



**NAB SUBMISSION ON
TELECOMMUNICATIONS AMENDMENT BILL**

19 September 2001

1. INTRODUCTION

1.1. On 29 August 2001, the Minister of Communications published the Telecommunications Amendment Bill ("the Bill") in the Government Gazette for public comment. The National Association of Broadcasters ("the NAB") as a stakeholder in the communications industry intends to comment on the Bill.

1.2. The NAB is an organisation that aims to further the interests of the broadcasting industry in South Africa by contributing to its development as well as the development of a coherent legislative framework. The NAB is the leading representative of South Africa's broadcasting industry, representing:

1.2.1. all television broadcasters;

1.2.2. the SABC radio stations, 14 commercial radio stations and 40 community radio stations; and

1.2.3. both the common carrier and the selective and preferential carrier signal distributors.

1.3. As a result of the convergence of broadcasting and telecommunication technologies, members of the NAB and other broadcasters are already, and will continue to be, profoundly affected by telecommunications policies and laws. It is mainly in this spirit that the NAB makes these written submissions.

1.4. The NAB wishes to contribute to the Parliamentary process of the enactment of the Bill by placing its concerns regarding a number of provisions or omissions in

the Bill in so far as they pertain directly or indirectly to broadcasting, and welcomes the opportunity to do so.

1.5. In this submission the NAB deals only with those provisions of the Bill that impact directly or indirectly on broadcasting policies, laws and regulations as follows:

1.5.1. firstly, the NAB sets out its major concerns regarding telecommunications and broadcasting regulatory and legislative processes in general; and

1.5.2. secondly, the NAB comments on specific provisions of the Bill.

2. ISSUES OF MAJOR CONCERN REGARDING BROADCASTING AND TELECOMMUNICATIONS REGULATION

2.1. LEGISLATIVE APPROACH

2.1.1. The NAB is concerned that government continues to pass separate pieces of legislation for both broadcasting and telecommunications despite the inevitable convergence of the two industries. The NAB is concerned that this represents a failure to address issues emanating from convergence, the internet and other new communications technologies. The NAB believes that the delay in passing an omnibus Act that merges and regulates the two industries creates problems for the entire communications industry. Firstly, the NAB believes that the delay is not in line with government's objectives, as set out in all the pieces of telecommunications and broadcasting legislation, of

regulating the communications industry in a manner that ensures and promotes economic growth and development, encourages investment and innovation in the industries and promotes the development of communication services which are responsive to the needs of users and consumers.

2.1.2. Secondly, the NAB is of the view that the continued separation of the two industries creates regulatory problems for the Independent Communications Authority of South Africa (“ICASA”), particularly with regard to regulation of multimedia or new media. ICASA currently operates under the legislative auspices of four primary pieces of legislation, namely, the Independent Communications Authority of South Africa Act (“ICASA Act”), the Broadcasting Act, 4 of 1999 (“the Broadcasting Act”), the Independent Broadcasting Authority Act, 153 of 1993 (“the IBA Act”) and the Telecommunications Act, 103 of 1996 (“the Telecommunications Act”). In terms of section 4(1) of the ICASA Act, ICASA is required to perform the duties imposed upon the former Independent Broadcasting Authority (“the IBA”) and the South African Telecommunications Regulatory Authority (“SATRA”) in terms of the IBA Act, the Broadcasting Act and the Telecommunications Act and may exercise the powers conferred upon the IBA and SATRA in terms of these underlying pieces of legislation. The difficulty is that broadcasting and telecommunications are regulated differently. For instance:

2.1.2.1. ICASA is not bound by policy directions on

broadcasting matters issued by the Minister but must only consider them, whereas it is bound by those issued on telecommunications matters;

2.1.2.2. In terms of the IBA Act, the Minister may not make any regulations that impair the independence of ICASA whereas the only limitation that exists in respect of her powers to make telecommunications regulations, is that such regulations must be consistent with the objects of the Telecommunications Act;

2.1.2.3. In terms of the IBA Act, licences are issued, and conditions thereof are determined, by ICASA whereas the Minister makes invitations for applications for certain major telecommunications licences, grants such licences and determines and imposes licence conditions in terms of the Telecommunications Act;

2.1.2.4. The Minister approves all telecommunications regulations in terms of the Telecommunications Act whereas she does not have those powers in terms of the IBA Act.

2.1.2.5. The NAB believes that the above situation creates confusion in the industry and for ICASA as, in its interactions with the Minister, ICASA will probably have

minimal regulatory powers in respect of its telecommunications functions whereas it will have far greater regulatory powers in respect of its broadcasting functions.

2.1.3. Thirdly, the NAB is concerned that the delay to pass one omnibus Act for the communications industry undermines the independence of ICASA as entrenched in the Constitution. The fact that ICASA has different statutory regulation powers as illustrated above poses some constitutional difficulties. This issue is fully discussed below.

2.1.4. The NAB recognises that government is under pressure to put in place legislative processes that would enable the entry of the Second National Operator (“SNO”) into the market on 7 May 2002. It is in light of this that the NAB submits that the Bill must be reduced to dealing only with this issue, and that government must urgently introduce an omnibus Act that would regulate the telecommunications and broadcasting industries. This Act would clearly spell out the policy making functions of government and the regulatory functions of ICASA.

2.2. **THE INDEPENDENCE OF ICASA**

2.2.1. The NAB is concerned that the Bill contains provisions that appear to undermine ICASA’s regulatory functions. The independence of the former IBA, and by extension ICASA, is provided for in section 192 of the Constitution. Section 192 of the Constitution provides that National legislation must establish an independent broadcasting authority to

regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society.

2.2.2. Section 192 is housed within Chapter 9 of the Constitution, which deals with institutions regarded as “State Institutions Supporting Constitutional Democracy”. However, Chapter 9 does not deal with the IBA in the same way as it deals with the other institutions. Section 181, which deals with the independence of Chapter 9 Institutions, provides, *inter alia*, that Chapter 9 Institutions are independent, subject only to the Constitution and the law, and must be impartial and must exercise their power and perform their functions without fear, favour or prejudice, and that no person or organ of state may interfere with the functioning of these institutions.

2.2.3. ICASA is a product of a merger between the IBA, whose independence was provided for in the Constitution, and SATRA, which was not explicitly referred to in the Constitution. The fact that ICASA will have to enjoy less independence when performing telecommunications functions undermines the provisions of the Constitution as well as the status of ICASA as a Chapter 9 institution.

2.2.4. Most of the provisions of the Bill are based on the Telecommunications Policy Directions issued by the Minister, which have far reaching implications on the independence of ICASA. In particular the provisions impact on ICASA’s independence in one or more of the following respects:

2.2.4.1. Certain entities will be granted licences without them having first applied for such licences, and without having followed the same procedures provided for in the Telecommunications Act. For example, ICASA has to issue a licence to Second National Operator, in terms of the proposed section 32C of the Bill, without it having applied for it;

2.2.4.2. 1800MHz spectrum and third generation licences have been allocated to certain entities, in terms of the proposed sections 30A and 30B of the Bill, without such entities first having applied for such spectrum and services licence and without ICASA first having determined whether there will be any interference. It should also be noted that the allocation of the 1800MHz spectrum has occurred in the absence of a national policy on spectrum pricing. The NAB believes that a national policy on spectrum pricing for all services in all frequency bands, that determines spectrum fees and the calculation method used to determine such fees, is urgently required.

2.2.5. The NAB is concerned that, although ICASA currently acts through a Council, contemplated in Section 5 of the Independent Communications Authority of South Africa Act, 13 of 2000 (“the

ICASA Act”), which consists of seven councillors appointed by the President on the recommendation of the National Assembly. The Bill introduces an amendment to section 5 of the ICASA Act regarding the appointment procedure. This amendment will result in the candidates nominated for the appointment to the Council of ICASA, having to appear before a selection panel consisting of five persons, all of whom will be appointed by the Minister. This selection committee decides on the fitness of each candidate to serve as a councillor, publishes a shortlist and makes recommendations to the President who in turn consults with the Portfolio Committee and the National Assembly, and after receiving their consent appoints the councillors recommended by the selection panel. The NAB is concerned that this is another example of the Minister threatening the independence of ICASA.

- 2.2.6. Some provisions of the Bill also compromise the principle of transparency. In this regard, the NAB is concerned by the proposed amendments to sections 29 and 34 of the Act and the proposed introduction of section 35A of the Bill. The NAB submits that the doing away of hearings in respect of frequency plans and in procedure for assessing applications for major telecommunication service licences is not in the interests of the industry. We are concerned that the lack of transparency in decision making that will arise from such action will damage the credibility of ICASA.

2.3. **TECHNOLOGY BASED LEGISLATION**

The NAB is concerned that the Bill legislates on specific technology. The NAB is of the view that issues of allocation and assignment of spectrum and the prescription of a specific technology are matters that should be dealt with in

regulations by ICASA. The NAB further believes that, in view of convergence and rapidly changing technologies, it is undesirable that particular technologies such as third generation cellular are legislated upon. The NAB believes this may hamper the industry's growth and capability to compete effectively in the global economy.

3. SPECIFIC PROVISIONS OF THE BILL

3.1. International Telecommunications Services and Multimedia Services

3.1.1. The NAB welcomes and supports government's move to licence Sentech to provide international telecommunications services, although the awarding of the licence without considering ICASA's role in process is concerning. This will enable Sentech to utilise its infrastructure more efficiently and productively and to the benefit of the entire industry and the country. However, the NAB seeks clarity as to whether certain provisions of the Bill will act to maximise competition in this market and provide sufficient benefits to end consumers.

3.1.2. The NAB is, however, of the opinion that the licensing of multimedia services should not be legislated in a piece of legislation relating exclusively to telecommunications or broadcasting. The NAB is of the view that multimedia should be regulated in an omnibus Act that should deal with all the issues relating to convergence. Firstly, it is not clear whether Sentech is licensed to provide the multimedia services on an exclusive basis. The NAB believes that multimedia

services should not be the subject of monopoly as that would hamper economic growth and development, investment and, most importantly, fair competition among broadcasters and telecommunications services providers, something that would be contrary to the fundamental objectives enunciated in both broadcasting and telecommunications legislation. Further, there are some broadcasters who already provide multimedia services envisaged in the definition of multimedia in Clause 1 of the Bill such as television or radio through the internet. What would the position be of broadcasters already providing these services?

3.1.3. Secondly, the NAB is concerned that there is no clarity as to whether Sentech will be licensed to serve as a multimedia services signal carrier only or would it also be able to provide content for multimedia services such as television or radio through the internet.

3.1.4. Thirdly, the NAB seeks clarity on the relationship between the licencing and regulation of multimedia services in the Bill and the Department of Communication's process on the formulation of E-commerce policy.

4. CONCLUSION

4.1. The NAB is grateful for the opportunity to present its written submissions on the Bill and trusts that the issues raised in this submission will be carefully considered.

- 4.2. The NAB will be available to discuss any issues raised in this submission, should it be requested to do so.