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SABC'S SUBMISSION ON THE ICASA DRAFT FINDINGS DOCUMENT IN THE INQUIRY INTO SUBSCRIPTION TELEVISION BROADCASTING SERVICES

Attached hereto, for your attention, please find the SABC's submission on the ICASA Draft Findings Document in the Inquiry into Subscription Television Broadcasting Services.

Yours Sincerely,

A handwritten signature in black ink, appearing to read 'Philly Moilwa', is written over a horizontal line.

**PHILLY MOILWA
GENERAL MANAGER:
POLICY AND REGULATORY AFFAIRS**



SABC SUBMISSION ON THE ICASA DRAFT FINDINGS DOCUMENT IN THE INQUIRY INTO SUBSCRIPTION TELEVISION BROADCASTING SERVICES, 2019

04 OCTOBER 2019

1. Introduction

The South African Broadcasting Corporation SOC Ltd (the "SABC") would like to extend its appreciation to the Independent Communications Authority of South Africa ("the Authority") for the opportunity to make a written submission on its Draft Findings Document on the Inquiry into Subscription Television Broadcasting Services ("Draft Findings") as published in April 2019. As an interested stakeholder in the Authority's process, the SABC made submissions in respect of the 2017 Discussion Document and also attended and presented at the public hearings held between 7 and 11 May 2018. Following public hearings additional submissions were lodged with the Authority during the course of 2018.

In this submission, the SABC will focus on areas that affect public broadcasting services. Furthermore, the SABC pledges to participate in this inquiry process until the highly required regulatory interventions are put in place.

2. Public Service Mandate of the SABC

2.1 SABC Services

Currently, the SABC's public service division consists of 15 (fifteen) radio stations and 2 (two) full spectrum multilingual television channels (SABC1 and SABC2) whilst the commercial service division comprises of 3 (three) radio stations and 1 (one) television channel SABC3. The SABC also offers a 24-hour news channel, SABC Encore and 19 (nineteen) radio stations on the subscription broadcasting platform. The SABC going forward sees itself as a multiplatform content provider which delivers public service content that includes content gathering, creation, commissioning, curation, packaging and distribution through a public service media. Hence, the SABC strives to offer its

sound and television services to all South Africans and will continue to do so in the digital environment.

2.2 Broadcasting Policy of 1999

The Broadcasting Act provides a blueprint for the SABC's public service mandate. Amongst other things, the SABC is required to;

- a) Provide its radio and television services to all citizens, in all official languages;
- b) Provide national sports, developmental and minority sports;
- c) Provide diverse programmes which are educative, informative and entertaining;
- d) Provide services targeted at people with disabilities, youth, children and women;
- e) Provide for needs of language, cultural and religious groups;
- f) Provide international, national, regional and local news and information; and
- g) Nurture South African talent and train people in production skills.

In essence the SABC services should bring to the greatest number of homes the fullest possible range of programmes, including minority interests. The implementation of this very broad mandate is dependent on an enabling regulatory environment and substantial funding support for public broadcasting service.

In actual fact, the 1995 Triple Inquiry Report of the Independent Broadcasting Authority ("Triple Inquiry Report") had recognized the need to support and safeguard public broadcasting service given its public value. The Triple Inquiry Report states that *"to protect the viability of public broadcasting services, the Authority will need to regulate the broadcasting environment as a whole, to ensure that each sector is viable and*

*compete fairly*¹. Additionally, section 2(t) of the Electronic Communications Act ("ECA") echoes the provision of the Triple Inquiry Report that the Authority must protect *the integrity and the viability of public broadcasting service*. Thus, the SABC submits that the findings and final regulations of this inquiry should be cognizant of the viability of the SABC.

3. Overview of the Draft Finding Document

The SABC commends the Authority for its intention to level the playing fields in the broadcasting sector as a measure to promote the development of public, commercial and community broadcasting services which are responsive to the needs of the public. South Africans deserve universal service and access to broadcasting services.

3.1 ICASA Findings

In the main the SABC supports the following draft findings:

- a) That not all content is substitutable because live sports cannot be substituted by drama. Therefore there is a need to make a distinction between premium and non-premium content with the view to detangle barriers to entry and inaccessibility of content for both the broadcasters and the public;
- b) That the imposition of licence conditions on a licensee with significant market power, i.e. i) unbundling of rights, ii) rights splitting, iii) wholesale must offer, iv) set-top-box interoperability; v) reducing contract duration; and vi) limiting access to the number of Hollywood studios as appropriate regulatory interventions

¹ The Independent Broadcasting Authority, Triple Inquiry Report, 1995, clause 8.4

should be adopted because a multi-faceted approach is required to deal with the entrenched anti-competitive practices in the sector;

- c) That MultiChoice possesses significant market power on the basis of high market share and the nature of its vertical integration which harms competition;
- d) That MultiChoice is the entity which holds significant market power in the; i) retail distribution of basic-tier subscription TV services and satellite free-to-air TV services; ii) retail distribution of premium subscription TV services; and iii) wholesale supply and acquisition of premium content for distribution in South Africa; and
- e) That the ICASA Must Carry Regulations will be reviewed.

3.2 Concurrent jurisdiction on competition matters

The SABC acknowledges that the Authority and the Competition Commission (“the Commission”) have concurrent jurisdiction on competition matters with respect to the broadcasting industry as per section 67(8) of the ECA. To this end, the SABC noted that on 05 February 2019, the Commission reported its decision to drop MultiChoice and SuperSport case, which looked at the various complaints of abuse of dominance because there was no reasonable prospect of success and concluded that a regulatory intervention by the Authority would be more effective. In the same breath, the Commission reported that there is potential market failure because of:

- a) “A high concentrated nature of subscription broadcasting market;
- b) High barriers to effectively enter the market and the inability of existing broadcasters to expand in the market ;
- c) limited credible alternative buyers of premium sports rights other than MultiChoice;

- d) Limited credible alternatives to which individual consumers can turn to should they require to switch away from MultiChoice; and
- e) Overly long and extensive contracts between the incumbent (MultiChoice) and some content suppliers.”²

Thus, the SABC submits these preliminary findings of the Commission should be taken as an accurate assessment of the television market. The SABC agrees with the Commission's findings that the current competition bottlenecks can only be resolved through a targeted regulatory intervention.

4. SABC Submission

4.1 Review of regulations and legislation amendment

4.1.1 Must Carry Regulations

The SABC has noted that the Draft Findings states that the Authority will consider reviewing the Must Carry Regulations.³ The SABC is of the view that to effectively deal with the existing anti-competitive challenges, the Must Carry Regulations need to be reviewed as a matter of urgency.

The SABC has noted that the Authority has begun the review of the Must Carry Regulations which runs parallel to this inquiry. To this end, the SABC has responded to the RIA questionnaire on 20 November 2018 and has noted the RIA Report as published on 19 March 2019. Furthermore, the SABC has noted with concern that the RIA Report does not necessarily acknowledge the worth and value of the SABC content.

² <http://www.compcom.co.za/wp-content/uploads/2019/01/COMMISSION-DECIDES-NOT-TO-PROSECUTE-MULTICHOICE-003.pdf> (visited on 11 February 2019)

³ Draft Findings, page 317, section 6.5.8

Notwithstanding, the Must Carry Regulations in their current formulation perpetuate unfair competition between broadcasters in that they permit subscription broadcasters who carry SABC services in line with these regulations to benefit from listed national sporting events and other premium content that are acquired through public funding. Thus, in the interest of fair competition subscription broadcasters should not unduly benefit from the Must Carry Regulations at the financial expense of the SABC as is currently the case. Therefore, the SABC submits that the Must Carry Regulations should be amended accordingly in order to cure and correct this anomaly.

4.1.2 Digital Migration Regulations and Policy

The ECA enjoins the Authority to protect the viability of public broadcasting services. Meaning, the regulatory environment should enable the SABC to be financial sustainable and still deliver on its public service mandate. On the Digital Migration Policy front, the SABC is concerned that it has no flexibility as it is confined to a DTH 84% and DTT16% split despite the huge benefits that could be derived from DTH technology.

Furthermore, the SABC is concerned about the principle of “use it or lose it” with respect to spectrum usage. The SABC calls for the removal of this principle because the SABC requires extensive funding for its public service mandate and should not lose spectrum due to the delayed usage of the spectrum due to financial constraints.

Lastly, the channel authorization process should be standard for all broadcasters. As it stands, the regulations speak of the possibility of holding public hearings prior to authorization. The SABC’s agility could be disrupted should the Authority initiate public hearings prior the authorization of the SABC’s incentive channels. As such, the SABC calls for a standard procedure for all TV broadcasters in the interest of promoting fair competition amongst broadcasters.

4.1.2 ICASA Sports Broadcasting Regulations

The SABC submitted a written representation to the Authority on 25 June 2018 with respect to the review of the ICASA Sports Broadcasting Services Regulations (“Sports Regulations”). Subsequently, the SABC participated in the public hearings of the review of the said regulations on 31 May 2019. In the main, the SABC addressed the following key issues that are important for creating a conducive and enabling regulatory framework for sports rights regulation:

- a) The unbundling of sports rights with the view to encourage sports rights owners to package rights for FTAs, SBS and Digital services in order to open the bidding of rights to all broadcasters;
- b) Exclusivity for the category of rights and platform as per the licensed service. Meaning, the SABC will be eligible for FTA rights based on its available platforms and same will apply to SBS services;
- c) Consideration of capacity by the SABC for sports content in a digital multichannel/multiplatform environment. Thus, these regulations should be made from a digital era perspective wherein the SABC will have capacity to flight all acquired rights;
- d) Accessibility of sports rights by FTA broadcasters for the benefit of all South Africans irrespective of their economic status. National teams are viewed as national assets and as such they should be accessible to all at a reasonable rate not only to the elite;
- e) A fair and transparent sub-licensing framework which avails sports rights to FTAs at a reasonable rate; and
- f) Exclusive funding for sports content (Listed sporting events, minority sports and developmental sports). The SABC requires ring-fenced funding to carry out the sports mandate to the benefit of the masses.

4.1.3 Advertising Revenue for Subscription Broadcasters

In the previous submission to the Authority, the SABC had submitted that section 60(4) of the ECA should be amended in order to capture the intention of the legislators which sought to cap advertising and sponsorship revenue of subscription broadcasters.

It is noted with concern that the Authority did not pronounce its preliminary position on this matter. Be that as it may, the SABC still submits that the Authority should prescribe regulations to cap advertising revenue of any single subscription broadcasting service to a maximum of 25% of all television advertising revenue. However, currently the Authority may not have the power to prescribe such regulations and it is therefore recommended that section 60(4) of the ECA be amended as follows:

Subscription broadcasting services may draw their revenues from subscriptions, advertising and sponsorships, however, with respect to any one subscription broadcasting service, in no event may advertising or sponsorship, or a combination thereof, be the largest source of annual revenue more than 25% of the total television advertising revenue in the Republic or such lesser percentage as may be prescribed by the Authority. The Authority shall also prescribe detailed requirements for compliance with such regulations and the monitoring thereof.

Section 4(2)(a) of the ICASA Act of 2000 empowers the Authority to make recommendations to the Minister with respect to any legislative amendment of the underlying statutes in the interest of the development of the communication sector. Thus, the SABC respectfully request the Authority to recommend to the policy maker the above-mentioned legislation amendment.

4.1.4 TV licence collection

The SABC has noted the MMA/SOS proposal that says Multichoice should be responsible for the collection of TV licence fees from its subscribers. Whilst the spirit of this suggestion is appreciated, it is also important to note that the collection model needs to change from a legislative front first. The current regulations and legislation will need to be strengthened to yield collection improvement.

To this end, the SABC has, *inter alia*, submitted to the Department of Communications during the review of public broadcasting policy that in order to enforce compliance on the payment of licence fees additional entities must be required to report on the sale or lease or use of television sets. In particular, the entities should include importers and manufacturers of TV sets, insurance companies, businesses that repair television sets and Pay TV operators. Reporting obligations to the SABC currently only apply to Retailers, Lessors and Businesses. Thus, the inclusion of the above mentioned entities will strengthen the collection function for the SABC.

Furthermore, technology has evolved so much that television is no longer consumed through TV sets only. There are many devices through which television is consumed. As such legislation has to change and be aligned to the status quo. Thus, the definition of "television set" needs to be agreed that broadens the net to include all receiving devices and apparatus that are capable of receiving television broadcasts over the broadcasting radio frequency spectrum but not so broad as to include all mobile phones and computing devices. A broadened definition will require all those entities with reporting obligations to enforce the regulations in relation to a defined type of devices or apparatus.

4.2. Impact of OTT on broadcasting services

The SABC has noted the Authority's finding that OTTs are neither a part of the subscription broadcasting market nor do they constitute a form of effective potential competition for broadcasting services. Nevertheless, OTTs are rapidly changing how content is consumed and do provide an alternative platform for premium content consumption. The effect thereof also spills into competition of all various content providers regardless of the platform of broadcast and the bottom line is that all content providers and broadcasters compete for eyeballs and advertising revenue.

The SABC has also noted the Competition Commission-Data Services Market Inquiry of 24 April 2019⁴, which indicates that the existing international comparisons on mobile prepaid data prices collectively indicates that South Africa performs poorly relative to other countries. It further states that, *inter alia*, lack of spectrum and cost facilities access drives up the cost of data.⁵ It also noted that OTTs find it difficult to compete with content providers due to limited level of internet access, the high cost of data, average of internet speeds and lack of local content and live sports. Be that as it may, the SABC submits that the impact of OTTs on the broadcasting sector should not be undermined. OTTs may not be a direct competitor to broadcasters but as soon as the cost of data is lowered OTTs will make serious inroads in the sector and may overtake regulation development for this sector. Thus, this area needs to be closely monitored by the Authority in order to ensure that broadcasters remain sustainable in the ICT sector.

4.3 Premium Content vs. Non-premium content

The SABC submits that there is a need to define and identify premium content in order to address the prevailing competition bottlenecks. The SABC agrees with the Authority

⁴ <http://www.compcom.co.za/wp-content/uploads/2019/04/Data-Services-Inquiry-Summary.pdf> at page 3

⁵ *Ibid*, at page 7

that premium content is fluid and dependent on a number of factors, such as, culture, language, geography, live or non-live, first window or other windows.

The essence of premium content serves as a primary means of differentiation among broadcasters in the subscription broadcasting services. It is acknowledged that premium content has the ability to (a) attract high audiences; and (b) drive subscriptions and advertising investments⁶. Thus, premium content is at the center of the dominance of MultiChoice. Moreover, other contributing factors such as the privileges afforded to Multichoice by the Must Carry Regulations cannot be neglected when trying to address competition barriers. Neglecting this area equates to neglecting the indigent citizens of the country as well as giving an unjustifiable and unfair competitive advantage to Multichoice at the expense and prejudice of the SABC.

Given the inequalities of this country, it cannot be that the regulations do not bridge the gap between the haves and the have nots. Premium content should be accessible to all citizen irrespective of their economic status.

The Draft Findings provide that the Authority considers the following as premium content.

- i. Hollywood premium First Subscription Pay TV Window (FSPTW) movies and series;
- ii. Major live soccer matches including Bafana Bafana, FIFA World Cup, PSL , EPL, UEFA, La Liga, Bundesliga, Ligue 1 and Serie A live soccer matches;
- iii. Live rugby matches, including Rugby Championships, Super Rugby, World Rugby Sevens Series and the Currie Cup Premier Division and the Super 14;
- iv. Live cricket matches, including the IPL, T20 and test matches involving Proteas.

⁶ <http://www.siecon.org/online/wp-content/uploads/2014/10/Preta-Zamengo-151.pdf>

The SABC supports and agrees with the identified premium content and further calls for the Authority to coin the definition of premium content in line with these findings.

4.4 Imposition of the licence conditions to a licensee of significant market power

The SABC shares the sentiments of the Competition Commission which provides that a multi-pronged regulatory intervention is required to deal with the existing competition bottlenecks. As it stands, there are many layers of competition barriers in the broadcasting sector and the current regulatory interventions have become obsolete. This is confirmed by the fact that in 2007 and 2012 the Authority licensed 7 other SBS licensees; namely Super5 Media, Walking on Water Televisions, Close-T Broadcasting Network Holdings, Kagiso TV, Mindset Media Enterprises, Siyaya Free To Air TV and Mobile TV which could not take off due to lack of premium content in the sector. Thus the SABC supports the proposed licence conditions which could be imposed on a licensee with significant market power.

4.4.1 Limiting access to the number of Hollywood movie studios

The SABC has noted that the Authority considers limiting the number of Hollywood studios that a licensee with significant market power may enter into exclusive agreements with. Whilst this is commendable, this alone will not entirely deal with the inaccessibility of movies. Instead the regulations should narrow the window period and allow other broadcasters to access these movies within a 12 months window period during which such premium movies will still be considered viable for meaningful commercial exploitation.

4.4.2 Shorten exclusive contracts

On the findings in the wholesale market for the supply and acquisition of premium content for distribution in SA, it is submitted that imposing licensing conditions that translate into reducing the duration of exclusive contracts of 5 years to 3 years might not be an effective solution if the window period concept of content is taken into consideration. For example Hollywood Movies that are accessible exclusively through Pay TV broadcasters or OTTs 1 month after theatrical play cannot be subjected to a 3 year exclusive contract term before they are made accessible to competitors. The term should be shortened to 6 months or even less before such premium content is made available to competitors by the license holder. There should therefore be a more practical approach and flexibility to ensure that premium content is made available to competitors within a short window within which it is still viable for commercial exploitation.

With regard to ever-green contracts the SABC agrees that automatic renewals should be prohibited on exclusive contracts. They serve no purpose but to uphold the market power of a significant player. This prohibition should necessarily extend to include the exclusion of the right of first refusal and first options of renewal which all serve to give the premium content rights holder an unfair advantage over other broadcasters who may be interested in the same property.

Furthermore, it may be necessary for the Authority to seriously consider retroactive application of the prohibition to any regulations aimed at shortening exclusive contracts. This will be necessary to counter situations where a licensee with significant market starts entering into long exclusive contracts in

order to cling to premium content as a means of circumventing the envisaged regulations before they come into effect.

4.4.3 Unbundling of rights:

With respect to sports rights regulations, as intimated earlier above, the SABC supports the Authority's finding and intention of unbundling of sports rights. In this regard and in amplification of what is stated earlier in this submission, the SABC submits the following:

- a) FTAs should be in the position to buy the full rights from a subscription broadcaster and be permitted to opt for certain packages, such as, local team games and the quarter, semi-finals and finals and subscription broadcasters who are the rights holders of such properties should be obligated to sell such packages at a reasonable rates;
- b) The SABC submits that the revised ICASA Sports Broadcasting Regulations should require broadcasters to acquire rights (local & international) for only licensed platforms (i.e. Pay-tv, FTA, Radio and TV) in order to open the bidding of rights to all broadcasters;
- c) The revised ICASA Sports Broadcasting Regulations should oblige National Federations to package their Rights into FTA broadcasting rights and Pay/Subscription broadcasting rights (Categories of TV; Radio & Digital).
- d) The SABC is of the view that rights to outbound matches for the FTA platform of the National Teams should be acquired through the Federations and not third parties. Currently, rights to outbound matches are facilitated by third parties or agencies and it could be easier for FTA services to acquire these rights directly from Federations.

4.4.4 Opening network infrastructure distribution

The SABC has noted that the Authority has not made a pronouncement on this regulatory measure. However, the SABC submits that the opening of network of infrastructure should be considered in the future as a measure to allow other service providers to piggyback on the existing infrastructure for optimization of available resources.

4.4.5 Introduction of set-top-box interoperability

In deed switching costs for consumers are real. As it stands, audiences will have to weigh their economic options before switching to any new broadcaster. Therefore, the playing fields could be levelled if set-top-boxes are interoperable as switching costs will be muted. Consequently, the SABC welcomes this regulatory measure as the correct approach to facilitate the easiness with which customers can switch between different service providers.

5. Conclusion

The SABC would like to thank the Authority for the opportunity to comment on the Draft Finding Document and looks forward to a speedy regulatory intervention that will level the playing field for broadcasters in the interest of all South Africans especially the marginalised majority.