

**etv comments and submissions on the Draft Must Carry Amendment
Regulations 2021 regarding the extent to which Subscription Broadcasting
Services must carry the television programmes provided by the Public Service
Licensee**

- 1 e.tv thanks the Independent Communications Authority of South Africa (“ICASA” or “the Authority”) for the opportunity to comment on the Draft Must Carry Amendment Regulations 2021 (“the Draft Regulations”) which seek to amend the Must Carry Regulations, 2008 (“the Regulations”). etv wishes to participate in any public hearings convened in relation to the Draft Regulations.

- 2 Must Carry obligations were originally introduced into the South African broadcasting landscape in 2008 when the Authority promulgated the Regulations. At the time, e.tv participated in the processes resulting in the promulgation of the Regulations. Unfortunately, notwithstanding e.tv’s stated position, the Regulations only dealt with the carriage by subscription broadcasters of the channels of the public broadcaster (the SABC). No mention was made of the obligation on subscription broadcasters to also carry the channels of other commercial free-to-air broadcasting licensees with public service obligations. Thus, the Regulations are titled “Regulations Regarding the Extent to which Subscription Broadcasting Services Must Carry the Television Programmes Provided by the Public Broadcast Service Licensee”. In the regulations, read with the Electronic Communications Act 36 of 2005 (“the ECA”) the Public Broadcast Service Licensee is defined as meaning the SABC.

- 3 It is submitted for the reasons set out herein, that the Regulations should not be limited to Public Service Broadcasting Licensees, but should be extended to other commercial free-to air broadcasters with public service obligations. Accordingly, the Regulations ought, regulate the extent to which Subscription Broadcasting Licensees must carry the television programmes of **all commercial or public free-to-air broadcasters** that are subject to public service obligations.
- 4 It is unfortunate that, at the time of promulgating the Regulations, the Authority did not accept the position which is widely accepted in many other jurisdictions, that the must carry obligations should not be narrowly prescribed and applied only to public broadcasters (in this instance the SABC) and not to other commercial free-to-air broadcasters as well. This is particularly so where such broadcasters have public service obligations and are required to make their signal available as widely as possible through the Republic with certain defined minima regarding population reach. Even more unfortunate, is that the Authority has not yet taken the opportunity now available to it to analyse what takes place in comparative jurisdictions as a basis to extend the must carry obligations and the Regulations to other commercial free-to-air broadcasters (particularly those with public service obligations) rather than limiting the Regulations to the SABC as the only Public Service Broadcasting Licensee. There is no rational reason for imposing such a narrow interpretation of the must carry rules as set out in the Regulations and Draft Regulations. The current process of amending the Regulations provides the Authority with the opportunity to do this and align the

must carry rules with what takes place in numerous other jurisdictions in the world.

- 5 In these submissions, the Authority is called upon to reassess and reconsider its position regarding the extension of the ambit of must carry regulations to all commercial free-to-air broadcasters and to consider the introduction of a “must carry, must pay” obligation. Suggestions are also made as to how this can be achieved with proposed amended wording to the Regulations read together with the Draft Regulations.
- 6 While e.tv did not make representations into the discussion document on the enquiry into the review of the Must Carry Regulations, 2008, its position regarding Must Carry obligations by subscription broadcasters has been made clear to the Authority on numerous occasions. Most recently, in its comments on the draft findings document in respect of the enquiry into the subscription television broadcasting services, e.tv made numerous submissions concerning subscription broadcasters must carry obligations. It again did so in relation to the draft White Paper on Audio and Audio Visual Content Services Policy Framework. Accordingly, prior to the Draft Regulations being finalised, e.tv requests the Authority to consider what is set out herein together with e.tv’s submissions on how the Draft Regulations could be amended to accommodate these submissions.
- 7 While e.tv acknowledges that section 60(3) of the Electronic Communications Act, 36 of 2005 (“the ECA”), empowers the Authority to prescribe regulations regarding the extent to which subscription broadcast services must carry, subject

to commercially negotiable terms, the television programmes provided by a public broadcaster, this provision, read together with the remaining provisions of the ECA and the ICASA Act do not limit the Authority's discretion and ability to also extend the Regulations to other commercial free-to-air broadcasters with a public service mandate. Indeed, for the reasons set out herein, they should be encouraged to do so.

- 8 Given that subscription broadcasters (and, in the current matrix of south Africa, this is dominated almost entirely by the monopoly MultiChoice has established), have few if any public service obligations, the only way to ensure that subscription broadcasters are benevolent towards the public interest, is to impose rules on them in terms of which they must carry and pay for channels which serve the public interest generally and have public service obligations placed upon them to achieve this purpose. To do otherwise, would give subscription broadcasters an unfair commercially competitive advantage where they too compete for advertising with free-to-air broadcasters in addition to having access to substantial subscription income.
- 9 Must-carry rules are a way in which the Authority can ensure that all viewers have access to free-to-air channels. Many of those receiving their television by means of subscription television (in this instance satellite television requiring a decoder and dish) will not have in place any other system of receiving free-to-air television (such as a terrestrial aerial) and if there are no must carry obligations, then a substantial portion of the population will be denied access to publicly mandated free-to-air television. In this regard, t satellite television is available throughout South Africa whereas terrestrial television is not. Accordingly, must

carry regulations function to support the concept of universal access to television. Moreover, as stated, there is no rational reason why this should extend only to the public broadcaster and not also to commercial free-to-air broadcasters with public service obligations. To do otherwise would create an arbitrary distinction and would be discriminatory. Equally, doing away with must carry rules would run contrary to the notion of universal access. In the context of etv, while its universal access obligation is not absolute, it must have a minimum population coverage of 77%.

- 10 It is instructive to compare the licences of etv, the SABC and MultiChoice.
- 11 e.tv's public service obligations are set out in its license. Many of these are similar in type to those imposed on the SABC although, as the SABC is the public service broadcaster, in many instances these obligations are greater for the SABC (particularly SABC 2 and 3). However, what e.tv's license shows is that much like the SABC, e.tv has language obligations which extend not only to news, information programming and children's programming, but also to drama productions. Again, much like the SABC, etv has local content obligations including the obligation to ensure that 45% of broadcast time consists of local television content. There are also numerous general programming obligations obligating requiring etv to broadcast certain amounts of South African drama, news and information programming and children's programming. The e.tv license further prescribes the languages in which such programming must be broadcast. Like the SABC, e.tv also has training and skills development / employment equality obligations.

- 12 Conversely, the MultiChoice license contains no such public service obligations. The only obligations placed on it relate to training and skills development; staff development and employment equity and the extent to which ownership must be by persons from historically disadvantaged groups. Even here, MultiChoice's obligations lag behind those of etv. So, for example, whereas etv is obliged to have a minimum 40% black employees (excluding Coloureds and Indians) and 35% women, all that is required of MultiChoice is that they submit an equity plan with race and gender targets. Similarly, its Training and Development obligations are nebulous and generalised focusing on the need to submit a workplace skills plan. e.tv, on the other hand, must participate in the development of the broadcasting industry by, amongst other things, supporting independent contractors from historically disadvantaged groups and promoting the development of such independent contractors. Moreover, e.tv is required to commission all programming (other than news and current affairs) from the independent production sector. No such obligation exists in the MultiChoice licence. Additionally, while e.tv must invest 5.5% of its total annual salary cost in staff training (escalating annually at the rate of inflation) no such obligation is imposed on MultiChoice.
- 13 Regarding the absolute requirement for must carry rules to continue to exist and to be extended to commercial free-to-air broadcasters with a public service mandate, the following table is instructive:

TOTAL TV HOUSEHOLDS	15 876 571	
TOTAL PAY TV HOUSEHOLDS	7 460 182	47%

TOTAL FTA TV HOUSEHOLDS	8 416 389	53%
TOTAL OPENVIEW TV HOUSEHOLDS	2 374 821	14,96%
TOTAL SAT TV HOUSEHOLDS	9 835 003	61,94%
TOTAL TERRESTRIAL TV HOUSEHOLDS	6 282 750	38,06%

Source :- BRC TAMS data October 2020.

- 14 The above table highlights that more viewers access television (including the free-to-air channels as the most watched channels on MultiChoice, the only pay tv operator with any traction) via pay tv/satellite (i.e., MultiChoice on the DStv bouquet) than via terrestrial tv aerials. The inescapable conclusion is that if must carry rules do not extend to e.tv as a commercial free-to-air broadcaster with a public service mandate, and MultiChoice ceases carrying e.tv, this will not only severely impact e.tv's ability to compete in the market and sell advertising (where audience size is king), but will deny a vast tract of the South African population access to e.tv in circumstances in which e.tv's programmes are amongst the most watched programmes on DStv. MultiChoice would have the power of squeezing etv out of the marketplace entirely.
- 15 While the public service obligations may differ between e.tv as a private free-to-air broadcaster whose only source of income is advertising, and the SABC who also receives licence fee revenue or government funding , it is clear from e.tv's licence conditions that it has substantial public service obligations of a type similar to those of the SABC (language, drama, news and current affairs, children's programming, training etc). Yet again this supports the notion that to

exclude e.tv as a commercial free-to-air broadcaster with substantial public service obligations from the must carry regulations would be arbitrary, irrational, unjustifiable and discriminatory.

- 16 The table above also highlights the failure of the digital migration process and the limitations of DTT as a viable distribution platform for free-to-air broadcasters. It is well known that the process of digital migration has been seriously delayed (it commenced some 14 years ago in 2006). As a result of this delay, a substantial number of viewers are watching free-to-air channels via satellite and not DTT (the total satellite television households currently make up 61,94% of the total television households (of which 47% are in respect of subscription broadcasting) while terrestrial television households only make up 38,06% of total television households). In mitigation of the fact that DTT is not a viable alternative distribution platform, and if, indeed, the Authority accepts that South Africa will rely on satellite as the platform for digital distribution of broadcasting (as an alternative or gap-filler for the lack of DTT penetration in the country), then it is clear that all satellite distribution platforms in the country should be required to carry all free-to-air broadcasters.
- 17 An argument has been put forward that “must carry” rules should be abolished in their entirety (rather than being extended to apply to all free-to-air broadcasters with public service obligations as proposed in these submission). e.tv strongly opposes this position as it would create the possibility for MultiChoice, as the dominant player in the subscription television broadcasting market, to arbitrarily switch off or refuse to carry other free-to-air broadcasters whether to gain a competitive advantage or otherwise. This would have a negative impact on

viewership and could deny a large section of the public access to such free-to-air channels. Moreover, as argued in various regulatory processes currently before the Authority and as set out above, the “must carry” obligations should extend to all platforms, which would be obligated to carry not only the SABC but also e.tv as a free-to-air broadcaster with its own public service obligations.

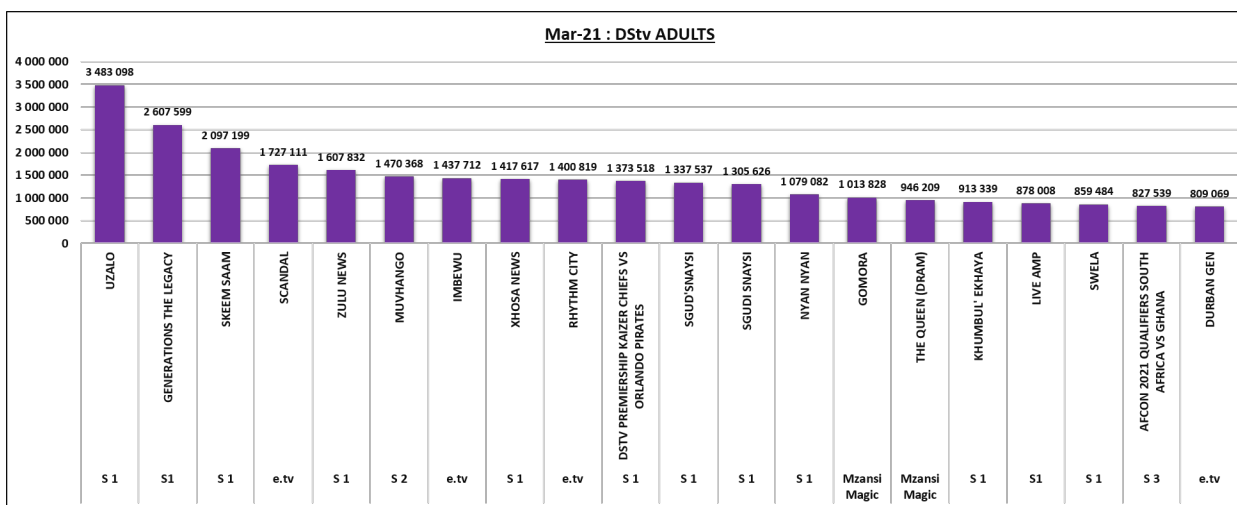
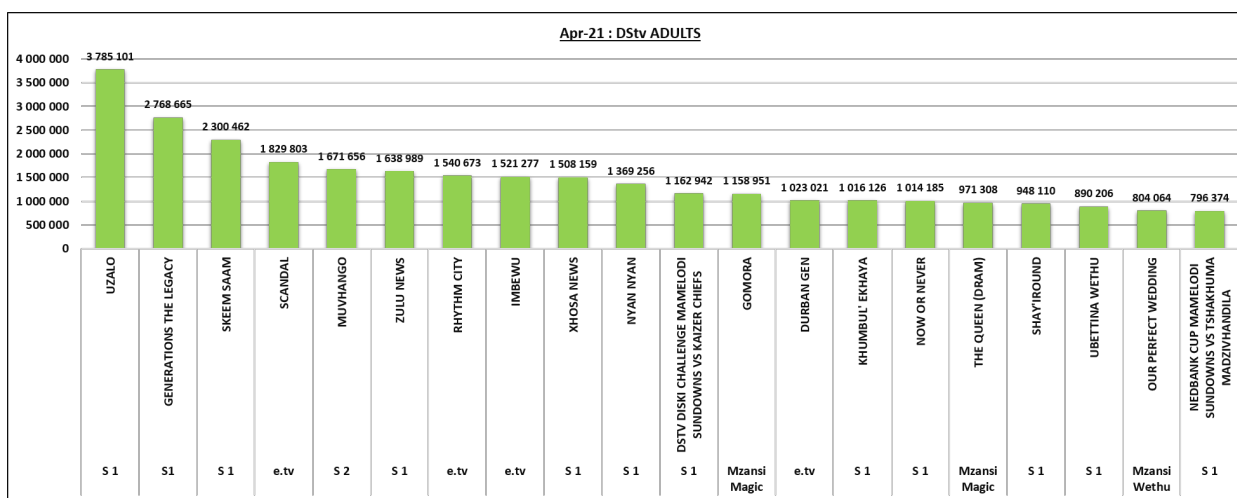
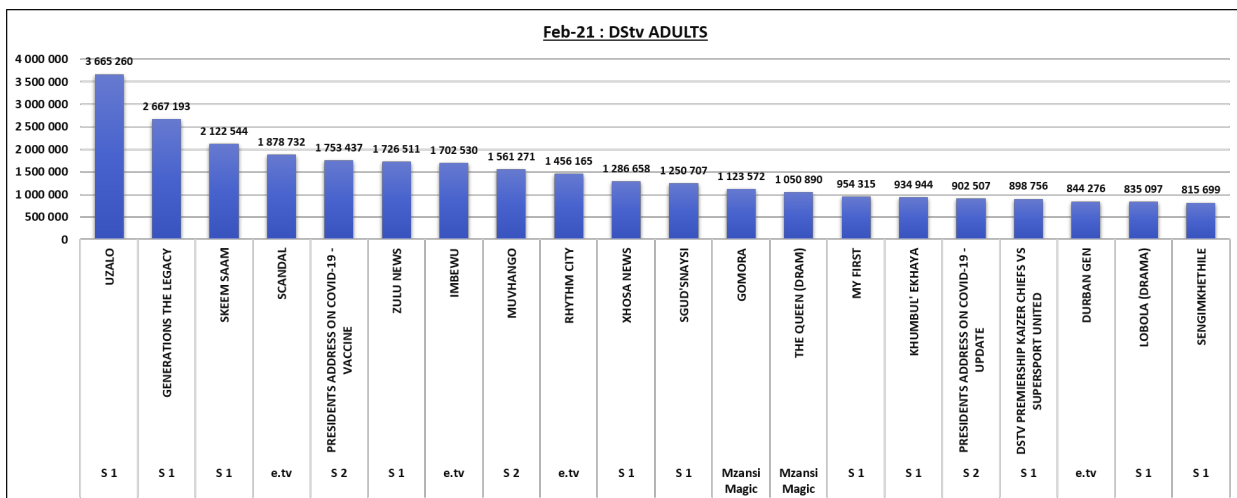
- 18 Importantly, SABC1 and e.tv as free-to-air channels are the most watched channels on DStv and accordingly drive audiences and subscriptions to DStv. Moreover, the programmes broadcast by e.tv (and the SABC for that matter) are amongst the most watched programmes on DStv. The below tables evidence the above submissions:

TABLE OF MOST WATCHED CHANNELS ON DSTV (FEB – APRIL 2021)

06h00 - 24h00											
DStv PLATFORM : ALL ADULTS CHANNEL RANKING											
FEBRUARY 2021				MARCH 2021				APRIL 2021			
Counter	Channel\Variable	AMR	TTVSHR %	Counter	Channel\Variable	AMR	TTVSHR %	Counter	Channel\Variable	AMR	TTVSHR %
1	SABC 1	485,290	13.65%	1	SABC 1	465,256	14.14%	1	SABC 1	499,185	14.47%
2	e.tv	319,361	8.98%	2	e.tv	263,149	8.00%	2	e.tv	289,098	8.38%
3	Mzansi Wethu	184,111	5.18%	3	Mzansi Wethu	175,966	5.35%	3	Mzansi Wethu	194,151	5.63%
4	Mzansi Magic	174,810	4.92%	4	Mzansi Magic	170,838	5.19%	4	Mzansi Magic	171,785	4.98%
5	Mzansi Bioskop	138,985	3.91%	5	SABC 2	127,742	3.88%	5	Mzansi Bioskop	134,828	3.91%
6	SABC 2	138,259	3.89%	6	Moja Love	125,204	3.80%	6	SABC 2	125,173	3.63%
7	eExtra	99,498	2.80%	7	Mzansi Bioskop	123,322	3.75%	7	eExtra	109,528	3.17%
8	MTV Base	95,707	2.69%	8	eExtra	100,966	3.07%	8	Africa Magic Epic	97,025	2.81%
9	Africa Magic Epic	94,229	2.65%	9	Africa Magic Epic	89,294	2.71%	9	MTV Base	94,638	2.74%
10	Cartoon Network	93,837	2.64%	10	MTV Base	87,855	2.67%	10	Cartoon Network	93,517	2.71%

(SOURCE : TAMS DATA/ARIANNA DAYPARTS FEBRUARY – APRIL 2021)

TABLE OF MOST WATCHED PROGRAMMES ON DSTV (FEB –APRIL 2021)



(SOURCE: TAMS DATA/ARIANNA PROGRAMMES FEBRUARY; MARCH; APRIL 2021)

- 19 SABC1 and e.tv are currently not compensated for being the most watched channels on the DStv platform and for, accordingly, for driving and attracting audiences to DStv thereby contributing to subscription revenue. It is accordingly submitted that, as the SABC and e.tv channels drive audiences to DStv (a subscription broadcaster) and as there are costs associated with creating the content which drives such audiences, the free-to-air channels who must be carried by subscription broadcasters in terms of the Regulations, also ought to be paid by the subscription broadcasters who carry and broadcast these channels. Hence it is submitted that the must carry obligation should be a “must carry, must pay” obligation.
- 20 By reason of what is set out herein, there is no rational reason why other free-to-air broadcasters should also not be carried by subscription broadcasters (based on the limitations as set out in the Regulations as amended following this process and the suggested draft wording to amend the Regulations as set out below). Particularly where such public service obligations exist, it would be discriminatory to exclude e.tv from the Regulations and would severely prejudice them in circumstances in which ICASA would wish to licence for success rather than failure. Again, it bears repeating, that unlike the SABC and Multichoice who have other sources of income, e.tv’s only income is that of advertising.
- 21 Importantly of the 840,757 all adult 15+ viewers (measured over a 24 hour period) who watch e.tv, 224,283 watch it on DStv while only 514,119 watch it terrestrially using a terrestrial aerial to receive the channel. This is evidenced in

the below table. Accordingly, if must carry does not apply to e.tv as a commercial free-to air broadcaster with public service obligations, over 25% of its viewers will not be able to view the channel if they only view television by means of a subscription decoder and satellite dish, if MultiChoice (or any other subscription broadcaster for that matter) elects not to carry the e.tv channel if it is not obliged to do so. This gives MultiChoice (or such other subscription broadcaster) an enviable competitive advantage thereby enhancing its already monopolistic position in the television broadcasting landscape with the ability to erode e.tv's ability to compete fairly in the advertising space on which it is totally reliant. The above figures are even greater for viewing between the prime time hours of 17:00 and 22:59. During this time period, of the 1 703 849 viewers who watch e.tv, 529 284 or approximately 31% watch it on DStv. These audiences would be denied access to the e.tv channel should MultiChoice have the unfettered discretion not to carry the e.tv channel.

ALL ADULTS 15+ AMR (000'S) - DAYPART 24 HOURS

Channel	Analogue - 000's	DStv - 000's	Openview - 000's	National- 000's
SABC 1	546,143	371,178	68,580	985,901
e.tv	514,119	225,283	101,355	840,757
SABC 2	209,116	104,472	51,040	364,628
eExtra	29,981	71,578	65,455	167,014
eMovies Extra		73,349	77,141	149,852
SABC 3	73,804	24,510	25,196	123,510
eMovies	15,727	27,994	42,160	85,881
Star Life		31,449	54,825	84,248
eReality	1,709		57,101	58,810
eToonz	9,395	6,744	28,853	44,992
Rewind	172		26,479	26,651
Glow TV		1,280	18,110	18,253
etv News & sport	56		11,714	11,770

(Source: Arianna, Day-parts, (02:00-25:59) Nov '20- Jan '21)

ALL ADULTS 15+ AMR (000'S) – DAYPART 17:00 TO 22:59

Channel	Analogue - 000's	DStv - 000's	Openview - 000's	National- 000's
SABC 1	1,149,946	973,704	165,947	2,289,597
e.tv	933,489	529,284	241,076	1,703,849
SABC 2	375,583	234,865	118,258	728,706
eExtra	50,973	123,575	148,229	322,777
eMovies Extra	79	106,990	111,244	218,313
SABC 3	123,300	41,505	40,714	205,519
Star Life		56,568	113,967	163,444
eMovies	21,493	44,093	63,004	128,590
eReality	714		95,947	96,661
eToonz	7,111	7,468	36,870	51,449
Rewind	271		42,648	42,919
Glow TV		3,317	41,827	42,091
etv News & sport	88		23,511	23,599

(Source: Arianna, Day-parts, (17:00-22:59) Nov '20- Jan '21)

- 22 Equally important, the Regulations need to ensure that the free-to-air channels (being the SABC channels and e.tv), continue to be available to Multichoice audiences when Multichoice turns off a subscriber's access to its services by reason of non-payment. To allow the contrary to take place would negate the concept of universal access. It is likely that viewers who watch the free-to-air channels on DStv do not have other satellite dishes or aerials which would enable them to watch these channels if Multichoice turns off such subscribers access to its services. They would thus be denied access to these free services. The same would apply to any other competitive subscription broadcaster.
- 23 It bears repeating and emphasis that given that free-to-air programmes are consistently the top shows on DStv and free-to-air channels, including e.tv are

the top performing channels on DStv, they drive audiences to DStv and hence assists them in establishing a strong market share for DStv. This would more than compensate Multichoice for the costs they allege they incur in carrying these channels and justifies a “must pay” provision being introduced into the Regulations.

- 24 In addition to what is set out above, the Authority has seen fit to impose must carry obligations on subscription broadcasters only where such broadcasters carry 29 or more channels. In view of the need for must carry obligations to fulfil an important public mandate and extending the purvey of free-to-air television to greater audiences, there is no reason why there should not be an additional channel added to a subscription broadcaster for each ten channels broadcast. This regulation should also be amended with the extent of a channel’s public service obligation determining the order in which such channel should be added to the subscription bouquet.
- 25 In the circumstances, should the Authority be inclined to accept the views set out herein, e.tv suggests the following amendments to the proposed Draft Regulations read in conjunction with the Regulations:

Amendment of Regulation 1

26 29 By amending the definition of “**Agreement**” in Regulation 1 of the Regulations – “**Definitions**” by adding in the words “*or a FTA Licensee*” after the words “...a PBS Licensee” where they appear in the definition.

27 By inserting the following after amended definition of “channel”:

“ ‘FTA LICENSEE’ means a free-to-air Service Licensee which has public service obligations.”

28 By amending the definition of “Must Carry” to read as follows:

*“ ‘MUST CARRY’ means the set of rules that obliges a SPS Licensee to carry the television programmes broadcast by a PBS **and** FTA Licensee.”*

29 By amending the definition of “Must Carry Channel” to read as follows:

*“ ‘MUST CARRY CHANNEL’ means the television programmes comprising a channel of **both the PBS Licensee and a FTA Licensee** to be added to the bouquet of a SPS Licensee in accordance with Regulation 4.”*

30 By amending the definition of “Non-Must Carry Channels” to read as follows:

*“ ‘NON-MUST CARRY CHANNELS’ means the television programmes comprising a channel of **either the PBS Licensee or a FTA Licensee** which the SPS Licensee voluntarily adds to its bouquet in the absence of an obligation imposed by these Regulations.”*

31 By amending the definition of “**Television Programmes**” to read as follows:

“means television programmes broadcast by a PBS or FTA Licensee to be carried by the SBS Licensee”

- 32 **By amending Regulation 2** of the Regulations as amended by the Draft Regulations– **“Purpose of the Regulations”** - by inserting the words *“and any FTA Licensee”* after the words “PBS Licensee” where they appear in section 2(a), (aA) and (b) of the 2008 Regulations.
- 33 By deleting the word *“PBS”* after the words *“All free-to air”* where they appear in amended regulation 3, **“Television Programmes to be Carried”**
- 34 By inserting the words “or any FTA Licensee” after the words “PBS Licensee” wherever they appear in **Regulations 3, 4, 5, and 6** of the Regulations as amended by the Draft Regulations.
- 35 By not deleting Regulation 4(4) of the Regulations as proposed in the Draft Regulations and retaining Regulation 4(4) of the Regulations.
- 36 **By deleting Regulation 4(5)** of the Regulations and replacing it with the following :

“A SBS Licensee must ensure that every tenth channel added to its bouquet is a Must Carry Channel. The order in which Must Carry Channels will be carried by an SBS Licensee will be determined by the Authority taking into consideration the on the public service mandate of each such channel, with priority being given to the existing terrestrial public and commercial television channels ahead of any digital incentive channels added pursuant to the Digital Migration Regulations.”

- 37 By amending **regulation 5** by replacing the words "twenty-nine (29) channels" with the words "*ten (10) channels*" where they appear in **Regulation 5(1) and 5(3)**.
- 38 By amending Regulation 6 read together with the proposed amendments in the Draft Regulations as follows:
- 38.1 By inserting a new sub-regulation 1 to replace the proposed sub-regulation 1 in the Draft Regulations to read as follows: "*Upon request by a SBS Licensee, a PBS or FTA Licensee must offer its Television Programmes contained on a Must Carry Channel to an SBS Licensee which is to be provided on commercially agreeable terms. The SBS Licensee is obliged to pay the PBS and FTA Licensee whose programmes must be carried by the SBS Licensee, an amount agreed upon by them. This amount, together with all other commercially agreed terms, must be reduced to writing in the Agreement*"
- 38.2 By inserting a new sub-regulation 2 to replace the proposed sub-regulation 2 in the Draft Regulations to read as follows: "*Any PBS or FTA Licensee whose channels must be carried by an SBS Licensee, must offer its Television Programmes which are contained in any Must Carry Channel, to the SBS Licensee within one (1) month of the conclusion of the Agreement or a determination by the Chair of the terms of the Agreement*"

- 38.3 By amending the proposed wording to sub-regulation (2A) as proposed in the Draft Regulations to read as follows: “ *The Agreement contemplated in regulation 6(2) above, must be concluded within 60 days from the date upon which a PBS or FTA Licensee offers a Must Carry Channel to a SBS Licensee*”
- 38.4 By inserting the following after Regulation after sub-regulation 6(2A) and to be renumbered 6(3): “*If the PBS or FTA Licensee and the SBS Licensee cannot agree on commercial terms for the purposes of concluding the Agreement, within the time period contemplated in regulation 6(2A), the matter shall be referred to the Chairperson for final determination of the commercial terms to be included in the Agreement. The Chairperson shall determine the procedure to be followed for purposes of reaching a decision, which decision shall be reached within 30 days of a referral to the Chairperson and which decision shall be final and binding on the referring parties*”
- 38.5 By renumbering Regulation 6(3) as Regulation 6(4)

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