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Mr Paris Mashile
Acting Chairperson
ICASA
164 Katherine Street
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E-mail: chairperson@icasa.org.za

Dear Mr Mashile

SABC REQUEST FOR URGENT ICASA REVIEW AND AMENDMENT OF REGULATIONS: EXTENT TO WHICH SUBSCRIPTION BROADCASTING SERVICES MUST CARRY THE TELEVISION PROGRAMMES PROVIDED BY THE PUBLIC BROADCAST SERVICE LICENSEE ("THE MUST CARRY REGULATIONS") SET OUT IN GAZETTE NO. 31500 ON 10 OCTOBER 2008

As you are aware, a new SABC Board was appointed by the President on 16 October 2017 and I had the honour of being appointed as the Chairperson. We look forward to having an introductory meeting with yourself and the ICASA Councillors as soon as our schedules permit.

Given the urgent governance and financial imperatives identified by the Parliamentary Ad Hoc Committee on the SABC, the new Board is currently implementing mechanisms to restore public faith in the Corporation. In particular, the very real threat to the SABC's financial sustainability is well known and most recently detailed in our first quarter report to Parliament on 7 November 2017.

The main causes of the current financial crisis are clearly spelt out in Parliament's Ad Hoc Committee report. The SABC Board has taken strong steps to stabilise the Corporation and we will deal with those accountable for wrongdoing, recovering as much as possible through the courts and the SIU. We also commit to keeping Parliament, the Authority and the public apprised of key developments in this regard as we move forward.

Less well known are some of the regulatory challenges faced by the SABC which have over the years put continued pressure on the public broadcaster's finances. The focus of this submission - the Must Carry Regulations (as gazetted on 10 October 2008) - has had a serious impact on the SABC from a potential revenue point of view. For ease of

South African Broadcasting Corporation SOC Limited: Registration Number: 2003/023915/30

Non-Executive Directors: Mr B E Makhathini (Chairperson); Ms F C Potgieter-Gqubule (Deputy Chairperson); Ms R Kalidass; Ms K T Kweyama; Mr M Markovitz; Mr J Matisonn; Mr D K Mohuba; Mr K Naidoo; Mr J H Phalane; Mr V Rambau; Mr M G Tsedu
Executive Directors: Ms N P Philiso (Acting Group Chief Executive Officer); Ms B L Tugwana (Acting Chief Operations Officer); Ms T S Dlamini (Acting Chief Financial Officer)
Company Secretary: Ms L V Bayi

reference, when we refer to the SABC's Must Carry Channels, we are talking about the SABC's three free-to-air ("FTA") television channels, SABC 1, SABC 2 and SABC 3, which are required by law to be carried by Subscription Broadcasting Services ("SBS") Licensees that have 30 or more channels.

It is the SABC's submission that:

- Clause 6(1) of the regulations has enforced non-payment by SBS Licensees for the three SABC Must Carry Channels. This clause provides that:
"The PBS Licensee must offer its television programmes, at no cost, to a SBS Licensee upon request from the SBS Licensee".
- This provision is ultra vires the enabling legislation, namely subsection (3) of section 60 of the Electronic Communications Act, 2006 ("the ECA") which envisages ***"commercially negotiable terms"*** being agreed between the SABC and SBS Licensees; and
- by reviewing and amending the regulations to comply with the enabling legislation, the Authority will be fulfilling one its core statutory objectives as set out in section 2(t) of the Electronic Communications Act, 2006 which is to: ***"protect the integrity and viability of public broadcasting services"***

It is the SABC's view that the 2008 regulations have unfortunately failed to protect the viability of the public broadcaster and it is on this basis that we submit that the Authority should urgently commence a separate, public regulatory process to review the Must Carry Regulations.

The SABC has welcomed the Authority's Discussion Document: Inquiry into Subscription Television Broadcasting Service (***"Subscription TV discussion document"***) and also intends to participate in that process insofar as anti-competitive practices and market structure issues impact on the sustainability, viability and integrity of public broadcasting services.

But the SABC hereby requests that the Must Carry regulatory review should commence as soon as possible as a separate process for the following reasons:

1. The SABC's relatively simple, proposed amendments to clauses 6(1) and 7(1) of the regulations only seek to bring the Must Carry Regulations in line with the enabling legislation and create the correct regulatory framework for commercial negotiations between the public broadcaster and SBS Licensees (see Appendix for proposed amendments).

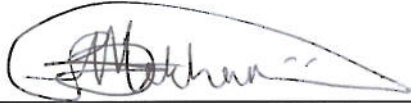
2. The Must Carry regulations were understandably not dealt with in the Subscription Television discussion document as that paper deals more directly with anti-competitive conditions in the industry and proposes several pro-competitive measures to address market structure. The SABC cannot afford to wait until the conclusion of this large, broader competition-related inquiry before the 'error' in the Must Carry Regulations is corrected. It is not an understatement to say that the viability of the public broadcaster is at stake here.
3. While the SABC, Multichoice Africa ("MCA") and other SBS Licensees may indeed commence commercial negotiations in good faith before the Must Carry Regulations are amended, it is still possible the SBS Licensees will rely on the ultra vires provision which effectively 'zero rates' the SABC Must Carry Channels and enforces a precedent-setting, non-commercial negotiating environment.
4. The SABC entered into a Must Carry Channel Distribution Agreement with MCA on 1 April 2011, as amended on 3 March 2015. In terms of this Agreement, MCA relied on the problematic 2008 regulations to contractually guarantee non-payment for the SABC's 3 Must Carry television channels.
5. The Must Carry Regulations were gazetted over nine years ago and are, in any event, due for a separate review process. At the time the regulations seemed to be drafted on the basis that the "must carry obligation" was an onerous one for SBS Licensees and that these broadcasters would be 'doing the public broadcaster a favour' by carrying its channels as part of an SBS television bouquet. The SABC will demonstrate in the public process that, on the contrary, the SABC Must Carry Channels have commercially benefited MCA at the expense of the public broadcaster.

In the interests of transparency and the public interest, we have copied known SBS Licensees about our request for the urgent regulatory review of the Must Carry Regulations. For the public, interested parties and any SBS Licensees we may have inadvertently left out, the SABC will also be making this letter available on our website and other channels.

The SABC Board will be briefing the Parliamentary Portfolio Committee on Communications as part of our report back on the Ad Hoc Committee and Public Protector recommendations on 24 November 2017.

When the Must Carry Regulations are gazetted for review, the SABC intends making more detailed legal, regulatory and commercial submissions why the 2008 regulations should be amended by the Authority.

We look forward to your response and thank you for your urgent consideration of our request



MR BONGUMUSA E. MAKHATHINI
CHAIRPERSON: SABC BOARD

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APPENDIX

PROPOSED AMENDMENT TO MUST CARRY REGULATIONS AS PUBLISHED IN GOVERNMENT GAZETTE NO. 31500 ON 10 OCTOBER 2008

The SABC hereby proposes that the Regulations be amended as follows:

Regulation 6(1):

Delete the words “*The PBS Licensee must offer its television programmes at no cost, to SBS Licensee upon a request from the SBS Licensee*” and replace it with the words “The PBS Licensee must offer its television programmes on commercially negotiable terms upon a request from SBS Licensee”.

Regulation 7(1)

Delete the words “*The PBS Licensee bears the cost of transmission of the broadcast signal to the Licensee*” and replace it with the words “The PBS and the SBS Licensees shall negotiate the transmission costs on commercial terms”.
