**E.TV SUBMISSION ON DRAFT PUBLIC SERVICE BROADCASTING BILL**

15 January 2010

1. **Introduction**
   1. e.tv thanks the Department of Communications (“the DoC”) for the opportunity to make this submission on the Draft Public Service Broadcasting Bill (“the Draft PSB Bill”) published in Government Gazette 32663 on 28 October 2009.
   2. As the only commercial free-to-air television broadcasting service licensee, e.tv is a vibrant presence in the South African broadcasting landscape, now attracting the second largest audience with a market share of approximately 22%.
   3. e.tv’s strategy over the past ten years has been to appeal to as broad an audience as possible and to position itself as a unifying influence among its viewership. As a result, its audience profile fairly represents the demographics of South Africa with regard to race, age, income and gender.
   4. Since 2000, e.tv has made a significant contribution to the development and broadcast of locally-produced programming which reflects the uniqueness of South Africa. e.tv has focused substantial resources on developing local programmes which have become the flagship audience drivers for the channel. Since 2001, more than 45% of e.tv’s programming between the hours of 5am and 11pm has consisted of local content. e.tv is the only channel in the country which broadcasts two daily South African dramas. These programmes reflect a wide diversity of South African cultures, languages and interests and are produced by independent producers.
   5. e.tv has, from the outset, ensured that its staff profile is reflective of South African diversity. Currently, 78% of e.tv’s staff are black and 46% are women. e.tv has paid particular attention to the recruitment and training of disabled employees who constitute 5% of its workforce. As the company has grown in size, it has ensured that the disabled component of the workforce has grown accordingly. Many disabled employees had little or no work skills when they were first employed by e.tv as they had not previously had the opportunity of full-time employment. These employees have been trained in various skills relevant to the industry and now work in a wide range of departments across the channel.
   6. e.tv’s controlling shareholder, Hosken Consolidated Investments (“HCI”) is a leading black empowerment company listed on the JSE Limited (“JSE”). HCI is controlled by the South African Clothing and Textile Workers Union (“SACTWU”) and its social benefit trusts. The members of SACTWU comprise of some 100 000 clothing and textile workers. The beneficiaries of the trusts are these workers together with their dependents. A large portion of investment income is allocated to the SACTWU Welfare Programme to provide social benefits to SACTWU members and their dependants. The range of projects funded by the Welfare Programme primarily covers educational support, employment creation and protection projects, HIV-Aids, health care projects and housing. HCI is one of the few companies on the JSE where broadly based black empowerment shareholders with substantial social responsibility initiatives have a major economic interest.

* 1. e.tv’s successes have been hard fought for – since e.tv was licensed it has had to struggle against commercial competition from all three television channels of the SABC which have, public and commercial alike, acted together to dominate the market. e.tv has made submissions to the Independent Communications Authority of South Africa (“ICASA”) concerning these practices on numerous occasions.
  2. e.tv believes the activities of the SABC’s television channels are symptomatic of a deeper problem which has become entrenched in the SABC, namely that no clear distinction is made between its commercial and its public service activities. e.tv therefore welcomes the publication of the PSB Bill which seeks to rectify this situation. While e.tv is supportive of certain of the approaches taken in the PSB Bill in this regard, we believe the Bill does not go far enough in dealing with the SABC’s commercialism. We address this and other key concerns on the Draft PSB Bill in our submission below.

1. **CONSTITUTUTIONAL ISSUES**
   1. We begin first by addressing two constitutional issues:
      1. e.tv is concerned that certain provisions in the Bill dealing with the Minister’s powers to make regulations are unlikely to pass constitutional muster, in light of section 192 of the Constitution.
      2. e.tv is further concerned that certain provisions dealing with the Public Service Broadcasting Fund is at variance with the procedure set out by the Constitution in respect of “**money bills**”.
   2. **MINISTER’S POWERS**
      1. s3(3) of the ICASA Act requires that the Authority be “independent”*,* be impartial and act without fear, favour or prejudice.
      2. s3(4) of the ICASA Act provides that the Authority “must function without any political or commercial interference*”.*
      3. s192 of the Constitution requires the Authority to be “independent”. The Constitutional Court has explained what independence means:

*“The generally accepted core of the principle of judicial independence has been the complete liberty of individual Judges to hear and decide the cases that come before them: no outsider - be it government, pressure group, individual or even another Judge - should interfere in fact, or attempt to interfere, with the way in which a Judge conducts his or her case and makes his or her decision.”*

*Van Rooyen v The State* 2002 (5) SA 246 (CC) para 19

* 1. e.tv submits therefore, no person – including the Minister – may interfere with the Authority’s ability to freely make the regulations. Any legislation which provides the contrary will be unlawful and open to a constitutional challenge. Providing the Minister with the power to make regulations will detract from the Authority’s independence and will accordingly be contrary to the provisions of section 192 of the constitution.
  2. **MONEY BILLS**
     1. Section 77 of the Constitution deals with “**money bills**” provides as follows:

“(1) A Bill is a money Bill if it-

(a) appropriates money;

(b) imposes national taxes, levies, duties or surcharges;

(c) abolishes or reduces, or grants exemptions from, any national taxes, levies, duties or surcharges; or

(d) authorises direct charges against the National Revenue Fund, except a Bill envisaged in section 214 authorising direct charges.

(2) A money Bill may not deal with any other matter except-

(a) a subordinate matter incidental to the appropriation of money;

b) the imposition, abolition or reduction of national taxes, levies, duties or surcharges;

(c) the granting of exemption from national taxes, levies, duties or surcharges; or

(d) the authorisation of direct charges against the National Revenue Fund.

(3) All money Bills must be considered in accordance with the procedure established by section 75. An Act of Parliament must provide for a procedure to amend money Bills before Parliament.”

* + 1. This must be read together with section 74(2)(a) of the Constitution which provides that “**only the Cabinet member responsible for national financial matters”** may introduce a money bill in the National Assembly.
    2. In e.tv’s view the Draft PSB Bill is a money bill by virtue of section 4 which seeks to establish the Public Service Broadcasting Fund comprising inter alia “Personal Income Tax, collected in terms of the Income Tax Act, 1962”.
    3. It therefore follows that this provision must be included in a separate money bill, without other matters being included, as is required by section 77(2) of the Constitution.
    4. It must have been introduced by the Minister of Finance, as is required by section 74(2)(a) of the Constitution.
    5. If these procedural requirements are not complied with, section 4 (2)(a) of the Draft PSB Bill would be inconsistent with the Constitution and would fall to be declared invalid. This is because the Constitutional Court has repeatedly made clear that a failure to observe the “**manner and form**” requirements of the Constitution renders the relevant legislation invalid.

*Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC) at paras 62 - 63

*Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) at paras 208 – 209

* + 1. e.tv’s other concerns on the Public Service Broadcasting Fund are dealt with below.

1. **FUNDING OF THE SABC AND THE DISTINCTION BETWEEN SABC PSB AND COMMERCIAL ACTIVITIES**
   1. e.tv is grateful that the Draft PSB Bill seeks to deal with the long-overdue matter of the funding model of the SABC. e.tv believes that the situation whereby the SABC continues to take approximately 69% of the free-to-air television advertising market must be corrected urgently:
      1. It undermines the core notion of public service broadcasting. How can the SABC deliver on its public service mandate if it operates in such a commercial manner?
      2. It undermines fair competition in the broadcasting market. For every 12 minutes of advertising on e.tv there are 36 minutes of advertising on the SABC television channels. This makes the SABC three times as competitive as e.tv in the analogue market.
   2. While e.tv believes action must be taken to provide a sufficiently stable and non-commercial funding base for the SABC, we do not support the notion of a Public Service Broadcasting Fund:
      1. We don’t support the notion that consumers should have to pay increased income tax to fund public service broadcasting.
      2. We also disagree that businesses should have to make funding contributions.
      3. Finally, we don’t support the wide mandate of the Fund which seeks to fund not only the SABC but also Sentech, content producers, community broadcasters and even commercial broadcasters undertaking public broadcasting.
   3. Rather than creating such a Fund, e.tv suggests that the SABC is funded by monies appropriated by Parliament, as is the case with many other public broadcasters around the world.
   4. Crucially, the funding of the SABC cannot be looked at in isolation of addressing the corporation’s over-reliance on commercial sources of revenue.
      1. In this regard, e.tv strongly supports the inclusion of section 13(2) of the Draft PSB Bill which says that advertising and commercial sponsorship must not exceed public funding and subsidies from the commercial division.
      2. We also support section 13(3) of the Draft PSB Bill which provides for the Minister to further limit commercial revenue and/or identify programmes where it should be prohibited.
   5. While these clauses go some way to limiting the over-commercialisation of the SABC, e.tv submits that there are a number of other provisions which must be included in sections 12 (Public Service Division) and 14 (Commercial Service Division). These additional provisions are needed to address the manner in which all three television channels of the SABC effectively operate as a single dominant commercial network – sharing programming, adopting complementary scheduling, cross-promoting programmes and selling advertising across the network.
   6. e.tv submits that the current provisions of the Broadcasting Act which seek to regulate these practices are inadequate and in any event are not being fully complied with by the SABC.
      1. The Broadcasting Act currently requires that the SABC must consist of two separate operational divisions, namely: a public service division and a commercial service division. These divisions are to be separately administered and a separate set of audited financial statements are to be prepared in respect of each division. The Draft PSB Bill retains these provisions and also provides for a third division – an International Broadcasting Service division.
      2. Notwithstanding these provisions, the SABC engages in various anti-competitive practices:
         1. The SABC cross-sells advertising across its three television channels and therefore makes no distinction between the public service and commercial channels. In addition, the SABC offers high discounts to advertisers in exchange for such advertisers buying advertising exclusively on SABC. Aside from the fact that the SABC is able to sell across platforms and channels, it is also able to discount heavily on its television channels as it has 36 minutes of advertising per hour to offer advertisers as against e.tv’s 12 minutes per hour.
         2. The SABC collectively purchases commercial international programming (particularly movies) for all three channels. As the SABC has never supplied separate accounts in respect of its public and commercial service divisions it is impossible to determine the extent to which, contrary to the provisions of the Broadcasting Act, revenues from the public service division may be subsidizing the costs of the commercial division. So, for example, a movie which is licensed to the SABC for three runs may be broadcast first on SABC1 and subsequently shown on SABC3 in circumstances in which the cost of the movie is amortised 100% against its first run on SABC1. The quantity of international programming acquired by the SABC also exceeds its requirements and a significant portion of this programming is written off as is evident from reports over the past months.
         3. The SABC cross-schedules local and international programmes on all three channels. For example:
            1. Generations is broadcast by SABC1 (a public service channel) every weeknight and is repeated every weekday. However, SABC3 (the commercial broadcaster) also broadcasts a repeat of Generations every day. The same happens with 7de Laan which airs on SABC2 (a public broadcaster), is repeated on SABC2 and is also repeated on SABC3 (the commercial broadcaster). SABC3’s repeats of 7de Laan and Generations amount to five hours of programming each week. The inescapable conclusion is that, contrary to the Broadcasting Act, the public service division is financing the commercial service division of the SABC in respect of programming costs. This practice also provides SABC3 the opportunity to earn additional advertising revenue from these SABC1 and SABC2 programmes. In the case of SABC 3, the channel uses the Generations repeats as a means to meet it local content quotas. This constitutes a further subsidy by the PSB Division of the Commercial Division as it results in SABC 3 not investing in local content.
            2. The schedule across all three channels on weekend nights is dominated by commercial international programming and it is difficult to make any distinction between public and commercial broadcasters on these nights.
         4. The SABC cross-promotes programmes on all three television channels and on its 19 radio services.
   7. A further matter which must be addressed concerns services which are shared by the divisions. These shared services include not only administrative and legal services, but extend to core broadcast functions such as programme commissioning and acquisition through the Content Hub. e.tv submits that the sharing of such services by the commercial and public service divisions runs counter to the Broadcasting Act, which attempts to separate the operations of the two divisions.
   8. The collective impact of these practices is that there is no real and meaningful distinction between the operations of the public service and commercial divisions.
   9. e.tv strongly recommends that provisions prohibiting the SABC’s anti-competitive practices listed above are included in sections 12 and 14 of the Draft PSB Bill.
2. **SIGNAL DISTRIBUTION**
   1. e.tv supports the inclusion in the Draft Bill of provisions which:
      1. Clarify the common-carrier status of Sentech (section 28 (2))
      2. Declare Sentech’s signal distribution network an essential facility (section 28 (2))
      3. Give ICASA the power to review tariff structures set by Sentech (section 34(1)(b)).
   2. In relation to the reference to the National Key Points Act, e.tv submits it is necessary to ensure that any steps taken in respect of the security of the facility owned by Sentech provide for reasonable access to such facility (being an essential facility) by parties requiring or entitled to access to such facilities.
   3. In relation to section 34(1)(b), e.tv proposes the following inclusion:

34(1) For the purposes of carrying out this function, the Authority is to have the powers and duties conferred to it by this Act, including:

(a)……

(b) Conduct inquiries and review, **and if necessary amend,** tariff structures set by the common carrier.

1. **LOCAL CONTENT**
   1. e.tv makes two submissions in relation to local content:
      1. We do not support the establishment of a Local Content Advisory Body as provided for in section 42 of the Draft PSB Bill. We do not believe there is a need for such a body, given the role of ICASA and the National Film and Video Foundation in the development and regulation of local content. We believe the establishment of the Local Content Advisory Body and the mandate detailed in section 42 serves only to undermine existing bodies working in this field.
      2. We do not support the inclusion of “radio” in section 61of the ECA which deals with local content and independent production. We draw the DoC’s attention to the fact that section 61(2)(c) of the ECA deals with South African music quotas for radio. No further local content quotas for radio are required.
2. **GENERAL**
   1. e.tv wishes to make two general comments concerning:
      1. The definition of broadcasting
      2. Technology neutral regulation
   2. On the definition of broadcasting, we note with concern that the Draft PSB Bill seeks to amend the definition of broadcasting. e.tv strongly cautions against this. Defining broadcasting as multidirectional will cause enormous confusion. We strongly urge the Authority to maintain the current definition of broadcasting, as provided for in the ECA.
   3. On technology neutral regulation, we note that the Draft PSB Bill seeks to re-introduce many of the old technology specific definitions which were omitted when the ECA was drafted. E.tv can see no reason for the inclusion of definitions for ‘satellite subscription broadcasting service” and “terrestrial subscription broadcasting service” in light of the technology neutral approach to regulation which the ECA encourages. e.tv suggests these definitions are deleted.
3. **CONCLUSION**

e.tv thanks the Department for the opportunity to comment on the draft PSB Bill. We look forward to participating in any further processes concerned with the finalisation of the Bill.