
GOVERNMENT NOTICES

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

No. R. 202

8 March 2011



REGULATIONS ON MUNICIPAL ELECTIONS BROADCASTING

OVERVIEW OF THE PROCESS LEADING TO THE
DEVELOPMENT OF THE FINAL REGULATIONS

MARCH 2011

1. PURPOSE

1.1 These regulations are developed in lieu of the imminent Municipal Elections taking place in 2011. This overview serves to provide a holistic report on the processes undertaken to finalise the regulations. The process commenced with the publication of the draft regulations on party election broadcasts, political advertisements, the equitable treatment of political parties by broadcasting licensees and related matters during municipal elections (the regulations), published in *Government Gazette* No.33779 on 19 November 2010. An amendment to the draft regulations was effected in *Government Gazette* Notice 33834 on 3 December 2010, to withdraw Annexure A in the schedule and have it substituted by Annexure B to enhance transparency and subject the formulae to extensive public discussion. The deadline for submissions was set for the 10th of January 2011. 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).

1.2 In light of the above, workshops were conducted in all the nine (9) provinces. In addition, at the invitation of the Independent Electoral Commission (IEC) workshops were extended to Party Liaison Committee (PLC) in the nine (9) provinces. An invitation was extended to broadcasters including the SABC so that the attendees could also engage the broadcasters on the regulations. The Authority also held meetings with the SABC on the 19th of October 2010 and the 11th of November 2010.

1.3 On the 11th of January 2011 one submission was received to which condonation was granted. In the process of finalising the regulations attached, verbal submissions made during the workshops and the formal written submission were considered.

2. General concerns

2.1 The questions raised and comments were generally almost the same in all provinces.

2.2 Attendees were concerned about the following issues:

2.2.1 They indicated that ICASA is not known, some stated that before our presentations they had never heard of our organisation.

2.2.2 They complain that in the past ICASA has not done enough to clarify its role and involvement during or in preparation for the elections, instead much of the role clarification was left to the IEC.

2.2.3 They argued that radio station representatives failed to attend most of the workshops and commit to fair broadcast of electoral content.

2.2.4 They indicated that there were a lot of incidents that occurred in the previous elections that they strongly feel ICASA needs to address in these coming elections, one of the issues was that radio presenters tend to take sides; they speak negatively about other parties and promote the manifesto of certain parties to the detriment of opposing parties.

2.2.5 The other issue that was raised the most was the absence of the broadcasters, especially the SABC, since they are the most affected by the regulations. Concerns centred on the SABC's editorial policy, specifically the conduct of presenters and journalists during the coverage and broadcast of news material and comments regarding elections. Parties also raised concerns regarding favouritism on coverage of events such as rallies. They indicated that prior to elections SABC must avoid broadcasting political rallies of specific parties and not covering the rallies of other parties. The smaller parties are usually sidelined and not given proper coverage as compared to the bigger parties.

3. SPECIFIC COMMENTS

3.1. Formula

Attendees were concerned about the following issues with regards to the formula:

- 3.1.1 **The general view expressed at the workshop was that the formula was biased towards bigger and established political parties. It became apparent that political parties that had a concern with the formula were mostly “smaller” parties, new parties and independent candidates. The latter argued that the big parties have the funds to pay for PA’s yet they are given the most time allocation for PEB’s. ICASA should assist political parties who cannot afford PA’s by giving them maximum free air-time as small parties need to grow and the media is the best platform for that growth. Proportional split does not represent a free and fair election.**

The Authority is not of the view that the formula was designed to be biased towards bigger political parties. The Authority is guided by the principle of proportional representation as outlined in section 157 of the Constitution and equitability as stated in section 57 of the ECA. Section 57 of the ECA does not provide for independent candidates; however should the number of independent candidates rise significantly in these elections, the Authority will consider making a submission during the legislative amendment process of the ECA. It should be noted that research undertaken by the South African Institute of Race Relations suggests that several independent candidates from the previous elections have now joined political parties (See South Africa Survey 2009/2010: Politics and Government published by the South African Institute of Race Relations).

- 3.1.2 **It was stated by some that the formula is unfair by considering historical data when other parties were not in existence.**

The Authority provides for all political parties as registered by the IEC in 2011 to obtain a minimum of two minutes for the broadcast of PEB's. Therefore all political parties regardless of their history, size and tenure have an opportunity to make their views known on public broadcasting.

3.1.3 It was asserted by some that the methodology used in determining the allocation is unconstitutional because the constitution encourages a multi party democracy which is interpreted to encourage all parties to participate fairly in the election process. The Constitution as the supreme law takes precedent over the ECA which permits equitable treatment. Parties also questioned the Authority's understanding of term "equitably" and its application in the formula.

The Authority is of the view that the concepts equitable and equal are not synonymous. Equal generally refers to giving similar treatment or equal subjection [anecdotally the French say: "*The Law in its majesty draws no distinction but forbids rich and poor alike from begging in the streets or from sleeping in the public parks*". The Oxford Dictionary defines equal as being *the same in quantity, size, degree and value*. Equitable on the other hand generally means just/ fair/ impartial. Accordingly the Authority has allowed for a minimum of 2 minutes for each registered political party so that all parties are heard on the public broadcaster by the electorate. The allocation of additional minutes are based on the principle of proportional representation thereby allowing political parties who have won the most number of seats to secure the most minutes. By so doing the Authority allows the public to hear more from and about political parties who are more likely to influence policy decisions affecting the electorate. This principle is also applied in the IEC when they allocate funds to political parties. It is important to note that in the consultation process political parties did not debate the basic allocation - a minimum of two minutes.

3.1.4 Some political parties argued that the independence of ICASA is questionable in view of the possible influence of the ruling party and bias in the Electronic Communications Act of 2005.

The Authority is an independent creature of statute as stated in Section 192 of the Constitution. According to Section 3(3) of the ICASA Act the Authority must be impartial and must perform its functions without fear, favour or prejudice. Furthermore, in terms of Section 3(4) the Authority is obliged to function without any political or commercial interference.

3.1.5 Some political parties stated that if the Authority proceeds with the draft allocation formula pertaining to PEBs, then it would be a serious injustice against smaller political parties and would amount to unfair discrimination as the current allocation formula will only benefit the two dominant political parties in the country, but more specially the ruling party.

The Authority will encourage Community and Commercial Broadcasters to broadcast PEBs and PAs especially where the public broadcaster does not have reach. The Authority will request SABC to broadcast PEB's and PAs on all its television and radio stations.

3.1.6 Some attendees were concerned about basing the formula on the number of seats held in 2006 and suggested that since there have been floor crossing and bi-elections the Authority should consider the latest data of seats currently held.

The Authority has the latitude to consider the latest by-election results. However, political parties and individual within political parties are divided on which results the Authority should rely on. In the absence of written submissions promised by the political party representatives the Authority will rely on the bi-election results as they reflect the electorates' most recent sentiments.

- 3.1.7 The attendees wanted to know the formula that will be used to allocate the SABC 8 slots on different radio stations. The question was on whether the 8 slots will be per SABC radio station or distributed across the SABC radio stations.**

As in the past, the radio stations will broadcast PEB's across all radio stations.

3.2 Draft regulations

The following comments were articulated;

- 3.2.1 The regulations must specify the times the PEB's will be broadcast. It was proposed that the time of broadcast of PEBs must not be during the day but in the evening. Other attendees requested three time slots for the PEBs and identified as peak time: Morning, Noon and Evening.**

The Authority is of the view that if the PEB's are broadcast only in the evening which is prime time, this will affect the viability of the broadcasters. The Authority will spread the slots across the day as has been done previously to minimise disruption of normal programming.

- 3.2.2 In terms of Regulation 8 some of the attendees suggested that there should be more than one nominated person; each province or region should have a nominated person.**

For effectiveness and consistency it is important to nominate one person. This will reduce the probability of confusion.

- 3.2.3 There was a concern that the SABC has an obligation to broadcast PEB's, however, they have no coverage in certain parts of the country.**

The Authority will encourage Community and Commercial Broadcasters to broadcast PEBs and PAs where the public broadcaster does not have reach.

3.2.4 The attendees enquired why PEBs and PAs cannot follow each other. They do not see a reason for the Authority to prohibit that especially as the SABC/broadcaster will introduce both at the beginning and at the end. They suggested that the Authority lift the prohibition.

The Authority would like to ensure that there is no perception that one political party has been awarded more PEB airtime. Despite a top and tail at the beginning and at the end of PEBs and PAs the SABC indicated that there is still confusion.

3.2.5 Clarity was sought on the difference between a PEB and PA in terms of content. The ECA only differentiates in terms of payment and does not refer to content. If the Authority says that the content broadcast as PEB must not be the same as for PA then there should be more clarity on what the content for PEB should entail and what kind of content is allowed for PA.

The Authority would like to maximise transparency and erase perception that one political party has been awarded more PEB airtime. There is a policy vacuum, going forward we will conduct a public enquiry to address this matter fully.

3.2.6 Attendees requested clarity between the role of BCCSA and ICASA in terms of complaints related to PEB's and PAs. They asked the Authority to make it clear in the regulations that complaints must be forwarded to ICASA and not BCCSA.

Regulation 7 specifies that complaints should be forwarded to the Authority.

3.2.7 Regulations 4(9)(a) and 6(6)(a) should also refer to the Municipal Electoral Act.

The Authority agrees with the attendees' suggestion to add the Municipal Electoral Act.

3.2.8 Special monitoring of community broadcasters in the election period was an issue. Community broadcasters are said to be more vulnerable to local politicians before and during election period, thus there was a suggestion that the Authority should monitor community broadcasters differently from mainstream broadcasters. Some political parties expect slots for current affairs because they believe they made the radio station to be what it is.

Prior, during and after the Election Broadcast Period the Authority employs a special monitoring team to focus specifically on the municipal elections broadcasting. The SABC is obliged to comply with regulation 10 of the Code of Conduct for Broadcasters.

3.2.9 There is a view that the Authority should have specific penalties and fines on non-compliance to the regulations.

The Authority is guided by the prescripts of Section 17H of the ICASA Act which provides for offences and penalties when there is contravention of the regulations.

3.2.10 The attendees also asked whether all broadcasters know their responsibilities around broadcasting of PAs and PEBs, including community and commercial broadcasters that do not have the same mandate as the SABC in terms of PEBs and PAs.

The Licensing and Compliance Division conducts workshops for broadcasters to educate them on the regulations upon publication.

3.2.11 It was suggested that community radio should cover political parties within its vicinity or the Authority should come with a plan to ensure that community broadcasters play a part however the requirements be reduced. For example, they can only cover those political parties registered in their area.

Any community broadcaster who chooses to broadcast the PEBs will have to comply with the regulations

3.2.12 In some locations issues raised related to how far ICASA's mandate can go. It was asked whether ICASA cannot force commercial broadcasters to do PEBs and PAs in those locations where the public broadcaster cannot reach. The attendees felt that since ICASA give licenses they should be able to demand that commercial broadcasters broadcast such.

Section 57(8) of the ECA does not allow the Authority to compel commercial and community broadcasters to broadcast PEBs and PAs.

3.2.13 Another concern was the monitoring of PEBs and PAs on whether ICASA will have the capacity to fully do monitoring of all the broadcasters intending to do the PEBs and the PAs.

The Authority employs a special monitoring team to focus specifically on monitoring the broadcast of municipal elections.

3.2.14 Some of the attendees complained that there are turnaround times outlined for the broadcasters in the regulations, however, there is none for the regulator on resolving complaints.(Regulation 7)

The Authority will ensure that a turnaround time of 48 hours is adhered to.

3.2.15 Some of the attendees wanted more clarity on the process to be followed when commercial broadcasters want to broadcast party election broadcasts. The commercial broadcasters in attendance suggested that they might want to broadcast PEBs and requested that regulations include a more detailed process of engagement for commercial broadcasters interested in PEB broadcasts.

Regulation 4(3) provides that commercial broadcasters that intend to broadcast PEBs must inform the Authority and comply with the regulations.

4. Recommendations from attendees

4.1 In all instances where the political parties had concerns we asked that they should propose alternative measures that should be undertaken by ICASA in resolving those issues. The following were the proposed solutions from various political parties:

- Equal time must be allocated to all political parties and no proportional split, in 1994 there was no proportional split. However it was noted that Political Parties can buy slots through PAs;
- ICASA must come back after the elections to find out the challenges that were faced during the election period;
- ICASA should conduct more workshops to inform the public of its role. It should in fact advertise on television or on radio;
- IEC should form part of ICASA's ongoing consultations; and
- ICASA should consider creating a toll-free number during the elections in order for the complaints to be dealt with promptly.