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Ms Refilwe Ramatlo

ICASA

[subscriptioninquiry@icasa.org.za](mailto:subscriptioninquiry@icasa.org.za)

31 May 2018

Dear Ms Ramatlo

**JOINT WRITTEN ADDITIONAL SUBMISSIONS BY THE SOS COALITION AND MEDIA MONITORING AFRICA ON THE INQUIRY INTO SUBSCRIPTION TELEVISION BROADCASTING SERVICES**

1. INTRODUCTION

1.1. 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”). SOS: Support Public Broadcasting Coalition (SOS) and Media Monitoring Africa (MMA) made submissions in writing and at the oral hearings.

1.2. On 8 May 2018, SOS and MMA also made oral submissions at the Inquiry hearings and in the course of the hearings a number of additional questions were put to SOS and MMA by the ICASA panel. We were asked to provide additional written submissions on these questions by 31 May 2018. These are set out below.

## 2. AD: ISSUE OF OTT VS TELEVISION

2.1. We recognise that Over The Top (OTT) services are:

2.1.1. changing the way that the public experiences audio-visual content; and

2.1.2. impacting on revenues of broadcasting services, including subscription service references, many of which are now launching their own OTT services.

2.2. This trend is evidenced not only in South Africa with MultiChoice's launch of Showmax but also with BskyB's launch of Sky Q<sup>1</sup>.

2.3. However, we are of the view that this does not change the fundamental monopolistic character of subscription television in South Africa.

2.4. MultiChoice's submissions in response to the Discussion Paper appear to argue that ICASA is required to, as part of this Inquiry, focus on the impact of OTT and regulate OTT services. We agree with this. However, it is critical to remain focused on the key driver of this Inquiry, namely, the utter failure of commercial competition in the subscription television market in South Africa.

2.5. We are of the view that ICASA must ensure that this enquiry continues to focus on the subscription television market in which MultiChoice clearly and unambiguously enjoys a monopoly. The threat or otherwise of new platforms/delivery mechanisms does not detract from ICASA's critical role to ensure fair competition in the subscription television market segment. We are anxious to ensure that ICASA does not lose sight of this aspect when dealing, as it must, with MultiChoice's arguments concerning emerging competition from OTT services.

2.6. In this regard, we are of the view that ICASA must develop a Position Paper with clear policy outcomes to break the MultiChoice monopoly in the subscription television market through clear pro-competitive regulatory measures such as those contained in paragraphs 8.7 and 8.8 of our original written submission. This is, in our view, the priority of this Inquiry.

2.7. We do however recognise that OTT services do provide the public with a clear alternative to traditional broadcasting and as such, ought to be contributing to meeting the public interest and social goals laid down in the objects of the Broadcasting Act, the ICASA Act and the ECA. In this regard:

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<sup>1</sup> <https://www.ibc.org/delivery/building-scalable-and-resilient-ott-services-at-sky/2461.article>.

2.7.1.the history of ICASA's failure to act timeously to regulate subscription broadcasting leading inexorably and directly to MultiChoice's monopoly as has been set out in details in our original written submissions (see especially paragraphs 3 and 7.5) cannot be repeated;

2.7.2.the longer the DOC fails to act to develop policy on audio-visual content services (which policy development has been stalled for three years), the more such international content services undermine our own audio-visual content developers and become used to not contributing to social objectives such as: paying tax, developing local content and ensuring BBBEE; and

2.7.3.similarly, the longer ICASA fails to develop regulations to deal with OTT services, the more entrenched they become and more international content services undermine our own audio-visual content developers and become used to not contributing to social objectives such as: paying tax, developing local content and ensuring BBBEE.

2.8. ICASA must act now to prevent a *de facto* international monopoly in regards to OTT services. We are of the view that this Subscription Inquiry needs to result in a simultaneous spin off Inquiry into the regulation of OTT services. This does not mean that the Subscription Inquiry should be halted or delayed in any way. The issues are separate and both are extremely urgent.

### 3. AD: COST OF ACCESS TO SPORTS RIGHTS ETC BY SABC AND OTHERS

3.1. SOS and MMA are of the view that ICASA's regulation of premium sports content, particularly, National Sporting Events, has been a failure from the point of view of public access thereto on free to air television. In fact we believe this to be self-evident.

3.2. It is also clear from a cursory reading of the Sports Broadcasting Rights Position Paper (25 July 2003) that free to air broadcasters and particularly, the SABC, warned ICASA that this would be the case unless subscription broadcasters were denied the right to obtain exclusive sports broadcasting rights.

3.3. It is clear from ICASA's Position Paper that the SABC was arguing for a nominal fee to be paid by it for sub-licensing rights to National Sporting Events. Unfortunately we are not in a position to access the SABC's submission although it was a public document at the time and therefore we can provide no additional detail as to what was meant by the reference to a "nominal fee". However, the SABC's 2003 submission will be in ICASA's files and accessible to the members of the panel engaged in this Inquiry. We strongly urge ICASA to reconsider the merits of the arguments raised by the public broadcaster in the public interest as it is clear that ICASA's own

approach has failed to ensure access to National Sporting Events by the majority of South Africa's people.

4. AD: PROVIDE LIBBY'S EVIDENCE ON PREMIUM CONTENT

4.1. In our original submission we made reference to research commissioned by the late Libby Lloyd into Exclusive Content Rights for subscription broadcasters, including in respect of sporting events of national interest.

4.2. Certain members of the ICASA panel asked that the commissioned research be made by available to ICASA for the purposes of this Enquiry.

4.3. SOS and MMA are happy to provide same in the public interest. The document is attached.

5. AD: AUTHORITY FOR REQUIRING MULTICHOICE TO LIST FREE TO AIR CHANNELS AT THE TOP OF THE EPG

5.1. In our original submission we argued that MultiChoice's Electronic Programme Guide (EPG) must list free to air channels at the top of the EPG (at paragraph 8.8.1).

5.2. At the oral hearings, certain members of the ICASA panel asked that we provide international precedent for such a requirement.

5.3. In this regard, we refer ICASA to OFCOM's Code of Practice on EPGs<sup>2</sup> which specifies that EPG providers are required to give "appropriate prominence" of public service broadcasting channels to audiences.

6. AD: AUTHORITY FOR REQUIRING INTEROPERABILITY OF MULTICHOICE'S STB/DECOECER AS AN ESSENTIAL FACILITY MULTICHOICE TO LIST FREE TO AIR CHANNELS AT THE TOP OF THE EPG

6.1. In our original submission we argued that MultiChoice's Set Top Box (STB) ought to be classified as an essential facility in terms of section 1 of the ECA (at paragraph 8.8.2).

6.2. At the oral hearings, certain members of the ICASA panel asked that we provide international precedent for such a requirement.

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<sup>2</sup> [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0031/19399/epgcode.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0031/19399/epgcode.pdf)

6.3. In this regard, we are aware that requiring subscription STB-interoperability is not a common regulatory practise at this stage. However, it would not be unique for ICASA to require this. In this regard, we request ICASA to follow the cutting edge precedent set by India where the Telecom Regulatory Authority of India (TRAI) which has started a pilot test for an interoperable STB<sup>3</sup> able to connect to cable, satellite and DTT television services. On 11 August 2017, TRAI released a Consultation Note on Solution Architecture for Technical Interoperable STB<sup>4</sup>. This is an important and relevant precedent because, like South Africa, India is a developing country whose population is unable, in the main, to afford a plethora of STBs to access different digital services.

## 7. AD: TV LICENCE FEE PAYMENT: AUTHORITY FOR REQUIRING MULTICHOICE TO COLLECT THE TV LICENCE FEE

7.1. In our original submission (at paragraph 9.2) SOS and MMA argued that the television licence fee ought to be collected by MultiChoice in respect of all of its subscribers (which now reach 6.5 million households)<sup>5</sup> on behalf of, and paid over to, the SABC.

7.2. The aim of this suggestion was to help ensure the financial sustainability of the SABC, something that ICASA is legally required to do in terms of section 2(t) of the ECA.

7.3. The ICASA panel at the oral hearings asked us to provide it with a legal justifications for this suggestion.

7.4. In this regard, we recognise that ICASA itself cannot make regulations requiring MultiChoice to collect the television licence fee from its subscribers on behalf of the SABC.

7.5. However, the Minister of Communications has broad discretionary powers in terms of section 40(1)(c)(i) of the Broadcasting Act to make regulations regarding the television licence fee which is payable for any television licence issued in terms of the Broadcasting Act, *including the manner of payment and the collection thereof*, penalties and ancillary matters (our emphasis).

7.6. Further, ICASA has broad discretionary powers in terms of section 4(3)(a) of the ICASA Act to make recommendations to the Minister of, *inter alia*, Communications on policy matters which accord with the objects of the ICASA Act and the underlying statutes (which include the ECA). It is clear that making recommendations to the Minister of Communications for her to amend the TV

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<sup>3</sup> <https://economictimes.indiatimes.com/news/economy/policy/set-top-box-interoperability-on-top-of-trai-agenda-for-2017/articleshow/56447666.cms>

<sup>4</sup> [http://www.trai.gov.in/sites/default/files/Consultation\\_note\\_on\\_STB\\_interoperability\\_110817.pdf](http://www.trai.gov.in/sites/default/files/Consultation_note_on_STB_interoperability_110817.pdf)

<sup>5</sup> <https://mybroadband.co.za/news/business/240224-dstvs-latest-subscriber-numbers-and-revenue-figures.html>.

Licence Regulations<sup>6</sup> to provide for MultiChoice's collection thereof from its subscribers would fall squarely within ICASA's mandate and powers and those of the Minister of Communications.

- 7.7. We therefore request ICASA to make such a recommendation in the Position Paper that will result from this Inquiry and to actually forward such recommendation to the Minister for subsequent action. We suggest, further, that Parliament be notified of such recommendation so that Parliament can perform oversight functions in respect of the Minister of Communication's actions in this regard.
8. SOS and MMA trust that these additional submissions will be of assistance to ICASA in finalising the Position Paper on Subscription Television.
9. Please do not hesitate to contact SOS and/or MMA should ICASA have any queries or require any further information.

Thank you

**Yours Sincerely**

**Dudetsang Makuse**

**National Co-ordinator, SOS**

**Also on behalf of MMA**

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<sup>6</sup> Contained in Notice 151 published in Government Gazette No. 25959 dated 28 January 2004 as amended by Notice 462 published in Government Gazette No. 36614 dated 5 July 2013.