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Mr Mothibi Ramusi

Chairperson, ICASA

Submitted via Email to: subscriptioninquiry@icasa.org.za

24 March 2025

Dear Mr Ramusi

WRITTEN SUBMISSIONS BY MEDIA MONITORING AFRICA ON THE SUPPLEMENTARY DISCUSSION DOCUMENT ON THE INQUIRY INTO SUBSCRIPTION TELEVISION BROADCASTING SERVICES

1. INTRODUCTION

- 1.1. Regulating Satellite Television Broadcasting Services has been a vexed issue for the Independent Communications Authority of South Africa (ICASA) and its predecessor the Independent Broadcasting Authority (IBA).
- 1.2. In April 1999 (more than a quarter of a century ago), the IBA issued a Discussion Paper on Satellite Broadcasting. The process was discontinued.
- 1.3. On 1 June 2005, ICASA issued a Subscription Broadcasting Services Position Paper to provide for the licensing of satellite subscription television broadcasting services, following the promulgation of the Broadcasting Amendment Act, Act 64 2002, which expressly provided for the licensing and regulation of satellite subscription broadcasting services.
- 1.4. On 11 July 2016, ICASA published its intention to conduct an inquiry into the state of competition in subscription broadcasting services in terms of section 48 of the ICASA Act¹.

¹ Government Gazette No. 40133.

- 1.5. In Notice 642 published in Government Gazette No. 41070 dated 25 August 2017, ICASA invited written submissions on its Discussion Document on the Inquiry into Subscription Television Broadcasting Services (“the Discussion Paper” and “the Inquiry”). The date for submissions of which was extended to 4 December 2017 as a result of various extensions provided for in the Government Gazette.
- 1.6. Media Monitoring Africa (MMA) made written submissions (jointly with the SOS Coalition) at the time in response to the Discussion Paper.
- 1.7. On 18 May 2018, MMA made oral submissions (jointly with the SOS Coalition) on the Discussion Paper.
- 1.8. In Notice 573 published in Government Gazette No. 42391 dated 12 April 2019, ICASA invited written submissions on its Draft Findings Document on the Inquiry into Subscription Television Broadcasting Services (“the Draft Findings Paper”). The date for submissions in respect of which was extended to 27 August 2019 as a result of the extension provided for in Notice 895 published in Government Gazette 42520 dated 7 June 2019.
- 1.9. Media Monitoring Africa (MMA) made written submissions (jointly with the SOS Coalition) at the time in response to the Draft Findings Paper.
- 1.10. On 6 January 2025 in Notice 5647 published in Government Gazette No. 51848, ICASA published a Supplementary Discussion Document (the Supplementary Discussion Document) as part of its Inquiry into Subscription Television Broadcasting Services. The date for submissions in respect of which was extended to 24 March 2025 as a result of the extension provided for in Notice 5975 published in Government Gazette 52257 dated 11 March 2025.
- 1.11. MMA is an NGO that has been monitoring the media since 1993. We aim to promote the development of a free, fair, ethical and critical media culture in South Africa and the rest of the continent. The three key areas that MMA seeks to address through a human rights-based approach are, media ethics, media quality and media freedom. In this regard:
 - 1.11.1. MMA’s vision is a just and fair society empowered by a free, responsible and quality media;
 - 1.11.2. in the last 32 years MMA has conducted hundreds of different media monitoring projects – all of which relate to key human rights issues, and at the same time to issues of media quality. MMA has challenged, and continues to challenge, the media on a range of issues

always with the overt objective of promoting human rights and democracy through the media. In this time MMA has also been one of the few civil society organisations that has consistently sought to deepen democracy and hold media accountable through engagement in policy and law-making processes; and

1.11.3. MMA has made submissions relating to Public Broadcasting, as well as numerous presentations to Parliaments Portfolio Committee on Communication as well as the National Council of Provinces and numerous submissions to ICASA, from CCC complaints to public submissions. In addition, MMA has made submissions to Broadcasters, the Press Council, the South African Human Rights Commission and a variety of international human rights bodies. MMA also actively seeks to encourage ordinary citizens to engage in the process of holding media accountable through the various means available – all of which can be found on MMA’s website (www.mediamonitoringafrica.org).

1.12. MMA thanks ICASA for the opportunity of making these written submissions and respectfully requests the opportunity to make oral submissions at the hearings which MMA believes are necessary as part of the Inquiry.

2. NATURE OF THIS SUBMISSION

2.1. MMA has extensive experience in acting in the public interest on matters of freedom of expression and has extensive experience in contributing to ICASA-process with regard to broadcasting.

2.2. Further, and as ICASA is aware, MMA is concerned about the broadcasting environment as a whole.

2.3. In responding to the issues raised in the Supplementary Discussion Paper, MMA does not necessarily deal with all issues raised or in the order in which they arise in the Supplementary Discussion Paper, nor does it confine itself to the issues canvassed in the Supplementary Discussion Paper.

2.4. In making these submissions, MMA is attempting to assist ICASA in realising the depth and breadth of the challenges facing the television sector in South Africa and the role of the effective monopoly player, MultiChoice, and indeed of ICASA itself, in creating the landscape that all television services: free to air public, commercial and community and subscription, find themselves in.

3. LEGAL AND COMMERCIAL FRAMEWORK WITHIN WHICH THE INQUIRY IS BEING CONDUCTED

- 3.1. MMA submits that it is worth repeating how we arrived at the current broadcasting regulatory landscape, particularly with regards to subscription television.
- 3.2. As ICASA is aware, from a broadcasting point of view, there are three pieces of governing legislation, namely the Broadcasting Act, 1999, the ICASA Act, 2000 and the Electronic Communications Act, 2005 (the ECA).
- 3.3. At the time of the transition to democracy:
- 3.3.1. there was one subscription broadcaster, M-Net which had been licensed during the Apartheid era;
 - 3.3.2. there was one community television broadcaster, Trinity Broadcast Network, operating out of the former Ciskei;
 - 3.3.3. there were television services operated by the SABC and also BOP TV operated out of the former Bophuthatswana, and which was incorporated into the SABC in due course;
 - 3.3.4. section 49(1)(a) of the IBA Act prohibited a person from controlling more than one commercial television broadcasting licence;
 - 3.3.5. the IBA Act established the IBA to regulate broadcasting in the public interest, but the IBA Act did not specifically mention various technology platforms through which broadcasting could be provided such as: satellite, analogue or digital terrestrial, cable etc; and
 - 3.3.6. the existing television operators were grandfathered, and soon new television entrants were licensed, e-TV for example as a national commercial broadcaster. In 1999 MultiChoice (Pty) Ltd (as it was then) (MultiChoice) started operating a Satellite Subscription Television Service, DStv, without a licence, alleging that the IBA had jurisdiction to regulate terrestrial broadcasting services only, despite the broad definition of broadcasting in the IBA and Broadcasting Acts and despite the constitutional mandate to regulate broadcasting in the public interest provided for in section 192 of the Constitution of the Republic of South Africa, 1996 (the Constitution).
- 3.4. In 2005 the IBA Act (as well as the Telecommunications Act, 1996) were repealed and replaced with the ECA.
- 3.5. In 2007 new Satellite Subscription Television Licensees began to be licensed, of these only two (besides DStv) ever became operational, namely On Digital Media (later Starsat) and Deukom, a niche German-language television service which had only some 4000 subscribers in South Africa

in 2017, including hotels and guest houses, and which, due to its German language-only offering and miniscule subscriber base, cannot rationally be described as a competitor to DStv.

3.6. Further the analogue subscription television service, M-Net (also operated by MultiChoice) has been collapsed into DStv as a channel thereon and no longer exists as a separate licensed entity.

3.7. Due to its failure to apply for the renewal of its Subscription Satellite Television Service licence, ICASA ordered Starsat to cease broadcasting with effect from 18 September 2024. In October 2024 ICASA and the South African Police Services enforced the shut-down order by raiding the Starsat offices and confiscating equipment. Starsat is no longer operational in South Africa. MMA therefore finds it astonishing that the Supplementary Discussion Paper includes Starsat in its discussion of the existing Satellite Subscription Television Broadcasting Services sector, even although Starsat ceased to operate in South Africa at least three months prior to the publication of the Supplementary Discussion Paper.

3.8. The reality of the current situation is that DStv is the monopoly provider of Satellite Subscription Broadcasting Services in South Africa in languages other than German (which is not, in any event, an official language) two decades after the launch of DStv not only highlights issues of market failure, but, respectfully, of regulatory failure in this sector too. In our respectful view, the regulatory failure has been exacerbated by the fact that this subscription broadcasting sector competition-focused Inquiry was launched some nine years ago, and we are, inexplicably, back at the Discussion Paper stage of the Inquiry and, therefore, probably years away from the finalisation of the Inquiry.

4. WHAT IS THE CORRECT MARKET DEFINITION WHEN CONSIDERING WHETHER OR NOT A MARKET IS COMPETITIVE OR REQUIRES INTERVENTION?

4.1. ICASA's market definitions have changed three times over the course of the Inquiry.

4.2. In its original Discussion Paper, ICASA proposed the following relevant markets at the retail level in South Africa²:

4.2.1. for the supply of premium subscription-TV channels; and

4.2.2. for the supply of basic-tier subscription-TV channels in South Africa.

² At paragraph 5.7.22 of the Discussion Paper

4.3. Two years later, in the Draft Findings Paper, ICASA changed its market definitions and determined there were in fact four relevant retail markets in South Africa³:

4.3.1.for the distribution of analogue Free to Air (FTA) television services;

4.3.2.for the distribution of basic-tier subscription services and satellite-based FTA television services;

4.3.3.for the distribution of premium subscription television services; and

4.3.4.for the distribution of video-on-demand services. In this regard, however, it found that Over-the-Top (OTT) services were “an out of market constraint on subscription television services” but that their impact was “still muted” given the relatively limited level of internet access, the lack of access to local and sports content”⁴.

4.4. In its Draft Findings Paper, ICASA changed its determinations of the markets and held the following regarding competitiveness in these various retail markets in South Africa:

4.4.1.the distribution of analogue Free to Air (FTA) television services: did not face “major competition challenges”⁵;

4.4.2.the distribution of basic-tier subscription television services and satellite FTA television services: MultiChoice commands about all 65% of the market share and therefore has significant market power (SMP)⁶;

4.4.3.the distribution of premium subscription television services: MultiChoice commands 99% market share and therefore has SMP⁷; and

4.4.4.the distribution of video-on-demand services⁸: ICASA said it would monitor developments but and will intervene “when required”. However it also noted that it had no statutory authority to impose pro-competitive licence conditions on non-licensees and that OTTs are “currently not subject to any form of regulation in South Africa, including BEE and local content requirements”.

³ At paragraph 7.3.6 of the Draft Findings Paper.

⁴ At paragraph 1.2.3 of the Draft Findings Paper.

⁵ At paragraph 7.3.7 of the Drafting Findings Paper.

⁶ At paragraph 7.3.8 of the Drafting Findings Paper.

⁷ At paragraph 7.3.9 of the Drafting Findings Paper.

⁸ At paragraph 7.3.10-13 of the Drafting Findings Paper.

4.5. In its Draft Findings Paper, ICASA found that “there was general support the proposed licence conditions to be imposed on licensees with SMP” and held that it was in favour of imposing the following pro-competitive licence conditions on licensees with SMP⁹:

4.5.1. reducing the duration of long-term contracts for the acquisition of premium content;

4.5.2. unbundling of sports rights to make the right available on different platforms or to more than one broadcaster;

4.5.3. wholesale must offer regulations in respect of premium sports content at regulated prices;

4.5.4. limiting the number of Hollywood studios that a broadcaster may enter into exclusive agreements with for purposes of distributing movies; and

4.5.5. requiring Set-Top-Box (STB) interoperability,

but that the imposition thereof would be subject to a separate regulatory process.

4.6. And there the Inquiry stalled. No finalised Findings Paper was published. No regulatory process for developing the pro-competitive licence conditions was commenced. ICASA did nothing for over half a decade.

4.7. And so, nearly six years later, ICASA has effectively begun the entire Inquiry again with the publication of the Supplementary Discussion Document which posits a third set of market definitions (which are completely new) and has come to conclusions about market competitiveness that constitute a 180 degree about-turn on its conclusions in the Drafting Findings Paper.

4.8. In the Supplementary Discussion Paper, 60 pages (out of a total of 109) is dedicated to determining/defining the relevant retail markets. This time and for the third time, ICASA changes its definitions of the relevant retail markets, finding that there were now only two relevant retail markets, namely:

4.8.1. basic-tier subscription television services and FTA television services¹⁰ being one market (whether provided terrestrially or on a Direct to Home (DTH) basis); and

⁹ At paragraph 8.3.3 and following of the Drafting Findings Paper.

¹⁰ At paragraph 2.4.3.6 of the Supplementary Discussion Paper.

4.8.2. premium more subscription television services and Subscription Video on Demand (SVOD) OTTs¹¹, being the other¹².

4.9. In a stunning about-turn, ICASA has further determined that no-one is exercising SMP in either the market for the retail distribution of basic-tier subscription television and FTA television services in South Africa or in the market for the retail distribution of premium subscription television and OTT services in South Africa!

4.10. Consequently ICASA has determined that despite DStv being the SOLE, that is, the monopoly, provider of subscription television broadcasting services in South African languages (other than the few thousand subscribers of the German language-only Deukom) it does not exercise SMP in the subscription television market because despite the entire *raison d'être* of the Inquiry being an enquiry into *Subscription* Television Broadcasting Services (our emphasis), ICASA has determined that FTA television services and OTT services are relevant markets to include subscription television services in too.

5. MMA'S CONCERNS REGARDING THE SCOPE SHIFT OF THE INQUIRY

5.1. When the Inquiry was launched, the relevant Government Gazette stipulated that “[d]ue to the Authority’s commitment and mandate to ensure that markets are effectively competitive it is commencing an enquiry into the Subscription Broadcasting Services Market”¹³.

5.2. MMA emphasises that ICASA used the term “Market”. Singular. ICASA recognised that there was one market for subscription broadcasting.

5.3. ICASA’s definitions of the relevant market(s) as provided for in the Supplementary Discussion Paper now reaches far beyond the promulgated scope of the Inquiry.

5.4. ICASA’s Inquiry now includes FTA broadcasting – a distinct and separate type of broadcasting service that has entirely different legislative and regulatory obligations and rights applicable to it.

5.5. Further, it has included OTTs in the definition of a “relevant retail market” that includes subscription broadcasting, when OTTs are not a broadcasting service at all.

¹¹ At pg 53 of the Supplementary Discussion Paper.

¹² See also paragraph 4.16 of the Supplementary Discussion Paper.

¹³ At paragraph 1.3 of Gazette No. 40133.

5.6. What ICASA has done by this scope creep is to do violence to the wording and clear intentions of the ECA and to its constitutional mandate¹⁴ to regulate *broadcasting* (our emphasis) “in the public interest”.

5.7. ICASA’s legislative-mandate objects include regulating broadcasting, electronic communications and postal matters in the public interest¹⁵. However, it is trite that ICASA’s ability to regulate OTTs is non-existent at this time because the ECA expressly delineates that an “electronic communications” excludes a “content service”¹⁶.

5.8. And so we are at this extraordinary situation where we have a monopoly provider of subscription television broadcasting services and ICASA cannot bring itself to look at the sole issue the Inquiry was established to investigate, namely, whether or not that market is effectively competitive and instead has chosen to ignore subscription broadcasting as a specific type of broadcasting service despite the clear delineation thereof in the Broadcasting Act, the ECA and in regulations, and instead lump it together with FTA broadcasting services and entirely unregulated OTTs.

6. MMA’S CONCERNS THE DEFINITIONS OF PREMIUM VS BASIC SUBSCRIPTION MARKETS

6.1. MMA notes that the two markets determined to be relevant to subscription broadcasters are the markets that include:

6.1.1.the retail distribution of basic-tier subscription television and DTA television; and

6.1.2.the retail distribution of premium subscription television and OTT services.

6.2. However, nowhere in its Supplementary Discussion Paper does ICASA even identify which of DStv’s packages fall within which market and the tables of price comparisons of packages on pg 35 of the Supplementary Discussion Paper is wholly inadequate in this regard.

6.3. A cursory look at the DStv website identifies the following six decoder packages¹⁷:

6.3.1.Premium; if

6.3.2.Compact Plus;

¹⁴ At section 192 of the Constitution.

¹⁵ Sections 2(a), (b) and (c) of the ICASA Act.

¹⁶ See definition of “Electronic Communications” – s.1 of the ECA.

¹⁷ https://www.dstv.com/en-za/buy/dstv-packages/?gad_source=1&gclid=Cj0KCQjwv_m-BhC4ARIsAlqNeBtNUPWBNskijju7-qULaJYIFM5PrsNQWmKONTtJZQP72izfzICrcL0aAtC7EALw_wcB&gclsrc=aw.ds

6.3.3.Compact;

6.3.4.Family;

6.3.5.Access; and

6.3.6.EasyView.

6.4. ICASA has failed to delineate which of these falls within which of the two markets and therefore its definitions of the markets are inadequate and, MMA submits, irrational.

7. MMA'S CONCERNS AT ICASA'S AMALGAMATION OF SUBSCRIPTION AND FTA MARKETS

7.1. MMA has long argued that MultiChoice's monopoly position in subscription broadcasting has had an outsize impact not only on the subscription broadcasting services sector but also on FTA television.

7.2. However, calling for ICASA to recognise the impacts of MultiChoice's dominance in the knock-on implications for FTA television does not mean that it is appropriate for ICASA to simply lump certain DStv subscriber packages and services with FTA television services for the purposes of determining markets.

7.3. The fact of the MultiChoice monopoly is one that ICASA appears desperate to diminish or disappear altogether and, in doing so, to do extraordinary damage to FTA television in ways that do not serve the interests of that sector or of the public.

7.4. The latest Broadcast Research Council of South Africa (BRC) research (Annexed) shows that the total number of television households that rely on one form of distribution technology, as at 17 March 2025, is 15 541 995 (Fifteen Million Five Hundred and Forty-One Thousand Nine Hundred and Ninety-Five). Of these, 7 157 003 households are Subscription only households – that is, 46% of television households using one form of television access (whether subscription, DTH FTA, Digital Terrestrial Television (DTT) or analogue) (which tracks the South African population) accesses television only via DStv.

7.5. This means that nearly half of all viewers of television do so via DStv only. Indeed the next largest category of television viewers, those that access analogue television only, is at 4 330 215 (Four Million Three Hundred and Thirty Thousand Two Hundred and Fifteen) households.

7.6. This means that the income generated by MultiChoice through its dominant position as a result of being the monopoly provider of subscription broadcasting is substantially greater than any other television operator in the country.

- 7.7. More worryingly, the scale of MultiChoice's market penetration as result of being the monopoly provider of subscription broadcasting means that the safeguards erected by the legislature in the ECA to protect FTA television broadcasters against having their advertising cannibalised by subscription broadcasters have been entirely undermined.
- 7.8. In this regard, section 60(4) of the ECA provides that "in no event may advertising or sponsorship, or a combination thereof, be the largest source of annual revenue [of subscription broadcasting services]". The clear intention of this limitation is to guard against the cannibalisation of FTA television revenues (which are based on advertising/sponsorship only) by subscription broadcasters which also access subscription revenue. However, the scale of the dominance of MultiChoice in the entire television sector is such that the limitations are rendered meaningless because having subscribers in nearly half of ALL television households enables MultiChoice to operate without any meaningful limits on its ability to chase advertising and sponsorship revenues too.
- 7.9. What is the logical conclusion of ICASA's determination that some of DStv's activities fall within the same market as FTA television providers? It is important to set these out.
- 7.9.1. First, it is to say that FTA television services (community, public and commercial) must compete with MultiChoice for advertising, with no effective limitations on the amount of advertising revenue that MultiChoice can earn;
- 7.9.2. Second, it is to say that notwithstanding that FTA television providers cannot generate income from subscribers, there is "effective competition" between them and MultiChoice as the monopoly provider of subscription broadcasting services;
- 7.9.3. Third, it is to say that there is to be no differentiation between the distribution mechanisms of the different types of FTA broadcasters, namely as between analogue terrestrial, DTT and DTH and MultiChoice as the monopoly provider of subscription broadcasting services, notwithstanding the fact that, according to the latest BRC research (annexed):
- 7.9.3.1. only 2 793 766 (Two Million Nine Hundred and Ninety-Three Thousand Seven Hundred and Sixty-Six) households have access to FTA DTH-only services; and
- 7.9.3.2. only 1 261 011 (One Million Two Hundred and Sixty-One Thousand and Eleven) households have access to FTA DTT-only services,
- factors that are taken into account by media buyers and advertisers.

7.9.4. Fourth, it is to say that there is to be no differentiation between different types of FTA broadcasters, namely: public, commercial and community in competing with MultiChoice as the monopoly provider of subscription broadcasting services. This is crucial because it undermines the essential architecture of ICASA's regulatory regime:

7.9.4.1. FTA broadcasting services are subject to much higher local content than MultiChoice is and between different types of FTA broadcasting there are differentials in local content quotas with community FTA broadcasters having to broadcast more local content than public FTA broadcaster which in turn has to broadcast more local content than the commercial FTA broadcaster;

7.9.4.2. FTA broadcasting services are subject to much higher independent production quotas than MultiChoice is;

7.9.4.3. FTA broadcasting services are subject to much more stringent Codes of Conduct for their services than MultiChoice is as is evidenced by the different Codes applied by the Broadcasting Complaints Commission of South Africa (BCCSA) and approved by ICASA in terms of section 54(3) of the ECA;

7.9.4.4. Community FTA broadcasting services have only municipality-sized coverage areas as opposed to DStv's national coverage;

7.9.4.5. Commercial FTA broadcasting services are subject to stringent ownership restrictions in terms of section 65 of the ECA which ICASA determined MultiChoice is exempt from in paragraph 5.8.2 of the Reasons for Decisions on the 2007 Satellite Licensing Process¹⁸; and

7.9.4.6. FTA broadcasters are subject to much more onerous and stringent programming-related licence conditions and regulations than MultiChoice is as is evidenced by the language, genre, news, and other content-related obligations imposed on them but not on MultiChoice.

7.9.5. MMA asks then: on what rational basis can ICASA continue enforce the clear provisions of the broadcasting-related statutes (which impose different obligations upon television broadcasters based on whether or not they are public, commercial, community FTA broadcasters or subscription broadcasters) if ICASA views them ALL as competing against each other in a single market?

¹⁸ http://thornton.co.za/resources/Subscription_Reasons.pdf

7.10. MMA queries how it can be said that there is effective competition in the market for the provision of basic tier and FTA broadcasting services if:

7.10.1. the revenue sources are entirely skewed as between MultiChoice and FTA services with one being able to access subscription revenue that the others are not able to access;

7.10.2. one broadcaster, MultiChoice, is not subject to the regulatory constraints and restrictions that FTA broadcasters are subject to with regards to ownership, local content, independent production, programming obligations etc; and

7.10.3. the licensed broadcast coverage areas are not similar if community FTA television broadcasters are included in the market.

7.11. If indeed all are in the same market, then the far more onerous obligations imposed upon FTA television broadcasters are unfair, irrational, and indeed anti-competitive as they FTA broadcasters are essentially being required to compete with both hands tied behind their backs.

8. MMA'S CONCERNS AT ICASA'S AMALGAMATION OF SUBSCRIPTION AND SVOD OTT MARKETS AND THE IRRATIONALITY OF NOT CONSIDERING VOD OTT SERVICES IN THE BASIC TIER/FTA MARKET GIVEN ICASA'S APPROACH TO THE FORMER

8.1. MMA has, as ICASA will be aware, long pushed for the finalisation of the various policy processes that have been underway since 2011 to regulate all audio and audiovisual media services and has long advocated for ICASA to regulate these. However the policy process has stalled with no resolution or direction and no updates to the legislative environment which is now hopelessly out of date and falling further behind technological developments.

8.2. The fact of this however, cannot mean that ICASA *mero motu*, can determine that subscription and SVOD OTTs (which are unregulated from an ICASA point of view) fall into the same market for the purposes of section 67 of the ECA.

8.3. MMA respectfully submits that the ambit of section 67(1) is that ICASA has the discretion to determine whether or not licensees (NOT SVOD OTT's for example which are unlicensed in South Africa) exercise SMP in the particular markets or market segments in which they operate. In MMA's view this means that for the purposes of section 67, ICASA's discretion to consider markets is limited to market activities which are under ICASA's jurisdiction.

8.4. This does not mean that ICASA entirely ignores the sectoral impacts of new and unlicensed activities that fall outside of the ECA but it cannot be that ICASA can determine that a class of licensees (in this case the sole, that is, monopoly provider of subscription television services) does not exercise market power by taking into account the impact of non-broadcasting services provided by unregulated non-licensees.

8.5. That said, it is not clear to MMA why, given ICASA's approach, non-subscription VOD OTT services are not taken into account in the delineation of the basic tier/subscription TV market too. If FTA/basic tier subscription services is how the lower end of the market is defined, then why not include free OTT content services such as YouTube etc? Why are OTT services held to be part of the high-end market but not the low-end market? This exclusion seems irrational given the arguments made by ICASA for the inclusion of SVOD OTT services in the premium market. Why are some VOD OTT services in and some out of the market definitions?

9. MMA'S CONCERNS REGARDING THE AUTHORITY'S TREATMENT OF DIGITAL MIGRATION

9.1. MMA is extremely concerned about the number of inaccurate statements regarding the migration of analogue terrestrial television to DTT that ICASA has made in the Supplementary Discussion Paper and which have, manifestly, influenced its decision to determine that Basic Tier subscription broadcasting competes in the same market as FTA television and that the market is characterized by "effective competition".

9.2. In paragraph 1.9 of the Supplementary Discussion Paper it is stated that "5 provinces have had their analogue signal switched off". This is not true:

9.2.1. The SABC's analogue signals have been switched off in five (5) provinces.

9.2.2. Etv's analogue signals remain switched on in those five provinces (our emphasis).

9.2.3. Further, in the recent High Court hearing on the Analogue Switch Off (ASO) date which took place on 18 and 19 March 2025, the SABC filed an affidavit by its CEO, Nomsa Chabeli in which she states:

9.2.3.1. at paragraph [20] "The premature analogue switch off in the above-mentioned five provinces resulted in a major loss of audiences and revenues to the SABC" and warns that "the analogue switch off gazetted to be effected on 31 March 2025 will further jeopardise the SABC's sustainability"; and

- 9.2.3.2. at paragraph [29] “*Had accurate information had been provided* (our emphasis), the SABC would not have switched off some of the areas and thus the SABC would not have consequently lost audiences and revenue”.
- 9.3. In paragraph 2.4.3.2 of the Supplementary Discussion Paper, ICASA baldly states that there will not be “a separate market for analogue FTA and digital FTA” after the ASO Date without further comment. MMA queries how ICASA can adopt such a *laissez faire* attitude to the ASO when the number of analogue FTA only households is *larger* (our emphasis) than the digital FTA only households even when combining both DTH FTA and DTT FTA television households¹⁹.
- 9.4. Further, in paragraph 2.4.3.1 of the Supplementary Discussion Paper, ICASA states even if the ASO Date is further extended, “this is likely to have limited impact on competition as the affected households have not yet transition to [DTT] have been identified as indigent and unlikely to switch to satellite or other means”. MMA finds this statement shocking given:
- 9.4.1. that, as the BRC’s latest Television research (annexed) has demonstrated, FTA to air analogue television is the ONLY way that 4 330 215 (Four Million Three Hundred and Thirty Thousand Two Hundred and Fifteen) *households* (our emphasis) access television content which translates to approximately 28% of the entire population or approximately 14 million people; and
- 9.4.2. its casual, even cavalier, acceptance that 28% of the population, undoubtedly correlating to the poorest part thereof, will soon be without any form of television service because they can’t afford digital television in any form; and
- 9.4.3. the frequent and insistent dire warnings of the implications for the FTA sector as a whole if the ASO date goes ahead that have been given by the SBC, etv and community broadcasters. If the analogue FTA market effectively collapses this would, patently, have a knock-on effect on DDT and DTH FTA both of which are largely provided by the SABC and etv which would, in all likelihood collapse too. And if that is the case, what would broadcasting look like?
- 9.5. MMA submits that the bottom line is that if the ASO Date goes ahead in a manner that results in the collapse of FTA television (as all operators have stated under oath in our courts) then MultiChoice would have a clear monopoly in the so-called Basic Tier and FTA television market. Frankly, it is laughable to suggest that there is or will be effective competition in this artificially

¹⁹ See BRC Television Households research for March 2025.

demarcated market where FTA television is under clear threat of collapse and DStv is currently the only service in 46% of households having only one form of television service.

- 9.6. In paragraph 2.4.3.3 ICASA states that “the SABC competes for advertising based on viewership of its content on analogue, DTT and satellite and across all services on which the content is available. As such, competition for advertisers is not strictly limited by the categorisation of services”. This statement is entirely at odds with the SABC’s actual financial situation which is that its advertising is heavily dependent on its analogue audiences. The SABC has warned, repeatedly, that losing that audience would be an existential threat to its continued existence.
- 9.7. MMA is one of the applicants in the ASO date High Court litigation and wishes to place on record as part of this Inquiry process its disappointment and indeed alarm that ICASA has not engaged actively in the High Court ASO process and is not, as is clear, from the above excerpts of its Supplementary Discussion Paper particularly perturbed about the imminent loss of analogue FTA television. In this regard:
 - 9.7.1. ICASA’s lack of engagement is, MMA submits, a dereliction of the following legal obligations imposed upon ICASA under the Constitution and the various pieces of legislation which prescribe the objectives of the regulator. These include:
 - 9.7.1.1. “to regulate broadcasting in the public interest” - section 192 of the Constitution;
 - 9.7.1.2. “to promote competition within the ICT sector” - section 2(f) of the ECA;
 - 9.7.1.3. “to promote the development of public, commercial and community broadcasting services which are responsive to the needs of the Republic” – section 2(r) of the ECA;
 - 9.7.1.4. “to protect the integrity and viability of public broadcasting services” – section 2(t) of the ECA;
 - 9.7.1.5. “to promote stability in the ICT sector” – section 2(t) of the ECA;
 - 9.7.1.6. “to ensure fair competition in the broadcasting sector - section 2(h) of the Broadcasting Act;
 - 9.7.1.7. “to provide for a three-tier system of public, commercial and community broadcasting services” – section 29(k) of the Broadcasting Act; and

- 9.7.1.8. “to establish a strong and committed public broadcasting service which will service the needs of all South African society” – section 2(l) of the Broadcasting Act.
- 9.7.2. That public broadcasting is facing an existential threat as a result of the latest ASO date determination is clear from the aforementioned affidavit of the SABC’s CEO and we refer to the following paragraphs of an Annexure to her Affidavit which is a copy of a letter to the Minister in the Department of Communications and Digital Technologies (DCDT) concerning the then-proposed ASO date of 31 December 2024:
- 9.7.2.1. at paragraph [6] of Annexure NC2 to the affidavit “the intended ASO Date is not aligned with operational readiness of the free to air television broadcasting industry to fully and efficiently migrate the audiences from analogue to digital broadcasting services”;
- 9.7.2.2. at paragraph [8] of Annexure NC2 to the affidavit “the imminent ASO date shall have disastrous consequences on the public audiences who do not afford decoders [or] pay television subscriptions because they rely on analogue technology to receive public broadcast services”;
- 9.7.2.3. at paragraph [11] of Annexure NC2 to the affidavit “from a legislative and regulatory perspective, the scheduled switch off will force the SABC to contravene the universal access service mandate as prescribed in the Broadcasting Act.”;
- 9.7.2.4. at paragraph [13] of Annexure NC2 to the affidavit “the implementation of the analogue switch off on the ASO date will culminate in millions of South Africans being left without access to the South African public television broadcasting services.”;
- 9.7.2.5. at paragraph [16] of Annexure NC2 to the affidavit “these indigent communities rely solely on analogue transmissions for access to information, education and entertainment.”; and
- 9.7.2.6. at paragraphs [17] and [18] of Annexure NC2 to the affidavit “our experience with the already analogue switched-off Provinces presents the SABC with a worrisome trend of declining audiences and revenue losses.... Undoubtedly, this will jeopardise the corporation’s financial sustainability and its legislated public mandate”.
- 9.8. The bottom line is the proposed ASO is an existential threat to FTA television in South Africa, both analogue and digital, given the DTH and DTT operator’s dependence on their base analogue audiences. Consequently ICASA cannot rationally determine that there could be

effective competition in the demarcated markets where it is feasible that MultiChoice might well become the sole monopoly provider of television in the country in the short to medium term.

10. MMA'S CONCERNS REGARDING ICASA'S TREATMENT OF PREMIUM SPORTS CONTENT

10.1. In paragraph 3.21.1.14 of the Supplementary Discussion Paper, ICASA notes that “due to excessive prices for sports content it remains difficult for FTA service providers to get access to the sports. It is unlikely that FTA services will be in a position to compete for premium sports in the long to short term.... In some instances FTA services are able to enter into sublicensing agreements with the winning bidder. This was the most recently with the sublicensing agreement between the SABC and DStv for the Rugby World Cup. However these do appear to be few and far between with the SABC accusing DStv of opening negotiations late, which does not give them an opportunity to raise sponsorships and advertising revenue to recoup the cost of the sublicense”.

10.2. Frankly MMA is horrified at these statements by ICASA.

10.3. As ICASA is aware, it is responsible for enforcing the provisions of the ECA which, at section 60(1), provide “subscription broadcasting services may not acquire exclusive rights to prevent or hinder the free to air broadcasting of national sporting events”.

10.4. To the extent that ICASA is admitting that subscription broadcasting services do so acquire such rights and that the SABC (or indeed any other FTA broadcaster) is prevented from sub-licensing same, this is an admission of its own regulatory failure to ensure fair competition in the critical realm of sport rights and the essential worthlessness of its Sports Broadcasting Regulations²⁰.

10.5. Further MMA submits that ICASA's own findings in the Supplementary Discussion Paper in this regard:

10.5.1. undermine its findings of there being effective competition in its artificially demarcated markets; and

10.5.2. clearly demonstrate the cannibalisation by MultiChoice of FTA television services through anti-competitive behaviour.

10.6. MMA submits that the recent findings by the Competition Tribunal²¹ in favour of etv against both the SABC and MultiChoice clearly point to the failure by the broadcasting sector regulator, ICASA, to

²⁰ Notice 275 published in Government Gazette No. 33108 dated 12 April 2010, as amended.

²¹ <https://www.comptrib.co.za/info-library/case-press-releases/tribunal-grants-emedial-interim-relief-against-MultiChoice-supersport-and-sabc-in-relation-to-the-broadcasting-of-sporting-events-on-television>

regulate sports broadcasting rights in a manner than promotes fair competition between the monopoly subscription operator, MultiChoice, and FTA broadcasters.

11. MMA'S CONCERNS REGARDING REDACTED INFORMATION IN THE SUPPLEMENTARY DISCUSSION PAPER

- 11.1. MMA is concerned at how much information that is critical to understanding how ICASA may have arrived at its decisions on market definitions and its lack of competition concerns in the sector has been redacted in the Supplementary Discussion Paper.
- 11.2. The word "Redacted" aka "kept from the public" appears in the Supplementary Discussion Paper thirteen times.
- 11.3. MMA submits that it is extremely concerning that critical information that requires robust debate and discussion to test the integrity of regulatory processes is manifestly being hidden from the public. This cannot be in the public interest and undermines public confidence in the Inquiry process.
- 11.4. MMA calls for ICASA to re-examine what redacted information genuinely constitutes "commercially sensitive" information as required by section 4B(5) of the ICASA Act and to make the rest available with additional opportunities for public comment thereon.
- 11.5. Besides the irony of the communications-sector regulator agreeing to redact information in a public Inquiry on a topic vital to the future of television broadcasting, ICASA undermines the constitutional principles and values governing public administration, particularly section 195(1)(g) of the Constitution which provides "Transparency must be fostered by providing the public with timely, accessible and accurate information."

12. CONCLUSION

- 12.1. MMA is not a luddite organisation cut off from the real world of converging content platforms.
- 12.2. MMA accepts the disruptive nature of OTT content services *vis a vis* broadcasting and is of the view that it is urgent that ICASA makes its own submissions directly to Parliament on the kinds of amendments to the ECA that are necessary to allow ICASA to regulate OTT content services (in particular) in the public interest, given the DCDT's abject failure to finalise a coherent policy position on audiovisual content services over the past 14 (Fourteen) years.

- 12.3. It is trite that vast areas of the country are without access to 3G, 4G and 5G and for whose residents mobile broadband remains a pipedream, and ICASA itself has recognised the continuing existence of the “digital divide” in paragraph 2.4.9.7 of the Supplementary Discussion Paper.
- 12.4. In table 5 of the Supplementary Discussion Paper, ICASA reflects its own research showing that the average download speed of mobile broadband is 47.95 Mbps and of fixed broadband is 43.66 Mbps. But it fails to refer to the national SA Connect²² targets which had set:
- 12.4.1. a target of 50% population coverage of 100 Mbps by 2020; and
- 12.4.2. a target of 80% population coverage of 100 Mbps by 2030,
- meaning that by 2025 (assuming an even progression to that target) the country ought to be at a population coverage of 65% at 100 Mbps. We are, manifestly, nowhere near the SA Connect targets and so streaming audiovisual content remains out of reach of the vast majority of the population.
- 12.5. ICASA states, at paragraph 2.4.8.2 of the Supplementary Discussion Document that South Africa has an internet penetration rate of “74.7% of the total population” leaving 25.3% with internet access. However, no mention is made of the massive unequal distribution of Internet users with more privileged sectors of the population having multiple Internet-enabled devices including smart TVs, computers, tablets and mobile phones. Thus the actual percentages of South Africans without any access to the Internet may in fact be far higher than the 25.3% figure stated above and these are concentrated in poor and rural areas and provinces.
- 12.6. MMA submits that the people who lack any access to the Internet are likely to also be reliant on analogue FTA television (some 28% of the population). This is a sobering reflection point. MMA queries how ICASA can simply stand by as a quarter of the population, and the poorest quarter at that, can just be entirely cut off from the world of information and ideas, because they lack access to Internet and television content?
- 12.7. MMA reiterates that it is critical that services in a particular market must be subject to similar regulatory constraints. In this regard, it is clear that:
- 12.7.1. non-broadcasting content services such as OTT content services are subsumed into a broadcasting market; and/or

²² Government Gazette No. 37119 of 2013.

- 12.7.2. FTA and subscription services are subsumed into the same television broadcasting market;
- 12.7.3. the monopoly provider of subscription broadcasting services, MultiChoice, will continue to cannibalise the more heavily regulated FTA broadcasting to the detriment of public, commercial and community television services; and
- 12.7.4. OTT services will continue to cannibalise the entire broadcasting market as they are entirely unregulated by ICASA.
- 12.8. The ASO will, according to the FTA broadcasters, effectively extinguish FTA broadcasting in South Africa as FTA DTH and DTT are reliant on their base analogue services for sustainable income.
- 12.9. Consequently, MultiChoice will be left as the monopoly, indeed the only, broadcaster with the ability to derive income from the South African market.
- 12.10. And, as ICASA must be aware from the various publicly available SENS announcements, MultiChoice has already entered into contracts to sell 100% of large swathes of its business, including: its valuable subscriber base, its ECS and ECNS licences (held through Orbicom²³) and its store of premium sports and other premium content, indeed everything BUT the actual DStv licence, to a foreign entity, Canal+, leaving only that part of the business it is not legally entitled (at this time) to transfer to Canal+ namely the shell that is the DStv broadcast licence.
- 12.11. MMA submits therefore, that the end result of ICASA's manifest failures to fulfil the objects of the broadcasting-related legislation and of s192 of the Constitution, is that the sole, monopoly broadcaster (which will be a subscription broadcaster) is likely, shortly, to be 100% foreign controlled if not yet 100% foreign owned, with devastating consequences for all sectors of the economy which are dependent on television broadcasting, particularly the independent local production industry.
- 12.12. MMA is of the view that ICASA has not just collapsed broadcasting. ICASA has collapsed its Constitutional obligation to the South African public to ensure that broadcasting services meet the needs of the South African public.
- 12.13. Ultimately, MMA submits, it is ICASA's betrayal, particularly, of the poorest quartile of the population with regard to their right to access broadcasting and electronic communications services that meet

²³ See Notice 6001 published in Government Gazette No. 52337 dated 18 March 2025.

their informational needs, that is the most bitter result of its inability to regulate broadcasting in the public interest.

13. THE PROCESS FROM HERE

13.1. MMA is disconcerted by the statement at paragraph 5.9 of the Supplementary Discussion Paper that ICASA “shall determine whether the convened public hearings” as if not having public hearings could be an appropriate way to proceed.

13.2. Frankly, the contents of the Supplementary Discussion Paper are so unexpected, controversial and at odds with all previous positions adopted by ICASA during the Inquiry that MMA submits that the following processes are essential going forward:

13.2.1. the holding of public hearings on the supplementary discussion paper; and

13.2.2. the provision of a notice and comment procedure in respect of any draft findings document that ICASA develops thereafter.

13.3. MMA also wishes to place on record its recommendation that ICASA engages with the Competition Commission under their Memorandum of Understanding to ascertain whether or not there is a common approach to the issue of dominance in the subscription television sector and if not, what the implications of such dissonance might be.

14. MMA trust that these submissions will be of assistance to ICASA.

15. Please do not hesitate to contact MMA should ICASA have any queries or require any further information.

Thank you

Yours Sincerely

A handwritten signature in black ink, appearing to read 'W Bird', written over a horizontal line.

William Bird

Executive Director, MMA