
GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

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Independent Communications Authority of South Africa

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POSITION PAPER

MUNICIPAL ELECTIONS BROADCASTING REGULATIONS AMENDMENT

FEBRUARY 2016

1. **Acknowledgements**

- 1.1 The Independent Communications Authority of South Africa ("the Authority") would like to acknowledge and thank all stakeholders who participated in the process aimed at amending the Municipal Elections Regulations.
- 1.2 The following stakeholders submitted written representations to the Draft Regulations:
- (a) Democratic Alliance
 - (b) Kelvin Johnson
 - (c) Makgoka Manong
 - (d) National Association of Broadcasters
 - (e) Western Cape Office of the Premier

2. Introduction

- 2.1 The Independent Communications Authority of South Africa ("the Authority") is amending the 2011 regulations¹ on Municipal Elections Broadcasting. The regulations seek to prescribe the framework and guidelines under which party election broadcasts (PEBs) and political advertisements (PAs) shall be conducted and carried by the broadcasting service licensees (BSLs) during the municipal elections. Although the Authority does not regulate political parties, the regulations are applicable to both BSLs and political parties contesting the municipal elections, primarily. Therefore both must ensure that they are conversant with the contents of the regulations.
- 2.2 It is also important to point out that the regulations are applicable during the Election period and therefore the broadcast of PEBs and PAs must only take place during this period. More specifically, PEBs must be broadcast during the Election Broadcast Period as will be determined by the Authority through the allocation of PEB slots. Broadcast of such material outside this period will be in contravention of the regulations.
- 2.3 Attached to the regulations are guidelines intended to assist the BSLs and political parties in terms of broadcasting matters of a political nature outside PEBs and PAs.
- 2.4 The Authority published the draft regulations on PEBs, PAs and the equitable treatment of political parties by broadcasting licensees and related matters in respect of municipal elections broadcasting on 25 September 2015, in Government Notice 896 of Government Gazette 39237.
- 2.5 The draft regulations seek to amend the 2011 regulations on Municipal Elections. The Authority conducted workshops across the nine provinces with the relevant stakeholders on the draft regulations. The closing date for

¹ Regulations on party election broadcasts, political advertisements, the equitable treatment of political parties by broadcasting licensees and related matters during municipal elections published in General Notices 202 and 203 of 08 March 2011, Government Gazette No. 34086

submissions was 13 November 2015 and the Authority received 5 written submissions in this regard.

- 2.6 This Position Paper considered the views expressed by interested stakeholders with main focus on salient issues. Where necessary, the Authority put forward its positions regarding the issues raised from the provincial workshops and written submissions. The positions (underlined below) form the basis for finalising the regulations on Municipal Elections Broadcasting. The provincial workshops report will be published on the Authority's website in due course.

3. Languages of Party Election Broadcasts

- 3.1 The National Association of Broadcasters ("the NAB) submitted that it welcomed the amendment to clause 4, by the insertion of sub clause 4 (25) that stipulates that a PEB must be in the language of the relevant BSL.
- 3.2 The NAB proposed that the Political Party responsible must be responsible for translation costs. Their proposed amendment reads as follows:

"A PEB must be in the language (s) of the relevant BSL. The party responsible for such a PEB shall be responsible for any translating costs that may arise"

- 3.3 The Authority's view is that the political party concerned should familiarize themselves with the language(s) of broadcast of the Licensee concerned that will be transmitting the PEBs. Furthermore, the draft regulation stipulates that the Licensee cannot alter or edit the content of the PEB which implies that any costs for the production, altering or editing of the PEB would be incurred by the party concerned.

4. Definitions

- 4.1 The NAB proposed that the term "party" as defined in the draft Regulations be substituted with the term "political party" for alignment with the Electronic Communication Act No. 36 of 2005 (ECA), which recognizes the term "political

party. To this end, any reference to party in the draft Regulations should be substituted with “political party, and the term “registered political party” used in clause 5 of the regulation be deleted, and substituted accordingly.

4.2 The Western Cape Office of the Premier submitted that an amendment is necessary for draft sub-regulation 2.5, the definition of “party”. The Office of Premier’s reasons are that this wording is too vague and is susceptible to abuse by a person or group who claims to support a political party but is not recognised or acknowledged by that party.

4.3 Mr Makgoka Manong (“Manong”) emphasised that, by registered political parties they are referring to political parties that registered as political parties in South Africa and not just to register for the purpose of elections only. He explains that politics is the business of political parties on daily business, so they want to be heard from day one, unlike to wait for the days of elections where only election agenda is prescribed.

4.4 The comments have been noted and the Authority will replace “party” with “political party” in order to align the regulations with the definition in the Legislation.

4.5 The Western Cape Office of the Premier pointed out that the proposed definition of “News” is confusing and ambiguous. Thus the following amendment to the definition is suggested:

“News’ means programming that is distinct from a current affairs programme and that consists of newly received information that is factual and properly contextualised pertaining to events of immediate social, political or economic relevance and on matters of international, national and local significance”.

4.6 The current definition of news is sufficient. It is reasonable to expect broadcasters to use journalistic ethics as mentioned in the guidelines and also refer to Section 10 of the Code of Conduct for Broadcasters.

5. Complaints

- 5.1 The NAB welcomes the alignment of the draft Municipal Regulations with the Rules and Procedure of the Complaints and Compliance Committee (CCC), by recognizing that any complaints relating to the draft Municipal Elections Regulations should be dealt with by the CCC as urgent matters. However, the NAB cautions that it appears that certain clauses dealing with the complaints are misplaced and not dealt with under regulation 7, a regulation dedicated to complaints. To this end, the NAB proposes that sub-regulation 4 (10) and 6 (8) be moved to regulation 7, as they deal with complaints.
- 5.2 The Authority agrees with NAB that the regulations dealing with Complaints be put under one section.

6. Timeframes

- 6.1 On Draft Regulation, sub-regulations 4(2), 4(7) and 4(8) dealing with submission of PEB to the BSL and the timeframes for rejection and re-submission, the Office of the Premier submits that the proposed regulations need to be amended to provide for appropriate and realistic timeframes to prevent abuse by the Authority and prejudice to a political party.
- 6.2 The Western Cape Office of the Premier is of the view that draft sub-regulation 4(8) is not clear as it does not specify within 24 hours of what event must the BSL notify the Authority? Presumably this refers to receiving the written confirmation from the party, but this must be made clear. This comment also pertains to proposed sub-regulation 6(6) pertaining to PAs.
- 6.3 The Authority refer to twenty four (24) hours after receiving the written confirmation.
- 6.4 The Office of the Premier argues that draft sub-regulation 4(9) is not sufficiently clear, and in these circumstances the wording can be interpreted to mean that the party still wants to broadcast the PEB (without alteration) on the original

date set for the broadcast and is approaching the Authority to review the rejection by the BSL accordingly. In such a case then, as pointed out elsewhere in these comments, the time frames will be very tight. Alternatively it is submitted that the wording can also mean that the party no longer wants to broadcast the unaltered PEB at all or broadcast it at a later date and is approaching the Authority to review the rejection with this in mind. It is submitted that clarity is required as to the intention of the wording. This comment also has application to proposed draft sub-regulation 6(7) pertaining to PAs.

- 6.5 The CCC will, upon referral of the rejected PEB, consider the matter and make a determination.
- 6.6 The Office of the Premier raised a concern that draft sub-regulation 6(5) differs from existing regulation 6(3) which states that the BSL must within twenty four (24) hours of the rejection furnish the party concerned with reasons.
- 6.7 Firstly, it is not clear why twenty four (24) hours has been amended to one day. It is not clear how "one day" will be measured and what the significance of the amendment is. It is submitted that the usage of hours is consistent with the rest of the regulations, particularly proposed sub-regulation 4(7) which relates to the rejection of a PEB by a BSL.
- 6.8 Secondly, if the proposed regulations are implemented it will mean that the BSL must assess the PA or PEB (and provide reasons for the rejection) within twenty four (24) hours of receiving the PA or PEB for broadcasting.
- 6.9 In terms of the current regulations the notification of rejection to the party must be made within twenty four (24) hours of the decision to reject the PA or PEB being made.
- 6.10 It is submitted that it is not reasonable to expect the assessment and notification to be made within one day or twenty four (24) hours of the PA or PEB being submitted by the party to the BSL for broadcasting.

- 6.11 It is submitted that it would be better to provide a time limit by which the BSL must accept or reject the PA or PEB and thereafter have a time limit of twenty four (24) hours by which notification of rejection to the party must be made.
- 6.12 The Office of the Premier submitted that the wording in draft sub-regulation 4(10) should read, "A matter referred to the Authority in terms of sub-regulation (9)...". A similar comment can be made with regard to proposed sub-regulation 6(8) pertaining to PAs. The Office of the Premier pointed out that regarding Draft Regulation 4(11), no time limit is specified within which the Authority must make its determination once the complaint has been lodged. It is submitted that such a time limit is necessary to prevent abuse by the Authority. A similar comment can be made with regard to proposed sub-regulation 6(9) pertaining to PAs.
- 6.13 In the same way, regarding draft sub-regulation 7(3), the Office of the Premier notes that no time limit is specified within which the Authority must make its determination once the complaint has been lodged. It is submitted that such a time limit is necessary to prevent abuse by the Authority. The fact that the decision is final and binding is also problematic as, given the political nature of appointments in the communications field, this is also open to abuse.
- 6.14 The Authority will use proven timeframes that have yielded positive results in the past years; that are a considerable improvement from the complaints mechanisms utilized in the 2011 Municipal Elections regulations. Complaints will be dealt with as per regulation 6 of the CCC Regulations. Election Broadcast Period is a relatively shorter period, thus the Authority cannot afford to extend timeframes in the Draft Regulations. Lengthening timeframes might mean some complaints regarding PEBs will extend beyond their scheduled broadcast time. In worst case scenario, complaints will extend beyond polling period. To ensure fairness to all Political Parties and interested stakeholders, the CCC will continue to speedily resolve all complaints and disputes within the suggested timeframes. Lack of listing specific timeframes will not compromise the urgency of election matters.

- 6.15 Section 17C of ICASA Act of 2000 as amended deals with procedures to be followed by the CCC; an independent judicial arm of ICASA; established in terms of Section 17A of the ICASA Act and is mandated to investigate and adjudicate all complaints received by it.
- 6.16 In order to relieve pressure from the CCC, complaints related to political parties alleging that they were not aware of PEB slots allocated to them, that broadcasters did not broadcast their slots even after allegedly meeting their deadlines or that broadcasters did not broadcast their PEBs because they are not in line with 'Regulation' or in line with Licensees' technical standards are dealt with by the internal ICASA Compliance Unit.
- 6.17 However, if there's a dispute, these are forwarded to the CCC. If the dispute relates to the contravention of Regulations these are immediately forwarded to CCC. Also those that are submitted to Compliance and are express to say they are lodged in terms of Section 17C of ICASA Act, are immediately forwarded to the CCC office.

7. Content of PEB and PA

- 7.1 The Democratic Alliance (DA) submitted that the draft amendment to the regulations takes the form of the addition of a point relating to the content of Party Election Broadcasts, which reads as follows:

Content of PEB's may not be derogatory of any other party or individual.

- 7.2 The DA provides an ordinary definition of the word "derogatory" as defined in the Oxford dictionary, as involving disparagement or discredit. The DA is of the view that Political contestation and the battle of ideas are by their very nature critical. Any form of worthwhile political discourse involves some form of disparagement or discredit to another candidate or such candidate's policies.

- 7.3 The DA further submitted that the application of the “derogatory” principle as proposed will in effect amount to self-censorship. Vague terminology opens the door to a myriad of interpretations by various functionaries in a multitude of public- and private bodies, and that the advertising party will be obliged to pre-censor any information that may be deemed “derogatory” to satisfy the demand of the Schedule.
- 7.4 The DA also make mention of the rights to freedom of expression as enshrined the Constitution of the Republic. In terms of section 36 of the Constitution of the Republic, *“the right to freedom of expression is limited in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom...”*,
- 7.5 The Western Cape Office of the Premier notes that Draft sub-regulation 4(12)(b) allows for subjective value judgments and the broad and vague discretionary nature of the wording is open to abuse by BSLs enabling them to stifle robust political commentary or criticism under the guise of this provision. It is submitted that clear guidelines and criteria need to be incorporated here. The wording “or that may be perceived as promoting any such act” should be deleted in its entirety. It is also not clear what the distinction is between “unlawful”, “illegal” and “criminal”. The Office of the Premier argues that it is not clear why on draft sub-regulation 4 (16), broadcast material used as a PEB cannot be broadcast as a PA.
- 7.6 The Office of the Premier submitted that draft sub-regulation 6(10) (b) pertaining to PAs is similar to draft sub-regulation 4(12) (b) pertaining to PEBs. The comments provided for draft sub-regulation 4(12) (b) have equal application here. It is also noted that there is a slight difference in the wording between proposed sub-regulations 4(12) (b) and 6(10) (b). It is not clear why there is no consistency in the wording.
- 7.7 The DA is of the view that the phrasing of the proposed amendment of sub-regulation 4(12) (b) is too vague for an objective interpretation. Sub-regulation

4 (12) (b) in its current form states that “*PEB may not contain any material that is calculated, or that in the ordinary course is likely, to provoke or incite any unlawful, illegal or criminal act, or that may be perceived as condoning or lending support to any such act*”.

7.8 The proposed amendment to sub-regulation 4 (12) (b) reads as follows- “*...contain any material that is likely to provoke or incite any unlawful, illegal or criminal act, or that may be perceived as promoting any such act*”. The DA argues that if taken to its logical conclusion, it could create a situation where a purely subjective test is applied to a PEB by a functionary of a BSL. Such functionary could subjectively declare that a particular PEB offends the provisions of sub-regulation 4(12) (b), when objectively it does not. It is impossible to objectively define what is “likely” to provoke or incite due to the divergent views held by individual members of society. Furthermore, that the vague phrasing of the restriction opens the door to potential abuse of power by functionaries of a BSL; which will in turn unfairly prejudice the political party that authored the PEB.

7.9 The DA submits that the proposed amendment be rejected and that the regulation is retained in its original form.

7.10 The DA makes a submission to the extent that the same objections raised above, apply to Regulation 6 (10) (b) of the proposed amended which reads as follows:

“A party that submits a PA to a BSL for broadcast must ensure that the advertisement does not: contain any material that is calculated, or that in the ordinary course is likely to provoke or incite any unlawful, illegal or criminal act, or that may be perceived as condoning or lending support to any such act, With the necessary changes thereto”.

7.11 The DA is raising an issue of interpretation and the possible abuse of powers by a BSL. Subjective interpretation is based on opinion while an objective one is based on facts. The interesting part of the DA's argument is that there is a

specific test that is generally used to determine the reasonableness of the expected conduct, the test is commonly known as ("the reasonable man's test"), which is also subjective in nature to the extent that such measuring mechanism depends on several external circumstances such as location, standard of education, moral principles and so forth.

- 7.12 There is a general rule of interpretation in that the words used in a statute are to be given their ordinary grammatical meaning unless they lead to absurdity. ICASA is an organ of state and any decision taken or failure to take such a decision is reviewable in law.
- 7.13 In the light of the above, there is no material harm to leave sub-regulation 4 (12) (b) in its current form.
- 7.14 A PEB is a direct address or message whilst a PA is an advertisement.
- 7.15 PEBs are direct address or messages meant to advance the interest of a political party during election period and they are for free whilst PAs are advertisements paid for by political parties during election period. Draft sub-regulation 4 (16) is meant to ensure that the contents of PEBs and PAs don't look the same. This in response to the historical accusations that has been vented against the Authority that some political parties have been awarded more PEBs by either the Authority or BSL. Thus if a PA is in a form of a direct address or message it must have a disclaimer in the beginning and in the end, stating that it has paid for by the advertising political party. All PEBs must have a disclaimer in the beginning and in the end stating that they are in terms of ICASA Regulations. In instances where it is paid for, the disclaimer must clearly mention the political party that paid for the PA. Broadcast content must also be differentiated, it must not be exactly the same from the first till the last second of a PEB/PA.

8. Allocation of slots

- 8.1 The Western Cape Office of the Premier submit that allocating air time for an upcoming election in accordance with seats held as a result of a previous election is effectively advantaging and disadvantaging parties based on past results, placing parties on different footings and compromising fair elections. It prejudices smaller parties, arbitrarily placing them on an unequal footing based on past performance and not future potential, and promotes the structural entrenching of larger party dominance. Consequently it is submitted that proportional representation of the number of seats currently held at District and Local level as a principle for allocating air time should be deleted.
- 8.2 Manong is of the view that all registered political parties should be given equal slot on air.
- 8.3 Allocation of PEBs is based on four (4) principles that allows all Political Parties an opportunity to communicate with the public and potential voters. Proportional representation of the number of seats currently held at District and Local level as a principle for allocating PEBs marks a smaller portion when considering all principles. Smaller and new Political Parties with no representation at District or Local level will benefit from other three principles that are futuristic in outlook.

9. Contact persons

- 9.1 In view of the nationwide nature of the municipal elections, the Office of the Premier submit that two people from each BSL and party are insufficient to handle the potential volume of work involved as stated in draft sub-regulation 8(1)(b).
- 9.2 The Authority has chosen to deal with two (2) people representing either a BSL or a Political party to avoid confusion that will emanate from dealing with an added number of people representing one political party/BSL. This is to ensure that the Authority/BSL/political party does not receive differing views from the same entity and accountability lies on 2 people during the Election period.

considering that the Election period is short. It is easier to consolidate views from 2 individuals of the same organisation than try to make out what many submissions from one organisation mean.

9.3 The Western Cape Office of the Premier noted that there might be a considerable length of time between the regulations coming into operation (and the nominations being made within thirty (30) days) and the date that the elections are held. It is possible that there might be a turn-over of nominated persons prior to the elections. The regulations should therefore make provision for a change in the nominated persons.

9.4 The Authority allows for change in nominated persons and such change must be reasonable so as not to experience high number of changes. Therefore the Authority must be informed immediately of the changes and the reasons thereof.

10. By-elections and Independent Candidates

10.1 Mr Kelvin Johnson ("Johnson") raised a concern that the ECA only recognises Political Parties. He suggested that the Authority should extend its jurisdiction to include independent candidates as well as individuals making political statements and advancing political agendas during elections and bi-elections. Johnson submits that the Authority should also extend its jurisdiction during bi-elections as the campaigns target and have the same influence to the electorate.

10.2 He further suggested that the regulations should also be applicable to NGOs and NPOs such as Treatment Action Campaign as these organisations are running political agendas and issue political statements.

10.3 Johnson submitted that with the election process and bi-elections in-between it is very difficult to distinguish "what the Election Period is", since political parties work around the clock to win over voters. He suggested that the Authority have

jurisdiction over broadcasters irrespective of whether it is an election period or not.

10.4 He further raised a concern that, since this is a draft and not yet applicable to political parties and Independent Candidates, it will then allow transgressions to test the Authority.

10.5 The Authority realises that the Independent Electoral Commission does allow individual candidates to contest for municipal elections. However, the ECA only recognises political parties. Therefore the regulations will only focus on political parties as per the definition in the ECA.

10.6 The Authority has not provided for the regulation of by-elections in the past. However, there has been increased requests from political parties for these regulations to cover by-elections over the past few years. The Authority deliberated on the possibility of regulating by-elections and determined that broadcast licensees will not be required to broadcast PEBs and PAs during by-elections due to:

- (a) the financial implications, unpredictability and frequency of the by-elections;
- (b) by-elections are contested by candidates whereas the Act recognise only political parties.

11. Ensuring Compliance

11.1 Johnson submitted that the Authority should strengthen its monitoring and enforcement as it is unacceptable to leave the decision to participate in PEBs to Station Managers. He further submitted that this hampers the pace of transformation and development at radio stations such as PUK Radio, which is supposed to service the broader community.

11.2 The ECA compels only the public broadcaster, as part of its public service mandate, to broadcast PEBs. The Act allows Commercial and Community Broadcasting Licensees to choose if they want participate or not. The decision is not left to the Station Manager, but the controlling structure of the Licensee.

11.3 Johnson recommended that content of a PA should not be left to the Political Party alone, without the guidance and influence by the Authority. He asserted that Political Parties cannot be given a blanket indemnity to exclusively own the content to any PA simply because it is a commercial agreement between the Licensee and the Political Party. He suggested that the Authority should influence the agreements as to not compromise anyone.

11.4 The content of a PA is required to comply with the relevant legislation as well as these regulations. The regulations and legislation provide enough guidance on the acceptable content; and non-compliance warrants rejection and alteration of a PA. It is therefore the responsibility of the Political Party to ensure that PA content is compliant to avoid rejection and possible delay. The Authority does not get involved in editorial matters as this is outside its jurisdiction.

12. General

12.1 Johnson suggested that the Authority should consider establishing a relationship with the Print Media in terms of enforcement. He pointed out that it is very easy for Political Parties to utilize Print Media or any other platform as alternatives to evade compliance with these regulations.

12.2 Johnson submitted that, for the Authority to send a correct and uniform message, it needs to get big Media Houses in the same room as Community Radio Stations. He asserted that there is a perception that the Authority does not have jurisdiction over Big Media Houses. He further submitted that since he believes that the Authority has a moral obligation and a Constitutional Mandate to reach out to communities more vigorously, the Authority should in future go to venues closer to these communities, especially farm communities and rural dwelling since television and radio are sometimes the only means to access broadcast services.

- 12.3 The Authority regulates all Broadcast Service Licensees, regardless of the tier or size. Public consultation and participation are always extended to all stakeholders.

13. ICASA Contact Person

All correspondence regarding Municipal Elections Broadcasting should be marked specifically for Attention: Ms Fikile Hlongwane. Delivery address: Block D, Pinmill Farm, 164 Katherine Street, Sandton. Further enquiries in that regard may be directed to her via e-mail at: FHlongwane@icasa.org.za or by facsimile: 011 566-3198 or by telephone: 011 566-3197; between 10h00 and 16h00, Monday to Friday only.



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