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Acting Director-General

Department of Communications and Digital Technologies

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15 February 2021

Dear Acting Director-General

**SOS COALITION AND MMA: JOINT SUBMISSION ON THE DRAFT WHITE PAPER ON AUDIO AND AUDIOVISUAL CONTENT SERVICES POLICY FRAMEWORK**

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, script-writers, 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 20 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 of 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 processes as they unfold to support the public interest in the outcomes of these processes. In this regard, on 28 January 2021, MMA hosted a roundtable with key stakeholders – including from government, industry, civil society and academia – to workshop the policy proposals being made as part of this process in order to ensure that the present submission is reflective of a wide range of considered views.

6. SOS and MMA welcome the Draft White Paper on Audio and Audiovisual Content Services Policy Framework: A New Vision for South Africa 2020 contained in Notice 1081 published in Government Gazette No. 43797 dated 9 October 2020 (the Draft White Paper). We note that this is long overdue and that our legal environment in respect of electronic communications regulation was last updated in 2005 with the passage of the Electronic Communications Act,

2005 (the ECA) but that, in reality, the last time our broadcasting environment was thoroughly overhauled was before the transition to democracy with the passage of the Independent Broadcasting Authority Act, 1993 (IBA Act). Essentially the key provisions of the IBA Act were simply transported into Chapter 9 of the ECA so no overall legislative upgrading to the broadcasting sector has been done for 28 years or so.

7. The SOS Coalition, in particular, being a membership body has members that are drafting their own separate and detailed submissions on those aspects of the Draft White Paper that specifically pertain to them. Where appropriate, we will be making reference to such submissions in these.
8. We are of the view that it is important that a civil society voice be heard on various aspects of the Draft White Paper and so we will be responding to a number of issues raised therein. We do so not only because it is critical that a diversity of views and voices on issues that will impact every person in the Republic can be considered, but also because the policy that is adopted must have, as its default point of departure, our Constitution and the concomitant requirement that the public interest frames national policy. Thus, while it is critical that the key industry players' views are canvassed and considered, they must be balanced against the public interest, so as to avoid a clash of competing special interests.
9. We will also be pointing out to the Department of Communications and Digital Technologies (DCDT) where we believe that it can proceed to move ahead immediately with various legislative and/or regulatory amendments, subject to following the necessary procedures, of course, to manifest long-awaited changes that the sector has been clamouring for, for years if not decades. In this regard:
  - a. Certain of the policy proposals in the Draft White Paper are of the future-looking variety and will require more research, particularly as regards market implications and enforcement, before final policy decisions are taken thereon. This is particularly so in respect of the draft proposals regarding the licensing and regulation of online content services.
  - b. However, other policy proposals in the Draft White Paper are, essentially, backward-looking and our proposals to address long-standing problems/previous policy failures that have been identified in the broadcasting sector for years if not decades. Certain of these can be addressed through regulatory amendments that are entirely within the power of the Minister of DCDT and through proposed legislative amendments that the Minister is able to put before the National Assembly at any time.

We are of the view that where it would be possible to address problems raised in the White Paper sooner rather than later, this should be done on an urgent basis. We will identify those issues that we think need urgent attention, that is, prior to the finalisation of the White Paper. As a general comment, we note that in the process of finalising the Draft White

Paper, we would urge the DCDT to (i) ensure that the key recommendations are clearly and succinctly identified in a manner that makes the recommendations clear from the more general observations and discussions contained in the Draft White Paper; and (ii) provide a proposed roadmap, with suggested timeframes, of the next steps going forward for the implementation of these recommendations.

#### 10. AD SECTIONS 1 AND 2: INTRODUCTION AND EVOLVING AUDIO AND AUDIOVISUAL CONTENT SERVICES LANDSCAPE IN SA

- a. We note the contents of the Introduction of the section setting out where we find ourselves with regard to the audio and audiovisual content services landscape in South Africa, and the brief overview of the past 30 or so years in respect of broadcasting and electronic communications developments. These sections set out the context of the new policy framework. The Minister of DCDT (the Minister) has indeed made it clear, through numerous references thereto, that the Fourth Industrial Revolution (4<sup>th</sup> IR), which is a particular feature of her ministerial agenda, is front and centre of the policy initiatives driving the Draft White Paper. This is laudable and we support it.
- b. However, we note that the provisions of both of these sections appear to deal with the migration to digital terrestrial television (DTT) as if it had already happened, as if analogue switch off was a thing of the past, instead of an event that is hampering the country's ability to realise the digital dividend required for the 4th IR to begin, much less be a reality for the majority. As the Minister must be aware, South Africa is falling further and further down the index of universal and affordable Internet access as measured across the African continent. Our mobile data rates remain stubbornly high – and, as the Competition Commission detailed, “anti-poor” – and only two provinces, the Western Cape and Gauteng, have Internet penetration rates above 50%. As a country, we have failed to meet the 2016 access targets set in SA Connect much less those for 2020.
- c. SOS and MMA are concerned at the apparent glossing over of the failure, at an implementation level, of the migration from analogue terrestrial television to DTT and in our view, the final White Paper must set out a clear, implementable, policy framework for digital television access, digital sound broadcasting access and broadband Internet access, that are to be universal, meaningful and affordable for the people of South Africa.<sup>1</sup> In our view, it is clear that DTT, alone, is unlikely to be the future of digital television and the DCDT must take account of the fact that DStv decoders and satellite dishes (to mention just one satellite broadcasting operator) are currently in more than 8 million households

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<sup>1</sup> For more information about what comprises universal, meaningful and affordable internet access in South Africa, please see MMA et al, 'Universal access to the internet and free public access in South Africa: A seven-point implementation plan', September 2019, accessible at <https://internetaccess.africa/wp-content/uploads/2019/10/UA-Report.pdf>.

(out of a potential 12 million) and must feature as part of South Africa's transition to digital television. A clear recognition of this would then open up the debate about:

- (a) how to ensure access to existing satellite services by people in rural areas;
  - (b) how to ensure access to existing satellite services by public service programming content providers; and
  - (c) how DTT can be used, particularly in urban areas, to complete a digital television transition.
- d. SOS and MMA note the provisions of the bullet entitled *Regulatory Parity* in section 1.2.9 of the Draft White Paper. However, while we support the regulatory principle of technological neutrality to guide licensing and/or the imposition of public interest obligations, we think it critical to point out that the use of finite national resources, such as scarce radiofrequency spectrum, will always require a higher commitment to meeting public interest/social obligations than those services which do not use scarce spectrum or, indeed, do not use spectrum at all. In this regard:
- (a) For example, we think that public interest obligations in respect of linear broadcasting, should be higher on those broadcasters making use of scarce terrestrial frequency spectrum (a significant barrier to entry of competitors) than on those linear broadcasters providing their services over the public internet.
  - (b) As technology evolves, particularly in respect of the much-vaunted migration to digital television and digital sound broadcasting, the scarcity argument in favour of heavier-touch regulation will of course be greatly lessened, if not fall away entirely.
  - (c) However, until that happens, it cannot be an appropriate policy decision to treat a scarce spectrum-using broadcaster in exactly the same way as one would treat an Over-the-Top (OTT) linear broadcaster.

SOS and MMA note that this position is likely to put us at odds with many broadcasters, but we are of the view that it is not in the public interest, to scale-down public interest obligations currently imposed, to the bare minimum expected of OTT services.

- e. Taking a bird's-eye view of the Draft White Paper, we can summarise the overarching principles of the Draft White Paper as being to ensure:
- (a) universal access to public audio and audiovisual content services on all electronic media platforms providing a wide range of South African programming in all official languages;
  - (b) the integrity and viability of the SABC;

- (c) no undue interference in commercial activities in the audio and audiovisual content services market except in the case of market failure or a clear public interest requiring governmental or regulatory intervention;
  - (d) that audio and audiovisual content services cater for the needs of children, women, the youth and persons with disabilities;
  - (e) the promotion of Broad-Based Black Economic Empowerment (BBBEE); and
  - (f) encouraging the local production sector.
- f. We obviously support all of the above principles and aims, and we look forward to working with the DCDT throughout this policy development process and trust that we can be of service and assistance in this regard.

#### 11. AD SECTION 3: LICENCE FRAMEWORK AND THRESHOLDS FOR AUDIO AND AUDIOVISUAL CONTENT SERVICES

- a. SOS and MMA have a number of concerns regarding the proposals set out in this section of the Draft White Paper, which we see as being at the heart of the entire audiovisual content regulatory and policy framework set out in the Draft White Paper.
- b. As the DCDT may be aware, SOS and MMA have long campaigned for greater regulatory parity between broadcasters and OTT-providers precisely to avoid the kind of regulatory forum shopping that can occur if similar types of content are distributed over platforms that are subject to totally dissimilar regulatory frameworks. Content providers will, of course, avoid heavy-touch regulation in favour of light-touch regulation, if they are able to reach targeted audiences via technologies subject to light-touch regulation. This can skew the market and indeed the entire eco-system and lead to regulatory failures. Never-the-less we reiterate our arguments made in paragraph 10.d above regarding the problems of regulating terrestrial broadcasters making use of scarce spectrum in exactly the same way as OTT services, whether or not these provide linear as opposed to non-linear services.
- c. The thresholds that are at the crux of this section are set out in figure 8 on pg. 70 of the Draft White Paper. Certain of these thresholds are based on spectrum use and others are on annual income. In this regard:
  - (a) Spectrum threshold submissions
    - 1. We agree that scarce spectrum use is a key driver of the imposition of public interest regulatory requirements and obligations.
    - 2. However, we are concerned by the impact that this will have on the community broadcasting sector which is, as the draft policy proposes, to now be required to apply for and be subject to the licensing regime applicable for individual licences. Being subject to the individual

licensing regime is much more costly and onerous than being subject to the class licensing regime. Additional obligations include much higher administration fees, licensing fees, and Universal Service and Access Fund/Media Diversity and Development Agency fees.

3. The community broadcasting sector has traditionally been subject to a class licensing regime. While both MMA and SOS are aware that this has been a bit of legal nonsense (one cannot assign individual use of scarce terrestrial frequencies and their coverage areas on a class basis, nor licence conditions such as the format and language or identify of a service), there is no doubt that the community broadcasting sector is extremely weak and its future viability and sustainability is far from secure.
4. SOS and MMA note the undertaking made in section 3.3.6 of the Draft White Paper that the processes for community broadcasters acquiring individual licences “should be faster and less onerous than those applied to public and commercial broadcasting services” but the mechanics of this are not set out. Further, SOS and MMA are worried that this would undo the basis of the distinction between individual and class licences that has underpinned the ECA for the past 15 years.
5. Consequently SOS and MMA are of the view that the particular licensing issues facing community broadcasters making use of scarce terrestrial frequencies and the policy options proposed to address these, must be clearly and fully set out in the next version of the Draft White Paper to be issued for public notice and comment. The current proposals are simply too scantily set out for robust interrogation as it is simply not clear what is being proposed.

(b) Annual income thresholds submissions:

1. We agree that income thresholds (whether in terms of advertising, subscription or other income generating mechanisms) are an important basis for regulation.
2. Unfortunately, the income threshold provisions of the Draft White Paper are unclear and confusing.
3. In a number of interactions with representatives of the drafters of the Draft White Paper, including representatives of the DCDDT, it was made clear that the thresholds are applicable only in respect of income earned in the country. However, this is not clear from the actual terms of the Draft White Paper itself.
4. In section 3.3.12 for example, the Draft White Paper provides that “if the global size of the international (foreign-based) business is capable of affecting economic activity, the regulator may issue a licence

irrespective of the size of its South African annual turnover” (our emphasis). This is at odds with the oral statements made in certain of the public engagements made prior to the submission date.

5. Consequently the methodology for determining the financial thresholds must be clearly and unambiguously set out in the next version of the Draft White Paper for public notice and comment.
6. In section 3.3.11 of the Draft White Paper, the DCDT makes it clear that the threshold for individual licensing (R100 million) was pegged at double the annual income thresholds used to distinguish between big and SMME businesses in the mining sector. The rationale given for this is that “***the nature of entertainment sector where the costs of acquiring or producing content of very high would justify having a threshold that is at least double that of the mining sector***”. SOS and MMA are astonished at this statement. SOS and MMA are of the respectful view that the statement reflects a drawback in the Draft White Paper, namely, what appears to be the absence of appropriate research, economic modelling, and regulatory impact assessments that ought to be carried out by government prior to the issuing of such a significant policy statement.
7. SOS and MMA are of the respectful view that the financial thresholds can only be set on any kind of a rational basis if the necessary and relevant market related research and financial modelling have in fact been undertaken by people with the necessary qualifications and expertise as commissioned by government. Consequently, SOS and MMA trust that this will be done prior to the next version of the Draft White Paper being published for further public notice and comment.
8. Lastly, one of the most concerning issues regarding the financial thresholds, is the fact that they determine which licensing regime is to apply to a particular service but the enforcement of such a licensing regime is left up in the air.
9. In section 3.3.12, the Draft White Paper states that “***an interdepartmental task team will be set up to report to the Minister on mechanisms to ensure compliance by international (foreign-based) AAVCS who meet the licensing criteria but who do not have a physical business premises in South Africa and potentially refuse to apply for a licence. Potential compliance measures include international remedies, blacklisting, blocking the AAVCS at the level of ISPs, or requiring banks and/or credit card merchants to halt transfers of payments by South African***

***subscribers or advertisers to the accounts of non-compliant AAVCS.*** In this regard:

- a. SOS and MMA are of the view that this constitutes a draft policy which undertakes to investigate options with other governmental departments and make a further draft policy. And so SOS and MMA cannot comment usefully on the Draft White Paper's threshold proposals as the actual implementation and enforcement thereof remains unclear. In fact, it is not clear whether or not the threshold proposals will in fact be implementable and enforceable, taking into consideration issues of jurisdiction, resources and mandate. In our view, this is the single biggest weakness of the Draft White Paper because it means that the crux of the regulatory framework has not been sufficiently tested so as to form the basis of actual policy proposals. In determining the next steps in this regard, it is imperative that the DCDT and other stakeholders are cautious of unintended consequences that may reduce consumer choice, limit competition and stifle innovation.
- b. SOS and MMA are deeply concerned at the suggested potential compliance measures to enforce licensing obligations as so many of these constitute a denial of the right of access to expression and information protected under the Constitution of the Republic of South Africa, 1996 (the Constitution). The suggestion of blocking Internet signals on ordinary commercially available content would not just violate section 16(1) of the Constitution but would also be a violation of numerous of South Africa's international treaty obligations undertaken as part of its membership to the African Union. These include freedom of commercial activity, as well as freedom of expression and access to information obligations, which obligations are applicable online as well as off-line.

(c) Which Threshold Applies?

1. Another significant challenge with the licensing framework set out in section 3 of the Draft White Paper is that it is not clear which threshold trumps the other.
2. For example, if one is providing a service that does not make use of scarce terrestrial frequencies (for example satellite television broadcasting services or on-demand AAVC) and so would ordinarily require only a class licence but that service generates annual

revenues in excess of R100 million (or whatever the actual upper threshold turns out to be) and so requires an individual licence, which licence is to be required.

3. The Draft White Paper must set out, specifically, that if one qualifies for both a class and an individual licence, via different threshold bases, which particular basis is to be determinative of the licence category into which one would fall.
- d. Another issue that is critical for the Draft White Paper to clarify is whether or not the thresholds (however they are to be applied) are to apply to the online press – that is the online news and journalism media. This is a critical issue for both SOS and MMA as both organisations have the importance of media freedom at the heart of their respective public interest mandates. In this regard, certain individual members of the Press Council of South Africa (the Press Council) and of the South African National Editors' Forum (Sanef) are also members of SOS. They have shared with us their joint detailed submission on the view of the news media (as represented by those two organisations) on the Draft White Paper, a copy of which is provided herewith. SOS and MMA advise the DCDT that they are in full agreement with the contents of the Press Council and Sanef's submission and that their submission also represents the views of SOS and MMA as if the submission was specifically incorporated hereunder. For the sake of brevity we do not so incorporate the provisions but we request that our support of the Press Council and Sanef's joint submission is recorded. Consequently, in brief and in conclusion on this issue, we think it imperative that:
- (a) definitions used in the Draft White Paper be synced with definitions used in the Film and Publications Act, 1996, as amended by the Film and publications Amendment Act, 2019, with regard to OTT services;
  - (b) no licensing requirement of any kind can be imposed on the news media/press outside of the need to licence broadcast news media that makes use of scarce radio frequency spectrum which licensing requirement is recognised as necessary and commonplace under international human rights law; and
  - (c) the next version of the Draft White Paper to be published for public notice and comment, put forward detailed policy proposals to ensure that a portion of advertising revenue generated in South Africa on platforms which would not meet any of the three categories of AAVCS, which platforms would include, for example, Facebook and Google, be ring fenced to support public interest journalism as practised by the news media.

- e. On the issue of the sustainability of the community broadcasting sector, SOS and MMA are concerned at how few concrete policy proposals are put forward in the Draft White Paper. In this regard:
- (a) In section 3.5.8, the Draft White Paper makes reference to community broadcasters “not receiving funding from government” in relation to a discussion about signal distribution costs, one of the largest cost centres for the entire community broadcasting sector.
  - (b) However, SOS and MMA ask the DCDT to clarify what funding is currently available from government for community broadcasting services as it is not aware of financial support other than via the MDDA.
  - (c) SOS and MMA support the statement in section 5.2.6.5 of the Draft White Paper that “*Government should develop a framework to assist community...services with transmission costs*”. We are of the view that this is long overdue and are concerned at the failure to finalise the Draft Community Broadcasting Support Scheme announced by the forerunner of the DCDT many years ago.
  - (d) SOS and MMA are concerned about the statement in section 3.5.15 that community broadcasters “should remain accessible at local level only”. This statement is too broadly framed and does not take account of the fact that while there are indeed geographically-based community broadcasting services, which do serve a particular local community, there are also community of interest community broadcasters which community of interest might well be found nationally as well as locally. SOS and MMA consequently request the DCDT to consider ensuring that community of interest community broadcasting services are available to the entire targeted community of interest and not simply to a local geographic community. Indeed, as digital broadcasting does become a reality, there remains no real arguments to limiting community of interest-targeted broadcasting services to any particular local geographic area as this would undermine universal service and access goals. Indeed, we are of the view that this is actually recognised by the Draft White Paper in section 5.2.6.2 which distinguishes between community broadcasting programming “of local significance and communities of interest”.

## 12. AD SECTION 4: PUBLIC BROADCASTING IN THE NEW POLICY FRAMEWORK

- a. As the DCDT is aware, the public broadcaster, the South African Broadcasting Corporation (SABC), is a major focus of the work and the campaigns of both MMA and SOS. SOS was initially established to deal with the first major governance crisis to hit the SABC in 2007. Sadly, the work of the SOS Coalition and of its member organisations, including MMA, has

continued unabated with on-going executive interference in Board and management issues having characterised the past fourteen years.

b. The DCDT will be aware of SOS and MMA's public interest activism on behalf of an independent, public-interest focused SABC that has a strong public mandate and sufficient and sustainable funding to support such public mandate. In this regard:

(a) Both SOS and MMA launched the ground-breaking case of *SOS and Others v SABC* to ensure that a human rights-based interpretation of the Broadcasting Act was adopted by our courts and in this way has assisted in securing the long-term independence of the SABC from Ministerial interference in our jurisprudence.

(b) SOS and MMA have a history of bringing public interest-based complaints in relation to the SABC to support ethical journalism and media freedom including:

1. *SOS and MMA v SABC (2020)*, a complaint lodged at the BCCSA about the various violations of the BCCSA Codes that were made during the airing of the controversial Ace Magashule interview, judgment in which matter is still outstanding
2. *SOS and MMA v SABC (2018)*, a complaint lodged at ICASA's Complaints and Compliance Committee (the CCC) about the SABC's failure to notify its viewers that certain flighted content (a Ministerial interview) was sponsored content. Available at: <https://www.icasa.org.za/complaints-and-compliance-committee/sos-and-mma-vs-sabc-28-sept-2018-287-2018>
3. *SOS and MMA v SABC (2016)*, a complaint lodged at the CCC about the SABC's failure to provide for a public notice and comment procedures on its draft Editorial Policies. Available at: <https://www.icasa.org.za/complaints-and-compliance-committee/sabc-vs-sos-and-media-monitoring-09-december-2016-214-2016>
4. *MMA and SOS v SABC (2016)*, a complaint lodged at the CCC about the SABC's refusal to air protest visuals in the run up to the 2016 municipal elections. Available at: <https://www.politicsweb.co.za/documents/icasas-ruling-against-the-sabc>

- c. SOS has set out its Vision Document on the SABC which is available here: <https://www.soscoalition.org.za/> Further, in light of the funding hole that the SABC found itself in and the threatened executive interference on the issue of the s189 Retrenchment Processes that were/and are ongoing at the SABC, SOS developed a call to action for all key stakeholders that is, Parliament, the DCDT, Icasa and the SABC itself, setting our key policy and action imperatives to secure the public mandate of the SABC. In our view this document is a sufficiently important contribution to the Draft White Paper policy development process, that we set it out, immediately below, in full:

### **SABC at a Crossroads – A Call to Action**

#### **Noting:**

- 1) *The Covid-19 pandemic and the interconnected climate crisis means that the SABC and its public broadcast mandate are now critically urgent in meeting the information, educational and social needs and building community resilience of all who reside in South Africa.***
- 2) *Until the appointment of the current Board, the SABC paid minimal attention to the other huge shift being faced by the sector across the globe - the threats and opportunities presented by digital. Despite limitations on access to the internet, the future will be digital. This has already had profound impact on public broadcasters around the world and the SABC will not be immune to similar challenges.***
- 3) *The historical legacy of Parliamentary inaction, state capture and Ministerial interference in the SABC board and management affairs has seen the SABC in crisis for much of the past two decades.***
- 4) *The woeful public underfunding of the SABC: only 3% of its budget is met from direct public funding and 17% from television licence fees, forcing it to operate on a heavily commercialised basis, reliant on advertising, thereby undermining its public mandate and role as a public broadcaster in contributing to, as required by the Broadcasting Act, 1999 “democracy, development of society, gender equality, nation building, provision of education and strengthening the spiritual and moral fibre of society” and “safeguard, enrich and strengthen the cultural, political, social and economic fabric of South Africa”.***

#### **Further noting that:**

- 5) *The Treasury-backed operating model developed by the current management and approved by the board is heavily reliant on cutting costs and driving increased commercial revenue, including a greater reliance on advertising and strategic business partnerships with commercial media.***
- 6) *The ANC as ruling party, at several of its national conferences resolved to ensure that the SABC fulfils its public mandate as per the Broadcasting Act but its promises of increased state funding remain unfulfilled.***
- 7) *Sentech, which was previously a part of the SABC and unbundled into an independent commercialised SOE by government in 1995, charges the SABC over***

*R1bn or 14% of the SABC's budget per annum for transmission charges.*

- 8) The SABC's total annual budget of R7Bn is a small fraction of the state's annual budget, and additional public spending on the SABC could reap significant rewards in terms of meeting the country's development needs by way of support for educational, news, health and other public-focused content.*
- 9) The current expenditure of the SABC is at odds with its role as a public broadcaster. It cannot spend 42% of its budget on salaries and only 22% on content – this is the reverse ratio to all other broadcasters.*

*And believing that:*

- 1. The SABC must be serve the public interest in line with the Constitution, the Broadcasting Act, and the Electronic Communications Act to ensure that its content is progressive in nature as per its public interest mandate.*
- 2. The ruling party must be held to account and implement its resolutions and policies regarding public broadcasting, to ensure the health, education and well-being of our people are put before profits.*

*We therefore resolve to:*

- 1. Immediately embark on a joint campaign to ensure that the outcome of the SABC's operating model is not a further-commercialised SABC.*
- 2. Our campaign is a call to action and we will be engaging a number forums, including, Nedlac, Parliament, ICASA, the Department of Communications and Technologies, and the SABC Board and Management to ensure positive responses from the following key role-players:*

*2.1. From the SABC, we demand that:*

- its management and board set out a vision for public broadcasting that is focused on ensuring excellent local programming aimed at meeting the needs of the people of South Africa, both on-air and online*
- it develops a substantially increased content budget to attract and retain audiences while also preventing further job losses in the independent production sector*
- it right-size the organization so it becomes fit for purpose and engage in cost cutting only in the service of meeting its public mandate*
- staff retrenchments be done rationally, reasonably and in accordance with all relevant labour laws,*
- that the SABC opens up the airwaves to enhance public debate on all the radio, TV and social media platforms. This will reveal to the public the transparency and accountability of the board as a partner in resolving the long standing issues in the SABC.*
- it engage with civil society formations, representing the youth, the disabled, the working class, religious groupings, other interested stake-holders, and the general public through public forums which are formally constituted and regularly held to foster public accountability with regard to public mandate-content issues.*

*2.2. From government and Parliament, we demand that:*

- the direct public funding of the SABC from funds appropriated by*

***Parliament be significantly increased to 60% of budget by 2023 in line with repeated ruling party resolutions and be ring-fenced to support unfunded educational, news and health/Covid-19-related programming with a focus on meeting the developmental needs of the population***

- ***Sentech's signal distribution costs for public broadcasting be significantly reduced***
- ***they respect the SABC's independence and focus on enhancing the ability of the SABC to turn the desperate situation around.***

***2.3. From the Minister of Communications and Digital Technologies, we demand that she:***

- ***urgently publish draft amendments to the Television Licence Fee Regulations to ensure that providers of subscription television services collect the television licence fee from their subscribers on behalf of the SABC where subscribers cannot provide copies of an existing valid TV licence, thereby doubling the SABC's TV licence revenue***
- ***embark on a public consultation process with a view to developing policies to ensure that audiovisual content services provided or aggregated over the internet such as Amazon Prime, Netflix, Facebook and Google to contribute to our economy via appropriate taxation mechanisms which are ring-fenced to contribute to local content production***
- ***ensures that all people in South Africa have access to fast, cheap reliable broadband internet.***

***2.4. From ICASA, we demand that it review all regulatory processes, including subscription regulations, must-carry regulations, and sports-broadcasting regulations to support the public broadcaster's financial viability and public service mandate.***

- d. As a result, SOS' Vision Document and its Call to Action are foundational to our written submissions on section 4 of the Draft White Paper.
- e. We wholly endorse the suggestion contained in section 4.1.3 of the Draft White Paper concerning the transformation and amendment of the Broadcasting Act, 1999, into the SABC Act, 2021. We have taken the liberty of adding the proposed date of the new or amended Act because we believe that none of the policy proposals contained in section 4 of the Draft White Paper required to wait until the finalisation of the whole White Paper given the funding constraints experienced by the SABC and the need of government to act swiftly to secure its sustainability going forward.
- f. We particularly support the vision for the SABC set out in section 4.1.4 of the Draft White Paper as many of the itemised bullets concord with SOS's Vision Document and our Call to Action. In this regard, we particularly support the statement that "a strong, sustainable and independently-governed SABC continues to be critical in building and shaping South Africa as a democratic nation". In this regard, we reiterate SOS's long-standing call for an

amendment to Chapter 9 of the Constitution to provide for the constitutionally-mandated independence of the public broadcaster, by the insertion of a new section 192A in the following terms:

“Public Broadcaster

192A. Public Broadcaster. – National legislation must establish an independent national public broadcaster to provide broadcasting services in the public interest and in accordance with its national public broadcasting mandate set out in such legislation.”

Further, SOS and MMA would campaign for consequential amendments to be made to sections 183, 193 and 194 of the Constitution to refer to the public broadcasters required to be established in terms of section 192A.

- g. We support the proposals regarding the Charter and Objectives of the SABC being set out in the new the SABC Act more directly, particularly with regard to distributing non-linearly online. However, we wish to point out that there is no single part of the current Broadcasting Act in which the public mandate of the SABC is clearly set out in a single consolidated matter. We think that this is a failing of the existing legislation and we wish to recommend to the DCDDT that it considers including our Vision Document’s suggestions in this regard (updated to take account of non-linear platforms in line with its existing policy proposals), which suggestions are set out in Annexure C to our Vision Document and which we set out immediately below, in full:

*Appendix C: Proposed Charter for the SABC*

*The SOS Coalition proposes that a Charter such as the following be adopted subsequent to*

*extensive debate and discussion with citizens, audiences, interested stakeholders etc.*

***The Charter of the Corporation sets out the public mandate of the SABC, which public mandate is to:***

***Promote the values of the Constitution and for this purpose to:***

- a. Contribute to building democracy.*
- b. Promote respect for freedom of expression.*
- c. Offer a forum for democratic debate.*
- d. Reflect a range of opinions and of social, political, philosophical, religious, scientific and artistic trends.*
- e. Reflect regional diversity.*
- f. Give a voice to the poor and marginalised.*
- g. Contribute to the development of an equal society, where all reach their full potential regardless of race, sex, social status, gender, ethnicity, age, culture, political belief, religion and sexual orientation.*
- h. Safeguard, enrich and strengthen the cultural, political, social and economic fabric of the country.*
- i. Reflect both the unity and diverse cultural, political, social and economic fabric of the country.*
- j. Develop a strong and committed public broadcasting service that will service the needs of society.*
- k. Ensure that public broadcasting services that meet the highest international technical standards are available to all.*

**Provide the public with programming of the highest quality and for this purpose to:**

- a. Set industry standards for innovation, excellence, and creativity.
- b. Provide, in its public broadcasting services, radio and television programming that informs, educates and entertains.
- c. Provide a plurality of news and public affairs programming that:
  - i. Meets the highest standards of journalism.
  - ii. Provides fair, unbiased and explanatory analysis that is independent of those wielding public power.
  - iii. Covers events in the country, Africa and the world.
  - iv. Gives voice to the disempowered and the marginalised.
- d. Ensure that public broadcasting services provide a reasonable, balanced opportunity for the public to receive a variety of points of view on matters of public concern, including through citizen-generated content.
- e. Cater for a broad range of programming, including drama and documentaries that cater specifically for the programming needs of children, women, the youth and the disabled.
- f. Include significant amounts of educational programming that contributes to a shared consciousness and identity. It must be both curriculum-based and informal. Topics from a wide range of social, political and economic issues must include, but not be limited to, human rights, health, early childhood development, agriculture, culture, justice and commerce.
- g. Include national sports' programming.
- h. Ensure programming is drawn from local, regional, national, continental and international sources.
- i. Ensure that public broadcasting services comply with the code of conduct for broadcasting.
- j. Be responsive to audience needs and account to the public on how to meet these needs.

**Contribute to the development of the country's cultures, languages and local cultural**

**industries and for that purpose to:**

- a. Encourage the development of original local programming content.
- b. Enrich the cultural heritage of the country by providing support for traditional and contemporary artistic expression.
- c. Ensure that public broadcasting services provide a range of high-quality programming in all of the country's official languages to all citizens.
- d. Encourage the development of local content production throughout the country, particularly in marginalised regions.
- e. Nurture the country's talent and carry out research and development for the benefit of audiences.

- h. In light of the *SOS and Others v SABC and Others* judgment referred to above, it will be important to make certain amendments to the provisions of section 14 of the current Broadcasting Act to clarify, in section 14(2), that the executive committee is not only accountable to the SABC Board it is also appointed by the Board, acting alone. It is important for this amendment to be made to bring South Africa's public broadcasting legislation in line with the requirements of Principle 13 of the *African Principles on Freedom of Expression and Access to Information Declaration (2019)* which sets out, in its relevant part, principles governing public service broadcasters, and which include that:

- *Public broadcasters should be governed by a transparently constituted and diverse board which is protected from interference, particularly of a political or commercial nature.*
- *The senior management of public service broadcasters shall be appointed by and accountable to the board.* (our emphasis)
- *Editorial independence of public service broadcasters shall be guaranteed.*

- *Public broadcasters should be adequately funded in a manner that protects them from undue interference.*
  - *The public service mandate of public broadcasters should be clearly defined and include an obligation to ensure that the public receive adequate, politically balanced information, particularly during election periods.*
- i. We entirely agree with the proposals contained in section 4.2.2.3 of the Draft White Paper to the effect that there will need to be amendments to the television licence fee section, namely section 27 of the current Broadcasting Act to broaden the definition and the collection system for television licences and to strengthen enforcement mechanisms and penalties for non-payment. In this regard:
- (a) There is a need to do away with the old-fashioned and unworkable television licence fee collection system.
  - (b) This ought to be replaced by a Public Information Levy that ensures that all South Africans contribute to ensuring that quality news, information and entertainment is available, for viewers and listeners, both over the airwaves and online for all citizens.
  - (c) Such a Public Information Levy would reflect a recognition of the importance of an independent and well-funded SABC to the health of democracy and to which we all need to contribute to guard against the entrenching of an information divide between the elites and the masses when it comes to enjoying quality broadcast and online content.
  - (d) We note that section 27 of the current Broadcasting Act empowers the Minister to prescribe the necessary television licence fee. In our view, the Minister must continue to have the power to prescribe the amount of the proposed Public Information Levy, in the same manner.
  - (e) Further, we think it imperative that section 27 be amended to give the Minister broad regulation-making powers in relation to the collection of the Public Information Levy:
    1. from sellers and lessors of any AAVS-reception device, including, way of illustration: radio receivers, satellite dishes, television decoders, television sets, computers, smartphones, tablets and the like;
    2. from subscription service operators, including broadcasting subscription operators such as DStv, Starsat and Deukom, as well as on-demand AVCS such as Netflix;
    3. from pay per view on-demand AVCS operators such as Google Play, Amazon Prime;

so as to be able to secure that every household contributes, including, via third parties who are already securing payment from such the purchasers, lessees, subscribers and one-off customers and who will be in a position

to pass on the Public Information Levy directly to the SABC, hopefully improving the dismal collection rates currently being experienced by the public broadcaster. To be clear – we are not saying the levy is charged on every device. What we are saying is that the above sellers/operators be required to confirm that the person produces his or her household's Public Information Levy number (like a SARS tax number) to prove that the household is contributing its levy, failing which, the seller/operator requires the Public Information Levy to be paid at the point of sale, lease or contract and that its paid amount is paid over to the SABC.

- (f) We reiterate that the proposed regulations suggested above, ought to be developed and prescribed by the Minister as soon as the amendments to the Broadcasting Act to make it into an SABC Act have come into law.
  
- j. We wish to agree with the DCDT's statement in paragraph 4.2.4 of the Draft White Paper that "*the idea of a commercial division cross subsidising the public division has been a policy failure since inception*". Frankly, we have always campaigned for an end to the supposed that division of the SABC into public and public commercial services and are pleased to see our ideas being reflected in the Draft White Paper. Although it is not clearly set out in the Draft White Paper currently, we respectfully submit that it will be important for the proposed SABC Act to make it clear that the SABC is to provide public services only, whether on air or online, and in accordance with its revamped, updated and consolidated public mandate.
  
- k. Lastly, we wish to endorse the proposals contained in sections 4.2.4 to 4.3.5 of the Draft White Paper regarding the need to fund the unfunded public mandate and for "*a comprehensive overhaul of the SABC's funding model based on international best practices to ensure that the public broadcaster has adequate funds to meet its public mandate*". Indeed, as is clear from our Vision Document and our Call to Action, we have been calling for such an overhaul for over a decade now.

### 13. AD SECTION 5: CONTENT REGULATION AND AUDIO AND AUDIOVISUAL CONTENT SERVICES

- a. Proposals on ICASA as content regulator:
  - (a) SOS and MMA are concerned about the proposal contained in sections 517 and 518 of the Draft White Paper regarding amending section 192 of the Constitution to replace the word "broadcasting" with "audio-visual content services".

- (b) SOS and MMA have long campaigned for the broadening of section 192 but this must not be limited to being the “content regulator” as proposed by the DCDT.
- (c) This is because the independent regulation of other aspects of the electronic communications sector, including the licensing of spectrum use and the regulation of Electronic Communication Network Services (ECNS) and Electronic Communication Services (ECS), is critical to the overall independent regulation of audiovisual content services too.
- (d) SOS and MMA would support an amendment to section 192 of the Constitution in the following terms:

*“Independent Authority to Regulate **[Broadcasting]** Communications*

**192. [Broadcasting] Communications Authority.** - National legislation must establish an independent authority to regulate [broadcasting] communications in the public interest, and in particular:

- (1) to ensure fairness and a diversity of views broadly representing South African society with regard to audio and audiovisual services;  
and
- (2) to promote convergence and the efficient use of communications infrastructure, including the radio frequency spectrum, and services.”

Further, SOS and MMA would campaign for consequential amendments to be made to sections 183, 193 and 194 of the Constitution to refer to the Communications Authority required to be established in terms of section 192.

- (e) However, we would oppose the proposed wording change put forward by the DCDT.
- (f) Another issue that SOS and MMA find concerning about these sections in the Draft White Paper is that no mention is made of the proposed policy change to amalgamate the Films and Publications Board and the .ZA Domain Name Authority with Icasa. These were announced in December 2019 and we query why no mention of these is made in the Draft White Paper? In any event and as a matter of principle, SOS and MMA agrees with the proposed merger but only condition that the level of independence of the merged regulator is raised to the level currently enjoyed by ICASA in terms of the ICASA Act, and that the future of such independence is guaranteed in the amended section 192 which will be the case only if the proposed wording (or similar) put forward by SOS and MMA above, is adopted. Additionally, it

would be imperative to ensure that the merged entity is appropriately resourced and funded to be able to meet its mandate effectively.

b. Must Carry Obligations:

(a) SOS and MMA are concerned at certain of the provisions of section 5.2.7 of the Draft White Paper that deal with the Must Carry issue and reiterate that assumptions about the wide-spread availability of DTT are premature.

(b) In paragraph 5.2.7.6 of the Draft White Paper, the DCDT refers to the Must Carry provisions of the ECA and to the Must Carry Regulations prescribed by Icasa and correctly summarises the Icasa Must Carry Regulations as stipulating that such programming is to be carried “at no cost”. However, the Draft White Paper fails to make it clear that Icasa’s Must Carry Regulations are unlawful as they are *ultra vires* the provisions of section 60(3) of the ECA which specifies that “The Authority must prescribe regulations regarding the extent to which subscription broadcast services must carry, subject to commercially negotiable terms, the television programmes provided by public broadcast service licensee” (our emphasis).

(c) We are concerned at the proposal contained in section 5.2.7.14 that the channels of the SABC “may not be exclusive to a single subscription audiovisual content service” as we think this contradicts and undermines the conclusions correctly drawn by the DCDT in paragraph 5.2.7.12 that talk about the need to guard against preventing “the public broadcaster from commercially negotiating retransmission consent agreements for its channels and programmes”.

c. Protection of Children and Consumers:

The provisions of paragraph 5.3 of the Draft White Paper have been dealt with in depth by the Press Council and Sanef in their joint submission and we agree with their proposals in this regard as if specifically incorporated herein. In particular, both MMA and SOS have had occasion to lay complaints at both the BCCSA and at the Press Council against the same respondent and regarding identical AV content but which require separate adjudication because the content was broadcast and made available online and the BCCSA and the Press Council have, respectively, exclusive jurisdiction over broadcast content vs online content distributed by their members, even if the member and the content are the same. The need for comprehensive platform-neutral self-regulatory code for print, broadcast and online content is clear.

d. Commercial Communications:

SOS and MMA do not have a great deal of input on this issue except to point out that MMA has extensive experience (as the DCDT is aware) of operating its disinformation reporting platform: <https://www.real411.org/> . Consequently, we feel it incumbent to point out to the DCDT that the issue of disinformation regarding political campaigning and advertising (whether online or otherwise) referred to in section 5.4.1 of the Draft White Paper is in fact already addressed in detail in terms of the Electoral Act, 1998 – specifically section 89(2) thereof, which makes it an offence to disseminate intentionally false information relating to the conduct or outcome of elections – and the Electoral Code of Conduct contained in the Electoral Act – which is binding on all candidates and political parties contesting an election.

#### 14. AD SECTION 6: SUPPORT OF DOMESTIC AUDIO AND AUDIOVISUAL PRODUCTION AND CREATIVE INDUSTRIES SECTOR

- a. MMA and SOS welcome the comprehensive discussion on the various ways in which the local AV production and creative industries sectors can be supported in the Draft White Paper, including through local content quotas. This is a critical issue for SOS and MMA as both organisations have always campaigned for local content and independently-produced local content to feature prominently on broadcasting services. We support the extensions of obligations in this regard to qualifying AVCS.
- b. The Independent Producer's Organisation (IPO) are members of SOS. They have shared with us their detailed submission on Section 6 of the Draft White Paper, a copy of which is provided herewith. SOS and MMA advise the DCDT that they are in full agreement with the contents of the submission produced by the IPO and that their submission also represents the views of SOS and MMA, as if the submission was specifically incorporated hereunder. For the sake of brevity, we do not so incorporate the submission, but we request that our support of the IPO's submission is recorded as if it had been.

#### 15. AD SECTION 7: OWNERSHIP, PLURALITY, COMPETITION AND INVESTMENT

- a. MMA and SOS are broadly supportive of the suggestions in sections 7.1.8.1 and 7.1.8.2 as we agree with the analysis of the DCDT as contained in the Draft White Paper that the ownership and control restrictions imposed in terms of the IBA Act in 1993, are no longer appropriate nearly 30 years later.
- b. However we have identified a number of issues with regard to the proposals in respect of qualifying foreign-operated qualifying linear broadcasters that we believe to be unworkable for being impossible to implement. In this regard:

- (a) In paragraph 7.1.7.5 the Draft White Paper proposes that the provisions of the Broad-based Black Economic Empowerment Act, 2003, and the relevant Charters and Codes of Good Practice (in our sector the ICT Charter), will continue to apply in respect of determining qualification criteria for the issuing of licences or other authorisations. With great respect, obligating a 30% Black (defined as relating to qualifying South African nationals only) ownership requirement on AVCS such as Netflix, Amazon Prime, Google Play or on a foreign-based linear streaming service is, in our view, unworkable and will be simply ignored by these companies. For example, Netflix has a market capitalization \$246.95 billion, thirty percent of which would be \$74.16 billion or over a Trillion Rand, Netflix has the smallest market capitalization of the multi-national tech giants. Suffice it to say, the idea of imposing South African BBBEE-ownership requirements on these companies is, in our view, a non-starter.
- (b) Similarly, in paragraph 7.2.3, the Draft White Paper proposes to cap all non-AU foreign ownership of qualifying linear AV broadcasting services (note which include linear services provided online, including foreign-originating services) at 49%. Again and with respect, obligating a ceiling of a non-controlling 49% stake for foreign ownership in a foreign-based-owned-and-operated linear AV broadcasting service provided over the internet is, quite simply, a non-starter. Such an obligation will simply be ignored and will not be enforceable.
- c. We support the ownership obligation suggestions contained in sections 7.1.7.5, 7.2 and 7.3 of the Draft White Paper provided they apply linear broadcasters making use of scarce spectrum (as per a South African radio frequency spectrum licence) only. There is no basis for such restrictive ownership requirements on foreign-owned services that do not make use of scarce national resources.
- d. We would also note that while we support the innovative proposals contained in section 7.3 regarding African Union ownership linear broadcasters making use of scarce spectrum (as per a South African radio frequency spectrum licence) only, we think it important to stress that this should be implemented only if the arrangements were reciprocal otherwise South Africa would be disadvantaged as a result.

## 16. AD SECTON 8: DEVELOPING HUMAN CAPITAL, DIGITAL SKILLS AND DIGITAL MEDIA LITERACY

- a. MMA and SOS strongly welcome the inclusion of this section in the Draft White Paper, but are concerned that insufficient attention has been paid to how this can and should be

operationalised. MMA, for example, together with partners in the DCDT, Google and Facebook, run the Web Rangers programme, which is designed to empower young people with critical skills on how to use the internet and social media confidently and responsibly. While this programme currently operates across three provinces, it is crucial that programmes such as this be formalised within the school curriculum to ensure that all children are able to learn these skills and benefit from the opportunities that the internet can provide in respect of learning, self-development and self-actualisation.

- b. We make several submissions in this regard:
- (a) To date, there has been a patent lack of coordination in respect of skills development and digital media literacy. While different government departments and regulatory authorities hold mandates in this regard, the lack of coordination has meant that there is no one entity that has taken responsibility for the lack of coordinated approach or shortcomings in the roll-out of the skills development and digital media literacy programmes across the country.
  - (b) The Draft White Paper is remiss in not identifying the types of skills required. As noted by UNESCO, media and information literacy – a broad term that encompasses digital literacy – provides answers to the key questions that users of ICTs may ask themselves: how to access, search, critically assess, use and contribute content wisely, both online and offline; what the ethical issues are that surround the access and use of information; and how to engage with media and ICTs to promote equality, dialogue, peace, sustainability, freedom of expression and access to information.
  - (c) Importantly, the Draft White Paper should acknowledge that the skills required include both supply-side skills and demand-side skills. Supply-side skills include addressing the skills shortage in the public and private sector to meet the specialised needs of knowledge production necessary for innovation, such as engineering and technical skills to design, build and operate networks, services and content; software developers, designers, writers, programmers and editors to produce and supply digital content; and dedicated sectoral training for job creation, such as call centre operations and management through a targeted youth development programme; whereas demand-side skills include enabling national access and use of ICTs through instilling digital skills through the school curriculum programme; and developing a national digital literacy project aimed at those marginalised from ICT services. Furthermore, while technical and related ICT skills are essential, it is also critical for all persons to have relevant media and information literacy skills to meaningfully access the internet. These skills are life skills that need to be rolled out as part of the school curricula, as well as more broadly to persons who have not been exposed to such skills through

their schooling. Not only are these skills effective for enabling the public to exercise their rights effectively, they are also powerful in assisting the public to combat mis- and disinformation and to not fall prey to cybercrimes.

- (d) As noted in SA Connect: “There is now considerable evidence to demonstrate that inequality of access and use of ICTs and therefore the ability to deploy their full potential – is rooted in the unequal capabilities of individuals and groups, such as the poor, particularly women, those living in rural areas, persons with disabilities, and the elderly ... As ICTs become more complex, the ability to optimise their use correlates strongly with education and income. Those marginalised from education and therefore from employment and income are most likely to be marginalised from access to the type of communications services required to participate meaningfully in a modern economy and society. Therefore, strategies for inclusion in the information society and knowledge economy need to be central to national human development strategies. This needs to become a national priority and a core election of the national project of digital inclusion.” MMA and SOS would urge the DCDT to recognise the need to address the digital divide – which currently serves to exacerbate existing socio-economic divides – as a matter of urgency and priority, and provide concrete guidance as to how this is to be remedied.
- (e) In doing so, we would urge the DCDT to consider *inter alia* (i) introducing demand-driven digital skills curricula in education, apprenticeships and other youth skills development programmes; (ii) boosting the quality of teaching and training of digital skills; (iii) building links between digital skills training provers and employers to foster job placement; (iv) delivering or funding digital skills development programmes for youth, including programmes targeting young women; (v) equipping young entrepreneurs in the digital economy with digital skills to start and grow their own businesses; (vi) creating jobs for young people with digital skills; and (vii) organising or participating in global, regional or local campaigns to spark the youth’s interest in digital skills.

Thank you,

Sincerely



**Duduetsang Makuse and William Bird**