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Att: Mamedupe Kgatshe

Independent Communications Authority of South Africa (ICASA)

Email: mkgatshe@icasa.org.za

21 July 2021

Dear Ms Kgatshe

SOS COALITION, MMA: JOINT ADDITIONAL SUBMISSIONS ON THE DRAFT MUST CARRY AMENDMENT REGULATIONS

1. The SOS Coalition (SOS) and Media Monitoring Africa (MMA) thank ICASA for the opportunity of responding to ICASA's request for additional submissions on the following two issues, namely:

- a. *MMA/SOS to expound on their proposal for the independent production sector to benefit from proceeds of "must carry/ must pay" in light of the proposals for the formation of the digital fund by the AAVCS draft White Paper. Does MMA/SOS see ICASA play a role in the distribution of the said proceeds, bearing the provisions of s2(y) of the ECA in mind?*

b. Kindly expand on the issue of dispute resolution during commercial negotiations.

2. We set out our additional submissions below.

3. WHO BENEFITS FROM MUST CARRY, MUST PAY – A CALL TO REWARD THE CREATIVES?

- a. As SOS and MMA have already made clear in its presentation at the oral hearings, we think it is vitally important for the creative industries, who developed much of the content on the South African Broadcasting Corporation (SABC) that is to be flighted on qualifying subscription broadcasters as part of the Electronic Communication Act, 2005 (ECA)'s envisaged must carry must pay regime, to benefit from the newly recognised "must pay" principle as recognised in the Draft Must Carry Regs. Hence, it is important to highlight that this submission is representative of the views of the independent production sector, in so far as this matter is concerned.
- b. SOS and MMA are of the view that the Draft Must Carry Regs ought to specify the minimum percentage of the commercially-agreed fee to be paid by qualifying subscription broadcasters to the SABC is to be set aside by the public broadcaster to reward the independent production sector (part of the creative industries sector) for its contribution to the development of such content.
- c. SOS and MMA are of the view that the Draft Must Carry Regs ought to specify that 35% (thirty five percent) of the total fee or fees payable by qualifying subscription broadcasters to the SABC for channels that are flighted as a result of the Must Carry Regs is to be paid over to the members of the independent production sector whose independently-commissioned programming is so flighted, in the following percentages:
 - (a) 15% (fifteen percent) of the total fee set out above is to be paid to the independent producers of independently commissioned programming flighted on qualifying subscription broadcasters as a result of the Must Carry Regs;

(b) 10% (ten percent) of the total fee set out above is to be paid to the principal writers of independently commissioned programming flighted on qualifying subscription broadcasters as a result of the Must Carry Regs; and

(c) 10% (ten percent) of the total fee set out above is to be paid to the principal actors performing in independently commissioned programming flighted on qualifying subscription broadcasters as a result of the Must Carry Regs.

d. The effect of this is the R35.00 of every R100.00 spent on Must Carry channels by qualifying subscription broadcasters is to be paid over to the principal actors, writers and to the producers of independently-commissioned South African television content flighted on those channels.

e. We are also of the view that the payments from the SABC to the above members of the independent production sector must be made within 90 days of payment by the qualifying subscription broadcasters.

4. DISPUTE RESOLUTION MECHANISM IN CASE OF DEADLOCK IN COMMERCIAL NEGOTIATIONS OVER MUST CARRY, MUST PAY

a. Both the SABC and MultiChoice have argued against any deadlock-breaking mechanism to be exercised by ICASA in case of deadlock arising in the commercial negotiations between them, undoubtedly to protect their respective rights to walk away in the event of a failure to agree the price of the “must pay” aspect of the “must carry, must pay” principle.

b. However, we submit that this is not in the public interest which should not be sacrificed on the altar of non-interference in the commercial dealings between two large broadcasting entities, by ICASA.

c. As ICASA is already aware, the legislature clearly envisaged some level of regulatory involvement in the commercial affairs of qualifying subscription broadcasters and the SABC, otherwise it would never have enacted section 60 of the ECA which clearly envisions regulatory intervention in three different aspects of subscription

broadcasters commercial affairs, namely: sports rights, carriage of the SABC's television programmes, and limitations on advertising revenue.

- d. DStv and the SABC argue that there is no authority for this kind of deadlock-breaking role to be played by ICASA in the ECA. They are correct that there is no express authority therefor. However, we are satisfied that the general regulation-making powers afforded ICASA as provided for in:

- (a) section 4(3)(j) of the ICASA Act; and

- (b) section 4(1) of the ECA, respectively,

particularly when read with the peremptory obligation contained in section 60(3) for ICASA to prescribe regulations "regarding the extent to which subscription broadcast services must carry, subject to commercially negotiable terms, the television programmes provided by a public broadcast service licensee", are sufficiently broad to enable ICASA to provide for a deadlock-breaking role for itself in the Must Carry Regs.

- e. ICASA is no stranger to performing this role. As we said in our oral presentation, ICASA performs this role, if needs be, with regard to disputes between licensees in respect of, *inter alia*, interconnection, facilities leasing and sports broadcasting rights.
- f. If ICASA were not to prescribe a role for itself when commercial negotiations deadlock in the must carry context, the entire aim of the must carry regime would be undermined.
- g. Simply put, either a qualifying subscription broadcaster or the SABC could act unreasonably to stymie the flighting of the SABC's television programmes on qualifying subscription broadcasting services.
- h. This would not be in the public interest. It may be that at some future date, the need for Must Carry Regs falls way altogether as the SABC's online portals, DTT services and free-to-air DTH opportunities render the need for public access to the SABC's television programming on qualifying subscription broadcasters, nugatory. However,

we are clearly nowhere near such a future date and the stalled DTT rollout coupled with an excessively optimistic analogue switch off date for May 2022 having been announced, we think it worryingly likely that many households would be completely dependent on their qualifying subscription broadcasters for access to the SABC's television programming.

- i. In any event, the Must Carry Regs could always contain a provision that ICASA may decline to use its deadlock-breaking powers in respect of the "must carry must pay" principle should ICASA be of the view that reaching agreement on the amount to be paid by qualifying subscription broadcasters for the SABC's television programming is not necessary to secure access thereto by the public at large, at that particular point in time.
5. We trust that ICASA finds the above submissions to be helpful and we look forward to the promulgation of the next iteration of the Must Carry Regs, in due course.

Sincerely

Mpho Antoon Ndaba and William Bird