



Independent Communications Authority of South Africa

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25 November 2005
Ms M Pricilla Themba
Honourable Chairperson
NCOP
Cape Town

Dear Ms Themba

**RE: ELECTRONIC COMMUNICATIONS BILL [B32B-2005] – WRITTEN
SUBMISSION BY THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH
AFRICA**

The Independent Communications Authority of South Africa (“the Authority”) thanks the National Council of Provinces (NCOP) for the opportunity to make written submission on the Electronic Communications Bill (B32b-2005), this proposed Bill presents a significant revision to regulation as it stands and the current telecommunications and broadcasting sectors and is thus, critical to the future of the sector.

The Authority welcomes the intervention of this Bill and applauds the stated objectives of the Bill. ICASA is of the view that this Bill must be read together with the ICASA Act Amendment Bill as it sets out certain elements which are essential for the proper implementation of the Electronic Communications Bill.

The Authority wishes to make the following general points:

1) The Authority supports the central purpose of the Electronic Communications Bill and the ICASA Act Amendment Bill and notes the definite need to strengthen the regulator in the face of convergence. When finalised, the Authority hopes that such legislation will assist in creating continued certainty and increased confidence in the regulatory environment for both local and foreign investors, trust for consumers and operators and a clear mandate for the Authority.

2) It is critical to ensure that in consolidating the current legislative framework there is no dilution of constitutionality required for the regulator in terms of section 192 of the Constitution and section 3 of the ICASA Act and that no unintended consequences arise. As such, reference must be had, at all times to the constitutional standard

applicable to broadcasting by virtue of Chapter 9 of the Constitution, which addresses institutions designed to protect democracy. In this regard particular attention must be paid to section 192 of the Constitution which provides for an independent body to be charged with regulating broadcasting. As a result of the effort to consolidate the legislation, the Authority will require a higher degree of discretion in operations than previously afforded to it in the arena of telecommunications regulation as this must then meet the standard set for broadcasting to the extent that the two regulatory regimes become converged. In this regard, the Authority is concerned about the proposal to amend section 5 of the ICASA Act No. 13 of 2000 with respect to the appointment of councillors, more so when read with the proposed amendments to section 8 of the ICASA Act no. 13 of 2000. These concerns have been articulated very clearly in our previous submissions on the ICASA Act Amendment Bill and the Electronic Communications Bill (formerly the Convergence Bill) which were made to the Portfolio Committee on Communications.

3) The Authority notes that the ICASA Amendment Bill and the Electronic Communications Bill commencement dates must be linked as they represent a holistic approach to the regulation of the industry in a converging environment.

4) Finally, the Authority urges the NCOP to consider our recommendations with respect to enacting the ownership and control amendments. These recommendations are the result of a public consultative process undertaken by ICASA and further delays in adopting these recommendations would have a negative impact on the industry. The current ownership and control provisions in the Bill have been taken directly from the Independent Broadcasting Authority Act which was promulgated in 1993 and therefore represent a state of affairs which was in place 12 years ago. Our recommendations in this regard are attached as Annexure A.

Specific drafting concerns with the Electronic Communications Bill as tabled on 3 November have been attached as Annexure B. As always, we look forward to participating further in this process and welcome the opportunity to address the NCOP at any oral hearings which may be held. We also remain at the NCOP's disposal to assist with further clarifications and any assistance that the NCOP may require in its deliberations.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Paris Mashile', is written over a light blue rectangular background.

PARIS MASHILE
CHAIRPERSON

ANNEXURE A

The Authority proposes an empowering provision to prescribe regulations setting limits on ownership and control for all licensed services similar to section 52 of the Telecommunications Act, subject to specific statutory limitations on broadcasting services as currently applied in terms of sections 48, 49 and 50 of the IBA Act. Therefore what is set out below is a composite proposal incorporating the power to make regulations together with statutory limitations on the ownership of broadcasting services.

Ad Clause 4 - Regulations by the Authority

The Authority recommends the insertion of the following sub-clause (3) under clause 4 in the Bill and the subsequent renumbering of the current sub-clauses (3) to (7) as (4) to (8):

“4(3) Subject to sections 64, 65 and 66, the Authority, taking into account the objects of the Act, may make regulations on matters relating to empowerment, ownership and control which may include regulations on, but not limited to, the following –
(a) defining what constitutes control;
(b) promoting broad based black economic empowerment and historically disadvantaged persons;
(c) limitations on, or the prohibition of the ownership of control of or the holding of any financial or voting interest in a licensee;
(d) any matter relevant or ancillary to the promotion of diversity of ownership in the communications industry; and
(e) the procedure to be followed by a licensee who is required to seek approval for the change of control of a licence when such approval does not involve an amendment or a transfer of a licence.”

Ad Clause 64 – Limitations on foreign control of commercial broadcasting services

The Authority recommends the substitution for clause 64 in the Bill with the following clause:

“64 (1) One or more foreign persons shall not, whether directly or indirectly –
(a) exercise control over a commercial broadcasting service licensee; or
(b) have issued share capital in a South African unlisted public or private company holding a commercial broadcasting service licence equal to or exceeding twenty-five percent of the issued share capital.

(2) Two or more foreign persons shall not, directly or indirectly, have issued share capital in a South African unlisted public or private company holding a commercial broadcasting service licence equal to or exceeding thirty-five percent of the issued share capital.

1 GENERAL EXPLANATORY NOTE:

Words in bold type in square brackets indicate deletions from the text of B9B—05.

Words underlined with a solid line indicate insertions in the text of B9B—05.

(3) One foreign person shall not, directly or indirectly, have issued share capital in a South African listed public company holding a commercial broadcasting service licence equal to or exceeding thirty-five percent of the issued share capital.

(4) Foreign persons who are directors of a commercial broadcasting service licensee shall not equal or exceed twenty-five percent of the total number of directors on the board.

(5) On application by any person the Authority may, on good cause shown and without departing from the objects and principles as enunciated in section 2, exempt such person from adhering to any one of the limitations contemplated in the preceding subsections on grounds that include the following:

(a) the promotion and facilitation of Black Economic Empowerment;

(b) the promotion of foreign direct investment and job creation;

(c) undertakings by the foreign shareholder to sell shares back to South African citizens with a specified period; and

(d) undertakings to transfer expertise to South African citizens.

(6) An exemption in terms of subsection (5) may be made subject to terms and conditions as the Authority deems appropriate and equitable in the circumstances.”

Ad Clause 65 - Limitations on control of commercial broadcasting services

The Authority recommends the substitution for clause 65 in the Bill with the following clause:

“65 (1) No person shall, directly or indirectly, exercise control over more than one commercial television broadcasting service licence;

(2) No person shall, directly or indirectly, exercise control over more than thirty five percent of the total number of licensed commercial sound broadcasting services provided that:

(a) when the calculation of the number of licensed commercial sound broadcasting services that a person may be in control of does not result in an integer and that when that number is rounded to the closest integer, that integer results in a percentage that is higher than the thirty five percent limitation set out in subsection (2); and/or

(b) when a person exceeds the thirty-five percentage limitation set out in subsection (2) only because one or more other licensees have had their licences suspended or revoked by the Authority, or one or more licensees have ceased broadcasting (temporarily or permanently), in which case the Authority shall consider an application by the relevant person for exemption from the limitations in terms of subsection (6)(a).

(3) Notwithstanding the provisions of subsection (2), no person shall, directly or indirectly, exercise control over more than two commercial sound broadcasting service licences which have the same licence areas or substantially overlapping licence areas.

(4)(a) On application by any person the Authority may, on good cause shown and without departing from the objects and principles enunciated in section 2 of this Act, exempt such person from adhering to any one of the limitations contemplated in the preceding subsections on grounds that include the following:

(i) the promotion and facilitation of Black Economic Empowerment; and

(ii) ensuring the survival of a commercial broadcasting service.

(b) An exemption in terms of paragraph (a) may be made subject to such terms and conditions as the Authority deems appropriate and equitable in the circumstances.

(5) The Authority may, whenever deemed necessary in view of developments in technology or for the purpose of advancing the objects and principles enunciated in this Act, after due inquiry in terms of section 4B of the ICASA Act make recommendations to the Minister regarding the amendment of any of the preceding subsections, which recommendations shall be Tabled in the National Assembly by the Minister within 14 days after receipt thereof, if the National Assembly is then in session, or, if the National Assembly is not then in session, within 14 days after the commencement of its next ensuing session.”

Ad Clause 66 - Limitations on cross-media control of commercial broadcasting services

The Authority recommends the substitution for clause 66 in the Bill with the following clause:

“66 (1) Cross-media control of broadcasting services shall be subject to such limitations as from time to time determined by the National Assembly so acting, in accordance with the provisions of the Constitution.

(2)(a) No person who controls a newspaper or newspapers shall exercise, direct or indirect, control of both a commercial sound broadcasting service licence and a commercial television broadcasting service licence.

(b) No person who is in a position to control a newspaper shall exercise, direct or indirect, control of a sound or a television broadcasting service licence where the newspaper or all the newspapers that it controls has a total weekly ABC circulation of twenty-five percent of the total weekly ABC circulation in that broadcast service licence area.

(c) The shareholding and financial structures of commercial broadcasting service licensees shall form part of their annual reports submitted to the Authority.

(3) On application by any person the Authority may, on good cause shown and without departing from the objects and principles as enunciated in section 2, exempt such person from adhering to the limitations contemplated in the preceding subsections on grounds that include the following:

(a) the promotion and facilitation of Black Economic Empowerment; and

(b) ensuring the survival of a commercial broadcasting service.

(4) An exemption in terms of subsection (3) may be made subject to terms and conditions as the Authority deems appropriate and equitable in the circumstances.

(5) The Authority may, whenever deemed necessary in view of developments in technology or for the purpose of advancing the objects and principles enunciated in this Act, after due inquiry in terms of section 4B of the ICASA Act make recommendations to the Minister regarding the amendment of any of the preceding subsections, which recommendations shall be Tabled in the National Assembly by the Minister within 14 days after receipt thereof, if the National Assembly is then in session, or, if the National Assembly is not then in session, within 14 days after the commencement of its next ensuing session.

(6) A determination made in terms of subsection (1), whether pursuant to the first inquiry or to any subsequent inquiry conducted in accordance with the provisions of this Act, shall not be applicable to and not be enforceable against any broadcasting service licensee to which such determination relates for the duration of the term of the licence valid at the time such determination is made, but shall become applicable to and enforceable against such a broadcasting service licensee only upon the renewal of his or her licence upon the expiration of such period."

ANNEXURE B²

In terms of specific drafting concerns the Authority wishes to point out the following:

Ad Definitions

1. A "licensee" in the definitions section is defined as "a person issued with a licence to provide services in terms of chapter 3 of this Act". This appears to ignore the fact that a radio frequency spectrum licence is issued not in terms of chapter 3, but rather in terms of clause 31 contained in chapter 5. This may have the unintended consequence of excluding radio frequency spectrum licensees from the ambit of the word "licensee" wherever it is used in the Bill. The Authority would suggest that the following words be inserted as follows:

"**licensee**" means a person issued with a licence to provide services in terms of chapter 3 **and chapter 5** of this Act;

Ad Clause 5

2. Subsection (6) in clause 5 states that "In consideration of the implementation of the managed liberalisation policies, the Authority may only accept and consider applications for individual electronic communications network services licences in terms of a policy direction issued by the Minister in terms of section 3." The unintended consequence of this section may be that the Authority may grant an individual broadcasting service licence whether free-to-air or subscription and such licensed broadcasters might be prevented from broadcasting if the Minister fails to gazette the date when the Authority may consider applications for individual electronic communications network services licences. Potentially, such broadcasters could resort to legal challenge on the grounds that this provision violates the spirit of section 192 of the Constitution. The following amendment is therefore proposed to avoid such a situation:

"5(6) In consideration of the implementation of the managed liberalisation policies, the Authority may only accept and consider applications for individual electronic communications network services licences **(excluding broadcasting signal distribution)** in terms of a policy direction issued by the Minister in terms of section 3."

Broadcasting signal distribution is already defined in the Electronic Communications Bill and Chapter 9 is an example where it has been focused on to the exclusion of other services in the broader category of electronic communications network licences to allow specific obligations related to broadcasting to be imposed.

² GENERAL EXPLANATORY NOTE:

Words in bold type in square brackets indicate deletions from the text.
Words underlined with a solid line indicate insertions in the text.

Ad Clause 74

3. Clause 74 which deals with offences and penalties does not make sense in the context of Offences and Penalties. Clause 74 as currently worded starts off by indicating that any person who contravenes or fails to comply with any licence condition contained in the licence, is guilty of an offence and is liable on conviction to the penalties set out in subsection 2. Subsection 2 then relates to outsource agreements that can be imposed on communication networks, services and facilities. The first problem is that an offence is a criminal matter and this immediately takes matters relating to licence conditions out of the jurisdiction of the Authority which contradicts the whole purpose of establishing the Complaints and Compliance Committee in the ICASA Act Amendment Bill. The second problem is that the penalties do not relate to all licences despite subsection (1) indicating that it applies to all licences, it only applies to electronic communications networks and services. Furthermore, the type of penalty contemplated is not fines but outsource agreements which do not appear likely to be properly placed with a court of law if the matter is an offence.

ICASA recommends that clause 74 as currently worded be deleted and that the following clause be inserted in its place in the Electronic Communications Bill

“74. Offences and Penalties.—

(1) Any natural or juristic person who -

(a) in applying for a licence in terms of this Act or the related legislation or for the renewal, amendment or transfer of such a licence, in his or her application furnishes any false or misleading information or particulars or makes any statement which is false or misleading in any material respect, or who wilfully fails to disclose any information or particulars material to his or her application;

(b) provides a service without a licence as required by this Act or the related legislation or fails to obtain the prior written permission of the Authority before transferring a licence;

(c) fails to keep records as required by this Act or the related legislation;

shall be guilty of an offence and liable on conviction -

(i) in the case of an offence contemplated in paragraph (a) of this subsection, to a maximum fine of R250 000;

(ii) in the case of an offence contemplated in paragraph (b) of this subsection, to a fine not exceeding the greater of R1 000 000 or 10% of the person or licensee’s annual turnover for ever day or part thereof during which the offence is continued;

(iii) in the case in the case of an offence contemplated in paragraph (c) to a fine not exceeding R100 000.

(2) The court convicting a person of any offence referred to in subsection (1)(b) of this section may, in addition to any fine which it may impose in terms of that paragraph, declare any transmitters, apparatus and other equipment and any article, object or thing by means of which such offence was committed, to be forfeited to the Authority: Provided that no such declaration shall be so made upon proof to the satisfaction of the court that such transmitter, apparatus, equipment, article, object or thing is not the property of the person so convicted and that, as regards such article, object or thing, the

owner thereof was unable to prevent it from being used as a means to commit such offence.

Furthermore, the Authority is of the view that this revised clause in the Electronic Communications Bill should then be complemented in the ICASA Act Amendment Bill with the following provision on Offences and Penalties:³

Offences and Penalties.—

(1) Any natural or juristic person who -

(a) fails to comply with any order made by the Authority in terms of this Act or the related legislation;

(b) applies to any venture, undertaking, business, company or other association or body (whether corporate or incorporate) a name or description signifying or implying some connection between such venture, undertaking, business, company or other association or body, of the one part, and the Authority, of the other, without the consent of the Authority.

(c) acts in disregard of any prohibition imposed by order of the Authority in terms of this Act or the related legislation

(d) fails to produce any licence issued to him or her under the Electronic Communications Act or the related legislation on the demand of any authorised person, or who hinders or obstructs any authorised person in the exercise or performance by the latter of his or her powers, functions or duties in terms of this Act or the related legislation;

(e) has been required in terms of this Act or the related legislation to attend and make a statement or to produce any document or object before the Authority who, without sufficient cause, fails to attend at the time and place specified in the notice, or to remain in attendance until the conclusion of the inquiry or hearing for the purpose he or she is required or until he or she is excused by the chairperson from further attendance, or having attended, refuses to make a statement after he or she has been required by the chairperson to do so or fails to answer fully and satisfactorily any question lawfully put to him or her, or fails to produce any document or object in his or her possession or custody or under his or her control, which he or she has been required to produce;

(f) makes a false statement before the Authority on any matter, knowing such statement to be false;

(g) wilfully interrupts the proceedings at any such inquiry or hearing or wilfully hinders or obstructs the Authority or any member thereof in the performance of its or his or her functions at the inquiry or hearing,

shall be guilty of an offence and liable on conviction -

(i) in the case of an offence contemplated in paragraph (a), (b), and (c) to a fine not exceeding R100 000.

(ii) in the case of an offence contemplated in paragraph (d), (e), (f) and (g) of this subsection, to a maximum fine of R50 000;

³ To the extent that the recommended provision cannot be accommodated in the ICASA Act Amendment Bill it should be incorporated in the Electronic Communications Bill with the necessary changes.