

Attention: Ms Adelaide Masemola

Director, Economic Analysis and Scenario Construction

ICT Policy and Strategy

DOC

Email: ictreviewpanel@doc.gov.za

15 June 2013

Dear Ms Masemola

WRITTEN REPRESENTATIONS BY KAGISO MEDIA ON THE ICT POLICY FRAMING PAPER

1. INTRODUCTION

1.1. These submissions are made by Kagiso Media Ltd ("Kagiso"), a company with a range of broadcasting and broadcasting-related interests as well as interests in on-line services, television content production and advertising. Kagiso thereby has a direct interest in the outcome of the ICT Policy Review Process.

1.2. In Notice No. 429 published in Government Gazette No. 36408 dated 24 April 2013, the Department of Communications ("the DOC") published its ICT Policy Review Framing Paper ("the Framing Paper" or "the Notice"). Written comments were invited to be submitted by 15 June 2013.

1.3. Kagiso thanks the DOC for the opportunity to make these written representations and requests an opportunity to make oral representations at any hearings held in respect of the Framing Paper.

1.4. At the outset, Kagiso wishes to stress that it applauds the open and transparent manner in which the DOC is going about the ICT Policy Process and in particular, Kagiso applauds and supports the expected process set out in paragraph 2 of the Notice, especially the development of a Green and White Paper. Kagiso is of the view that the ICT Policy Review Process is long overdue and that it is imperative that it be concluded before any wholesale amendment of existing ICT legislation takes place, whether with regard to broadcasting, electronic communications, infrastructure, regulation etc.

1.5. While Kagiso appreciates the opportunity to comment on all aspects of the Framing Paper it shall confine its comments to those areas in which it has real expertise, namely, the broadcasting sector and associated industries such as local content development.

2. INTERNATIONAL AND NATIONAL INSTRUMENTS WHICH MUST GUIDE THE DEVELOPMENT OF THE POLICY PRINCIPLES TO UNDERPIN THE ICT POLICY DEVELOPMENT PROCESS

2.1. Kagiso is of the view that it is imperative that the principles which are to underpin the ICT Policy Process going forward be derived from international best practise and, in particular, from international instruments, Charters and the like that pertain to the ICT sector, including broadcasting, ICT, electronic communication, freedom of expression, access to information, including:

2.1.1. the African Charter on Broadcasting, 2001, developed by UNESCO ("the African Broadcasting Charter");

2.1.2. the Declaration of Freedom of Expression in Africa, 2002; developed by the African Commission on Human and Peoples' Rights, a body established under the African Union ("The African Principles of Freedom of Expression Declaration");

2.1.3. Access to the Airwaves, Principles on Freedom of Expression and Broadcast Regulation, 2002, developed by Article XIX an international NGO working on freedom of expression issues ("Access to the Airwaves Principles");

2.1.4. the Southern African Development Community Protocol on Culture, Information and Sport, 2000 (“the SADC Protocol”); and

2.1.5. the WSIS Geneva Principles, 2003, adopted at the World Summit on the Information Society, hosted by the UN/ITU (“WSIS Geneva Principles”).

2.2. Kagiso is also of the view that it is imperative that the principles for the ICT Policy Review Process be developed in accordance with national instruments such as the Constitution, 2006 and the National Development Plan 2030. In this regard, Kagiso notes:

2.2.1. the provisions of section 192 of the Constitution which requires legislation to establish an independent authority to regulate broadcasting in the public interest to ensure a diversity of views broadly representing South African society; and

2.2.2. the statement from the National Development plan that in future, “the state’s primary role in the ICT sector will be to facilitate competition and private investment, to ensure effective regulation where market failure is apparent, and to intervene directly to meet specific social goals”¹.

3. KAGISO’S SPECIFIC COMMENTS ON THE FRAMING PAPER

3.1. First, Kagiso is unstinting in its support of the ideas behind the 14 principles articulated in the Framing Paper, namely:

3.1.1. South Africans have a right to freedom of expression;

3.1.2. South Africans have a right to a diverse range of content;

¹ Page 191, in Chapter 4 “Economic Infrastructure – the foundation of social and economic development” of the National Development Plan 2013 Our Future – Make it Work <http://www.info.gov.za/view/DownloadFileAction?id=172300> [Accessed 2 June 2013]

- 3.1.3. South Africans have a right to access a broad diverse range of information, opinion and news of relevance to their communities and lives;
- 3.1.4. South Africans have a right to quality communications infrastructure and services which enable economic growth, employment and wealth creation;
- 3.1.5. South Africans have a right to benefit from the ability of the communications sector to facilitate social development and improve the quality of life for individuals and communities;
- 3.1.6. South Africans have a right to celebrate their cultural heritage in the language(s) of their choice;
- 3.1.7. All sectors of the population have a right to equally enjoy and benefit from communication services;
- 3.1.8. All sectors of the population have a right to equally enjoy and benefit from communication services;
- 3.1.9. South Africans are entitled to communication services that reflect, respect and uphold constitutional and community standards and values;
- 3.1.10. South Africans have a right to privacy and to protection of personal information;
- 3.1.11. Government has a responsibility to maximise the overall public benefit derived from the use of public resources;
- 3.1.12. All South Africans are entitled to a quality communication system that facilitates innovation, fair competition and equitable treatment of all role players;
- 3.1.13. South African citizens and consumers are entitled to maximum transparency in how services are delivered and conditions under which they are delivered; and
- 3.1.14. South Africans have a right to an environment that is not harmful to their health or well-being.

- 3.2. However, in Kagiso's respectful view, there is significant and unnecessary overlap between a number of these principles, particularly in relation to: equality, the relationship between access to infrastructure and development, and universal access and service. This can lead only to confusion and therefore Kagiso submits that a number of principles expressing similar statements ought to be combined into a single coherent statement of principle on a particular issue.

- 3.3. Kagiso is also of the view that at least one principle, namely principle 14 which deals with the right to an environment that is not harmful to health or well-being, has application far beyond the communications sector and ought not to be part of the specific principles underpinning the communications sector as such issues are regulated by an entirely different Government Department under entirely different legislation.

- 3.4. Further, Kagiso is of the respectful view that a number of key foundational principles arising out of the international instruments governing the regulation of broadcasting referred to above, have simply not been sufficiently provided for in the Framing Paper. In some areas key areas are only touched on in passing. In this regard:
 - 3.4.1. Lumped together under the principle headed: Freedom of Expression, the Framing Paper merely states the obligations of the current framework, including: independent regulation, content obligations, and a three tier broadcasting system. In Kagiso's respectful view, each of these requires a statement of principle on its own, which statement is then threshed out.

 - 3.4.2. Secondly, Kagiso notes that the role of the public broadcaster is hardly mentioned in the Framing Paper and that this is a particularly egregious problem given the importance of the public information role of the public broadcaster and the fact that the institution has been beset by crises for years now.

 - 3.4.3. Thirdly Kagiso is of the view that insufficient attention has been paid to the principles which must underlie the commercial ICT sector (whether in respect of broadcasting, electronic communications services ("ECS"), or electronic communications network services ("ECNS")) and in particular to the need for vibrant pro-competitive landscape to be created therefor.

3.5. As a result of the above, Kagiso respectfully submits that the following nine discrete principles are specifically protected and provided for in taking the ICT Policy Process forward:

1. SOUTH AFRICANS HAVE THE RIGHT TO FREEDOM OF EXPRESSION, WHICH MEANS...

- a. **All South Africans must be able to exercise their rights freely to impart information and ideas so as to be able to participate actively in South African society.**
- b. **Freedom of the electronic press and other electronic media must be protected by law, including in respect of ensuring a diverse range of broadcasting services across all three broadcasting tiers.**
- c. **There is a need to ensure access by all South Africans to compelling news, information, education, entertainment and creative expression, across a range of platforms and services and in all South African languages.**
- d. **There is a need to ensure communication and conversations by citizens with each other and with Government, thereby ensuring a socially cohesive South African society.**
- e. **The communications sector as a whole must facilitate meaningful communication and robust debate.**
- f. **Using communications technologies to support communication, consultation, and participation in public decision-making.**

2. SOUTH AFRICAN HAVE THE RIGHT TO AN INDEPENDNTLY REGULATED COMMUNICATIONS SECTOR, WHICH MEANS...

- a. **All electronic communications must be regulated by an independent regulator.**
- b. **The electronic communications regulator must act in the public interest.**
- c. **The electronic communications regulator must act without fear, favour or prejudice.**
- d. **The electronic communications regulator must not be subject to political or commercial interference.**

- e. **The electronic communications regulator must have its independence guaranteed through the processes to appoint and remove its councillors.**
- f. **The electronic communications regulator must be accountable to the people of South Africa as represented by Parliament.**
- g. **The electronic communications regulator must have its independence guaranteed through appropriate funding arrangements which ensure its ability to perform its functions, including being able to retain licensing and administrative fees.**

3. SOUTH AFRICANS HAVE THE RIGHT TO A THREE TIER BROADCASTING ENVIRONMENT which means...

- a. **A three tier broadcasting system with public, commercial and community services all fulfilling different responsibilities.**
- b. **A community broadcasting sector which is characterised by:**
 - i. **the provision of both sound and television services to communities;**
 - ii. **both geographic and community of interest community broadcasters;**
 - iii. **participation in and control of broadcasting activities by members of the community which the service represents; and**
 - iv. **sustainable community broadcasting funding models including public private partnerships and public funding which does not result in political interference.**
- c. **A commercial broadcasting sector which is characterised by:**
 - i. **sustainable competition at all levels – sound and television, free-to-air and subscription;**
 - ii. **high levels of ownership and control by Black persons;**
 - iii. **flexible cross-media and other media ownership regulations which are tailored to market conditions and which are sufficiently flexible to ensure sustainable competition;**
 - iv. **national as well as regional commercial sound and/or television broadcasting services; and**
 - v. **pro-competitive measures being introduced to encourage new market entrants and to discourage the development of monopoly players in any service category;**

- d. **A public broadcasting sector which is characterised by:**
- i. **a public broadcaster, whose Board is independent and which is not subject to political or commercial interference;**
 - ii. **a public broadcaster whose Board's independence is guaranteed through the processes to appoint and remove its directors;**
 - iii. **public broadcasting content which promotes the public interest through a detailed public mandate contained in its Broadcasting Charter;**
 - iv. **a public broadcaster which plays a leading role in supporting innovation and content production in the broadcasting industry;**
 - v. **a public broadcaster which is accountable to the people of South Africa as represented by Parliament; and**
 - vi. **a public broadcaster which has appropriate public funding arrangements which ensure its ability to fulfil its public mandate contained in its Broadcasting Charter without being subject to commercial pressures.**

4. SOUTH AFRICANS HAVE A RIGHT TO ACCESS A BROAD RANGE OF INFORMATION, OPINION AND NEWS OF RELEVANCE TO THEIR COMMUNITIES AND LIVES WHICH MEANS...

- a. **Recognition that people need access to a broad range of diverse information and news at an international, national, provincial and local level to make informed choices about their lives.**
- b. **Recognition that people need for a range of sources of news, information, opinion and analysis that is relevant to audiences and users, across all platforms and all tiers of broadcasting services.**
- c. **Recognition of the right of individuals and communities to be heard and to be able to disseminate as well as to receive news, information and opinions.**
- d. **Recognition of the right of all to fair representation of their opinions and perspectives.**
- e. **Recognition of the fact that information plays a significant role in developing a sense of community awareness, cohesion and identity.**

- f. **An obligation on the public sector and public services to ensure access to information about their priorities, programmes and services.**

5. SOUTH AFRICANS HAVE A RIGHT TO CELEBRATE THEIR CULTURAL HERITAGE WHICH MEANS

- a. **Facilitating the right of all to tell their own stories and to create and share their own content.**
- b. **Using governmental production subsidies and international best practices regarding intellectual property to ensure that local producers of content are innovative in sourcing funding other than relying on broadcasters to commission works.**
- c. **Imposing appropriate content obligations on all broadcasters across all three tiers of broadcasters.**
- d. **Facilitating a broad range of local content programming from a diverse range of sources.**
- e. **Ensuring the growth of local cultural industries to meet the demand for local content, including in respect of sound, film and video production.**
- f. **Regulating the commissioning of local content to ensure the growth and diversity of local cultural industries.**
- g. **Ensuring a range of local content is available in a variety of South African languages.**

6. SOUTH AFRICANS HAVE AN EQUAL RIGHT TO BENEFIT FROM THE ABILITY OF THE COMMUNICATIONS SECTOR TO FACILITATE SOCIAL DEVELOPMENT AND IMPROVE THE QUALITY OF LIFE FOR INDIVIDUALS AND COMMUNITIES WHICH MEANS...

- a. **Recognition that universal access to affordable and reliable public postal services is essential and therefore reinforcing the importance of the South African Post Office while imposing obligations on it.**
- b. **Recognition that universal access to affordable and reliable public broadcasting, electronic communications and electronic communications network services is essential and therefore reinforcing the importance of public entities such as: Telkom, Sentech, the SABC, Broadband Infracore, ICASA and the Universal Service and Access Agency.**

- c. Ensuring nationwide availability of communications infrastructure, services and facilities, with particular attention to remote, impoverished and disadvantaged individuals and communities.**
- d. Recognising the right of access to quality communications services by all South Africans, both rich and poor, in urban and rural areas, including those disadvantaged by gender, disability or lack of literacy.**
- e. Encouraging all South Africans to use a wide range of devices and technologies so as to ensure optimal access to communication services and infrastructure.**
- f. Imposing specific obligations to ensure people with disabilities can access services (such as using sign language and braille in communications and ensuring access to facilities).**
- g. Recognition of the importance of redressing skewed ownership and management patterns throughout the communications sector through specific empowerment provisions.**
- h. Using communication services and applications to offer digital Government services enabling citizens to transact with Government at any time and wherever they are, to improve service delivery and to translate South Africa's Batho Pele principles into reality.**
- i. Using communications services and infrastructure to manage and optimise public service administration, including in respect of the management of administrative processes, developing secure databases, and monitoring and evaluating performance.**
- j. Using computers and other communication tools in schools and educational institutes through e-learning platforms providing for access to a wide range of educational content and teaching support and development services.**
- k. The development of e-health systems that support the integration, extension and co-ordination of quality health-care on a widespread basis.**
- l. The deployment of communication systems to help detect and combat crime.**

- m. **The use of communications technologies to monitor weather patterns and their effect on the agricultural sector and to provide early warning systems to manage natural disasters.**
- n. **Developing social and economic considerations that should be taken into account when planning, managing, allocating and assigning the radio frequency spectrum, including in respect of imposing obligations on users of such spectrum.**

7. SOUTH AFRICANS ARE ENTITLED TO COMMUNICATION SERVICES THAT REFLECT, RESPECT AND UPHOLD CONSTITUTIONAL AND COMMUNITY STANDARDS AND VALUES WHICH MEANS...

- a. **Protecting children from commercial exploitation and access to unsuitable content.**
- b. **Ensuring compliance by broadcasting, and electronic communications service licensees with self-regulatory Codes of Conduct overseen by the independent communications regulatory authority**
- c. **Exercising freedom of expression in a manner that does not unlawfully infringe other persons' rights to, among others, privacy, dignity and equality.**

8. ALL SOUTH AFRICANS ARE ENTITLED TO A QUALITY COMMUNICATION SYSTEM THAT FACILITATES INNOVATION, FAIR COMPETITION AND EQUITABLE TREATMENT OF ALL ROLE PLAYERS WHICH MEANS

- a. **Developing capable, effective and efficient processes and institutions to ensure a competitive communications sector.**
- b. **Ensuring that South Africa has the skills and capacity necessary to develop and build a quality and innovative communications system relevant and responsive to South African circumstances.**
- c. **Promoting open systems that facilitate innovation, fair competition and equitable treatment of all role players as well as increase access by citizens to a choice of services. Open systems include the concepts of interoperability, portability and open rather than proprietary standards.**
- d. **Ensuring that the communications sector promotes customer-oriented and technology neutral services.**

- e. **Ensuring that the communications regulator is empowered to impose pro-competitive measures to combat market failures in areas of the communications sector where there is a lack of effective competitive.**

9. SOUTH AFRICAN CITIZENS AND CONSUMERS ARE ENTITLED TO MAXIMUM TRANSPARENCY IN HOW SERVICES ARE DELIVERED AND CONDITIONS UNDER WHICH THEY ARE DELIVERED WHICH MEANS...

- a. **Protection must be afforded to consumers of communications services.**
- b. **Ensuring that consumers have access to the best possible information in respect of communications services, including:**
 - i. **what specific services are provided;**
 - ii. **the expected quality thereof;**
 - iii. **the conditions of service; and**
 - iv. **the costs to the user thereof.**
- c. **Ensuring that communications service providers develop complaints procedures.**

4. CONCLUSION

Kagiso thanks the DOC for the opportunity to make these representations on the Framing Paper and reiterates its desire to make oral representation at any hearings held. Please do not hesitate to contact the writer should Kagiso be able to be of any further assistance to the DOC.

Kind regards

Yours faithfully

Yusuf Nabee