

**NCRF WRITTEN SUBMISSION REGARDING THE INDEPENDENT
COMMUNICATIONS
AUTHORITY OF SOUTH AFRICA AMENDMENT BILL**
*(As introduced in the National Assembly as a section 75 Bill;
explanatory summary of Bill published in Government Gazette No
28050 of 20 September 2005)*

INTRODUCTION

National Community Radio Forum hereinafter referred "NCRF", thanks the Parliamentary Portfolio Committee on Communications for the opportunity to comment on the **INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA AMENDMENT BILL** and hopes to make a positive contribution towards the process that the parliament portfolio committee on communication has embarked upon.

NCRF kindly request an opportunity to make an oral submission. The duration of which will not exceed 30 minutes on this matter.

NCRF would like to draw the honorable member of the parliament portfolio committee on communication attention to the difficulty that it has had in responding to the amendment bill given the time and the manner in which the purpose of the amendment has been articulated in the gazette. NCRF is concerned that the national assembly is amending the bill to be in line with the convergence bill. In so doing, it should be clear as to why the amendment bill should be amended as a key to strengthen the introduction of the convergence policy processing, (let alone whether any value can be compromised, if the outcomes are taken as predetermined and the validation of these assumptions constitutes a primary motive as articulated in the constitution of the Republic Act 108 of 1996.

This written submission should be viewed in the interest of the collective and not viewed as views and inputs of individual community sound broadcasters. Some of the broadcasters need to present their individual view they should not be prejudice by the NCRF written submission. NCRF's submission is based on its own perspective and views in accordance with its core business, which is that of advocacy and lobbying for the diversification of the airwaves and the creation of the community sound broadcasting services with more support from its member stations and in the interest of the communication industry sector.

1. General comments

From the amendment bill it is evident to NCRF that the major concern underlying this bill is the fact that the bill seems to take powers of parliament and place them in the executive arm to oversight /monitors ICASA.

Let us take honourable members back and remind parliament that the notion of the establishment of an institution such as the Authority herein this written submission referred to as Independent Communication Authority of South Africa (ICASA).

1.1 Supreme document

In 1993 An Interim Constitution was enacted (Constitution of the Republic of South Africa Act 200 of 1993), which entrenched the right to freedom of expression. This was carried over into the Final Constitution enacted in 1996 (Constitution of the Republic of South Africa Act 108 of 1996). A notable feature of the Final Constitution is that it safeguards the independence of the Regulator among other regulating broadcasting against interference by the state including the executive arm of the state.

It is against this background that the NCRF commends the ANC led Government for the support with regard to this notion. Honorable members should take note of the fact that this is what make our South African Republic one of the best countries that has a constitution that engender human rights and protect regulation of broadcasting and information from commercial and political interference. This bill seems to reduce the unique nature and opportunity provided to us as public within our constitution and South Africa. This written submission will borrow from a phrase that I once heard being used by the Minister of Communication; **If it ain't broke, why fix it?**

1.2 Independence of the mass media communication market in South Africa

The transition to democracy in South Africa has been accompanied by considerable managed liberalization of the communication industry sector. The print media is characterized by the presence of a number of independently owned newspaper Groups. The broadcasting sector, which was previously almost completely state owned, has seen the introduction of a number of new private and community broadcasters that are independently owned and controlled.

In addition to the SABC and e-tv, there is M-Net, which offers subscription terrestrial television services. There is also one satellite broadcaster; DSTV (Digital Satellite Television) that is independently owned by MultiChoice and that also provides services on a subscription basis. Both M-Net and MultiChoice form part of the MIH cluster, which also has a significant independent ownership interest in newspaper group Naspers. The radio-broadcasting sector is comparatively more liberalised and diverse than the television-broadcasting sector. A large number of private commercial and community broadcasters have been licensed in the post-apartheid era.

The ownership limitations that the law imposes in respect of commercial radio Stations and the legal requirements in respect of community radio stations ensure that ownership is more spread out and that there is no market concentration in terms of ownership. As regards the print media sector, there are a relatively large number of independently owned daily and weekly papers in circulation in South Africa.

It will be detrimental for the independence, diversity and development if this bill will not be in a position to acknowledge the privilege that has been created by the constitution of this country. NCRF view this as an unintended consequence and remain convinced that if we advance this bill in the interest of the people that we claim we are serving we will walk with a pride that project South Africans and South Africa Republic as the country that stick to its plans that it created in the 1991 agreement sign 21 December 1991 at the CODESA 1 that

CODESA I - Declaration of Intent

21 December 1991

We, the duly authorised representatives of political parties, political organisations, administrations and the South African Government, coming together at this first meeting of the Convention for a Democratic South Africa (CODESA), mindful of the awesome responsibility that rests on us at this moment in the history of our country, declare our solemn commitment:

1. To bring about an undivided South Africa with one nation sharing a common citizenship, patriotism and loyalty, pursuing amidst our diversity, freedom,

equality and security for all irrespective of race, colour, sex or creed; a country free from apartheid or any other form of discrimination or domination;

2. To work to heal the divisions of the past, to secure the advancement of all, and to establish a free and open society based on democratic values where the dignity, worth and rights of every South African are protected by law;
3. To strive to improve the quality of life of our people through policies that will promote economic growth and human development and ensure equal opportunities and social justice for all South Africans;
4. To create a climate conducive to peaceful constitutional change by eliminating violence, intimidation and destabilisation and by promoting free political participation, discussion and debate;
5. To set in motion the process of drawing up and establishing a constitution that will ensure, inter alia:
 - (a) that South Africa will be a united, democratic, non-racial and non-sexist state in which sovereign authority is exercised over the whole of its territory
 - (b) that the Constitution will be the supreme law and that it will be guarded over by an independent, non-racial and impartial judiciary;
 - (c) that there will be a multi-party democracy with the right to form and join political parties and with regular elections on the basis of universal adult suffrage on a common voters roll; in general the basic electoral system, shall be that of proportional representation;
 - (d) that there shall be a separation of powers between the legislature, executive and judiciary with appropriate checks and balances;
 - (e) that the diversity of languages, cultures and religions of the people of South Africa shall be acknowledged;
 - (f) that all shall enjoy universally accepted human rights, freedoms and civil liberties including freedom of religion, speech and assembly protected by an entrenched and justifiable Bill of Rights and a legal system that guarantees equality of all before the law.

WE AGREE

1. That the present and future participants shall be entitled to put forward freely to the Convention any proposal consistent with democracy.
2. That CODESA will establish a mechanism whose task it will be, in co-operation with administrations and the South African Government, to draft the texts of all legislation required to give effect to the agreements reached in CODESA.

We, the representatives of political parties, political organisations and administrations, further solemnly commit ourselves to be bound by the agreements of CODESA and in good faith to take all such steps as are within our power and authority to realise implementation.

SIGNED BY:

African National Congress

Ciskei Government

Party

Democratic Party

Dikwenkwentla Party

Communist Party

Inyanda National Movement

Government

Intando Yesizwe party

Front

Labour Party South Africa

Natal/Transvaal Indian Congress

Progressive Party

National Party

National People's

Solidarity

South African

Transkei

United People's

Venda Government

Ximoko

We, the South African Government, declare ourselves to be bound by agreements we reach together with other participants in CODESA in accordance with the standing rules and hereby commit ourselves to the implementation thereof within our capacity, powers and authority.

Signed by Mr F. W. de Klerk for the South African Government Nkosi Sikelel' iAfrica. Ons vir jou Suid-Afrika. Morena boloka sechaba sa heso. May the Lord bless our country. Mudzimu. Fhatshedza Africa. Hosi katekisa Africa.

"The removal to the independence we call for the death of the communications sector in the republic" there is a need for a strong Independent Regulator for the SA communications industries, with responsibilities across television, radio, telecommunications and wireless communications services and any other communication services as contemplated in the related status and laws.

1.3 Why do we need an independent Regulator?

Regulation is needed to protect consumers in the areas that even with modern technology, is still not contestable. In areas that can be opened up for competition, the barriers to entry due to the nature of capital investment required and incumbency advantages such as customer loyalty. Competition has to be nurtured, and the regulator must have the power to influence the development of competition and the form it will take. Regulation is needed to ensure that licence obligations e.g. quality standards, interconnection are met and to monitor the performance of any social obligation that players have to undertake most importantly regulation is needed to ensure that competition emerges in the industry sector. Without proper regulation, abuse of market power and political influence can go on unchecked and competition stifled. NCRF would like to bring to the attention of honourable members those policies such as market liberalisation and privatisation can lead to sub optimal outcomes if right institutions and process do not exist.

1.4 Why do we need an effective independent regulator?

1.4.1 Political will

One of the most important determinants of the success of an independent agency is political will. NCRF is adamant that commitment by the ministry and cabinet to create a strong efficient independent regulatory agency. Successful reform requires a strong independent regulator who is able to balance the demand of different interest groups, Yet the state may find it advantageous to create a weak regulatory agency, allowing it to favour the interest of certain rent seeking groups sometimes at the expense of the public.

1.4.2 Ghana Study by TIPS

The case of Ghana clearly demonstrates how lack of political will can undermine the capabilities of the regulatory agency. Ghana set out to liberalise telecommunications with the hopes of achieving greater competition in the market. Efficiency in service provision, private sector led to expansion and improvement of services nationwide and establishment of a modern, transparent regulatory framework (Republic of Ghana, investor presentation 1996) the need for an effective regulator was acknowledged very early in the process of regulatory reform, signalling a good start to the process.

Yet, the government failed to act according to its own state objectives, as it delayed appointment of the board that governs the regulatory agency. The National Communication Authority (NCA) and the board performs a variety of very crucial roles, as outlined in the Ghana statutes and legislation. This included the appointment of the staff, allocation of licenses and developing and approving the budget. Legislation provided that if the board does not exist, the minister has to

assume its role, as the NCA annual report 1999 states "the board is not in place, the continued absence of the board of directors thus puts a lot of pressure on the honourable Minister who has to combine a heavily schedule with the direction and control of the affairs of the NCA. In spite of the stated objectives of creating an independent and transparent regulatory agency. The affairs of the regulatory agency in Ghana ended up under the control of the minister. The debacle demonstrates the impact that politicians have on the future success of the regulatory agency.

The NCA has been unable to carry out some of the basic functions such as monitoring operators and releasing draft regulations and conducting public interest on time; due to the long absence of a governing board. This has earned the regulator a negative image in the eye of the public and the industry; further undermining effectiveness. Some have argued that the previous government had an interest in keeping the regulatory agency weak. All this holds an important lesson; the creation of a successful regulatory framework and effective regulator requires political will from the cabinet and politicians.

NCRF is aware that most of the cases used in the communication industry sector are of Malaysia. Of which it is not of the hook when it comes to the creation of an effective independent regulator. Thus far it looks up to South African regulatory framework as one of the cases towards their reforms.

1.5 South African Environment

Section 192 of the SA Constitution provides that national legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African Society. The first incarnation of the regulatory authority contemplated in section 192 of the Constitution was the Independent Broadcasting Authority (IBA), which was established by the Independent Broadcasting Authority Act 1 (the IBA Act). In terms of the Independent Communications Authority of South Africa Act 2 (the ICASA Act), the IBA was merged with the South African Telecommunications Regulatory Authority to establish the Independent Communications Authority of South Africa (ICASA), which came into existence on 1 July 2002.

The IBA Act of 1993 provides for the establishment of the regulator which shall function wholly independently of state government and party political influence and free from political or other bias or interference. The IBA Act provides for representation of the authority by its function through a council and define the powers; functions and duties of the authority. The IBA Act

further provide devolution of the powers relating to the administration management planning and use of the broadcasting services frequency bands to said authority and provide incidental matters. Due to the merger with the telecommunication regulator, water started to flow out of the line set by the telecommunications Act.

NCRF is of the view that for the amendment bill to enable the environment in the field of regulation of communication; it needs to acknowledge strong component of public process. Of which this process should still prevail in accordance with the ICASA amendment bill and both IBA Act; the Telecommunication Act respectively until such time that this bill is promulgated as the Act of parliament.

At the end of the day this amendment Act must remain one of the most practical, transparent and open underlying Act in as far as our mass communication in the Republic is concerned

2. Specification of the bill

The ICASA Amendment Act should provide for :-

To [add] *provide for* amend the Independent Communications Authority of South Africa Act, 2000, so as to amend certain definitions and insert certain new definitions; to determine in greater detail the functions and *powers* of the Authority; to consolidate certain powers and duties of the Authority; to provide for inquiries by the Authority; [remove] to amend the procedure for the appointment of councilors; to further regulate the financing of the Authority; to provide for the establishment of a Complaints and Compliance [remove] *Committee* [replace with] *Unit*; [remove] to provide for the appointment of inspectors [incorporate it in the complains and compliance unit]; to provide for the creation of new offences and penalties; and to amend the short title; and to provide for matters connected therewith.

Honorable Members must be aware that NCRF did allude to this point in their convergence oral submission and still believe that the way to go for communication industry sector is when **"player play, regulator regulate, policy makers direct policy"** not to interfere [honorable member must be aware of the collision that this bill can course in the coming process of migration, digitization, advance ICT policies and implementation convergence]. "let collision be avoided at all time during this process .

2.1 PREAMBLE

The NCRF propose that such amendment should still carry a mode of preamble seeing that we are collapsing the major work and all of us in the communication sector will have to abide by this will serve as a declaration of intend to the whole industry. Amendments of Section 1 of the amendment bill

Whereas is Desirable To

Recognize that [Information Communication Technological (ICT)] and other developments in the fields of communication are causing a rapid convergence of these fields;

Expand the Independent Communication Authority of South Africa to regulation communications in the Republic.

Acknowledge the work done the IBA Act, Broadcasting Act, Broadcasting Amendment Act, Sentech Act, Telecommunications Act and other regulation that have been in place to liberalize the communication sector thus far as contemplated in the hands of the ICASA Act 13 of 2000 that the consolidation of powered vested in ICASA in one legislation to have move powers to regulate communication in the highest possible mode is required.

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as

2.2 Amendment of act 13 of 2000 Chapter II

NCRF is of the view that substitution of the word independent by the electronic will be detrimental to the real independent this is viewed against the background find in our interpretation from the word "independence" is "

NCRF would like to draw honorable members to **Media Development and Diversity Agency Act, 2002 expertise and extensive consultation that mass media under took together with state to look at the development of the media agency that will cater for the development and diversity in the Republic.**

2.2.1 Purpose

The purpose of the Act is to create an enabling environment for media development and diversity in South Africa, which the legislation envisages should be facilitated via the Media Development and Diversity Agency (MDDA).

Section 2(4) states that the MDDA must operate independently without political or commercial

interference. Section 2(5) enjoins the MDDA to respect the autonomy and specifically prohibits the MDDA from interfering in the editorial content of the media. The MDDA acts through a board whose members are appointed by the President on the recommendation of the National Assembly of Parliament pursuant to a public process. Section 9 empowers the responsible Minister to determine the remuneration of MDDA board members in consultation with the Minister of Finance. Otherwise, section 12 empowers the board to determine the remuneration of the CEO and other MDDA staff members in accordance with a system approved by the Minister, with the concurrence of the Minister of Finance. Section 16 requires the MDDA to report annually to Parliament via the Minister.

looking at ICASA and the IBA acts as amended the question is what when wrong in enacting independence. While NCRF understand the importance on electronic communication as the backbone of regulation it is believed that that it will not be wise for the change of the name as the name instill the independence of the regulator.

Now let us take honorable member to the big question.

Independent broadcasting Authority Act 1993 commenced in 30 march 1994, The primary purpose of the Act was to establish an independent regulator in the form of the IBA to regulate broadcasting in the public interest. The IBA has subsequently been subsumed into ICASA. The provisions in the IBA Act that establish the regulatory framework for broadcasting in South Africa still remain in force. *Sector of the media governed by the Act is broadcasting service providers and to broadcasting signal distributors.*

Powers granted to the Minister or Director-General by the Act:

Section 28 empowers ICASA to conduct public inquiries into any matter relevant to the achievement of its objects, the exercise and performance of its powers, functions and duties, and its regulation-making powers under section 78. Section 78 empowers ICASA to make regulations without any involvement from the executive arm of government.

Section 13A(2) empowers the Minister of communications to direct ICASA to undertake special investigations and inquiries, to determine priorities for the development of broadcasting services, and to consider any matter placed before it by the Minister for urgent consideration.

Section 13A(5) empowers the Minister to issue policy directions to ICASA.

Under section 13A(4), the Minister is required to consult with ICASA before doing this. However, section 13A(5)(b) does not require ICASA to follow policy directions issued by the Minister, only to take them into consideration. In relation to the public broadcaster, the SABC, section 13A(1) provides that the Minister must approve all acquisitions and disposals of state broadcasting assets.

NCRF propose that the section dealing with public enquiry need to be left as is. And provides for the consultation by ICASA on matters that affect the consumer and consumer rights[cost of services]

NCRF has observed that this section that is "shaded grey" is the bone of contention. NCRF believe that if this section can be addressed it will benefit the grassroots community "remember during the convergence oral presentation we alluded to the fact that when the elephants fight the grass suffer, NCRF of the view that the amendment bill should have picked up the course of the problem and provided for the solution to massage the problem within the context of communication services using the : -

In terms of the ICASA Amendment bill [b32-2005] a section on the Minister is required to consult with ICASA before directing policy however ICASA shall conduct the market and feasibility study before taking into consideration. In relation to communication to the communication industry sector Minister must approve acquisition and disposals of state communication assets.

in term of Telecommunications Act 1996 ICASA cannot regulate all telecommunication services but it must monitor and enforce compliance within the Telecommunications Act. In the event of repealing the Telecommunications Act we need to empower the ICASA in the amendment bill to regulate all communications services as contemplated by the Convergence Act and other related status such as the ECT Act

Propose Solutions towards the this matter:-

Independent Communications Authority of South Africa Act, 2000 *Commenced on 11 May 2000 the purpose of the Act is to combine sector-specific regulators for the broadcasting and telecommunications sectors in the form of the Independent Broadcasting Authority (IBA) and the South African Telecommunications Regulatory Authority (SATRA) respectively. The purpose of the Act was to amalgamate the two regulators into one body in the form of ICASA, with overarching jurisdiction over both the broadcasting and telecommunication sectors. Sector governed by this Act applies to both the broadcasting and telecommunication industries.*

• Key provisions:

Section 3(1) establishes ICASA as a juristic person, with the power to regulate both the broadcasting and telecommunication sectors. Section 3(3) enshrines the independence of ICASA from commercial and political interference.

Section 5 of the Act empowers the President to appoint the seven councilors of ICASA. The President is only permitted to make appointments on the recommendation of the National Assembly, following a public hearing with all the candidates. Section 5(2)(a) empowers the President to appoint the chairperson of ICASA from the ranks of the councilors this are from our understanding granted to *Powers by the Act: granted to the Minister or Director-General*

Section 10 empowers the Minister of Communications to determine the remuneration and benefits of ICASA with the concurrence of the Minister of Finance. ICASA is required to report to Parliament via the Minister under section 16. ICASA must be empowered by the amendment bill to regulate all communication as contemplated by this Act and other status [convergence act]

ICASA should be empowered to enforces compliance with the regulatory regime in terms of the Underlying legislation governing communication.

Amendment of section 5 of act 13 of 2000

Again the NCRF would like to borrow from the phrase used being: **If it ain't broke, why fix it?**

NCRF does not support this amendment and propose that section 5 of act 13 of 2000 be left as is. This is against the background that we still have confidence in the democratic parliamentary process. We are confident that the work that parliamentary portfolio committee of communication is doing is in the public interest.

NCRF is of the view that the current status stipulate in full the process that needs to be undertake when selecting the council and see no bias in the process including the Presidential involvement in the process.

The president must still appoint chair of the council in consultation with cabinet and relevant committee of parliament.

The addition of sub section 5(b) needs to be drafted in this regard and the reflection of section (2) (a) Act 13 of 2000 must be retained as is.

NCRF supports the insertion of subsection (d) and the changes thus far.

Amendment of section 6 of act 13 of 2000 as amended by section 36 of Act 12 of 2004

Insertion of section 6(a) needs to be redrafted and NCRF propose that ICASA as the authority should not be naïve from Labour Relations Act (LRA)

The performance of the council should be established within the ambit of the labour relations act King II Commission report set as the yard stick towards the performance of the councillors. This must be done within the Corporate Governance Code of good practice. NCRF would like to refer

honourable members to the King II Commission Report. This report is the best in as far NCRF is concerned that can be used to evaluate the performance of councillors.

Amendment of section 7 of Act 13 of 2000

NCRF still has the confidence in the current status of the presidential involvement therefore propose that the section 3 be left to the president.

Amendment of section 9 of Act 13 of 2000

NCRF propose that this section be left as is in the current Act 13 of 2000 without removing national assembly to direct such matters.

Amendment of section 14 of Act 13 of 2000

NCRF still believes that this section should be redrafted and in doing so honourable members must look at King Commission Report so as to align this section with corporate governance and good practice.

Amendment of section 14 Act 2000

The establishment of complaints and compliance committee is a step in the right direction but NCRF would like to bring to the attention of honourable members that we must not be seen creating the so called "*communication scorpions*" but establish unit when viewed collectively be able to: -

- Promote the compliance in a developmental manner within public interest far from political and commercial interference.
- Develop tools to protect national and regional identity, culture and character of communication industry sector.
- Protect and promote the integrity of viability on equitable and non-discriminatory communication services.
- Promote compliance in the manner that will be empowering and not killing.

NCRF believe that the inspector must be part of the complaint and compliance committee report to the head of the unit and be appointed the by CEO of the Authority.

In conclusion

In conclusion the relationship between the Department of Communication and the regulator has been problematic. The NCRF would like to plead to the national assembly that we need political will to exist in order to create a strong regulatory agency and other issues relating to regulation within which regulation has to go.

NCRF is confident the these issues will eventually be resolved during the deliberation of this amendment bill and the core attention be put in the implementation of the convergence policy more that anything else.

Note

The National Community Radio Forum (NCRF), registered as a Section 21 Company not for gain in 2001, was formed in 1993 in Orlando, Soweto, in order to lobby for the diversification of the airwaves in South Africa, and to foster a dynamic broadcasting environment in the country through the establishment of community radio stations. The NCRF has about 120 community radio station projects in its membership, with about 70 of the stations on air and others waiting to be licensed.

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