CHANNEL: A MEMBER OF THE
ELECTRONIC MEDIA NETWORK
LIMITED GROUP

137 Hendrik Verwoerd Drive
P 0 Box 4950

Randburg 2125 S A
Telephone (011) 889 1911

The Technical Committee on the Reg No: 85/02853/06
Independent Media Commission and Reg Add: 11 Grove Street
The Independent Broadcasting Authority P 0 Box 4350
Multi-Party Forum Randburg 2125 Â§ A
World Trade Centre

KEMPTON PARK

19 August 1993

Dear Sirs,

RE: 5TH DRAFT OF THE INDEPENDENT BROADCASTING AUTHORITY BILL
Please find enclosed M-Netâ\200\231s comments on the above.

Regards

COBUS SCHOLTZ
DIRECTOR CORPORATE AFFAIRS

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DIRECTORS

T Vosloo (Chairman)

DD B Band

J P Bekker

D Briceland

J M Buitendag

H F Conradie

D C Kovarsky

K B Sibiya

ALTERNATE DIRECTORS

J Sturgeon

D M Craib

D S van der Merwe

LR Clark

&b

MEMORANDUM CONCERNING DRAFT 5 OF THE IBA BILL

I DEFINITIONS

The definitions of common carrier and political organization must still be published. M-Net requests, in the 1light of its expertise, that it be drawn in to help draft a definition of "common carrier".

II PRIMARY OBJECTS OF ACT

Although the Committee has added the words "viewed collectively" to this section, M-Net nevertheless questions section 2(3) which provides that the Authority should ensure that broadcasting services, viewed collectively, develop and protect a national identity, culture and character and provide for regular news services, actuality programmes on matters of public interest, programmes on political issues of public interest and programmes on matters of international, national, regional and local significance. Although the Authority would probably not focus on private broadcasters here and expect public and community broadcasters to comply with section 2(3), we are nevertheless concerned that depending on circumstances it could turn to the private broadcasters and obligate them to provide for "programmes on political issues of public interest" (for example). When it comes to section 2(3)(b) which deals with these obligatory categories etc, there would be an opportunity for the IBA to obligate M-Net to broadcast the programmes stipulated. Section 16(2) of the British Act does, in so far as regional channel 3 services are concerned, prescribe that news programmes and current affairs should form part of the content of these services. When it comes to national channel 3 services, section 16(3) of the Act is less prescriptive. Whatever the position may be, it is not only financially burdening but also contrary to the nature of the service which M-Net provides to place the IBA in a position where it can obligate M-Net to broadcast news services, for instance.

Our submission is therefore that section 2(3) should be amended so that it only applies to public and community broadcasting services. The words "viewed collectively" are simply not of sufficient strength to ensure M-Netâ\200\231s autonomy in this area.

In so far as section 2(10) is concerned, we propose that the words should be amended to read as follows: "Impose limitations on undue cross-media control of private broadcasting services unless circumstances indicate the contrary." This would give the IBA during its proposed open hearings some guidance as to what kind of limitations should be imposed. The word "undue", on the face of it, seems rather vague, but is not foreign to 1legal nomenclature. For example, the Canadian Criminal Code prohibits the "undue" exploitation of sex." 1In R v Butler 1992 Canadian Criminal Cases 129 (Supreme Court) Sopinka J said the following in regard to the word "undue":

"Standards which escape precise technical definition, such as â\200\231undueâ\200\231, are an inevitable part of the law. The Criminal Code contains other such standards. ... It is within the role of the judiciary to attempt to interpret these terms. If such interpretation yields an intelligible standard, the threshold test for the application of section 1 is met. 1In my opinion, the interpretation of section 163(8) in prior judgments which I have reviewed, as supplemented by these reasons, provides an intelligible standard."

The Irish Broadcasting Act also provides for the guideline of "undue" cross-ownership and concentration. The addition of a word such as "undue" would, at least, indicate that not any kind of 1limitation, which could be unfounded economically and practically, could be imposed by the IBA. The wide discretion granted by section 2(10) should be limited if such a sub-section should be in the Act at all. Although cross-media limitations exist in countries such as the United States, Ireland and Britain, it is of special significance that a modern system such as the Nordrhein Westphalen (German) system - which has also been scrutinized meticulously by the German Constitutional Court - does not limit cross-ownership at all.

In so far as concentration is concerned, see our comment on section 43.

It is significant that section 2(14) makes use of the word "undue interference". It is submitted that this indicates that the word "undue" is not that problematic for the drafters of the bill. At the very least it should be added to sub-section 2(10).

SECTION 4 - CONSTITUTION OF THE COUNCIL

Section 4 (2) which provides what the requirements for members of the Authority are, seems acceptable.

SECTION 6 - TERMS OF OFFICE OF COUNCILLORS

While the term of five years for the chairman is now acceptable (a term of three years was proposed in the previous draft) it remains problematic to apply a rotation system to the other members. Although they would be eligible for a re-appointment after two or four years, the task which this Act bestows upon these members, requires that they should have a longer term. Two years hardly provides sufficient time for proper planning. Rotation would also 1lead to inconsistency and could even, possibly, affect the independence of the authority.

It is proposed that at 1least for the first term all the councillors should be appointed for five years. This would give them the necessary time to do proper planning, gain consistency and come to an understanding of this Act which requires significant expertise not only in the field of broadcasting but also in the field of quasi-judicial inquiries.

SECTION 8 – VACANCIES IN COUNCIL

As a mere observation, it must be pointed out that section 8(1) (c) does not provide for and is in any case not supported by any other section in this Act in so far as no procedure is provided for according to which the appointing body could remove a councillor. The matter could be solved by way of regulation. The principle that the appointing body is the only body which could remove a councillor is an acceptable one and in this fashion the appointment and removal of members of the Authority remains depoliticised and independent.

SECTION 21 – CONSTITUTION OF STANDING COMMITTEES

The requirement in section 21(3) that the chairperson of the Broadcasting Monitoring and Complaints Committee shall be a judge etc or a practising advocate or attorney of at least ten years standing, limits the matter unnecessarily. While legal training and experience should be a requirement, the requirement that only a practising advocate or attorney of at least ten years standing could be appointed, is too limiting. Academics of at least ten years experience should also be brought within the ambit of this sub-section. Section 35 of the Publications Act includes academics of such standing. There is no reason to distinguish the kind of work which the Publications Appeal Board does from the kind of work which the Broadcasting Monitoring and Complaints Committee would be doing – obviously the criteria differ but the kind of work and the procedures do not differ.

SECTION 31 – GRANTING OF BROADCASTING SIGNAL DISTRIBUTION LICENCE

Section 31(2) grandfathers existing signal distribution licence holders for a period of twelve months. M-Net interprets the sub-section to mean that as a common carrier it would be deemed to be a holder of a broadcasting signal distribution 1licence in category 1(a) (i). If that is not so,, the section should be amended accordingly. However, it would seem that M-Netâ\200\231s interpretation does fall within the wording of section 31(2). The matter is merely referred to on a cautionary basis.

SECTION 38 – GRANTING AND RENEWAL OF BROADCASTING LICENCES

It is noted that the draft allows "any person" to file written representations in relation to the application for a broadcasting licence with the Authority. Although this provision opens the door extremely wide, it does accord with the idea of open proceedings. A note of caution should, however, be sounded here: All kinds of persons could file representations with (possibly) far-fetched allegations which could lead to a lengthy inquiry. Limiting the right to make representations to financially interested parties would be in accordance with efficient judicial administration and, on balance, the public interest.

Section 38(3) (d) should require not only reasons but "full reasons". See section 36 of the Publications Act which requires the Publications Appeal Board to give "full reasons" in contrast

to Publications Committees which are only required to give "reasons". "Reasons" are simply not good enough, "full reasons" should be required.

It is noted that sub-sections 38(9) and (10) operate in favour of those who were previously licensed and now apply for renewal. It is submitted that in so far as signal distribution licences are concerned, similar provision should be made for those who have a licence and would after the first term apply for renewal.

SECTION 40 - PRIVATE BROADCASTING LICENCES

It is noted, according to note 12, that the section merely states the principles and that the matter will be finalised in the following draft.

Section 40(2) grandfathers all private broadcasting services which were licensed immediately prior to the commencement of this Act.

SECTION 42 - LIMITATIONS ON FOREIGN CONTROL OF PRIVATE BROADCASTING SERVICES

M-Net, once again, opposes the limitation of foreign investment to 20 %. A limitation in so far as voting rights or the right to appoint directors is concerned would be understandable. But to limit foreign investment in South African industry by way of 20

% is not in accord with sound economic principles. A limitation of 49 % would be more acceptable.

SECTION 43 - LIMITATIONS ON THE CONTROL OVER PRIVATE BROADCASTING S8ERVICES

While M-Net could, with substantial hesitation, support section 43(1) (2) (3) and (4) it strongly opposes section 43(6). When Parliament sets up an Authority and requires the kind of expertise which it provides for in this Act from it, it is simply not acceptable that it retains the ultimate decision in certain matters. Parliament would be interfering in a quasi-judicial matter which is, according to its own legislation, to be decided upon by the IBA. Once the Authority decides to depart from the preceding sub-sections, it should be allowed to do so without referring the matter to Parliament. The following proposal should in our view be included in the act as a broad guideline for the hearings to be held with regards to this subject.

"(1) No person shall have control over an undue number of private television broadcasting licences unless the Authority is of the opinion that the said number is not likely to hamper the diversity of voices in a Democracy substantially.

A person shall be presumed to have control over an undue number in terms of sub-section (1) applies mutatis mutandis to an undue number of FM sound broadcasting licences or an undue number of AM sound broadcasting licences, as the case may be."

S8ECTION 44 - LIMITATIONS ON CROSS-MEDIA CONTROL OF PRIVATE BROADCASTING SERVICES

M-Net opposes unreasonable restrictions on cross-media control. This position is in accord with the modern approach followed by German law and would, in any case, seem to be contrary to international practice which, in spite of limiting laws, has given way to the forces of excellence in service and quality. A multiplicity of voices should never be understood to mean a multitude of voices. Quality in service should be the ultimate test. Understandably some measures would have to be taken to ensure accuracy, balance and reasonable comment, but, it is submitted that the Code for Broadcasters in schedule 3 would do so sufficiently. Within the South African economy great care must be taken not to overregulate within this field. M-Net would, obviously, also put this case to the Authority when a public inquiry is conducted.

At this stage, however, it is submitted that some guidance must be given in section 44. Section 44 seems to accept that certain forms of limitations in regard to cross-media control will be imposed by the Authority. Section 44 should state clearly that the Authority may only impose these limitations if, according to its view after a full hearing, they are economically viable and absolutely necessary in the interests of fairness which, in the view of the Authority, cannot be attained by way of an application of the Code of Conduct.

At least, a guideline such as "undue cross-media control" should be added to this section. The "undue" criterion should be sufficiently elastic to accommodate the needs of society.

SECTION 46 - LICENCE CONDITIONS

We take note of the fact that section 47(1) explicitly states that the circumstances under which conditions may be amended are "limited circumstances". The word "limited" affects the interpretation of the paragraphs which follow. Nevertheless we are concerned about the seemingly wide ambit of section 46(1) (a). The words "inconsistent with the provisions of this Act" are wide and, it is submitted, could be invalidated by a Constitutional Court as being so vague that it destroys the essence of freedom of expression which would be guaranteed, according to all the drafts available, in the Bill of Rights. The authority to amend conditions during the term of a licence, especially a television broadcasting licence, is not a typical authority bestowed upon broadcasting authorities in other countries. One could argue that the particular circumstances of South Africa make this necessary, but on the other hand if the term for a television licence is to be shortened to eight years, it would be in the interests of stability if the conditions were to be left intact for this term, unless the private broadcasting licence holder requests the authority to amend the conditions.

We therefore propose that section 47(1) (a) be scrapped even if that means that M-Netâ\200\231s term is reduced to eight years.

SECTION 48 - LICENCE CONDITIONS ON LOCAL TELEVISION CONTENT

M-Net is concerned with the over-regulating nature of section 48, even though this section is still subject to a hearing by the proposed IBA. Certain broad guidelines would certainly have to be included to account for instance, for M-Netâ\200\231s own licence condition on local content. M-Net will accept a prescription as to a lump sum per year which would not be attached to a percentage of gross revenue. The matter of gross revenue and a percentage thereof is not in the interests of certainty at all. To make the quantity of local content dependable on gross revenue in a business which would at least need a year to eighteen months in planning, would create uncertainty for local independent producers and M-Net. No long term planning could be done. Therefore M-Net proposes that after the inquiry to which reference is made in section 48(5), the lump sum approach should be the only economically viable formula to solve this problem. We therefore propose the scrapping of (2) and (4) and regard these provisions as an overly executive-minded approach, which amounts to a heavy-handed intervention in programme planning by a private broadcaster, who has to produce quality to its subscribers. Whatever the position may be, M-Net opposes section 46(2) (b) which deals with specified minimum percentage of the total amount of broadcast transmission time as well as the other three paragraphs. Section 46(4) (b) also amounts to a broad power of intervention, where it authorises the IBA to even define viewing and listening times where applicable.

SECTION 50 - TRANSFER OF LICENCE

Section 50 should be amended to provide for the independent transfer of a common carrier signal distribution 1licence. Section 50(3) obviously has a bearing on signal distribution attached to a broadcasting licence and not to a common carrier which by its very nature relates to more than one broadcasting licence holder. A provision should, it is submitted, be added to section 50(3).

SECTION 54 - CODE OF CONDUCT, AND EXEMPTIONS

The sub-section should read as follows since not all the members of NAB (e.g.) are necessarily broadcasters.

"The provisions of subsection (1) shall not apply to any broadcasting licensee if that licensee is a member of a body that has proved to the satisfaction of the Authority that the said licensee subscribes and adheres to an acceptable code of conduct enforced by that body by means of its own disciplinary mechanisms."

S8ECTION 56, 57, 58, 59 - PARTY POLITICAL BROADCASTS

As we understand that the matter is still under discussion, we reserve comment to a later stage.

SECTION 62 - POWERS OF AUTHORIZED PERSONS

We submit that this section is too wide and that it could lead to misuse. It is submitted that a general authorization to inspect and to move into premises in accordance with such authorization is unacceptable within a Bill of Rights society. The Authority must obtain a warrant from a Court of law. There are sufficient mechanisms in law to ensure that the broadcaster who, on reasonable grounds, is presumed to be transgressing, could still be confronted without prior warning, which would give him the opportunity to evade the inspection.

SECTION 70 - REGULATIONS

Regulations

We support the philosophy behind granting the Authority and not, for example the Minister or the State President the authority to make regulations. This ensures the independence of the Authority

and once again accentuates that any form of political intervention is unacceptable.

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