ORAL SUBMISSION BY

MEDIA INSTITUTE OF SOUTHERN AFRICA – SOUTH AFRICA [MISA-SA]

TO

THE PORTFOLIO COMMITTEE ON COMMUNICATIONS ON THE CONVERGENCE BILL, GAZETTE NO. 27294 OF 16 FEBRUARY 2005

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INTRODUCTION

The South African Chapter of the Media Institute of Southern Africa (MISA-SA) welcomes the opportunity to amplify our written submission on the Convergence Bill [B9 – 2005].

MISA is a regional, member-driven, non-governmental organisation with eleven chapters in the SADC region, coordinated by a regional Secretariat. The network of national chapters aim - through monitoring, training, capacity building, research and the distribution of information - to foster free, independent and diverse media throughout southern Africa in the service of democracy and development as stated in the Windhoek Declaration of 1991 and African Charter of Broadcasting of 2001.

MISA-SA is involved with consultative networks in the promotion of freedom of expression, diversity, pluralism, self-sufficiency and independence.

Our oral submission will be delivered by Mr Raymond Louw (Deputy Chairperson, MISA-SA, National Governing Council) and René Smith (Researcher: Campaign for Broadcasting Diversity, MISA-SA). Our submission is supported by the Media Institute of Southern Africa (MISA), Media Monitoring Project (MMP) and the Freedom of Expression Institute (FXI).

CONTEXTUAL ANALYSIS

MISA-SA welcomes the Convergence Bill (the Bill) as a significant development to the regulatory framework for the convergence of technologies. We are encouraged by the commitment to public participation since the initial draft was published in 2003 and trust this principle will be sustained in the Convergence Act.

In developing our submission, we are aware that the Bill was not preceded by a green or white paper, which would provide a context for the Bill, and a guideline to the Independent Communications Authority of South Africa (ICASA) as to how to implement the Bill. A policy framework for regulation under the Bill would set clear medium to long-term objectives for the communications sector and comprehensively deal with, amongst other things, liberalization of the sector, universal access goals and how they are to be achieved, the role of communications in development and the promotion of diversity in the media. All stakeholders need to know what the current policy is.

We note further the Bill's significance in relation to the effects on the broadcasting, broadcasting signal distribution and telecommunications sector evidenced by the planned repeal of the Independent Broadcasting Authority Act of 1993, the Telecommunications Act of 1997 and amendments to the Broadcasting Act of 1999 and the Sentech Act of 1996. The Bill's significance is

most evident in the provision that in the event of conflicts, the provisions of the Convergence Act will prevail (cf. section 86). This is particularly problematic in light of the supremacy of the Constitution, and the powers of an independent authority to regulate broadcasting contained therein (section 192 of eth Constitution of Republic of South Africa).

MISA-SA would also like to draw attention to references in the Bill to the ICASA Act (Act No 13 of 2000), namely the introductory provisions and sections 17 F; and 17 H to 17 N of the ICASA Act in chapters 2, 3 and 9 of the Bill respectively. What initially appeared to MISA-SA as an erroneous inclusion of these sections, have subsequently been identified as amendments to the ICASA Act, which we did not at the time of our submission had sight of. MISA-SA's submissions did not take cognizance of the ICASA Amendment Act. We trust the public will be afforded the opportunity to amend submissions upon sight of the ICASA Amendment Act, should this prove necessary.

In keeping with our mandate, our submission illuminates (1) freedom of expression guarantees; (2) independent, transparent regulation in the public interest; (3) policy development and the role of the Minister and the need to (4) promote access, diversity and pluralism. In advancing our position, we are guided by principles contained in the following documents:

The Constitution of the RSA (1996) – Particularly, section 16, 7(2), 8(1) & 192;

Universal Declaration of Human Rights – Article 19, in particular;

African Commission on Human and Peoples' Rights' Declaration of Principles on Freedom of Expression in Africa (2002);

African Charter on Broadcasting (2001) and

World Summit on the Information Society: Declaration of Principles – Clause 55, in particular (Principles Adopted on the Media) (Dec 2003).

Our submission highlights areas of concern in relation to specific sections of the Bill and includes proposed amendments. (Bold square parenthesis indicates a proposed deletion while a solid bold underlined text indicates a proposed insertion).

1. PREAMBLE

1.1 The Right to Freedom of Expression

The right to freedom of expression is contained in the Constitution (Chapter 2, section 16 – the Bill of Rights). The right to freedom of expression and, in particular, the right to receive and impart information not only covers the content of the information, but also the means of transmission or reception of the content. Section 16 therefore protects the substance and the process of communication and is supported by section 32, which provides for the right of access to information.

MISA-SA believes the fundamental importance of the constitutional right to freedom of expression must be included in the preamble the Bill as follows:

- **Proposed Amendment:**

To provide for the regulation of … and to provide for matters incidental thereto. **The objects of the Bill and the application of the various provisions shall be predicated on the principles of freedom of expression and the maintenance of free and independent media and access to, and the dissemination of, information in accordance with Article 19 of the Universal Declaration of Human Rights and the acceptance of these principles by the World Summit on the Information Society as a core value of the information society.**[1]

1.2 Regulation in the Public Interest

Section 2 of the Bill begins "[t]he primary object of this Act is to provide for regulation of communication in the Republic *in the public interest* [our emphasis]…"

MISA-SA believes this provision should be included in the preamble so as to demonstrate the significance thereof. In so doing, the aims and objectives of this legislation will be clear. It will also be consistent with the section 192 of the constitution, which provides for ICASA "to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society".

- **Proposed Amendment:**

To provide for the regulation of broadcasting, broadcasting signal distribution and telecommunications sectors **in the public interest** and to provide …

[1] **[ ]** indicates delete, while **_____** indicates insert

2. CHAPTER ONE

2.1 Definitions

The following terms should be defined in the Bill:

- *"historically disadvantaged individuals"* (s2(g), 9(b) and 13(b))
- *"Ministerial policy directions"* (s3)
- *"Convergence"*

2.2 Object of the Act

MISA-SA believes the fundamental importance of the constitutional right to freedom of expression must be included in section 2 of the Bill as follows:

- **Proposed Amendment:**

2. The primary object of this Act is to provide for the regulation of communications in the Republic in the public interest **in accordance with the principles contained in Chapter 9 of the Constitution and those of free expression and the maintenance of free and independent media, access to, and the dissemination of, information as contained in Article 19 of the Universal Declaration of Human Rights** and for that purpose to -

…

encourage the widest receipt and imparting of information in line with the right to freedom of expression as contained in the Constitution.

In addition, regulation in the public interest must demonstrate due regard for equality and non-discrimination in terms of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth (cf. section 9 of the Bill of Rights, Constitution of RSA)

According to section 2 of the Bill, ((s)(i)) broadcasting services, when viewed collectively, "promote the provision and development of a diverse range of sound and television broadcasting services on a national, regional and local level, that cater to all language and cultural groups […]". Section 2 (g) refers to the empowerment of historically disadvantaged persons while section 2 (k) & (v) refer to persons or groups from a diverse range of communities in the Republic. However, not only is historically disadvantaged individuals (HDIs) not defined in the introductory provisions, but people with disabilities and children in particular are not addressed in the Bill. Moreover, reference to diversity, marginalized groups, including people with disabilities, children and women are conspicuously absent in the Broadcasting Service Objectives listed under section 58.

❖ **Proposed Amendments**

2. The primary object … and for that purpose to -

Ensure that, in relation to the provision of communication services, the needs of women, children and people with disabilities are duly taken into account.

(s) ensure that broadcasting services, viewed collectively –

(i) promote the provision and development of sound and broadcasting services on a national, regional and local level, that cater to all language and cultural groups and provide entertainment, education, **news** and information.

(v) ensure that commercial and community broadcasting licences, viewed collectively, are controlled by persons or groups of persons from a diverse range of communities in the Republic, **independent of political affiliation or allegiance**.

3. CHAPTER TWO

Policy and Regulations - Ministerial Policies and Policy Directions

According to the African Commission on Human and Peoples' Rights Declaration of Principles on Freedom of Expression in Africa (2002): "[a]ny public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature".

MISA-SA is deeply concerned at the Bill's provisions for the intrusion of the Minister of Communications on the independence of the regulator. ICASA has been set up as an independent authority in terms of Chapter 9 of the Constitution which states (Clause 192) that national legislation must establish an independent authority to regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society.

Independence is defined in Chapter 9 (Clause 181 (2), (3), (4) & (5)), which stipulates that such an institution is subject only to the Constitution and the law and must be impartial and must exercise its powers and perform its functions without fear, favour or prejudice. Other organs of state, through legislation and other measures, must assist and protect such an institution to ensure its independence, impartiality, dignity and effectiveness. No person or organ of state may interfere with the functioning of such an institution. Such an institution is accountable to the National Assembly and must report on its activities and the performance of its functions to the Assembly at least once a year. These are clear principles ensuring the independence of the regulator, but the Convergence Bill clearly breaches these rules:

The Bill gives the Minister powers to intrude on the conduct of ICASA, which seriously erodes the independence ICASA should enjoy in terms of the Constitution.

Furthermore, there are references to "policy directions" throughout chapter three. The term suggests orders whereas under the Constitution, ICASA is expected to observe the policies outlined by the Minister, interpret and carry them out. "Policy directions" suggests outlining a policy and how it should be carried out, in short an order for ICASA to perform in a certain way, which seriously reduces its independence - as implied in section 3 (1) & (4) as well as section 4(1), (5) & (6) specifically.

MISA-SA contends that the Ministers power to lay down policies is subject to the approval by the National Assembly. It is for ICASA as an independent regulator to interpret and implement those policies. We urge that for ICASA to carry out its duties and conduct its operations with the maximum independence, impartiality, dignity and effectiveness in the public interest, that in laying down policies, the

Minister should outline them in the broadest possible terms, rather than with narrow definitions.

Our proposed amendments aim to ensure the Minister does not act unilaterally without reference to the National Assembly - against the letter and spirit of the Constitution - and without consulting ICASA before he or she issues a policy statement. In addition, it moves away from permissive language that implies the Minister ``must'' consult the public but need only ``may'' consult ICASA - thus reducing the authority and status of ICASA and infringing on its dignity.

- **Proposed Amendments:**

Section 3

(1) The Minister may **[**make**]** **propose, for acceptance by parliament,** policies on matters of […] in relation to -

(1) (c) the Republic's obligations and undertakings under bilateral, multilateral or international treaties**,** **[**and**]** conventions **and declarations, especially those related to freedom of expression and access to dissemination of information,** including technical standards and frequency matters

(2) (a) the undertaking of an inquiry in terms of section 17F of the ICASA Act on any matter within the jurisdiction of the Authority and the submission of reports to **[**the Minister**]** **the National Assembly** in respect of such matter

(2) (c) the consideration of any matter within the jurisdiction of the Authority reasonably placed before it by the Minister **[**for urgent consideration**]**

2 (n) promote the **[**interests**]** **rights** of consumers with regard to the price, quality and variety of communications services

(3) The Authority, in exercising its powers and performing its duties in terms of this Act and the related legislation, must consider policies **[**made by the Minister**]** **proposed by the Minister and accepted by Parliament** in terms of subsection (1) and policy **[directions]** issued by the Minister in terms of subsection (2).

(4) When issuing a policy **[**direction**]** under subsection (2)**,** the Minister –

(a) **[**may**]** **shall** consult the Authority; and …

(5) The provisions of subsection (4) **[**do not**]** **also** apply in respect of any amendment by the Minister of a policy **[**direction**]** contemplated in subsection (2) …

Section 4

(1)… without derogating from the generality of this subsection, the Authority shall make regulations with regard to

(d) **[**generally**]** the control of the radio frequency spectrum, radio activities and the use of radio apparatus

(5) The Authority **[**may**]** **shall** conduct public hearings in respect of a draft regulation.

(6) The provisions of subsection (4) **[do not]** **apply** with regard to - …

4. CHAPTER THREE – LICENSING FRAMEWORK

4.1 Licensing

MISA-SA is concerned this chapter could be interpreted to apply to individuals who publish items on-line who would then be required to obtain licences. The definitions of whom this section does apply are extremely broad, vague and not clearly defined. Apart from ICASA not having the capacity to issue hundreds of licences, such an application could be seriously abused by being used as a censorship weapon – i.e. refusing licences to persons whose statements are not acceptable.

MISA-SA proposes the inclusion of an exclusion clause vis-à-vis content or the reworking of current definitions so as to remove any ambiguities from the proposed legislature. The following definitions submitted by Lisa Thornton (2005) in the document entitled "South Africa's legislative response to convergence" are proposed as possible alternatives:

"**Communication network service licensee**" means a person licensed to provide communication network services in terms of an individual license.

"**Communication network service**" means a service whereby a communication network service licensee makes available a communications network or any part thereof to a communications services licensee or content services provider.

"**Communication service licensee**" means a person authorised to provide communications services in terms of a class license.

"**Communication service**" means any service that consists wholly or mainly of the conveyance of communications over communications networks, including conveyance over communication networks used for broadcasting, and including, but not limited to, resellers.

"**Communications**" means the sending or receiving of content.

"**Reseller**" means a person who acquires any communications network service or communications service and makes such service available to end users, whether the service made available by the reseller is –

- identical to the service acquired;
- packaged, bundled or otherwise re-grouped with other communication network services or communications services; or
- combined, linked or used in connection with other communications networks or communications services, and
- whether the reseller adds value.

"**Content service**" means the provision of content or the exercise of editorial control over the content conveyed via a communications network to the public or sections of the public.

"**Content**" means any sound, text, still picture, moving picture, other audio visual representation or sensory representation, or any combination of the preceding, which is capable of being created, manipulated, stored, retrieved, and communicated, but excludes content contained in private communications.

In terms of licensing, Thornton (2005) proposes the following categorisation of licenses:

Individual licences
- Communication network services
- Radio frequency spectrum
- Broadcasting services

Class licences
- Communication services (including resellers)
- Application services

Following the above, *content* service providers would; therefore, *not be licensed*.

- **Proposed Amendments:**

  MISA-SA proposes the above definitions be used to amend or replace existing definitions in the Bill.

4.2 Ministerial influence

In section 5 (5) of the Bill, the Minister retains the power to determine when, and the extent to which the markets can open up by the issuing of a Ministerial invitation. MISA-SA believes the licensing process in its entirety must fall within the regulator's power, subject to the regulator being guided by the policy issued by the Minister and approved by the National Assembly.

The regulator's independence is violated by the provision in section 5(5), and it has the potential of creating serious conflict of interest issues for the Minister because of the major infrastructure provider still being State owned.

- **Proposed Amendment:**

Section 5

(5) The **[**Minister may**]** **Authority shall** determine**, subject to policy issued in terms of subsection (2),** the date when and the geographical area within which communications network services licences may be granted

Ministerial influence is again evident in section 9(2)(e) where the regulator is required to submit to the Minister the proposed license conditions for approval. The regulator should be given full power to determine the proposed license conditions for individual licenses, subject to policies issued by the Minister. Requiring the Minister to approve licence conditions is an unacceptable interference with the regulator's independence, and where the license concerns broadcasting services, this requirement is clearly unconstitutional as it violates the provisions of section 192 of the Constitution which requires independent regulation of broadcasting.

In addition to the above, there is no logical reason for the Regulator to have to submit each and every application with the proposed licence conditions to the Minister for approval. This will only result in unwarranted delays in processing applications for licenses.

- **Proposed Amendment:**

Section 9

(2) (e) **Remove clause**

4.3 Period of Licence

MISA-SA submits that a period of 25 years (cf. s5(9) (a)) for the validity of an individual license is too long.

In a paper submitted by the International Telecommunication Union on the "Introduction of Economic Criteria in Spectrum Management and the principles of fees", it is stated that normally licence periods lie in the range of 1 to 10 years. It is recognised that extended licence periods serve as enticement for investment, but this does not necessitate a licence period exceeding the current periods applicable to the major operators being 15 years in respect of the mobile operators and 25 years in respect of Telkom.

- **Proposed Amendment:**

Section 5

(9) (a) are issued for a period of **between 15 and** 25 years **[**…**], as determined by the Authority**

5. CHAPTER FOUR – COMMUNICATIONS NETWORKS AND COMMUNICATIONS FACILITIES

5.1 Construction of lines and other network infrastructure development

In its current form, section 22 (1) is a dictatorial clause providing for the laying of cables and other construction work, etc. across private and other land. The owner has no recourse to any tribunal to argue an alternative or to gain compensation; there is no realistic provision for compensation. The provisions in this section and section 27 (3) should be subject to the rights of the owners of the land.

The same is true for section 27 (2), which allows the communications network service licensee to cut or trim a tree or vegetation even if the owner of that land does not approve thereof. While the rights of owner(s) of private land are not considered, communication network service licensees appear to have rights in terms of requesting not only the removal of a facility, pipe, tunnel or tube as a result of alterations or other work being done, but also in terms of the cost, which is incumbent upon those responsible for the said alteration (section 25). Moreover, section 28(2) provides no compensation for the owner's losses and the factors listed as potential obstructions to the free use of his/her land, are limited to height and depth only.

MISA-SA is of the view, communications network service licensees must provide notice of intentions to cut down a tree or vegetation interfering with or endangering the said network or facility. As a result, clause 27(3) should be removed. Furthermore, communication network service licensees should be required to demonstrate the cutting or trimming of trees, construction or removal of pipes or tubes for example is for a public purpose or in the public interest. Regulation in the public interest should emphasise the protection of consumer rights in terms of the requirement that the owner(s) of property are made aware of conditions requiring 28 days written notification as contemplated in section 25(2) (b) and 25 (3). Similarly, consumers must be made aware of the provisions regarding the payment of fees payable to the local authority in respect of "installation of the electricity supply line" (cf 23 (2) (b)).

Fundamentally, the promotion of consumer rights should to be integrated throughout the Bill.

- **Proposed Amendments:**

Section 27

(1) Any tree or vegetation which in the opinion of a communication network service licensee … must, after reasonable notice to the owner or occupier of the land **and after exhausting all possible alternatives,** be cut down or trimmed by the Authority responsible for the care and management of such State-owned land, road or private land …"

Section 27

(3) **Remove clause**

6. CHAPTER FIVE – RADIO FREQUENCY SPECTRUM

6.1 Ministerial Influence

In introducing the chapter on Radio Frequency Spectrum, the Bill provides that the Regulator controls, plans, administers and manages the use and licensing of radio frequency spectrum (s30 (1)). Section 34(14)(a) then gives the Minister the right to assign radio frequency spectrum for the exclusive use of the security forces, and to retain control over such radio frequency.

This section is an unwarranted interference with the Regulator's power to control, plan, administer and manage the radio frequency spectrum. The regulator is tasked with determining the radio frequency plan, and in doing so should be required to take into account the radio frequency spectrum needs for the security forces, without the need for Ministerial authority over this spectrum.

There is no reason for the Minister to be involved with the allocation of radio frequency spectrum, and the security services should apply for radio frequency spectrum in the same manner that the South African National Defence Force has done under section 30(5)(b) of the Telecommunications Act.

Moreover, in the absence of policy, there exist no compelling reasons for the regulator to not be able to allocate radio frequencies. It is not clear why the Minister should enter this area, which can be dealt with appropriately in the public interest. However, where Ministerial approval is desired this should be referred to the National Assembly for its approval.

- **Proposed Amendments:**

Section 34

(14) (a) The **[**Minister**]** **Authority** may allocate radio frequency spectrum for the exclusive use of the security services

Section 34

(14) (b) **Remove clause and replace with:**

(b) The security services contemplated in terms of subsection (14) (a), shall be deemed to be the holder of a licence under section 5 authorising it to use the radio frequencies and groups of radio frequencies assigned to it for defence purposes, in terms of subsection 34 (14) (a) immediately before the date of commencement of this Act:

(c)The said security services shall apply to the Authority within six months after the date of commencement of this Act or such extended period as the Authority may allow, for such a licence, and that the Authority shall grant such a licence in terms of this section to the security services.

6.2 Radio frequency plan

The Telecommunications Act authorises ICASA to prepare a frequency band plan in respect of any part of the radio frequency spectrum. The frequency band plan published by ICASA in July 2004 only indicates the frequencies that are in current use and does not display the frequencies that are or may be available for allocation. This makes it difficult for people wishing to apply for a licence in certain frequencies to determine whether those frequencies will be available for allocation, and therefore creates uncertainty with regard to applications for licenses. In this regard, MISA –SA proposes that the Convergence Bill should include a provision which requires ICASA to publish a frequency band plan that not only shows the frequencies that are in use, but also those that are available for allocation. This would improve transparency in the process and engender greater confidence in the regulatory regime.

- **Proposed Amendment:**

Section 34 (10)

The entire radio frequency band, including any radio frequency plan approved in terms of this section and all the comments, representations and other documents received in response to the notice contemplated in subsection (5) or tendered at the hearing must be - …

6.3 Prioritising digital communications facilities

One of the principles of good regulation is that the regulation should be technology neutral. The Bill however clearly favours players who use digital technology, thus posing a serious threat to achieving pluralism and diversity:
Section 30(2)(c) - *"The authority must – give high priority to applications for radio frequency where the applicant proposes to utilise digital communications facilities for the provision of communications services licensed in terms of this Act and the related legislation […]"*

MISA-SA acknowledges government initiatives regarding digital migration. In light of this however, MISA-SA believes that analogue use of frequency spectrum and technology should not be at a disadvantage. Many community-based radio stations will not be able to afford digital technology and are therefore unlikely to obtain the necessary spectrum.

The Bill must include measures which protect the promotion of diversity: this is a constitutional obligation, and MISA-SA submits that the proposed regulatory regime should encourage fair competition by giving the Authority the flexibility to regulate the industry in a technological neutral way in order to promote and encourage a diversity of views. Section 2(e) of the Bill provides that one of the objects of the Convergence Act is to promote competition within the communications sector. It is submitted that in order to give effect to the principles of fair competition, ICASA ought to ensure that the playing field is levelled. The

regulations must be able to sustain growth of all players in the communications sector whatever technology base is used.

Section 9(1) of the Constitution provides for equality, equal protection and benefit of the law. Section 9(2) amplifies this by providing that "*equality includes the full and equal enjoyment of all rights and freedoms*", while section 9(3) prohibits the state from taking any action that has the effect of unfairly discriminating against any person on the stated grounds.

MISA-SA believes that the principle of equality before the law will be infringed in the proposed regulatory environment in so far as digital use of communication facilities is preferred over analogue, as directed by section 30(2)(c). The conversion from analogue to digital is contemplated in section 30 (2) (d). Once this is achieved, all applications will need to propose the use of digital communication, thus limiting potential discrimination against applicants utilising analogue facilities. In so doing, the provisions are consistent with the object of the Act: Section 2

(v) *"ensure that commercial and community broadcasting licenses, viewed collectively, are controlled by persons or groups of persons form a diverse range of communities in the Republic".*

- **Proposed Amendment:**

Section 30
(2)(c) **Remove clause**

7. CHAPTER TEN - CONSUMER ISSUES

- **Proposed Amendment:**

Consumer **[**Issues**]** **Rights**

8. CHAPTER ELEVEN – GENERAL

Ministerial influence in again evident in section 68 (Establishment of public emergency communication centres):

- **Proposed Amendment:**

Section 68
(3) 112 Emergency Centres **[**must**]** **shall** be accountable to the **[**Minister**]** **Authority**.

9. CHAPTER THIRTEEN – TRANSITIONAL PROVISIONS

Section 86 of the Bill is inconsistent with following provisions of the Constitution:

- The Constitution is the supreme law of the Republic (s2)
- Establishment of an independent body to regulate broadcasting (s192)

- **Proposed Amendment:**

Section 86
"In the event of any conflict between the provisions of this Act, the related legislation or any other law relating to the regulation of broadcasting or communications **and, subject to the Constitution**, the provisions of this Act **shall** prevail."

CONCLUSION

MISA-SA would like to take this opportunity to thank the committee, once again.

We will now take questions pertaining to our submission.