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GENERAL NOTICE

NOTICE 1102 OF 2013



Independent Communications Authority of South Africa

EXPLANATORY MEMORANDUM ON THE REVIEW OF THE DRAFT REGULATIONS ON PARTY ELECTION BROADCASTS, POLITICAL ADVERTISEMENTS, THE EQUITABLE TREATMENT OF POLITICAL PARTIES BY BROADCASTING LICENSEES AND RELATED MATTERS

1. INTRODUCTION

The Independent Communications Authority of South Africa ("the Authority") hereby wishes to review the regulations on Party Elections Broadcasts (PEBs), Political Advertisements (PAs), the equitable treatment of political parties by broadcasting licensees and related matters for the 2014 national and provincial elections for public consultation. Section 57 (3) of the Electronic Communications Act of 2005 (ECA) explicitly requires that the Authority must consult with the relevant public broadcasting service licensee and all political parties prior to making any determination in terms of developing these regulations (our emphasis).

These regulations are intended to outline an approach that should be adhered to by broadcasting service licensees in their coverage of the elections. Elections are an important public event and they clearly fall within the area of news and current affairs. Broadcasting service licensees are encouraged, in the public interest, to provide a full, impartial, and independent coverage of the elections.

2. BACKGROUND

The regulations on Party Elections Broadcasts (PEBs), Political Advertisements (PAs), the equitable treatment of political parties by broadcasting licensees were published in **GN R.247 in Government Gazette No 31980 of 3 March 2009 and Government Gazette 34086 of March 2011 volume 549** and they are all applicable to broadcasting service licensees and political parties contesting the elections during an election period. Their main purpose is to:

- allocate timeslots for the broadcasting of PEBs;
- regulate rights and obligations of broadcasting service licensees;
- provide for the rights and obligations of political parties; and
- provide dispute resolution mechanism.

The Authority published a Report on the Review of the Broadcasting Regulatory Framework towards a digitally converged environment on 25 June 2013 and having considered the submissions made by interested parties and the general public, the Authority highlighted a variety of issues that were raised. Amongst the contentious issues raised by interested parties were concerns centred on the public broadcaster's editorial policy, specifically the conduct of presenters and journalists during the coverage and broadcast of news material and comments regarding elections. Political parties also raised concerns regarding favouritism on coverage of events such as rallies. They indicated that prior to elections the public broadcaster must avoid broadcasting political rallies of specific parties and not covering the rallies of other parties. They submitted that the smaller parties are not given proper coverage as compared to the bigger parties.

In monitoring broadcasting licensees' coverage of the elections the Authority has to comply with the requirements set out in section 2 of the ECA, while empowered by sections 56, 57, 58 and 59 of the ECA with the aim of ensuring that the broadcasting of programmes by public, commercial and community broadcasting services on political matters is of public interest.

3. EQUITABLE TREATMENT

Equitable treatment has two meanings one being on the allocation of broadcasting time slots and another on fair representation of political parties in terms of news and current affairs.

The Authority's position in 2011¹ provides that the concepts equitable and equal are not synonymous. Equal generally refers to giving similar treatment or equal subjection. Equitable on the other hand generally means just/fair/impartial. Sections 57 (4) and 59 of the ECA directs the Authority to ensure that contesting parties are treated equitably.

¹ GG 34086, Municipal Elections Broadcasting Regulations

3.1 EDITORIAL MATTERS

The Authority will not expect broadcasting services to distort their news values and processes by giving the same weight to small or one-person parties as they do to larger contenders for a place in national or provincial government.

Each broadcasting service licensee will be expected to treat parties fairly. Equitable treatment is unlikely to be achieved in a single programme but can be achieved in a series of programmes. Each broadcasting service should be consistent in its treatment of contesting parties and of conflicting views.

Broadcasting service licensees should recognise their obligation to the electorate to provide a full and accurate record of events and developments. Broadcasting service licensees should not rely on political parties to bring information to them, but should actively seek out information. Failure to do so will give parties with greater resources inequitable amounts of news coverage.

The Authority does not intervene in the news and programming operations of the broadcasters, however, broadcasting service licensee's role during elections does not differ from their normal journalistic role during non-election periods. Normal ethical considerations continue to apply. A distinguishing feature of the election period is the obligation to achieve equitable coverage of political parties without abdicating news value judgements.

Section 59 of the ECA lays down specific requirements for the treatment of political parties during the election period by broadcasters in their editorial programming. The requirements are:

- (1) If, during an election period, the coverage of any broadcasting service licensee extends to the field of elections, political parties and issues relevant thereto, the broadcasting licensee concerned must afford reasonable opportunities for the discussion of conflicting views and must treat all political parties equitably.
- (2) In the event of any criticism against a political party being leveled in a particular programme of any broadcasting service licensee without such party having been afforded an opportunity to respond thereto in such programme or without the view of such political party having been reflected therein, the broadcasting service licensee concerned will be obliged to afford such a party a reasonable opportunity to respond to criticism.

- (3) If, within 48 hours before the commencement of the polling period or during the polling period, a broadcasting service licensee intends broadcasting a programme in which a particular political party is criticized, the broadcasting service licensee must ensure that the political party is given a reasonable opportunity to respond thereto in the same programme, or to do so as soon as reasonably practicable thereafter.
- (4) The Authority advises broadcasters to take special care during the final 48 hours prior to Election Day. There will be limited time for broadcasters to ensure that political parties' right of reply is honoured during this period. Broadcasters should, therefore, ensure that parties are given time to reply, should this be necessary, within the same programme during this period, as there will not be broadcast of PEBs and PAs later than 48 hours prior to the commencement of the polling period.

3.2 Time Allocation

A major issue in providing political parties and potential voters with direct access to programming is the amount of broadcast time allowed. The challenge here is to provide adequate time for each of the contesting parties to present their messages effectively. This challenge may be complicated by the number of registered political parties contesting elections, the number of issues central to the election, and the number of other effective medium of communication to be used.

The Authority has exclusive responsibility for allocating airtime to parties contesting political parties during party election broadcasts on public broadcasting services and any other broadcasting service licensees choosing to broadcast party election broadcasts.

The Act directs the Authority to ensure contesting parties are treated equitably. Equitable treatment is defined in South African law and international precedent as fair. Section 57 (4) of the ECA provides that *"...the Authority may impose such conditions on a public broadcasting service licensee with respect to party election broadcasts as it considers necessary, having due regard to the fundamental principle that all political parties are to be treated equitably."*

The United Nations Educational, Scientific and Cultural Organization (UNESCO) use equitable treatment and proportionality to mean the same in terms of allocation of time slots. According to UNESCO granting equal time to all parties may dilute the messages of the

parties that are most likely to form the next government.² Therefore airtime should be allocated in an equitable manner to ensure fairness and confidence to viewers.

Broadcasters in Canada are required to cover elections, and they must give all candidates and parties equitable treatment. Equitable doesn't mean equal – it means that all candidates and parties get some air time to share their ideas on issues with the public. If the demand for advertising time exceeds the airtime available, broadcasters must divide up the available advertising time on an equitable basis. Should a broadcaster offers free time to a party or candidate, it must then offer equitable time to other parties and candidates.

To achieve this, the Authority has adapted the formula to allocate Party Election Broadcasts to take into account the political parties' occupying and contesting a number of seats.

3.3 Formulae for airtime allocation in respect of election broadcasts

Three factors have been taken into account when developing the formula by which parties will be allocated Party Election Broadcast slots:

1. The right for all political parties to be heard by voters who could vote for them
2. Historical record: current seats in national parliament and provincial legislature
3. Number of seats parties are contesting provincially and nationally

These factors serve as a numerical filter, to ensure that the electorate is afforded an opportunity to hear all parties potentially exercising influence in policy decisions affecting their lives. They differentiate between parties occupying and contesting a large number of seats and those contesting fewer seats.

The criteria considered to receive percentages entail the equal basic allocation, the number of seats currently held in the national assembly and provincial legislatures, national and provincial allocation list and national assembly regional list allocation.

The maximum number of percentages will be secured by a party that has fielded most candidates on the national assembly list, on the national assembly's regional list and provincial legislature lists, and on all seats in all nine provinces and with a good performance in the previous elections.

² Reporting Elections Broadcast Guidelines: UNESCO, Article 19 Guideline 9.5
http://webworld.unesco.org/AABF53ED-EA26-4D53-A25B-C67AB1BD49D4/FinalDownload/DownloadId-7910A1454ECACE6DB94B15A853FAE55D/AABF53ED-EA26-4D53-A25B-C67AB1BD49D4/download/fed/iraq/english/broadcast_guidelines_en.pdf, page 9

Fairness requires that the difference between new, untested parties and established parties is relatively low. The basic, equal allocation to all parties is thus relatively large, accounting for approximately a quarter of the optimum number of percentages available to a party.

The Authority assigns slots to registered political parties as per the list issued by the Independent Electoral Commission (IEC).

8. CONCLUSION

Initially the Authority's intention of reviewing this set of regulations was to merge the current National and Municipal Elections Regulations, as well as a possibility of including By-Elections. The proposal of developing one regulation to cover all forms of Elections arose during the inception of the Review of the Broadcasting Regulatory Framework towards a digitally converged environment where the Authority did a benchmark study and learned that various jurisdictions, for example Ireland, do not have separate regulations for local government elections and national elections.

The Authority considered the idea and further engaged in thorough research to learn that elections regulation varies from country to country depending on the political systems used. Countries benchmarked have different requirements in terms of broadcasting PEBs and PAs, informed by the legislative mandate. The research done by the Authority shows that there have not been much developments or differences in terms of regulations such as the issue of determining factors when allocating slots.

These regulations in essence will provide a framework to broadcasting service licensee covering the elections in which the system of Party Election Broadcasts and political advertising will operate. Therefore the most important aspect for these regulations during elections is finding the right balance between the respect for editorial independence and the need for rules to guarantee that media coverage is balanced.

9. INVITATION FOR WRITTEN REPRESENTATIONS

In terms of section 4(4) of the Electronic Communications Act, 2005 (Act No. 36 of 2005), interested persons are hereby invited to submit their written representations on the draft Elections Broadcasting Regulations published herewith by the Authority. A copy of the proposed regulation will be made available on the Authority's website at <http://www.icasa.org.za> and in the ICASA Library at No. 164 Katherine Street, Pin Mill Farm, (Ground Floor at Block D), SANDTON between 09h00 and 16h00, Monday to Friday only.

Written representations with regard to the proposed regulations must be submitted to the Authority **by no later than 16h00 on 7 January 2014** by post, hand delivery or electronically (in Microsoft Word) and marked specifically **Attention: Ms Refilwe Ramatlo. Delivery address: Block A, Pinmill Farm, 164 Katherine Street, Sandton.** Further enquiries in that regard may be directed to her via e-mail at: Rramatlo@icasa.org.za or Hmashapha@icasa.org.za or by facsimile: 011 566-3252/3802 or by telephone: 011 566-3251/3801; between 10h00 and 16h00, Monday to Friday only.

Written representation(s) received by ICASA pursuant to this notice, will be made available for inspection by interested persons at the ICASA library and such copies will be obtainable upon payment of the prescribed fee.

At the request of any person who submits written representations pursuant to this notice, ICASA may determine that such representations or any portion thereof is to be treated as confidential in terms of section 4D of the ICASA Act. Where the request for confidentiality is refused, the person who made the request will be allowed to withdraw such representations or portion(s) thereof.

The final regulations following the conclusion of the consultative process including any hearing that may be held, will be published in the Government Gazette and made available on the website referred to above.



DR STEPHEN MNCUBE
CHAIRPERSON

DRAFT ELECTIONS BROADCASTING REGULATIONS

SCHEDULE

1. DEFINITIONS

In these Regulations, unless the context indicates otherwise, a word or expression to which a meaning has been assigned in the Electronic Communications Act, 2005 (Act No. 36 of 2005) will bear such meaning, unless the context indicates otherwise: -

“the Act” means the Electronic Communications Act, 2005 (Act No. 36 of 2005);

“the Authority” means the Independent Communications Authority of South Africa, established in terms of section 3(1) of the ICASA Act;

“BSL” means broadcasting service licensee;

“CCC” means the Complaints and Compliance Committee established by the Authority in terms of section 17A of the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000);

“CCC Regulations” means the Regulations Governing Aspects of the Procedures of the Complaints and Compliance Committee of the Authority, published in Government Gazette No. 33609, Notice No. R 886 on 6 October 2010;

“Commission” means the Independent Electoral Commission established by section 3 of the Electoral Commission Act, 1996 (Act No 51 of 1996);

“Constitution” means the Constitution of the Republic of South Africa 1996;

“current affairs programme” means a program that is not a news bulletin but which focuses on and includes comment on and interpretation and analysis of issues of immediate social, political or economic relevance and matters of international, national, regional and local significance;

“election broadcast period” means the period within which party election broadcasts may be transmitted, such period commencing 120 hours after the allotment of time slots by the Authority and ending 48 hours before polling commences;

“election period” means the period commencing with the date on which the election day is proclaimed and ending on the day immediately following upon the day on which candidates of any of the political parties are declared elected;

“Electoral Act” means the Electoral Act, 1998 (Act No. 73 of 1998);

“Electoral Code” means the Electoral Code of Conduct as set out in Schedule 2 of the Electoral Act;

“Electoral Commission Act” means the Electoral Commission Act, 1996 (Act No 51 of 1996);

“ICASA Act” means the Independent Communications Authority of South Africa Act, 2000, (Act No 13 of 2000);

“News” means programming which reports on news events of immediate social, political or economic relevance and on matters of international, national and local significance;

“PA” means political advertisement and has the same meaning as that term is defined in the Electronic Communications Act;

“party” means a political party registered in terms of section 15 of the Electoral Commission Act, or any alliance of such registered political parties, that has nominated candidates and submitted a list or lists of those candidates in accordance with section 27 of the Electoral Act, and includes any organisation that, group of people which, or person who, acts in support of such a registered political party;

“PEB” means a party election broadcast and has the same meaning as that term is defined in the Electronic Communications Act;

“polling day” means the day proclaimed by the President of the Republic in terms of section 49(2) of the Constitution, as read with section 17 of the Electoral Act, as being the day on which voting for the National Assembly will take place;

“SABC” means the South African Broadcasting Corporation Limited, a statutory body established in terms of the Broadcasting Act, 1999 (Act No 4 of 1999)

2. Purpose of the regulations

The purpose of these Regulations is to prescribe the framework and guidelines under which PEB(s) and PA(s) shall be conducted and carried by the BSLs, during the national and provincial elections.

3. Application of these regulations

These regulations are applicable:

- (a) during the election period;
- (b) to broadcasting service licensees; and
- (c) to political parties contesting the national and provincial elections.

4. Party election broadcasts

- (1) PEB(s) must only be broadcast during the election broadcast period;
- (2) A party that intends to broadcast a PEB must submit same to the broadcasting service licensee at least five (5) working days prior to the broadcast thereof;
- (3) A public broadcasting service licensee must permit a PEB during an election broadcast period;
- (4) A commercial or community broadcasting service licensee that intends to broadcast PEB must inform the Authority, in writing, of its intention to do so within thirty (30) days of the publication of these regulations;
- (5) A broadcasting service licensee that is obliged, or intends to broadcast PEB must ensure that the PEB conforms to the Authority's technical quality as listed in **annexure B** of these regulations;
- (6) A broadcasting service licensee, to whom a PEB has been submitted by a party for broadcast; must not in any way edit or alter the content of the PEB;
- (7) A broadcasting service licensee that rejects a PEB submitted by a party for broadcast must, within 24 hours of such submission:
 - (a) furnish the party concerned with written reasons for the rejection:
 - (i) the party concerned may alter or edit the PEB and re-submit it to the broadcasting service licensee concerned at least 48 hours prior to it being broadcast;

- (8) Where the broadcasting service licensee has rejected a PEB and the party concerned has confirmed in writing to the broadcasting service licensee that it will not be re-submitting the PEB, then the broadcasting service licensee must within 24 hours notify the Authority of such rejection and must also furnish to the Authority written reasons for the rejection;
- (9) A party whose PEB has been rejected and has no intention of altering or editing the PEB, may refer the matter to the Authority and inform the concerned licensee of the referral to the Authority, within 48 hours of being informed in writing of the rejection;
- (10) The Authority must address a notice received in terms of regulation 4(9), in accordance with regulation 6 of the CCC Regulations;
- (11) Subject to regulation 4(10), the Authority must, within 48 hours of receiving the said notice, make, and communicate to the parties, a determination which is final and binding on the parties;
- (12) A party that submits a PEB to a broadcasting service licensee for broadcast must ensure that the PEB does not:
- (a) contravene the provisions of the Electoral Code, the Electoral Act, the Constitution, the Act and the Broadcasting Act; and
 - (b) 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;
- (13) A party that submits a PEB for broadcast to a broadcasting service licensee, is deemed to have indemnified the broadcasting service licensee against incurred costs, damages, losses, and third party claims arising from the broadcast thereof;
- (14) A broadcasting service licensee that broadcasts PEB must:
- (a) make available, every day, throughout the election broadcast period, eight time-slots of one (1) minute each for the broadcast of PEB;
 - (b) do so in accordance with the sequence and timing prescribed by the Authority in terms of these regulations;
 - (c) ensure that all PEB(s) broadcast by it are clearly identified as such;

- (d) ensure that all PEB(s) broadcast by it are identified or announced in a similar manner;
- (15) A PEB must not exceed one (1) minute in duration;
- (16) Content broadcast as PEB cannot be broadcast as PA;
- (17) A broadcasting service licensee must not transmit a PEB immediately before or after another PEB or immediately before or after a PA;
- (18) PEB air-time allocated to but not used by a party shall be forfeited by the party concerned;
- (19) If a party fails to deliver the PEB to the broadcasting service licensee before the expiry of five (5) days prior to the broadcasting thereof, then the party is deemed to have forfeited its allocated airtime;
- (20) In the event that a party elects to forfeit its allocated PEB air-time, then such air-time must not be allocated to another party but must be used by the broadcaster concerned for the purpose of broadcasting its normal programming;
- (21) In the event that a party does not wish to use its allocated PEB air-time, the broadcasting service licensee concerned must not, during the relevant time-slot, in any way vary the sequence or scheduling of PEB(s);
- (22) A broadcasting service licensee or party must not permit or engage in any interference with, or trading in, the sequence or scheduling of PEB(s);
- (23) A PEB must not be broadcast after the end of the election broadcast period.

5. Allocation of air-time in respect of party election broadcasts

Air-time in respect of PEB(s) shall be allocated by the Authority to the registered political parties contesting the national and provincial elections on the basis of the respective formulae set out in Annexure A of these regulations.

6. Political Advertising

- (1) PA must only be broadcast during the election period and no later than forty eight (48) hours before polling commences;
- (2) A broadcasting service licensee that intends to transmit a PA must ensure that the advertisement conforms to the Authority's technical standards and quality as listed in Annexure B of these regulations;
- (3) A broadcasting service licensee, to whom a PA has been submitted by a party for broadcast, must not in any way edit or alter the advertisement;
- (4) A broadcasting service licensee who rejects a PA submitted by a party for broadcast must, within 24 hours of such submission:
 - (a) Furnish the party concerned with written reasons for the rejection:
 - (i) the party concerned may alter or edit the PA and re-submit the PA to the broadcasting service licensee concerned at least 48 hours prior to it being broadcast;
- (5) Where the broadcasting service licensee has rejected a PA and the party concerned has confirmed in writing to the broadcasting service licensee that it will not be re-submitting the advertisement, then the broadcasting service licensee must within 24 hours notify the Authority in writing of such rejection and must also furnish to the Authority written reasons for the rejection;
- (6) A party whose PA has been rejected and has no intention of altering or editing the advertisement, may refer the matter to the Authority within 48 hours of being informed of the rejection;
- (7) The Authority must address a notice received in terms of regulation 6 (6), in accordance with regulation 6 of the CCC Regulations;
- (8) Subject to regulation 6 (7), the Authority must, within 48 hours of receiving the said notice, make, and communicate to the parties, a determination which is final and binding on the parties;

- (9) A party that submits a PA to a broadcasting service licensee for broadcast must ensure that the advertisement does not:
- (a) Contravene the provisions of the Electoral Code, the Electoral Act, the Constitution, the Act and the Broadcasting Act; or
 - (b) 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;
- (10) A party that submits a PA for broadcast to a broadcasting service licensee, is deemed to have indemnified the broadcasting service licensee against incurred costs, damages, losses, and third party claims arising from the broadcast thereof;
- (11) Content broadcast as PA cannot be broadcast as PEB.

7. Complaints

- (1) In the event of any person being aggrieved by any PA or PEB that person may lodge a complaint with the Authority within 48 hours after such broadcast has occurred.
- (2) Any complaint lodged with the Authority in terms of regulation 7(1) shall be addressed by the Authority in accordance with regulation 6 of the CCC Regulations; and
- (3) The Authority shall, within 48 hours of receiving a complaint, communicate to the parties, the outcomes of such complaint.

8. General

- (1) Every broadcasting service licensee and party must:
 - (a) nominate a person who must be the representative of that broadcasting service licensee or party in respect of all matters regulated by, or arising from, these Regulations;

- (b) within 30 days of the publication of these regulations notify the Authority in writing of the name, physical and postal address, telephone number and, where available, cellular phone number and e-mail address of the nominated person.
- (2) The Authority and a broadcasting service licensee will recognise the nominated party representative as the sole representative of the party and will not enter into discussion on PEB's with any other representative of the party. Similarly, a party must direct all communications in respect of PEB's only to the nominated representative of broadcasting service licensee and may not engage in discussion on PEB's with any other service or staff member of the Authority and broadcasting service licensee.

9. Penalty

Failure by a broadcasting service licensee to comply with these Regulations will result in a fine not exceeding one million Rands (R 1 000 000, 00)

10. Short title and Commencement

These regulations are called National and Provincial Party Elections Broadcasts and Political Advertisements Regulations, 2014 and shall come into force upon publication in the Government Gazette.

ANNEXURES

Annexure A: Formulae for airtime allocation in respect of PEBs

Annexure B: Technical standards and quality

ANNEXURE A**FORMULA**

Basic Allocation Percentage of slots to be allocated to all parties contesting seats in the National Assembly. 25%
National Number of Seats Currently Held Percentage of slots to be allocated to all parties based on current seats in the National Assembly pro rata. 15%
Provincial Number of Seats Currently Held Percentage of slots to be allocated to all parties based on current seats in the Provincial Legislature pro rata. 15%
National Allocation List Percentage of slots to be allocated according to the number of candidates fielded by parties on the national assembly list. 15%
National Assembly Regional List Allocation Percentage of slots to be allocated according to the number of candidates fielded by parties on the national assembly list. 15%
Provincial List Allocation Percentage of slots to be allocated according to the number of provincial legislature candidates fielded by parties throughout the country. 15%

ANNEXURE B**TECHNICAL STANDARDS AND QUALITY**

Technical standards and quality:

BSL that is obliged or intends to broadcast PEB/PA must ensure that the PEB/PA confirms to the technical quality acceptable to the Authority namely:

- a. Audio and video recordings shall be of the highest professional quality;
- b. Audio and video recordings are to be supplied on compact disc (CD); and
- c. Audio and video recordings will be clearly labeled, outlining the name of the political party and appointed nominee

The technical standards are as follows:

Radio: Electronically MP3 format or on CD format in broadcast quality standard and:

Television: On broadcast quality DVD playable on standard DVD player format or in broadcast quality Beta format

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