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**URGENT**

**To**

THE TECHNICAL COMMITTEE ON THE INDEPENDENT  
MEDIA COMMISSION AND INDEPENDENT  
TELECOMMUNICATIONS AUTHORITY

Your reference

**Fax Number**

3972211

**Town**

KEMPTON PARK

**Country**

RSA

**From**

**Name**

MR WEND WENDLAND

**Our file reference no.**

109/N.12/93

**Date**

28 July 1993

**Number of pages (including this page)**

13

**Matter**

SUBMISSION OF THE NATIONAL ASSOCIATION OF BROADCASTERS OF SOUTH AND  
SOUTHERN AFRICA ON THE EIGHTH DRAFT OF THE INDEPENDENT MEDIA COMMISSION  
BILL

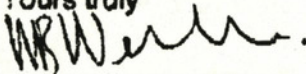
**Message**

Dear Sirs

Attached please find the submission of the National Association of Broadcasters of South and  
Southern Africa on the Independent Media Commission Bill.

Copies of the submission are also being forwarded to each member of the Technical Committee.

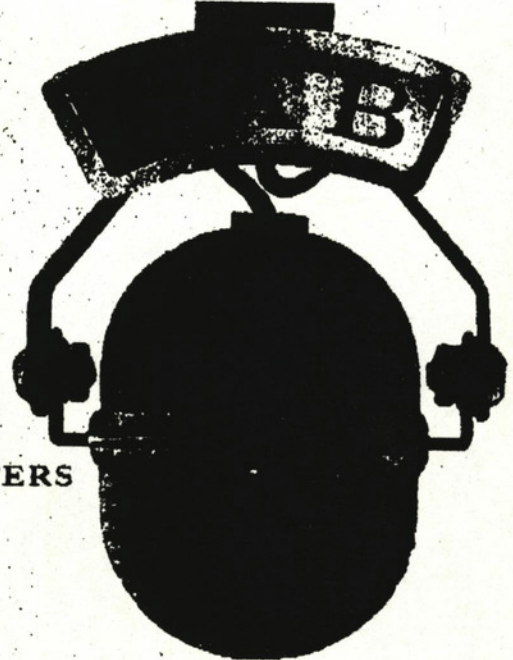
Yours truly



**WEBBER WENTZEL**

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NATIONAL ASSOCIATION OF BROADCASTERS  
of South and Southern Africa

**SUBMISSION OF THE NATIONAL ASSOCIATION OF BROADCASTERS  
OF SOUTH AND SOUTHERN AFRICA ON THE EIGHTH DRAFT OF THE  
INDEPENDENT MEDIA COMMISSION BILL**



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**SUBMISSION OF THE NATIONAL ASSOCIATION OF BROADCASTERS OF SOUTH AND SOUTHERN AFRICA ON THE EIGHTH DRAFT OF THE INDEPENDENT MEDIA COMMISSION BILL**

**INTRODUCTION**

1. The National Association of Broadcasters of South and Southern Africa ("the NAB") is an association of parties involved in the broadcasting industry in South and Southern Africa. At present, the full members of the NAB are the South African Broadcasting Corporation ("the SABC"), M-Net, Bop Broadcasting, Radio 702 and Trinity Broadcasting Network. The NAB seeks to represent and promote the interests of the broadcasting industry.
2. The NAB has already filed, with the Technical Committee on the Independent Media Commission and Independent Telecommunications Authority ("the Technical Committee"), a submission on the Fourth Working Draft of the Independent Broadcasting Authority Bill ("the IBA Bill").
3. The NAB welcomes the opportunity to comment on the Eighth Draft of the Independent Media Commission Bill ("the IMC Bill"), which the NAB has been advised is the most recent draft of the Bill.
4. The NAB, however, received, for the first time, a copy of the Eighth Draft of the IMC Bill only on Tuesday 20 July 1993. This was so despite the fact that the NAB had written to the Technical Committee some time ago, requesting a copy of the Bill, and an opportunity to comment thereon. The NAB has subsequently also been advised that the Technical Committee is required to complete its work on the Bill by Thursday 29 July 1993, thereby affording the NAB no more than a few days to consider and comment on the Bill. As the NAB believes that the IMC Bill is of substantial significance to the industry that the NAB represents, the NAB is concerned that it has not been afforded an adequate opportunity to consider and comment on the Bill. Accordingly, the NAB requests that, should time permit, it be afforded a further opportunity to participate in the further consideration and finalisation of the Bill, and that, from now on, it be informed



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as to all further developments with regard to the consideration, drafting and enactment of the Bill.

5. The NAB has studied, in some detail, the provisions corresponding to those contained in the IMC Bill in the laws of certain other jurisdictions, such as the United States of America ("the USA") and Australia. Unfortunately, in the time available, the NAB has not been able to comment in detail on the IMC Bill, and has, in this submission, confined itself to commenting on certain matters of policy and principle only. The NAB hopes, however, that its submission will be of assistance to the Technical Committee. The NAB is willing to be of further assistance with regard to the consideration and finalisation of the IMC Bill.
6. This is a consensus document prepared by the NAB. Individual members of the NAB are entitled to furnish their own submissions on the IMC Bill, in relation to matters that may affect them directly, and may do so.
7. The NAB has noted that the IMC Bill seeks to provide for, firstly, the equitable treatment of political parties by broadcasting services and, secondly, the monitoring of state - financed publications and state information services. As the NAB is a body representing the broadcasting industry, the NAB does not propose to comment on those provisions of the Bill relating to the monitoring of state-financed publications and state information services.
8. This submission consists of two parts. The first part contains certain general comments regarding the IMC Bill as a whole, while the second part contains comments regarding certain of the specific provisions of the Bill.

#### **PART I: GENERAL COMMENTS**

9. The NAB's first general comment relates to the inter-play between the proposed Independent Broadcasting Authority ("the IBA"), the proposed Independent Media Commission ("the IMC") and the Broadcasting Complaints Commission of South Africa ("the BCCSA"), recently established by the NAB.
10. The NAB will demonstrate that that inter-play creates an unfortunately confusing state of affairs.

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11. Section 57(2) of the IBA Bill provides, broadly speaking, that broadcasting services that subscribe to an acceptable code of conduct shall be exempt from the Code of Conduct for Broadcasting Services, as set out in Schedule 3 to the IBA Bill.
12. The IMC Bill provides for the establishment of the IMC, to, broadly speaking, administer sections 59, 60, 61 and 62 of the IBA Bill (it is noted that sections 15, 16, 17 and 18 of the IMC Bill correspond with sections 59, 60, 61 and 62 of the IBA Bill), from the time of the enactment of the IMC Bill until "the completion of the election" (see section 7(2) of the IMC Bill). The "election" referred to is defined, in section 1 of the IMC Bill, as the "first national election held after the commencement of this Act".
13. The IMC Bill, unlike the IBA Bill, makes no provision for the exemption, from its ambit, of broadcasters who subscribe to an acceptable code of conduct.
14. In other words, even those broadcasters who subscribe to, and who are bound by, an acceptable code of conduct, will nevertheless fall under the control of the IMC, and be subject to sections 15, 16, 17 and 18 of the IMC Bill, from the time of the enactment of the IMC Bill to the completion of the first national election thereafter.
15. The NAB has established the BCCSA to hear and adjudicate upon complaints against those broadcasters who are full members of the NAB. Those members have adopted a Code of Conduct regarding the content of what they broadcast, and it is intended that the Complaints Commission will apply that Code. The Code contains provisions regulating, inter alia, political coverage. More particularly, section 4 of the Code provides as follows:

**\*4. Elections and referenda**

- 4.1 Where during an election period or referendum period a signatory grants access to its services to a political party, organisation or movement or a candidate taking part in a national, regional or by-election, or referendum, or has itself during an election period or referendum period



criticised a political party, organisation or movement or a candidate taking part in such an election or referendum it is under a duty to grant an opposing or criticised (as the case may be) political party, organisation or movement or a candidate an equal opportunity to its services to state its policy or respond to the criticism of the signatory or the political party, organisation or movement or candidate to whom the signatory has granted access: provided that this clause does not in any way detract from the duties which a signatory has in accordance with the other clauses of this Code.

4.2 For purposes of this clause, "election period" and "referendum period" means a period which commences when the State President promulgates an election or by-election for Parliament or referendum in the Government Gazette and lapses when polling closes on the (last) election day, or referendum day, as the case may be."

16. The NAB intends applying to the IBA, once established, for the exemption referred to in section 57(2) of the IBA Bill.
17. In the event that the NAB is successful in obtaining the exemption concerned, then the following situation will arise:
  - 17.1 in terms of the IBA Bill, those broadcasters who submitted themselves to the jurisdiction of the BCCSA (we will refer to them as "BCCSA broadcasters") would be exempt from the provisions of the Code of Conduct referred to in the IBA Bill. Therefore, BCCSA broadcasters will, subject to 17.2, be subject to the Code of the BCCSA, in relation to both political and non-political coverage;
  - 17.2 however, from the time that the IMC Bill is enacted, until the completion of the first national election, and in so far as political coverage is concerned, BCCSA broadcasters will fall under the control of both the IMC, and be



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subject to sections 15, 16, 17 and 18 of the IMC Bill, and also the BCCSA, and be subject to the BCCSA Code. During this period, in respect of non-political coverage, BCCSA broadcasters would remain subject to only the Code of the BCCSA;

- 17.3 until such time as the IMC Bill is enacted, BCCSA broadcasters will, also in so far as political coverage is concerned, only be subject to the Code of the BCCSA;
- 17.4 after the first national election, and the dissolution of the IMC (see section 7(2) of the IMC Bill), BCCSA broadcasters will, once again, with respect to political coverage, fall under the aegis of only the BCCSA, and be subject to only the Code of the BCCSA;
- 17.5 in so far as non-political coverage is concerned, BCCSA broadcasters will, at all times, fall under the aegis of the BCCSA, and the BCCSA Code.
18. The NAB believes that the above amply demonstrates that the combined effect of the IBA Bill and the IMC Bill, and the existence of the BCCSA, creates an unfortunately confusing state of affairs.
19. In the circumstances, the NAB notes that, with respect to political coverage in the run-up to the first national election, both the IMC and the BCCSA will have jurisdiction over BCCSA broadcasters. It is intended that, during that period, the BCCSA will, notwithstanding the IMC, continue to apply the BCCSA Code, including its provisions regulating political coverage, in respect of BCCSA broadcasters.
20. The NAB's second comment of a general nature relates to the workability, or otherwise, of the rules relating to political coverage contained in the IMC Bill. The NAB refers, in this regard, to sections 15,16,17 and, more particularly, 18 of the IMC Bill.
21. Section 18(1) of the IMC Bill provides, broadly speaking, for the "equitable treatment" of political parties if "coverage" by a broadcaster extends to "the field of elections, political parties and issues related thereto". Such "equitable treatment", the section provides, must consist of affording "reasonable



opportunity for the discussion of conflicting views" and of treating "all political parties equitably."

22. The NAB suggests that the meaning of the section concerned is obscure, and its workability, in practice, questionable. The NAB believes that the same comments are of equal application to the remainder of section 18.

23. For example:

23.1 it is not clear as to what is meant by "coverage" in section 18(1), and, more particularly, as to whether this would include news coverage or not. The NAB would argue that bona fide, normal news coverage should not be subject to the IMC Bill;

23.2 in this regard, reference may be had to the provisions concerning political coverage in the USA, which are contained in sections 312(a)(7), 315 and 317 of the Communications Act, and in Rules 73.1212, 73.1920, 73.1930, and 73.1941 to 73.1944 of the Political Broadcast Rules and Regulations of the Federal Communications Commission ("the FCC"). In short, such provisions regulate only political advertisements, party election broadcasts and the "use" of broadcasting services by political candidates. Such "use" means candidate appearance (including by voice or picture) that is controlled, approved or sponsored by the candidate. (FCC Rule 73.1941(b)). Section 315 of the Communications Act specifically excludes from the meaning of "use" a "bona fide newscast", "bona fide interview", "bona fide news documentary" and "on-the-spot coverage of bona fide news events." Accordingly, the NAB believes that section 18(1) is too widely cast, and should be amended to exclude reference to bona fide, normal news coverage. There is much learning in the USA as to what constitutes the latter, and the NAB is willing to be of further assistance in this regard;

23.3 it is unclear as to what the "thereto" in section 18(1) relates. It could, on a reading of the section, relate to either "elections" or "political parties", or both;



23.4 the obligation on a broadcaster, in section 18(1), to afford reasonable opportunity for the "discussion" of conflicting views seems perhaps too onerous. The NAB believes that an obligation to afford the opportunity for the "presentation" of conflicting views may be more appropriate;

23.5 section 18(4) provides that the IMC may "prescribe standards to which broadcasting services shall be required to conform." The section sheds no light on the subject matter of such "standards", or the content that such "standards" may have. Presumably, the standards concerned will relate only to the subject matter of section 18, but that should be clarified. In so far as their content is concerned, the NAB believes strongly that the IMC should have no authority over matters such as the scheduling and duration of political coverage. The NAB believes that section 18(4) should either be deleted, or be re-drafted in accordance with the above.

## **PART II: SPECIFIC COMMENTS**

### **Section 1 of the Bill**

24. With respect of the definition of a "private broadcasting service", the NAB would suggest that paragraphs (b), (c) and (d) of the definition be deleted, as private broadcasting services could also receive revenue from other sources.

### **Section 4 of the Bill**

25. The NAB notes that section 4(2) provides only that the Commission shall be selected and appointed by the Multi-Party Forum/Transitional Executive Council. The NAB believes that the procedures for such selection and appointment should be detailed further, and that the Bill should provide specifically that the selection and appointment process should be subject to public scrutiny. The NAB does not believe that it is adequate to argue that, as the proceedings of the Multi-Party Forum/Transitional Executive Council will presumably be conducted in public, so will the selection and appointment of the Commission.



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800728**Section 6(c) of the Bill**

26. The NAB believes that section 6(c) should include a reference to not only political parties, but also "organisations which seek to influence public opinion".

**Section 11 of the Bill**

27. Section 11 of the Bill appears to be missing a subsection (3). Section 11(6) of the Bill refers to section 5(5) of the Bill, but there is no such section.

**Section 12 of the Bill**

28. The NAB believes that experts, appointed in terms of section 12 of the Bill, should satisfy the same criteria referred to in sections 5(3) and 6 of the Bill.

**Section 15 of the Bill**

29. The NAB refers, with respect to sections 15, 16, 17 and 18 of the Bill, to its general comments in paragraphs 20 to 23 above.
30. Section 15(1) of the Bill provides that public sound broadcasting services, as defined in section 1 of the Bill, are compelled to permit political parties to make party election broadcasts.
31. The definition of a "public sound broadcasting service" in section 1 of the Bill is widely framed, so as to include also commercially operated sound broadcasters. The NAB believes strongly that commercially operated sound broadcasters should not be compelled to broadcast party election broadcasts, and that section 15(1) of the Bill ought to be amended accordingly.
32. With respect to section 15(2) of the Bill, the NAB believes that the IMC should be required to make rulings concerning the duration and scheduling of party election broadcasts only after taking into account the financial implications of such rulings. Accordingly, the NAB would suggest that the words such as the following be added at the end of section 15(2) of the Bill:



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"... after having given due consideration to the financial implications, for the broadcaster(s) concerned, of such a ruling."

33. With respect to sections 15(5) and 16(4) of the IMC Bill, the NAB wishes to draw attention to the Appellate Division judgement in Argus Printing and Publishing Company (Pty) Limited v Inkatha Freedom Party 1992 (3) SA 579 AD. In short, this decision held that political parties, and similar organisations, can be defamed, and hence sue for damages.
34. The implication of sections 15(5) and 16(4) is that broadcasters may be required to act as censors in respect of political material that they may be requested to broadcast.
35. In this regard, reference may once again be had to the laws of the USA. Section 315 of the Communications Act provides that a broadcaster "shall have no power of censorship over the material broadcast under the provision of this section." The United States Supreme Court has held that Congress could not have intended to compel a broadcaster to broadcast defamatory statements and at the same time subject the broadcaster to the risk of a damages suit. Accordingly, in USA law, a broadcaster who does not directly participate in the defamation is free from liability which might otherwise be incurred.
36. The NAB suggests that, should broadcasters obtain indemnities in respect of political material, they should then be free to broadcast such material.

#### Section 17 of the Bill

37. The NAB questions the reasoning behind the prohibition on the broadcasting of party election broadcasts and political advertisements on television. As print advertising can be as expensive as television advertising, it follows that the argument that access to television will unduly advantage large parties with unlimited financial resources is unsound. The NAB believes that, while television broadcasters should not be compelled to broadcast either party election broadcasts or political advertisements, they should be free to do so.



**Section 20(1) of the Bill**

38. With respect to sections 20(8), (11) and (12), the NAB believes that the determinations of the Commission should not only be "public documents", but should also be made public. In providing only that the determinations concerned will be "public documents", the IMC Bill does not, the NAB believes, go far enough in ensuring that the public will be fully informed as to the decisions taken by the Commission.
39. The NAB notes that section 20 of the Bill does not contain, or refer to, any procedure whereby a complainant or respondent may appeal against the decisions of the Commission. The NAB believes that, notwithstanding that decisions may need to be taken, and implemented, in situations of urgency, there should be some form of appeal procedure.
40. The NAB is uncertain as to the meaning of section 20(9). Section 11(2)(a) of the Bill provides for the establishment, by the Commission, of a "broadcasting committee" which "shall monitor all broadcasting services" so as to, broadly speaking, ensure their compliance with the provisions of the proposed Act. It will, therefore, so the NAB understands the Bill, be such a committee, and not the Commission, which will monitor broadcasting services. If that is, indeed, the position, then the NAB fails to understand how any hearings could be instituted by the Commission, as is anticipated in section 20(9). It is, the NAB would suggest, more likely that hearings would be instituted by the broadcasting committee, established in terms of section 11(2)(a) of the Bill, which hearings would take place before the Commission.

**Section 21 of the Bill**

41. The NAB believes that section 21(1)(d) should specify the maximum financial penalties that may be imposed by the Commission. The NAB notes that a maximum fine is provided for in section 26 of the Bill.
42. With respect of section 21(2) of the Bill, the NAB believes that the orders and recommendations of the Commission should be made public.



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**Section 27 of the Bill**

43. Section 27(1) refers to a "state member". The NAB is not certain to whom or what this refers.
44. With respect of section 27(2) of the Bill, the NAB suggests that not only the rights of persons should be protected, but also their "legitimate expectations". The NAB would suggest that the section concerned be amended accordingly.

**CONCLUSION**

45. The NAB hopes that its comments will be of assistance to the Technical Committee and to the Multi-Party Forum.
46. In this regard, the NAB is willing to be of further assistance with regard to the drafting and finalisation of the Bill, and would welcome an opportunity to do so.

**THE NATIONAL ASSOCIATION OF BROADCASTERS OF SOUTH AND SOUTHERN AFRICA****28 JULY 1993**