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**GENERAL NOTICES • ALGEMENE KENNISGEWINGS**

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**INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA****NOTICE 290 OF 2023****DRAFT AMENDMENT TO THE NATIONAL AND PROVINCIAL PARTY ELECTIONS BROADCASTS AND POLITICAL ADVERTISEMENTS REGULATIONS, 2014**

The Independent Communications Authority of South Africa ("**ICASA**" or "**the Authority**") hereby declares its intention to amend the National and Provincial Party Elections Broadcasts and Political Advertisements Regulations, 2014 as amended ("**the Regulations**") in terms of section 4(3)(j) of the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000) read with sections 4(1), 56, 57, 58 and 59 of the Electronic Communications, 2005 (Act No. 36 of 2005), to the extent reflected in the Schedule.

A copy of the Draft Amendment to the National and Provincial Party Elections Broadcasts and Political Advertisements Regulations, 2014 ("**the Draft Regulations**") will be made available on the Authority's website at <https://www.icasa.org.za> or can be sent via email upon request by any individual or can be collected from ICASA Library at the following address: 350 Witch-Hazel Avenue, Eco Point Office Park, Eco Park, Centurion between 09h00 and 16h00, Monday to Friday.

The Authority hereby invites interested parties to make written representations on the Draft Regulations by no later than 16H00 on **17 November 2023** by post, hand delivery or electronically (in Microsoft Word) and marked specifically for the attention of: **Mr Ndawo Khanyile – Project Manager**.

Delivery address: Block C, 350 Witch-Hazel Avenue, Eco Point Office Park, Centurion; or by email at [nkhanyile@icasa.org.za](mailto:nkhanyile@icasa.org.za) and [2024NationalElectionsRegulationsCommittee@icasa.org.za](mailto:2024NationalElectionsRegulationsCommittee@icasa.org.za).


Telephonic enquiries should be directed to **Mamedupe Kgatshe** at 012 568 3259 between 08h30 and 16h30, from Monday to Friday.

Written representations received by the Authority pursuant to this notice, will be made available for inspection by interested persons at the Authority's library.

When a person submits information to the Authority, such person may request that specific information be treated as confidential information in terms of section 4D of the Independent Communications Act of South Africa Act, 2000 (Act No.13 of 2000) ("ICASA Act"). The request for confidentiality must be accompanied by a written statement explaining why the specific information should be treated as confidential, in accordance with ICASA Guidelines for Confidentiality Request published in Government Gazette No. 41839 of 17 August 2018.

The Authority may determine that such specific information 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 granted an opportunity to withdraw such representations or portion(s) thereof.

Persons submitting written representations are further invited to indicate, as part of their representations, whether they require an opportunity to make oral presentations.



**YOLISA KEDAMA**

**ACTING CHAIRPERSON**

**DATE: 02 /10/2023**

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## GENERAL NOTICES

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### **INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA**

#### **NOTICE [TO BE INSERTED] OF 2023**



#### **DRAFT AMENDMENT TO THE NATIONAL AND PROVINCIAL PARTY ELECTIONS BROADCASTS AND POLITICAL ADVERTISEMENTS REGULATIONS, 2014**

The Independent Communications Authority of South Africa has, under sections 4 (1), 56, 57, 58 and 59 of the Electronic Communications, 2005 (Act No. 36 of 2005), made the regulations in the Schedule.

#### **SCHEDULE**

##### **1. DEFINITIONS**

In these regulations “the Regulations” means the Regulations published by Government Notice No. 101 (Government Gazette No. 37350) of 17 February 2014, as amended by Government Notice No. 245 (Government Gazette No. 42249) of 25 February 2019 and Government Notice No. 534 (Government Gazette No. 42374) of 2 April 2019.

##### **2. Amendment of regulation 1 of the Regulations**

Regulation 1 of the Regulations is hereby amended –

- 2.1 by the deletion of the definition of “Commission” after the definition of “CCC Regulations”;

- 2.2 by the substitution of the definition of “election broadcast period”, after the definition of “Current Affairs Programme”, for the following definition:

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

- 2.3 by the deletion of the definition of “Electoral Commission Act” after the definition of “Electoral Code”;

- 2.4 by the insertion after the definition of “ICASA Act” of the following definition:

“**Independent candidate**” means a South African citizen contesting an election and who is not nominated on a list of a party contesting an election”;

- 2.5 by the substitution of the definition of “PA”, after the definition of “News”, of the following definition:

“**political advertisement**” or “**PA**” means an advertisement broadcast on a broadcasting service which is intended or calculated to advance the interests of any particular political party or independent candidate, for which advertisement the relevant broadcasting service licensee has received or is to receive, directly or indirectly, any money or other consideration”;

- 2.6 by the substitution of the definition of “PEB”, after the definition of “Party” of the following definition:

“**party election broadcast**” or “**PEB**” means a direct address or message broadcast free of charge on a broadcasting service during an election period and which is intended or calculated to advance the interests of any particular political party or an independent candidate”;

- 2.7 by the deletion of the definition of “party”, after the definition of “PA”;

- 2.8 by the deletion of the definition of “polling day” after the definition of “PEB”;  
and

- 2.9 by the deletion of the definition of "SABC" after the definition of "polling day".

### **3. Substitution of regulation 3 of the Regulations**

The following regulation is hereby substituted for regulation 3 of the Regulations:

#### **"3. Scope of these Regulations**

These regulations are applicable during the election period to:

- (a) broadcasting service licensees;
- (b) political parties contesting the national and provincial elections; and
- (c) independent candidates contesting the national and provincial elections.

### **4. Amendment of regulation 4 of the Regulations**

Regulation 4 of the Regulations is hereby amended-

- 4.1 by the substitution for sub-regulation (2) of the following sub-regulation:

"(2) A political party or an independent candidate who wishes to have its PEB broadcast must submit same to the BSL within five (5) working days after the date of the proclamation of the election date.";

- 4.2 by the substitution in sub-regulation (4) for the words "thirty (30) days" of the words "twenty (20) calendar days";

- 4.3 by the substitution in sub-regulation (6) for the word "party" of the words "political party or an independent candidate";

- 4.4 by the substitution for sub-regulation (7) of the following sub-regulation:

"(7) A BSL that rejects a PEB submitted by a political party or an independent candidate for broadcast, must within five (5) days of such submission:

(a) furnish the political party or independent candidate concerned with written reasons for the rejection; and

(b) afford the political party or independent candidate concerned an opportunity to alter or edit the PEB and re-submit it to the BSL concerned or confirm in writing that it will not be re-submitting the PEB within two (2) days after receiving the rejected PEB”;

4.5 by the substitution for sub-regulation (8) of the following sub-regulation:

“(8) Where the BSL has rejected a PEB and the political party or independent candidate concerned has confirmed in writing to the BSL that it will not be re-submitting the PEB, the BSL must within two (2) days notify the Authority of such rejection and must also furnish to the Authority written reasons for the rejection.”;

4.6 by the substitution in sub-regulation (9) for the word “party” of the words “political party or an independent candidate”;

4.7 by the substitution for sub-regulation (10) of the following sub-regulation:

“(10) Any complaint lodged with the Authority in terms of sub-regulation (9) will be addressed by the Authority in accordance with regulation 6 of the CCC Regulations.”;

4.8 by the substitution for sub-regulation (11) of the following sub-regulation:

“(11) Subject to sub-regulation (10), the Authority will, within twenty-four (24) hours of making a determination, communicate to the parties the outcome, which is final and binding on the parties.”;

4.9 by the substitution in sub-regulation (12) of the word “party” for the words “political party or an independent candidate”;

4.10 by the substitution in sub-regulation (13) for the word “party” of the words “political party or an independent candidate”;

4.11 by the substitution in paragraph (a) of sub-regulation (14) of the words “ten (10) time slots of fifty (50) seconds” for the words “twelve (12) timeslots of forty (40) seconds.”;

4.12 by the substitution for paragraphs (c) and (d) in sub-regulation (14) of the following paragraphs:

“(c) ensure that all PEB(s) are announced in a similar manner;

(d) ensure that all PEBs broadcasts are clearly identified through a standard pre-recorded concluding message (tail) disclaimer”;

4.13 by the substitution in sub-regulation (15) of the word “fifty (50)” for the words “forty (40)”;

4.14 by the substitution in sub-regulation (17) for the word “transmit” of the word “broadcast”;

4.15 by the substitution in sub-regulation (18) for the word “party” of the words “political party or an independent candidate”;

4.16 by the substitution for sub-regulation (19) of the following sub-regulation:

“(19) If a political party or an independent candidate fails to deliver the PEB to the BSL before the expiry of five (5) working days after the date of the proclamation of the election date, then the political party or independent candidate is deemed to have forfeited its allocated airtime.”;

4.17 by the substitution in sub-regulation (20) for the word “party” of the words “political party or an independent candidate”;

4.18 by the substitution in sub-regulation (21) for the word “party” of the words “political party or an independent candidate”;

4.19 by the substitution in sub-regulation (22) for the word “party” of the words “political party or an independent candidate”;

4.20 by the substitution for sub-regulation (23) of the following sub-regulation:

“(23) In the event that a political party or independent candidate has complied with the requirements of this regulation 4, and a BSL concerned is unable to broadcast such political party's or

independent candidate's PEB due to a breakdown in transmission, the BSL after consulting the Authority shall broadcast the PEB within forty-eight (48) hours from the date on which the PEB was scheduled."

4.21 by the substitution of sub-regulation (24) of the following sub regulation:

"(24) A political party or independent candidate must inform the BSL, in writing, if it does not intend to use all its allocated PEB slots within five (5) days of the publication of the PEB allocation schedule."; and

4.22 by the addition of the following sub-regulation:

"(26) A Low Power Broadcasting Service Licensee must not broadcast a PEB."

## **5. Amendment of regulation 5 of the Regulations**

Regulation 5 of the Regulations is hereby amended by the insertion of the words "or independent candidates" after the words "political parties";

## **6. Substitution of regulation 6 in the Regulations**

The following regulation is hereby substituted for regulation 6 of the Regulations:

### **"6. Political Advertisements**

- (1) PA must only be broadcast during the election period and no later than forty-eight (48) hours before polling commences.
- (2) A BSL that intends to broadcast a PA must inform the Authority, in writing, of its intention to do so within twenty (20) calendar days of the publication of these Regulations.
- (3) A BSL 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.
- (4) Each PA submitted to the BSL must indicate clearly the name of

the political party or independent candidate and the day, time of broadcast, and relevant broadcast service/s for the PA.

- (5) A BSL, to whom a PA has been submitted by a political party or an independent candidate for broadcast, must not in any way edit or alter the advertisement.
- (6) A political party or an independent candidate whose PA has been rejected and disputes the rejection, and has no intention of altering or editing the advertisement, may refer the matter to the Authority within forty-eight (48) hours of being informed of the rejection.
- (7) Any complaint lodged with the Authority in terms of sub-regulation (6) will be addressed by the Authority in accordance with regulation 6 of the CCC Regulations.
- (8) Subject to sub-regulation (7), the Authority will, within twenty-four (24) hours of making a determination, communicate to the parties the outcome, which is final and binding on the parties.
- (9) A political party or an independent candidate that submits a PA to a BSL for broadcast must ensure that the PA 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 political party or an independent candidate that submits a PA for broadcast to a BSL, is deemed to have indemnified the BSL against incurred costs, damages, losses, and third-party claims arising from the broadcast thereof.
- (11) A BSL must not broadcast a PA immediately before or after another PA or PEB.

(12) Content broadcast as a PA must be broadcast as a PEB.

(13) A BSL that broadcasts a PA must ensure that all PA broadcasts are clearly identified through a standard pre-recorded concluding message (tail) disclaimer.

(14) A BSL that broadcasts a PA must ensure that all PA broadcasts are announced in a similar manner.

(15) A Low Power Broadcasting Service Licensee must not broadcast a PA.

## **7. Amendment of regulation 7 of the Regulations**

Regulation 7 of the Regulations is hereby amended by –

7.1 the substitution in sub-regulation (1) for the words “48 hours” of the words “five (5) days”;

7.2 the substitution in sub-regulation (3) for the words “within 48 hours of” of the words “after”; and

7.3 by the addition of the following sub-regulation:

“(4) A BSL that broadcasts a PA and/or PEB must inform the public of the complaint procedure in Regulations 7(1) – 7(3) through a pre-recorded message.”

## **8. Amendment of regulation 8 of the Regulations**

Regulation 8 of the Regulations is hereby amended –

8.1 by the substitution in sub-regulation (1) for the word “party” of the words “political party and independent candidate”;

8.2 by the substitution in paragraph (a) of sub-regulation (1) for the word “party” of the words “political party and independent candidate”;

8.3 by the substitution in paragraph (b) of sub-regulation (1) for the word "30 days" of the words "twenty (20) calendar days";

8.4 by the substitution for sub-regulation (2) of the following sub-regulation:

"(2) The Authority and a BSL will recognise the nominated political party or independent candidate representatives as the sole representatives of the political party or independent candidate and must only communicate with the nominated representatives."; and

8.5 by the addition of the following sub regulation:

"(3) A political party or an independent candidate must direct all communications in respect of PEBs only to the nominated representatives of the BSL and may not engage in discussion on PEB's with any other service or staff member of the BSL."

## **9. Short Title and Commencement**

These regulations are called the National and Provincial Elections Broadcasts and Political Advertisements Amendment Regulations, 2024 and will come into force upon publication in the Government Gazette.

**10. Substitution of Annexure A of the Regulations**

The following Annexure is hereby substituted for Annexure A of the Regulations:

**"ANNEXURE A****PRINCIPLES FOR AIRTIME ALLOCATION IN RESPECT OF PEBs**

**The allocation principles in Table 1 below will apply if there are sufficient PEB slots to accommodate all the contesting political parties and independent candidates.**

**Table 1:**

<b>Basic Allocation</b>
Percentage of slots to be allocated to all political parties and independent candidates contesting seats in the National and Provincial Elections. 60%
<b>Number of Candidates fielded</b>
Percentage of slots to be allocated according to the number of candidates fielded by political parties and independent candidates at National and Provincial level. 25%
<b>Number of Seats Currently Held</b>
Percentage of slots to be allocated to political parties according to seats currently held at National and Provincial level. 15%

**The allocation principles in Table 2 below will apply if there are insufficient PEB slots to accommodate all the contesting political parties and independent candidates.**

**Table 2:**

<b>Basic Allocation</b>
Number of slots to be allocated to all political parties and independent

candidates contesting seats in the National and Provincial Elections.

**Number of Candidates Fielded**

Number of slots to be allocated according to the number of candidates fielded by political parties and independent candidates at National and Provincial level.

**Number of Seats Currently Held**

Number of slots to be allocated to political parties according to seats currently held at National and Provincial level.

## **11. Amendment of Annexure B of the Regulations**

The following Annexure is hereby substituted for Annexure B of the Regulations:

### **"ANNEXURE B**

#### **GUIDELINES**

##### **1. INTRODUCTION**

- 1.1. These guidelines are intended to outline a general approach that should be adopted by BSLs in their coverage of the national and provincial elections. Elections are an important public event and as such fall within the ambit of news and current affairs. BSLs are encouraged, in the public interest, to provide a full, impartial, and independent coverage of the elections.
- 1.2. The Authority does not intervene in the news and programming operations of the broadcasters. BSLs' role during elections does not differ from their normal journalistic role during non-election periods. Normal ethical considerations will continue to apply. A distinguishing feature of the election period is the obligation to achieve equitable coverage of political parties or independent candidates without abdicating news value judgments.

##### **2. EDITORIAL MATTERS**

- 2.1. Section 59 of the ECA prescribes specific requirements for the treatment of political parties or independent candidates during the election period by broadcasters in their editorial programming. The requirements are:
  - (a) If during an election period, the coverage of any broadcasting service licensee extends to the field of elections, political parties or independent candidates and issues relevant thereto, the broadcasting licensee concerned must afford reasonable opportunities for the discussion of conflicting views and must treat all political parties and all independent candidates equitably.

(b) In the event of any criticism against a political party or an independent candidate being levelled 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 the party having been reflected therein, the broadcasting service licensee concerned will be obliged to afford the party a reasonable opportunity to respond to criticism.

(c) 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 or an independent candidate is criticized, the broadcasting service licensee must ensure that the political party or independent candidate is given a reasonable opportunity to respond thereto in the same programme, or to do so as soon as reasonably practicable thereafter”.

2.2. 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’ or independent candidates’ 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.

### 3. EQUITABLE TREATMENT

3.1. Equitable treatment means fair treatment Each BSL 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 BSL should be consistent in its treatment of contesting parties and of conflicting views.

3.2. Broadcasting service licensee must seek out information. BSLs should recognise their obligation to the electorate to provide a full and accurate record of events and developments. BSLs should not rely on political parties or independent candidates 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.

#### 4. PRINCIPLES TO BE ADHERED TO

To further assist BSLs in fulfilling the requirements of the Act the following principles will apply:

##### 4.1. Fairness

- (a) All news coverage should be fair to all interested parties concerned.
- (b) Care should be taken to balance the exposure given to the non-political activities of candidates (such as attendance at functions, sporting events, etc).
- (c) All parties should receive equitable treatment on current affairs programmes. If the programme intends to feature party representatives, parties contesting the elections must be invited, with reasonable notice, to participate either in the same programme or in a series of programmes.
- (d) The requirement that broadcasters give an opportunity for conflicting views to be heard should not be interpreted as a requirement that all parties be heard on any subject, only that all views be heard. Nor is it a requirement that all views be heard on the same programme.

##### 4.2. The right of reply to broadcast criticism

- (a) Each BSL should afford all political parties and independent candidates reasonable opportunity to respond to criticism broadcast by that BSL. However, affording parties reasonable time to respond should not amount to forcing BSLs to turn their editorial programmes into a series of replies and replies-to-replies. There should be a distinction between demands for the right to reply to mild or rhetorical criticism, which properly forms part of the cut and thrust of robust political contest; and demands for the right to reply to criticisms which result in clear and immediate damage to a political party or an independent candidate.
- (b) With regard to rhetorical criticisms, BSLs must have the flexibility to incorporate responses into their formal news patterns. With regard to damaging criticisms, BSLs should give the offended party an opportunity

to respond. The party should be afforded the earliest and most appropriate opportunity to do so. Broadcasters should, however, not allow political parties or independent candidates to use their right to reply to criticism to manipulate or distort the general principle of equity.

#### 4.3. Coverage of government

During the election period, BSLs must recognise that government officials are in a position to use their incumbency to advance their electoral prospects. During the election period, BSLs should regard with particular caution any statement or action by an official of an incumbent party. In particular, BSLs need to ensure that, during the election period, they do not afford the policies of incumbent parties' or independent candidate's greater legitimacy than they would afford those policies or actions if the party was not in government.

#### 4.4. Coverage of non-participating organisations

In providing a reasonable opportunity for the discussion of conflicting views, non-participating political parties, independent candidates, and organisations affiliated to alliances should not be excluded from debates and news bulletins. They should be included in terms of normal journalistic practice – when the topic is one in which they have a material interest. However, they should not be included with such frequency that they distort the general principle of equity between registered, contesting parties.

#### 4.5. Coverage of election results

BSLs, particularly the public BSL, have an obligation to inform the electorate of the election results, as they become available. Coverage of election results may also include a comment, analysis, and interpretation. Special care should be taken to ensure the accuracy of all results broadcast.

### 5. CONCLUSION

The guidelines provide a framework to BSLs covering the elections in which the system of Party Election Broadcasts and Political Advertising will operate."

## **12. Substitution of Annexure C of the Regulations**

The following Annexure is hereby substituted for Annexure C of the Regulations:

### **"ANNEXURE C**

#### **TECHNICAL STANDARDS AND QUALITY**

Audio and video recordings must be clearly labelled to indicate the name of the political party or independent candidate and nominated representative.

Audio and video recordings must be submitted electronically or physically to the BSL.

#### **HD (High Definition)**

- Commercials to comply with the 1920 x 1080i HD Standard in a 16:9 aspect ratio at 25 frames per second
- Digital Audio Reference level is defined as 18dB below the maximum coding value (-18dBFS) as per EBU recommended practice R128.
- Timecode of commercial start is at 00:00:00:00.
- Stereo audio on tracks 1&2, (Any additional audio tracks should not be MUTE but rather be duplicates of track 1&2)
- Fade to silence at commercials end.

#### **File format:**

MXF OP-1a (SMPTE 378M), XDCAM HD 422

#### **Video:**

Codec: MPEG-2 422P@HL LongGOP

Bit rate mode Constant

Bit rate: 50 Mb/s (CBR)

Resolution: 1920 x 1080

Interlacing: Upper Field First

Display aspect ratio 16:9

Frame rate: 25 fps (50i).

**Audio:**

Track 1 (AES1) Stereo Left / Lt

Track 2 (AES1) Stereo Right / Rt

Codec: Uncompressed (PCM)

Sample Rate: 48 kHz,

Sampling Size: 24 bit

Additional tracks: Duplicate tracks 1&2."



**THE DRAFT AMENDMENT OF THE NATIONAL AND PROVINCIAL  
ELECTIONS BROADCASTING REGULATIONS, 2014**

EXPLANATORY MEMORANDUM

**October 2023**

## 1. INTRODUCTION

- 1.1 The Independent Communications Authority of South Africa ("**ICASA**" or the "**Authority**") is reviewing the National and Provincial Elections Broadcasting Regulations, 2014<sup>1</sup> as amended<sup>2</sup> (the "**Regulations**") in anticipation of the 2024 National and Provincial Elections.
- 1.2 The review process is guided by the Constitution of the Republic of South Africa, 1996 (the "**Constitution**"), the Broadcasting Act, 1999 (Act No. 4 of 1999) ("**Broadcasting Act**"), the Electronic Communications Act, 2005 (Act No. 36 of 2005) ("**ECA**"), and the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000).
- 1.3 The Authority's mandate to regulate elections broadcasting is enshrined in sections 56 - 59 of the ECA as these sections outlines how election broadcasts should be handled by broadcasters, political parties and ICASA.
- 1.4 The purpose of the Regulations is to regulate the broadcasting of party election broadcasts on broadcasting services and also to determine and prescribe the framework and guidelines under which party election broadcasts ("**PEBs**") and political advertisements ("**PAs**") will be conducted and carried by various broadcasting service licensees during the elections. The legislation requires that the Authority ensures equitable treatment of political parties by Broadcasting Service Licensees ("**BSLs**") during the election period.
- 1.5 The Authority acknowledges the changes in the political landscape as demonstrated during the 2021 Municipal Elections through the inclusion of independent candidates in the allocation process of PEB slots and the

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<sup>1</sup> ICASA, 2014, Regulations on Party Election Broadcasts, Political Advertisements, the equitable treatment of Political Parties by Broadcasting Licensees and related matters, published in Government Gazette 37350 of 17 February 2014

<sup>2</sup> by Government Notice No. 245 (Government Gazette No. 42249) of 25 February 2019 and Government Notice No. 534 (Government Gazette No. 42374) of 2 April 2019.

first monitoring exercise by the Authority.<sup>3</sup> Thus, the Authority seeks to make provision for independent candidates in the Draft Amendment of the National and Provincial Elections Broadcasting Regulations, 2014 (the “**Draft Regulations**”). The basis for the inclusion of independent candidates in the Draft Regulations emanated from the Constitutional Court judgment of 11 June 2020<sup>4</sup> that upheld the right of independent candidates to contest elections at the national and provincial level. The Constitutional Court declared the Electoral Act, 1998 (Act No. 73 of 1998) unconstitutional so far as it provides for a pure proportional electoral system that caters only for representation by political parties and precludes adult citizens from standing as independent candidates in elections for the National Assembly and the provincial legislatures.<sup>5</sup>

- 1.6 Therefore, the proposed inclusion of independent candidates in the Draft Regulations necessitates that all processes in the Regulations which only focus on political parties be amended to include independent candidates.

## **2. REASONS FOR THE PROPOSED AMENDMENTS**

The explanatory memorandum canvasses the reasons for the proposed amendments to the Regulations. Where a clause or part thereof is not amended, or the amendment is merely to effect editorial changes, or to include independent candidates, an explanation is not provided.

### **2.1 Regulation 1:**

It is proposed that the definitions contained in the Regulations be amended as follows:

- 2.1.1 The definition of “election broadcast period” is amended to mean that the election broadcast period commences immediately after the publication

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<sup>3</sup> ICASA 2021 Municipal Elections Coverage Report.

<sup>4</sup> New Nation Movement NPC and Others v President of the Republic of South Africa and Others (CCT110/19) [2020] ZACC 11.

<sup>5</sup> Municipal Elections Broadcasts and Political Advertisement Amendment Regulations, 2021, published in government gazette 44370 of 31 March 2021, page 19

of time slots by the Authority. This proposed amendment is in line with the proposed amendment in regulation 4(2) which requires that PEBs are submitted to the broadcaster five (5) days after proclamation of the election date.

- 2.1.2 The definition of a “party” is amended to align with the definition of political party in the ECA.

## 2.2 Regulation 4:

The following reasons are provided for the proposed amendment to regulation 4:

- 2.2.1 The proposed amendment in sub-regulation (2) is intended to provide a singular cut-off date for all political parties and independent candidates to submit their PEBs. In turn, the proposed amendment will afford enough time for the BSL to assess all the PEBs so that they are ready when the Authority allocates the PEB slots. Furthermore, the proposed amendment is meant to provide for additional days during the election broadcast period as compared to the provision in the current regulations i.e., the current provision provides for the election broadcast period to start five (5) working days after allotment whereas the proposed amendment will ensure that PEBs would be submitted, assessed, and processed prior to the allocation of slots by the Authority. BSLs would then be able to start PEB broadcast as soon as the schedule is published and not have to wait for five (5) working days after allocation, thereby providing additional days which equates to additional PEB slots for the political party/independent candidates.
- 2.2.2 Sub-regulation 4 is amended by reducing a period from thirty (30) to twenty (20) calendar days for community and commercial broadcasters to inform the Authority of their intention to broadcast PEBs. The reduced time period will aid the Authority to commence with its processes of allocating slots earlier. The twenty (20) calendar days provision provides sufficient time to all the stakeholders (the broadcasters, the political

parties and the independent candidates) to familiarise themselves with the regulations/regulatory processes and make enquiries where necessary.

- 2.2.3 Sub-regulation (7) is amended to afford a BSL sufficient time (i.e., five (5) working days) to reject a PEB submission received by a BSL, since in terms of sub-regulation (2) a BSL receives all PEB submissions by a singular cut-off date.
- 2.2.4 In terms of sub-regulation (14), the Authority has for the past three (3) National and Provincial Elections elected to reduce the duration of PEBs. This reduction in the PEB duration has been justified by financial implications on BSLs when slots are not utilised, as these slots could have been used for advertising or other programming. Furthermore, political parties in previous elections were not using the maximum duration of their slots to record their PEBs.
- 2.2.5 The Authority has also, in the past three (3) National Elections increased the total number of PEB slots. This increase was due to the ever-changing political climate and the increase of political parties contesting the national and provincial elections. Given that 2024 is the first time that independent candidates are contesting national and provincial elections, it is crucial to increase the number of PEB slots to ensure that there is a fair and equitable allocation of these slots to all those who are contesting the national and provincial elections.
- 2.2.6 Further, section 57(2) of the ECA prescribes that the Authority, when determining the duration and scheduling of PEBs, must consider the financial and programming implications for the BSLs in question.
- 2.2.7 Section 57(3) of the ECA requires that prior to making the determination in terms of section 57(2), the Authority must consult the public BSL as well as all the political parties.
- 2.2.8 Having considered the above, the Authority proposes to amend sub-regulation (14) to reflect a decreased duration of PEBs from fifty (50)

seconds to forty (40) seconds and increase the number of timeslots from ten (10) to twelve (12) in the Draft Regulations. The amendment represents a 20% decrease in PEB duration from the previous election. The practical implication of the amendment is set out below:

2.2.8.1 The amendment will result in a BSL availing less airtime for PEBs: 8 minutes of airtime (40 second PEB duration x 12 slots), per day for 2024 Election compared to the 8 minutes 20 seconds of airtime (50 second PEB duration x 10 timeslots) per day during 2019 Election.

2.2.8.2 The amendment would result in more slots being available to be allocated to political parties and independent candidates. Working on the assumption that the election broadcast period totals the same number of days as that from the 2019 Election, which was twenty-seven (27) days:

- 12 slots per day x 27-day election broadcast period = 324 slots per BSL in 2024 Election
- *Comparison: 10 slots per day x 27-day election broadcast period = 270 slots in 2019 Election.*

2.2.9 The Authority also considered other possible scenarios in trying to achieve a balance of ensuring that sufficient slots are made available for allocation while taking into cognisance the financial impact on BSL. If the Authority were to decrease the duration of PEBs from fifty (50) seconds to forty-five (45) seconds and keep the number of slots at 10 (ten) slots per day, a BSL would be availing only seven (7) minutes and (30) seconds of airtime per day. While this potentially benefits the BSL, the risk is that the number of slots will not be sufficient given the expected increased number of those contesting the elections.

2.2.10 If the Authority were to decrease the duration of PEBs from fifty (50) seconds to forty (45) seconds and increase the number of slots from ten (10) to twelve (12), it would mean that BSLs are availing nine (9)

minutes of airtime per day. This would be an increase from the 2019 Elections where BSLs were required to avail eight (8) minutes and twenty (20) seconds. It would be difficult to justify why the Authority increased the total amount of airtime to be made available, given that concerns have already been raised about the financial implications of unused PEB slots.

- 2.2.11 Therefore, it is the considered view of the Authority that the amendment of sub-regulation (14) of twelve (12) slots with a duration of forty (40) seconds each strikes a balance between the Authority's mandate to allocate PEBs and the financial impact on BSLs in so far as the proposal decreases the airtime to be made available by BSLs and increases the number of slots to be allocated to political parties and independent candidates.
- 2.2.12 Paragraph (d) in sub-regulation 14 is amended to make it a requirement that a BSL that broadcasts a PEB clearly identifies all PEBs through only a standard pre-recorded concluding message (tail) disclaimer. Previously BSLs were required to identify a PEB through a standard pre-recorded opening (top) and a concluding (tail) disclaimer. The single disclaimer at the end of a PEB is sufficient to ensure that listeners or viewers are aware that the PEB is separate from the normal programming of the BSL and that views expressed in the PEB are not the views of the BSL. Removing the obligation to have two disclaimers allows BSL to fill the airtime that would have been used for a disclaimer with its normal programming. Further, the usage of a single disclaimer is standard industry practice.
- 2.2.13 Sub-regulation (15) aligns with the duration in paragraph (a) of sub-14.
- 2.2.14 Sub-regulation (23) seeks to ensure that the Authority will oversee this process to ensure fairness; that the political party/independent candidate are treated fairly or equitably. It is the responsibility of the BSL to show the Authority that the proposed scheduled re-allocation of

the slot is fair in the context of the BSLs programming and scheduling of other PEB and PA slots.

- 2.2.15 Sub-regulation (24) is substituted by the new sub regulation as it is addressed by sub-regulation (1). The new sub regulation (24) affords political parties and independent candidates an opportunity to surrender allocated PEB slots. In turn sub-regulation (24) ensures that there are no wasted time slots and then the BSL can plan to fill the slot with normal programming.
- 2.2.16 The Authority inserted sub regulation (26) to provide certainty on who is permitted or not permitted to broadcast PEBs and to make a clear distinction between low power sound broadcasting service licensees and other broadcasting service licensees. The proposed exclusion of low power sound broadcasting service licensees is due to the small coverage area (not exceeding one watt of power).
- 2.2.17 The Authority added a sub-regulation to exclude low power sound broadcasting service licensees from broadcasting PEBs with the intention of providing certainty to the sector and to political parties and independent candidates on who they may approach to broadcast their political content. Regulation 10B of the Standard Terms and Conditions Regulations<sup>6</sup> states that Low Power Broadcasting Service licensees must source advertising only from within the coverage area. The majority of political advertisements therefore fall outside of this requirement. Further, the regulations require that low power broadcasting service licensees broadcast programmes that are specific to their coverage areas which includes malls, sports grounds, show grounds, old age homes, places of worship or any other like service. The Regulations explicitly prohibit Low Power Broadcasting Service Licensees from broadcasting news and current affairs. This sets Low Power broadcasting service licensees apart from other licensees as they do not have an obligation to inform their listeners on events relating to news and current affairs. The Authority therefore

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<sup>6</sup> Regulation 10B of the Amendment Standard Terms and Conditions for Class Licences, 2021.

is of the view that Low Power Broadcasting Service Licensees are not an appropriate platform for the broadcasting of political content such as PEBs.

### 2.3 **Regulation 6:**

The following reasons are provided for the proposed amendment to regulation 6:

- 2.3.1 Sub-regulation (2) is inserted for the BSL be informed and subjected to adhere to the relevant legal prescriptions such as the National and Provincial Elections Broadcasting Regulations and other related legal stipulations as found in the Constitution, the ICASA Act and the ECA. The twenty (20) calendar days provision provides sufficient time to all the stakeholders (the broadcasters, the political parties and the independent candidates) to familiarize themselves with the regulations/regulatory processes and make enquiries where necessary.
- 2.3.2 Sub-regulations (4) and (5) are removed since the PAs are commercial in nature. As such, it is a commercial agreement between the broadcaster and the political party/independent candidate. Therefore, it will not be necessary for the Authority to impose conditions into contractual agreements of parties in terms of section 2(y) of the ECA.
- 2.3.3 Sub-regulation (11) is added because a broadcaster must not broadcast a PA or a PEB immediately before or after another PA or PEB has been transmitted so that the delay in the transmission of another PA or PEB allows the voting audiences an opportunity to digest and decipher the message from the PA or PEB that has just been broadcast.
- 2.3.4 Sub-regulation (13) seeks to ensure that a BSL which broadcast a PA, will also broadcast a standard concluding tail which will be utilized for all PAs in order for the members of the public to distinguish that the content is the sole view of the political party or independent candidate. The message should be standard to ensure that there is no favouritism

in introducing PA of some political parties or independent candidate in terms of how the tail is crafted.

2.3.5 The Authority inserted sub regulation (15) to provide certainty on who is permitted or not permitted to broadcast PAs and to make a clear distinction between low power sound broadcasting service licensees and other broadcasting service licensees. The proposed exclusion of low power sound broadcasting service licensees is due to the small coverage area (not exceeding one watt of power).

2.3.6 The Authority added a sub-regulation to exclude low power sound broadcasting service licensees from broadcasting PAs with the intention of providing certainty to the sector and to political parties and independent candidates on who they may approach to broadcast their political content. Regulation 10B of the Standard Terms and Conditions Regulations<sup>7</sup> states that Low Power Broadcasting Service licensees must source advertising only from within the coverage area. The majority of political advertisements therefore fall outside of this requirement. Further, the regulations require that low power broadcasting service licensees broadcast programmes that are specific to their coverage areas which includes malls, sports grounds, show grounds, old age homes, places of worship or any other like service. The Regulations explicitly prohibit Low Power Broadcasting Service Licensees from broadcasting news and current affairs. This sets Low Power broadcasting service licensees apart from other licensees as they do not have an obligation to inform their listeners on events relating to news and current affairs. The Authority therefore is of the view that Low Power Broadcasting Service Licensees are not an appropriate platform for the broadcasting of political content such as PAs.

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<sup>7</sup> Regulation 10B of the Amendment Standard Terms and Conditions for Class Licences, 2021.

## 2.4 Regulation 7: Complaints

The following reasons are provided for the proposed amendment to regulation 7:

- 2.4.1 Sub-regulation (1) is amended to address the limited time constraints available for aggrieved persons to lodge a complaint, the Authority changed period from 48 hours to five (5) days to allow anyone aggrieved by a PA or PEB sufficient time to lodge a complaint with the Authority.
- 2.4.2 Sub-regulation (3) is amended by deleting the 48-hour timeframe for communicating outcomes to parties involved in a complaint to align with the CCC Regulations that govern complaints related to the elections. Given that these complaints relate to a person being aggrieved by a PA/PEB and does not impact the scheduling/broadcast thereof. Deleting the 48-hour timeframe empowers the CCC to use its discretion regarding turn around times based on the merits of each case/complaint.
- 2.4.3 Sub-regulation (4) is amended to create awareness of the complaints procedure.

## 2.5 Regulation 8:

The 30 days to 20 calendar days under Regulation 8(1)(b) is amended to align with the time required of broadcaster to notify the Authority of their intention to carry PEBs and or PAs and avoid unnecessary delays on such notifications.

## 3. ANNEXURE A: PRINCIPLES OF AIRTIME ALLOCATION

- 3.1 Section 57(4) of the ECA provides that: *"in making any determination in terms of subsection (2), 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."*

- 3.2 In line with section 57(4) of the ECA, the Authority seeks to increase the percentage of slots under "Basic Allocation" from 50% to 60% to accommodate the increasing number of political election participants, which now include independent candidates. This is another way of achieving equitable treatment of political parties and independent candidates. Furthermore, the Authority proposes the reduction of the percentage of "Number of Seats Currently Held" from 25% to 15%. The 10% deducted has been added to 50% to increase the percentage of "Basic Allocation". The Authority proposes that the percentage of "Number of Candidates Fielded" should remain unchanged.
- 3.3 The principle of equitable treatment of political parties is used in Albania<sup>8</sup>, Australia<sup>9</sup> and many other countries. In terms of this principle the outgoing political parties or political parties with seats in the national assembly, before the parliament get dissolved, are given more airtime on television and radio. The small political parties get airtime as well according to the number of seats they have in parliament. The new political parties and independent candidates are given airtime in terms of the fielded seats and basic allocation principles.
- 3.4 The principle of equitable treatment of political parties used in Albania and Australia demonstrates that it is fair discrimination to give additional airtime to the political parties that have seats in an outgoing Parliament or Assembly. Therefore, ICASA's decision to include allocation based on the seats currently held by political parties is a fair practice which is accepted and recognized internationally. The allocation of PEB slots based on the "Number of Candidates Fielded" is a fair practice to achieve equitable treatment of political parties and independent candidates.
- 3.5 The Authority is not able to predict the number of independent candidates

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<sup>8</sup> Tirana, Besar Likmeta, 'Albanian Election Commissioner Turns Blind Eye to Broadcasters Bias', <http://balkaninsight.com/2021/06/02/albanian-election-commissioner-turns-blind-eye-to-broadcasters-bias/>, date accessed: 27 June 2023.

<sup>9</sup> Australian Broadcasting Corporation Board, Allocation of free broadcast time to political parties during election periods, 2021.

that will participate in the 2024 elections. Therefore, the Authority made provision for a scenario whereby there is a high number of independent candidates contesting the National Elections. The principles of allocation without suggested percentages (Table 2) will apply in a situation whereby the number of participants in the elections is higher than could be accommodated through Table 1.

- 3.6 The Authority will use three (3) principles to allocate slots to all political parties and independent candidates contesting the National and Provincial Elections. The allocation process is separated into National and Provincial allocation with the same principles. For those political parties and independent candidates participating at National Assembly and/or more than five provinces, their allocation will be exclusive to National Radio and Television.
- 3.7 For political parties and independent candidates participating in less than five provinces, their allocation will be limited to those provinces, whether it is one or more provinces. For those provinces that has more than one SABC station and would still have not enough slots available, the Authority will utilise community sound stations for PEB slots.
- 3.8 Further, the number of slots assigned to the three principles will depend on the number of political parties and independent candidates. In the event that there are sufficient slots to cover all the political parties and independent candidates, the allocation process will be as follows:
  - 3.8.1 Sixty (60) percent of the number of total slots available will be utilised for the first principle. This principle is called the "*basic allocation principle*". There is no qualifying criteria to be allocated slots under this principle besides that the political party and independent candidate must contest the elections. Political parties and independent candidates are given the same number of slots.

- 3.8.2 By way of example: The Authority has a total of one thousand (1000) slots to allocate to political parties and independent candidates. Applying the basic principle means that the total number of slots available are divided by sixty (60) percent, thus equates to six hundred (600) slots being available under the allocation principle. If the total number of political parties and independent candidates contesting the election is 200, it would mean that the 600 slots are divided by the total number of political parties and independent candidates ( $600/200 = 3$ ). This would result in each political party and independent candidate receiving 3 PEB slots. If the number is 600, each political party and independent candidate receives 1 slot ( $600/600 = 1$ ). If the number of political parties and independent candidates are 500, each party and independent candidate will get 1 slot ( $600/500 = 1\frac{1}{2}$ ). Half slots cannot be allocated and therefore the 100 slots that remain will be added to the slots available for the second principle.
- 3.8.3 The second principle of allocation is the "*number of candidates fielded by political parties and independent candidates' principle*". Twenty-five (25) percent of the total number of slots. Political parties and independent candidates qualify for this allocation based on the number of candidates fielded. The number of slots, if any, will depend on the minimum threshold applied by the Authority.
- 3.8.4 By way of example, if every political party and independent candidate fields 1 candidate, the slots will be divided equally. However, if there are more candidates fielded than slots, the Authority will apply a minimum threshold based on a percentages system as a qualifying criterion. Political parties and independent candidates who meet the threshold will then be allocated slots under this principle and those who fall below the threshold will not be allocated any slots under this principle.

3.8.5 The third principle is the “number of seats currently held principle” and operates in the same manner as the second principle in relation to the minimum threshold based on a percentages system as a qualifying criterion. Fifteen (15) percent of the total number of slots available will be used for this allocation.

3.9 Given that the Authority utilises mathematic calculations as outlined above to allocate the slots, it would be impossible to include percentages in Table 2. The number of slots available depend on variables that the Authority cannot reasonably foresee such as the number of political parties and independent candidates contesting the election, the length of the election broadcast period, as well as the number of participating BSLs. If the slots are not sufficient in comparison to the number of political parties and independent candidates contesting the elections for basic principles, for instance under the percentage-based allocation, the Authority will use its discretion to allocate slots attached to each principle in a manner that gives due regard to the principle that all political parties and independent candidates be treated equitably.

3.10 The balance from Basic Allocation under a non-percentage principle would then be rolled over to the next principle and the same principle in relation to the minimum threshold based on a percentages system as a qualifying criterion will be utilised for slot allocation.

#### **4. ANNEXURE C: TECHNICAL STANDARDS**

The Authority proposes that the electronic submission of PEBs and PAs should be allowed. Electronic submission allows political parties and independent candidates to choose a delivery method that is most convenient to them as well as lessening the administrative burden of the BSL relating to the physical delivery of PEBs and PAs. However, physical submission is still allowed.







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