

SABC SUBMISSION OF PUBLIC INQUIRY INTO THE STATE OF COMPETITION IN THE INFORMATION AND COMMUNICATIONS TECHNOLOGY SECTOR

South African Broadcasting Corporation Limited SOC: Registration Number: 2003/023915/06

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1 INTRODUCTION

- 1.1 On 20 March 2014, the Independent Communications Authority of South Africa (the "Authority") published Notice 229 of 2014, Government Gazette No. 37456 (*Notice of Public Inquiry into the State of Competition in the Information and Communications Technology Sector, or "The Notice"*). All interested persons were invited to submit their written representations on the matters outlined in the Notice. The South African Broadcasting Corporation ("SABC") would like to thank the Authority for the opportunity to make this written response.
- 1.2 In terms of paragraph 3 of the Notice, the inquiry will seek to address the current state of competition in the Information and Communications Technology ("ICT") sector as a whole; challenges to creating a level playing field across platforms; the impact of convergence, net neutrality and disruptive technologies on the competitive landscape; the role of fixed (fibre) and wireless (high demand spectrum) in enabling competition; the tension between consolidation and plurality in the ICT sector.
- 1.3 The SABC intends to cooperate fully in this process. However, at early stage it would also like to raise a concern regarding the multiplicity of processes currently underway in the ICT sector, which will each have a significant effect on the broadcasting landscape. There may be various alternative outcomes, and the interaction of the various outcomes will have complex effects on the markets and regulatory environment within which the SABC operates. Therefore the ability of the SABC, and it is respectfully submitted, the Authority, to predict how the competitive landscape will develop in the future, is constrained.
- 1.4 For example, the SABC has delivered submissions with regard to: *A Review of the Broadcasting Regulatory Framework Towards a Digitally Converged Environment* (16 April 2012); the *SABC's Submission on the Explanatory Memorandum on the Decision to Amend the Draft Digital Terrestrial Television Regulations* (30 July 2012); the *SABC's Submission on the Draft Promotion of Diversity and Competition on Digital Terrestrial Television Regulations* (20 February 2013); and the *SABC's Submission on the National Integrated ICT Policy Green Paper*.
- 1.5 The *National Integrated ICT Policy Green Paper* was published on 24 January 2014 in Government Gazette No. 37261. The policy paper addresses issues, *inter alia*, the current

state of the broadcasting services sector (chapter 3); broadcasting (chapter 8) including but not limited to licencing and spectrum (at 8.5), public broadcasting (at 8.7), commercial broadcasting (at 8.8), community broadcasting (at 8.9) and fair competition (at 8.10). The issues raised in the green paper may therefore substantially coincide with the issues to be dealt with in the competition inquiry.

- 1.6 The SABC respectfully submits that the process of developing a policy paper in respect of the ICT sector will be central to any other regulatory process and that all other inquiries should be subservient to the policy development process. This will ensure that resources required to prepare submissions for inquiries are not expended unnecessarily and will allow the SABC and other broadcasters to align their practices with the revised policy. As was submitted in the SABC's submission of 16 April 2012 "certainty in relation to policy and regulations should be advocated for at all cost."¹
- 1.7 Furthermore, a change of policy may result in a change to the SABC's funding model and this may impact directly on competition related issues. It would therefore be advisable for the Authority to await the finalisation of the National Integrated ICT Policy before finalising its inquiry into competition in the broadcasting sector, save to the extent that the inputs receive during this process are intended to be utilised in making submissions in respect of the National Integrated ICT Policy (in that case an extent of duplication will arise).
- 1.8 Against this background, the SABC proceeds to respond to the inquiry in this submission. It is understood that the process for undertaking the enquiry, including its scope will be further clarified by the Authority during its engagement with stakeholders after receiving these submissions. As will be seen below, defining the scope and concretizing the procedure will be crucial, as without a clear grasp of the markets involved based on economic analysis, as well as a sensitivity to the regulatory processes already underway, the usefulness of the inquiry and its outcomes will suffer.
- 1.9 Specific issues have been raised in the Notice, which are pertinent to broadcasting and the SABC, in particular. The issues, which are addressed in this submission are:
 - 1.9.1 The effect of significant technological changes on the state of competition and regulatory certainty.

¹ SABC's Submission on *A Review of the Broadcasting Regulatory Framework Towards a Digitally Converged Environment* Page 3.

- 1.9.2 The allegation that, in the free-to-air commercial television market unfair competition exists between subscription TV and free-to-air TV with regard to access to advertising spend ("adspend") revenues;
- 1.9.3 Concerns raised by the incumbent TV broadcasters about the Authority's plans to introduce new commercial and community TV services during the digital migration process;
- 1.9.4 The question whether the fact that broadcasters do not pay for spectrum gives them an unfair advantage in a converged environment or whether this advantage offsets the cost of local content regulation;
- 1.9.5 The fact that multiple closed transactions are taking place between mobile companies and content developers outside any regulatory framework, while broadcasters continue to be subject to strict rules;
- 1.9.6 The role that disruptive technologies, such as TV White spaces play in making the ICT sector more competitive;
- 1.9.7 How competition can be introduced into the subscription television broadcasting environment;
- 1.10 The SABC has previously made submissions regarding various of these issues and would again wish to use this opportunity to highlight issues that have been raised in previous submissions.

2 STRUCTURE OF THIS SUBMISSION

- 2.1 This submission is divided into four parts:
- 2.2 Part one: the SABC's role and mandate as the public service broadcaster;
- 2.3 Part two: The importance of carrying out a thorough market assessment in order to understand the dynamics of competition in the broadcasting sector;
- 2.4 Part three: funding of the mandate;
- 2.5 Part four: The required regulatory environment in the evolving broadcasting sector; and
- 2.6 Part five: Specific responses to the broadcasting related issues raised in the notice which

have not been addressed in parts one to four.

3 PART ONE: UNDERSTANDING THE SABC'S ROLE AND MANDATE AS THE PUBLIC SERVICE BROADCASTER

- 3.1 One cannot consider competition in the sector in context without a proper understanding of the specific nature of the SABC's mandate and the constraints its public service mandate places on it as a broadcaster. Understanding the public interest importance of its mandate is also fundamental to developing a balanced view of the effect that the SABC's activities may have on competition within the sector, and the manner in which it is required by legislation to self-fund its mandate.
- 3.2 The SABC is enjoined in terms of chapter IV, section 8 of the *Broadcasting Act* 4 of 1999 ("Broadcasting Act") to meet specific objectives. These objectives are, *inter alia*, to provide, in its public broadcasting services, radio and television programming that informs, educates and entertains and to provide such to be transmitted or distributed by the common carrier for free to air reception by the public. The SABC must also, for example, arrange concerts, performances and shows; it must collect news and information; carry out research; nurture South African talent and train people in production skills; it must produce or purchase films, and even develop and extend the services of the SABC beyond the borders of South Africa. It is specifically required to provide for a wide range of audience interests, beliefs and perspectives.
- 3.3 In fulfilling this mandate, it was envisaged by the legislature that the SABC should consist of two separate operational divisions, namely, a public service division and a commercial division which are to be administered separately and must keep separate financial records. The public service division is intended to fulfil the SABC's responsibility to make services available to South Africans in all the official languages; to include significant news and public affairs programming, educational programming, enrich cultural heritage and to include national sports programming as well as programming commissioned from the independent production sector.
- 3.4 This mandate is very broad and the SABC has previously submitted that the mandate be should be categorized in two sections, namely: high priority objectives and general objectives.² Considering the significant scope of the current mandate, the financial

²SABC's *Submission on the National Integrated ICT Policy Green Paper for Public Comment* 31 March 2014 at page 14.

necessity of obtaining revenue from all available sources becomes clear. Furthermore, considering the specific objectives that the SABC is required to meet, it is submitted that the SABC is not in competitive relationship with other broadcasters in so far as it is the only broadcaster with such a specific and extensive public interest mandate.

- 3.5 By virtue of the fact that SABC is the only licenced public broadcaster, it occupies a unique position in the broadcasting landscape and in its capacity as the public broadcaster it has no competitors.
- 3.6 In these submissions reference to SABC's competitiveness must be seen in the light of its role as the public broadcaster and its desire to remain relevant and sustainable in this capacity. Its main purpose is not informed by a profit motive and its interaction with other commercial players must therefore not be viewed in the light of a typical competitive relationship. While it may be alleged that the place that SABC occupies in the broadcasting landscape may, in certain instances have a negative effect on commercial players, with whom it competes for certain commercial revenue streams, the public interest objective of SABC distinguishes it from the commercial players.
- 3.7 The relationship between the SABC and the commercial players with whom it enters into commercial contracts must therefore be viewed as complementary in nature, in many respects. This is particularly so in the context of the development of television content, since commercial broadcasters are more focused on satisfying their viewers and thus need to develop suitable content. The SABC's mandate to develop particular content, on the other hand, requires funding beyond, for example, advertising revenues. Since it has the capacity to develop more content than it is able to use itself, within the strictures of its broadcast content requirements, SABC is able to sell such content to generate funds to apply to fulfil its mandate. The regulatory environment within which SABC operates should not restrict such activities.
- 3.8 Public broadcasters in other countries have also commented on the complementary role between public broadcasters and private broadcasters. The positive effect that public service broadcasting has on commercial broadcasting has been analysed by the BBC in a report entitled: "Public service broadcasting promotes a 'race to the top' with the commercial sector". The report states that: "*PSBs (public service broadcasting) must be of scale to influence their markets most positively. PSB is at its most effective when it not only delivers high quality programmes but also exerts pressure on commercial competitors*

to do the same." The trends show that countries where PSB is less strong tend to have a less strong market, such as Portugal and Italy. This finding has important implications in the sense that the SABC's participation in the broadcasting market must be viewed as an enabling force and the ability of SABC to perform this role needs to be supported, within the regulatory framework that applies to the SABC as the public broadcaster.

4 PART TWO: THE IMPORTANCE OF CARRYING OUT A THOROUGH MARKET ASSESSMENT IN ORDER TO UNDERSTAND THE DYNAMICS OF COMPETITION IN THE BROADCASTING SECTOR

4.1 SABC submits that proper research will need to be conducted by ICASA regarding the state of competition in the broadcastings sector. It would be useful for SABC to interact with ICASA regarding ICASA's findings and there will be significant scope for the SABC to assist through the SABC's own research and market intelligence collected in relation to the areas that ICASA wishes to investigate further.

4.2 The nature of the markets in which the SABC participates are complex and require careful analysis and delineation – not least as a result of the SABC's specific mandate. As noted in the OECD report regarding Competition in Television and Broadcasting: "*The exact delineation of the relevant market will be determined by a number of factors. The nature of the relationships and the extent to which the broadcasting sector in a given country is integrated is one of them. While market definitions are likely to vary among individual broadcasting markets and across jurisdictions, on a general level one can differentiate between i) a wholesale market for 'raw content' ii) a wholesale access market to the infrastructure and iii) a retail market.*

Furthermore, competition authorities may identify markets more narrowly on the basis of:

- *The type of broadcaster (i.e. commercial vs public) and in particular the provision of pay-TV as opposed to free-to-air television;*
- *The type of platform that is used for transmitting the television broadcasting (i.e. cable, satellite, digital terrestrial, etc);*
- *The type of pay TV (pay-per channel, pay-per view, video-on-demand, digital interactive broadcasting) and*

- *The type of premium content that is provided, in particular premium sport channels and premium film channels. "*

- 4.3 In the executive summary of the OECD's Policy Roundtable regarding Competition Issues in Television and Broadcasting, 2013, the certain key points were raised regarding the competitive dynamic in this sector. Similar considerations are raised by ICASA in the Notice. These key points are:
- 4.3.1 The penetration of new technologies (platforms) and the dynamic effect of convergence is changing the way that consumers access and view audio-visual content;
- 4.3.2 The proliferation of digital devices, the migration of networks to IP data transmission, broadband penetration and increased bandwidth allows consumers to decode video services across a variety of fixed and mobile devices;
- 4.3.3 Barriers to entry have reduced because of the technological developments;
- 4.3.4 Network neutrality is important in the context of these developments and affects competition in television markets;
- 4.3.5 Convergence has resulted in regulatory uncertainty because uncertainty affects business planning, the deployment of new technologies, the choice of a profitable business model and sources of competitive products. The risk of inappropriate regulatory intervention in these circumstances is high.
- 4.3.6 Market definition is problematic in the context of these developments since market analysis must take into account the different variables specific to audio-visual products and service markets, like high fixed costs, low marginal costs, bundling, non-price competition, two-sided or multi-sided nature of markets.
- 4.4 The exercise of defining the relevant markets in which competition takes place and considering the competitive dynamics operating in those markets based on economic best practice is a fundamental step in investigating competition in the ICT sector. The fact that such an exercise is complex does not detract from its usefulness and it is submitted that the inquiry will not be able to attain its objective without such an analysis as a starting point. The Authority will be addressed on the need for proper economic analysis of all the markets involved in more detail during the anticipated engagement process for determining the exact scope and process of the inquiry.

5 PART THREE: FUNDING OF THE MANDATE

- 5.1 The SABC's public service mandate places unique pressures on its business model. It is clear that it cannot be treated the same as a commercial broadcaster. Some of the activities it is required to undertake would never form part of a commercial broadcaster's business. In fact, by undertaking some of its public services activities the SABC reduces pressure on commercial broadcasters to undertake these activities.
- 5.2 In order to fund its activities, the SABC may draw revenue from advertising and sponsorships, grants and donations, as well as licence fees levied in respect of licencing of persons in relation to television sets. The SABC may also receive grants from the State. Finally, it is specifically provided in the Broadcasting Act that commercial services division of the SABC must subsidise the public services to the extent recommended by the Board and approved by the Minister.
- 5.3 The SABC has previously submitted that legislation should be amended first to remove the divisions in such a way that the SABC can still deliver on its public service mandate from both programming and finance point of view, without having to use divisions as such. The divisions will also further complicate the platform structure in a DTT environment where there needs to be programming flexibility across channels. This will mean the SABC giving an account on how much public service programming it broadcasts and the related expenditure thereof. Through regulation the Authority should determine the criteria or guidelines for defining public service mandate vs. commercial service mandate.³
- 5.4 Ultimately the public interest mandate fulfilled by the SABC means that government funding on public broadcasting service is essential, particularly in the digital era. In light of the fact that the SABC is required to offer its services to all citizens in all the official languages, play a developmental role in the creative industry, offer unprofitable content such as sports and offer content which educates, informs and entertains, it is vital for government to ring fence funds for public broadcasting service. Furthermore, the SABC should also be able source funding from the Universal Service Fund (USF).⁴
- 5.5 The current collection of TV licence fees are governed by section 27 of the Broadcasting

³SABC's Submission on the National Integrated ICT Policy Green Paper for Public Comment 31 March 2014 at page 18.

⁴SABC's Submission on the National Integrated ICT Policy Green Paper for Public Comment 31 March 2014 at page 23.

Act. Section 27 makes payment of a television licence a statutory obligation and it further provides that the collected funds should be used solely to fund the SABC public service mandate.⁵ Revenue from licence fees is allocated to the SABC's two PSB channels, SABC1 and SABC2. Television licence revenue also assists in funding the Corporation's full-spectrum PSB radio services in all 11 official languages.⁶ The SABC has made various suggestions as to possible revisions of the TV licence provisions and continues to advocate for change to the TV licence payment provisions in order to counteract non payment so that it may cover its public service mandate.

5.6 The SABC is still predominantly reliant on the commercial revenue, as this constitutes an estimated 80% of its annual income. The funding model of benchmarked countries, have been reformed in order that the financing of the public broadcaster be reliable and consistent. The importance of reliable and consistent financing cannot be understated, as the mandate of the public broadcaster has to be met by the SABC.

5.7 SABC's dependence on advertising revenue

5.8 If SABC had been funded 100% by the state, and was not required to source its own funding, it would not have needed to "compete" with other broadcasters for advertising revenue. However, its largest source of funding is advertising revenue and it accordingly sells advertising space on its radio stations and television channels in return for advertising revenue. Approximately 80% of its revenues are derived from advertising.

5.9 In various submissions made by SABC, it has referred to the effect of various regulations on competition within the broadcasting sector. These references have been made loosely in the context of SABC's desire to maintain a commercially viable operation, in light of the requirement that it must raise its own funds. Its desire to remain competitive within this context is motivated by its intention to ensure that as a public broadcaster, it will be secured of its proverbial place in the sun, in the changing ICT landscape. Viewers have access to various alternative channels through which to access content, such as social media and the internet, through which content is disseminated.

5.10 South Africa is the largest pay-TV market in Africa, with some 4.5 million pay-TV

⁵SABC's Submission on the National Integrated ICT Policy Green Paper for Public Comment 31 March 2014 at page 23.

⁶SABC's Submission on the National Integrated ICT Policy Green Paper for Public Comment 31 March 2014 at page 24.

subscribers, representing 58% of TV households in 2012. This number is expected to increase to 6.3 million by the end of 2017, a compounded annual growth rate of 7%, giving a household penetration rate of more than 74%, which is very high by regional – and indeed by global – standards. Apart from the current pay-TV operators in SA (MultiChoice and Top TV) several other companies have applied for licences to launch new pay-TV channels. The Authority will be issuing these licences once the move from analogue to digital broadcasting is completed.

5.11 In 2006, Cap Gemini predicted that DTT and Pay TV will continue to grow and take some audiences from FTA broadcasters (SABC and eTV). It was predicted that the advent of DTT and the growth Pay TV will result in the loss of audience share on the part of the SABC. It is therefore crucial for the Authority to consider and safeguard the viability of the SABC. This appeal is not founded on the desire of SABC to be insulated from competition but it flows from the appreciation of the fact that SABC's role as public broadcaster is under threat. This theme finds expression in various pieces of international research. The regulatory environment established by ICASA must be sufficiently flexible to allow SABC to adapt to changing circumstances.

5.12 The SABC submits that the current mixed funding model should be retained as most developed countries consider it as the most progressive model to deliver the public service mandate. The SABC submits that its public mandate should be funded by government and measures must be put in place to ensure that the Corporation accounts for the public funding. These measures could be outlined in the shareholder compact between the Minister of Communications and the SABC. The SABC could be required to conduct public feedback sessions every three years whereby it gives account on how public money was spent and how its programming can be more responsive to the needs of the public. Furthermore, this process could be monitored by the Authority.⁷

6 PART FOUR: THE REQUIRED REGULATORY ENVIRONMENT IN THE EVOLVING BROADCASTING SECTOR

6.1 The SABC is of the view that the policy and regulatory framework should create an enabling environment which allows the public broadcaster to perform and deliver on its mandate. SABC's very existence and viability depends on this and various participants in

⁷SABC's Submission on the National Integrated ICT Policy Green Paper for Public Comment 31 March 2014 at page 32.

the broadcasting sector, in turn, depend on the existence and proper functioning of the SABC as a public broadcaster.

- 6.2 Because of SABC's role as public broadcaster, SABC is well placed to comment on factors that may negatively affect the very fabric of the broadcasting sector and the financial viability of its participants. Without a broadcasting sector that is financially viable, in the sense that the participants are able sustain viable businesses, the pre-occupation with competition is meaningless.
- 6.3 The industry is one which by definition is considered to be one which cannot function in an unregulated and laissez-faire way; however misdirected or overly restrictive regulation can have unintended consequences. The dynamic nature of the broadcasting environment means that the parameters of regulation need to be flexible enough to adapt to the commercial and practical requirements faced by broadcasters.
- 6.4 The SABC submits the complexities of the competitive environment dictate that the Authority conduct market research prior to the licensing of any new player with significant market share potential. This process will avert failure to launch a broadcasting service or to break even in the sector. In other instances deregulation with a view of facilitating a light touch regulation for all broadcasters may be required to ensure the viability of existing broadcasters.
- 6.5 The SABC does not oppose competition in the broadcasting sector, but opposes the random introduction of new competition which is not supported by findings of a market research/analysis. The Authority had previously conducted market analysis prior to the introduction of new players and the SABC submits that this is not only necessary, but that it is the Authority's duty to investigate the viability of new entrants.⁸
- 6.6 In the context of the Broadcasting Digital Migration (BDM"), the period within which the SABC will provide simulcast service is still unknown. The Broadcasting Digital Migration Policy (the "BDM Policy") only provides for the digital switch-on date (01 April 2014) as per paragraph 2 of the Broadcasting Digital Migration Policy of December 2013 (as amended). The dual illumination period, due to the vague regulations set by the Authority, may be a very short period and therefore the SABC infers that it may be an improper incubation period for new channels prior to the introduction of competition. It will be challenging for

⁸SABC's *Submission on the Draft Promotion of Diversity and Competition on Digital Terrestrial Television Regulations* (20 February 2013) at page 3.

the SABC to compete with new TV broadcasters, who do not have an obligation to simulcast and who will compete head-to-head with the SABC [Note: how do these new entrants compete with SABC? We need to understand SABC's concerns better and be careful not to create the impression that SABC opposes competition. Could we argue that the fragmentation of public broadcasting roles will detract from the attractiveness of the smaller broadcasters to advertisers and thus undermine SABC's ability to generate the same advertising revenue. The pie therefore gets smaller because of fragmentation and the revenue is diverted to other forms of advertising, away from broadcasting]. On numerous occasions the SABC has engaged with the Authority, indicating that the introduction of new broadcasters during the dual illumination period threatens its financial viability as the public broadcaster. In the digital environment, the SABC will have numerous channels which will require content and the resourcing of these channels is critical for the success of digital migration.⁹

- 6.7 The SABC recommends that the current licensing model should be amended as it was tailor-made for the analogue environment. The SABC can deliver its services much better if the licensing model can be aligned to the digital environment.
- 6.8 During the DTT Regulations development process, the SABC proposed a framework that provides for global quotas for television rather than channel based quotas. That is, television as a whole would be obliged for instance to provide X number of children's programming rather than prescribing them for individual channels as is the current regulated process. This would allow flexibility in scheduling and more so assist the SABC to reposition the channels, incubate new channels and allow them space to grow in a DTT environment.¹⁰
- 6.9 The TV industry's whole premise – that audiences are actively engaged with a TV screen – has helped create South Africa's most lucrative advertising platform. But now that model needs to adapt to the new reality of TV as an increasingly ambient part of a multiscreen environment, one that is increasingly viewed in the background and is just one screen among many. New measurement metrics are essential to safeguard revenue levels.¹¹

⁹SABC's *Submission on the National Integrated ICT Policy Green Paper for Public Comment* 31 March 2014 at page 37-36.

¹⁰SABC's *Submission on the National Integrated ICT Policy Green Paper for Public Comment* 31 March 2014 at page 16.

¹¹SABC's *Submission on the National Integrated ICT Policy Green Paper for Public Comment* 31 March 2014 at page 10.

- 6.10 Importantly, these submissions are made against the backdrop of a realignment of ICT sector policies within a digital environment which is changing rapidly due to the convergence of technologies and the growth of internet access on fixed, and especially mobile platforms. In this changing environment, SABC envisages itself as a multiplatform content provider which delivers public service content that includes content gathering, creation, commissioning, curation, packaging and distribution.
- 6.11 In its submission dated 16 April 2012, regarding the review of regulations in preparation for digital migration, the SABC expressed the view that the Authority ought to embark on an independent regulatory impact assessment without placing reliance on the individual submissions from interested parties.¹² This view is reiterated in this submission in so far as the regulatory impact assessment will be relevant to competition and to the SABC's broader mandate.
- 6.12 The SABC submits that it is uniquely constrained in terms of local content regulations and non-attendance in respect of certain critical regulations, unlike other broadcasters which have more freedom to procure content that is attractive to audiences, thereby making channels more attractive to advertisers. Pay TV continues to grow in leaps and bounds as it now targets higher and lower LSMs and as a result FTA broadcasters lose their audiences. It is noted that consumer consumption of TV offering is driven by choice, quality and flexibility of content which is readily available on satellite offering.¹³ The SABC has therefore suggested prioritising the review of: The South African Local Content Regulations, Must Carry Regulations and Sports Rights Regulations.
- 6.12.1 The South African Local Content Regulations
- 6.12.1.1 Current TV and Sound local content regulations were developed for the analogue environment. The SABC has previously raised its concern that, in the current digital migration policy, the exemption from Local Content Regulations has been deleted. The SABC has submitted that all new channels should automatically be exempted from compliance with local content regulations in order for broadcasters to reposition themselves and retain current audiences.¹⁴ The SABC, in order to fulfil its mandate,

¹²SABC's Submission on *A Review of the Broadcasting Regulatory Framework Towards a Digitally Converged Environment* at page 4.

¹³SABC's Submission on the *National Integrated ICT Policy Green Paper for Public Comment* 31 March 2014 at page 9.

¹⁴SABC's Submission on the *National Integrated ICT Policy Green Paper for Public Comment* 31 March 2014 at page 9.

must be financially viable and this will require that it maintains and grows its audiences in order to maintain and grow advertising revenue.

6.12.1.2 It is imperative that the SABC enjoy similar freedoms to other broadcasters and suggests that a global content quota be applied on all digital channels as it currently applies to subscription broadcasting services. SABC submits that licence conditions and local content quotas should not be channel based because they stifle and erode the Corporation's competitive edge. The SABC has to have programming scheduling flexibility in order to remain viable and sustainable.¹⁵

6.12.2 Must Carry Regulations

6.12.2.1 No provision is made for the dual illumination period in the Must Carry Regulations. Clarity is needed here and the SABC submits that subscription broadcasters should carry SABC 1, 2 and 3 only on condition that parties be allowed to negotiate on commercial terms.

6.12.2.2 The SABC has also previously submitted that Must Carry Regulations could be onerous on small or niche Subscription Broadcasting Service ("SBS") licensees and that the regulations should not be applicable to new incentive channels, particularly in the dual illumination period.

6.12.2.3 SABC has on previous occasion submitted that the must-carry obligations result in pay-TV operators gaining access to sport content without being required to compensate SABC and this effectively subsidises their programming. SABC submits that market-related compensation must be paid for providing content to broadcasters pursuant to its must-carry obligations.

6.12.3 Sports Rights Regulations

6.12.3.1 The SABC has previously noted the need for the Authority to conduct an inquiry in order to deal with competition matters that affect sporting rights in the broadcasting sector and it has noted the Authority's concurrence that such an inquiry is urgently required.¹⁶ It is submitted that the current inquiry may present an opportunity to

¹⁵SABC's *Submission on the National Integrated ICT Policy Green Paper for Public Comment* 31 March 2014 at page 15.

¹⁶ SABC's *Submission on A Review of the Broadcasting Regulatory Framework Towards a Digitally Converged Environment* at page 10.

gather information in this regard, but that the inquiry is framed very broadly. Furthermore, as noted previously, any change in policy may affect the SABC's funding model and this may impact competition, rendering the present inquiry vulnerable to inconsistencies.

- 6.12.3.2 Nevertheless, the SABC has previously submitted that exclusive funding for sports rights is required by the SABC in order to offer the citizenry full access to national sports. The SABC has a mandate to broadcast developmental and minority sports which are unprofitable and still broadcast sports of national interest. All these programmes require of the SABC to have deep pockets and to fully deliver on the public mandate.¹⁷
- 6.12.3.3 Subscription broadcasters should not be allowed to “lock-up” rights for years because this arrangement hinders competition as other broadcasters are unable to access desirable content which could potentially make their programming attractive to audiences. This practice results in subscription broadcasters overpaying for content in order to extend its window of exclusivity and locking out competitors.¹⁸
- 6.12.3.4 The SABC believes that the current regulations should be reviewed with due consideration to the digital integration. In light of increased competition and the prospective further segmentation of advertising revenue, the SABC should be provided with the opportunity to offer increased advertising space (and therefore advertising minutes per hour) to product providers, in order to remain financially secure in an increasingly competitive environment. Section 60(4) of the EC Act, states that “subscription broadcasting services may draw their revenues from subscriptions, advertising and sponsorships. In no case may advertising or sponsorships, or a combination thereof, be the largest source of annual revenue”. Thus, the SABC is of the view that this provision should be retained and effectively monitored by ICASA to ensure that there is fair competition in the market for advertising by the television broadcasters.¹⁹

¹⁷SABC's *Submission on the National Integrated ICT Policy Green Paper for Public Comment* 31 March 2014 at page 44.

¹⁸SABC's *Submission on the National Integrated ICT Policy Green Paper for Public Comment* 31 March 2014 at page 44.

¹⁹SABC's *Submission on the National Integrated ICT Policy Green Paper for Public Comment* 31 March 2014 at page 46.

7 PART FIVE: SPECIFIC RESPONSES TO THE BROADCASTING RELATED ISSUES RAISED IN THE NOTICE WHICH HAVE NOT BEEN ADDRESSED IN PARTS ONE TO FOUR

7.1 Introduction of new competitors;

7.1.1 The SABC is of the view that the introduction of new satellite players means the fragmentation of the advertising pie. With multiple platforms available, advertising revenue would increasingly shift away from the SABC advertising space towards new media platforms.

7.1.2 It is therefore, submitted that policy should take into account challenges which broadcasters are going to face in the digital space.²⁰Regulatory parity should be employed to enable traditional broadcasters to compete with other content providers offered on various platforms.²¹

7.1.3 With regard to the channel authorisation process, as currently reflected in the Digital Migration Regulatory Framework, the application process for commercial broadcasters is administrative, without the need for a public consultation process. In contrast, the public broadcaster's application will involve the consultation process which tests if the proposed channel is of public value. The Authority would therefore take longer than a year to authorize new SABC digital channels and therefore commercial broadcasters would gain leverage over the public broadcaster. The disparity in this process should be addressed.

7.1.4 The SABC submits that the allocation of spectrum for broadcasting services should be futuristic and anticipate the broadcasting needs of the South Africans who still largely depended on TV and Radio for information and educational content.²²

7.2 The question whether the fact that broadcasters do not pay for spectrum gives them an unfair advantage in a converged environment or whether this advantage offsets the cost of local content regulation;

²⁰SABC's Submission on the National Integrated ICT Policy Green Paper for Public Comment 31 March 2014 at page 9.

²¹SABC's Submission on the National Integrated ICT Policy Green Paper for Public Comment 31 March 2014 at page 16-17.

²²SABC's Submission on the National Integrated ICT Policy Green Paper for Public Comment 31 March 2014 at page 38.

- 7.2.1 As the public service broadcaster, SABC submits that it already operates under funding constraints and to require it to pay for spectrum would further undermine its financial viability.
- 7.2.2 The fact that SABC struggles to address the free-riding problem in an analogue environment means that the cost of broadcasting cannot be passed on to viewers and other source of funding need to be used, such as advertisers. The public interest nature of its public broadcasting role therefore justifies that SABC does should not pay for spectrum.
- 7.3 The fact that multiple closed transactions are taking place between mobile companies and content developers outside any regulatory framework, while broadcasters continue to be subject to strict rules;
- 7.3.1 SABC's continued viability as a public broadcaster will depend on its ability to operate flexibly within the digital environment in order to compete for viewers and advertising revenue with alternative and unregulated forms of broadcasting.
- 7.3.2 The SABC opines that it is in the public interest for policy and regulation to manage and protect children from harmful content. It may not be within the Authority's jurisdiction to regulate internet content; however, there should be measures employed to protect children from harmful content offered on various platforms, including content offered through new media services. In the main control measures (such as encryption, pin codes and parental control) which seek to authenticate users are a regulatory necessity and are highly recommended. Thus, it is suggested that children should be appropriately protected from destructive content.
- 7.3.3 Furthermore the SABC opines that regulatory parity is necessary amongst content providers or broadcast-like services. In light of the fact that a highly regulated environment stifles innovation and disables traditional broadcasters from competing with new media services, it is submitted that regulatory parity should be employed in order to secure the viability of traditional broadcasters. In the case of a public broadcaster , it must still deliver on its broad and expensive public mandate, offer its services to all citizens, pay high spectrum fees and ensure that it remains financial sustainable, despite the constraints brought by heavy regulations and uneven playing fields amongst competitors.

- 7.4 The role that disruptive technologies, such as TV White spaces play in making the ICT sector more competitive;
- 7.4.1 TV White Spaces (TVWS) are vacant frequencies made available for unlicensed use at locations where spectrum is not being used by licensed services, such as television broadcasting. This spectrum is located in the VHF (54-216 MHz) and UHF (470-698 MHz) bands and has characteristics that make it highly desirable for wireless communications.
- 7.4.2 The availability of TV White Spaces (TVWS) technology is an opportunity for broadcasters to meet the demands of converged platforms. The technology could be exploited for better delivery of universal at an affordable connectivity rate to the public at large. Furthermore, in terms of the section 2(e) the Electronic Communications Act of 2005, as amended, the Authority should promote and ensure efficient use of the radio frequency spectrum. Thus, in the interest of efficient usage of radio frequency spectrum, the SABC seeks to venture into other platforms in order to improve its competitive edge and to fairly compete with new media services.
- 7.4.3 The technology is at its trial stages as an alternative platform for providing internet network; the SABC can heighten its public service delivery by diversifying its services through the utilisation of this platform in the provision additional services such as Mobile TV, VOD, IPTV and Audio Streaming. Broadcasters are already concerned that they have lost 56% of the UHF band due to the digital migration process (dividend 1 and dividend 2). Therefore, it is submitted that TVWS should be reserved and allocated to broadcasters for future broadcasting needs purposes.
- 7.4.4 In conclusion, the convergence and multiplatform developments, IPTV, VOD are the current and future delivery platforms which required internet connectivity. Therefore, broadcasters should be allowed to venture into TVWS considering that there is low penetration on internet in rural areas as this will also bridge the current digital divide. In summary, broadcasters must be awarded the TVWS licences in order to compete, diversify and offer affordable broadcasting services to the public. If TVWS could be reserved for broadcasters, it will be easy for the Authority to deal with complex interference matters that could crop up, especially since this technology model will co-exists with TV in the UHF band.
- 7.5 How competition can be introduced into the subscription television broadcasting environment;

7.5.1 The SABC still maintains that the BDM Policy acknowledges the need for new entrants but does not dictate the timeframes within which they should be introduced. It is the Authority's prerogative to determine the time and provide justifiable grounds through a market study before introducing new players. It is therefore recommended that new players should only be introduced after the dual illumination period.

7.5.2 The SABC wishes to outline the burden of digital migration for existing broadcasters as follows:

- The BDM Policy calls for the accelerated dual illumination period. This implies that the broadcasters must expedite digital migration and ensure that the signal covers both analogue and digital platforms. This is an unusual occurrence that must be fully supported and managed by the Authority.
- Broadcasters must reposition themselves during the transition; and also ensure that they retain their current audiences. This burden will be worsened by the introduction of new players who will compete with old broadcasters for their audiences.
- The migration of incumbent broadcasters will be very costly, hence the call for incentivisation of existing broadcasters worldwide. The existing players will incur major capital outlays, with no guarantee of a return in order to successfully migrate.
- Further, it cannot be easily determined from the outset the revenue and audience potential that new channels will have within the networks of the broadcasters. Instead it might have a negative impact, where there could be implosion or migration of audiences within the network causing audience fragmentation. RAI television in Italy experienced fragmentation of its audiences among its channels on DTT platform. Similar lessons could be learnt from other countries.
- New players will not incur migration costs nor experience fragmentation of audiences, instead their novelty can attract more audiences shared from incumbent broadcasters including the public broadcaster whose viability and integrity must be protected by the Authority given its role and mandate in society;
- The existing players will have to seek alternative revenue sources as the advertising pie will not increase but shrink.

- 7.5.3 It should be acknowledged that the existing broadcasters have to migrate for the national good and interest as the digital dividend will benefit the entire country. This is a massive inconvenience and risk to existing broadcasters and the Authority has a responsibility to ensure the viability of existing broadcasting services licensees before any new licenses are issued.
- 7.5.4 In terms of the Triple Inquiry Report ('Report'), the public broadcaster must serve all citizens of the country, irrespective of sex, gender, age, race, or culture. Furthermore, the services provided by the SABC should bring to the greatest number of homes the fullest possible range of programmes, including minority interests, and should address their needs as citizens primarily, rather than their preference as consumers.
- 7.5.5 The Report states that **“to protect the viability of public broadcasting services, the Authority will need to regulate the broadcasting environment as a whole, to ensure that each sector is viable and compete fairly”**. It further states that **“the notion of fair competition is central to the protection and viability of the broadcaster”**. It also acknowledges the fact that the viability of the public broadcaster is intimately related to its mandate and programme obligations. The same principles are espoused in the Broadcasting Act of 1999 as amended. The SABC amidst its mandate and programme obligations still has to retain its audiences which could be close to impossible during the digital transition period. Given the SABC's current funding model it is even crucial for it to attract a larger market share so as to generate sizable advertising revenue.
- 7.5.6 Existing broadcasters will be required to maneuver into the accelerated dual illumination period within the unspecified period and under strict time constraints, which could be shorter or longer. But the BDM Policy seems to imply that the dual illumination process will be shorter. The survival of the existing broadcasters is under threat with the proposals of introducing new players during the accelerated dual illumination period. It is also uncertain whether existing broadcasters will be able to retain their current audiences, let alone attract new ones. This factor is exacerbated by the complexities of the South African demographics with a range of competing programming needs, and eleven official languages.
- 7.5.7 International precedent indicates that it takes a long time to fully migrate to the digital environment, even for developed countries such as the United Kingdom, which took 14 years to migrate, Spain, took ten years. The reason for a gradual and slow take-up is

because consumers want more benefits in order to migrate into DTT. Creative strategies of attracting consumers must be employed and should be a collective effort by government, the Regulator and broadcasters.

7.5.8 For those African countries that have already launched their DTT services, there seems to be a very slow and gradual take-up of digital services. Mauritius has proven to be an exception to this trend as it has managed to fully migrate to digital, but experienced problems with non-conformant Set-Top-Boxes entering that market.

7.5.9 In a nutshell, the Authority's quest to introduce competition, particularly, individual broadcasting service licensees, should be preceded and informed by the findings of the market research which confirm that the market is ripe for new competition. As a result the success of existing and new licensees will be safeguarded.

8 CONCLUSION

8.1 The SABC would like to thank the Authority for the opportunity to make this submission and would like to participate in oral hearings.