that such a practice would make a great contribution for consumer involvement.
- 3.30.2. ODM contends that this would not be ideal as such policies would relate to the relationship between the broadcaster and the independent producer.
- 3.30.3. SASFED is of the view that full disclosure would not be ideal as there is a need to protect competitive production, know-how and privacy. It submits that partial disclosure would be more ideal.
- 3.30.4. e.tv contends that only information which is in the public domain should be contained in the websites of broadcasters.
- 3.30.5. For fear of misuse by third parties, the SABC argues that confidential information should not be published and posted on the website.
- 3.30.6. WOW submits that information may be provided through the website provided that such information is not confidential. It contends that any additional information will have to be requested as provided in PAIA.

3.31. SHOULD THE AUTHORITY ADVISE BROADCASTERS TO PUT THEIR COMMISSIONING DETAILS INCLUDING SCHEDULES ON THEIR WEBSITE, ADVERTISE FROM TIME TO TIME ON TELEVISION AND INFORM THE PRODUCERS' ORGANISATIONS ABOUT THOSE?

- 3.31.1. The NFVF and SASFED are in favour of this proposed practice.
- 3.31.2. ODM also agrees with this proposal, and are of the view that this would be a good practice as it would enhance transparency.

3.31.3. The SABC disagrees with this suggestion. It argues that this should be left to the licensees as it may have financial implications for the licensees.

3.31.4. WOW submits that the Authority should grant broadcasters the liberty to decide on the method to be employed in communicating with independent producers.

3.32. PLEASE MAKE SUGGESTION ON AN EFFICIENT MONITORING MECHANISM FOR COMPLIANCE WITH THE REGULATIONS ON COMMISSIONING.

3.32.1. MNET submits that in order to ensure effective oversight and monitoring of the Regulations, there will need to be in place a system of annual reporting by the broadcasting service licensees on their terms of trade.

3.32.2. The NFVF submits that a monitoring mechanism in line with section 2(s)(i) of the EC Act would be ideal. Some of the indicators which the NFVF pointed out would effectively measure diversity in all its forms were:

- 3.32.2.1. total number of independent production commissions per year;
- 3.32.2.2. geographical spread of commissions in terms of percentage per broadcaster;
- 3.32.2.3. demographics of the independent production companies commissioned; and
- 3.32.2.4. amount spent in total and per broadcaster on local content from the independent production sector in relation to applicable quota per licence category per annum.

3.32.3. NFVF proposes that a penalty for non-compliance should be equivalent to the value of the commissioned programme.

3.32.4. ODM submits that the current monitoring mechanisms utilised by the Authority to monitor compliance should be supplemented to provide the required monitoring of broadcasters commissioning processes.

- 3.32.5. SASFED proposes the following:
- 3.32.5.1. the establishment of an active complaints and compliance office set up by the Authority;
 - 3.32.5.2. the allocation of staff by the Authority to monitor the process;
 - 3.32.5.3. a staff member of the Authority to act as an observer during contractual negotiations; and
 - 3.32.5.4. setting up of an archive of contractual agreements reached by broadcasters on intellectual property as a means of transparency in the industry.
- 3.32.6. The SABC submits that the SA Television Content Regulations together with *policies and procedures of individual broadcasters* are sufficient mechanisms to monitor compliance.
- 3.32.7. WOW is of the view that commissioning policies should be in the form of guidelines instead of regulations.

3.33. ANY SUGGESTIONS ON THE DRAFTING OF THESE REGULATIONS?

- 3.33.1. MNET submits the following suggestions should be covered in the drafting of the regulations:
- 3.33.1.1. that broadcasting service licensees set out in the terms of trade their overall approach to, and the details of, the commissioning process;
 - 3.33.1.2. a system of review to ensure effective oversight and monitoring of the application of the Code of Practice; and
 - 3.33.1.3. dispute resolution mechanisms for the resolving of disputes that arise in respect of the provisions of the Code of Practice, rather than the terms of a specific commercial negotiation.

- 3.33.2. WOW proposes that the Authority initiate the drafting of guidelines, and not of regulations, based on intensive research and in view of world trends.

3.34. ARE THERE OTHER RELEVANT ISSUES THAT THE AUTHORITY NEED TO CONSIDER THAT ARE NOT RAISED IN THIS DOCUMENT?

- 3.34.1. ODM requests that the Authority, in assessing the impact of the current regulatory process on the various broadcasters, take into account that subscription broadcasters procure entire channels and not individual programming.
- 3.34.2. IPO recommends the following in its supplementary submission: (i) guidelines be issued by the Authority on commissioning practice and terms of trade in line with international best practices, (ii) new terms of trade with broadcasting service licensees, and (iii) a platform be created by the Authority where independent producers and broadcasters can engage in constructive dialogue.
- 3.34.3. The SABC suggests that the Authority should consider all relevant regulations and legislation that already govern production of content for a holistic view on commissioning requirements.
- 3.34.4. In its supplementary submission WOW proposes a distinct regulatory framework between the public service broadcaster and commercial broadcasters. The reasons advanced for such proposal is that the public service broadcaster is a public entity that is funded by taxpayers and exists to advance the national and public interest, whereas commercial service broadcasters are business corporations that are established with a unique vision to advance the interests of their shareholders. Due to the fact that commercial service broadcasters are privately owned entities, WOW argues that they should reserve full discretion over which programmes to commission, which production houses to work with, and the allocation of various rights associated with each production. It

recommends that the Authority should develop commissioning regulations which should be mandatory to the public broadcaster on the basis that its mandate is to serve public interest. It submits that these commissioning regulations should be adopted as a non-binding framework applicable to commercial service broadcasters.

3.35. TELKOM MEDIA

- 3.35.1. Telkom Media does not address the questions raised in the Discussion Document directly. Instead it addresses the questions generally without following the order as contained in the Discussion Document.
- 3.35.2. Telkom Media fully supports the objectives identified in the Discussion Document. It contends that the South African industry is out of step with international best practice. It argues that this has accordingly limited South Africa's ability to participate meaningfully in a multi-platform, globalised economy.
- 3.35.3. Telkom Media submits that the Television Content Regulations should provide that the independence of independent television production be measured, inter alia, in terms of whether or not the producer retains any intellectual property rights therein. It agrees that the South African Copyright Act has to be amended to do away with the exception vesting copyright in a person commissioning a cinematograph film instead of in the author of the work. This, argues Telkom Media, ought to be done to facilitate further exploitation of cinematograph films by parties other than commissioning broadcasters which generally do not exploit them effectively.
- 3.35.4. Telkom Media concurs with the findings of the report MHA Report that the issue of rights is central and crucial to this undertaking. It submits that there is a need for a commissioning work framework that fundamentally shifts the ownership model for underlying rights, distinguishing between

primary rights and secondary rights, and generally aligns the interests of broadcasters and producers.

3.35.5. Telkom Media suggests that the Authority's role should be to create and sustain the ecology within which broadcasters and producers deal with each other, rather than becoming involved in the details of commissioning practice. It proposes adoption of the UK model.

3.35.6. Telkom Media does not support the idea of standard commissioning policy. It proposes instead that licensees should have the ability to develop these individually to serve their individual interests, and enable distinctive relationships with producers.

SECTION C: FINDINGS AND RECOMMENDATIONS

4. INTRODUCTION

4.1. An analysis of the submissions made by the interested parties indicates that there is some level of agreement on the issues facing the broadcasting and independent production sector in South Africa. However, the degree with which the various parties agree on the issues at hand is influenced by the interests of the particular stakeholder. For instance, on issues that seemingly affect independent producers more than they do broadcasting licensees, the stakeholders representing the independent production sector seem to take a very strong stand towards regulation, whereas the broadcasting stakeholders lean towards self regulation or "light touch" regulation.

4.2 This document will be structured as follows:

4.2.1 matters of general concern;

4.2.2 matters that the Authority may competently address by regulations; and

4.2.3 matters that the Authority may not competently address by regulations.

4.3 MATTERS OF GENERAL CONCERN

4.3.1 We establish that the matters that follow below were generally of general concern among the independent producers and/or the broadcasting service licensees.

4.3.2 The IPO, SASFED and NFVF are of the view that the Authority is mandated to intervene in issues of terms of trade with broadcasting service licensees. They substantiated their position by reference to section 61(1) of the EC Act, and Regulation 7 of the Television Content Regulations. On the other hand, the broadcasting service licensees are of the view that whilst the Authority may be mandated to make regulations in terms of section 61(1) of the EC Act, it should be careful not to intervene in the commercial activities of broadcasters,

which would be impermissible in law. In general, the broadcasting service licensees are in favour of self regulation.

- 4.3.3 There was a common view between the IPO and SASFED that the commissioning practices employed by the SABC were unfair and restrictive. They further contended that whilst freedom to contract is an important element of a trade relationship between parties, the continued in-equality in the bargaining position of the independent producers as against the broadcasting service licensees results in unfair terms of trade for commissioning of local independently produced programming. As a result of the aforesaid, they submit that these unfair and restrictive practices could be best dealt with by the Authority through regulatory interventions in the form of guidelines on commissioning practices and new terms of trade. The broadcasting service licensees generally were of the view that the unfair and restrictive commissioning practices experienced by the independent producers were specifically common to the SABC, and therefore further supported the view that self regulation was working adequately.
- 4.3.4 With regard to the different methods of commissioning programming, IPO and SASFED identified co-production, licensing and pre-sale agreements as other commissioning methods that may be utilised. However, the general response received from broadcasting service licensees is that they are only aware of the commissioning methods as outlined in the Discussion Document.
- 4.3.5 There was consensus amongst the independent producer bodies that their independence as independent producers was compromised as broadcasting service licensees reduces them to *quasi* employees and removes control over the production from the independent producers.
- 4.3.6 There is also a general concern amongst the independent producers that the quality of commissioned programming that they can produce is often adversely impacted by the low production fee paid by the broadcasting service licensees. Micro-management and control in the production process were also factors specific to the SABC that were highlighted as impacting on the quality of programming produced. The broadcasting service licensees

raised lack of experience, funding, and facilities by the independent producers as factors affecting the quality of commissioned programming.

- 4.3.7 The independent producer bodies also highlighted the current exception to the ownership of copyright as a serious area of concern. They argued that copyright ownership should be assigned to the producer who will be entitled to exploit the commissioned work domestically beyond the broadcaster's rights to broadcast the commissioned programming locally, internationally as well as the ancillary rights on other platforms. They also argue for a distinction to be drawn between primary, secondary and tertiary rights in the terms of trade. The broadcasting service licensees on the other hand argued that the ownership of copyright in commissioned programming by them was legitimate as provided for in the exception to the general ownership of copyright, and did not think that the current regulatory framework in respect of copyright ownership should be amended.
- 4.3.8 There was consensus amongst both the broadcasting service licensees and the independent producers that the Preferential Procurement Policy was sufficient to ensure that the desired transformation is achieved in the industry, and as such, unnecessary for the Authority to further regulate transformation.
- 4.3.9 With regards to the suggestion by NFVF on penalties, the Authority is guided by section 17H of the ICASA Act of 2000 which sets limits on penalties that can be imposed for lack of compliance.

4.4 MATTERS THE AUTHORITY MAY NOT COMPETENTLY ADDRESS BY REGULATIONS

- 4.4.1 Having considered the submissions made by the participants and the legal and regulatory framework that applies to the Authority, the Authority concludes that it is not desirable or competent for it to deal with the matters set out below.

shall only intervene as permitted by the EC Act where a broadcasting service licensee has breached any of its licence conditions or the provisions of the EC Act and other relevant laws.

- 4.4.8 The Authority does not have legislative powers to adjudicate disputes between parties arising from a commercial agreement.

Pricing and Commercial Negotiations

- 4.4.9 The EC Act provides that the Authority shall not unduly interfere with the commercial activities of the broadcasting licensees.¹⁰ In light of this legislative restriction, the Authority shall not require that broadcasting licensees publicise their programming pricing on their websites, or interfere in commercial negotiations relating thereto.

- 4.4.10 The Authority is of the view that pricing should be left to the discretion of the broadcasting service licensees so as to promote competition. In addition, such a practice could be construed to amount to price fixing and thus an anticompetitive measure which is prohibited in terms of the Competition Act¹¹.

Access to Information

- 4.4.11 Access to information held by private or public bodies is governed in terms of the PAIA. In particular, Sections 11 and 50 of Chapter 1 provide for the process to be followed by any party wishing to acquire information from any public and private body respectively. It is therefore not necessary for the Authority to further regulate on these aspects.

- 4.4.12 With regards to the publicising of commissioning schedules, the broadcasting service licensees should have a discretion as to the medium of communication they prefer to use, as the imposition of any such a requirement would have cost implications for their businesses.

¹⁰ Section 2(y), Electronic Communications Act No. 36 of 2005

¹¹ Section 4(1) (b) (i) Competition Act No 89 of 1998

4.5 MATTERS THAT THE AUTHORITY MAY COMPETENTLY ADDRESS BY REGULATIONS

- 4.5.1 The Authority has as one of its objects to regulate broadcasting in the public interest and to ensure fairness and diversity of views broadly representing South African society, as required by Section 192 of the Constitution¹². It is the function of the Authority, among others, to exercise the powers and to perform the duties conferred and imposed upon it by the ICASA Act, the underlying statutes and any other law¹³.
- 4.5.2 The Authority may make regulations on any matter consistent with the objects of the ICASA Act and the underlying statutes or that are incidental or necessary for the performance of the functions of the Authority¹⁴.
- 4.5.3 One of the primary objects of the EC Act is, among others, to promote the development of public, commercial and community broadcasting services which are responsive to the needs of the public¹⁵. It is further one of the objects of the EC Act to refrain from undue interference in the commercial activities of licences while taking into account the electronic communication needs of the public¹⁶.
- 4.5.4 In terms of the Television Content Regulations, public, commercial and subscription television licensees shall ensure that their terms of trade and commissioning procedures are, *inter alia*, fair, transparent and non discriminatory¹⁷.
- 4.5.5 Therefore any intervention by the Authority through regulation will in broad terms be constrained by the parameters set out in 4.1 to 4.3 above.

¹² Section 2 (a), ICASA Act

¹³ Section 4(1)(a), ICASA Act

¹⁴ Section 4(3)(j), ICASA Act

¹⁵ Section 2(r), EC Act

¹⁶ Section 2(y), EC Act

¹⁷ Regulation 7.1, Television Content Regulations

5 RECOMMENDATIONS

5.1 It is apparent from the submissions made by the independent producers and the broadcasting service licensees that whilst certain aspects of commissioning of independently produced South African programme may be working efficiently, there are still areas of concern which may negate the essence of the obligation upon public, commercial and subscription broadcasting licensees to ensure that their terms of trade and commissioning procedures are, *inter alia*, fair, transparent and non discriminatory as contemplated in Regulation 7 of the Television Content Regulations¹⁸.

5.2 Generally the Authority accepts that self regulation would be ideal. However, taking into account the prevailing practices and the submissions made by the various participants, the Authority is persuaded to make regulations to regulate the commissioning of independently produced South African programming as contemplated in Section 61(1) of the EC Act. These regulations will be complementary to Regulation 7 of the Television Content Regulations and will seek to give meaning to the concept of fair, transparent and non discriminatory commissioning practices as contemplated in that regulation. The regulations aforesaid will introduce the requirement for broadcasting service licensees to submit to the Authority for approval commissioning protocols in order to enable the Authority to monitor the commissioning practices of independently produced South African programming and to ensure that the same is conducted in a manner that is fair, transparent and non-discriminatory, without hampering the flexibility of broadcasting service licensees to deal with the pertinent commercial issues in any manner they deem appropriate. ("the Protocol").

5.3 Approval in this case does not extend to substantive issues, but the focus is on ensuring that all minimum requirements set out in the regulations are filed as part of protocols. The Authority does not intend checking whether provisions submitted in commissioning protocols are correct or not, but simply to check

¹⁸ Television content Regulations as published in Government Gazette No 28454, published on 31 January 2006.

whether those provisions are there or not and whether they detail the minimum information required or not. The Authority makes this finding, taking into account the varying licence conditions of the broadcasting service licensees, the provisions of the Television Content Regulations¹⁹ and the limitations on its powers as contained in the EC Act²⁰ and the ICASA Act²¹.

5.4 Confidential information submitted in commissioning protocols will be dealt with in accordance with section 4D of the ICASA Act 13 of 2000.

¹⁹ Regulation 7, Television Content Regulations

²⁰ Section 2(y) EC Act

²¹ Section 4(3)(j), ICASA Act