

**DRAFT MUST CARRY AMENDMENT REGULATIONS, 2021:
SUPPLEMENTARY SUBMISSIONS BY MULTICHOICE**

Question 1: Submit a legal opinion as referred to in MultiChoice's presentation of 28 June 2021

- 1 MultiChoice welcomes the opportunity to submit the legal opinion which we procured from Advocate Steven Budlender SC and Advocate Michael Bishop on the legality of certain proposals made by third parties for the Must Carry Regulations.
- 2 MultiChoice took the initiative to procure legal advice in the light of the written submissions which various third parties made to the Authority on 21 May 2021 in response to the invitation for comments on the draft Must Carry Amendment Regulations¹.
- 3 More specifically, MultiChoice sought counsel's opinion on whether the Authority may lawfully –
 - 3.1 require a subscription broadcasting service to carry channels of free-to-air broadcasters like e.tv;
 - 3.2 oblige a subscription broadcasting service to continue to provide Must Carry channels after a subscriber terminates her subscription ("post subscription access");
 - 3.3 determine the terms on which a subscription broadcasting service must carry channels; and
 - 3.4 require that the channels concerned be carried by a subscription broadcasting service on a Must Carry, Must Pay basis ("Must Carry, Must Pay").
- 4 Counsel provided MultiChoice with a written opinion which advised that none of these proposals could be lawfully implemented by the Authority via the Regulations.²
- 5 Counsel have further assured us that the Opinion represents their honestly and ethically held views on these matters.
- 6 MultiChoice elected to provide a copy of the Opinion to the Authority (a) in response to the unlawful and impermissible proposals made by third parties; (b) in an effort to contribute constructively to the review of the Regulations with a view to ensuring that the amended Regulations are lawful and reasonable, and are not susceptible to challenge, which would result in delays and uncertainty and potentially undermine universal access.

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

² Opinion for MultiChoice on the Legality of Certain Proposals for the Must Carry Regulations, Steven Budlender SC and Michael Bishop, 24 June 2021 ("the Opinion")

- 7 We noted the request posed by eMedia's legal representative in the chatbox during MultiChoice's hearing, for the Opinion to be made "*available to any member of the public on request so that this can, if necessary, be considered by all parties and that such parties be entitled to respond to this opinion should they decide to do so otherwise ICASA will be denied the right to consider any contrary legal opinions*".
- 8 MultiChoice would have expected, given the far-reaching proposals made by parties such as eMedia, that they would have procured legal advice regarding the lawfulness of their proposals when preparing their written submissions.
- 9 As MultiChoice indicated during the hearing, MultiChoice has no objection to making the Opinion available to the Authority and to the public as part of MultiChoice's supplementary submission.
- 10 Nor does MultiChoice object to other interested parties procuring their own legal advice and submitting it to the Authority as part of their supplementary submissions should they wish to do so.
- 11 However, third parties are not "entitled to respond" to this opinion. The ability of third parties to procure legal advice on the lawfulness of their own proposals is, with respect, not dependant on the provision of the Opinion procured by MultiChoice in response to their proposals.
- 12 We respectfully submit that the Authority should not permit an infinite "tit-for-tat" exchange of opinions or condone the delay in third parties submitting supplementary submissions following the hearings in order to afford them an undue advantage to attempt to rebut the Opinion procured by MultiChoice.
- 13 A copy of the Opinion is attached on this basis.

Question 2: Expand on dispute resolution as MultiChoice was of the view that ICASA does not have a right to impose dispute resolution on commercial negotiations

- 14 MultiChoice welcomes the opportunity to expand on the resolution of Must Carry disputes.
- 15 MultiChoice dealt with dispute resolution in paragraphs 214 to 221 of its written submission³ on the Must Carry Discussion Document.⁴
- 16 The Discussion Document asked:

"6. If the Authority should not play a role in the negotiation of contracts, what are the proposed dispute resolution mechanisms and by when should the

³ MultiChoice Submission: Discussion Document on the Review of the ICASA Must Carry Regulations, 2008, 31 March 2020

⁴ 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")

agreement be concluded subsequent to receiving a must-offer or must-carry request."

- 17 MultiChoice submitted that the Authority cannot play a role in the negotiation of contracts or the resolution of Must Carry disputes because (a) s60(3) of the ECA provides that Must Carry obligations are subject to commercially negotiable terms and (b) the ECA does not empower the Authority to resolve Must Carry disputes.
- 18 MultiChoice did not deal with dispute resolution further in its written submission on the draft Regulations. It adopted this stance in the light of the Authority's Findings Document, which indicated (quite sensibly and correctly) that the Authority would not become involved in commercial negotiations and that it is up to the parties negotiating the commercial terms to adopt a suitable dispute resolution mechanism as part of their agreement.⁵
- 19 However, notwithstanding (a) the Authority's position and (b) the absence of any empowering statutory provision, eMedia and SOS/MMA then proposed that if the free-to-air and subscription broadcasting licensees are unable to agree on commercial terms for the purposes of concluding a must carry agreement, then the Authority should determine the terms on which the channels will be carried.⁶
- 20 These submissions by eMedia and SOS/MMA prompted MultiChoice to seek legal advice on whether the Authority is lawfully entitled to determine the terms on which a subscription broadcasting service must carry channels.
- 21 Counsel advised that eMedia and SOS/MMA's dispute resolution proposals are "plainly impermissible".⁷ The Opinion stated:

"If the Authority is to determine the terms on which the channels are to be carried, rather than those terms being determined by agreement between the parties, then this would not comply with the requirement that the channels are to be carried on commercially negotiable terms. Such a regulation would be contrary to s 60(3)."⁸

⁵ Findings and Positions document on the Review of the ICASA Must Carry Regulations, 2008, ICASA, 26 March 2021, paras 6.5 and 8.6

⁶ eMedia submitted further that the Chairperson should determine the procedure to be followed for purposes of reaching a decision, which decision shall be reached within 30 days of a referral to the Chairperson and which decision shall be final and binding on the referring parties (para 38.4 of eMedia's submission on the draft Must Carry Amendment Regulations, 21 May 2021) SOS/MMA proposed that the Authority as a whole must resolve any dispute about the terms (SOS/MMA's response to the Regulatory Impact Assessment of the ICASA Must Carry Regulations October 2018, pgs 10 - 11, with proposed amendment to s8 of the Must Carry Regulations to provide for the resolution of Must Carry disputes)

⁷ Para 23 of the Opinion

⁸ Para 25 of the Opinion

- 22 Counsel accordingly advised MultiChoice that "*The Authority is not lawfully entitled to determine the terms on which an SBS must carry channels if it cannot reach a commercial agreement with the relevant broadcaster*".⁹
- 23 We refer the Authority to paragraphs 22 to 26, and 50.3 of the Opinion.
- 24 During the hearings, SOS/MMA referred to unrelated provisions of the ECA in support of their dispute resolution proposals, specifically s37 and s43 of the ECA, which deal with interconnection and facilities leasing.
- 25 But, with respect, this reference to s37 and 43 makes quite clear that the approach proposed by MMA/SOS would be unlawful. In other words, it merely confirms the problems with the submission.
- 25.1 As indicated in MultiChoice's written submissions on the Discussion Document, and in MultiChoice's response during the question and answer session at the hearings, while the Authority is empowered to resolve certain other disputes, the Authority is not empowered to resolve disputes in relation to Must Carry.
- 25.2 Where the legislature intended for the Authority or the CCC to resolve disputes under the ECA, it made express provision for it to do so. The Authority is given express dispute resolution powers under s21¹⁰, 25¹¹, 33¹², 37¹³, 40¹⁴, 43¹⁵, 46¹⁶ and 60(2)¹⁷ of the ECA. None of these provisions relate to Must Carry.
- 25.3 For example, s37 and 43 of the ECA make express provision for the intervention of the CCC in circumstances where the parties are unwilling or unable to negotiate or agree on the terms and conditions of an interconnection agreement or an electronic communications facilities leasing agreement. Similarly, s60(2) of the ECA makes express provision for the Authority to resolve disputes arising concerning s60(1) of the ECA (in relation to the acquisition by subscription broadcasting services of exclusive rights that prevent or hinder the free-to-air broadcasting of national sporting events as identified in the public interest).

⁹ Para 50.3 of the Opinion

¹⁰ Resolving disputes that may arise between an electronic communications network service licensee and any landowner in order to satisfy the public interest in the rapid rollout of electronic communications networks and electronic communications facilities

¹¹ Removal of electronic communications network facilities

¹² Frequency co-ordination

¹³ Obligation to interconnect

¹⁴ Notification of interconnection disputes

¹⁵ Obligation to lease electronic communications facilities

¹⁶ Notification of electronic communications facilities leasing agreement disputes

¹⁷ Disputes arising concerning s60(1) of the ECA, which provides that subscription broadcasting services may not acquire exclusive rights that prevent or hinder the free to air broadcasting of national sporting events identified in the public interest

- 25.4 s60(3) of the ECA, by contrast, does not give the Authority or the CCC the authority to resolve any disputes which arise from the failure to negotiate in good faith or to reach agreement on the terms and conditions of carriage as contemplated under s60(3) of the ECA. s60(3) of the ECA only gives the Authority the limited power to prescribe regulations regarding the extent to which a subscription broadcasting service must carry programmes provided by the public broadcaster. Nor is there any other provision of the ECA or the related legislation which empowers the Authority to do so.
- 25.5 The contrast between s 60(3) and the other provisions (including those referred to by MMA/SOS) is palpable. In one situation (for example s37 and s43) Parliament conferred on the Authority the power to engage in dispute resolution. In another (s60(3)), Parliament did the opposite.
- 25.6 The contrast is telling. Our courts have repeatedly held that a relevant consideration in statutory interpretation is the *expressio unius* principle – that is the express inclusion of one implies the exclusion of the other.¹⁸ In the present case, Parliament singled out eight different circumstances in which the Authority could become involved in dispute resolution (s21, 25, 33, 37, 40, 43, 46 and 60(2)) but did not do so for Must Carry (s60(3)). The inevitable conclusion is that Parliament did not confer this dispute resolution power on the Authority regarding Must Carry.
- 26 The Authority is accordingly not empowered to resolve disputes between the public broadcaster and a subscription broadcaster arising out of s60(3) of the ECA.
- 27 Indeed, and notably, as we understand it the SABC also accepts that this is the position.
- 28 A person who has reason to believe that a licensee is guilty of any non-compliance with s60(3) of the ECA or the Must Carry Regulations may lodge a complaint with the Authority within 60 days of becoming aware of the alleged non-compliance for investigation or referral to the CCC for consideration.¹⁹ However, there is no provision for the Authority to regulate Must Carry disputes or to determine the terms of carriage if the parties cannot reach commercial agreement.
- 29 MultiChoice respectfully submits that the Authority is not empowered to resolve Must Carry disputes. The Authority cannot play a role in the negotiation of contracts or the resolution of Must Carry disputes.

¹⁸ This has been described as “*principle of common sense rather than a rule of construction*” in *Poynton v Cran* 1910 AD 205 at 222, quoted by the Constitutional Court in *National Director of Public Prosecutions v Mohamed* 2003 (4) SA 1 (CC)

¹⁹ s17C(1)(a) and (b) of the ICASA Act

Question 3: MultiChoice suggest lengthy time frames from the time the regulations are published until the negotiations are concluded. In terms of access to public service channels what happens in the interim for MultiChoice and other subscription broadcasters?

- 30 MultiChoice has proposed increasing two time frames.
- 31 First, 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 sufficient time to arrange their affairs in order to comply with the new Regulations ("the phasing in period").
- 32 Second, we propose that the public and subscription broadcasting services must seek to conclude a written Must Carry agreement setting out 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 ("the negotiation period").
- 33 We do not believe that these time frames are unduly lengthy. More importantly, as we reiterate below, we have coupled these proposals with provisions which would ensure that the existing Must Carry arrangements remain in place while these processes occur.

The phasing in period

- 34 As the Draft Regulations stand, the proposed amendment would come into force immediately upon publication in the Gazette, without making provision for the amendments to be phased in.
- 35 The Authority has proposed a significant change to the entire Must Carry regime, namely to shift to Must Carry subject to commercially negotiable terms.
- 36 The proposed amendment regulations are still in draft form and have yet to be finalised by the Authority. Until there is finality on the regulations, the parties cannot formulate their negotiation positions or begin negotiating.
- 37 A phasing in period is therefore essential to put the parties in a position to commence commercial negotiations.
- 38 Our proposed 6 month phasing in period will allow all of the affected parties to consider the Regulations and form a legal and commercial view, which in turn will allow the parties to commence negotiations as soon as the Regulations come into force.²⁰

²⁰ Insofar as there may be a concern about new subscription broadcasting licensees, we point out that any new subscription broadcasters which are licensed by the Authority, will be required to comply with the current Regulations or the amended Regulations, whichever is in force at the relevant point in time. They will not be subject to the transitional arrangements, as there is no current arrangement to be transitioned, and accordingly no potential harm to universal access

The negotiation period

- 39 We support the Authority's sentiment that it is necessary to provide a clear time frame for the negotiation and conclusion of commercial agreements to provide certainty to the public and subscription broadcasters on what is expected of them in terms of time frames.²¹
- 40 While it is important that the parties have a time period to work towards, it is imperative that the parties have sufficient time to negotiate and conclude a commercial agreement.
- 41 As the Authority recognised, there is a risk that the "*the parties will take long to reach an agreement.*"²² If the process is rushed, there is a greater risk that, despite good faith negotiations, the parties will be unable to reach agreement.
- 42 The amended Regulations must accordingly (a) provide sufficient time for the parties to negotiate commercial terms in good faith and (b) contemplate the reasonable possibility that negotiations take longer than anticipated.
- 43 Our proposal will achieve both of these objectives, and is more likely to facilitate the negotiation and conclusion of workable Must Carry agreements and avoid unnecessary disputes.

What happens in the interim for MultiChoice and other subscription broadcasters?

- 44 The Authority has posed the pertinent question: What happens in the interim for MultiChoice and other subscription broadcasters?
- 45 MultiChoice respectfully submits that the primary consideration during the interim period should be to maintain the status quo and avoid a drop in subscribers' access to the SABC Must Carry channels while the new regime is being phased-in and negotiated. We are mindful in this regard that approximately 8 million TV households have seamless access to the SABC PBS channels by virtue of Must Carry Rules.
- 46 While MultiChoice has proposed certain additional time frames, our proposals would ensure that pay TV subscribers will continue to have seamless access to the Must Carry channels via their pay TV service until the SABC and subscription broadcasters have concluded a new Must Carry agreement under the new Regulations.
- 46.1 Our proposed phasing in period will prevent a delay between the commencement of the Amendment Regulations and the parties' ability to commence negotiations under the Amended Regulations. It will allow the parties time to arrange their respective affairs and to make the necessary plans, strategies and budgets in order to commence

²¹ Para 3.5 of the Explanatory Memorandum states:

"The purpose of this regulation is to provide a clear time frame for negotiation and conclusion on commercial agreements to provide certainty to the SBS and PBS on what is expected of them in terms of time frames"

²² Para 16.19 of the Findings Document

negotiations as soon as the Amendment Regulations come into effect. This will promote stability, predictability and universal access.

- 46.2 Our proposed negotiation period will ensure that the parties have sufficient time to conduct good faith commercial negotiations, and thus to give commercial negotiations their "best shot". This too should promote the achievement of the Must Carry objectives.
- 47 Sound transitional provisions are pivotal to ensuring that the existing benefits of the Must Carry regime are not undermined in the course of shifting to the Authority's proposed new Must Carry regime.
- 48 We 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.²³
- 49 However, as we noted in our submissions, 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.
- 50 This will ensure that the Must Carry channels continue to be carried during the transitional period, which will ensure that the benefits of the existing regime are not disrupted or undermined pending the conclusion of commercial negotiations.
- 51 Accordingly, the response to the Authority's question "*What happens in the interim for MultiChoice and other subscription broadcasters?*" is that Must Carry will continue to be served as it is currently.
- 52 The current Regulations will continue to apply until the Amended Regulations come into operation at the end of the phasing in period, at which point the transitional period will commence, during which subscription broadcasters will continue to carry the Must Carry channels in accordance with the current arrangement.
- 53 Subscription broadcasters will continue to carry the Must Carry channels on the same basis as they do now, with no disruption to the SABC, the subscription broadcasters or the public. The transitional provisions and proposed timeframes will ensure stability and continuity in the public interest.

²³ Para 16.19 of the Findings Document

- 54 We have noted the SABC's suggestion that the Current Regulations are unlawful and that the Authority should not allow such "illegality" to continue.²⁴
- 55 We respectfully disagree with the SABC's submission in this regard. We make two points in this regard.
- 56 First, the Regulations have never been challenged and therefore must be treated as valid.
- 56.1 The Regulations were enacted 13 years ago – in 2008. The SABC now relies on legal advice which was furnished to it 13 years ago – also in 2008.
- 56.2 A challenge to regulations must be brought within a reasonable time. This is known as the "delay principle". Where a party fails to bring a challenge within a reasonable time, the effect is to "validate" the decision or regulations. The effect of the principle has been explained neatly by the Supreme Court of Appeal in the *OUTA*²⁵ matter, in explaining the effect of unreasonable delay:
- "... Whether or not the decision was unlawful no longer matters. The decision has been validated by the delay..."*²⁶
- 56.3 The Must Carry Regulations have never been challenged by the SABC or any other party, nor declared by a court to be invalid.
- 56.4 The Must Carry Regulations are valid and in force, in line with the legal principle that regulations are "*presumed*" to be valid and are "*treated as valid*" until a court has "*decided that they are not*".²⁷
- 56.5 Whether or not the current Regulations might have suffered from legal defects when originally enacted is irrelevant – because as a matter of law the regulations have been "*validated*" by the fact that no party timeously sought to challenge them.
- 56.6 Thus, in the present context, whether regulations 6(1) and 7(1) might at some stage have been said to be *ultra vires* "*no longer matters*". Instead, they have been "*validated*" by the 12 years that have passed since they were enacted.

²⁴ In its written submission on the Must Carry Discussion Document, the SABC contended that regulations 6(1) and 7(1) of the current Must Carry Regulations "*are ultra vires*" and for this reason "*should be urgently revised*" by the Authority. (Paras 8.1 and 8.2 of the SABC's submissions on the Must Carry Discussion Document, 31 March 2020)

²⁵ *Opposition to Urban Tolling Alliance and Others v South African National Roads Agency Ltd and Others* [2013] 4 All SA 639 (SCA) at para 26

²⁶ This passage was quoted with approval by the majority of the Constitutional Court in *Buffalo City Metro Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) at para 49

²⁷ *Wings Park Port Elizabeth (Pty) Ltd v MEC, Environmental Affairs, Eastern Cape and Others* 2019 (2) SA 606 (ECG) at para 31. The SABC cannot now permissibly challenge the lawfulness of the current Regulations via the back-door route of making an argument about the new regime

- 56.7 The SABC and subscription broadcasters have implemented the Regulations and continue to comply with them.
- 57 Second, even if (for the sake of argument) the Regulations were invalid, this is no basis for ignoring public interest considerations in determining how to smoothly move into the new regime.
- 57.1 On the contrary, even if the Regulations suffered from legal defects, priority should be given to the public good in allowing for a smooth transition into the new regime and in allowing the parties a proper opportunity to negotiate. In order to serve the public interest, Must Carry should continue to operate on the basis of the current Regulations pending the conclusion of commercial negotiations.
- 57.2 The need for this approach has repeatedly been recognised by our Courts. Even when a Court declares administrative conduct “unlawful and invalid”, it must craft a “just and equitable remedy” to leave in place until the unlawful conduct is replaced with lawful conduct. In this regard, the courts have explained:
- “The interests of those most closely associated with the benefits of that [unlawful conduct] must be given due weight. Here it will be the imperative interests of grant beneficiaries and particularly child grant recipients in an uninterrupted grant system that will play a major role”.*²⁸
- 57.3 As the RIA Report shows, the current “Regulations are effective in ensuring that public broadcasting television services are universally accessible to the public” and “have been beneficial to all stakeholders and to the public”.²⁹
- 57.4 Thus, whatever concerns may arise regarding any legal defects in the present Regulations, the public good must be promoted by ensuring an uninterrupted Must Carry regime while a smooth transition into the new regime occurs and while the parties are afforded a proper opportunity to negotiate. Requiring the existing arrangements to remain in place during this period achieves this.
- 58 By maintaining the status quo in the interim period, the public interest will continue to be served, and the SABC will continue to enjoy substantial commercial benefits, including greater viewership and significantly higher advertising revenue.
- 59 Lastly, we point out that the transitional period is not expected to last indefinitely. It would last until (a) an agreement is concluded or, alternatively, (b) the negotiations fail.

²⁸ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* [2014] ZACC 12; 2014 (6) BCLR 641 (CC); 2014 (4) SA 179 (CC) (17 April 2014)), para 32 (emphasis added)

²⁹ Paras 4.17 and 6.1 of the RIA Report

- 60 MultiChoice recognises that the effect of the Must Carry Regulations, as proposed to be amended, is that both the subscription broadcasters and the SABC would be obliged to negotiate commercial terms in good faith. MultiChoice accepts this obligation and intends to negotiate in good faith should the Regulations be amended in this manner.
- 61 If the negotiations succeed, the subscription broadcaster will begin to carry the Must Carry channels under the commercially negotiated terms.
- 62 In the event that, despite good faith negotiations, the negotiations fail, MultiChoice is prepared to continue to carry the Must Carry channels in line with the existing arrangements to avoid inconveniencing subscribers.
- 63 If the SABC then decides to withdraw the Must Carry channels from the subscription broadcasting service (as foreshadowed in its submission),³⁰ it would then need to give the subscription broadcaster reasonable notice of this decision so that the relevant unwinding arrangements could be put into effect.
- 64 MultiChoice respectfully submits that its proposed timeframes are not unduly lengthy. Together with the proposed transitional arrangements, these timeframes are necessary to ensure the orderly and successful implementation of the Authority's proposed new Must Carry regime. In the interim, the current Regulations, which are still valid and in force and have been proven to be effective and in the public interest, will continue to apply, with no harm to the public, the public broadcaster or subscription broadcasters.

Question 4: Please submit on anything else you would like to clarify from the presentation you made on 28 June 2021

- 65 MultiChoice appreciates the opportunity to clarify any other matters from its oral presentation.
- 66 In this regard, we wish to (a) reiterate the rationale for Must Carry and (b) clarify the position regarding Must Carry, Must Pay.

Rationale for Must Carry

- 67 The SABC suggested that MultiChoice misconstrued the concept of universal access, stating that MultiChoice confuses it with subscriber convenience.
- 68 The Authority has consistently reiterated that the purpose of Must Carry is "*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*".³¹

³⁰ SABC submission on the draft Must Carry Amendment Regulations, 21 May 2021, para 3.6.5

³¹ Emphasis added

- 69 As this quote from the Authority's 2007 Must Carry Discussion Paper makes clear, Must Carry is principally to ensure convenience so that subscribers can access the SABC channels seamlessly through the pay TV platform.
- 70 The Authority has repeated this policy statement in its 2007 Discussion Document on the Must Carry Obligations,³² its RIA Report, 2019,³³ and in its 2021 Findings Document³⁴.³⁵
- 71 As the Authority has consistently held since 2007, it is the "*overriding principle of universality, which gives rise to must carry obligations*".³⁶

"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."³⁷ (Emphasis added)

- 72 This was articulated in the National Integrated ICT Policy Green Paper, 2014,³⁸ which referred to Must Carry obligations under the policy objective of promoting access to public interest content, and stated:

"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."³⁹ (Emphasis added)

³² Discussion Document on Must Carry Obligations, ICASA, 14 September 2007 ("the 2007 Discussion Paper), pgs 9 to 10

³³ Regulatory Impact Assessment Report on the Must Carry Regulations, ICASA, 19 March 2019, para 4.1

³⁴ Para 2.37 of the Findings Document

³⁵ This rationale has found broad stakeholder support. (For example, SOS/MMA's written submission on the Draft Regulations expressly "*support the rationales of the Authority for the must carry regulations*" specifically including the Authority's position in para 2.37 of the Findings Document (Pgs 2 to 3 of SOS/MMA submission on the draft Must Carry Amendment Regulations, 21 May 2021)

³⁶ Pg 6 of the 2007 Discussion Paper

³⁷ Pgs 9 to 10 of the 2007 Discussion Paper

³⁸ *National Integrated ICT Policy Green Paper*, 2014, Notice No. 44, Gazette No. 37261, 24 January 2014

³⁹ Para 8.12.1, pgs 65 – 66 of the Green Paper (pgs 69 – 70 of the Gazette)

- 73 In contrast to its current arguments, the SABC's 2007 Must Carry submission recognised that Must Carry obligations –
- "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."⁴⁰ (Emphasis added)
- 74 Sentech ensures universal access to the SABC channels, by distributing the SABC signals, free of charge to the public, everywhere throughout the Republic on free-to-view satellite platforms.
- 75 Prior to the Must Carry Regulations coming into effect, the SABC already had 100% free-to-view 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 rather about 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.
- 76 In addition to 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.⁴¹ (We note in this regard that Must Carry is not a tool to address digital migration delays.)
- 77 The SABC's 21 May 2021 submission listed multiple ways in which *"all South African audiences are already 'guaranteed access to the PBS channels'"*, including satellite via Openview and Sentech's DTH box, via DTT on STBs and IDTVs also carried by Sentech and via streaming on the TelkomOne mobile app.⁴²
- 78 Even though 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, online, or SABC terrestrial (in most cases)), it is a principle of universal access that subscribers should be able to watch the channels through the pay TV service to which they subscribe.

⁴⁰ 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)

⁴¹ 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))

⁴² SABC submission on the draft Must Carry Amendment Regulations, 21 May 2021, paras 3.1.20 and 3.1.21

- 79 MultiChoice agrees with the SABC that "*members of the public have the very real possibility of accessing all SABC television programmes and channels outside of the SBS universe*"⁴³, without subscription fee and with 100% coverage throughout the Republic, beyond pay TV and online options. Every person in South Africa has access to the public broadcasting service through the common carrier (Sentech), which was established with a statutory obligation to "*carry public broadcasting services*"⁴⁴ and to "*provide universal access for all South Africans to broadcasting services*".⁴⁵
- 80 Insofar as pay TV is concerned, we point out that MultiChoice makes a range of bouquets available at various price points, to suit every pocket. The DStv EasyView package is available for as little as R29 a month, and offers subscribers a choice of 32 audiovisual channels, including movies and entertainment, documentaries and lifestyle, sport, kids and teen, music, religion, news and commerce, and specialist and foreign channels over and above the Must Carry channels, as well as nearly 100 audio channels.

81 MultiChoice accordingly submits that Must Carry is clearly motivated by a rationale to promote universal access to the public broadcasting service to ensure pay TV subscribers have seamless access to the channels of the public broadcaster. MultiChoice stands by its written and oral submissions in this regard.

Must Carry, Must Pay

- 82 During the hearings some parties shifted their positions regarding Must Carry, Must Pay. In this regard, we record that:

82.1 eMedia abandoned its Must Carry, Must Pay proposals.⁴⁶

82.2 After the hearing, the SABC spontaneously confirmed to MultiChoice that notwithstanding its statements to the contrary during the hearing, the SABC agrees with Adv. Budlender that it would be unlawful for pay TV to offer services for free and the SABC is not advocating that. The SABC confirmed that it maintains the position in its written submission on the draft Regulations that "*the strict regulatory distinction between SBS and free to air public broadcasting services would prevent [post subscription access] must be maintained*" and that "*subscribers may be inconvenienced if SABC withdrew its channels, but they have a very*

⁴³ SABC submission on the draft Must Carry Amendment Regulations, 21 May 2021, para 3.1.21

⁴⁴ s62(3)(c) of the ECA

⁴⁵ s62(1)(b) of the ECA

⁴⁶ On slide 5 of its presentation at the hearings, eMedia stated:

"eMedia has reconsidered the matter in view of amongst others, the submissions made in relation to the Draft White Paper and now abandons the position that these channels should be paid for. The 21 May submissions should thus be read on the basis of what is set out herein and the Must Pay obligation is abandoned. These submissions proceed on this basis"

real opportunity of accessing the channels without having to pay a subscription".⁴⁷

- 83 In the circumstances, the only commenting party which supports Must Carry, Must Pay is SOS/MMA, who assume that some payment must be envisaged by the reference in s60(3) of the ECA to carriage "*subject to commercially negotiable terms*", and question what else this could refer to if not Must Pay.
- 84 There is no legal basis on which to read a Must Pay obligation in to s60(3) of the ECA. It contains no express requirement for payment. If the Legislature's intention was to encroach on existing rights of persons it is expected that it will manifest it plainly, if not in express words, at least by clear implication and beyond reasonable doubt.⁴⁸
- 85 The phrase "*subject to commercially negotiable terms*" in s60(3) of the ECA simply refers to those terms, to be agreed between the parties concerned, on which the subscription broadcaster must carry the Must Carry channels – i.e. the terms on which the parties will agree in order to implement the Must Carry obligation.
- 86 Examples of terms in the Must Carry agreement which have been commercially negotiated and agreed between MultiChoice and the SABC include –
- 86.1 format, manner of delivery and signal quality specifications for the transmission of the channel signals from the SABC to MultiChoice's uplink facility;
 - 86.2 technical and other specifications regarding MultiChoice's uplink facility hosted at the SABC's premises, such as coding, maintenance, power supply and access to premises;
 - 86.3 information to be provided by the SABC to MultiChoice for inclusion in the EPG, such as information required and the timeframes for the provision of that information to MultiChoice;
 - 86.4 rights and obligations in respect of the insertion of logos;
 - 86.5 rights and obligations in the event of transmission failure;
 - 86.6 fees arising out of the agreement (e.g. in respect of the transmission of the Must Carry channels on MultiChoice's DStv platform, costs associated with the delivery of the channel signals to the uplink facility, and programme guide printing costs);
 - 86.7 piracy provisions;
 - 86.8 representations and warranties;

⁴⁷ SABC submission on the draft Must Carry Amendment Regulations, 21 May 2021, paras 3.1.6 and 3.1.9 to 3.1.22

⁴⁸ *Mhlongo v MacDonald* 1940 AD 299 at 310

- 86.9 indemnities and limitations of liability;
- 86.10 remedies for breach; and
- 86.11 confidentiality.
- 87 These are but a few examples to demonstrate that the legislature recognised that a range of terms need to be negotiated and agreed to between the parties in order to implement the Must Carry obligation. It is those matters which form the basis of the "*commercially negotiable terms*" in terms of s60(3) of the ECA.
- 88 To the extent that one of the commercially negotiated terms relates to payment, there is no basis to assume that this requires payment to the public broadcaster by the subscription broadcaster.
- 89 MultiChoice has not identified any mandatory "Must Pay" obligations which require subscription broadcasting licensees to pay the public broadcaster for the channels which they carry.⁴⁹
- 90 In fact, the opposite is true – in several countries "must pay" refers to an obligation on the public service broadcaster to pay for the carriage of its channels.
- 91 In the circumstances, we respectfully submit that there is no legal basis for Must Carry, Must Pay. Such proposals enjoy very little stakeholder support and are not supported by international best practice.

⁴⁹ The only exception is Estonia, where the commercial free to air broadcasting system has collapsed