



Attention: Ms Refilwe Ramatlo

ICASA

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WRITTEN REPRESENTATIONS BY THE CIVIL SOCIETY COALITION: SOS – IN SUPPORT OF PUBLIC BROADCASTING AND MEDIA MONITORING AFRICA – ON THE REVISED DRAFT DIGITAL TERRESTRIAL TELEVISION REGULATIONS

1. INTRODUCTION

- 1.1. In Notice No. 532 published in Government Gazette No. 35508 dated 10 July 2012, the Independent Communications Authority of South Africa (“ICASA”) published its “Explanatory Memorandum on the Decision to Amend the Draft Digital Terrestrial Television Regulations” (“the Draft DTT Regulations”). Written comments were invited to be submitted by 30 July 2012.

- 1.2. We, the Civil Society Coalition: **SOS – In Support of Public Broadcasting** (“the Coalition” or “SOS”) and Media Monitoring Africa (a member of the Coalition but which has previously made submissions separately) thank ICASA for the opportunity to make these written representations. We recognise that ICASA was under no legal obligations to allow a second of public notice and comment procedure in respect of the Draft DTT Regulations and we acknowledge ICASA’s transparency in this regard with thanks. We also feel it important to congratulate ICASA on the obvious improvements that have been made to the Draft DTT Regulations since the first draft thereof was published in 2011. We are of the view that the Draft DTT Regulations published in the Notice are far clearer, more consistent and more coherent than those previously published and that it is obvious that a number of concerns articulated by civil society and others have been taken into account. Nevertheless, there are still problems with the current Draft DTT Regulations and we trust that these written submissions will assist ICASA in finalising the DTT regulations

- 1.3. The Coalition is a large grouping of organisations and individuals working together to address the crisis in public broadcasting in South Africa. It includes non-governmental and civil society organisations, trade unions, independent producers and academics. Please see Annexure A to this written submission.

1.4. At the outset, SOS and MMA reiterate their key policy principles with regard to digital television which have informed these responses. We set out immediately below and in summary form, our key stances on the principles of: the aims of the digital switch over, the centrality of the concept of technology neutrality, the need for a fair regulatory environment:

1.4.1. Aims of the Digital Switch-Over:

The Coalition and MMA believe that the main reason for switching from analogue to digital television broadcasting is the fact that this would free up radio frequency spectrum which could be used for additional communications services, including broadcasting services. The Coalition is of the view that increasing the range and variety of broadcasting services is clearly in the public interest because it would allow for greater choice for audiences and would increase the public's access to a variety of sources of news, information and entertainment. This increased choice has proved to be one of the major drivers of Set-Top-Box ("STB") uptake and one of the success factors in the migration to DTT in other countries.

1.4.2. Need for Technology Neutrality:

1.4.2.1. SOS and MMA are of the view that process of switching from analogue to digital broadcasting should be conducted and regulated in a manner that does not undermine the principle of technology neutrality that is central to convergence and to the Electronic Communications Act, 2005 ("the ECA").

1.4.2.2. Thus digital terrestrial television should not, in principle, be regulated differently from other delivery platforms used to provide television, such as cable, mobile or satellite.

1.4.2.3. Further, the principle of technology neutrality requires licensees to be entitled to make use of any technology platform (such as mobile, cable, satellite, terrestrial, IPTV) subject only to spectrum availability where the licensee makes use of the radio frequency spectrum.

1.4.3. Need for a Coherent, Consistent and Fair Regulatory Environment:

The Coalition and MMA are of the view that all broadcasters should contribute to the public interest and should be subject to appropriate regulatory requirements. Consequently regulatory requirements such as complying with local content



requirements, must-carry rules, the relevant Codes of Broadcasting Conduct etc should apply to all broadcasters.

1.4.4. Need for SABC as a whole to be Regulated as a Public Broadcaster:

- 1.4.4.1. The Coalition and MMA have long argued that the operational divisions of public vs public commercial within the SABC are nonsensical and are not based on reality.
- 1.4.4.2. SABC 1 for example is squarely a “public” television channel and yet it generates more income for the SABC than SABC 3 (which is clearly a public-commercial channel) does.
- 1.4.4.3. The SOS is of the view that continuing to regulate any aspect of the public broadcaster on the basis of outmoded concepts of public vs public-commercial broadcasting in respect of the SABC is counter-productive.
- 1.4.4.4. The SOS has long argued for a comprehensive review of the SABC’s structure precisely because of the fact that the current nominal divisions of “public” vs “public commercial” bear no relation to the facts as they exist at the SABC currently in relation to their various television channels. All of the SABC’s television channels are “commercially operated”. To what extent they should be, and/or should bear specific public mandate obligations in accordance with the SABC Charter, is something that ICASA, among others, must grapple with.

1.5. The Coalition and MMA’s specific comments are set out Below:

2. AD SECTION 3 OF THE DRAFT DTT REGULATIONS – FRAMEWORK FOR DIGITAL MIGRATION:

2.1. Ad: sub-section (3)

The Coalition and MMA are concerned at the lack of regulatory clarity regarding when HD vs SD channels will be appropriate. We note that ICASA appears to leave that decision entirely to broadcasters. We are concerned that if all broadcasters are entitled to broadcast all of their channels in HD then the most important benefit of the so-called digital dividend, namely, the freeing up of spectrum for the broadcast of many additional channels will not eventuate. We are of the view that ICASA must give regulatory



direction such that not all channels may be in HD to ensure that there is sufficient freed-up spectrum for new channels.

2.2. Ad: sub-section (4)

The Coalition and MMA submit that the word “Analogue” be inserted at the beginning of this sub-paragraph given that ICASA is in the process of considering an application by a would-be satellite community broadcaster and it is important to distinguish between satellite and analogue broadcasters in the Draft DTT Regulations.

2.3. Ad: sub-section (7):

The Coalition and MMA submit that this sub-paragraph must be amended refer to Multiplex 3 and to accommodate:

2.3.1. any new subscription broadcaster(s) licensed by ICASA in response to the Invitation to Apply issued earlier this year; and/or

2.3.2. any new free-to-air broadcaster(s) licensed by ICASA,
during the dual illumination period.

2.4. Ad: sub-section (9):

The Coalition and MMA respectfully point out to ICASA the apparent contradiction between the time period of 18 months specified in sub-section (9) and the 90 day period specified in section 7(4) both of which relate to the period within which a channel must be operationalized after authorisation. We formally request ICASA to clarify and amend the Draft DTT Regulations such that the contradiction is resolved and we respectfully suggest that the provisions of section 7(4) fall away as is suggested below.

3. **AD: SECTION 5(10) OF THE DRAFT DTT REGULATIONS – MULTIPLEX ALLOCATION – MULTIPLEX 2**

The Coalition and MMA respectfully request that the words “and new licensed community broadcasting services” be added at the end of this sub-section. We think it essential that community broadcasters also have access to 10% of Multiplex 2 and submit that this ought to be explicit in the DTT regulations.

4. **AD: SECTION 6 OF THE DRAFT DTT REGULATIONS – MULTIPLEX ALLOCATION – MULTIPLEX 3**

4.1. Ad sub-section (1):

The Coalition and MMA respectfully request that the words “Commencing with” replace the word “During” at the beginning of this sub-section to avoid the apparent implication that Multiplex 3 will be operational only during the dual-illumination period and not thereafter as well.

4.2. Ad sub-section (2)(c):

The Coalition and MMA respectfully request that the words “and/or community” be inserted between the words “commercial” and “sound”. We think it essential that community sound broadcasters also have access to 10% of Multiplex 3 and submit that this ought to be explicit in the DTT regulations.

5. AD: SECTIONS 7, 9, 11 AND 12 AUTHORISATIONS OF DIGITAL INCENTIVE CHANNELS

5.1. The Coalition and MMA respectfully requests ICASA to reconsider and amend the provisions of these sections of the Draft DTT Regulations. In this regard, we respectfully submit that:

5.1.1. ICASA has attempted to differentiate between the different digital incentive channel authorisation procedures and criteria based on the multiplex on which the channel is to sit. We submit that this is not a rational basis for such differentiation as different *types* of broadcasters, namely free to air vs subscription and public vs commercial require different authorisation procedures, and that the multiplex on which such broadcaster sits is in fact irrelevant;

5.1.2. the process ought to be simplified into a single section that contains different and processes (and criteria) for different types of broadcasting services, in order to ensure meaningful diversity.

5.1.3. sections 7,9,11 and 12 be collapsed into a single section to read as follows:

“7. DIGITAL INCENTIVE CHANNEL AUTHORISATION CRITERIA AND PROCEDURE

(1) A terrestrial television broadcasting service licensee, other than a community broadcasting service, may make written application to the Authority, before or after the commencement of the dual illumination period, for authorisation to broadcast one or more digital incentive channels.

(2) An application for any digital incentive channel must include:



- a. the name of the proposed channel;
 - b. the primary language(s) of the proposed channel;
 - c. a programming plan, including local content;
 - d. an indication that the channel is not available on any platform (such as satellite for example)
 - e. an indication of whether or not the channel is an HD or SD channel;
 - f. research demonstrating financial viability;
 - g. a market impact analysis, including the implications of the addition of the proposed channel: for the relevant broadcasting service and for diversity of programming generally;
 - h. an assessment of how the proposed channel will further the objects of section 2 of the Act; and
 - i. any other information specifically requested by the Authority.
- (3) Any application that does not contain the information required to be submitted in terms of these Regulations will not be considered by the Authority.
- (4) The Authority:
- a. shall publish notice of the application in the Gazette and invite written comments from interested persons on the application within the period specified in the notice;
 - b. shall afford the licensee an opportunity to submit written responses to representations received in relation to the application; and
 - c. may hold a public hearing in relation to the application submitted in terms of sub-regulation 1.
- (5) Any application submitted by the SABC, whether in respect of a channel to be broadcast as part of its public or public commercial service, shall be subject to a public value assessment, for which purposes the Authority shall:
- a. publish, in the notice of the application referred to in sub-regulation (4)a., the criteria which are proposed to be taken into account by the Authority in assessing the public value of the proposed SABC digital incentive channel. Such public value assessment criteria may include but are not limited to:
 - i. supporting citizenship, consumer protection and civil society;



- ii. providing fair and impartial news and current affairs coverage;
- iii. promoting education and learning;
- iv. the extent to which the needs of children and the youth are being catered for;
- v. stimulating creativity and cultural excellence;
- vi. representing South Africa in all its diversity; and
- vii. the extent to which the proposed channel will assist the SABC in meeting its Charter obligations; and

- b. afford interested persons, including the SABC, an opportunity to make written representations on such public value assessment criteria within the period specified in the notice.”; and

(6) we submit that consequential numbering amendments would be require to be made to all subsequent remaining sections as a number of sections would have been deleted.

6. AD: SECTION (8)(2)(b) OF THE DRAFT DTT REGULATIONS – LOCAL CONTENT FOR DIGITAL INCENTIVE CHANNELS AND NEW DIGITAL CHANNELS

The Coalition and MMA are concerned at the possibility of a waiver of local content requirements being considered by ICASA without the necessary public participation. Consequently we respectfully request that ICASA amend section 8(2)(b) by inserting the following at end of the existing subsection:

“and the procedure for such waiver is as follows: Any licensee wishing to apply for a waiver in respect of a channel’s local content obligations shall submit an application for such waiver setting out:

- i. the grounds upon which such waiver is sought, such as, without limitation, genre-specific channels and internationally aggregated channels; and
- ii. its proposals for compensating for the lack of adherence to the local content requirements,

to the Authority which:



- iii. shall publish notice of the application in the Gazette and invite written comments from interested persons on the application within the period specified in the notice;
- iv. shall afford the licensee an opportunity to submit written responses to representations received in relation to the application; and
- v. may hold a public hearing in relation to the application submitted in terms of this sub-regulation.”

7. AD: SECTION 10 OF THE DRAFT DTT REGULATIONS – REGIONAL OPEN WINDOWS

The Coalition and MMA are of the view that open windows also provide a pro-competitive opportunity to show-case new subscription broadcasters and so to improve their chances of success against the incumbent subscription broadcasters one of whom benefitted from open windows for decades. Consequently, we respectfully suggest the following amendments to section 10, namely that:

7.1. the at word “Regional” be deleted in the title of section 10 such that the title reads simply “OPEN WINDOWS”;

7.2. the existing section 10 be re-numbered as 10(1); and

7.3. a new sub-section 10(2) be inserted as follows: “(2) All newly-licensed terrestrial subscription broadcasters shall be entitled to broadcast an unencrypted signal, that is, to provide an “open window” of programming on a free-to-air basis for a two-hour period between the hours of 6-10 p.m, for a period of four years from the date of commencement of broadcasting. An application by a subscription broadcaster to make use of such an open window must be made to the Authority and the provisions of regulation 7 apply *mutatis mutandis* to any such application.”

8. AD: SECTION 15(2) – THE DIGITAL TELEVISION CONTENT ADVISORY GROUP

The Coalition and MMA are of the respectful view that the Digital Television Content Advisory Group must have an expanded mandate to include advising on monitoring and compliance matters in respect of DTT. Consequently we respectfully suggest that sub-section 15(2) be amended to read as follows:



(2) “The DTAG will advise the Authority on the most effective way to ensure:

- a. the supply digital television content to encourage consumers to acquire set-top boxes in order to begin viewing digital television services; and
- b. compliance by DTT broadcasters with legislation, regulations and licence conditions setting out content-related obligations.”

9. AD: SECTION 20 – REPEAL OF REGULATIONS

The Coalition and MMA are concerned to ensure the provisions of the Draft DTT Regulations be given effect to immediately upon the coming into effect thereof. Consequently we respectfully suggest that a new sub-section (3) be inserted in section 20 which contains the necessary amendments to the Radio Frequency Band Plan to allow for the immediate operationalization of Multiplex 3.

10. CONCLUSION

The Coalition thanks ICASA for the opportunity to make these representations and is available to assist ICASA should it wish to discuss any matter raised herein. We also like to acknowledge that views expressed in this submission are based on consensus; some of our members will make their own written submissions, with specific focuses and emphasis. We hope that their views will be highly considered.

Please do not hesitate to contact Ms Carol Mohlala, the Coalition’s campaign coordinator, (contact details provided below) should ICASA have any queries or require any further information with regard to the Coalition’s submission.

Cell: 074 690 1023

Email: carol@supportpublicbroadcasting.co.za

Kind Regards,

A handwritten signature in black ink, appearing to read 'Carol Mohlala', is written over a set of horizontal lines. The signature is bold and stylized.

**Carol Mohlala,
SOS Coordinator**



Annexure A

Members of the “SOS: Support of Public Broadcasting Coalition”:

Organisations:

- Alternative Information Development Centre (AIDC)
- The Broadcast, Electronic Media and Allied Workers Union (BEMAWU)
- Congress of South African Trade Unions (COSATU)
- Communication Workers Union (CWU)
- Creative Workers Union of South Africa (CWUSA)
- Ecumenical Services for Social and Economic Transformation (ESSET)
- Federation of South African Unions (FEDUSA)
- Freedom of Expression Institute (FXI)
- Freedom of Expression Network (FXN)
- Gender and Media Southern Africa (Gemsa)
- Genderlinks
- IDASA, an African Democracy Institute
- Institute for the Advancement of Journalism (IAJ)
- Link Centre
- Media Monitoring Africa (MMA)
- MISA South Africa (The South African National Chapter of the Media Institute of Southern Africa)
- Media Workers Association of South Africa (MWASA)
- National Community Radio Forum (NCRF)
- South African Non-Governmental Organisation Network (SANGONET)
- South African History Archives (SAHA)
- South African Screen Federation (SASFED):
 - Documentary Filmmakers Association (DFA)
 - Independent Producers Association (IPO)
 - The Official South African Casting Association (OSCA SA)
 - Personal Managers Association (PMA)
 - South African Guild of Actors (SAGA)
 - South African Guild of Editors (SAGE)
 - Writers Guild of South Africa (WGSA)
 - Women in Film and Television, SA (WIFTSA)
 - Women of the Sun (WOS)
- Workers World Media Productions

Individuals:

- Ms. Ingrid Bruynse – Bright Media, independent producers
- Ms. Jayshree Pather – Independent Media Consultant
- Mr. Raymond Louw – South African National Editors Forum (in his private capacity)
- Prof. Anton Harber – Caxton Professor of Journalism, University of the Witwatersrand (in his private capacity)
- Prof. Devan Pillay – Head of Sociology Department, University of the Witwatersrand (in his private capacity)
- Prof. Tawana Kupe – Associate Professor of Media Studies and Dean of the Faculty of Humanities, University of the Witwatersrand (in his private capacity)



- Prof. Jane Duncan – Chair of the Information Society, Rhodes University (in her personal capacity)
- Ms. Justine Limpitlaw – broadcasting lawyer (in her private capacity)
- Ms. Jeanette Minnie of Zambezi FoX – international Freedom of Expression and Media Consultant
- Prof. William Gumede – writer, journalist, academic and freedom of expression activist, Development Bank of Southern Africa
- Mr. Jay Naidoo – ex-General Secretary of Cosatu, ex-Minister of Communications, international human rights activist
- Mr. Martin Dolny – Director of the Joe Slovo Foundation (in his personal capacity)
- Ms Kerry Harris – Development Consultant (in her personal capacity)