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Att: Mamedupe Kgatshe

Independent Communications Authority of South Africa (ICASA)

Email: [mkgatshe@icasa.org.za](mailto:mkgatshe@icasa.org.za)

21 May 2021

Dear Ms Kgatshe

**SOS COALITION AND MMA: JOINT SUBMISSION ON THE DRAFT MUST CARRY AMENDMENT REGULATIONS**

1. The SOS Coalition (SOS) is a civil society coalition that is committed to, and campaigns for, broadcasting services that advance the public interest. While the SABC is our primary focus – as the key site of and the institution established to drive public interest broadcasting – SOS also engages in the advancement of community broadcast media in South Africa. SOS is made up of a broad range of civil society organisations, trade unions and their federations, and individuals (including academics, freedom of expression activists, policy and legal consultants, actors, scriptwriters, film makers, producers, and directors).
2. SOS campaigns tirelessly for an independent and effective public broadcaster. We engage with policymakers, regulators, and lawmakers to secure changes that will promote citizen-friendly policy, legislative and regulatory changes to broadcasting and its associated sectors.
3. Media Monitoring Africa (MMA) is a not-for-profit organisation that has been monitoring the media since 1993. MMA's objectives are 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.

4. MMA aims to contribute to this vision by being the premier media watchdog in Africa to promote a free, fair, ethical and critical media culture. MMA has over 27 years' experience in media monitoring and direct engagement with media, civil society organisations and citizens. MMA is the only independent organisation that analyses and engages with media according to this framework. In all our projects, we seek to demonstrate leadership, creativity, and progressive approaches to meet the changing needs of the media environment.
5. As part of their aims to promote:
  - a. a broadcasting ecosystem that meets the information needs of the public through ensuring adherence to the three-tier broadcasting system: public, community and commercial
  - b. a general media environment that is responsive to the demands of convergence and audience preferences in respect of media consumption patterns and platform choices
  - c. a public broadcaster that is governed in accordance with international best practice standards for public broadcasting and public interest programming
  - d. a free press; and
  - e. a vibrant, economically impactful and growing local content production sector to ensure that South African voices are heard not only on broadcasting platforms but also online and in games etc (although that is not a traditional area of focus of our organisations).

It is incumbent upon SOS and MMA to respond to significant policy and regulatory processes as they unfold to support the public interest in the outcomes of these processes.

6. SOS and MMA welcome the Draft Must Carry Regulations. As noted in our previous submission (link/attached in annex A), the Must Carry Regulations required an amendment to be line with the law. In broad terms, the draft regulations are supportive of our position on Must Carry, which can be summarised as: ***Must carry must pay.***
7. SOS and MMA support the rationales of the Authority for the must carry regulations. We note specifically in 2.29 that "the purpose of the Must Carry rule in South Africa is to advance universal access of the television programming of the public broadcaster."<sup>1</sup> This is in line with

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<sup>1</sup> ICASA Must Carry Findings Document page: 13.

our previous submission made in response to question five of the ICASA Must Carry public questionnaire (page nine).

In para 2.37 “The Authority’s position is that Must Carry must be driven by a central public interest principle of universal access to ensure that PBS programming is available to all citizens, targeting those citizens that use SBS as their means of access to television.

And in para 2.38, that “Payment regarding the transmission of must carry channels must be negotiated by both PBS and the SBS in terms of section 60(3) of the ECA. The PBS has an obligation to serve the public by producing content that is in the public interest.”<sup>2</sup>

We welcome the approach by the Authority to ensure the finalised Must Carry regulations are in line with the existing law.

8. SOS and MMA reiterate the following points we made in the ICASA Must Carry public questionnaire (as attached), namely

***“(a) The Must Carry Regulations have not achieved the intended objectives. Section 60(3) of the Electronic Communications Act, 2005 (ECA) provides that ICASA must prescribe regulations regarding the extent to which subscription broadcast services must carry, subject to commercially negotiable terms, the television programs provided by a public broadcast service licensee (our emphasis). While ICASA has indeed prescribed Must Carry Regulations<sup>2</sup>, the results have not been beneficial to the SABC precisely because the Must Carry Regulations were drafted in a manner that was ultra vires the ECA.***

***(b) The Must Carry Regulations provides at section 6(1) that the PBS licensee that “must offer its television programmes, at no cost, to a SBS [Subscription Broadcasting Service] Licensee upon a request from the SBS Licensee”.***

***(c) This is ultra vires the ECA because that Act specifies that this Must Carry be subject to “commercially negotiable terms” which does not empower ICASA to promulgate regulations that provide that PBS programming is to be offered to a subscription broadcaster “at no cost” as it has, unlawfully, done in section 6(1) of the Must Carry Regulations.***

***(d) It is quite clear that the section 60(3) of the ECA enshrines the “Must Carry, Must Pay” principle for subscription broadcasting services and requires ICASA to provide for same in its regulations. However, ICASA, in making its regulations, has not complied with the legislative requirements set out in section 60(3) and instead has provided for a “Must Carry, Must Not Pay Anything” principle in its regulations.”***

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<sup>2</sup> ICASA Must Carry Findings Document page: 15

Consequently, we now welcome the approach by the Authority as evidenced in the Draft Regulations to ensure that Must Carry regulations are in line with the relevant statutory requirements.

9. While we welcome the shift evidenced in the Draft Regulations, we are concerned that these, and indeed others (as pointed out previously, e.g., the Inquiry into Subscription Broadcast Services) can be viewed as a decade too late. While it is important that the dominance of Multichoice is acknowledged, the horse has long since bolted and there is no longer a cart, but a motor manufacturing plant in its place. We refer to South Africa's transition, albeit too slowly, to a digital reality. Imminent threats to our broadcasting audio and audio-visual content services, are not coming from the dominance of multichoice alone, but from global behemoths, multi-national audio and audio-visual content providers/OTT services. While we therefor support the draft regulations, we wish to alert the Authority to the urgent and critical need for a coherent, holistic, and converged digital policy and regulations.
10. If, as is planned, analogue signal is switched off in March 2022, we know that we will not be in a position where we have universal access to devices to enable the reception of digital terrestrial let alone universal service, that is, such devices being installed in households across South Africa. At that point, we will then have to make decisions on whether to use existing digital subscription service broadcasters (e.g., Multichoice) and free to air satellite services (e.g., Open View) to ensure universal access to digital television, including all Free-to-Air (FTA) services provided by all FTA broadcasters, public, community and commercial. It will then be the case that we will need new policy and regulations regarding how such satellite services (subscription and FTA) will be required contribute to ensuring that FTA content FTA that used to be available on an analogue FTA basis (including but not limited to that which used to be provided by the SABC) remains accessible to the public? This will require a reconsideration of the entire broadcasting landscape to avoid a situation where DStv carries the SABC channels on its service but that the SABC and all other FTA television broadcasters (e-tv and community broadcasters) are otherwise practically unavailable to the public.
11. Accordingly, SOS and MMA welcome the draft Must Carry Regulations but warn that much larger existential questions regarding the universal availability of FTA television content are looming, given the disastrous failures in the roll-out of DTT thus far and the impossibly short timetable set for analogue signal switch-off proposed by the Department of Communications and Digital Technologies.
12. We ask that if there are oral hearings, we are granted an opportunity to make oral submissions.

We thank the Authority for the opportunity to make these brief written submissions.

Thank you,

**Sincerely**

A handwritten signature in black ink, appearing to read 'Dudukuse'.

**Duduetsang Makuse**

A handwritten signature in black ink, appearing to read 'W. Bird'.

**William Bird**