5 - Broadcasting Legislation and Regulation

Published by

Akingbula, Akin.
Public Broadcasting in Africa Series: Nigeria.
Project MUSE. muse.jhu.edu/book/17531.

⇒ For additional information about this book
https://muse.jhu.edu/book/17531
5

Broadcasting Legislation and Regulation

1 The National Broadcasting Commission

Broadcasting regulation is the responsibility of the National Broadcasting Commission (NBC). The commission was created by a military law, the National Broadcasting Commission Decree 38 of 1992. When Nigeria returned to civil, constitutional government in 1999 the decree (along with its 1999 amendment) became an Act of Parliament. Hence it is now called the National Broadcasting Commission Act, although the term ‘decree’ remains in the texts of the principal and subsidiary laws.

The law terminated government’s monopoly of broadcasting and opened the door for private participation through ownership and operation in the sector. However, it gives the Commission limited regulatory independence and subordinates it to government executive bodies, namely the ministry of information and the presidency.

Section 2(i) of the Act provides for the Commission to carry out a wide array of functions: advising the federal government on policy implementation on broadcasting; processing and recommending broadcasting licence applications to the president through the information minister; undertaking research and development; establishing an industry code and setting standards; addressing public complaints; upholding equity and fairness; promoting indigenous cultures and community life; measuring audiences and penetration levels; harmonising government policies on trans-border transmission and reception; monitoring for harmful emission, interference and illegal broadcasting; determining and applying sanctions; approving transmitter power, station’s location, coverage areas and equipment types; and carrying out other activities necessary for the discharge of its functions.

The subsidiary (also military-made) legislation, NBC (Amendment) Decree (now Act) 55 of 1999, added the following functions: ensuring manpower development through broadcast curricula and programme accreditation; arbitration in industry
conflicts; ensuring adherence to laws, rules and regulation on foreign and local capital participation in broadcasting; serving as national legislative and regulatory consultants on broadcasting issues (that is, being the agency of reference for advice to government on broadcasting matters); and guaranteeing and ensuring the liberty and protection of the industry with due respect to the law.

Section 2(i)(b) and (c) of the principal Act (Decree 38 of 1992) restricts the NBC’s role in the licensing process to ‘receiving, processing and considering applications’ and ‘recommending applications through the Minister to the President, Commander-in-Chief of the Armed Forces for the grant of radio licences’. The final authority for the granting of licences rests with the president. This is in line with section 39(2) of the Constitution which empowers the president (and not an independent regulator) to license broadcasters:

Provided that no person, other than the government of the Federation or of a state or any other person or body authorized by the President on the fulfillment of conditions laid down by an act of the National Assembly, shall own, establish or operate a television or wireless broadcasting station for any purpose whatsoever.

Under the NBC Act, various superintending powers over the commission are given to the information minister:

- Section 6 empowers the minister to give ‘directives of a general character’ to the commission, and ‘it shall be the duty of the commission to comply with such directives’.
- Should the NBC decide to borrow funds, section 17 stipulates that the minister’s consent must be obtained.
- According to section 19, the NBC must prepare and submit its annual report, including audited accounts, to the minister.
- According to section 20, the making of regulations by the NBC for the purpose of giving effect to the provisions of the Act must receive the minister’s approval.

The Act (as amended) provides for a decision-making body of the NBC which comprises a chairman, ten other members and the director-general. The ten members are to represent the following interests: law, business, culture, education, social science, broadcasting, public affairs, engineering, state security services and the federal ministry of information and culture. The last two interests were included in the amendment law presumably to strengthen government’s presence in the NBC.
The members of the NBC, including the chairman and the director-general, are all appointed by the president on the recommendation of the information minister. This is at the discretion of the minister and there is no public participation in the process.

As is the case with appointments, the president has power to remove any member of the commission ‘if he is satisfied that it is not in the interest of the commission or in the interest of the public that the member should continue in office’. This has not happened yet but it could, given that it has a legal basis. The government alone defines ‘interest of the commission’ and ‘interest of the public’.

These provisions have the combined effect of denying the regulatory body full regulatory powers and institutional independence and creating arbitrariness in the regulatory process. Specific concerns include the following:

- With the latitude given to the president, he or she could easily appoint a commission dominated by government officials and/or members of the ruling party.
- The inclusion of the representatives of the federal ministry of information and the state security service will enhance government’s ability to intimidate and control the NBC’s decision-making process.
- The absence of provisions in the law regarding the process by which constituencies ought to be represented and to make inputs into appointments does not make for transparency.
- The absence of clearly defined security of tenure for the director-general and members of the commission might expose them to political pressure to act in accordance with the wishes of the minister or president.

For several years after the promulgation of NBC Act 38, state broadcasters did not want to submit to the regulatory powers of the NBC, arguing that they predated the NBC and that there was no express provision in the law putting them under the Commission’s purview. For this reason, the 1999 Amendment Act clarified that ‘[a]ny broadcast station transmitting in Nigeria before the commencement of the Decree shall be deemed to have been licensed under this Decree and, accordingly, shall be subject to the provisions of this Decree’.

While the regulatory activities of the NBC have now been extended to cover the state broadcasters, there are still signs of the old times. The Nigerian Television Authority (NTA) and the Federal Radio Corporation of Nigeria (FRCN) began expansion programmes in 2000, involving the establishment of more stations across the country. Government approved the programme. The NBC played no part in either the approval or implementation processes.
The NBC has a mixed strategy on the involvement of the public or stakeholders in its regulatory operations. The Commission organises public fora, seminars, conferences and retreats through which it brings together operators and members of the public to discuss issues affecting the industry. Matters covered at these events depend on participants’ priorities. For example, at a 2005 public forum the dominant issues were: imitation of foreign accents by English language presenters; upsurge of religious programmes with unverifiable claims; unprofessional transmission of offensive scenes such as fatal accidents; poor technical transmission of programmes by cable stations; excessive transmission of programmes which stereotype women as witches; and excessive showing of ritual killings. The forum also criticised the NBC for being hard on private stations while showing leniency towards government ones. One of the outcomes of these consultations is the Nigeria Broadcasting Code, the industry regulatory document which the NBC reviews and publishes every three years.

A structured broadcasting policy framework does not exist as a basis for the work of the NBC. The only existing policy document, the National Mass Communication Policy of 1990, expressly said ‘the time is not yet ripe for private ownership of the electronic media’. The 1992 NBC Act reversed this position, but a new policy has not been produced.

In response to stakeholders’ advocacy, government began a review of the 1990 policy in mid-2004 and started the process of developing a new National Community Radio Policy as well as a National Frequency Management Policy in 2006.

Working Groups on the 1990 policy and the community radio policy submitted reports to government which in turn asked the public to make their inputs. The Working Group on Frequency Management Policy invited and received memoranda from the public, but nothing more has since been heard about its work. The government has yet to issue final documents to the public from all three exercises.

2 Licensing of broadcasters and enforcement of licence conditions

The NBC receives, collates and processes applications for broadcasting licences and forwards them with their recommendation to the Information Minister, who in turn submits his recommendation to the President for his consideration.

Each applicant has to complete an application form to be purchased from the NBC at a cost of N 50,000 (US$ 424) and provide, among others, a feasibility study including the engineering design of the proposed station as well as an undertaking

---

that the station will be used to promote national interest, unity and cohesion. It must also undertake not to offend religious sensibilities or promote ethnicity, sectionalism, hatred and disaffection among the peoples of Nigeria. While the latter obligation seems to be reasonable, it is questionable whether stations can and should be obliged to promote ‘national interest, unity and cohesion’, with the definition of what that is supposed to mean known only to the regulatory agency.

The NBC processes and forwards the application to the minister of information and onwards to the president who gives final approval at his discretion. This process is shrouded in secrecy and has no fixed time frame. Each stage – NBC, minister and presidency – works at its own speed. Consequently, applicants often wait for years without getting results and the regulatory body is not obliged to offer any explanation.

Public hearings have been held in some exceptional cases of licence renewal, particularly concerning broadcasters around whom controversy had developed. An example is Multichoice. A prominent operator in the pay-TV sector, the company was criticised for, among other things, high tariffs, airing of materials classified as NTBB (not to be broadcast) by the regulator, and laxity in education programming. The issues were discussed at a May 2004 public hearing. The company’s licence was then renewed by the NBC.

Licensing of a broadcaster ‘shall be subject to availability of broadcast frequencies’ (Section 9[2] of the NBC Act). The NBC takes bulk broadcasting sector allocation of frequencies from the National Frequency Management Council, keeps custody of the data and solely determines availability. The public has no access to this information and the regulatory body could use it to reject applications. Section 9(3) also provides that: ‘Compliance with the requirements specified in sub-section (1) of this section shall not entitle an applicant to the grant of a licence but the grant of a licence by the commission shall not be unreasonably withheld.’ There is no provision for appeal if a licence is withheld and unsuccessful applicants have not been going to court to seek redress.

According to the third schedule of the NBC Act (as amended), a broadcasting licence is valid for five years in the first instance and a renewal is required if a licensee wants to continue operating her/his station. The commission may refuse to renew a licence if after considering past performance of the station it is not in the ‘national or public interest’ or in the interest of the broadcast industry to do so. Again, the national or public interest or that of the broadcast industry are not clearly defined. They are what the NBC might arbitrarily determine them to be.

Majority shares in a broadcasting company must be held by Nigerians. ‘Majority shares’ are not precisely quantified but former information minister Jerry Gana gave
insight into government’s reasoning on this issue when in May 2001 he asked the NBC to properly scrutinise proposals by foreign media interested in investing in the nation’s broadcast industry so as to save the country from being taken over by foreign investors. He said: ‘Our airwaves shall be considered sacrosanct and it shall only serve great and noble causes of Nigerian people and media practitioners. I consider it rather obnoxious to fight off one form of colonialism only to replace it with another form from the back door.’

In April 2004 the NBC forbade the relay of live news and news programmes of foreign stations. It argued that the basis of its ban on the relay of foreign news is contained in section 5 of the Broadcasting Code which states:

A terrestrial free-to-air station shall not relay foreign news content ‘live’ … shall not relay foreign news content in its entirety, even delayed … (but these provisions) do not preclude the universal practice of using excerpts for news; in which circumstances, the local station assumes editorial responsibility.

The third schedule of the NBC Act (as amended) prescribes that programme content for a radio or television station shall be at least 60 per cent local and not more than 40 per cent foreign. The Nigeria Broadcasting Code, on the other hand, sets local content at a minimum of 70 per cent. The reason for this inconsistency is not known. For cable or subscription stations, local content should not be less than 20 per cent. All these content ratios were arbitrarily fixed without any industry or public consultations.

Section 10 of the NBC Act disqualifies religious organisations and political parties from being granted a licence. The reasons are not stated in the law but the provision may have been informed by the occurrence of numerous religious–induced conflicts in many parts of the country, the bitterness with which party-political contests are conducted, and the possible fear that putting broadcasting stations in the hands of these two groups might just amount to licensing them to destroy the country.

The exclusion of religious groups in particular has not been without criticism. It has been argued that despite the incidence of religious fundamentalism and conflicts in the country’s history, the need for pluralism is strong enough to compel a rethink of this provision. A case-by-case approach is suggested in place of a blanket ban.

---


Broadcasting licensees have to comply with broad obligations set by the National Mass Communication Policy of 1990. Among others they are bound to:

- Disseminate information to enhance people’s welfare, provide professional and comprehensive coverage of Nigerian culture, opportunity for discussion of national issues, regulate channels of communication between the government and the people, effective coverage of the country, delivery of accurate information;
- Promote values of national consciousness, emphasise excellence in ethical and programme standards to meet the tastes of the viewing and listening public, including programming in indigenous languages to ensure direct relevance to local communities;
- Ensure that programmes for children and youth are used for inculcating in them indigenous values, spirit of hard work and patriotism.

The NBC complements these obligations with a framework of rules and procedures which it says are for ‘developing and enhancing professionalism in Nigerian broadcasting’. It demands, for example, that broadcasters observe basic professional tenets such as caution, empathy and due sensitivity in the coverage of emergencies, calamities, riots, grief, etc. The failure to define, in consultation with industry stakeholders, such terms as ‘caution’, ‘empathy’ and ‘sensitivity’ has provided the NBC latitude to take arbitrary decisions against broadcasters. In one instance in 2005, the NBC closed down Africa Independent Television (AIT) over its coverage of a plane crash in Lisa-Igbore, a village in south-west Nigeria. The station was re-opened after public protests against the closure.

The NBC also obliges broadcasters to adhere to a number of laws such as the Official Secrets Act and provisions on sedition despite the fact that the latter have been pronounced unconstitutional by the Court of Appeal in 1983.

Failure to comply with licence conditions may attract any of seven categories of sanctions:

(a) reprimand
(b) warning
(c) right of reply
(d) light, heavy, severe and special case fine. Light fines range from N 50 000 to N 99 000, heavy fines from N 100 000 to N 999 999, severe fines upwards of N 1 000 000, while a special case fine attracts the breach value plus percentage penalty. The NBC unilaterally decides the monetary value of a breach along with the percentage penalty.
Broadcasters have been sanctioned on many occasions. Examples are: a warning to Murhi International TV (Lagos) in October 2005 over alleged breaches which include ‘alarming reportage of dark clouds and fumes over Lagos which was used as ‘breaking news’ without verification or onsite report and unverifiable claims of traditional medicine’; a fine of ₦500,000 on each of eleven state and commercial stations who violated guidelines on political coverage during the 2007 national elections; or the suspension of licences in early 2006 of six commercial stations who defaulted on the payment of licence renewal fees.

A licence may be revoked by the NBC if, for example, a licensee fails to pay prescribed fees on the due date or if the station has been used in a ‘manner contrary to national interest’. This, experts say, could be used arbitrarily because government’s and the public’s definitions of ‘national interest’ often differ. The regulatory body has used the national interest argument as a reason to close down a commercial radio station in 2003 in Benin City, in the south-south region. The NBC claimed that the station had aired martial music and that this could have been interpreted by the audience/public as an indication that there had been a military coup (martial music was the kind usually played by soldiers during coup d’états in Nigeria). The station pointed out that it had been playing solemn classical Christian music as a mark of respect for a senior editor at the station who died in a car accident. The station was later re-opened.

The commission monitors broadcasting stations through a network of zonal and state offices as well as independent professionals located in various regions of the country. Reports are sent to the headquarters in Abuja, the country’s capital. Sometimes, these reports are published in the regulator’s journal, NBC News. In addition to monitoring aired programmes, zonal and state officers of the NBC make visits to stations to inspect facilities. Independent professionals used in monitoring are industry veterans, mainly those who have retired from active broadcasting. The regulatory body believes that their long professional experience is useful for the monitoring process.

---

3 Complaints and conflict resolution systems

Complaints and conflict management mechanisms have been provided for in legislative and regulatory codes.

The Broadcasting Code is the industry regulation document. It was first published in 1993 by the NBC and is reviewed every three years, the last time in 2006. An NBC code review committee takes inputs from industry stakeholders, produces a draft, sends it to stakeholders and discusses it with them during a retreat with the objective to adopt a revised document.

A station is expected to adhere to the commission’s six-stage complaints and resolution procedure:

(a) An aggrieved person, group or institution lodges a complaint with the commission within 14 days after the occurrence of an act or omission.
(b) Upon receipt of complaint, the commission informs and requires the station to provide a response within 72 hours, although an extension of time may be given.
(c) Within 14 days after receipt of response from the station, the commission investigates and arbitrates.
(d) Then it notifies the parties to the complaint on the progress of its investigation, finding and reasons.
(e) If the complaint is upheld, the station is directed to comply with the findings (meaning: decisions) of the NBC ‘within a specified time’.
(f) The findings are made public.

The process is handled entirely within the NBC. There is no separate or specially constituted complaints mechanism or a provision for appeals either within to the NBC or outside to the courts.

According to the code, a licensee is required to ‘regularly broadcast information on how the public may lodge complaints about its programming’. The meaning of ‘regularly’ is not specified and stations simply ignore this requirement.

The NBC has expressed concern that members of the public seldom use the existing complaints mechanism, but records of the few cases where this has happened are not available to the public. Political parties, their candidates and state governments have been forwarding complaints, which have been investigated and arbitrated by the NBC.

---

64 At the time of writing the next review was under way.
4 Proposed merger of regulatory authorities

Under its establishment law, the NBC has the mandate to regulate only broadcasting. Telecommunication is regulated by the Nigerian Communications Commission (NCC) while information technology falls under the National Information Technology Development Agency (NITDA). The NCC and NITDA each have their own legislative framework.

In August 2006, government set up a presidential task force on the restructuring of government institutions/organisations in the telecommunications and ICT sector. This included the broadcasting sector. The task force is, among others, mandated to study the implications of having different supervisory agencies for content and infrastructure in the communications sector and to identify stages of convergence and the role of the legislator in the emerging convergence environment.

The task force has been working behind closed doors and results are not known yet. But what looked like one of the outcomes of the process in early 2007 was the merger of the hitherto ministry of information and national orientation with that of communications to form a new ministry of information and communication. Another government announcement in early 2008 said that the NBC and the NCC would be merged while two new ministries (one for information, the other for ICT) would be created from the current ministry of information and communication. Details of the proposed arrangement are still to be released although there is speculation that the new information ministry will just handle government’s public information management machinery while the ICT ministry will be in charge of policy and implementation for the ICT sector and will supervise the regulatory body to be formed after the merger of the NBC and NCC.

While the public is waiting, this convergence issue has been a subject of discussion among stakeholders. Interest groups such as the Nigerian Computer Society, the Association of Licensed Telecommunication Operators of Nigeria (ALTON) and the Nigeria Internet Group (NIG) all support the merger of the regulatory bodies.

Broadcasters have also been positive toward the merger but warn that the interests of the broadcasting sector must be safeguarded. John Momoh, CEO of Channels TV, says that ‘the government must ensure that the NBC is not made subordinate to the NCC in any merger arrangement’.65 A former chairman of the NBC, Peter Enahoro, advocated a merger process characterised by a ‘partnership of the merging regulatory bodies within one stable and not one swallowing or dissolving into the other’.66

The Nigerian Community Radio Coalition added that the proposed regulatory

66 ‘Proposed NBC/NCC merger: Union of uneven brands?’, ThisDay, 12 March 2007 p. 64.
body should be independent and its administrative structure should be designed in a way that will allow for equitable attention to be given to all the sub-sectors, including broadcasting.67

5 Conclusions and recommendations

The regulatory structure and culture in place at the NBC is a vestige of military rule. The provisions of the law (NBC Act 38 and its amendment plus section 39(2) of the country’s Constitution) and the broadcasting code constrain it from appropriately serving the public interest, helping to consolidate democracy and participating as an up-to-date regulator in the contemporary global broadcasting landscape.

The members of the NBC are all appointed by the president on the recommendation of the information minister. This procedure contradicts Clause 7 of the Declaration of Principles on Freedom of Expression in Africa, which requires that the appointment process for members of a regulatory body should be open and transparent and involve the participation of civil society, and shall not be controlled by any political party.

The NBC lacks independence and adequate protection against political and economic interference and is accountable to the executive arm of government.

The licensing procedures are shrouded in secrecy and the granting of licences is left to the discretion of the president.

Complaints and sanctions procedures concentrate all powers in the NBC, leaving no room for appeals and judicial processes.

Recommendations

- An updated broadcasting policy should be put in place. This should include the completion of the review process of the 1990 National Mass Communication Policy and updating of the broadcasting policy contained in that document, also taking into account the 2004 National Mass Communication Policy review draft and the 2006 Community Radio Policy Document.

- Section 39(2) of the country’s Constitution, which gives the president power to authorise broadcasting licences, should be amended, such that this power will vest in the regulatory body.

• The NBC Act should be reviewed and deliver the following:
  – A converged regulatory body which should be independent and have an administrative structure designed in a way that will allow for equitable attention to all the subsectors, including broadcasting.
  – The regulatory body should be independent of the government, political parties and media interests.
  – Its members should be appointed by parliament in a transparent and public process which involves consultation with civil society and other specific constituencies from which the members are drawn. Government agencies, political parties and persons with financial interests in the industry should be disqualified from membership. Members of the NBC should be granted security of tenure.
  – The NBC should be vested with full regulatory powers, including the power to process applications and grant licences, without reference to government organs like the ministry of information and the presidency.
  – The commission should be accountable to the public through parliament.
  – It should be funded through direct budgetary allocation from parliament as well as from a share of radio/TV-set licence fees.
  – The licensing process should be transparent. Clear criteria and procedure for licensing, agreed upon in consultation with stakeholders, should be advertised by the NBC. Time limits should be set for the process, explanations should be supplied to unsuccessful applicants, and there should be provision for appeals through institutions such as the courts.
  – Political parties and owners of other media, particularly newspapers, should be ineligible for obtaining a broadcasting licence.
  – Religious organisations should be eligible for broadcasting licences subject to criteria such as: restriction of coverage to geographical and homogenous communities; a commitment to devote a substantial proportion of their airtime to secular public interest programming; and an undertaking that their content will not offend religious, ethnic and other sensibilities.
– Precise proportional stipulations of local and foreign content of broadcasters’ programming should be removed from legislation and left for the consideration of the NBC in consultation with stakeholders.

– The complaints and sanctions process should be reviewed to guarantee:
  » an appeals mechanism – through the establishment of either a broadcasting complaints body or a special, higher-level body within the regulator, as well as the courts;
  » an industry consultative mechanism to undertake a periodic review of the proportionality of stations’ offences to imposed sanctions.

• All the above reviews should be done with the participation of stakeholders and civil society at large.

• The on-going process of licensing private commercial broadcasting networks should be concluded and the federal government should, through the NBC, announce the results of the 2009 bid process.