

**MULTICHOICE SUBMISSION**

**DRAFT MUST CARRY  
AMENDMENT  
REGULATIONS, 2021**

**21 MAY 2021**

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## EXECUTIVE SUMMARY

- 1 With ICASA's publication of the Draft Must Carry Amendment Regulations, South Africa is poised to enter a new phase of Must Carry regulation. The existing Must Carry regime, in place since 2008, has been found to work well – the PBS channels have been carried uninterrupted on pay TV services since the Regulations came into effect, thereby ensuring that the channels are not "shut out" of pay TV and are easily accessible to subscribers. There have also been no disputes or findings of non-compliance. The universal access benefits have been well documented in both the Authority's RIA Report and in evidence provided to the Authority in the course of this inquiry.
- 2 Although Must Carry obligations are a restriction on pay TV broadcasters and limit their right to freedom of expression (the right to broadcast the channels they choose), and freedom of trade (the right to choose channels that are the most commercially favourable), MultiChoice does not oppose reasonable and appropriate Must Carry obligations in the advancement of universal access.
- 3 Even though the carriage of the SABC channels means the pay TV operator incurs the opportunity cost of not carrying its own channels or other channels from which it could draw revenue, it is an obligation MultiChoice has always accepted, as long as it is commercially viable to do so and provided the Regulations are reasonable, balanced and proportionate and do not impose an undue burden on pay TV licensees.
- 4 Notwithstanding the successes of the current regime, the Authority has now proposed certain changes to the Regulations. And with those changes comes a challenge - to ensure that the new regime is no less effective than the existing one and that the Must Carry Channels will continue to be carried by pay TV broadcasters on reasonable terms and so advance universal access. A risk exists that the public interest benefits delivered through the current regime could be reversed under the new regime.

- 5 As the Draft Regulations stand, several provisions are unworkable and/or unclear, and are likely to give rise to difficulties in implementation. We submit that certain amendments to the Draft Regulations need to be made in order to assist with their smooth implementation and to ensure that the gains achieved under the current Regulations are not undone. In particular, we are concerned that the following aspects of the Draft Regulations may cause some confusion and/or give rise to challenges in the implementation of Must Carry:
- 5.1 The purpose of the Regulations has not been updated in line with the RIA Report and the Findings Document, save for the addition of Reg. 2(aA). We propose amendments to reflect the principles underlying the Must Carry Regulations.
  - 5.2 Some terms are defined and/or used inconsistently and/or interchangeably with other terms. We propose some amendments to clarify and align key terms.
  - 5.3 The timing and sequencing of the negotiation framework is unclear, rigid and long-winded. We propose a simplified, clearer framework.
  - 5.4 Some of the substantive provisions are unclear. We propose amendments to address instances of ambiguity and our related concerns.
  - 5.5 Some of the contraventions and fines are unduly harsh. We make some proposals to ensure that these provisions are balanced and appropriate.
  - 5.6 The Draft Regulations lack the necessary transitional provisions to give effect to the Authority's intentions articulated in the Findings Document and to ensure that the Must Carry Channels continue to be carried pending the conclusion of a new agreement under the new Regulations. We propose wording to give effect to the Authority's proposed transitional arrangement.

- 6 Our submission focuses on refining the Regulations, with particular regard to clarifying the obligations of PBS and subscription broadcasters and ironing out uncertainty and practical implementation challenges.
- 7 Although we make submissions on strengthening and clarifying the Draft Regulations, we cannot ignore the fact that the proposed amendment of the Must Carry Regulations takes place at a time when government is considering wholesale changes to the policy underpinning the South African broadcasting landscape, including the continued existence of the Must Carry rules.
- 8 Since the very survival of the Must Carry regime is in debate in the Draft White Paper process, MultiChoice recommends that the Authority place the proposed amendments to the Must Carry Regulations on hold pending policy certainty. Should it be necessary, the Authority could resume the Must Carry amendment process once there is policy certainty which warrants the continuation of the process.
- 9 The debates on the future of Must Carry have in many ways been driven by the SABC which has changed its position on the Must Carry obligations over the years. Instead of supporting a reasonable and proportionate obligation on pay TV operators to make the PBS channels available to consumers, as one might expect of a public broadcaster, the SABC now argues in favour of abandoning Must Carry completely, preferring instead the opportunity to sell its channels to the highest bidder. No longer concerned with making its channels easily accessible to all, the public broadcaster would rather withhold PBS services from pay TV subscribers in order to extract a commercial carriage fee, a position wholly at odds with the rationale underpinning Must Carry regulation.
- 10 The SABC seems to advance this argument because it mistakenly believes that pay TV somehow profits from the PBS channels. But this is simply untrue. As we have repeatedly shown, pay TV earns no advertising revenue from the channels and the channels do not drive subscriptions. After all, no one pays for services that can easily be received elsewhere for free – why would they?
- 11 Despite numerous requests during this inquiry for the SABC to back up its arguments on the benefits to pay TV, it has to date, failed to submit any evidence.

- 12 In light of this it was disappointing that the Authority paid insufficient weight to the evidence which was submitted to it. The Authority's failure to grapple meaningfully with the SABC's misconceptions and/or misrepresentations and its unquestioning acceptance of unsubstantiated claims in the face of clear evidence to the contrary, detracts from the value and significance of the Findings Document as a basis for the amendment of the Regulations.
- 13 Curiously, despite its recognition that the parties held widely divergent views, the Authority proceeded directly to a final Findings and Positions document. The Authority decided not to hold a hearing as required in terms of s4B of the ICASA Act and has not given stakeholders an opportunity to make representations on the Findings Document. The findings and positions, and the proposed amendments that flow from them, are therefore not evidence-based, leaving a shaky foundation for the proposed amendments.
- 14 In spite of these challenges, MultiChoice wants to make the proposed new regime work. We therefore propose a range of improvements to the Regulations, to ensure that the amended regime is cohesive and streamlined, and takes into account developments since 2008, with a view to contributing constructively to this review.

## INTRODUCTION

- 1 MultiChoice thanks the Independent Communications Authority of South Africa ("**ICASA**" or "**the Authority**") for the opportunity to comment on the Draft Must Carry Amendment Regulations ("**the Draft Regulations**").<sup>1</sup>
- 2 Must Carry places a restriction on pay TV broadcasters in order to assist in the achievement of universal access objectives:
  - 2.1 Public broadcasters are established as agents for ensuring social cohesion, achieving cultural imperatives, consolidating democratic values and giving a voice for the people.<sup>2</sup>
  - 2.2 Having established public broadcasters for this purpose, it follows that public policy would wish to ensure that subscribers are able to easily access these services when they take up pay TV. Must Carry rules ensure that subscribers do not have to switch platforms to access such content.<sup>3</sup>
  - 2.3 Therein lies the universal access rationale for Must Carry regulation.
- 3 Carriage of the PBS channels ensures pay TV subscribers have ease of access to public broadcasting services and therefore advances universal access. With Must Carry, pay TV subscribers are assured convenient access through their existing, preferred means of watching TV. The legislature therefore decided that the Must Carry obligation on pay TV is in the public interest, even though it requires subscription broadcasters to carry the channels of one of their competitors.

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<sup>1</sup> Draft Must Carry Amendment Regulations, 2021, published under notice number 273, Government Gazette Number 44338, 26 March 2021

<sup>2</sup> Nikoltchev, S (Ed.) 2012 *Must Carry: Renaissance or Reformation?* Strasburg: European Audiovisual Observatory, pg 7 ("the EU Must Carry Report"), pg 7

<sup>3</sup> *National Integrated ICT Policy Green Paper*, 2014, Notice No. 44, Gazette No. 37261, 24 January 2014, para 8.12.1

- 4 MultiChoice has participated constructively in the review of the Must Carry Regulations since the inception of this process in 2018. In every phase of the process we have endeavoured to provide the data and evidence requested, in order to assist the Authority in reaching evidence based conclusions. In light of this, it was disappointing that other participants, including the SABC, did not accede to the Authority's request to provide the necessary data and evidence to support their arguments and address the questions raised.
- 5 As we have consistently stressed in our submissions and demonstrated through evidence, and contrary to the unfounded claims made by other parties, the added convenience to pay TV subscribers of being able to access the PBS channels through a single system is a universal access benefit, not a benefit to MultiChoice.
- 6 Must Carry obligations are restrictions on pay TV broadcasters and limit their right to freedom of expression and their commercial interests. It limits subscription broadcasters' rights to broadcast the channels they choose, and to use their capacity to broadcast channels of their choice to generate subscription and advertising revenue. The obligation to carry the SABC channels means the pay TV operator incurs the opportunity cost of not carrying other channels of its choice, which it could commercialise.
- 7 MultiChoice does not oppose reasonable and appropriate Must Carry obligations in the advancement of universal access. It is an obligation MultiChoice has always accepted, as long as it is commercially viable to do so and provided the Regulations are reasonable, balanced, proportionate and do not impose an undue burden on pay TV licensees.
- 8 To that end, MultiChoice has always complied fully with the Must Carry Regulations and, in fact, gone above and beyond their strict requirements since their inception.
- 9 With the publication of the Draft Regulations, we now potentially enter a new phase for Must Carry. Although the Authority has found that the existing Must Carry regime works well, it has proposed certain changes to the Regulations.



- 10 MultiChoice is keen to ensure that the new regime is no less effective than the existing one and that the Must Carry Channels will continue to be carried by pay TV broadcasters on reasonable terms and continue to advance universal access. If the SABC channels were not carried by pay TV broadcasters, pay TV subscribers would have to take additional steps to view the SABC services thereby undermining universal access.
- 11 In order to ensure that the Must Carry regime continues to run smoothly, and that the current gains are not undone, we believe that certain changes should be made to the Draft Regulations.
- 12 Our priority is to streamline the Draft Regulations so that the new Regulations can be practically implemented without compromising universal access or inconveniencing pay TV subscribers.
- 13 The bulk of our submission will therefore focus on refining the Draft Regulations, with particular regard to clarifying the obligations of public and subscription broadcasters and ironing out practical challenges, including those that arise from the proposed shift to commercial negotiations.
- 14 We will also propose a range of improvements to the current Regulations, to ensure that the amended regime is cohesive and streamlined, and takes into account developments since 2008, with a view to contributing constructively to this review. In order to assist the Authority, our proposed amendments to the Regulations are set out in **Annexure A** for the Authority's consideration.

## **PROCESS ISSUES**

### **Procedural concerns**

- 15 Prior to commenting on the Draft Regulations, we reflect on the process of the review to date.
- 16 The process commenced with a regulatory impact assessment launched by the Authority in September 2018. We commend the Authority for taking the initiative to assess the impact of the Must Carry Regulations. A RIA is good regulatory

practice, an important step in ensuring evidence-based regulation, and is more likely to yield robust regulatory outcomes which are in the public interest.<sup>4</sup>

- 17 The evidence provided to the Authority overwhelmingly showed that the Must Carry Regulations are effective. As the RIA Report stated -

17.1 *"it is evident from the submissions by the SABC, MultiChoice, e.tv and SOS/MMA that the Regulations are effective in ensuring that public broadcasting television services are universally accessible to the public";<sup>5</sup> and*

17.2 *"the Regulations have been beneficial to all stakeholders and to the public".<sup>6</sup>*

- 18 Unfortunately, the Authority's ability to make a full assessment during the RIA was undermined by the SABC's failure to provide evidence on costs, since the SABC did not *"provide empirical evidence or figures"*.<sup>7</sup>

- 19 The Authority accordingly proceeded to publish the Discussion Document,<sup>8</sup> which provided another opportunity for parties to contribute meaningfully to the inquiry, and again called for evidence, including evidence on the costs of Must Carry. Two parties made written submissions in response to the Discussion Document, namely MultiChoice and the SABC:

19.1 MultiChoice submitted that the architecture of the Must Carry framework is sound and that, as borne out by the Authority's RIA report, the Regulations are serving their intended purpose. In support of its position, MultiChoice made detailed representations, including

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<sup>4</sup> As recognised by the Presidency when it first issued RIA Guidelines in 2012, *"RIAs are an extension of a broader commitment to the quality of government through evidence-based policy making. The advantage of instituting RIA is that RIA adds structure, predictability, and methodological clarity to assessment while also ensuring that the right information is available for decision making"* (Guidelines for the Implementation of the Regulatory Impact Analysis/Assessment (RIA) Process in South Africa, 2012, The Presidency: Republic of South Africa, pg 2)

<sup>5</sup> Para 4.17 of the RIA Report

<sup>6</sup> Para 6.1 of the RIA Report

<sup>7</sup> Para 8.4 of the RIA Report

<sup>8</sup> *Discussion Document: Review of the ICASA Must Carry Regulations*, 2008, published under notice number 650, Government Gazette number 42902, 13 December 2019 ("the Discussion Document")

extensive evidence and research, an analysis of the costs to comply with the Must Carry Regulations, an independent economic perspective prepared by Genesis Analytics, and an international benchmarking annexure. MultiChoice's representations demonstrated that the Regulations are working well, are beneficial to the public and the SABC, strike an appropriate balance in the public interest, and accord with international best practice.

19.2 In contrast, the SABC motivated for the Must Carry Regulations to be amended, particularly in relation to costs. The SABC again failed to provide evidence on costs, despite the RIA Report's concern about the "*unsubstantiated*" arguments made by the SABC and the multiple opportunities and invitations to it to substantiate its claims. Rather than heeding the Authority's call for evidence and substantiation, the SABC's submission is replete with fundamental errors/misrepresentations and unsubstantiated rhetoric, and raises many irrelevant matters.<sup>9</sup>

20 Examples of patent errors and/or misrepresentations in the SABC's submission, which the Authority appears not to have interrogated, include the following:

20.1 The SABC submitted incorrectly that SBS carry the PBS at the SABC's cost.<sup>10</sup> In fact, MultiChoice covers all the transmission costs associated with Must Carry, including those which the SABC is, in fact, obliged to incur. The SABC incurs no additional costs for Must Carry. The SABC provided no evidence to counter MultiChoice's submission that it covers these costs. The Authority simply found that "*there are different*

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<sup>9</sup> The SABC raised multiple matters which fall outside of this review, including (a) policy and legislative issues, such as the SABC's funding model, purported unfunded public mandate, advertising provisions in the ECA and Sentech rollout obligations, (b) unrelated parallel regulatory processes, such as the review of the Sports Broadcasting Services Regulations, the Advertising Regulations and the Pay TV inquiry, and (c) other regulations, such as the TV Licence Fee Regulations and the Digital Migration Regulations

<sup>10</sup> SABC Submission on the ICASA Must Carry Regulations Discussion Document Notice, SABC, 31 March 2020 ("SABC 2020 Must Carry submission"), Para 7.4, which stated incorrectly that "*Currently, public interest content is carried by SBS at the SABC's cost...*", referred to in para 2.17 of the Findings Document

*views regarding the must carry costs"*<sup>11</sup> and that *"it is difficult to determine the costs of Must Carry / Must Offer with insufficient information received."*<sup>12</sup> Annexure B of MultiChoice's submission on the Discussion Document provided a detailed breakdown of our relevant annual costs to comply with the Must Carry Regulations and made it clear that (a) the SABC has not incurred any of the costs that arise from the Must Carry Regulations and (b) there is no validity to the SABC's attempt to include opportunity costs or other costs which do not arise from the implementation of the Must Carry Regulations.<sup>13</sup> The Authority's failure to make a clear, evidence-based finding on such a pivotal issue is disappointing.

- 20.2 The SABC submitted incorrectly that it does not derive advertising revenue from audiences viewing the SABC channels on pay TV services.<sup>14</sup> This statement is manifestly false. In fact, the SABC retains all of the advertising revenue from the SABC channels carried on DStv, amounting to hundreds of millions of Rands of extra advertising revenue per year. The Authority noted MultiChoice's submission that the SABC keeps all of the advertising revenue generated from the Must Carry Channels, amounting to approximately R569 million yearly,<sup>15</sup> and the Genesis Report's recognition of the benefit to the SABC of deriving advertising revenues based on DStv viewership.<sup>16</sup> It is disappointing that the Authority did not make a clear evidence-based finding on this patent benefit to the SABC.

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<sup>11</sup> Para 11.36 of the Findings Document

<sup>12</sup> Para 11.40 of the Findings Document

<sup>13</sup> Also see paras 130 to 146 and 257 to 268 of MultiChoice's submission on the Discussion Document where MultiChoice dealt with costs in great detail

<sup>14</sup> Para 9.2.2(b) of the SABC 2020 Must Carry submission, which stated incorrectly that *"SABC could not derive advertising revenue from audiences sitting on the SBS platform"*, referred to in para 3.4(c) of the Findings Document which quoted the SABC's incorrect claim that *"PBS do not derive advertising from audiences sitting on the SBS platform"*

<sup>15</sup> Paras 11.12 and 14.3 of the Findings Document

<sup>16</sup> Para 11.27 and 16.14 of the Findings Document

- 20.3 The SABC incorrectly asserted that the SABC channels boost pay TV uptake. The RIA Report had rightly rejected this "*unsubstantiated*" argument because it "*does not delve into the reasons for subscriber growth, but merely makes an assumption based on the popularity of programmes*"<sup>17</sup> and recognised that "*there is no compelling reason why ... viewers would choose to pay for services that are available free-of-charge*".<sup>18</sup> The SABC persisted with this argument, yet failed to provide any evidence to support it, despite the RIA Report's clear direction that "*Evidence to support the SABC ... arguments would have to include a survey comprising all the factors behind subscriber growth for SBS*".<sup>19</sup> MultiChoice provided clear evidence that subscribers do not subscribe to DStv in order to watch the Must Carry Channels, including research commissioned by MultiChoice. Despite the clear evidence before it to the contrary, the Findings Document inexplicably found that subscription broadcasters benefit because "*the SBS will obtain additional subscribers who have no access to freely available PBS analogue network*".<sup>20</sup> No evidence was provided in this inquiry to support such a finding.
- 21 The above examples are just a few of the patent inaccuracies in the SABC's submission on pivotal issues, in the face of overwhelming evidence to the contrary. More examples of factual errors in the SABC's submission are contained in **Annexure B**.
- 22 Despite the clear evidence provided by MultiChoice on these pivotal issues, the Authority merely found that "*there are different views on the advantages of the Must Carry Regulations*".<sup>21</sup>
- 23 We respectfully submit that the Authority paid insufficient weight to the evidence before it. The Authority's failure to grapple meaningfully with the SABC's

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<sup>17</sup> Para 5.12 of the RIA Report

<sup>18</sup> Para 5.13 of the RIA Report

<sup>19</sup> Para 5.12 of the RIA Report

<sup>20</sup> Para 3.8 of the Findings Document

<sup>21</sup> Para 3.5 of the Findings Document

misconceptions and/or misrepresentations and its unquestioning acceptance of unsubstantiated claims in the face of clear evidence to the contrary detracts from the value and significance of the Findings Document as a basis for the amendment of the Regulations.

- 24 Curiously, despite its recognition that the parties held widely divergent views, the Authority proceeded directly to a final findings and positions document. The Authority decided not to hold a hearing as required in terms of s4B of the ICASA Act and has not given stakeholders an opportunity to make representations on the Findings Document. As it makes clear -

*"the Findings and Positions Document is not published for comments, but rather to inform stakeholders of the Authority's findings from the input received after the publication of the Discussion Document".<sup>22</sup>*

- 25 As a result, parties have not had an opportunity to (a) highlight and explain the key aspects of their written representations on the Discussion Document in a setting which permits direct engagement with the Authority or (b) to respond to the other party's representations.
- 26 Oral representations would have afforded MultiChoice an opportunity (which written representations do not present) to engage with the Authority; understand the Authority's response to, or concerns about, the written representations; contextualise, explain and clarify its position on key issues; engage with the Authority on the pertinent facts and principles; and demonstrate the extensive errors and misconceptions in the SABC's representations, to prevent the Authority relying on misinformation.
- 27 Since the findings reached will have informed the proposed amendments to the Must Carry Regulations, it was imperative that the inquiry resulted in evidence-based, rational and reasonable findings. As is evident from the examples referenced in paragraph 20 above, this opportunity has been lost and the unsubstantiated misinformation submitted to the Authority has been perpetuated.

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<sup>22</sup> Paras 1.5 and 19 of the Findings Document

- 28 The Authority's failure to conduct a hearing on the inquiry and to grapple with the evidence before it (notwithstanding its recognition of the parties' divergent views) has undermined the legitimacy of the inquiry, the integrity of the Findings Document and the next phase of this process.
- 29 While we note the Authority's stated intention to hold a hearing on the Draft Regulations, this will not address the stated purpose of the inquiry, which was to assess whether there is a need to amend the Regulations in the first place. Since the Findings Document lays the foundation for the proposed amendments, a prior meaningful engagement on the underlying inquiry should have been completed first.
- 30 The fact that only two parties made written representations on the Discussion Document also does not dispense with the need for a hearing. The Must Carry Regulations impose a restriction on subscription broadcasters, and have a direct and substantial impact on MultiChoice, which made written representations on the Discussion Document and had a right to be heard.
- 31 These concerns are exacerbated by the Authority's artificial attempt to divorce its Findings Document from the proposed amendments by denying stakeholders an opportunity to comment on the findings and positions underlying the proposed amendments.
- 32 The findings and positions, and the proposed amendments that flow from them, are therefore not evidence-based, leaving a shaky foundation for the proposed amendments.

### **Intervening White Paper proposal to remove Must Carry regime**

- 33 MultiChoice is concerned that the Authority has not given stakeholders an opportunity to reflect on the implications for this process arising from the draft White Paper's proposal to amend the legislation so as to remove Must Carry

rules.<sup>23</sup> The White Paper was published after submissions were made on the Discussion Document, but before the Authority published the Findings Document and Draft Regulations.

- 34 The Findings Document states that the Authority recognises that the White Paper, *"when approved as Policy, might require that the broadcasting sector readjust their transmission and business strategies and eventually impact on the ... Must Carry Regulations"*.<sup>24</sup>
- 35 MultiChoice respectfully submits that this understates the potential impact of the White Paper, which proposes to do away with Must Carry completely.
- 36 Since the very survival of the Must Carry regime is in debate, MultiChoice recommends that the Authority place the proposed amendments to the Must Carry Regulations on hold pending policy certainty.
- 37 As the RIA Report found, the Must Carry Regulations are effective and beneficial. In these circumstances, we do not believe that it is in the interests of the Authority, industry stakeholders or the public to pursue an amendment of the Regulations – and to invest the necessary time and resources associated with such an amendment - where the Regulations and their enabling legislative provisions are proposed to fall away completely.
- 38 We urge the Authority to rather prioritise other regulatory processes which are unaffected by the White Paper. Should it be necessary, the Authority could resume the Must Carry amendment process once (and if) there is a clear policy position which warrants the continuation of the process.

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<sup>23</sup> *Draft White Paper on Audio and Audiovisual Content Services Policy Framework: A New Vision for South Africa 2020*, published under notice number 1081, Government Gazette number 43797, 9 October 2020, paras 5.2.7.14. MultiChoice does not believe that it is in the public interest to abandon Must Carry in favour of commercial retransmission agreements and is participating in the White Paper process, but we recognise that the White Paper process could result in the removal of Must Carry Regulations

<sup>24</sup> Para 16.20 of the Findings Document



## **COSTS AND BENEFITS OF MUST CARRY AND COMMENTS ON DRAFT FINDINGS' IMPLICATIONS FOR THE PROPOSED AMENDMENTS**

### **Rationale for Must Carry rules**

39 The Authority's Findings Document correctly adopted the position that -

*"Must Carry must be driven by a central public interest principle of universal access to ensure that PBS programming is available to all citizens, targeting those citizens that use SBS as their means of access to television".<sup>25</sup>*

40 The SABC was established with the public mandate to *"service the needs of all South African society"*<sup>26</sup> and to *"provide television and radio programmes and any other material to be transmitted or distributed by the common carrier for free to air reception by the public..."*.<sup>27</sup>

41 To enable the SABC to achieve its universal access mandate, Sentech was established as the common carrier broadcasting signal distributor, with a statutory obligation to *"carry public broadcasting services"*<sup>28</sup> and to *"provide universal access for all South Africans to broadcasting services"*.<sup>29</sup> Sentech fulfils this obligation, by distributing the SABC signals, free of charge to the public, everywhere throughout the Republic on free-to-view terrestrial and satellite platforms.

42 Must Carry rules advance universal access further, by ensuring that pay TV subscribers are able to view the public broadcasting channels conveniently through the pay TV services to which they subscribe, without having to switch platforms to access the PBS content.<sup>30</sup>

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<sup>25</sup> Para 2.37 of the Findings Document

<sup>26</sup> s2(l) of the Broadcasting Act

<sup>27</sup> s8(g) of the Broadcasting Act

<sup>28</sup> s62(3)(c) of the ECA

<sup>29</sup> s62(1)(b) of the ECA

<sup>30</sup> *National Integrated ICT Policy Green Paper*, 2014, Notice No. 44, Gazette No. 37261, 24 January 2014, para 8.12.1

- 43 The universal access objective of Must Carry has long been recognised. As the SABC stated in 2007 when the first Must Carry Regulations were being developed:

*"60(3) of the EC Act ... is, in summary, to ensure that the content of the SABC is ubiquitous on all broadcasting platforms and that South African viewers, whichever platform they choose to use to access their television programming, have ready access to public service content".<sup>31</sup>*

- 44 It is striking that the SABC's position has shifted from its prior recognition of the "universal acceptance" of must carry "because of the nature of the public benefit that they bring in the advancement of universal access"<sup>32</sup> to reposition Must Carry as a revenue generator for the SABC. In its recent submission on Government's Draft White Paper, the SABC supported the proposal that Must Carry should be scrapped so that it can commercially exploit its content through carriage agreements which will "contribute significantly to the public broadcaster's revenues".<sup>33</sup>
- 45 But, as the Authority's 2008 Must Carry Position Paper made clear, "*the Must Carry Obligations should not be imposed as a form of financial support for any of the broadcasters*".<sup>34</sup>
- 46 The universal access objectives which are sought to be achieved by the Must Carry Regulations are intended to serve the public interest, not the financial interests of the SABC. It is not appropriate for the public broadcaster to sidestep its public broadcasting mandate in favour of its financial interests.

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<sup>31</sup> SABC written submission on notice of intention to make regulations in respect of Must-Carry Obligations, Notice 1150 of 2007, SABC, 29 October 2007 ("SABC 2007 Must Carry submission"), para 2 of the executive summary and para 14 of the SABC main submission

<sup>32</sup> Para 27 of the SABC 2007 Must Carry submission

<sup>33</sup> Summary: SABC makes policy submissions on draft White Paper on Audio and Audiovisual Content Services, SABC, 15 February 2021 ("SABC White Paper submission"), para 4

<sup>34</sup> ICASA Must Carry Obligations Position Paper, 22 May 2008, published under notice number 651, Government Gazette number 31081, 22 May 2008, pg 27

47 We support the Authority's position in paragraph 2.37 of the Findings Document, that Must Carry must be driven by universal access, targeting those citizens that use SBS as their means of access to television. This principle underscores the Must Carry Regulations and should inform their amendment.

### **Must Carry is effective in advancing universal access**

48 MultiChoice agrees with the Authority's central finding and position, namely that the Must Carry Regulations -

48.1 *"have been effective in ensuring universal access to PBS television programmes"; and*

48.2 *"will continue to be necessary and relevant in a digital environment to ensure universal access to public broadcasting services".<sup>35</sup>*

49 The evidence provided during the Must Carry review process overwhelmingly supports ICASA's conclusion that Must Carry has assisted with universal access:

49.1 More than 8 million pay TV homes are able to seamlessly access the PBS channels through their pay TV remote. Even though these pay TV homes are able to watch the SABC through a means other than pay TV should they wish to (through the Sentech gap filler, Openview or SABC terrestrial (in most cases)), it is a principle of universal access that they should be able to watch the channels through the pay TV service to which they subscribe.

49.2 Research shows that the vast majority of DStv subscribers appreciate the convenience of being able to access Must Carry Channels through pay TV (although they state overwhelmingly that it is not their reason for subscribing to a pay TV service).

49.3 Audience figures show that even though most subscribers can access the SABC terrestrially, a significant portion of the SABC's audience chooses to watch SABC over a pay TV service. 31% of SABC1 and

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<sup>35</sup> Paras 2.31 and 16.20 of the Findings Document

25% of SABC2's audience are made up of DStv subscribers. If the Must Carry Channels were not carried, it is therefore possible the SABC's audience numbers would fall significantly and universal access would be weakened.

49.4 The majority of DStv subscribers stated that Must Carry makes it more likely that they will watch the SABC channels than if the channels were not carried on pay TV. Since the SABC depends on viewership for advertising revenue, this is both a universal access and commercial benefit to the SABC. Must Carry makes it more likely that the SABC channels will be watched. Ease of access to PBS channels is precisely what regulators aimed for when they set obligations to ensure public service content is not excluded in favour of the programmes and services of the pay TV service.

49.5 When pay TV subscribers watch SABC channels on pay TV services, they are "back-counted" as SABC viewers. SABC is able to monetise and "sell" this audience to advertisers. MultiChoice estimates the value of this revenue (which flows exclusively to the SABC) to be in the region of R569m annually. Contrary to the unsubstantiated allegations made by the SABC, no subscription or advertising revenue flows to MultiChoice as a result of the carriage of the Must Carry Channels.

### **Universal access is about more than widening SABC signal coverage**

50 Given that the evidence provided in the course of the inquiry demonstrates the universal access benefits of Must Carry, MultiChoice believes the Authority has reached the correct conclusion in respect of the purpose,<sup>36</sup> effectiveness and ongoing relevance of Must Carry.

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<sup>36</sup> Specifically the Authority's position that "*Must Carry must be driven by a central public interest principle of universal access to ensure that PBS programming is available to all citizens, targeting those citizens that use subscription services as their preferred means of access to television*" (Para 2.37 of the Findings Document)

- 51 However, it is notable that the Findings Document sometimes mistakenly frames the universal access benefit as being only in relation to the SABC's analogue network coverage. For instance, it states that "*Through Must Carry, the public can access the PBS' channels where the public broadcasting signal does not reach*".<sup>37</sup>
- 52 In fact, as we stated previously, there is already 100% national free-to-view SABC coverage, including public broadcasting signal coverage.
- 53 The SABC channels are carried on the Sentech gap filler network which has 100% coverage and was designed specifically to supplement terrestrial coverage. Even before the Sentech gap filler, the SABC already had 100% free-to-view satellite coverage throughout the country, through its presence on Sentech's "Vivid" satellite platform.
- 54 The SABC channels are also carried on other commercial networks such as Openview. The SABC channels are available without any subscription fee on both the gap filler and Openview networks, meaning that free-to-view PBS signals cover 100% of the country. The SABC has also made it clear that all of its upcoming channels will be carried on Openview. In a media statement announcing the launch of a new channel distribution agreement between the SABC and Openview on 25 March 2021, the SABC stated that the -

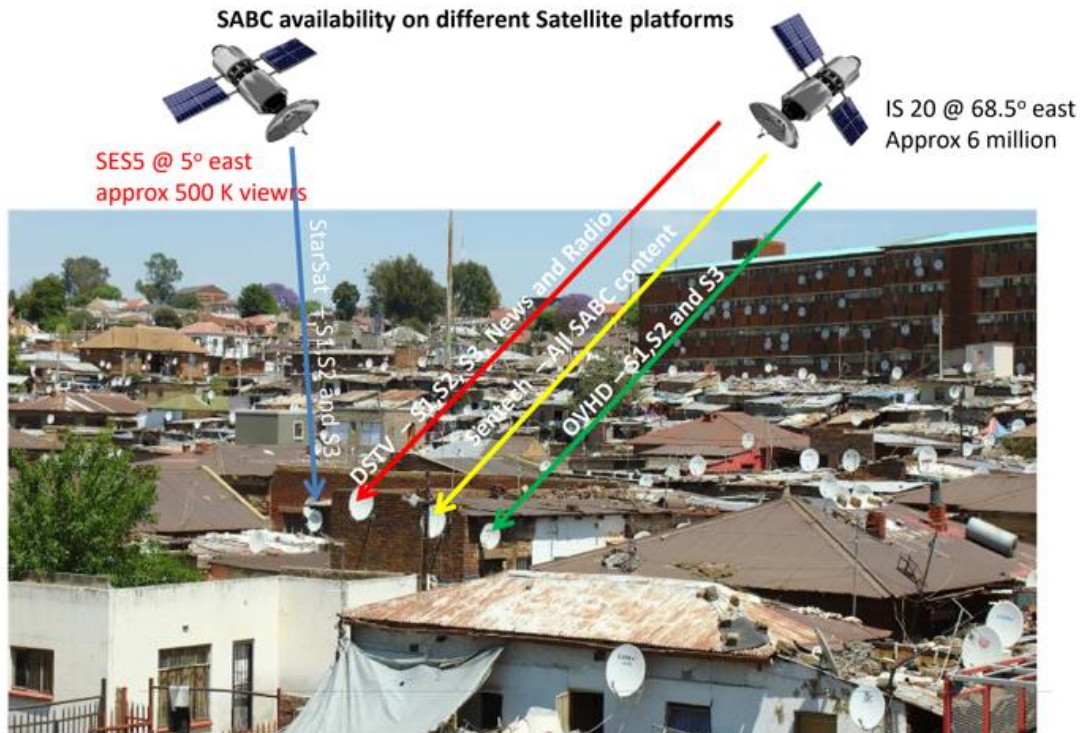
*"agreement also guarantees High Definition broadcast quality and free access to the SABC's television network wherever you are in South Africa. ... In addition to carrying SABC 1, 2 and 3, Openview will carry three additional television channels from the Public Broadcaster and all its 19 radio channels. ... Openview's aggressively growing base of 2.3 million households will have access to four SABC television channels, with two more to be announced in due course... Openview provides audiences with a free HD alternative to both analogue terrestrial and pay satellite options".*<sup>38</sup>

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<sup>37</sup> Para 3.6 of the Findings Document

<sup>38</sup> *SABC and Openview Sign a New Channel-Carriage Agreement*, SABC and Openview, 25 March 2021

- 55 In a presentation in October 2020, the SABC depicted the "SABC availability on different Satellite platforms" as follows, with the description "DTH – 100% coverage with no infrastructure costs":<sup>39</sup>



### **DTH – 100% COVERAGE WITH NO INFRASTRUCTURE COSTS**

- 56 Not only is there 100% national free-to-view public coverage of the SABC channels, "government will also subsidise affected communities using satellite technology" through the Universal Service and Access Fund.<sup>40</sup>
- 57 The primary aim of Must Carry is therefore not to extend the SABC's coverage into areas where its analogue signal does not reach (since it already has 100% satellite coverage), but, as stated in the White Paper on Broadcasting Policy of

<sup>39</sup> SABC Presentation to the Portfolio Committee on Communications, SABC, 20 October 2020, available at <https://pmg.org.za/committee-meeting/31224>

<sup>40</sup> Government explicitly extended the STB subsidy "to households that can only experience free-to-air digital services via DTH platform, to ensure close to 100% coverage" (Broadcasting Digital Migration Policy, published under Notice Number 958, Government Gazette Number 31408, 8 September 2008 ("Digital Migration Policy"), para 2.1.4) Poor TV households who live in areas where there is no terrestrial coverage are eligible for a 100% subsidised DTH kit. Those members of the public who are not eligible for the subsidy can acquire a satellite decoder on Takealot.com for a once off cost as low as R689 (including free delivery) (See <https://www.takealot.com/amo-combo-digital-tv-decoder-dvbt2-s2/PLID55067292> (last visited 17 May 2021))

1998, and as recognised in the RIA Report<sup>41</sup> and elsewhere in the Findings Document, "*to ensure that PBS programming is available to all citizens, targeting those citizens that use subscription services as their preferred means of access to television*".<sup>42</sup>

- 58 Since the PBS channels are available throughout the country on other satellite networks which do not charge a subscription fee, it seems absurd to claim that viewers would subscribe to pay TV for the sole purpose of getting the SABC channels. As the SABC and Openview stated, "*Openview provides audiences with a free HD alternative to both analogue terrestrial and pay satellite options*".<sup>43</sup>
- 59 Yet, the Findings Document inexplicably, and in the absence of any evidence to support the claim, posits that "*The SBS benefit by getting subscribers who have no access to freely available PBS analogue network*".<sup>44</sup>
- 60 No evidence was provided in the course of this inquiry to support such a finding, notwithstanding the Authority's explicit call for evidence on this issue.<sup>45</sup> As the RIA Report stated: "*The argument that SBS licensees have experienced subscriber growth as a result of the popularity of the PBS channels is unsubstantiated*".<sup>46</sup> The RIA Report also recognised that "*there is no compelling reason why 80% of the population would choose to pay for services that are available free of charge*".<sup>47</sup> This was confirmed by research commissioned by MultiChoice, which showed that subscribers do not subscribe to DStv in order to gain access to the SABC channels. As Ofcom has noted -

*"content which has a broad appeal, but which is widely available free-to-air, such as some of the UK-originated content available via the public service*

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<sup>41</sup> Pg 8 of the RIA Report

<sup>42</sup> White Paper on Broadcasting Policy, 1998

<sup>43</sup> *SABC and Openview Sign a New Channel-Carriage Agreement*, SABC and Openview, 25 March 2021

<sup>44</sup> Para 2.36, as well as para 3.8, of the Findings Document. The Authority reached this conclusion even though it "*noted that MultiChoice denies the SABC's assertion that SBS licensees benefit by getting subscribers who have no access to freely available PBS services in areas outside the SABC analogue network*" (para 18.19 of the Findings Document)

<sup>45</sup> Para 5.12 of the RIA Report

<sup>46</sup> Para 5.13 of the RIA Report

<sup>47</sup> Para 5.13 of the RIA Report

*broadcasters, is unlikely to drive pay TV subscriptions, since consumers are unlikely to pay a significant premium to watch programmes similar to those which they can already watch for free."*<sup>48</sup>

- 61 If the PBS channels are available on other platforms, why do they also need to be made available on pay TV? As we have stated in our previous submissions, Must Carry rules have often applied in cases where end users of private or "closed" networks may not otherwise have access to public broadcasting services. The "closed" nature of these platforms (including cable and satellite platforms) is a policy concern for Governments, as the closed nature can impact on access to public broadcasting services. The Findings Document reflects this when it formulates the universal access benefits of Must Carry as follows:

61.1 *"... members of the public who do not struggle with reach also benefit from the must-carry rules irrespective of the broadcasting platform that they use".*<sup>49</sup>

61.2 *"Audiences that use SBS services as their preferred means of access can also access PBS channels without having to spend extra money to purchase an antenna or receiver in addition to the SBS satellite receivers".*<sup>50</sup>

61.3 *"Regulating in the public interest, the Authority has a responsibility to promote access to public services and economic convenience for the audiences who receive public service programming primarily through SBS".*<sup>51</sup>

- 62 A subscription broadcasting service is not a broadcasting signal distributor. But in the Must Carry context, the subscription broadcaster is effectively a mere conduit for Must Carry Channels, simulcasting the Must Carry Channels and carrying them as part of its pay TV service, with the end goal being for

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<sup>48</sup> *Pay TV Second Consultation: Access to Premium Content*, Ofcom, 30 September 2008, para 3.2

<sup>49</sup> Para 2.32 of the Findings Document

<sup>50</sup> Para 2.35 of the Findings Document

<sup>51</sup> Para 9.8 of the Findings Document



subscribers to conveniently access the PBS content on the Must Carry Channels through their pay TV service of choice.

63 This principle must continue to inform the Must Carry Regulations.

**The purpose of Must Carry is not to create revenue stream for SABC**

64 MultiChoice is pleased that the Authority has not taken on board the SABC's unsubstantiated suggestion that the primary purpose of Must Carry should be to ensure a revenue stream for the SABC.

65 MultiChoice accepts that as a subscription broadcasting licensee, it is subject to certain restrictions and obligations which are intended to fulfil broad public interest objectives. Must Carry is one such obligation – it requires subscription broadcasters to use some of their channel capacity to carry the channels of a competitor instead of carrying channels of their choice (which subscribers demand and which MultiChoice can commercialise). MultiChoice currently accrues no revenue from the Must Carry arrangement with the SABC (all the advertising revenue goes to the SABC) and pays all of the transmission costs.<sup>52</sup> As stated previously, MultiChoice accepts the reasonable Must Carry obligation, since it advances universal access, namely the convenient access by pay TV subscribers to PBS channels on pay TV services.

66 In this context, it is surprising that the SABC, whose statutory public mandate is to "*service the needs of all South African society*,"<sup>53</sup> persists in interpreting Must Carry as a burden on it, framing it as interfering with its plans to "*commercially exploit its content through carriage agreements*"<sup>54</sup> and preventing it from "*exploiting its content for revenue generation purposes*".<sup>55</sup> Throughout the RIA and Discussion Paper process, the SABC has attempted to persuade the Authority that it should amend the Must Carry Regulations to better cater for the SABC's commercial interests, interests which have become more urgent in light

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<sup>52</sup> By agreement between the parties, MultiChoice pays both its and the SABC's transmission costs

<sup>53</sup> s2(l) of the Broadcasting Act

<sup>54</sup> Para 4 of the SABC White Paper submission

<sup>55</sup> Paras 3.2 and 7.3, and response to question 9.1, of the SABC 2020 Must Carry submission

of its continuing financial difficulties but which have nothing to do with universal access.

- 67 This framing by the SABC stands in stark contrast to its previous understanding of Must Carry when the 2008 regulations were being developed. In 2007 the SABC stated that:

67.1 *"The SABC believes the must-carry obligations are a logical extension of the objectives set previously for public service broadcasting."*<sup>56</sup>

67.2 *"The SABC is broadly supportive of the goals for must-carry regulation as we believe it is important that public service content is made available as widely as possible and on all platforms".*<sup>57</sup>

- 68 Regardless of the current stance of the SABC, the Authority is required to advance the public interest - and that is not the same as advancing the narrow interests of the public broadcaster. The public broadcaster is subject to the environment in which it exists at a particular moment. Financial and other pressures have an influence on its objectives and the interests it chooses to advance at any particular time. It is not for the Authority to serve these changing interests. It has a duty to ensure that the broader public interest is served through its regulations.

- 69 There is also nothing in s60(3) which supports the SABC's arguments that Must Carry should allow for *"a contribution by SBS towards sustenance of public broadcasting services"*.<sup>58</sup> It is notable that the SABC does not acknowledge that MultiChoice already makes a significant contribution towards the sustenance of public broadcasting by carrying all Must Carry transmission costs, which it has done since the inception of the Regulations, incurring expenditure in excess of R108 million between 2008 and 2020 to comply with the Must Carry Regulations. (It is also striking that the Authority's Findings Document fails to recognise this).

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<sup>56</sup> Para 14 of the SABC 2007 Must Carry submission and para 2 of the executive summary

<sup>57</sup> Para 3 of the SABC 2007 Must Carry submission and para 1 of the executive summary

<sup>58</sup> Para 7.4 of the SABC 2020 Must Carry submission

70 In spite of the SABC's efforts, we note that the Authority has elected not to change the substance of the Must Carry obligation, nor has it proposed amending the obligation on the SABC that it "must offer" its PBS channels to subscription broadcasting services. Instead, the key change is that parties must now commercially negotiate how the transmission costs which arise from Must Carry should be apportioned between them. The Findings Document accordingly states that:

*"Payment regarding the transmission of must carry channels must be negotiated by both PBS and the SBS in terms of section 60(3) of the ECA".<sup>59</sup>*

and

*"...issues concerning the obligation of delivering Must Carry channels to SBS by the PBS, and the subsequent measures of ensuring that those channels reach subscribers on the SBS are best addressed by the parties in commercial agreements".<sup>60</sup>*

71 Notwithstanding the SABC's motivation that it be given *carte blanche* to "commercially exploit its content"<sup>61</sup> MultiChoice understands that under the amended regulations, the Authority intends that the parties will still be obligated to adhere to the principle of Must Offer / Must Carry, in the public interest.

## **COMMENTS ON PROPOSED AMENDMENTS TO THE REGULATIONS**

72 MultiChoice has always been committed to complying with its Must Carry obligations and that remains the case.

73 But of course, it is also necessary that the Regulations are reasonable, balanced, proportionate and lawful, and do not place an undue burden on pay TV licensees.

74 Moreover, as we indicated above, MultiChoice is keen to ensure that the new regime is no less effective than the existing one, that the Must Carry Channels will continue to be carried by SBS on reasonable terms, and that MultiChoice

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<sup>59</sup> Para 2.38 of the Findings Document

<sup>60</sup> Para 5.4 of the Findings Document

<sup>61</sup> Para 4 of the SABC White Paper submission

subscribers will not lose convenient access as a consequence of the new Regulations.

- 75 As the Draft Regulations stand, several provisions are unworkable and/or unclear, and are likely to give rise to difficulties in implementation.
- 76 We therefore submit that certain amendments to the Draft Regulations need to be made in order to assist with their smooth implementation and to ensure that the gains achieved under the current regulations are not undone.
- 77 In particular, we are concerned that the following aspects of the Draft Regulations may cause some confusion and/or give rise to challenges in the implementation of Must Carry:
- 77.1 The purpose of the Regulations has not been updated in line with the RIA Report and the Findings Document, save for the addition of Reg. 2(aA). We propose amendments to reflect the principles underlying the Must Carry Regulations.
- 77.2 Some terms are defined and/or used inconsistently and/or interchangeably with other terms. We propose amendments to clarify and align key terms.
- 77.3 The timing and sequencing of the negotiation framework is unclear, rigid and long-winded. We propose a simplified, clearer framework.
- 77.4 Some of the substantive provisions are unclear. We propose amendments in order to address instances of ambiguity and our related concerns.
- 77.5 Some of the contraventions and fines are unduly harsh. We make proposals to ensure that these provisions are balanced and appropriate.
- 77.6 The Draft Regulations lack the necessary transitional provisions to give effect to the Authority's intentions articulated in the Findings Document and to ensure that the Must Carry Channels continue to be carried

pending the conclusion of a new agreement under the new Regulations. We propose wording to give effect to the Authority's proposed transitional arrangement.

- 78 The remainder of our submission will therefore focus on refining the Regulations, with particular regard to clarifying the obligations of PBS and subscription broadcasters and ironing out uncertainty and practical implementation challenges.
- 79 We make these comments in the spirit of contributing constructively to the review of the Regulations and trust that they will assist the Authority in developing Must Carry Regulations which achieve their objective in a reasonable, balanced, proportionate, clear and workable way.

### **Purpose of the Regulations**

- 80 The purpose of the Regulations has not been updated in line with the RIA Report and the Findings Document. We propose some amendments to reflect the following principles underlying the Must Carry Regulations:
- 80.1 The PBS Licensee is established as the public broadcaster to service the needs of all South African society, to be responsive to audience needs and to make its services available throughout the Republic.
- 80.2 Must Carry rules are driven by a central public interest principle of universal access to make PBS programming available to all citizens, targeting those citizens that use SBS as their means of access to television.
- 80.3 The objective of Must Carry Regulations is to make Must Carry Channels conveniently accessible to SBS subscribers, by requiring

SBS licensees to simultaneously retransmit the Must Carry Channels to subscribers on their SBS.<sup>62</sup>

80.4 The purpose of the Must Carry Regulations is to prescribe the extent to which SBS licensees must carry, subject to commercially negotiable terms, the television programmes provided by a PBS licensee.

81 A consistent theme in the Findings Document is that the Authority should not be involved in or interfere with the commercial negotiations of Must Carry.<sup>63</sup> The Authority clearly intends the terms and conditions of Must Carry to be determined by the parties pursuant to commercial negotiations. However, Reg. 2(aA) and 2(b) could be read as suggesting that it is the Authority, through the Must Carry Regulations, which will determine these issues, given the provisions that "*the purpose of the regulations is to... provide for terms and conditions under which the PBS Licensee will offer its television programmes to the SBS licensee*"<sup>64</sup> and to "*Determine the transparent, equitable and reasonable terms and conditions under which the PBS Licensee may offer its programmes to the SBS licensee*".<sup>65</sup> These provisions could unintentionally suggest that the Authority will determine the terms and conditions which the PBS and SBS Licensees must negotiate.

82 In line with the principles highlighted in paragraph 80, and to remove the ambiguity referred to in paragraph 81, we propose that the Authority amend Reg. 2 to read as follows:

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<sup>62</sup> For example, the National Integrated ICT Policy Green Paper, 2014 (Notice No. 44, Gazette No. 37261, 24 January 2014) stated:

*"Policies that focus on these issues are aimed at ensuring prominence of public interest content across all platforms. They include, for example, obligations requiring subscription broadcasters to carry public broadcasting content services ...*

*What are called 'must carry rules' requiring, for example subscription broadcasters to re-transmit public broadcasting services, are prevalent in a number of countries and are aimed at ensuring that audiences have easy access to public interest content. They are intended to ensure that audiences do not have to switch platforms to access such content"* (Para 8.12.1, pgs 65 – 66 of the Green Paper (pgs 69 – 70 of the Gazette))

<sup>63</sup> Para 6.4, 6.5, 7.3 and 7.4 of the Findings Document

<sup>64</sup> Reg. 2(aA) as proposed to be amended by clause 3 of the Draft Regulations

<sup>65</sup> Reg. 2(b)

- "(1) The PBS Licensee is established as the public broadcaster to service the needs of all South African society, to be responsive to audience needs and to make its services available throughout the Republic.
- (2) Must Carry rules are driven by a central public interest principle of universal access to make public broadcasting programming available to all citizens, targeting those citizens that use subscription broadcasting services as their means of access to television.
- (3) The objective of Must Carry Regulations is to make Must Carry Channels conveniently accessible to subscribers, by requiring SBS Licensees to carry the Must Carry Channels on their subscription broadcasting service.
- (2) The purpose of these regulations is to:

- (a) Prescribe the extent to which SBS licensees must carry, subject to commercially negotiable terms, the Television Programmes provided by the PBS licensee.
- (b) Provide exemptions for certain SBS Licensees from compliance with these Regulations.
- (c) Set out the obligations on the PBS Licensee to offer, and SBS Licensees to carry, the Must Carry Channels, subject to commercially negotiable terms.
- (d) Create a framework for PBS and SBS licensees to commercially negotiate terms to which the carriage of Must Carry Channels will be subject.
- (e) Regulate all other matters incidental hereto."

## Definition and use of terms

### "Channel"

83 The Draft Regulations propose inserting a definition of "channel", to mean *"a single defined television programming service of a licensee other than a video on demand programming service"*.<sup>66</sup>

84 But that term is already defined in s1 of the ECA as meaning *"a single defined programming service of a broadcasting services licensee"*. It is therefore not necessary to define the term in the Must Carry Regulations, since it is covered

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<sup>66</sup> Reg. 1 as proposed to be amended by clause 2.1 of the Draft Regulations

by the opening phrase in Reg. 1, which provides that any word or expression to which a meaning has been assigned in the ECA will have the meaning ascribed to it in the ECA unless the context indicates otherwise.

- 85 The term "channel" need not be defined in the Regulations as it is already defined in the ECA. If it is defined in the Regulations, it must be consistent with the definition of the term in the ECA.

#### "Carry"

- 86 The term "carry" is used, but not defined, in the Regulations.

- 87 We propose that the Authority define the term "carry" to mean "*to simultaneously retransmit a Must Carry Channel on the subscription broadcasting service of an SBS Licensee*".

#### Interchangeable use of "*bouquet*" and "*service*"

- 88 The Draft Regulations propose inserting a definition of "bouquet", in order to provide clarification for the term used in the Draft Regulations.<sup>67</sup>
- 89 The term "bouquet" is used in the definitions of "Must Carry Channel" and "Non-Must Carry Channels" and in Reg. 4(1A), 4(5)(b) and 4(5)(c), usually in the context of the addition of a PBS channel to the bouquet of an SBS licensee. The Regulations seem to use the term "bouquet" interchangeably with a *service* or *service offering* of an SBS licensee.
- 90 This blurring of terms overlooks the fact that in the multi-channel environment, subscription broadcasters typically offer multiple bouquets. For example, the DStv service currently offers a choice of seven audiovisual bouquets and StarSat offers a choice of five bouquets.
- 91 It would therefore make more sense to refer to the subscription broadcasting *service* (as is currently done in Reg. 5(1), rather than the *bouquet* of an SBS

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<sup>67</sup> Reg. 1 as proposed to be amended by clause 2.1 of the Draft Regulations, read with para 3.1 of the Explanatory Memorandum to the Draft Regulations



licensee. For instance, in Reg. 4(5)(b) and (c), the obligation to carry a Must Carry Channel would be triggered when the 30<sup>th</sup> and every 20<sup>th</sup> channel thereafter is added to the overall subscription broadcasting service (rather than referring to the number of channels in a bouquet, which we do not understand to be the Authority's intention). The same reasoning applies to the definition of "Must Carry Channel" and "Non-Must Carry Channels" in Reg. 1.

92 We accordingly recommend that the Authority replace the term "bouquet" with the term "subscription broadcasting service" in Reg. 4(1A), 4(5)(b) and 4(5)(c) and in the definitions of "Must Carry Channel" and "Non-Must Carry Channels" in Reg. 1.

Interchangeable use of "commercially negotiable terms" and "commercially agreeable terms"

93 The Authority has proposed replacing the phrase "*at no cost*" in Reg. 6(1) with the phrase "*subject to commercially agreeable terms*".<sup>68</sup>

94 We understand the Authority's intention to be to align the Regulations with s60(3) of the ECA. However, s60(3) requires SBS licensees to "*carry, subject to commercially negotiable terms*".

95 To avoid confusion, we propose that the Authority amend Reg. 6(1) to refer to "*commercially negotiable terms*", which is the language used in s60(3) of the ECA.

Interchangeable use of "Must Carry Channels" and "television programmes of the PBS Licensee"

96 Reg. 3(1) provides that "*all the free-to-air PBS programmes comprising a channel broadcast by a PBS Licensee as part of its broadcasting service are subject to Must Carry obligations*".<sup>69</sup>

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<sup>68</sup> Reg. 6(1) as proposed to be amended by clause 6.1 of the Draft Regulations

<sup>69</sup> Reg. 3(1) as proposed to be amended by clause 4 of the Draft Regulations

97 "Must Carry Channel" is defined in the Draft Regulations as meaning -

*"the television programmes comprising a channel of the PBS Licensee to be added to the bouquet of a SBS Licensee in accordance with regulation 4".<sup>70</sup>*

98 Given this definition, it is not necessary to refer to *"the television programmes of the PBS Licensee"* in full in each of Reg. 4(2), 4(5), 5(1), 5(3), 5(3)(a), 5(3)(b), 6(1), 6(2) and 7.

99 To avoid confusion and long-windedness, we propose that the Authority replace the phrase *"the television programmes of the PBS Licensee"* in Reg. 4(2), 4(5), 5(1), 5(3), 5(3)(a), 5(3)(b), 6(1), 6(2) and 7 with a reference to *"the Must Carry Channels"*.

#### Interchangeable use of "Must Carry Channels" and "PBS channels"

100 On multiple occasions the Regulations refer to *"Must Carry Channels"*, which is the term defined in Reg. 1.

101 However, in the proposed new Reg. 3(2),<sup>71</sup> the Authority proposes that *"The PBS and the SBS Licensees must negotiate the carriage of PBS channels"*.

102 We understand Reg. 3(2) to refer interchangeably to *"Must Carry Channels"*.

103 To avoid confusion, we propose that the Authority amend Reg. 3(2) to refer to the carriage of "Must Carry" Channels instead of "PBS" channels.

#### **The negotiation framework**

104 Reg. 4, 6 and 8 set out the framework for Must Carry negotiations. Read together and in chronological order (as we understand it), they provide as follows:

104.1 *"A SBS Licensee must submit a request to carry the television programmes of the PBS Licensee within six (6) months of the coming into effect of these regulations, or within six (6) months from the date*

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<sup>70</sup> Reg. 1

<sup>71</sup> Reg. 3(2), proposed to be inserted by clause 4 of the Draft Regulations

*of issue of the Subscription Broadcasting licence, whichever occurs first."*<sup>72</sup>

104.2 *"The PBS Licensee must offer its television programmes, subject to commercially agreeable terms, to a SBS Licensee upon a request from the SBS Licensee."*<sup>73</sup>

104.3 *"The commercial negotiations contemplated in regulation 6(2) above must be concluded within 90 days from the date of receiving a request for the Must Carry channels."*<sup>74</sup>

104.4 *"The PBS Licensee must offer its television programmes to a SBS Licensee within three (3) months from the date of conclusion of the commercial negotiations."*<sup>75</sup>

104.5 *"The SBS Licensee must submit to the Authority a copy of the agreement within 30 days of the agreement being signed."*<sup>76</sup>

104.6 *"The SBS Licensee must commence to transmit the must carry channels within three (3) months of receipt of the must carry channels from the PBS Licensee."*<sup>77</sup>

105 While we understand this to be the intended chronological sequence, the timing and sequencing of the negotiation framework is rigid, long-winded and unclear.

106 Leaving aside the sequencing, the following aspects are particularly unclear:

106.1 Reg. 4(2) still refers to the coming into effect of the principal Regulations (i.e. the 2008 Must Carry Regulations). Is there an obligation for an existing SBS Licensee to request to carry an existing

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<sup>72</sup> Reg. 4(2)

<sup>73</sup> Reg. 6(1) as proposed to be amended by clause 6.1 of the Draft Regulations

<sup>74</sup> Reg. 6(2A), proposed to be inserted by clause 6.2 of the Draft Regulations

<sup>75</sup> Reg. 6(2) as proposed to be amended by clause 6.1 of the Draft Regulations

<sup>76</sup> Reg. 8

<sup>77</sup> Reg. 4(3)

Must Carry Channel that has already been added to its subscription broadcasting service and, if so, by when?

- 106.2 What is the difference between the PBS Licensee's obligation to offer its television programmes, subject to commercially agreeable terms<sup>78</sup> and to negotiate the carriage of PBS channels<sup>79</sup>?
- 106.3 What is the difference between the PBS Licensee's obligations to "offer its television programmes" to an SBS licensee (a) in terms of Reg. 6(1) upon request, and (b) in terms of Reg. 6(2) within three months from the date of conclusion of the commercial negotiations? The use of the term "offer" in both of these provisions is confusing.
- 106.4 By when must the PBS Licensee commence negotiating the carriage of PBS channels after receiving a request from an SBS Licensee? The Regulations are silent in this regard.
- 106.5 Why does the PBS Licensee require three months from the date of conclusion of the commercial negotiations to "offer" its television programmes to the SBS Licensee?
- 106.6 When are Must Carry Channels considered to have been "received" from the PBS Licensee for the purposes of Reg. 4(3)? What is meant by the "receipt" of the Must Carry Channels in this context? We understand that this can't mean the reception of the PBS broadcast signal, as SBS Licensees are required to transmit the Must Carry Channels simultaneously.<sup>80</sup>
- 107 Given the Authority's proposal to shift to a Must Carry regime characterised by commercial negotiations, it is imperative that the negotiation framework is clear, simple, flexible and workable, to avoid disputes and potential black-outs.

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<sup>78</sup> Reg. 6(1) as proposed to be amended by clause 6.1 of the Draft Regulations

<sup>79</sup> Reg. 3(2) as proposed to be amended by clause 4 of the Draft Regulations

<sup>80</sup> Reg. 7 as proposed to be amended by clause 7 of the Draft Regulations

108 We propose that the Authority provide a simplified framework along the following lines:

- 108.1 An SBS Licensee must, in writing, request the PBS Licensee to carry one or more Must Carry Channels within a specified period (e.g. three months from the coming into operation of the Amendment Regulations or the date of issue of the SBS licence, whichever occurs first, or from the time that an obligation to add another Must Carry Channel is triggered).
- 108.2 The PBS and SBS Licensee must commence commercial negotiations within 15 days of a request and must negotiate the terms in good faith, having regard to the purpose of the Regulations.
- 108.3 Within 180 days from the request to carry, or such further period as may be agreed to by the parties and notified to the Authority, the PBS and SBS Licensee must conclude a written must carry agreement setting out the commercially negotiated terms.
- 108.4 The SBS Licensee must notify the Authority, within 30 days from the date of signature of the Agreement by the party signing last in time, that the parties have concluded an Agreement in terms of the Must Carry Regulations.
- 108.5 The PBS and SBS Licensees must both take all of the reasonably necessary steps within their control in order for the SBS to add the Must Carry Channel/s to its SBS service within 90 days from the signature of the Agreement, or such further period as may be agreed by the parties and authorised by the Authority.
- 108.6 The negotiation framework must be subject to the transitional arrangements proposed by the Authority, which we deal with in paragraphs 155 to 162 below.

108.7 The proposed amendments to give effect to this simplified framework are set out in our drafting proposals in Annexure A, as a proposed new regulation 7A.

109 The proposals in paragraph 108 above must be read together with the remainder of our submission, including as regards the terminology used and our other drafting proposals. We also propose that these "framework" provisions be carved out of Reg. 4, 6 and 8 and grouped together in sequence in a single regulation 7A dealing with the framework for commercial negotiations. The requirement in Reg. 3(2) for the PBS and SBS Licensees to negotiate the carriage of the Must Carry Channels should refer to the negotiation framework in Reg. 7A.

### **Substantive Must Carry obligations**

#### Television programmes to be carried

110 The Authority has proposed amending Reg. 3(1) to clarify that "*all PBS channels be carried*", as opposed to the other view that "*only public interest programmes should be carried*."<sup>81</sup>

111 While the heading to Reg. 3 still refers to "Television programmes to be carried", the word "*television*" has been deleted from Reg. 3(1).

112 We propose that the Authority reinsert the word "television" into Reg. 3(1) before the word "channel", so that it is clear that the Must Carry obligations apply only to the television channels broadcast by the PBS licensee.

113 In addition, for the avoidance of doubt, Reg. 3(1) should be subject to Reg. 4(5) (incremental Must Carry obligations) and Reg. 5 (exemption from compliance with the regulations).

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<sup>81</sup> Reg. 3(a) as proposed to be amended by clause 4 of the Draft Regulations, read with para 3.5 of the Findings Summary

114 We suggest that the Authority amend Reg. 3(1) to read as follows:

"Subject to Regulations 4(5) and 5, all the free-to-air PBS programmes comprising a television channel broadcast by a PBS Licensee as part of its broadcasting service are subject to Must Carry obligations."

115 We also reiterate our proposal in paragraph 103 above, that Reg. 3(2) should refer to the carriage of "Must Carry" Channels instead of "PBS" channels.

Available at all times

116 The Authority has proposed amending the Regulations to require an SBS Licensee to ensure that the Must Carry Channels are available on its bouquet at all times.<sup>82</sup>

117 This requirement is not as clear as it ought to be. However, we understand Reg. 4(1A) to require an SBS licensee to (a) add the Must Carry Channels to all of the bouquets which it provides on its SBS and (b) to simultaneously re-transmit the Must Carry Channels on its SBS 24/7/365.

118 We support such a proposal in principle, as SBS should not be permitted to cherry pick which of the bouquets on their SBS will include the Must Carry Channels, or to broadcast the Must Carry Channels on their SBS only at some times but not others (e.g. only when popular or public interest programming is scheduled on the Must Carry Channels).

119 But MultiChoice would be unable to meet this requirement if the SABC were to fail to make the Must Carry Channels available for carriage at all times. For example, SBS would not be in a position to comply if the SABC failed to make one or more Must Carry Channels available for carriage (a) at or during any particular time or (b) at all, or (c) if the SABC permitted the SBS licensee to add specific Must Carry Channels only to particular bouquets. SBS licensees cannot be held to have contravened the Must Carry Regulations in circumstances where

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<sup>82</sup> Reg. 4(1A), as proposed to be inserted by clause 5 of the Draft Regulations

the SABC has not made the Must Carry Channels available for carriage at all times.

120 We propose that the SABC should also be required to take all reasonable and necessary steps within its control to ensure that the Must Carry Channels are carried on SBS in accordance with the Must Carry Regulations. While Must Carry is a restriction on SBS, the SABC must be explicitly required to make the necessary arrangements within its control to put the SBS in a position to comply with the Must Carry Regulations.

121 In addition, MultiChoice is concerned that the requirement for the Must Carry Channels to be available "at all times" is absolute. The word "all" requires continuous indefinite availability of the Must Carry Channels on the SBS' bouquets. However, there may be instances in which 100% compliance is not possible, such as business interruptions, a link failure, planned or unplanned repairs or maintenance, or other temporary downtime. Temporary downtime or interruptions for reasons beyond the control of the licensee, or which are necessary for the purposes of the SBS licensee's security or operational requirements, should not constitute a contravention of Reg. 4(1A).

122 We propose that the Authority amend Reg. 4(1A) to read as follows:

"(1A) The SBS licensee and the PBS licensee must take all reasonable and necessary steps within their control to ensure that the Must Carry channels are carried on all of the bouquets provided on the subscription broadcasting service concurrent with the broadcast of those channels by the PBS licensee. Provided that an SBS licensee will not be held to have contravened this regulation due to circumstances beyond its reasonable control or due to downtime not exceeding 24 continuous hours."

123 We also understand the proposed Reg. 4(1A) to require SBS to continue to carry the Must Carry Channels while the PBS and SBS licensees negotiate commercial terms under the amended Regulations. While Reg. 4(1A) may have been intended to give effect to the Authority's proposed transitional arrangements, we propose that the new regulations should contain an express transitional provision to give effect to the Authority's proposed transitional arrangements to ensure that the Must Carry Channels continue to be carried on



SBS at all times while the parties are negotiating. We refer in this regard to our comments on the proposed transitional arrangements in paragraphs 155 to 160 below.

124 Lastly, insofar as it might be suggested by anyone that the effect of Reg. 4(1A) is to require SBS to provide the Must Carry Channels to members of the public without paying subscription fees (i.e. to persons who do not subscribe to an SBS) MultiChoice does not agree with this interpretation and is firmly opposed to such an obligation being introduced.

124.1 The ECA does not permit the Authority to require SBS licensees to provide the Must Carry Channels to non-subscribers.

124.2 A subscription broadcasting service may only be "*provided to a subscriber upon payment of a fee*".<sup>83</sup> A "subscriber" is "*a person who lawfully accesses, uses or receives a retail service of a licensee referred to in Chapter 3 [of the ECA] for a fee ...*"<sup>84</sup> MultiChoice's licence obliges it to encrypt its output signal.<sup>85</sup>

124.3 The power s60(3) of the ECA grants ICASA is therefore explicitly limited to regulating the extent to which subscription broadcasting services provide the Must Carry Channels to subscribers. It does not grant ICASA the power to require subscription broadcasters to provide the Must Carry Channels to people who are not subscribers.

124.4 As the Authority has indicated previously:

*"A subscription broadcaster provides a broadcasting service to sections of the public in return for the payment of a fee. It is clear that there is a principle involved here, namely that subscription broadcasting services are not free-to-air commercial*

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<sup>83</sup> s1 of the ECA. It is precisely the charging of a fee to access the service which differentiates a subscription broadcasting service from a free-to-air service. "Free-to-air service" is defined as meaning "*a service which is broadcast and capable of being received without payment of subscription fees*" (s1 of the ECA)

<sup>84</sup> s1 of the ECA

<sup>85</sup> Clause 3.1 of MultiChoice's licence contains an obligation to "*ensure that the output signal of its subscription broadcasting service is encrypted*"

*broadcasting services and as such should not be providing any broadcasting services to free-to-air audiences."*<sup>86</sup>

- 124.5 Subscription broadcasters cannot lawfully be required to provide the Must Carry Channels to non-subscribers. Such an obligation would not be legally permissible and is likely to be struck down as *ultra vires* and invalid on other grounds.

125 Insofar as it might be suggested that Reg. 4(1A) compels subscription broadcasters to provide the Must Carry Channels to non-subscribers, this would not be lawful and the Regulation would then be invalid.

126 To the extent that this is the intent of Reg. 4(1A) it should be deleted.

#### Requirement to simultaneously retransmit Must Carry Channels

- 127 The SBS Licensees are required to transmit simultaneously and without any alteration, the entire television programmes that are identified as Must Carry programmes.

128 Since the SBS Licensee is obliged to carry them as is pursuant to the Must Carry obligations, the Must Carry Regulations should expressly state that the SBS Licensee will not bear any responsibility or liability arising from any of the programming or advertising broadcast on the Must Carry Channel. We propose that the Authority renumber Reg. 7 as Reg. 7(1) and insert a new Reg. 7 (2) which reads as follows:

"(2) An SBS licensee which carries the Must Carry Channels on its SBS in accordance with these Regulations will not bear any responsibility or liability to any person arising from any of the programming or advertising broadcast on the Must Carry Channel."

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<sup>86</sup> Amendment of M-Net's Broadcasting Licence in terms of Section 52(1)(d) of the Independent Broadcasting Authority Act, 1993: Ruling and Reasons, ICASA, 2 June 2005, para 5.8

### Submission of Agreement to the Authority

129 Reg. 8 of the current Must Carry Regulations requires SBS Licensees to submit a copy of the Must Carry Agreement to the Authority.

130 MultiChoice is not opposed to this requirement in the context of the current Must Carry Regulations, where the Must Carry Agreement is unlikely to contain any commercially sensitive terms.

131 However, since the Authority has proposed shifting to a Must Carry regime characterised by commercial negotiations, the agreement to be concluded between SBS licensees and the SABC will be a negotiated confidential commercial agreement, which is more likely to contain sensitive terms.

132 The Authority has adopted the position that -

*"The Authority's involvement in commercial negotiations may be perceived as undue interference in the commercial dealings of licensees. The Authority will not scrutinize the commercial nature of agreements as stated above other than to receive same from licensees to ensure that there is compliance with the Regulations."*<sup>87</sup>

133 We respectfully submit that it is not necessary to provide a copy of the Agreement to the Authority to demonstrate compliance. It should suffice for the SBS licensee to notify the Authority, in writing, that it has concluded a Must Carry Agreement with the SABC. Should it be necessary, the Authority could ask the SABC to confirm that it has concluded a Must Carry Agreement with the relevant SBS Licensee. If necessary, the Authority could, in appropriate circumstances, call for a copy of the Agreement in terms of s4(3)(g) of the ICASA Act.<sup>88</sup>

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<sup>87</sup> Para 6.5 of the Findings Document

<sup>88</sup> In terms of s4(3)(g) of the ICASA Act the Authority "may, by notice in writing, direct the holder of a licence in terms of the underlying statutes to produce or furnish to the Authority, at a time and place specified in the notice, any documents and information specified in such notice and relating to any matter in respect of which a duty or obligation is imposed on such licensee by this Act or the underlying statutes"

134 We propose that the Authority -

- 134.1 capitalise the term "agreement" in Reg. 8 to make it clear that it is referring to the Must Carry Agreement, as defined in Reg. 1; and
- 134.2 amend Reg. 8 to require the SBS licensee to notify the Authority, in writing, within 30 days from the signature of the Agreement by the party signing the Agreement last in time (to cater for different signature dates by the parties), that it has concluded a Must Carry Agreement with the PBS Licensee.

#### Compliance reporting

135 We support the proposed change in Reg. 9 to require licensees to report annually no later than six months after their financial year end.<sup>89</sup>

#### **Contraventions and fines**

136 Some of the proposed contraventions and fines are unduly harsh.

#### Penalties: negotiation framework

137 The Authority has posed a fine of up to R1 million in respect each of -

- 137.1 Reg. 4(2) (requirement for SBS Licensee to submit a request to carry);
- 137.2 Reg. 4(3) (requirement for SBS Licensee to commence to transmit the Must Carry Channels within 3 months of receipt of the channels from the PBS Licensee); and
- 137.3 Reg. 6 (obligation for PBS Licensee to offer television programmes) all deal with the negotiation framework.

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<sup>89</sup> Reg. 9 as proposed to be amended by clause 8

138 As indicated above, Reg. 4 and 6 are particularly unclear and unworkable. It is unduly harsh to impose such severe penalties in respect of such unclear provisions. Nor should the penalties apply cumulatively to these provisions.

Penalties: failure to conclude commercial negotiations within 90 days

139 The Draft Regulations provide that the failure to conclude commercial negotiations within 90 days from receiving a request for the Must Carry Channels is punishable by a fine of up to R1 million.<sup>90</sup> There is no provision for the negotiation period to be extended beyond the stipulated 90 days (an issue which we have sought to address in paragraph 108.3 above).<sup>91</sup>

140 We support<sup>92</sup> the sentiment that it is necessary to provide a clear time frame for the negotiation and conclusion of commercial agreements to provide certainty to the SBS and PBS on what is expected of them in terms of time frames.<sup>93</sup>

141 However, we do not support the imposition of a penalty in circumstances where, despite good faith negotiations, the parties are unable to reach agreement in the specified period or at all.

142 The Authority has proposed a shift to a Must Carry Regime centred on the requirement for SBS to carry subject to commercially negotiable terms. The Authority's position is that the SBS and PBS will have to negotiate to reach an agreement.<sup>94</sup>

143 MultiChoice is committed to negotiating with the SABC in good faith. But, as the Authority, like Ofcom, recognises, there is a risk that the "*the parties will take long to reach an agreement*"<sup>95</sup> and/or that the parties will be unable to reach agreement at all.

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<sup>90</sup> Reg. 10(1)(a) read with Reg. 6(2A), as proposed to be amended by clauses 9 and 6.2 respectively

<sup>91</sup> We propose that the PBS and SBS Licensee must conclude a written must carry agreement on the commercially negotiated terms within 180 days from the request to carry, or such further period as may be agreed to by the parties and notified to the Authority

<sup>92</sup> Subject to our proposals in paragraph 108

<sup>93</sup> Para 3.5 of the Explanatory Memorandum

<sup>94</sup> Para 16.18 of the Findings Document

<sup>95</sup> Para 16.19 of the Findings Document

144 The Regulations must contemplate the reasonable possibility that negotiations take longer than anticipated, or the parties are, despite good faith negotiations, unable to agree.

145 Provided the negotiations are conducted in good faith on the part of both parties, a licensee should not be penalised if, despite good faith negotiations, it is unable to reach agreement within the specified period or at all. To do so would be unreasonable and unfair. To the extent that a party does not negotiate (a) at all or (b) in good faith, its failure to do so may be referred to the CCC in terms of the ICASA Act.

#### Penalties: Exemptions from Must Carry

146 The contravention of Reg. 5(2), which provides that a Licensee may only be exempt from the Must Carry Regulations where it has notified the Authority in writing and the Authority has approved the exemption in writing, is punishable by a fine of up to R1 million in terms of Reg. 10(1)(a).

147 This is unduly harsh, given that the intention of the Regulations is to exempt such licensees from the Must Carry Regulations.

#### Penalties: Reg. 4(6)

148 The reference to Reg. 4(6) in the penalty provision is unclear, since Reg. 4(6) merely provides that where channels are added in accordance with Reg. 4(5)(b) and 4(5)(c), Reg. 7<sup>96</sup> and 8<sup>97</sup> will apply to such channels. A contravention of Reg. 7 is punishable under Reg. 10(1)(a), but Reg. 8 is not.

149 It is not clear whether the intention is to incorporate a contravention of Reg. 8 into Reg. 10(1)(a) by reference, but if this is the intention, it is unduly harsh and inappropriate.

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<sup>96</sup> Requirement to transmit the entire Must Carry Channels simultaneously and without any alteration

<sup>97</sup> Requirement for the SBS Licensee to submit the Must Carry Agreement to the Authority within 30 days of signature of the Agreement

### Penalties: Catch-all

150 Every contravention in the Regulations not listed in Reg. 10(1)(a) is punishable by a fine of up to R100, 000, given the catch-all in sub-regulation 10(1)(b).

151 This is excessively wide and harsh. For example, the submission of a Must Carry Agreement or a compliance report to the Authority one week late<sup>98</sup> could be punished by a fine of up to R100, 000.

152 We recommend that the proposed contraventions and fines be streamlined in line with our above-mentioned submissions and the proposed penalties adjusted appropriately.

153 In addition, the flow in Reg. 10 needs to be corrected so that sub-regulation (1)(a) follows on from Reg. 10(1).

154 We have made suggested amendments to Reg. 10 in our drafting proposals in Annexure A.

### **Transitional arrangements**

155 Under the proposed new regime, the public and subscription broadcasters will negotiate the terms and reach an agreement on the carriage of Must Carry Channels.<sup>99</sup> It is possible that the new regime will be as successful as the current one, but there is also a risk that the parties might not reach agreement (e.g. on the apportionment of transmission costs) and that the gains achieved under the current regulations will be then be undone.

156 The Authority has noted the risks that no commercial agreement is reached resulting in no universal coverage and convenient access to PBS channels on the SBS platform (black out), in which case the objectives of universal coverage and convenient access will not be achieved.<sup>100</sup>

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<sup>98</sup> In terms of Reg. 8

<sup>99</sup> Paras 13.4 and 16.18 of the Findings Document

<sup>100</sup> Paras 11.29 and 16.17 of the Findings Document

- 157 The Authority is not alone in recognising this risk. Ofcom identified a real risk that without Must Carry rules, public service broadcasters in the UK "*may find it difficult to agree fair terms for their content and may not be available on certain TV platforms*".<sup>101</sup>
- 158 Universal access would undoubtedly be harmed if the parties failed to reach agreement. Like the Authority, we too wish to avoid a reduction in universal access or to inconvenience subscribers as a result of the amendments.
- 159 We therefore support the Authority's position that the current Regulations will apply until the subscription broadcasting services broadcast the Must Carry Channels in line with the reviewed Regulations to ensure that if the parties take long to reach an agreement there is no impediment to accessing public broadcasting service programmes.<sup>102</sup>
- 160 We note, however, that the Draft Regulations do not contain wording to expressly give effect to the Authority's position. We suggest that the new Regulations should contain an express transitional provision to give effect to the Authority's position, to ensure that the Must Carry Channels continue to be carried in accordance with the current arrangement until the parties have concluded a new agreement under the new Regulations.
- 161 In addition, we propose that the amendments to the Must Carry Regulations should come into operation six months after they are gazetted to allow the affected parties to arrange their affairs in order to comply with the new Regulations.

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<sup>101</sup> *Small Screen: Big Debate Consultation: The Future of Public Service Media*, Ofcom, 8 December 2020, para 1.16

<sup>102</sup> Para 16.19 of the Findings Document



162 We propose that the Authority amend clause 10 of the Amendment Regulations and Reg. 8(2) of the principal Regulations to include commencement and transitional arrangements, to read as follows:

**"Short title, commencement and transitional arrangements**

- (1) These Regulations are called the Must Carry Amendment Regulations, 2021, and will come into force six months after the date of the publication thereof in the Government Gazette.
- (2) The Must Carry Channels carried by an SBS Licensee immediately prior to the publication of the Must Carry Amendment Regulations, 2021 shall continue to be carried on an SBS in accordance with the Agreement concluded between that SBS Licensee and the PBS Licensee and submitted to the Authority under the ICASA Must Carry Regulations, 2008 until such time as the Must Carry Channels are carried by that SBS Licensee in accordance with a new Agreement concluded by the parties in terms of the amended regulations."

## CONCLUSION

163 We reiterate our thanks to the Authority for the opportunity to make this submission and look forward to participating further in this process.

164 Given the universal access gains made since 2008 under the existing Must Carry Regulations, our priority at this stage is to take care not to upend something that is working, thereby unintentionally compromising universal access and inconveniencing subscribers through amendments which are unclear and/or impractical.

165 We hope that our submission will help to streamline the proposed amendments so that universal access can continue to be achieved in a viable way.

166 In order to assist the Authority, our proposed amendments to the Regulations are set out in **Annexure A**. We hope that our input will contribute constructively to the review of the Regulations and trust that it will assist the Authority in developing Must Carry Regulations which achieve their objective in a reasonable, balanced, proportionate, clear and workable way.

167 MultiChoice requests an opportunity to make oral representations at the hearings to be convened by the Authority in due course.

## ANNEXURE A: MULTICHOICE'S PROPOSED AMENDMENTS TO THE DRAFT REGULATIONS

### ICASA Must Carry Regulations, 2008, as proposed to be amended by the draft Must Carry Amendment Regulations, 2021: MultiChoice's drafting proposals (tracked changes)

#### 1 Definitions

In these Regulations any word or expression to which a meaning has been assigned in the Electronic Communications Act, 2005 (Act No. 36 of 2005) and the Broadcasting Act, 1999 (Act No. 4 of 1999) shall have the meaning ascribed to them unless the context indicates otherwise.

**"Act"** means the Electronic Communications Act, 2005 (Act No. 36 of 2005);

**"Agreement"** means the agreement in terms of these regulations concluded between a PBS Licensee and a SBS Licensee, governing the carriage of television programmes of the PBS Licensee by a SBS Licensee;

**"Bouquet"** means a collection of video and/or audio channels marketed as a single package, often transmitted in a single data stream, or a thematic environment where channels are devoted to a specific programming genre;

"Carry" means to simultaneously retransmit a Must Carry Channel on the subscription broadcasting service of an SBS Licensee;

~~"Channel" means a single defined television programming service of a licensee other than a video on demand programming service;~~

**"Must Carry"** means the set of rules that obliges a SBS Licensee to carry the television programmes broadcast by a PBS ~~licensee~~Licensee;

**"Must Carry Channel"** means the television programmes comprising a channel of the PBS Licensee to be added to the ~~bouquet~~subscription broadcasting service of a SBS Licensee in accordance with regulation 4;

**"Non-Must Carry Channels"** means the television programmes comprising a channel of the PBS Licensee which the SBS Licensee voluntarily adds to its ~~bouquet~~subscription broadcasting service in the absence of an obligation imposed by these regulations;

**"PBS Licensee"** means Public Broadcasting Service Licensee;

**"SBS Licensee"** means Subscription Broadcasting Service Licensee;

**"Television Programmes"** means television programmes broadcast by the Public Broadcasting Service Licensee to be carried by the Subscription Broadcasting Service Licensee in terms of section 60(3) of the Act;

## 2 Purpose of the regulations

(1) The PBS Licensee is established as the public broadcaster to service the needs of all South African society, to be responsive to audience needs and to make its services available throughout the Republic.

(2) Must Carry rules are driven by a central public interest principle of universal access to make public broadcasting programming available to all citizens, targeting those citizens that use subscription broadcasting services as their means of access to television.

(3) The objective of Must Carry Regulations is to make Must Carry Channels conveniently accessible to subscribers, by requiring SBS Licensees to carry the Must Carry Channels on their subscription broadcasting service.

~~(1)~~(4) The purpose of these regulations is to:

(a) ~~Provide for terms and conditions under which~~ Prescribe the extent to which SBS Licensees ~~will~~must carry, subject to commercially negotiable terms, the ~~programmes of~~ Television Programmes provided by the PBS Licensee;

~~(aA) provide for terms and conditions under which the PBS Licensee will offer its television programmes to the SBS licensee;~~

~~(b) Determine the transparent, equitable and reasonable terms and conditions under which the PBS Licensee may offer its programmes to the SBS Licensee;~~

~~(e (b))~~ Provide exemptions for certain SBS Licensees from compliance with these ~~regulations; and~~ Regulations.

~~(c) Set out the obligations on the PBS Licensee to offer, and SBS Licensees to carry, the Must Carry Channels, subject to commercially negotiable terms.~~

~~(d) Create a framework for PBS and SBS Licensees to commercially negotiate terms to which the carriage of Must Carry Channels will be subject.~~

(d) Regulate all other matters incidental hereto.

### 3 Television programmes to be carried

(1) ~~All~~ Subject to regulations 4(5) and 5, all the free-to-air PBS programmes comprising a television channel broadcast by a PBS Licensee as part of its broadcasting service are subject to Must Carry obligations.

(2) The PBS and the SBS Licensees must negotiate the carriage of ~~PBS channel~~ the Must Carry Channels in accordance with the framework in regulation 7A.

### 4 Obligation to carry television programmes

(1) All SBS Licensees must carry the channels of the PBS Licensee designated as ~~must carry channels~~ Must Carry Channels as part of the service offering, subject to Regulation 5 and 7A.

(1A) The SBS ~~licensee~~ Licensee and the PBS Licensee must take all reasonable and necessary steps within their control to ensure that the Must Carry channels are ~~available~~ carried on ~~its bouquet at all times~~.

~~(2)~~ A SBS Licensee must submit a request to carry the television programmes~~all~~ of the PBS Licensee within six ~~(6)~~ months of ~~bouquets provided on~~ the coming into effect of these regulations, or within six ~~(6)~~ months from~~subscription broadcasting service concurrent with~~ the date of issue of the Subscription Broadcasting licence, whichever occurs first.

The SBS Licensee must commence to transmit the must carry~~broadcast of those~~ channels within three ~~(3)~~ months of receipt of the must carry channels from~~by~~ the PBS Licensee. Provided that an SBS Licensee will not be held to have contravened this regulation due to circumstances beyond its reasonable control or due to downtime not exceeding 24 continuous hours.

~~(2)~~ ....

~~(3)~~ ....

~~(3)~~~~(4)~~ ....

~~(4)~~~~(5)~~ A SBS Licensee:

- (a) whose service offering consists of more than twenty-nine (29) channels is subject to the obligation to carry the ~~television programmes of the PBS Licensee~~Must Carry Channels;
- (b) must ensure that the thirtieth (30th) channel added to its ~~bouquets~~subscription broadcasting service is a ~~must carry channel of the PBS Licensee~~Must Carry Channel;
- (c) must ensure that every twentieth (20th) channel added to its ~~bouquets~~subscription broadcasting service over the minimum thirty (30) channels is a ~~must carry channel~~Must Carry Channel (being the 50th, 70th, 90th channels and so forth) in accordance with Regulation 3.

~~(5)~~~~(6)~~ Where channels are added in accordance with Regulation 4(5)(b) and 4(5)(c), regulations 7 and 8 apply to such channels.

~~(6)~~~~(7)~~ ....

## 5 Exemption from compliance with the regulations

- (1) Subject to regulation 5(3), a SBS Licensee whose service offering has twenty-nine (29) channels or less is exempt from the obligation to carry the ~~television programmes of the PBS Licensee~~Must Carry Channels.
- (2) A SBS Licensee may only be exempt where:
  - (a) Written notice has been submitted to the Authority by the SBS Licensee; and
  - (b) Approval of such exemption has been granted in writing by the Authority.
- (3) A SBS Licensee with twenty-nine (29) or less channels intending to carry ~~television programmes or non-must carry channels~~Must Carry Channels or Non-Must Carry Channels.
  - (a) is not precluded by the application of an exemption, granted in terms of regulation 5(1), to carry ~~television programmes or non-must carry channels~~Must Carry Channels or Non-Must Carry Channels; and
  - (b) may carry such ~~television programmes~~Must Carry Channels or ~~non-must carry channels~~Non-Must Carry Channels subject to commercial negotiations between the SBS and PBS Licensees.

## 6 Obligation to offer television programmes

- ~~(1) The PBS Licensee must offer its television programmes, subject to commercially agreeable terms, to a SBS Licensee upon a request from the SBS Licensee.~~
- ~~(2) The PBS Licensee must offer its television programmes to a SBS Licensee within three (3) months from the date of conclusion of the commercial negotiations.~~
- ~~(3) (2A) The commercial negotiations contemplated in regulation 6(2) above must be concluded within 90 days from the date of receiving a request for the Must Carry channels.~~

(1) ...

(2) ....

(2A) ....

(4)(3) The PBS Licensee must deliver its signal to the SBS Licensee in an un-encoded and compatible format.

## **7 Transmission of television programmes**

(1) The SBS Licensees are required to transmit simultaneously and without any alteration, the entire television programmes that are identified as Must Carry programmes on the Must Carry Channels.

(2) An SBS Licensee which carries the Must Carry Channels on its SBS in accordance with these Regulations will not bear any responsibility or liability to any person arising from any of the programming or advertising broadcast on the Must Carry Channel.

### **7A Negotiation framework**

(1) An SBS Licensee must, in writing, submit a request to carry one or more Must Carry Channels, as required in terms of regulation 4(5), within three (3) months of –

(a) the coming into effect of the Must Carry Amendment Regulations, 2021 or the date of issue of the relevant Subscription Broadcasting Service licence, whichever occurs first;

(b) the addition of every twentieth (20th) channel to its subscription broadcasting service which triggers the addition of a Must Carry Channel by the SBS Licensee to its subscription broadcasting service from time to time; and/or

(c) the launch of a new television channel on the broadcasting service of the PBS Licensee which triggers the addition of a Must Carry Channel by the SBS Licensee to its subscription broadcasting service from time to time.

- (2) The PBS Licensee and SBS Licensee must commence commercial negotiations within fifteen days from the receipt of a request from the SBS Licensee in terms of sub-regulation (1), and must negotiate the commercial terms in good faith having regard to the purpose of these Regulations specified in regulation (2).
- (3) Within 180 days from the receipt of a request from the SBS Licensee in terms of sub-regulation (1), or such further period as may be agreed to by the parties and notified to the Authority in writing, the PBS Licensee and the SBS Licensee must conclude a written Agreement setting out the commercially negotiated terms agreed to by the parties pursuant to the commercial negotiations.
- (4) Subject to this regulation 7A, the SBS Licensee must add the Must Carry Channel(s) to its subscription broadcasting service within 90 days of the signature of the Agreement by the party signing last in time, or such further period as may be agreed to by the parties and authorised by the Authority.
- (5) The PBS Licensee must take all relevant steps within its control in order for the SBS Licensee to carry the Must Carry Channels on its subscription broadcasting service in accordance with these Regulations.

## **8 Agreement**

- (1) The SBS Licensee must ~~submit to~~notify the Authority ~~a copy of the agreement, in writing,~~ within thirty (30) days of the ~~agreement being signed~~signature of an Agreement by the party signing last in time, that it has concluded an Agreement with the PBS Licensee.
- (2) Notwithstanding any other provision of these Regulations, the Must Carry Channels carried by an SBS Licensee immediately prior to the publication of the Must Carry Amendment Regulations, 2021 shall continue to be carried on an SBS in accordance with the Agreement concluded between that SBS Licensee and the PBS Licensee and submitted to the Authority under the ICASA Must Carry Regulations, 2008 until such time as the Must



Carry Channels are carried by that SBS Licensee in accordance with a new Agreement concluded by the parties in terms of the amended regulations.

## **9 Monitoring compliance with the Regulations**

Licensees must submit a compliance report annually no later than six (6) months after the end of their financial year.

## **10 Contravention and fines**

(1) In terms of section 17E (2)(b) of the ICASA Act, the Authority may impose a fine not exceeding:

~~(a) Any person that contravenes regulations 4(2), 4(3), 4(6), 5(2), 6, 7 and 9 is liable to a fine not exceeding R1 000 000, 00.~~

(a) One Million Rands (R1 000 000, 00) for contravention of regulations 3(2), 4(1), 5(2), 6, 7A(1), 7A(2), 7A(5), 8(2) and 9.

(b) One Hundred Thousand Rands (R100 000, 00) for a repeated material contravention of ~~the~~ regulations ~~not specified in regulation 40 7(1)(a)-, 8(1) and 9.~~

(c) One Million Rands (R1 000 000, 00) for repeated material contravention of the regulations ~~-~~ specified in Regulation 10(1)(a).

## **11 Short title and commencement**

These regulations are called the ICASA Must Carry Regulations, 2008 and will come into force upon publication thereof in the Gazette.

### **Transitional arrangements to be included in the Must Carry Amendment Regulations, 2021: Clause 10 of the Amendment Regulations**

"(1) These Regulations are called the Must Carry Amendment Regulations, 2021, and will come into force six months after the date of the publication thereof in the Government Gazette.

(2) The Must Carry Channels carried by an SBS Licensee immediately prior to the publication of the Must Carry Amendment Regulations, 2021 shall continue to be carried on an SBS in accordance with the Agreement concluded between that SBS Licensee and the PBS Licensee and submitted to the Authority under the ICASA Must Carry Regulations, 2008 until such time as the Must Carry Channels are carried by that SBS Licensee in accordance with a new Agreement concluded by the parties in terms of the amended regulations."

# **ICASA Must Carry Regulations, 2008, as proposed to be amended by the draft Must Carry Amendment Regulations, 2021: MultiChoice's drafting proposals (clean version)**

## **1 Definitions**

In these Regulations any word or expression to which a meaning has been assigned in the Electronic Communications Act, 2005 (Act No. 36 of 2005) and the Broadcasting Act, 1999 (Act No. 4 of 1999) shall have the meaning ascribed to them unless the context indicates otherwise.

**"Act"** means the Electronic Communications Act, 2005 (Act No. 36 of 2005);

**"Agreement"** means the agreement in terms of these regulations concluded between a PBS Licensee and a SBS Licensee, governing the carriage of television programmes of the PBS Licensee by a SBS Licensee;

**"Bouquet"** means a collection of video and/or audio channels marketed as a single package, often transmitted in a single data stream, or a thematic environment where channels are devoted to a specific programming genre;

**"Carry"** means to simultaneously retransmit a Must Carry Channel on the subscription broadcasting service of an SBS Licensee;

**"Must Carry"** means the set of rules that obliges a SBS Licensee to carry the television programmes broadcast by a PBS Licensee;

**"Must Carry Channel"** means the television programmes comprising a channel of the PBS Licensee to be added to the subscription broadcasting service of a SBS Licensee in accordance with regulation 4;

**"Non-Must Carry Channels"** means the television programmes comprising a channel of the PBS Licensee which the SBS Licensee voluntarily adds to its subscription broadcasting service in the absence of an obligation imposed by these regulations;

**"PBS Licensee"** means Public Broadcasting Service Licensee;

**"SBS Licensee"** means Subscription Broadcasting Service Licensee;

**"Television Programmes"** means television programmes broadcast by the Public Broadcasting Service Licensee to be carried by the Subscription Broadcasting Service Licensee in terms of section 60(3) of the Act;

## **2 Purpose of the regulations**

- (1) The PBS Licensee is established as the public broadcaster to service the needs of all South African society, to be responsive to audience needs and to make its services available throughout the Republic.
- (2) Must Carry rules are driven by a central public interest principle of universal access to make public broadcasting programming available to all citizens, targeting those citizens that use subscription broadcasting services as their means of access to television.
- (3) The objective of Must Carry Regulations is to make Must Carry Channels conveniently accessible to subscribers, by requiring SBS Licensees to carry the Must Carry Channels on their subscription broadcasting service.
- (4) The purpose of these regulations is to:
  - (a) Prescribe the extent to which SBS Licensees must carry, subject to commercially negotiable terms, the Television Programmes provided by the PBS Licensee;
  - (b) Provide exemptions for certain SBS Licensees from compliance with these Regulations.
  - (c) Set out the obligations on the PBS Licensee to offer, and SBS Licensees to carry, the Must Carry Channels, subject to commercially negotiable terms.

- (d) Create a framework for PBS and SBS Licensees to commercially negotiate terms to which the carriage of Must Carry Channels will be subject.

- (d) Regulate all other matters incidental hereto.

### **3 Television programmes to be carried**

- (1) Subject to regulations 4(5) and 5, all the free-to-air PBS programmes comprising a television channel broadcast by a PBS Licensee as part of its broadcasting service are subject to Must Carry obligations.
- (2) The PBS and the SBS Licensees must negotiate the carriage of the Must Carry Channels in accordance with the framework in regulation 7A.

### **4 Obligation to carry television programmes**

- (1) All SBS Licensees must carry the channels of the PBS Licensee designated as Must Carry Channels as part of the service offering, subject to Regulation 5 and 7A.
- (1A) The SBS Licensee and the PBS Licensee must take all reasonable and necessary steps within their control to ensure that the Must Carry channels are carried on all of the bouquets provided on the subscription broadcasting service concurrent with the broadcast of those channels by the PBS Licensee. Provided that an SBS Licensee will not be held to have contravened this regulation due to circumstances beyond its reasonable control or due to downtime not exceeding 24 continuous hours.
- (2) ....
- (3) ....
- (4) ....
- (5) A SBS Licensee:
  - (a) whose service offering consists of more than twenty-nine (29) channels is subject to the obligation to carry the Must Carry Channels;

- (b) must ensure that the thirtieth (30th) channel added to its subscription broadcasting service is a Must Carry Channel;
  - (c) must ensure that every twentieth (20th) channel added to its subscription broadcasting service over the minimum thirty (30) channels is a Must Carry Channel (being the 50th, 70th, 90th channels and so forth) in accordance with Regulation 3.
- (6) Where channels are added in accordance with Regulation 4(5)(b) and 4(5)(c), regulations 7 and 8 apply to such channels.
- (7) ....

## **5 Exemption from compliance with the regulations**

- (1) Subject to regulation 5(3), a SBS Licensee whose service offering has twenty-nine (29) channels or less is exempt from the obligation to carry the Must Carry Channels.
- (2) A SBS Licensee may only be exempt where:
- (a) Written notice has been submitted to the Authority by the SBS Licensee; and
  - (b) Approval of such exemption has been granted in writing by the Authority.
- (3) A SBS Licensee with twenty-nine (29) or less channels intending to carry Must Carry Channels or Non-Must Carry Channels.
- (a) is not precluded by the application of an exemption, granted in terms of regulation 5(1), to carry Must Carry Channels or Non-Must Carry Channels; and
  - (b) may carry such Must Carry Channels or Non-Must Carry Channels subject to commercial negotiations between the SBS and PBS Licensees.

## **6 Obligation to offer television programmes**

- (1) ...

(2) ....

(2A) ....

(3) The PBS Licensee must deliver its signal to the SBS Licensee in an un-encoded and compatible format.

## **7 Transmission of television programmes**

(1) The SBS Licensees are required to transmit simultaneously and without any alteration, the entire television programmes that are identified as Must Carry programmes on the Must Carry Channels.

(2) An SBS Licensee which carries the Must Carry Channels on its SBS in accordance with these Regulations will not bear any responsibility or liability to any person arising from any of the programming or advertising broadcast on the Must Carry Channel.

### **7A Negotiation framework**

(1) An SBS Licensee must, in writing, submit a request to carry one or more Must Carry Channels, as required in terms of regulation 4(5), within three (3) months of –

(a) the coming into effect of the Must Carry Amendment Regulations, 2021 or the date of issue of the relevant Subscription Broadcasting Service licence, whichever occurs first;

(b) the addition of every twentieth (20th) channel to its subscription broadcasting service which triggers the addition of a Must Carry Channel by the SBS Licensee to its subscription broadcasting service from time to time; and/or

(c) the launch of a new television channel on the broadcasting service of the PBS Licensee which triggers the addition of a Must Carry Channel by the SBS Licensee to its subscription broadcasting service from time to time.

- (2) The PBS Licensee and SBS Licensee must commence commercial negotiations within fifteen days from the receipt of a request from the SBS Licensee in terms of sub-regulation (1), and must negotiate the commercial terms in good faith having regard to the purpose of these Regulations specified in regulation (2).
- (3) Within 180 days from the receipt of a request from the SBS Licensee in terms of sub-regulation (1), or such further period as may be agreed to by the parties and notified to the Authority in writing, the PBS Licensee and the SBS Licensee must conclude a written Agreement setting out the commercially negotiated terms agreed to by the parties pursuant to the commercial negotiations.
- (4) Subject to this regulation 7A, the SBS Licensee must add the Must Carry Channel(s) to its subscription broadcasting service within 90 days of the signature of the Agreement by the party signing last in time, or such further period as may be agreed to by the parties and authorised by the Authority.
- (5) The PBS Licensee must take all relevant steps within its control in order for the SBS Licensee to carry the Must Carry Channels on its subscription broadcasting service in accordance with these Regulations.

## **8 Agreement**

- (1) The SBS Licensee must notify the Authority, in writing, within thirty (30) days of the signature of an Agreement by the party signing last in time, that it has concluded an Agreement with the PBS Licensee.
- (2) Notwithstanding any other provision of these Regulations, the Must Carry Channels carried by an SBS Licensee immediately prior to the publication of the Must Carry Amendment Regulations, 2021 shall continue to be carried on an SBS in accordance with the Agreement concluded between that SBS Licensee and the PBS Licensee and submitted to the Authority under the ICASA Must Carry Regulations, 2008 until such time as the Must Carry Channels are carried by that SBS Licensee in accordance with a new Agreement concluded by the parties in terms of the amended regulations.



## **9 Monitoring compliance with the Regulations**

Licensees must submit a compliance report annually no later than six (6) months after the end of their financial year.

## **10 Contravention and fines**

- (1) In terms of section 17E (2)(b) of the ICASA Act, the Authority may impose a fine not exceeding:
- (a) One Million Rands (R1 000 000, 00) for contravention of regulations 3(2), 4(1), 5(2), 6, 7A(1), 7A(2), 7A(5), 8(2) and 9.
  - (b) One Hundred Thousand Rands (R100 000, 00) for a repeated material contravention of regulations 7(1), 8(1) and 9.
  - (c) One Million Rands (R1 000 000, 00) for repeated material contravention of the regulations specified in Regulation 10(1)(a).

## **11 Short title and commencement**

These regulations are called the ICASA Must Carry Regulations, 2008 and will come into force upon publication thereof in the Gazette.

### **Transitional arrangements to be included in the Must Carry Amendment Regulations, 2021: Clause 10 of the Amendment Regulations**

- "(1) These Regulations are called the Must Carry Amendment Regulations, 2021, and will come into force six months after the date of the publication thereof in the Government Gazette.
- (2) The Must Carry Channels carried by an SBS Licensee immediately prior to the publication of the Must Carry Amendment Regulations, 2021 shall continue to be carried on an SBS in accordance with the Agreement concluded between that SBS Licensee and the PBS Licensee and submitted to the Authority under the ICASA Must Carry Regulations, 2008 until such time as the Must Carry Channels

are carried by that SBS Licensee in accordance with a new Agreement concluded by the parties in terms of the amended regulations."

## ANNEXURE B: FACTUAL ERRORS IN THE SABC'S SUBMISSION ON THE MUST CARRY DISCUSSION DOCUMENT

This schedule corrects factual errors in the written submission made by the SABC on 31 March 2020 in response to the Discussion Document on the review of the Must Carry Regulations. The purpose of this document is to (a) highlight factual matters which were misconceived or misrepresented in the SABC's submission (stated in red in the column under the heading "Error in SABC submission") and (b) briefly explain why they are incorrect (in the column under the heading "MultiChoice's response"). We have not commented on other errors made in the SABC's submissions or issues raised by the SABC which fall outside of this inquiry. Our failure to do so should not be construed as an acceptance thereof.

Item	Topic	Error in SABC submission	Para	MultiChoice's Response
1.	Rationale for must carry	<p><b>SABC argues ICASA's understanding of the rationale for Must Carry is flawed, that Must Carry in South Africa is principally about resolving coverage (and therefore differs with the rationale for Must Carry in Europe). The SABC argues that if there are no coverage constraints, there is no need for must carry.</b></p> <p><i>"Further the SABC's view on the study is that <b>the Authority's interpretation of universal service and access is flawed</b> in that, in Europe Must Carry was introduced for consumers who could afford to have both SBS/cable broadcasting services and public broadcasting services. It had nothing to do with <b>reach/coverage constraints as is the case in South Africa.</b>"</i></p> <p><i>"In contrast, for South Africa Must Carry is premised on the need to resolve coverage constraints but the consumer</i></p>	3.3, 3.4 and 9.1	<p>ICASA's interpretation is not wrong, the SABC's interpretation is wrong.</p> <p>In Europe the rationale for Must Carry obligations is to ensure universal access to public service broadcasting services, targeting those citizens who subscribe to pay TV services.</p> <p>Similarly, in SA, Must Carry is designed to extend universal access to public interest content. As the Must Carry Discussion Paper, 2007 states, it is the <i>"overriding principle of universality, which gives rise to must carry obligations"</i>. ... <i>"In most parts of the world, especially in Europe, discussions have always located must carry as part of universal service obligations, imposed on subscription services. Must carry is driven by a policy goal to ensure that public service broadcasting programming is available to all citizens, targeting those citizens that use subscription services as their preferred means of access to television. ... It is generally presumed that any citizen of a particular country has interest on the developments taking place within the country, and therefore should be able to receive public service programming. ... Must carry obligations promote the accessibility of important programming content that is of public interest on a variety of platforms and with economic convenience for the consumer who continues to receive public service programming without spending extra cost to purchase an antenna or receiver in addition to the subscription satellite dish and set-top-boxes"</i>.</p> <p>As this quote makes clear, Must Carry is principally to ensure convenience so that subscribers can access the SABC channels through the pay TV platform without having to purchase additional equipment. This was articulated in the National</p>

Item	Topic	Error in SABC submission	Para	MultiChoice's Response
		<i>must still pay for the SABC coverage in the guise of subscription fees."</i>		<p>Integrated ICT Policy Green Paper, 2014,<sup>103</sup> which referred to Must Carry obligations under the policy objective of promoting access to public interest content, and stated: <i>"What are called 'must carry rules' requiring, for example subscription broadcasters to re-transmit public broadcasting services, are prevalent in a number of countries and are aimed at ensuring that audiences have easy access to public interest content. They are intended to ensure that audiences do not have to switch platforms to access such content."</i><sup>104</sup></p> <p>In contrast to its current arguments, the SABC's 2007 Must Carry submission recognised that Must Carry obligations <i>"ensure that the content of the SABC is ubiquitous on all broadcasting platforms and that South African viewers, whichever platform they choose to use to access their television programming, have ready access to public service content."</i><sup>105</sup></p>
		<i>"The SABC holds the view that if its broadcasting services were accessible across the country, the Must Carry regime would not have been necessary."</i>	7.2	<p>Prior to the Must Carry Regulations coming into effect, the SABC already had 100% FTA coverage throughout the country, thanks to its presence on the Vivid satellite platform. The introduction of Must Carry was therefore not merely about extending geographic coverage, but ensuring that citizens on pay TV platforms could also access the PBS content. The SABC continues to be available on a variety of different platforms which gives it 100% coverage of the country. Nonetheless, Must Carry is still applied as it ensures universal access on private platforms where the PBS channels might otherwise not be available.</p>

<sup>103</sup> National Integrated ICT Policy Green Paper, 2014, Notice No. 44, Gazette No. 37261, 24 January 2014

<sup>104</sup> Para 8.12.1, pgs 65 – 66 of the Green Paper (pgs 69 – 70 of the Gazette)

<sup>105</sup> SABC written submission on ICASA Discussion Document on Must Carry Obligations, dated 29 October 2007, para 2 (of the executive summary) and para 14 (of the main submission) ("**the 2007 SABC submission**")

Item	Topic	Error in SABC submission	Para	MultiChoice's Response
2.	SBS benefit	<p><b>The SABC argues that its channels boost the uptake of pay TV platforms.</b></p> <p><i>"The SABC has significantly contributed to the success of SBS as could be seen through the demand of SABC channels on SBS platform over the years. Therefore, it is only fair to have a contribution made by SBS towards the sustenance of public broadcasting services."</i></p> <p><i>"SABC Channels have boosted and assisted in the uptake of subscriptions for SBS operators."</i></p>	7.4 and 9.2.2 (c)	<p>This is incorrect and unsubstantiated.</p> <p>The SABC has not provided any evidence on how SBS licensees allegedly benefit, as the RIA report urged it to do.</p> <p>MultiChoice's submission has already shown that subscribers do not subscribe to pay TV to get FTA channels. Every South African with a television set can access the SABC for free. Consumers have no incentive to subscribe to pay TV to receive that programming. Subscribers are only willing to pay to receive exclusive content which is not freely available elsewhere.</p> <p>It is irrelevant whether some programmes are popular or not, as SBS licensees are required to carry the Must Carry channels regardless of their popularity.</p> <p>The SABC's attempt to use the Must Carry Regulations to compel pay TV services to fund it is misguided and inappropriate. The SABC also fails to recognise that SBS do in fact contribute to the sustenance of the SABC, by promoting universal access and assisting PBS to achieve its mandate. In addition, the SABC enjoys significant commercial benefits, even though that is not the purpose of Must Carry.</p>
3.	SABC costs	<p><b>The SABC argues that it incurs the costs of must carry.</b></p> <p><i>"Currently, public interest content is carried by SBS at the SABC's cost; ..."</i></p> <p><i>"An SABC cost is the lost opportunity to generate revenue from premium content, such as listed sporting events and local dramas."</i></p>	7.4 and 9.9(b)	<p>Despite several attempts by ICASA to obtain evidence on this, the SABC has provided no costing information. The evidence provided by MultiChoice shows that the SABC does not incur costs related to Must Carry.</p> <p><b>Transmission costs:</b> MultiChoice covers all the transmission costs associated with Must Carry, including those the SABC is required to incur (which it elected to do so, in the public interest, given that this was the self-regulatory position prior to the Regulations coming into effect). The SABC has provided no evidence to counter MultiChoice's submission that it covers these costs.</p> <p><b>Content costs:</b> The issue of content costs does not arise, because Must Carry does not involve the commercial supply of content. It involves the simultaneous transmission by SBS licensees of content broadcast by the SABC. In any event, the SABC incurs no additional content costs pursuant to the Must Carry Regulations. It would incur the same programming costs for its channels regardless of Must Carry. If SBS licensees were compelled to pay a content-related cost to carry the Must Carry channels, they would have to pass those costs on to subscribers, creating precisely the double taxation that the SABC is concerned about. SBS licensees might opt not to carry the Must Carry channels at all, which</p>

Item	Topic	Error in SABC submission	Para	MultiChoice's Response
				<p>would lead to the situation which the Must Carry Regulations were put in place to avoid, namely the potential non-carriage of PBS channels.</p> <p>The SABC does not lose revenue on content in which it has invested, as it operates in a two-sided market: It monetises its content by generating revenue from advertising, which is audience driven. Having its channels transmitted simultaneously on DStv allows the SABC to increase its audience and sell that audience to advertisers. The SABC retains all of the advertising revenue from its channels.</p>
4.	Advertising revenue	<p><b>The SABC argues that it cannot derive advertising from audiences sitting on the pay TV platform</b></p> <p><i>"SABC could not derive advertising revenue from audiences sitting on the SBS platform."</i></p>	9.2.2 (b)	<p>This statement is manifestly incorrect. The SABC keeps all of the advertising revenue from the SABC channels carried on DStv.</p> <p>SABC has total control of what advertising goes on their channels and receives all of the revenue. Viewership of the SABC channels via DStv are "back-counted" and added to the SABC's audience figures, thereby enabling the SABC to sell greater advertising revenue.</p>
5.	Cost to consumers	<p><b>The SABC argues that pay TV subscribers should not have to pay a subscription fee to watch SABC channels.</b></p> <p><i>"[T]he consumer must still pay for the SABC coverage in the guise of subscription fees..."</i></p> <p><i>"[T]he public has been taxed thrice to access public broadcasting services. The public paid 1) TV licence fees, 2) SBS/MultiChoice subscription fee ..., and 3) and other related taxes such as municipality tariffs."</i></p>	3.4 and 6.1	<p>All South Africans are entitled to view television on the platform they prefer – some choose to access television via a pay TV platform. Pay TV operators do not charge these subscribers for the Must Carry channels. Subscribers pay a subscription fee to access the pay TV service in its entirety (not standalone channels, and certainly not the SABC free-to-air channels).</p> <p>Pay TV operators simultaneously retransmit the SABC channels, which they simply multiplex and insert as part of the SBS bouquets without imposing any additional costs on subscribers.</p> <p>It is in fact the SABC's proposal (that pay TV operators must pay the SABC to simulcast the PBS channels) which would have this double taxation effect as it would impose a significant input cost on the SBS which they would have to recoup.</p>

Item	Topic	Error in SABC submission	Para	MultiChoice's Response
		<p>According to the understanding of audiences, TV licence fees help the SABC to deliver its public service mandate. <i>So to make consumers pay for the SABC content again through SBS subscription fees is tantamount to double jeopardy for the consumer.</i></p> <p><i>...So SBS uses the SABC Channels to lure subscribers into various subscription packages and further charges them a fee for access to free-to-air services. As a matter of principle, free-to-air services should not be accessed through subscription fee."</i></p>		
6.	Encryption of FTA channels on DStv	<p><b>The SABC argues that pay TV operators now realise the value of the SABC channels and have therefore elected to encrypt them in order to compel subscribers to pay subscription fees to access the channels.</b></p> <p><i>"The Authority must consider the lacuna in the regulations, which enables SBS to encrypt the SABC Channels with the view to compel subscribers to pay subscription fees. So SBS uses the SABC Channels to lure subscribers into various subscription packages and further charges them a fee for access to free-to-air services. As a matter of principle, free-to-air services should not be accessed through subscription fee."</i></p>	6.1 and 7.5	<p>There is no lacuna in the Must Carry Regulations. All satellite TV signals have to be encrypted to prevent spillover to other territories in the satellite footprint area. This is in line with the High Court ruling in eBotswana. Free-to-view operators Openview and Sentech's satellite signals are also encrypted.</p> <p>In addition, pay TV operators are also obliged by their licence conditions to encrypt their signals. Clause 3.1 of MultiChoice's SBS licence provides:</p> <p><i>"3. Encryption of signal and use of licensed electronic communications network service</i></p> <p><i>3.1 The Licensee must ensure that the output signal of its subscription broadcasting service is encrypted."</i></p> <p>The ECA also defines a "subscription broadcasting service" as <i>"a broadcasting service provided to a subscriber upon payment of a fee"</i>.</p> <p>Contrary to the SABC's allegation, the SABC channels on DStv have always been encrypted and have always been provided only to subscribers. If a person does not pay a subscription fee, there is no subscriber agreement in place and therefore no access to the DStv service is authorised. As defined in the ECA, there must be a payment of a fee to access a SBS.</p>

Item	Topic	Error in SABC submission	Para	MultiChoice's Response
		<i>"In the early days of SBS, SABC channels were not encrypted with the understanding that it is a free-to-air services and subscribers could access the channels despite failing to pay the subscription. However, once SBS realised the value proposition of the SABC channels, they began to encrypt SABC channels in order to compel audiences to pay subscription fees..."</i>		The suggestion that SBS use the SABC channels to lure subscribers is not correct. The research evidence provided as part of MultiChoice's submission has established that subscribers do not subscribe to pay TV to get FTA channels. The SABC has not provided any evidence to the contrary, even though the RIA report invited it to do so.
7.	<b>Cost of consumer equipment</b>	<p><b>The SABC argues ICASA's RIA is flawed by not taking into account the cost of pay TV consumer equipment.</b></p> <p><i>"In clause 4.7 of the RIA Report, the Authority states its position that without the Must Carry Regulations, the cost of the extra antenna would be an inhibiting factor for millions of audiences<sup>6</sup>. This statement insinuates that any device used for terrestrial SABC services, in this case the antennae, is expensive; however the cost of devices used for SBS are assumed to be free. Therefore, this statement is lopsided and favours SBS over FTA terrestrial television."</i></p>	6.2	<p>The SABC appears to have misunderstood the RIA finding. It is not about comparing one service's equipment cost to another, but rather about consumers avoiding having to acquire multiple sets of equipment. The policy concern is that subscribers may choose not to incur the inconvenience and additional cost of acquiring additional equipment, resulting in loss of access to public broadcasting content, which would be to the detriment of media diversity and democracy.</p> <p>As the Must Carry Discussion Paper, 2007 states, <i>"Must carry obligations promote the accessibility of important programming content that is of public interest on a variety of platforms and with economic convenience for the consumer who continues to receive public service programming without spending extra cost to purchase an antenna or receiver in addition to the subscription satellite dish and set-top-boxes"</i>. Must carry achieves this convenience by enabling pay TV subscribers to use their existing subscriber equipment to also access the public broadcasting programming on the pay TV service.</p>



Item	Topic	Error in SABC submission	Para	MultiChoice's Response
8.	Competition	<p><b>The SABC argues that Must Carry distorts competition.</b></p> <p><i>"One of the major conceptual problems with Must Carry obligations is that it unjustifiably distorts competition and intervenes in market freedom."</i></p> <p><i>"By virtue of Must Carry channels, the SABC bids for premium content with SBS but whether SBS has bade for that content or not, it will be transmitted on the SBS platform. The net effect is the perpetuation of unfair competition (exclusive and copyrighted content acquired through public funding is unduly shared with competitors."</i></p>	9.2.2.(a) and (e)	<p>This is incorrect and unsubstantiated.</p> <p>The PBS is a public good. Universal access demands that the PBS channels be made available for the public good. The retransmission of the PBS channels does not undermine their availability free to air. Rather, it expands on the availability of the public good, which is the policy and legislative intention underlying must carry regulation. A public good is not depleted by use. Must Carry merely promotes and extends the availability of the PBS content to those who are in any event entitled to view it.</p> <p>The SABC seems to have lost sight of its public broadcasting mandate. The SABC is required to make its programming available as widely as possible. The very purpose of Must Carry is to promote universal access to the SABC programming. As ICASA's RIA Report found, this purpose is being achieved.</p>

Item	Topic	Error in SABC submission	Para	MultiChoice's Response
9.	Programmes vs channels	<p><b>The SABC argues that the Must Carry Regulations should not apply to whole channels but to individual programmes.</b></p> <p><i>"It is worth noting that a channel is a specific brand with its own numerous compositions with cost. A channel is a separate intellectual property which includes scheduling, on-air personalities, operation costs, FCC, etc. A channel is a different entity compared to a TV programme. For purpose of Must Carry obligations, the SABC can easily create TV programmes of public interest nature which can be Must Carry TV programmes as per the original intention of the legislature."</i></p>	5.2	<p>The SABC's current proposal is surprising, given its 2007 motivation for Must Carry to apply to channels and not to programmes. The SABC's 2007 Must Carry submission stated:</p> <p><i>"[T]he obligation imposed upon subscription broadcasters ought to be in relation to whole channels and not individual television programmes. There are a number of compelling reasons for adopting this approach.</i></p> <p><i>...It is plain that giving the term "television programmes" its ordinary grammatical meaning will lead to absurd results. For instance, who would decide which television programmes should be carried? How would such programmes be scheduled? ...</i></p> <p><i>...The truth of the matter is that any persistence with the requirement that subscription broadcasters must carry television programmes (as opposed to channels) will defeat the very purpose for which section 60(3) has been enacted, namely, to ensure that the public service channels of the SABC are made available to as wide an audience as possible."</i></p> <p>(SABC's 2007 Must Carry submission, paras 33 to 43)</p> <p>Since Must Carry is about ensuring that the programming broadcast by the SABC as part of its broadcasting service is available to the public on a variety of platforms, Must Carry does not contemplate the SABC creating special Must Carry programmes. The legislature's intent was never for the SABC to create bespoke Must Carry programmes. This is consistent with the position internationally where Must Carry traditionally requires the carriage of channels (not programmes).</p>