

MULTICHOICE SUBMISSION

**DISCUSSION DOCUMENT ON
THE REVIEW OF THE ICASA
MUST CARRY REGULATIONS,
2008**

31 MARCH 2020

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EXECUTIVE SUMMARY

It is "the over-riding principle of universality which gives rise to the must carry regulations".¹

- 1 Must Carry is one of the few instances of broadcasting regulation where the public broadcaster and pay TV licensees must work together to benefit the public. Prioritising the public interest is central to Must Carry. As the Authority explained in its 2008 Position Paper:

"The Authority would like all the parties to view the designation of the obligations as a collective shared obligation aimed at fulfilling the objects enunciated in the ECA, as related to the broadcasting environment."²

- 2 South Africa's policy and rationale for the Must Carry Regulations is clear – it is to advance universal access. In so doing, the Regulations must weigh up the limitations / obligations which are set for the broadcasters (both the public service and Pay TV licensees) with the envisaged public interest benefit. It is this balancing act which is paramount (rather than only balancing the interests of competing broadcasters).
- 3 For its part, MultiChoice has long accepted its statutory obligation to contribute to universal access to public broadcasting service programming. MultiChoice has supported the objectives of the Must Carry regime, provided that the Regulations are reasonable, balanced and proportionate, and do not place an undue burden on Pay TV licensees.
- 4 Although the Regulations are concerned with the public interest (in the sense of promoting access to public broadcast service programming), this is not the same as advancing the organisational or financial interests of the public broadcaster. It is about universal access to public interest programming.
- 5 Since the Regulations have been in effect for more than 10 years, it is opportune for the Authority to evaluate their effectiveness and assess whether they require

¹ Discussion Document on Must Carry Obligations, ICASA, September 2007, published under notice number 1150, Government Gazette number 30305, 14 September 2007 ("**the 2007 Discussion Paper**"), pg 6

² ICASA Must Carry Obligations Position Paper, 22 May 2008, published under notice number 651, Government Gazette number 31081, 22 May 2008 ("**the Position Paper**"), pgs 27 – 28

amendment. We commend the Authority's process in conducting this review, including, in particular, conducting an in-depth Regulatory Impact Assessment (RIA) prior to the publication of a discussion document. We believe this evidence-based approach is most likely to yield robust regulatory outcomes which are in the public interest.

- 6 As the Authority has shown through its benchmarking, Must Carry is well established in other jurisdictions. The South African approach accords with the European model, which aims to promote audience access to public service broadcasting programming. The Authority's international benchmarking confirms that South Africa's existing Must Carry Regulations are in line with best practice internationally.
- 7 The Must Carry framework in the ECA provides that:
 - 7.1 ICASA must determine the extent to which subscription broadcasters Must Carry the SABC's programmes (e.g. how many and which of the SABC's programmes/channels subscription broadcasters must carry and the basis for exemptions); and
 - 7.2 the parties must negotiate and agree on the practical matters to give effect to the Must Carry obligation.
- 8 Other extraneous matters falling outside the Must Carry framework (i.e. matters which are not related to the delivery of the signal or the carriage of the channels) have no place in the Must Carry Regulations. Therefore a Must Carry regulatory regime which purports to give ICASA powers to decide on matters such as programming rights licensing arrangements, or the cost of programming, is clearly at odds with s60(3) of the ECA.
- 9 It is MultiChoice's assessment that the architecture of the Must Carry framework is sound. The Regulations are serving their intended purpose. This is confirmed by the Authority's RIA Report, which states that the Regulations are serving the public interest by extending universal access to PBS services.

- 10 Must Carry gives rise to at least two quantifiable universal access benefits:
 - 10.1 Must Carry ensures that SABC programming is conveniently available in pay TV homes – approximately 8 million homes have assured access to public broadcasting content and between 17% and 31% of the SABC's audience watch the SABC channels over DStv, rather than through another means of delivery.
 - 10.2 Must Carry widens the coverage of the SABC channels – 1 million homes who are outside the SABC terrestrial coverage gain access through DStv. (This is over and above subscribers to other pay TV services).
- 11 The evidence shows that the SABC also gains the following commercial benefits from Must Carry (even though this is not the objective of Must Carry):
 - 11.1 Must Carry directly benefits the SABC commercially by enabling it to extend its viewership to audiences watching on pay TV platforms, and to derive advertising revenue from this viewership. The value of the portion of advertising revenue earned by the SABC due to its viewership over the DStv platform is estimated to be approximately R569 million annually.
 - 11.2 Must Carry allows the SABC channels to be positively showcased on Pay TV platforms with features not available in an analogue environment, for example, high definition picture quality and additional services such as "catch-up" which promote viewer loyalty to the SABC.
 - 11.3 The contribution made by Pay TV operators to the SABC's coverage represents a significant cost saving to the SABC. The SABC would have to spend 84% more on its signal distribution if it were to expand its terrestrial coverage to match that of satellite Pay TV.
- 12 There is no validity to the SABC's arguments to date on Must Carry:
 - 12.1 There is no basis for the SABC's argument that the Must Carry Regulations undermine the SABC's investment in content. Quite

contrary, the Must Carry Regulations allow the SABC to extend universal access to its content, which is a core element of its mandate and the reason why it invests in content in the first place. In addition, the Must Carry Regulations also allow the SABC to monetise its investment in content through selling advertising to viewers watching over satellite pay TV.

- 12.2 The Must Carry obligation gives no direct commercial advantage to MultiChoice or other pay TV operators as the channels are freely available elsewhere – they are not the reason people subscribe to Pay TV. Subscribers to Pay TV spend far more time viewing Pay TV content than free-to-air content.
 - 12.3 The SABC's argument that the Must Carry Regulations provide pay TV a "short-cut" to sports rights has no merit.
 - 12.4 There is no legal basis for the SABC's Must carry / Must Pay proposal. Any suggestion that subscription broadcasters must pay the SABC for the Must Carry channels is completely at odds with s60(3) of the ECA. In making this argument, the SABC is essentially arguing for (i) guaranteed carriage and (ii) guaranteed payment, so that it can strengthen its bargaining position and extract a high and unwarranted fee from Pay TV services. Must Carry should not be used to supplement the SABC's funding.
- 13 As the benefits are already clear, the focus of this review is to determine how the issue of costs should be dealt with. Rather than seeking to balance broadcaster costs, the approach should be to weigh up (i) the costs incurred by all broadcasters in implementing the Regulations with (ii) the benefit to the public. The key question to be considered is: Are the collective costs incurred by the broadcasters reasonable and proportionate when considering the advancement of universal access which is achieved as a result of the Must Carry Regulations?

- 14 In this regard, only the costs arising from the actual implementation of the Must Carry Regulations should be included in the assessment. There is no validity to the argument to include opportunity costs in the analysis. The relevant costs are:
- 14.1 Costs related to the delivery of the SABC signal to the pay TV broadcaster.
- 14.2 The transmission costs incurred by the Pay TV broadcaster.
- 15 MultiChoice incurred more than R108 million between 2008 and 2020 in order to comply with the Must Carry Regulations. In terms of its Must Carry agreement with the SABC, the SABC has not incurred any costs related to Must Carry.
- 16 Although MultiChoice does not have insight into the costs which other South African pay TV broadcasters may incur, given our experience and our international benchmarking, we believe that the public benefit which arises from Must Carry justifies the costs to public and subscription broadcasters.
- 17 For all of these reasons, MultiChoice believes that the architecture of the Must Carry framework is sound.
- 18 We thank the Authority for the opportunity to make these submissions.

MUST CARRY "BY THE NUMBERS"

~ 8 million	Number of Pay TV homes in South Africa able to access the Must Carry channels on DStv
> 1 million	Number of Pay TV homes falling outside SABC terrestrial coverage
75%	The share of viewing of Pay channels by DStv subscribers, as opposed to the share of viewing of all FTA channels (public, commercial and community)
R569 million	Estimated advertising revenue earned by SABC annually due to its viewership via DStv
R0	Advertising revenue earned by DStv annually due to the presence of the SABC channels on DStv
< R50 million	Estimated revenue earned by SABC annually due to its viewership via YouTube (presuming on average a 50/50 split with YouTube)
31%	Percentage of total SABC 1 audience watching via DStv (rather than a terrestrial signal)
25%	Percentage of total SABC 2 audience watching via DStv (rather than a terrestrial signal)
17%	Percentage of total SABC 3 audience watching via DStv (rather than a terrestrial signal)
R108 million	Costs incurred by MultiChoice since 2008 as a result of the Must Carry Regulations

INTRODUCTION

- 19 MultiChoice thanks the Independent Communications Authority of South Africa ("**ICASA**" or "**the Authority**") for the opportunity to comment on the Discussion Document on the Review of the ICASA Must Carry Regulations ("**the Discussion Document**").³
- 20 Must Carry Obligations have been a feature of South African broadcasting regulation since 2008. In the early years, following the democratisation of South Africa's broadcasting system, it fell on the public broadcaster alone to advance universal access to public interest programming. With the licensing of Pay TV services in the mid-2000s and the promulgation of the Electronic Communications Act, 2005 ("**the ECA**"), certain public service obligations were also placed on Pay TV licensees. This includes the obligation to carry prescribed public broadcasting service programming and, in so doing, promote access to these services.
- 21 As documented in the Discussion Document, this is not unusual. Must Carry obligations are a well-established feature of many regulatory systems around the world.
- 22 For its part, MultiChoice has long accepted its statutory obligation to contribute to universal access to public broadcasting service programming. MultiChoice has supported the objectives of the Must Carry regime, provided that the Regulations are reasonable, balanced and proportionate, and do not place an undue burden on Pay TV licensees.
- 23 The Must Carry Regulations oblige Pay TV services to carry prescribed public broadcasting service programming and, in so doing, promote access to this programming. As the Authority stated in its Discussion Document on Must Carry

³ Discussion Document: Review of the ICASA Must Carry Regulations, 2008, published under notice number 650, Government Gazette number 42902, 13 December 2009 ("**the Discussion Document**")

Obligations ("**the 2007 Discussion Paper**"), it is *"the over-riding principle of universality which gives rise to the must carry regulations."*⁴

- 24 Since the Regulations have been in effect for more than 10 years, it is opportune for the Authority to evaluate their effectiveness and assess whether they require amendment. We commend the Authority's process in conducting this review, including, in particular, conducting an in-depth Regulatory Impact Assessment (RIA) prior to the publication of the Discussion Document. We believe this evidence-based approach is most likely to yield robust regulatory outcomes which are in the public interest.
- 25 MultiChoice is a Pay TV licensee and is therefore directly affected by the Regulations. MultiChoice therefore welcomes the opportunity to comment on the Discussion Document.
- 26 Since MultiChoice is one of the parties responsible for implementing the Must Carry Regulations, we are well placed to evaluate how they have worked. MultiChoice has long maintained that a light touch approach to the regulation of Pay TV licensees is warranted. Even so, it is our assessment that the architecture of the Must Carry Regulations is generally sound and the Regulations are serving their intended purpose.
- 27 We are committed to making a constructive contribution to the debates on Must Carry. In the submission which follows we describe the manner in which the Regulations currently function and the public interest benefits which we believe accrue from the current approach.
- 28 We consider various issues thematically, before responding to the specific questions posed in the Discussion Document.

⁴ Pg 6 of the 2007 Discussion Paper

29 In order to contribute meaningfully to the debate, we have included the following three annexures:

29.1 **Annexure A: International best practice:** MultiChoice commends the Authority on a lengthy international benchmarking section in the Discussion Document. In order to assist the Authority, we have supplemented and commented on the findings in Annexure A.

29.2 **Annexure B: Costs to comply with Must Carry Regulations:** MultiChoice incurred a total of R108,854,395 between 2008 and 2020 to comply with the Must Carry Regulations. A detailed breakdown of our annual costs is set out in Annexure B.

29.3 **Annexure C: Genesis Report:** When MultiChoice responded to the Authority's RIA questionnaire in 2018, MultiChoice commissioned Genesis Analytics to provide an independent economic perspective on a regulatory impact assessment that would inform a review of the Must Carry Regulations. We have re-attached the Genesis Report, which we hope will be of assistance to the Authority.

30 MultiChoice reiterates its commitment to contributing constructively to this review and requests an opportunity to make an oral presentation if the Authority conducts hearings in due course.

POLICY AND RATIONALE FOR MUST CARRY

Overview

31 Must Carry is a common tool used by policy-makers and regulators to promote universal access to public service broadcasting programming, and to ensure media diversity and plurality for end-users.⁵ Historically, Must Carry rules have often applied in cases where end users of private or "closed" networks may not

⁵ Nikoltchev, S (Ed.) 2012 Must Carry: Renaissance or Reformation? Strasburg: European Audiovisual Observatory, pg 7 ("**the EU Must Carry Report**")

otherwise have access to public broadcasting services (which are in the main carried on the free-to-air terrestrial frequency platform).

- 32 The "closed" nature of these platforms (including cable and satellite platforms) was a policy concern for Governments, as the closed nature can impact on access to public broadcasting services.
- 33 Governments establish public broadcasters as the primary agents for ensuring social cohesion, achieving cultural imperatives, consolidating democratic values, giving a voice for the people and providing a platform to articulate government policy.⁶ It follows that having established public broadcasters for this purpose, Governments would wish to ensure that audiences are able to easily access these services. Therein lies the rationale for Must Carry regulation.

South Africa - Policy rationale and regulatory implementation

- 34 As is the case elsewhere, the South African approach to Must Carry policy and regulation has always been based on promoting universal access to public broadcasting service programming. This has been reiterated repeatedly in policy, legislative and regulatory processes since the mid-2000s.
- 35 Pay TV platforms are conduits for advancing universal access. 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, with the end goal being for viewers to get access to the PBS content on the Must Carry channels.
- 36 Initially, Must Carry was not explicitly dealt with in government policy. Prior to 2005, in the absence of a regulatory framework, MultiChoice entered into agreements with the public broadcaster, the SABC (as well as the free-to-air commercial broadcaster, e.tv) to carry their channels on DStv free of charge.⁷

⁶ Pg 7 of the EU Must Carry Report

⁷ Pg 7 of the 2007 Discussion Paper. This self-regulatory arrangement to ensure continued access to FTA channels in South Africa by MultiChoice subscribers was based on a "zero fees" arrangement, i.e. the broadcasters delivered their channels to MultiChoice at no cost and MultiChoice carried these channels on the DStv satellite platform at no cost to the FTA broadcasters.

37 In 2005 Must Carry was addressed for the first time by the regulator in the Authority's Position Paper on Subscription Broadcasting Services, which stated that the Authority would:

"prescribe, in licence conditions, the extent to which satellite/cable subscription television broadcasting services may carry the public service television channels of the SABC. The SABC shall be required to offer its public service channels subject to agreed terms. Digital terrestrial subscription television services shall be required to reserve a channel for public access television."⁸

38 It is clear from the Authority's reasoning in 2005 that it already recognised Must Carry as a tool to help promote universal access.⁹

39 Around the same time as the Authority conducted that process, Parliament enacted the ECA. During the development of the Act the legislature grappled with the concept of Must Carry and considered whether the universal access objective justified putting obligations on the public and subscription broadcasting licensees. Ultimately, the legislature decided that the public benefit outweighed the burden arising from the obligations to be placed on the broadcasters.

40 The ECA consequently empowers the Authority to make regulations on Must Carry. s60(3) of the ECA provides:

"The Authority must prescribe regulations regarding the extent to which subscription broadcast services must carry, subject to commercially negotiable terms, the television programmes provided by a public broadcast service licensee".

41 Once the Must Carry provision was enacted in legislation, it was no longer ICASA's role to determine whether or not there should be Must Carry. The legislature had made the determination that it was in the public interest to have this form of regulation. Since then, ICASA's role is to determine the extent to which subscription broadcasters must carry the public broadcasting television programmes.

⁸ Subscription Broadcasting Services Position Paper, ICASA, 1 June 2005, pg 75

⁹ The Authority's Position Paper on Subscription Broadcasting Services, June 2005, stated on pg 75: "Must-carry rules require certain television or radio channels to be carried over certain networks. The reasons invoked are typically the universal accessibility of certain radio and television programmes and the need to guarantee a pluralistic offer to the public"

42 In 2007 ICASA published its first Must Carry discussion document in the form of the 2007 Discussion Paper and stated its intention to make regulations. The Authority once again reiterated that Must Carry was about ensuring universal access to public service broadcasting and reiterated in the 2007 Discussion Paper that:

"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."¹⁰

43 On the issue of agreements between the parties which are necessary to enable the carriage of the Must Carry channels, the Authority was of the view that caution needs to be exercised to ensure that provisions in commercial agreements did not override the principle of universality. The Authority therefore made clear that a key focus of inquiry was:

"assessing the interpretation and meaning of 'subject to commercially negotiable terms', which the Authority believes that the legislature has left sufficiently vague to provide flexibility and discretion to the Authority in carrying its mandate for providing a regulatory framework and guideline for 'Must Carry Obligations and Rules' in South Africa."¹¹

44 In October 2008, ICASA published the final Must Carry Regulations.¹²

45 The Must Carry Regulations make it clear that a subscription broadcasting licensee is a mere "*carrier*" of the Must Carry channels and is obliged to transmit the channel simultaneously ("simulcast") the channels "as is". The obligation on subscription broadcasting service licensees is to "transmit the must carry channels".¹³ Subscription broadcasters are legally precluded from altering or interfering with the Must Carry channels by virtue of Reg. 7.2, which provides:

"The SBS Licensees are required to transmit simultaneously and without any alteration, the entire television programmes of the PBS Licensee."

¹⁰ Pg 10 of the 2007 Discussion Paper

¹¹ Pg 6 of the 2007 Discussion Paper

¹² ICASA Must Carry Regulations published under notice number 1271, Government Gazette number 31500, 10 October 2008 ("**the Must Carry Regulations**")

¹³ Reg. 4(3) of the Must Carry Regulations

- 46 On the issue of costs, and in line with international best practice, ICASA made the important finding in the Position Paper that the Must Carry Obligations should not be imposed as a form of financial support for any of the broadcasters, stating:
- "In setting a cost model, the Must Carry Obligations should not be imposed as a form of financial support for any of the broadcasters. The Authority would like all the parties to view the designation of the obligations as a collective shared obligation aimed at fulfilling the objects enunciated in the ECA, as related to the broadcasting environment."¹⁴
- 47 It has therefore always been clear that the Must Carry regime should not be used to supplement the SABC's funding.
- 48 ICASA reiterated the 2008 principles in 2013, when it conducted an audit and review of all regulations governing the broadcasting sector. Here ICASA again determined that "*the Must Carry obligation is a critical component of achieving universal service and access*".¹⁵
- 49 Concurrent to ICASA's development of the Must Carry Regulations, Government developed the Broadcasting Digital Migration (BDM) Policy, 2008 which also touched on Must Carry. The BDM Policy emphasized that Must Carry arrangements should continue in the new digital environment so as to fulfil "*the important aspect of providing public broadcasting service to all citizens*".¹⁶
- 50 It is apparent from the above narrative on the development of Must Carry policy and regulation in South Africa that the approach has always been concerned with balance: weighing up the interests of (i) public and subscription broadcasters against (ii) the public benefit which accrues, namely universal access to the public good that is free to air public television broadcasting. Both these factors are to be taken into account when considering the "public interest". (See Figure 1 below).

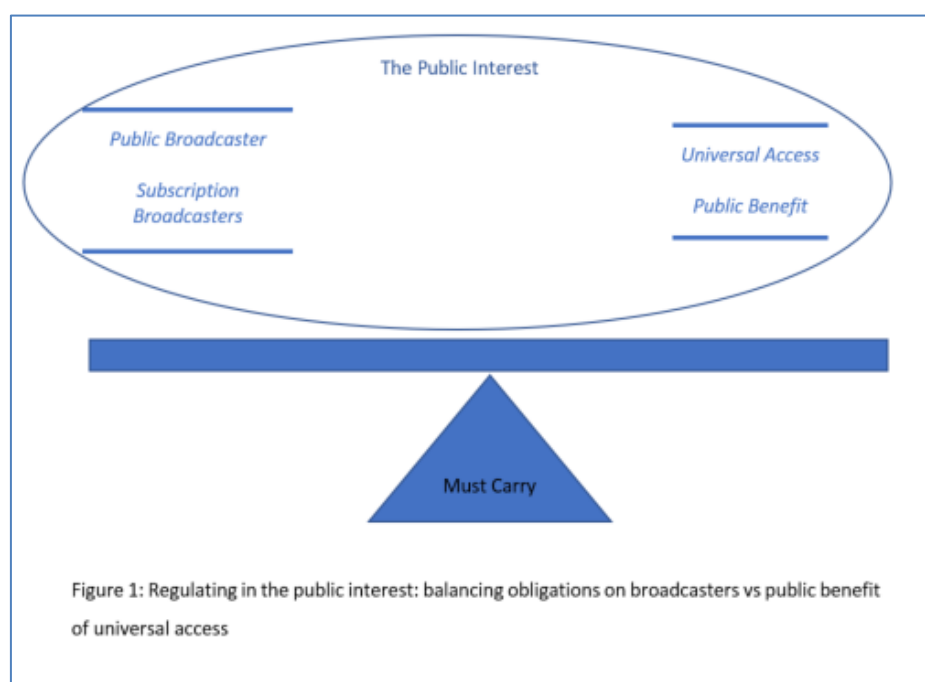
¹⁴ Pg 27 of the Position paper

¹⁵ ICASA Final report: The review of Broadcasting Regulatory Framework towards a Digitally Converged Environment in South Africa published under notice number 643, Government Gazette number 36598, 25 June 2013, para 3.10.17

¹⁶ Broadcasting Digital Migration Policy for South Africa published under notice number 958, Government Gazette number 31408, 8 September 2008, para 2.3.5

- 51 When a statutory body has a duty to regulate "in the public interest", it must –
- 51.1 assess the impact on all persons who may be directly or indirectly affected by the scheme;
 - 51.2 weigh the different interests of those who might be affected; and
 - 51.3 balance the conflicting interests.

Figure 1: Balancing Must Carry obligations on all broadcasters against the public benefit arising from the Must Carry Regulations



- 52 MultiChoice maintains that this approach should continue to inform Must Carry in South Africa. This "balancing of interests" (broadcaster interests vs. universal access) should also guide the Authority's thinking on the benefits of Must Carry, and how the costs are to be apportioned between the broadcasters.

Comparing the SA approach to other models

- 53 In making the determination on whether or not to impose Must Carry obligations, the policy maker was faced with two international models around Must Carry: The US Model and the European Model. It clear from the focus of the legislation

on Must Carry of the programming of the public broadcaster that South Africa adopted the EU model.

- 54 The concern with achieving a balance of interests between the broadcasters and the public good is also reflected in Europe, which provides an informative Must Carry model.

The European model of Must Carry

- 55 Must Carry rules in Europe were initially implemented in a fragmented manner in the nineties, mainly driven by a concern that without such an obligation cable and later satellite networks would not carry the programmes of the national public broadcaster. In 1999, the approach was codified at the European Union level into the rationale that Must Carry rules were to ensure access to public service broadcasting on all broadcasting distribution platforms, thereby providing for diversity and choice.

- 56 This universal access mandate found expression in Article 31 of the EU's Universal Service Directive,¹⁷ which provides that Member States may impose reasonable Must Carry obligations for the transmission of specified services on transmission networks. Certain pre-conditions apply:

56.1 The obligations only apply to networks where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcasts.

56.2 The obligations shall only be imposed where they are necessary to meet clearly defined, general interest objectives and shall be proportionate and transparent.

56.3 Non-discriminatory, proportionate and transparent remuneration can be provided to the network providers (not to the public broadcasters), although Must Carry obligations have sometimes been imposed without provision being made for this. (As we cover later, there is no

¹⁷ Directive 2002/22/EC of the European Parliament and of the Council on Universal Service and User's Rights relating to Electronic Communications Networks and Services, 7 March 2002

precedent for "Must Carry / Must Pay" obligations in favour of public broadcasters).

- 57 The Universal Service Directive provisions aim to protect audience access to public service broadcasting and ensure that network operators do not exclude public service content in favour of their own programmes and services. (Article 31 specifically targets network operators only because Must Carry rules in Europe are not intended to be a form of content regulation like local content quotas, but rather a form of access regulation¹⁸ where mandatory carriage of specific channels is imposed on the network operator).¹⁹
- 58 Member states have some discretion in how they choose to implement Article 31. (We elaborate in more detail on some of these jurisdictions in the International Benchmarking annexure (Annexure A)). But the European model can be characterised generally as catering for a technology neutral approach to platforms and targeting national public broadcasting channels specifically for carriage.
- 59 In the past decade some public broadcasters in Europe have argued that their content should no longer be available free-of-charge on other platforms. This is partly due to increasing competition among content providers and platforms that has increased the demand for content. But this has not diminished Must Carry regulation. Instead it has led to some EU member states adopting a must-offer principle (which is not addressed at European Union level in the Universal Service Directive) to ensure that public broadcasting services continue to provide their content to all platforms so that the public interest and universal access objective continues to be met.

¹⁸ This is an important distinction in the European context. Member states are not involving themselves in mandating that a cable or satellite operator must purchase/license public service content from specific service providers. They are mandating that the network operator must provide access to carriage or retransmission of specific public service channels of another broadcast licensee for universal access purposes in the public interest. In other words, they are acting as a "mere conduit" for the simultaneous, unaltered broadcast of another broadcasting service in order to promote access and availability

¹⁹ In practice this only works if the network operator and the service provider are the same licensee such as is the case in the UK. In France, the cable network operator and the service providers on the network are different entities, hence the must carry obligation falling on the service distributors to ensure the channels are include as part of the basic package offering

- 60 The issue of must offer and universal access was particularly pertinent in the 2012 court case where the Tribunale Amministrativo Regionale per il Lazio, an Italian administrative court in Rome, decided on a case involving the Italian public service broadcaster RAI. It found RAI guilty of having violated its public service charter by encrypting its free-to-air TV channels, making it impossible for Sky Italia to carry RAI channels on its platform. In its decision, the court emphasized the significance of public service content which must be "*universally accessible via all technology*".²⁰
- 61 A similar sentiment was expressed by the British government in a policy statement in 2016 wherein they expressed their continued support for the current regulatory regime of must offer/must carry and dismissed calls for de-regulation and market-based negotiations. It also rejected calls to allow for remuneration for the must carry channels which they saw risking an unbalancing of the relationship between platforms and broadcasters to the detriment of consumer benefit.²¹
- 62 The British government sees Must Carry regulation as supporting the principle of "*universal availability which governs access to licensed PSB services on all major platforms...*". In the view of the UK government, the underpinning regulatory framework must deliver on the objective of zero net fees, i.e. no net payments between all platform operators and the PSBs for the carriage of the licensed PSB channels.²²

The US model of Must Carry

- 63 Although the South African approach to Must Carry has been informed by the European Model, for the sake of completeness we will deal briefly with the US Model.

²⁰ Pg 3 of the EU Must Carry Report

²¹ Department for Culture, Media and Sport 2016 The Balance of Payments between Platforms and Public Service Broadcasters Consultation Report London: DCMS, pg18 ("**DCMS Balance of Payments Report**")

²² Pg 5 of the DCMS Balance of Payments Report

- 64 The US model is sometimes incorrectly pointed to as allowing for remuneration for the Must Carry channels. However, the US Model is based on giving each local commercial television broadcast station the option of selecting either mandatory carriage (Must Carry) or selecting commercial negotiations on retransmission consent. The broadcaster must make its selection every three years. If a local commercial station elects Must Carry, it is then entitled to cable carriage in its local market. But if a local station elects retransmission consent, then there is no Must Carry. Parties then negotiate on such matters such as compensation for the channels, advertising time or additional channel access.²³ There is therefore no Must Carry and no guaranteed universal access for those channels that have elected retransmission consent. In some cases no agreement is reached, resulting in no carriage of the broadcast stations on the cable platforms. There has been an increasing trend in broadcast TV station "blackouts", with at least 230 blackouts in 2019.²⁴
- 65 It is noteworthy that the US model is not concerned with access to public broadcasting, as there is no national public broadcaster along the lines of what is found in Europe, South Africa and Commonwealth countries. Rather the US model is concerned with local free-to-air stations. Hence the universal access / public benefit goals have not been paramount.
- 66 In addition, the US model has evolved over the years from being driven solely by economic protectionism for local broadcasters (a concern that they should not be shut out of cable systems) to a more nuanced approach which seeks to ensure that any limitations / obligations on cable operators must be proportionate. Therefore there is no obligation on cable operators for Must Carry should the broadcaster choose to negotiate commercial terms.

²³ See USA Federal Communications Commission's Cable Television Website, at <https://www.fcc.gov/media/engineering/cable-television> [Accessed 13 March 2020]

²⁴ Broadcast Blackouts - TV blackouts hit record high as customers get screwed by industry squabbles, 24 July 2019 (<https://arstechnica.com/tech-policy/2019/07/tv-blackouts-hit-record-high-as-customers-get-screwed-by-industry-squabbles/?comments=1&post=%E2%80%A6>) [visited 15 March 2020]

Summary on policy rationale and regulatory implementation of Must Carry

- 67 The South African policy rationale for Must Carry is clear. It is based on advancing universal access / availability to the television programming of the public broadcaster. This has been reiterated in various policy and regulatory processes. Must Carry is not intended to supplement the SABC's funding.
- 68 This accords with the approach in Europe where the Universal Service Directive aims to protect audience access to public service broadcasting and ensure that network operators do not exclude public service content.
- 69 European governments have rejected calls to legislate for remuneration for the Must Carry channels as this is seen as potentially unbalancing the relationship between platforms and broadcasters to the detriment of the consumer benefit.²⁵ (The only exception is Estonia, and then only due to the complete collapse of the free to air broadcasting system in that country.)
- 70 Must offer has been introduced in some European jurisdictions to ensure that PBS broadcasters continue to make their channels available to the platforms.
- 71 Where commercial negotiations around compensation for channels occurs in the US, this is not in terms of Must Carry but rather for retransmission consent. Some local commercial broadcasters elect to go this route rather than the Must Carry route.
- 72 The approach to Must Carry has always been concerned with balance: weighing up the interests of broadcasters with the public benefit which accrues, namely universal access and the availability of the public broadcaster on all platforms. Both these factors are to be taken into account when considering the public interest. This approach should continue to inform the Must Carry Regulations in South Africa.

CONTEXT FOR THIS REVIEW

- 73 Balancing the interests of different categories of licensees is a complex task for regulators. In the case of the Must Carry Regulations, the Authority is not only charged with balancing the interests of the public broadcaster (the SABC) and the interests of Pay TV licensees, but also the interests of the public to be able to access public service broadcasting on all platforms.
- 74 The goal of this balancing act is not about ensuring that one set of broadcaster interests is off-set against another competing set of broadcaster interests. As

²⁵ Pg 18 of the DCMS Balance of Payments Report

with all regulation, the primary goal is to ensure that the all-encompassing public interest is met. The question of how the public interest can best be achieved through the Must Carry Regulations is therefore central to this review.

75 The Authority's RIA Report provides a good starting point for addressing the public interest question. The Report is categorical that the public interest is met through the Regulations in their current form. This is because the Regulations advance universal access. ICASA makes the following findings in the RIA Report:

75.1 *"The must-carry obligation extends coverage reach of the PBS licensee to areas where there may be no coverage."*²⁶

75.2 *"The Regulations have been effective and have ensured that PBS channels are universally accessible..."*²⁷

75.3 *"The Regulations have facilitated access to public broadcasting to the remaining [percentage] of the population that falls outside the SABC's analogue network coverage area..."*²⁸

75.4 *"Consumers are afforded an opportunity to access public service programming without incurring the cost of purchasing an antenna or receiver in addition to the subscription satellite dish and a set-top-box."*²⁹

75.5 There are a *"number of audiences that have benefitted from the Regulations"*.³⁰

75.6 *"Without the Regulations, the cost of an extra antenna would be an inhibiting factor for millions of audiences"*.³¹

²⁶ Para 4.4 of the RIA Report

²⁷ Para 8.2 of the RIA Report

²⁸ Para 4.4 of the RIA Report

²⁹ Para 4.5 of the RIA Report

³⁰ Para 4.8 of the RIA Report

³¹ Para 4.7 of the RIA Report

- 75.7 *Without the Regulations "audiences outside the SABC analogue network coverage would have been denied access to public broadcasting content".³²*
- 75.8 *"The Regulations have ensured that a combined total of 591 393 viewers have access to public broadcasting television programming".³³*
- 75.9 *"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".³⁴*
- 75.10 *"The Regulations have been beneficial to all stakeholders and to the public".³⁵*
- 76 It is apparent from these extracts from the Authority's RIA Report that the primary question of the review has already been answered. As the RIA Report makes clear, the Must Carry Regulations are achieving their objective by extending universal access to public broadcasting content.
- 77 It is worth stressing that advancing the public interest is not the same as advancing the 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 the public broadcaster's organisational or financial interests.
- 78 In light of the overwhelming evidence in the Authority's RIA Report showing that the Regulations are in the public interest, it may be unclear why it was necessary for the Authority to publish a Discussion Document thereafter. The answer seems to lie in the area of costs, for it was on this issue that the Authority was unable to

³² Para 4.7 of the RIA Report

³³ Para 4.9 of the RIA Report

³⁴ Para 4.17 of the RIA Report

³⁵ Para 6.1 of the RIA Report

make a full assessment during the RIA. The Authority explained that this was because the SABC did not "*provide empirical evidence or figures*"³⁶ in its submission during the RIA process.

- 79 A major focus for this current stage of the Review is therefore to determine how to deal with the issue of costs which arise from Must Carry. We address this issue more fully in a later section of this submission. For now, we advance the following principle which should guide the Authority's analysis, namely: rather than seeking to balance broadcaster costs against other broadcasters' costs, the approach should be to weigh up (i) the costs incurred by all broadcasters in implementing the Must Carry Regulations with (ii) the benefit to the public which results from the Regulations.
- 80 MultiChoice suggests that the costs assessment should therefore be based on the collective contribution made by broadcasters and whether this contribution is justified in light of the objective being served. We suggest this is a more fruitful point of departure than whether each of the broadcaster contributions is equally matched. (Albeit that a comparison of MultiChoice and the SABC's respective contributions shows that MultiChoice currently makes by far the greater contribution to the cost of implementing the Regulations. We refer to the cost summary in Annexure B).
- 81 Nonetheless, we submit that the key question to be considered is: Are the collective costs incurred by the broadcasters reasonable when considering the advancement of universal access which is achieved?
- 82 On this score, if the Regulations were very costly for broadcasters to implement and very little universal access was achieved, the Authority might reach the conclusion that the outcome does not justify the cost. It might accordingly adjust its Regulations on "the extent to which" Pay TV must carry the public broadcasting channels.
- 83 On the other hand, if there are extensive universal access gains, and the costs are not excessive, then the Authority might determine that the collective cost to

³⁶ Para 8.4 of the RIA Report

broadcasters of implementing the Regulations is justified, given the benefit which accrues.

84 Later in our submission we make more detailed representations on what the true costs are of implementing the Regulations. For now we stress that, in line with the approach outlined above, this Review should:

84.1 Firstly, focus on identifying what costs arise from implementing the Must Carry Regulations.

84.2 Secondly, assess whether the collective cost is justified in light of the achievement of universal access to a public good and the public benefit that arises from this.

Summary of the context for this review

- 85 The Authority must develop Must Carry Regulations in the public interest.
- 86 The public interest is not the same as the interests of the SABC as the public broadcaster. (The SABC's interests may change from time to time in light of its financial performance and position in the market).
- 87 The Authority's RIA Report shows conclusively that universal access benefits are currently being achieved by the Must Carry Regulations and therefore that the public interest is being served.
- 88 A further step is for the Authority to identify the collective costs incurred by broadcasters in the course of implementing the Regulations so it can evaluate whether these costs are justified, given the universal access contribution and availability of the public broadcasting programming across all platforms.

BENEFITS ARISING FROM THE MUST CARRY REGULATIONS

Universal access benefits

89 As we have already stated in some detail, at its core Must Carry is about universal access. All stakeholders³⁷ seem to agree that the primary rationale for the Must Carry Regulations is sound: it is to promote universal access to public

³⁷ Paras 4.10 4.12, 4.13, 4.16 and 4.17 of the RIA Report

broadcasting services. This is a matter of national policy and it is why the Authority is charged with developing Must Carry Regulations.

- 90 If the over-arching goal is settled, the next obvious question is whether the Regulations fulfil the rationale? Are the benefits which are intended actually being achieved? These are questions which, from time to time, can and should reasonably be asked of any regulations.
- 91 The Discussion Document states that "*with regards to universal access, the Regulations have been effective and have ensured that the Public Broadcasting Service licensee's channels are universally accessible*"³⁸.
- 92 MultiChoice agrees with the Authority's assessment. We submit that the evidence demonstrates a number of measurable universal access benefits. For ease of reference, we summarise the benefits of the Must Carry Regulations below.

Must Carry ensures SABC services are conveniently available in pay TV homes

- 93 The SABC is a public broadcaster, established with a statutory public mandate to "*service the needs of all South African society*".³⁹ The underlying principle which guides its actions, is that they are a "public good".

"A public good is one that is not depleted by use. Its consumption by one individual does not undermine its availability for others. Public goods are therefore said to be non-rivalrous: nobody has less merely because others have access. Often public goods are not only non-rivalrous, but also (more or less) non excludable: it is hard or expensive to exclude some people from enjoying them. Typical public goods include a sound currency, a non-corrupt judiciary, a medical database, a common language, flood control systems, lighthouses, and street lighting. All of these are non-rivalrous goods (although some are geographically restricted). Nobody loses when others too enjoy them. Broadcast content is a public good par excellence, and while it is technologically possible to exclude some from enjoying it, this may have costs

³⁸ Pg 52 of the Discussion Document

³⁹ s2(l) of the Broadcasting Act

and any benefits may accrue to (commercial) service providers rather than to service users."⁴⁰

- 94 The universal access principle demands that the public broadcasting channels must be made available everywhere for the public good. The retransmission of the public broadcasting channels on a pay TV platform does not undermine that they are a public good. Nor does access to the Must Carry channels on other platforms undermine their availability free to air. Rather, it expands on the availability of the public good – which is precisely the policy and legislative intention.
- 95 The major universal access benefit arising from Must Carry concerns those citizens who subscribe to satellite pay TV and access the SABC channels via the pay TV platform instead of over the terrestrial network, even though they are within the terrestrial coverage area.
- 96 Unlike homes who cannot get the SABC terrestrial signal at all, consumers within the coverage area do not need help getting the SABC signal. But there is still a major universal access consideration, namely that the public broadcasting channels should not be side-lined in Pay TV homes. The concern is that unless they are required to, Pay TV broadcasters might not carry the public broadcasting channels at all and this could lead to public service broadcasting ultimately becoming marginalised and irrelevant (which would also have knock-on commercial implications for the SABC).
- 97 The goal is for Pay TV subscribers to have ease of access to public broadcasting content. Viewers are advantaged by the Must Carry Regulations because they are easily and conveniently able to access the Must Carry channels on a variety of platforms, without the inconvenience and cost of installing other equipment or switching platforms.
- 98 Universal access policies (whether in broadcasting or telecommunications) do not necessarily contemplate that there should be no economic burden of any kind

⁴⁰ *Concepts of Public Service Broadcasting in a Changing Policy Context*, British Academy for the Humanities and Social Sciences, December 2015, pg 4 (https://www.thebritishacademy.ac.uk/sites/default/files/BRIJ4610%20Public%20service%20Broadcasting%2006_16_WEB_0.pdf) [Visited 13 March 2020]

on the consumer. For instance, even though the SABC channels are expected to be universally available, viewers must still purchase their own TV sets and pay a TV licence fee. It is accepted that viewers will choose a system to access television, in line with what their circumstances allow (e.g. an old analogue TV set vs. HD set; satellite vs. terrestrial, FTA vs. pay TV).

- 99 Currently, approximately 8 million South African homes have elected to pay subscriptions to a pay TV operator. In the absence of the Must Carry channels being available on Pay TV, these homes would need to make alternative arrangements to have continued access to the PBS channels. Many consumers would likely still have a terrestrial aerial even though it may not be in use.⁴¹ However, it is probable that some homes would need to invest in new terrestrial reception equipment. ICASA notes in the RIA Report that "*the cost of an extra antenna would be an inhibiting factor for millions of audiences*".⁴²
- 100 MultiChoice research shows that [REDACTED] of subscribers appreciate the convenience of being able to access the SABC channels through the Pay TV system and that if SABC 1, 2 or 3 were not available on DStv some would no longer watch the SABC channels.⁴³ Subscribers also confirmed that the presence of SABC channels on DStv made them more likely to watch the channels. (See Figure 2).⁴⁴ **[CONFIDENTIAL]**

⁴¹ It is likely that many homes adopted television directly through satellite pay TV and never had a terrestrial TV aerial at all

⁴² Para 4.7 of the RIA Report

⁴³ MCG CII Group Research and InSites Consulting, March 2020

⁴⁴ MCG CII Group Research and InSites Consulting, March 2020

[REDACTED]

[REDACTED]

[CONFIDENTIAL]

- 101 Evidently, the SABC gains viewers due to the Must Carry Regulations. It follows that viewers would be less inclined to watch the SABC if the channels were not available on Pay TV. This means that the size of the SABC's audiences would likely reduce if the SABC channels were taken off pay TV.
- 102 In its RIA Report, ICASA stated that, based on figures submitted by MultiChoice, it appeared that 591 393 viewers watch the SABC on the DStv platform (rather than using a terrestrial aerial). Since the publication of the RIA Report, as pay TV subscriber numbers have grown, these numbers have also grown, with even more people choosing to access the SABC via DStv rather than via the terrestrial signal. (See Figure 3). These are (some of) the viewers who would be negatively impacted if there were no Must Carry regime.
- 103 In summary, the evidence shows that the public benefit is being served by the Must Carry Regulations and that their objective is being achieved.

Must Carry widens the coverage of the SABC channels

104 At a more simplistic level, universal access (in the broadcasting context) means giving all citizens access to a TV signal.⁴⁵

105 South African policy and legislation places this mandate primarily on the public broadcaster. One of the SABC's statutory objectives is "*to make its services available throughout the Republic*".⁴⁶ The SABC must therefore work steadily to extend its coverage to all citizens, a massive undertaking which is both costly and complex.

106 On this score it is clear that the Must Carry Regulations assist:

106.1 Satellite pay TV services have 100% coverage of the SA population whereas the terrestrial coverage of the SABC channels is more restricted (91.2% for SABC1, 92.5% for SABC2 and 82.1% for SABC3)⁴⁷.

⁴⁵ For example, On pg 4.1 of the Authority's Regulatory Impact Assessment Report on the Must Carry Regulations, 19 March 2019 ("**RIA Report**"), the Authority recognises that:

"The Regulations are driven by a central public interest principle of universal access as per the White Paper on Broadcasting Policy of 1998, 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" (Pg 8 of the RIA Report).

On pg 52 of the Discussion Document, the Authority states:

"Nonetheless, with regards to universal access, the Regulations have been effective and have ensured that Public Broadcasting Service Licensee's channels are universally accessible. The Regulations have enabled the public, who ordinarily would not have access to Public Broadcasting Service television programmes due to coverage deficiencies, to access public Broadcasting Service television programmes"

⁴⁶ s8(a) of the Broadcasting Act. The preamble to the Broadcasting Act notes that the South African broadcasting system provides "a public service necessary for the maintenance of a South African identity, universal access, equality, unity and diversity". One of the objects of the Broadcasting Act is to "*establish a strong and committed public broadcasting service which will service the needs of all South African society*" (s2(l) of the Broadcasting Act) As the 2007 Discussion Paper noted, "*the SABC is subjected to universal access to programming...*" (Pg 23 of the 2007 Discussion Paper. The preamble to the Broadcasting Act notes that the South African broadcasting system provides "*a public service necessary for the maintenance of a South African identity, universal access, equality, unity and diversity*". One of the objects of the Broadcasting Act is to "*establish a strong and committed public broadcasting service which will service the needs of all South African society*" (s2(l) of the Broadcasting Act)

⁴⁷ At best the DTT network would exhibit the same or similar coverage limitations since DTT MUX 1 provides a population coverage of 87.9% with 183 sites.

- 106.2 The greater coverage and audience provided by satellite pay TV therefore means that because the Must Carry Regulations ensure SABC is present on pay TV, viewers who cannot be reached by the existing Sentech terrestrial network have another means to access the channels.
- 106.3 Since there is more than one satellite Pay TV service, viewers can access the SABC channels no matter which Pay TV service they choose – the SABC is therefore universally available.
- 106.4 The evidence shows that approximately 10% of South African homes still fall outside the Sentech terrestrial network.
- 106.5 MultiChoice has calculated that of those, approximately 1 million homes subscribe to DStv.⁴⁸ (We have not determined what proportion subscribe to another Pay TV service or FTA satellite).
- 106.6 ICASA notes in the RIA *"Without the Regulations...The audiences outside the SABC analogue network coverage would have been denied access to public broadcasting content."*⁴⁹
- 107 The point of Must Carry obligations is obviously not to turn pay TV systems into de facto free-to-air signal distributors for the SABC (Sentech runs both terrestrial and satellite platforms for that purpose). Nonetheless, taking universal access at its most basic level - access to a TV signal - there is quantifiable evidence that the Must Carry Regulations make an important contribution to access by some South Africans. A substantial number of DStv subscriber homes are outside of SABC coverage and presently gain access to the SABC channels via the DStv system.

⁴⁸ The coverage analysis presented is based on the DTT coverage for MUX1 as per the published SABC and Sentech site list. This coverage map was converted into a georeferenced data layer for analysis in a Geographical Information System (GIS) and the DStv subscriber data was geocoded to postal code level. As the MUX1 network replicates the SABC's analogue coverage, the findings are also indicative of the estimated number of DStv subscribers outside the SABC's analogue coverage

⁴⁹ Para 4.7 of the RIA Report

108 This evidence also makes apparent that the concept of universal access is more nuanced than just signal coverage. The homes outside of SABC terrestrial coverage are able to receive other satellite services. DStv is not the only option for these citizens to get television. However, not all platforms are equally effective. In the case of the Sentech gapfiller satellite platform, since very few DTH STBs have been deployed or are available to purchase, it does not currently provide a practical avenue for consumers to watch TV.

109 In contrast, the commercial satellite players, including DStv, have receiver equipment already installed or readily available to be deployed. Hence, these players advance universal access in a more practical manner than by just making the signal available.

Summary of universal access benefits

110 In summary, the evidence shows that there are at least two quantifiable universal access benefits arising from the Must Carry Regulations, namely:

- | | |
|-------|--|
| 110.1 | Must Carry ensures SABC services are conveniently available in pay TV homes – approximately 8 million homes have assured access to public broadcasting content. |
| 110.2 | Must Carry widens the coverage of the SABC channels – approximately 1 million homes who are outside the SABC terrestrial coverage gain access through DStv. (This does not take into account subscribers to other pay TV operators). |

Commercial benefits to the SABC

111 Although the primary goal of Must Carry is to advance universal access, there are also commercial benefits which flow to the SABC. These commercial benefits are not the objective of the Regulations, but they are nonetheless an important consideration.

Must Carry results in expanded audience and revenue for the SABC

112 First off, Must Carry enables the SABC to continue to reach a valuable segment of the audience which has moved onto Pay TV. This audience is skewed to the higher LSMs / SEMs and is important from an advertising revenue point of view.

113 As a study prepared for the European Union indicated:

"Greater coverage for a broadcaster with must-carry status translates to increased advertising revenue as advertisers are willing to pay more to reach more viewers, and increased viewers means that public service broadcasters may be able to bid more for valuable content rights."⁵⁰

114 One of the reasons commercial FTA local broadcasters opt into the 'must carry' regime in the US for carriage by local cable operators is that they are faced with declining FTA audiences and hence declining advertising revenue. Must Carry provides them with access to audience on the cable operator's platform which can be sold to advertisers. At the same time the US government's objective for must carry of encouraging diversity and localism in broadcasting is also achieved.

115 The viewership figures which the SABC uses when it sells advertising reflect all SABC viewers across all television platforms, including those who watch SABC on DStv and other pay TV services.

116 It is therefore not correct that the Must Carry regime undermines the SABC's investment in content. The SABC would invest in the channels regardless of Must Carry, and their presence on pay TV actually enables the SABC to monetise its investment in content more effectively.

117 Figure 3 below shows the significant percentage of SABC viewers who watch the SABC on DStv rather than over another platform. It is notable that for all SABC channels, the percentage of viewers watching over DStv (rather than over a terrestrial network) has grown.

⁵⁰ Study on the Regulation of Broadcasting Issues Under the New Regulatory Framework prepared for the European Commission, Information Society and Media Directorate-General, December 22, 2006, by Cullen International SA, pg 83

Figure 3: Percentage of SABC viewers who watch SABC on DStv

	SABC 1		SABC 2		SABC 3	
	2014	2019	2014	2019	2014	2019
National Viewers	1 313 331	1 678 234	839 080	730 816	496 170	284 654
DStv Viewers	178 743	517 706	137 138	180 959	72 602	48 169
% DStv Subs Watching SABC	14%	31%	16%	25%	15%	17%

Source: TAMS Data, Arianna, Adults 15+, Jan-Dec 2014 vs 2019, 06:00-24:00

118 Looking at the two core trading markets the advertising industry uses, it is evident that DStv contributes significant audiences to SABC in the more lucrative top LSM segment (LSM 8-10). (By contribution we mean the portion of the SABC's audience which is made up of viewers which watch the channels via a DStv decoder).

Figure 4: DStv contribution to SABC audiences

DStv contribution to SABC audiences	
SABC audience	Percentage contribution
SABC 1 LSM 8-10	63%
SABC 2 LSM 8-10	47%
SABC 3 LSM 8-10	22%

119 To put the above figures in context, if there were no Must Carry, SABC 1 could lose as much as 63% of its LSM 8-10 audience.

120 This data is broken down further in the tables below:

Figure 5: SABC audiences watching via DStv v.s. FTA by LSM and SEM

	LSM 5-7: 000's	LSM 5-7: %	LSM 8-10: 000's	LSM 8-10: %	SEM 3-5: 000's	SEM 3-5: %	SEM 6-8: 000's	SEM 6-8: %	SEM 9-10: 000's	SEM 9-10: %
SABC 1 watched on DStv	369 129	30.3%	100 849	63%	230 996	29.8%	172 003	47%	24 818	83%
SABC 1 watched on FTA	850 668	69.7%	58 320	37%	545 156	70.2%	195 141	53%	5 093	17%
Total SABC 1 viewership	1 219 797	100%	159 169	100%	776 152	100%	367 144	100%	29 911	100%

	LSM 5-7: 000's	LSM 5-7: %	LSM 8-10: 000's	LSM 8-10: %	SEM 3-5: 000's	SEM 3-5: %	SEM 6-8: 000's	SEM 6-8: %	SEM 9-10: 000's	SEM 9-10: %
SABC 2 watched on DStv	120 441	22.7%	49 146	47%	66 915	22.7%	69 339	32%	19 610	46%
SABC 2 watched on FTA	408 979	77.3%	55 885	53%	227 507	77.3%	149 546	68%	23 329	54%
Total SABC 2 viewership	529 420	100%	105 031	100%	294 422	100%	218 885	100%	42 939	100%

	LSM 5-7: 000's	LSM 5-7: %	LSM 8-10: 000's	LSM 8-10: %	SEM 3-5: 000's	SEM 3-5: %	SEM 6-8: 000's	SEM 6-8: %	SEM 9-10: 000's	SEM 9-10: %
SABC 3 watched on DStv	29 956	15.8%	13 197	22%	15 188	14.9%	19 537	19%	6 026	27%
SABC 3 watched on FTA	159 959	84.2%	46 428	78%	86 782	85.1%	85 092	81%	16 431	73%
Total SABC 3 viewership	189 915	100%	59 625	100%	101 970	100%	104 629	100%	22 457	100%

121 Due to the high proportion of audiences watching over DStv, MultiChoice estimates that the viewership of the SABC Must Carry channels on DStv accounts for approximately R569 million⁵¹ of the SABC's total advertising revenue per year. (This is approximately 19.6% of the SABC's total television advertising revenue⁵² and nearly 60% of its annual licence fee revenue.⁵³)

122 It is worth emphasising that all of the advertising revenue drawn by the SABC channels on the DStv platform goes only to the SABC – none of it goes to MultiChoice. This is not a requirement of the regulations and it is unlike the revenue share models which the SABC enters into with other platforms such as YouTube. (It is also distinct from commercial channel supply deals where advertising revenue is often shared).

⁵¹ MultiChoice conducted this estimation by applying a direct correlation between the viewing profile of SABC channels via the DSTV platform and revenue estimates for 2018 of approximately R1138m (TAMS; Arianna; Postbuys; All day 06h00-24h00; Gross revenues with DMS estimates for Net). We then applied an assumption that only 50% of this adspend takes into account viewership over DStv. 50% of R1138m = R569m

⁵² The SABC's TV advertising revenue in the financial year ending February 2019 was R2.9 billion (SABC Annual Report, 2019, pg 35.) MultiChoice estimates that R569 million of this revenue derive from SABC 1, 2 and 3 viewership on DStv

⁵³ The SABC's TV licence revenue in the financial year ending February 2019 was just over R 968 million (SABC Annual Report, 2019, pg 36)

Must Carry ensures the SABC channels are positively showcased

- 123 There is significant ongoing investment in the Pay TV platforms which carry the Must Carry channels. This investment means that the SABC channels are positively showcased on platforms which are far more advanced than the analogue environment and which encourage viewer loyalty to the SABC.
- 124 For instance, the Must Carry channels can be seen in high definition, there is support for closed captioning and there are additional value-add services such as "catch-up", enabling viewers to watch some SABC programmes at a different time from the linear broadcast.
- 125 It is difficult to quantify the value consumers might put on such features. However, in MultiChoice research subscribers say they appreciate the opportunity of being able to watch SABC 1, 2 and 3 programmes on DStv Catch Up rather than having to watch the shows at the time of airing on the channels.⁵⁴

Must Carry reduces coverage expansion costs to the SABC

- 126 Terrestrial broadcast signal distribution is expensive and the fees Sentech charges to extend universal access on the SABC's behalf are a significant contributor to the Corporation's annual costs. Approximately 11% of the SABC's total expenses is on transmission fees to Sentech (for TV and radio signal distribution)⁵⁵. In contrast, pay TV operators do not charge the SABC signal distribution/carriage/transmission fees.
- 127 While pay TV operators are not fulfilling the role of signal distributor, their contribution to coverage does represent a significant saving to the SABC. MultiChoice estimates that it would cost the SABC a prohibitive 84% (over and above the transmission fees it already pays Sentech)⁵⁶, if it had to extend its

⁵⁴ MCG CII Group Research and InSites Consulting, March 2020

⁵⁵ Last year, the SABC incurred an expense of R740,207,000 for signal distribution and linking costs, out of a total expense of R6,909,389,000 (SABC Annual Report, 2019, pgs 37 and 94)

⁵⁶ Costing is based on a linear extrapolation of the number of additional sites required to step from the MUX2 coverage (81.4% with 102 sites) to the MUX1 coverage (87.9 % with 183 sites) and then up to a theoretical 100% coverage. This projects the requirement of 330 sites to deliver 100% coverage and an increase of more than 84% of the network costs

terrestrial network to reach all South Africans. This would be an unsustainably large increase on an already substantial area of expenditure and would require the SABC directing funds away from other areas of investment, for example local content.

- 128 The SABC is continuously trying to manage down its signal distribution costs. In the DTT context it has argued that its obligations to provide expensive terrestrial coverage should be reduced in favour of satellite. The Must Carry Regulations already provide the SABC with guaranteed 100% satellite coverage for which it does not have to pay.

Summary of commercial benefits

129 In summary, the evidence shows that the SABC accrues the following commercial benefits from the Must Carry Regulations, namely:

- | | |
|-------|--|
| 129.1 | Must Carry directly benefits the SABC commercially by enabling it to extend its viewership and derive advertising revenue. The value of the portion of advertising revenue earned over the DStv platform is approximately R569m annually. |
| 129.2 | Must Carry allows the SABC channels to be positively showcased on Pay TV platforms with features not available in an analogue environment, for example, high definition picture quality and additional services such as "catch-up" which promote viewer loyalty to the SABC. |
| 129.3 | The contribution made by Pay TV operators to the SABC's coverage represents a cost saving to the SABC. The SABC would have to spend 84% more on its signal distribution if it were to expand its terrestrial coverage to match that of Pay TV. |

COSTS ASSOCIATED WITH MUST CARRY

- 130 In its RIA Report, the Authority was unable to make a conclusive finding on costs as the SABC did not provide sufficient information.⁵⁷ The Discussion Document

⁵⁷ Para 5.3 of the RIA Report

accordingly poses several questions related to the actual costs associated with Must Carry.⁵⁸

Appropriate approach to determine relevant costs

131 The over-arching principle when identifying costs relevant to Must Carry is that only those costs that arise from the actual implementation of the Regulations should be included in an assessment.

132 This is consistent with best practice for conducting RIAs where only the costs (including the unintended consequences) and the benefits associated with the imposition of a regulation are considered. Costs that do not arise from the imposition of a regulation are excluded from consideration for a self-evident reason – the presence of the regulation does not give rise to that cost.

133 Using this framework means that the relevant costs are those that are incurred because of the Must Carry Regulations. When contemplating the costs faced by the SABC, for instance, the correct approach would be to consider which costs the SABC would not incur were there no Must Carry. Approaching the matter in this way requires that the Authority understand and identify those cost areas that arise directly as a result of the Must Carry Regulations.

134 MultiChoice submits that the costs that arise from the Must-Carry Regulations are twofold:

134.1 the costs related to the delivery of the signal to the Pay TV broadcaster;
and

134.2 the transmission costs incurred by the Pay TV broadcaster.

135 These costs arise because of the Must Carry Regulations and are inextricably related to the implementation of the Regulations.

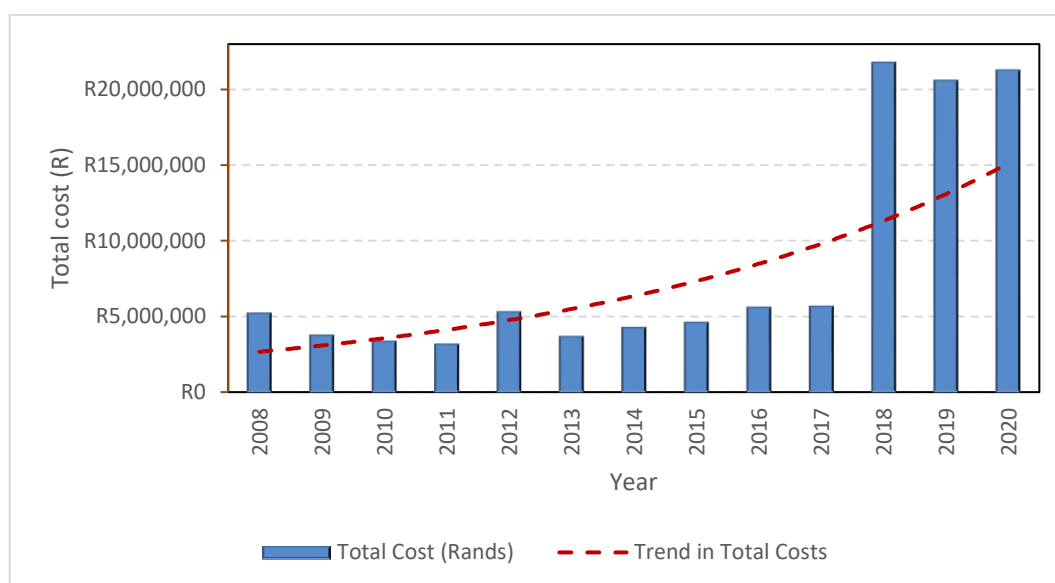
⁵⁸ Pg 4 of the Discussion Document

Calculating the costs that have arisen from the Must Carry Regulations

136 Between 2008 and 2020, MultiChoice incurred a total of R108,854,395 in compliance with the requirement to carry the SABC Must Carry channels on its platform. For a detailed breakdown of these costs at an annual level refer to Annexure B.

137 These costs have risen over the period as reflected in Figure 3 below. (The spike in costs in 2018 is a result of investment in broadcasting the PBS channels in HD, which significantly increases satellite capacity costs. An HD channel uses more satellite capacity than an SD channel and broadcasting the PBS channels in HD enhances the viewing experience, which in turn enhances the appeal of the channels.)

Figure 6: Annual escalation in costs borne by MultiChoice because of Must Carry Regulations⁵⁹



⁵⁹ These costs are related to the MultiChoice Financial Year which ends on 31 March of each year. The 2020 costs in part reflect projected costs for the year to 31 March 2020

138 In terms of the Must Carry agreement, the SABC has not incurred any of the costs that arise from the Must Carry Regulations.⁶⁰

There is no validity to including opportunity costs

139 Having identified the costs that arise from the Must Carry Regulations, the next step is to consider how to treat other costs such as opportunity costs (for instance the opportunity that Pay TV loses to use the satellite capacity for other revenue generating purposes instead of carrying the Must Carry channels) and any unintended consequences arising from the Regulations.

140 As indicated in the Genesis Report (attached as **Annexure C**),⁶¹ these opportunity costs typically become difficult to identify and measure and therefore lend themselves to subjectivity. MultiChoice submits that this category of costs is only legitimate and worthy of consideration if the claimed opportunity costs are, with a high degree of certainty, unlikely to be incurred in the absence of the current Must Carry Regulations.

141 One of the opportunity costs mentioned by the SABC is the opportunity to charge a fee to Pay TV providers for its channels. This argument is not credible. This opportunity cost can only exist if subscription broadcasters were willing to pay a commercial fee for channels that are freely available to consumers. There are several reasons to doubt that subscription broadcasters would be willing to pay for freely available content.

141.1 First, as indicated earlier, the self-regulatory Must Carry model that was in place before the enactment of the ECA was on a voluntary zero net cost basis, agreed to by both MultiChoice and the SABC. There is no reason to believe that in the event of removing the current Must Carry Regulations or amending them, this would not be the outcome.

⁶⁰ Although the SABC is supposed (in terms of the Must Carry Regulations) to cover the costs of delivering its signals to MultiChoice, MultiChoice covers that cost. MultiChoice thus not only meets its own compliance costs, but also absorbs the SABC's cost of delivering the signal to MultiChoice. This is a cost over and above what the Must Carry Regulations require

⁶¹ Genesis Report: An Economic Perspective on the ICASA RIA of the Must-Carry Regulations, 25 October 2018, paras 34 – 36 ("**the Genesis Report**")

141.2 Second, the foundation of the opportunity cost proposition is the notion that Pay TV licensees are attracting subscribers using the public broadcaster's channels because certain programmes are popular. This proposition has already been rightly rejected by the Authority in its RIA report, which states that:

"The argument that SBS licensees have experienced subscriber growth as a result of the popularity of the PBS channels is unsubstantiated."⁶²

141.3 Third, as outlined in the Genesis Report, if there are any benefits to Pay TV licensees these are unlikely to be large, primarily because the Must Carry content is in any event widely and freely available.⁶³ Even though some of the SABC's programming is popular, this does not translate to a driver of the growth in subscriptions for Pay TV providers. If anything, the presence of popular public service programming may be expected to reduce the willingness of consumers to pay for subscription services, thereby having a negative effect on subscriber growth. When consumers have compelling content that they can access for free, they have reduced desire to pay for subscription-based content. This naturally means that growth in subscriptions on Pay TV would be a result of other factors such as the Pay TV content and other services offered by Pay TV providers and not the presence of the content on the Must Carry channels.⁶⁴

141.4 Fourth, the SABC's proposition assumes that Pay TV subscribers would be willing to pay an additional amount for content (SABC programming) that is freely available elsewhere (e.g. directly from the SABC and through the internet). Because Pay TV licensees generate revenue from subscription fees, if citizens are not willing to pay extra, this limits the ability and willingness of Pay TV licensees to pay the

⁶² Paras 5.12 – 5.13 of the RIA Report

⁶³ Para 42 – 42.3 of the Genesis Report

⁶⁴ See for example, *Audio-Visual Copyright Society Ltd v Foxtel Management Pty Ltd* (No. 4), [2006], Copyright Tribunal of Australia, para 370

public broadcaster. The only situation where this might make sense is if Pay TV was deriving a disproportionately greater benefit compared to other platforms that carry the Must Carry content. But there does not appear to be any special benefit to Pay TV.⁶⁵ In MultiChoice's case, in terms of the Must Carry agreement it has with the SABC, the SABC keeps all advertising revenue generated from the Must Carry channels and MultiChoice carries all the transmission costs associated with Must Carry.

- 141.5 It appears that the arrangements between the SABC and other platforms leave the SABC worse off than its Must Carry arrangements with Pay TV. For example, in the SABC's arrangement with YouTube, we understand that the SABC would not receive all the advertising revenue generated from its programming. There is therefore no reason to ascribe any credence to the argument that the Must Carry Regulations impose a significant opportunity cost on the SABC, as in Must Carry, MultiChoice does not share any advertising revenue. The SABC may well be left worse-off if it was subject to purely commercial negotiations rather than Must Carry.

Costs which are irrelevant to Must Carry

- 142 The following categories are examples of costs that are not related to the Must Carry Regulations because they would be incurred anyway:

- 142.1 First, programming costs are not relevant to Must Carry. The SABC will produce the Must Carry channels regardless of whether they are carried on Pay TV. If the Must-Carry Regulations required the SABC to produce specific content specifically for carriage by Pay TV, over and above that which it ordinarily acquires or produces, then those specific incremental content costs could be relevant. (This is because those costs would be a direct result of the Must Carry Regulations being in place and would be specifically incurred for carriage on Pay TV

⁶⁵ Para 42 – 42.3 of the Genesis Report

platforms). But that is not the case. At present, the Must Carry Regulations do not impose any such incremental programming costs on the public broadcaster.

142.2 Second, other operational and capex costs are also not relevant to Must Carry. At an operational level the SABC incurs costs related to staff, administration and other costs. Equally, there are capital costs such as investment in outside broadcast vans, buildings, office equipment etc. These are all going to be incurred regardless of whether the Must Carry Regulations exist or not. They cannot be attributed to Must Carry. (It would be just as absurd for Pay TV licensees to argue that costs related to, for instance, transmission of other channels should be considered as part of the review of the Must Carry Regulations).

142.3 In any event, the PBS licensee has various avenues available to it to meet its required funding. This includes the TV licence fee, grants from the government including financial support, special concessions on annual licence fees payable to ICASA, and advertising revenue. It is not appropriate for it to be looking to the Must Carry Regulations to create a revenue stream. As the Authority's RIA Report reiterated, the Must Carry "*Regulations should not be imposed as a form of financial support for any of the broadcasters but rather to promote the objectives of universal access*".⁶⁶

Summary on costs

143	Only the costs which arise from the actual implementation of Must Carry should be included in an assessment. There is no validity to the argument to include opportunity costs in the analysis. The relevant costs are:
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143.1	Costs related to the delivery of the SABC signal to the pay TV broadcaster
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143.2	The transmission costs incurred by the Pay TV broadcaster.
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⁶⁶ Para 5.1 of the RIA Report

- | | |
|-----|--|
| 144 | MultiChoice has incurred R108,854,395 in compliance with Must Carry. |
| 145 | In terms of its agreement with the SABC, MultiChoice understands that the SABC has not incurred any of the costs that arise from the Must Carry Regulations. |
| 146 | Although MultiChoice does not have insight into the costs which may be incurred by other pay TV broadcasters, we believe that the public benefit which arises from Must Carry justifies the costs to broadcasters. |

RESPONSE TO SABC ARGUMENTS

147 To date the SABC has not engaged meaningfully with the issue of costs which arise from the Regulations. Instead the SABC has focused its arguments on claims that the Must Carry Regulations have commercially benefitted pay TV and MultiChoice in particular, at the expense of the public broadcaster.⁶⁷ To support this view, the SABC has advanced various arguments, including that the Must Carry Regulations -

147.1 undermine the SABC's investment in content;

147.2 promote the uptake of MultiChoice's product; and

147.3 enable MultiChoice to screen sports for which it may not necessarily have the rights and generally enable MultiChoice to target free-to-air audiences by having access to the SABC's content.⁶⁸

148 In making these arguments, the SABC portrays the Must Carry channels as indispensable content which MultiChoice does not pay for and exploits for its own benefit. The SABC also incorrectly maintains that there is no commercial benefit to it from the Must Carry regime. But as we have shown earlier, the SABC does benefit commercially (even though commercial benefits to the SABC are not the objective of Must Carry). The SABC does not acknowledge these benefits and persists in submitting that the Regulations should be amended so that it obtains

⁶⁷ Letter from the SABC to the Authority, SABC request for urgent ICASA review and amendment of the Must Carry Regulations, 21 November 2017 ("**the SABC letter**")

⁶⁸ The SABC letter and SABC presentation on the ICASA Discussion Document: Inquiry into Subscription Television Broadcasting Services, 8 May 2018 ("**the SABC presentation**") slides 18 to 21

even further benefits, namely to compel those who are obliged to carry its channels to pay for those channels (the so called "Must Carry / Must Pay" proposal).

Must Carry does not undermine SABC's investment in content

- 149 The SABC is the public broadcaster, charged with delivering a public mandate. Its core reason for being is to produce public interest programming and broadcast that content throughout South Africa and service the needs of all South African society.
- 150 The Must Carry Regulations are designed to extend universal access to public broadcasting service content. In light of this, it is unclear how having this content distributed by Pay TV satellite platforms (at no charge to the SABC) can be said to undermine the SABC's content investment. After all, the SABC content is watched on the Pay TV platforms, the viewership figures are attributed to the SABC (thereby contributing to the SABC's audience size) and the ad revenue which is earned as a consequence of that viewership accrues solely to SABC.
- 151 This should be contrasted with the manner in which SABC content on YouTube is treated. In that situation there is a revenue split, with on average 50% of ad revenue earned going to YouTube.
- 152 MultiChoice estimates that the SABC would have made less than R50 million⁶⁹ from the content it has uploaded to YouTube in the last year (a far lower amount than the R569 million it earns per annum due to its presence on the DStv platform).

⁶⁹ Analysis based on YouTube views of SABC content in 2019 and 2020. YouTube channels on average earn \$18 per 1000 views with \$9 going to YouTube and the other \$9 going to creators. At an exchange rate of R 15 that equals R135 per 1000 views

Must Carry does not promote uptake of Pay TV

153 In the RIA Report the Authority recognised that "*there is no compelling reason why ... viewers would choose to pay for services that are available free-of-charge*".⁷⁰

154 A person will only subscribe to a subscription broadcasting service if it offers quality programming that is not available free-to-air or on other subscription broadcasting services (i.e. which is exclusive to that subscription broadcasting service). The Must Carry content is available on many platforms.

155 In MultiChoice's research, [REDACTED] of subscribers confirmed that they did not subscribe to DStv in order to watch the Must Carry channels (see Figure 7).⁷¹ After consumers have subscribed to a Pay TV service, they may watch some SABC programmes, but that is not their reason for subscribing.

[REDACTED]

[CONFIDENTIAL]

⁷⁰ Para 5.13 of the RIA Report

⁷¹ MCG CII Group Research and InSites Consulting, March 2020

156 After all, there is no incentive for subscribers to pay for pay TV services that merely replicate what is already available free-to-air.

157 In this regard, the UK House of Lords stated:

"In order to persuade people to pay to watch television, it is necessary to offer them programmes which would not be available for free on ordinary public broadcasts."⁷²

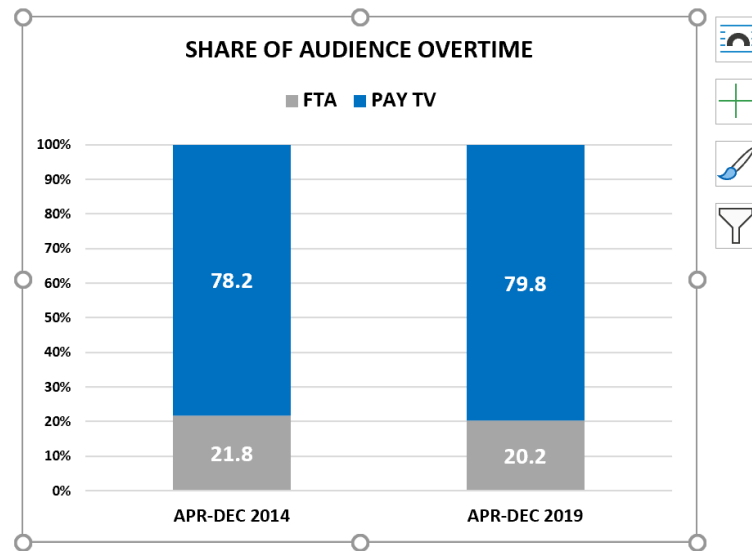
158 The Must Carry channels do not assist a pay TV operator to distinguish itself from other pay TV operators, because the Must Carry channels are available on all satellite subscription broadcasting services. The inclusion of the Must Carry channels on DStv therefore does not promote the take up of DStv above other pay TV services.

159 Neither does MultiChoice benefit by "targeting" free-to-air audiences with the Must Carry channels. While the Must Carry Regulations provide ease of access by pay TV viewers to the public broadcaster, this does not equate to a direct commercial benefit for a pay TV platform.

160 The SABC alleges that Pay TV benefits from Must Carry because the SABC programmes are popular. However, the share of viewing of Pay TV programming is far greater than for free-to-air, as is shown in the figure below.

⁷² *Independent Television Commission, Ex Parte TV Danmark 1 Ltd v R* [2001] UKHL 42

Figure 8: Pay TV v.s. FTA share of viewing



Source: TAMS Data, Mon-Sun, 06:00-24:00, All Individuals, Live + VOSDAL

161 While the percentage of SABC viewers watching over pay TV (rather than terrestrial) has grown, the viewership of the SABC channels has gradually declined in markets such as Premium and Compact. SABC 2 and 3 in particular do not enjoy large or consistent viewership on DStv. But in terms of Must Carry, small viewership does not affect carriage. Pay TV must carry the channels, regardless of whether they are widely viewed or not. The point is to make them easily accessible to viewers. The main contributors to the SABC's viewership on DStv is the prime time viewing for SABC 1 where three shows - *Uzalo*, *Skeem Saam* and *Generations* – perform well relative to MultiChoice's own shows. (See Figure 9). It is apparent from Figure 9 that a number of pay TV programmes also have high share.

[REDACTED]

[CONFIDENTIAL]

162 Loyal viewership of FTA programmes on a pay TV platform is, in any event, not unusual. In South Africa and elsewhere, free to air channels, including the Must Carry channels, have strong, well-established programme brands which command viewer attention in the clutter of a multi-channel environment.

163 The viewership of SABC programming does not give MultiChoice any commercial advantage, because the programming is freely available elsewhere and it is the SABC - not MultiChoice - which derives the advertising revenue from that viewership.

164 Ultimately, the Must Carry obligation gives no direct commercial advantage to MultiChoice or other pay TV operators.

No "short cut" to screen sports

165 It is implausible to suggest, as the SABC does, that the sports offering on the Must Carry channels is critical to MultiChoice and its subscribers. As stated earlier, consumers do not pay subscription fees to view content which is freely

⁷³ DStv-I Aug18 – Jan 20, Mon- Sun 06:00 – 24:00

available elsewhere. Rather, they pay for content which is not freely available elsewhere.

- 166 This is why MultiChoice competes with other free to air and pay TV broadcasters for sports rights. MultiChoice spends in excess of R2 billion annually on local sport. Clearly, there would be no need to do so if MultiChoice took the view that the sports offering of the Must Carry channels would suffice. Furthermore, the Must Carry channels are available on all satellite subscription broadcasting services, therefore MultiChoice would be unable to distinguish itself from other pay TV operators if it relied on the sports content on the Must Carry channels.
- 167 As the SABC is aware, pay TV operators do not go out and market the sports offering of the SABC channels. Members of the public would rightly see this as absurd, as the SABC's sports content is freely available, therefore who would sensibly pay a subscription to see it?

There is no basis for a Must Carry / Must Pay obligation

- 168 Must Carry / Must Pay is a fiction – it doesn't exist anywhere. 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. (The only exception is Estonia, where the commercial free to air broadcasting system has collapsed). 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.
- 169 As Genesis noted in their 2018 Report, the primary difficulty with Must Carry / Must Pay is the enormous complexity involved in any actual determination of the appropriate fee and the risk of unduly imposing high costs on Pay TV operators and their subscribers.
- 170 While it is arguably in the public interest to oblige Pay TV services to carry PSB channels to ensure their universal availability, it is quite another to also require that PSBs be paid for these channels whose carriage is being imposed. This would constitute an undue and impermissible interference in the commercial activities of Pay TV broadcasters. To use an analogy: it might be in the public

interest if government required commercial bus services to allocate a certain number of seats on their buses at no cost to pensioners or SANDF members. But it would not be permissible or withstand constitutional scrutiny if the government also told the commercial bus services not only would they have to carry these passengers for free they must also pay them a fee to transport them.

171 The Must Carry Regulations specify that (i) the SABC must offer the Must Carry channels to pay TV "at no cost"⁷⁴ and (ii) the transmission costs arising from Must Carry are to be shared by the broadcasters.⁷⁵ As we have argued in this submission, this is less about ensuring a level playing field among the broadcasters than it is about ensuring citizen access to public broadcasting content. National policy has determined that the public broadcast service programming should be universally available, including on pay TV. Having imposed this obligation on it would be senseless to penalise Pay TV subscribers by making them pay extra (which would be the end-result of the SABC charging Pay TV for its channels).

172 The universal access principle requires the SABC programming to be widely available "everywhere" for "everyone". It is also understood that the SABC finances the cost of extending its coverage. If the SABC asked Sentech to put up an additional transmitter in an area previously without terrestrial coverage, it could never levy a special charge on those citizens served by the new transmitter. Neither, the thinking goes, should SABC viewers who are pay TV subscribers have to pay over and above their standard subscription fee, just because they elect to watch SABC via the pay TV system.

173 As the Genesis Report notes⁷⁶ "*a must carry / must pay regulation also completely changes the nature of any commercial negotiation and upsets the ordinary bargaining dynamic*". Ordinarily, either party can walk away from a commercial negotiation, but in a Must carry / Must pay model, the pay TV licensee could ultimately be forced to accept an unreasonably high fee proposed

⁷⁴ Reg. 6(1) of the Must Carry Regulations

⁷⁵ Regs. 4(4) and 7(1) of the Must Carry Regulations

⁷⁶ Para 53.2 of the Genesis Report

by the SABC. This can never work. In commercial channel supply agreements where the platform pays for the channel, pay TV operators put performance obligations on the channels and the channels are dropped if they fail to perform. Again, this could never work in a Must Carry environment. At the very least it would be inappropriate and unworkable for pay TV operators to determine the programming, editorial direction and performance criteria of the Must Carry channels.

- 174 The motivation for Must Carry / Must Pay belies an anxiety on the part of the SABC as to what fee might arise from a purely commercial negotiation. As Genesis points out, if the SABC was truly confident that commercial negotiations would lead to carriage at a substantial fee, then it would be satisfied with a "no regulation" approach. Instead, it has to date argued for guaranteed carriage and a must pay obligation in order to artificially strengthen its bargaining position so that it can extract a high but unwarranted fee from the Pay TV licensees.

Summary on SABC arguments

- 175 There is no basis for the SABC's argument that the Must Carry Regulations undermine the SABC's investment in content. The Must Carry Regulations allow the SABC to extend universal access to its content which is a core element of its mandate and the reason why it invests in content in the first place. The Must Carry Regulations also allow the SABC to monetise its investment in content through selling advertising to viewers watching over satellite pay TV.
- 176 The Must Carry obligation gives no direct commercial advantage to MultiChoice or other pay TV operators as the channels are freely available elsewhere.
- 177 While the Must carry channels may be watched, they are not the reason for subscribing to pay TV. Subscribers in fact spend far more time viewing Pay TV content than free-to-air content. In any event, Must Carry requires that even if the channels are unpopular, they must still be carried.
- 178 The SABC argument that the Must Carry Regulations provide pay TV a "short-cut" to sports rights has no merit.
- 179 There is no basis for the SABC's Must carry / Must Pay proposal. Any suggestion that subscription broadcasters must pay the SABC for the Must Carry channels is completely at odds with s60(3) of the ECA. In making this argument, the SABC is essentially arguing for guaranteed carriage and guaranteed payment so that it can strengthen its bargaining position and extract a high and unwarranted fee from pay TV licensees.

LEGAL PARAMETERS OF MUST CARRY REGULATIONS

180 The starting point for considering the legal parameters of the Must carry Regulations is the policy objective: universal access.

181 The legislature chose to achieve the objective of making public service broadcasting programming universally available to all citizens, by requiring subscription broadcasting licensees to carry on their subscription television broadcasting platforms some of the television programmes broadcast by the SABC.

182 The Authority was tasked with prescribing regulations to give effect to this requirement. s60(3) of the ECA provides:

"Restriction on subscription broadcasting services

The Authority must prescribe regulations regarding the extent to which subscription broadcast services must carry, subject to commercially negotiable terms, the television programmes provided by a public broadcast service licensee."

183 This provision envisages that –

183.1 subscription broadcasters must, to the extent determined by the Authority, extend the availability of the television programmes provided by the SABC by carrying that programming on its pay TV platform; and

183.2 the subscription broadcaster and the SABC must negotiate and agree on the commercial terms required to give effect to that Must Carry obligation.

184 The role envisaged for ICASA is that it must determine the extent to which subscription broadcasters must carry the SABC's programmes (e.g. how many and which of the SABC's programmes/channels subscription broadcasters must carry and the basis for exemptions).

185 Following ICASA's determination it is envisaged that the parties will negotiate and agree on the practical matters to give effect to the Must Carry obligation.

- 186 The phrase "*subject to commercially negotiable terms*" in s60(3) of the ECA refers to those terms, to be agreed between the parties concerned, on which the subscription broadcaster must carry the SABC's programming – i.e. the terms on which the parties will agree in order to implement the Must Carry obligation.
- 187 Examples of terms in the Must Carry agreement which have been commercially negotiated and agreed between MultiChoice and the SABC include –
- 187.1 format, manner of delivery and signal quality specifications for the transmission of the channel signals from the SABC to MultiChoice's uplink facility;
 - 187.2 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;
 - 187.3 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;
 - 187.4 rights and obligations in respect of the insertion of logos;
 - 187.5 rights and obligations in the event of transmission failure;
 - 187.6 fees arising out of the agreement (e.g. in respect of the broadcast, transmission, distribution and/or encryption 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);
 - 187.7 piracy provisions;
 - 187.8 representations and warranties;
 - 187.9 indemnities and limitations of liability;
 - 187.10 remedies for breach; and
 - 187.11 confidentiality.

- 188 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 negotiated terms" in terms of s60(3) of the ECA.
- 189 Matters beyond those which are necessary to give effect to the Must Carry obligation fall outside the scope of s60(3) entirely. These extraneous terms fall outside the Must Carry framework (i.e. matters which are not related to the delivery of the signal or the carriage of the channels).
- 190 Therefore a Must Carry regulatory regime which purports to give ICASA powers to decide on matters such as programming rights, licensing arrangements, or the cost of programming, is clearly at odds with s60(3) of the ECA. There is also no legal basis for any suggestion that subscription broadcasters must pay the SABC for the content which they are obliged to carry under the Must Carry Regulations.

191 The Authority's powers do not extend to commercial terms, the resolution of Must Carry disputes or other matters beyond the ambit of s60(3) of the ECA.

INTERNATIONAL BENCHMARKING

- 192 We commend ICASA for undertaking a thorough international benchmarking study. In order to assist the Authority, we have supplemented and commented on the findings in **Annexure A**. It is apparent from the international benchmarking that the current Must Carry Regulations are in line with the general approach adopted internationally, specifically:
- 192.1 South Africa follows the EU Must Carry Model. That is the most useful comparative model for present purposes.
- 192.2 Although the legislative context differs, in most cases the point of Must Carry regulations is to drive universal access.
- 192.3 Must Carry regulations are mostly concerned with promoting access to public broadcasting content.

- 192.4 A "must offer" component is frequently included in the regulations.
- 192.5 The obligation to carry is frequently placed on pay TV platforms (sometimes the number of end users on the platform is taken into account).
- 192.6 Must Carry regimes typically do not provide for payment to the public broadcaster and there are no examples of Must Carry / Must Pay.
- 192.7 Where there is provision for payment, this happens in the context of retransmission fees and there is no Must Carry obligation or payment by the public broadcaster to the pay TV operator for the carriage.

193 International benchmarking confirms that the Must Carry Regulations are in line with best practice internationally.

OTHER ISSUES RAISED IN THE DISCUSSION DOCUMENT

Must carry obligations in the digital and DTT context

194 The Discussion Document asks:

"8.What changes, if any, should there be in the digital environment with regard to Must Carry regulations?

12. What are the costs associated with meeting the Must Carry obligations on an analogue platform versus over a digital platform?

13. Do you think Must Carry obligations should apply during the dual illumination period? What will be the impact of Must Carry during dual illumination?"

195 These questions are not entirely clear. In particular, it is unclear to us whether the Authority is posing these questions regarding the digital environment in general or specifically in relation to the digital terrestrial television broadcasting platform.

Must Carry obligations are still relevant in digital environment

196 To the extent that these questions are intended to grapple with whether Must Carry obligations are still relevant in the digital environment in general, MultiChoice notes that the obligation arises out of s60(3) of the ECA, which requires the Authority to prescribe Must Carry Regulations. The policy question of whether Must Carry obligations should continue to apply in the digital environment is one which should be properly considered in the context of the review of broadcasting policy. As it stands, the statutory obligation is in place and all affected parties must make their contribution to comply with it.

197 We also note that South Africa is currently in the dual illumination period, and the Must Carry Regulations are effective at this time.

198 MultiChoice agrees with the Authority's finding in the RIA Report that the Must Carry Regulations *"will continue to be necessary and relevant in a digital environment until all audiences are guaranteed universal access to the PBS channels"*.⁷⁷

Must Carry assessment in respect of the terrestrial television broadcasting platform

199 To the extent that these questions are intended to grapple with whether Must Carry obligations should be imposed on subscription DTT broadcasters, MultiChoice points out that as long as the SABC channels are broadcast free to air unencrypted, they will be picked up on subscription DTT set top boxes ("**STB**") such as the M-Net DTT STB.

200 As a result, when the SABC broadcasts its channels on the DTT platform, those channels are automatically receivable by any person with a DTT STB in the coverage area. There is, accordingly, no need for a DTT subscription broadcaster such as M-Net to include the SABC Must Carry channels in its bouquet, because M-Net subscribers are already able to pick up the SABC channels.

⁷⁷ Para 7.7 of the RIA Report

201 Unlike the satellite broadcasting platform, which allows broadcasters to broadcast around 200 channels, the DTT platform is constrained by the scarcity of spectrum. Currently only half a multiplex is allocated to M-Net, thus limiting it to broadcasting approximately 12 DTT channels.

202 DTT subscription broadcasters such as M-Net currently fall below the threshold in the Must Carry Regulations at which Must Carry obligations are triggered. This is because –

202.1 a subscription broadcasting service licensee whose service offering has 29 channels or less is exempt from the Must Carry obligation;⁷⁸ and

202.2 the DTT spectrum allocated to M-Net is not sufficient to transmit 29 or more channels.

203 It would be inefficient and stifle plurality and diversity to require DTT subscription broadcasters to use their limited multiplex capacity to re-broadcast as part of their bouquets those SABC free to air DTT channels which are already receivable on subscribers' decoders. To do so would give rise to unnecessary duplication and would waste scarce frequency spectrum, which should rather be used to add other channels to the bouquet.

204 We support the exemption for subscription broadcasters who fall below this threshold.

Programmes v channels

205 The reference in s60(3) of the ECA to the carriage of the SABC's "*television programmes*" is awkward in the digital multi-channel environment.

206 The Authority considered this issue in 2007 and 2008 before it prescribed the current Must Carry Regulations. The Position Paper stated:

⁷⁸ Reg. 5(1) of the Must Carry Regulations. The obligation to carry the SABC's television programmes applies to a subscription broadcasting service licensee whose service offering consists of more than 29 channels (Reg. 4(5) of the Must Carry Regulations)

"The Authority has decided that the reference to 'television programmes' and not 'channels' can be interpreted in line with what appears to be consensus amongst the submitters for the various reasons advanced. It would also appear from the contextual interpretation that 'television programmes' was used as an equivalent for 'channels' although the terms are not interchangeable.

Whilst the Authority understands the views expressed around the issue of using the term channels rather than television programmes, it has decided that the Must Carry obligations will relate to the carriage of television programmes. The obligation will extend to the entire television programmes comprising a channel within the service offering of the Public Broadcaster."⁷⁹

207 "Must Carry Channel" is defined in Reg. 1 of the Current Must Carry 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"*.

208 The Authority's decision to extend the Must Carry obligation to the entire television programmes comprising a channel within the SABC's service offering is pragmatic and has worked well. MultiChoice submits that this approach should remain unchanged.

209 The Discussion Document asks:

"14. Should the requirement be that all programmes provided by the PBS licensee channels be carried, or should there be room to elect programmes for carriage? If you advocate for the right to elect programmes to carry, what criteria should be used for such a choice?"⁸⁰

210 Permitting subscription broadcasters to elect which programmes to carry could have the effect of defeating the objective to ensure the availability of public interest programming. Subscription broadcasters should not be permitted to "cherry pick" certain programmes. The Must Carry obligation should continue to apply to entire channels in line with the current Must Carry Regulations, which are working well.

⁷⁹ Pg 30 of the Position Paper

⁸⁰ Question 14 of the Discussion Document

Monitoring compliance with Must Carry obligations

211 The Discussion Document asks whether the Authority should monitor compliance with the requirement of section 60(3) on an annual basis? If yes, how should such monitoring be done in an effective manner?⁸¹

212 Reg. 9 of the current Must Carry Regulations requires licensees to submit a compliance report annually no later than the end of June to demonstrate compliance with the Regulations.

213 We submit that this is adequate and should remain as is.

Dispute resolution

214 The Discussion Document asks:

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

215 MultiChoice submits that the Authority should not play a role in the negotiation of contracts or the resolution of Must Carry disputes.

216 s60(3) provides that Must Carry obligations are subject to commercially negotiable terms.

217 Where the legislature intended for the Authority or CCC to resolve disputes under the ECA, it made express provision for it to do so. The Authority is given express

⁸¹ Question 3 of the Discussion Document

dispute resolution powers under s21⁸², 25⁸³, 33⁸⁴, 37⁸⁵, 40⁸⁶, 43⁸⁷, 46⁸⁸ and 60(2)⁸⁹ of the ECA.

218 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.

219 s60(3) of the ECA, in contrast, does not provide the Authority or the CCC with the authority to resolve any disputes which arise from the inability or unwillingness of the public and subscription broadcast service licensees to negotiate or agree 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.

220 The Authority is not empowered to resolve any dispute between the public broadcaster and a subscription broadcaster arising out of s60(3) of the ECA (e.g. a dispute which relates to their failure to reach agreement on the terms of carriage of the public broadcaster's programming).

221 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

⁸² 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

⁸³ Removal of electronic communications network facilities

⁸⁴ Frequency co-ordination

⁸⁵ Obligation to interconnect

⁸⁶ Notification of interconnection disputes

⁸⁷ Obligation to lease electronic communications facilities

⁸⁸ Notification of electronic communications facilities leasing agreement disputes

⁸⁹ 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

non-compliance for investigation or referral to the CCC for consideration.⁹⁰ However, there is no provision for the Authority to regulate Must Carry disputes.

CONCLUSION

222 MultiChoice is grateful for the opportunity to have made this submission, and commends the Authority, once again, for the process it has undertaken in reviewing the Must Carry Regulations.

223 The Authority and stakeholders accept that the Must Carry Regulations are achieving their objective by extending universal access to public broadcasting content.

224 Quantifiable universal access benefits arise from the Must Carry Regulations.

225 In addition – although it is not the objective of the Must Carry Regulations – the SABC derives significant commercial benefits from the Regulations.

226 In circumstances where the Must Carry Regulations are effective and are achieving their intended objectives without unduly burdening any of the affected licensees, we urge the Authority not to be distracted by submissions which seek to achieve narrow interests, such as creating commercial revenue streams. Nor should the Authority place undue weight on arguments which are intended to misdirect the debate, such as irrelevant "costs".

227 Distilled to its essence, we submit that the key issue for the Authority to determine in this review is whether the collective costs incurred by the public and subscription broadcasters are reasonable when considering the advancement of universal access which is achieved as a result of the Must Carry Regulations?

228 We believe that the answer is clearly in the affirmative: The collective cost to broadcasters of implementing the current Must Carry Regulations is reasonable,

⁹⁰ s17C(1)(a) and (b) of the ICASA Act

proportionate and justified, given the extensive universal access benefit which accrues.

229 MultiChoice submits that the architecture of the Must Carry framework is sound.

230 We look forward to participating further in this process.

RESPONSE TO SPECIFIC QUESTIONS ASKED IN THE DISCUSSION DOCUMENT

1. What in your view is the purpose of Must Carry in South Africa? Please substantiate.

231 As the Authority stated in its 2007 Discussion Paper, it is "*the over-riding principle of universality which gives rise to the must carry regulations.*"⁹¹ "*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.*"⁹²

2. What are the advantages and disadvantages of the current Must Carry Regulations to both PBS and SBS licensees?

Advantages

232 The Must Carry Regulations have advantages for the public, the SABC and pay TV subscribers, and indirect benefits for subscription broadcasting services, because audiences are able to easily and conveniently access the Must Carry channels on the platform of their choice, without having to incur the cost of additional receiving equipment.

⁹¹ Pg 6 of the 2007 Discussion Paper

⁹² Pg 10 of the 2007 Discussion Paper

- 233 The SABC benefits because the Must Carry obligations assist it to achieve universal access - its primary mandate - and at the same time, reap significant commercial benefits. Please refer to paragraphs 89 to 110 above regarding the universal access and commercial benefits which flow from the Must Carry Regulations.
- 234 If there is any benefit to subscription broadcasting services it is indirect,⁹³ because the inclusion of the Must Carry channels provides a value add to subscribers, who are able to conveniently access the Must Carry channels via the pay TV service at no additional cost. However, the public has no incentive to pay to receive that which they are able to receive for free. Subscribers do not subscribe to pay TV services in order to view free to air TV. Please refer to paragraphs 153 to 167 above, where we explain that the purported advantages to pay TV are not correct.

Disadvantages

- 235 The current Must Carry Regulations have no disadvantages for the public or the SABC. The public and the SABC only benefit from the Regulations. In paragraphs 147 to 177 above we explain why there is no basis for the SABC's arguments that it is disadvantaged by the Must Carry Regulations.
- 236 There are some disadvantages for subscription broadcasting services, because they are compelled to carry channels which they might otherwise not have chosen to carry, which use satellite transponder capacity. Subscription broadcasters also bear the cost of carrying the Must Carry channels on their distribution platforms.
- 237 There are both advantages and disadvantages of the Must Carry Regulations. Overwhelmingly, however, we are of the view that they achieve their public interest objective, benefit the viewing public, and strike an appropriate balance in the public interest, without unduly burdening either public or subscription broadcasters.

⁹³ As the Genesis Report stated, this indirect benefit is unlikely to be significant

3. Should the Authority monitor compliance with the requirement of section 60(3) on an annual basis? If yes, how should such monitoring be done in an effective manner?

238 Reg. 9 of the current Must Carry Regulations requires licensees to submit a compliance report annually no later than the end of June to demonstrate compliance with the Regulations.

239 We submit that this is adequate and should remain as is.

4. What role, if any, should the Authority play in the negotiation of contracts for must carry?

240 The Authority should not play a role in the negotiation of Must Carry contracts.

241 Once ICASA has determined the extent to which subscription broadcasters must carry the SABC's programmes, the parties must negotiate and agree on the practical matters to give effect to the Must Carry obligation.

242 There is no legal or commercial basis for ICASA to play a role in the negotiation of Must Carry contracts.

243 Please refer to paragraphs 180 to 191 above in this regard.

5. Should the Authority provide a framework for commercial agreements? Please substantiate your answer. What should be the content of such a framework?

244 The Authority should not provide a framework for commercial agreements.

245 As indicated above, once ICASA has determined the extent to which subscription broadcasters must carry the SABC's programmes, it is for the parties to negotiate and agree on the practical matters to give effect to the Must Carry obligation.

246 Please refer to paragraphs 180 to 191 above in this regard.

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

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

247 The Authority should not play a role in the resolution of Must Carry disputes.

248 As explained in paragraphs 214 to 221 above, s60(3) of the ECA does not empower the Authority to resolve Must Carry disputes.

249 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.⁹⁴

7. What are the compliance burdens associated with Must Carry regulations if any? How can these burdens best be addressed?

250 The compliance burden is for the -

250.1 SABC to deliver the Must Carry channel signals to the pay TV broadcasters; and

250.2 pay TV broadcasters to deliver the Must Carry channels to their subscribers.

251 We do not consider this burden to be unreasonable, disproportionate or unduly onerous in the light of the substantial public benefits which arise.

8. What changes, if any, should there be in the digital environment with regard to Must Carry regulations?

252 To the extent that these questions are intended to grapple with whether Must Carry obligations are still relevant in the digital environment in general, MultiChoice –

⁹⁴ s17C(1)(a) and (b) of the ICASA Act

- 252.1 notes that the policy question should be considered in the context of the review of broadcasting policy, as the obligation arises out of s60(3) of the ECA;
- 252.2 notes that South Africa is currently in the dual illumination period, and the Must Carry Regulations are effective at this time; and
- 252.3 agrees with the Authority's finding in the RIA Report that the Must Carry Regulations "*will continue to be necessary and relevant in a digital environment until all audiences are guaranteed universal access to the PBS channels*".⁹⁵
- 253 To the extent that these questions are intended to grapple with whether Must Carry obligations should be imposed on subscription DTT broadcasters, MultiChoice submits that the Must Carry obligations should not apply to pay TV licensees on the DTT platform because –
- 253.1 the SABC DTT free to air channels are automatically receivable by any person with a DTT STB in the coverage area; and
- 253.2 DTT pay TV licensees' scarce frequency spectrum should be used for other channels, rather than to duplicate the SABC channels.
- 254 This is currently addressed in the Must Carry Regulations, because DTT subscription broadcasters such as M-Net fall below the threshold at which Must Carry obligations are triggered (29 channels).
- 255 Please refer to paragraphs 194 to 204 above.

9. Should the Authority continue exempting some subscription broadcasting service licensees based on the number of channels they provide? Should there be other forms of exemptions, and why?

- 256 Pay TV licensees should continue to be exempt from the Must Carry Regulations obligations if they broadcast fewer than 29 channels.

⁹⁵ Para 7.7 of the RIA Report

10. What are the actual costs incurred associated with meeting the Must Carry obligations by the PBS and SBS licensees? To support assertions, kindly provide a detailed breakdown of costs for the previous 3 financial years. In your response kindly ensure the following are answered:

(a) What are the cost drivers and associated costs for Must Carry?

(b) What are the costs (breakdown required) to the PBS licensee for offering must carry channels?

(c) What are the costs (breakdown required) to the SBS licensees of carrying the channels?

257 The over-arching principle when identifying costs relevant to Must Carry is that only those costs that arise from the actual implementation of the Regulations should be included in an assessment.

258 MultiChoice submits that the costs that arise from the Must-Carry Regulations are twofold:

258.1 the costs related to the delivery of the signal to the Pay TV broadcaster;
and

258.2 the transmission costs incurred by the Pay TV broadcaster.

259 MultiChoice incurred R108,854,395 in compliance with Must Carry since 2008. Please refer to the breakdown in Annexure B.

260 In terms of the Must Carry agreement between the SABC and MultiChoice, the SABC has not incurred any of the costs that arise from the Must Carry Regulations.

261 There is no validity to including opportunity costs or other costs which do not arise from the implementation of the Must Carry Regulations (such as the SABC's programming costs or other operational and capex costs).

262 Although MultiChoice does not have insight into the costs which may be incurred by other pay TV broadcasters, we believe that the public benefit which arises from Must Carry justifies the costs to broadcasters.

263 Please refer to paragraphs 130 to 146 above, as well as Annexure B, where we dealt with costs in detail.

11. How should the costs for Must Carry be apportioned between the PBS and SBS licensees, if at all?

264 The current Must Carry framework, in terms of which the public and subscription broadcasting licensees each bear their own transmission costs, is fair and accords with international best practice.

265 We agree with the Authority's finding in the Position Paper that all the parties impacted by Must Carry should "*view the designation of the obligations as a collective shared obligation aimed at fulfilling the objects enunciated in the ECA, as related to the broadcasting environment.*"⁹⁶

12. What are the costs associated with meeting the Must Carry obligations on an analogue platform versus over a digital platform?

266 The Must Carry obligations do not currently apply to DTT pay TV licensees, as they fall below the 29 channel threshold.

267 It would not make sense to impose Must Carry obligations on DTT pay TV licensees, as the SABC free to air channels are already received by the pay TV DTT STBs.

268 Please refer to our response in paragraphs 194– 204 and 252 to 254 above.

⁹⁶ Pg 27 of the Position paper

13. Do you think Must Carry obligations should apply during the dual illumination period? What will be the impact of Must Carry during dual illumination?

269 South Africa is currently in the dual illumination period and the Must Carry Regulations are effective at this time.

270 Please refer to our response in paragraphs 252 to 254 above.

14. Should the requirement be that all programmes provided by the PBS licensee channels be carried, or should there be room to elect programmes for carriage? If you advocate for the right to elect programmes to carry, what criteria should be used for such a choice?

271 Permitting subscription broadcasters to elect which programmes to carry could have the effect of defeating the objective to ensure the availability of public interest programming.

272 Subscription broadcasters should not be permitted to "cherry pick" certain programmes. The Must Carry obligation should continue to apply to entire channels in line with the current Must Carry Regulations, which are working well.

15. What are the benefits of offering channels for Must Carry?

273 The absence of a must offer obligation could frustrate the objectives of the Must Carry Regulations.

274 We support the Authority's reasoning in the Position Paper that:

"The Authority supports the contention in most submissions that the must carry obligations need to be mirrored by a must-offer requirement, and should not be interpreted as an obligation on subscription broadcasting services to pay public broadcasting service for carriage of such channels. Evidence from International benchmarking and best practice supports this contention. The Authority concludes that it will subject the designated Public Broadcasting Service Television programmes to 'must-offer' obligations and expects the SABC to offer the designated television programmes on request.

The Subscription Broadcasting Service Licensees argued that the absence of must offer might constraint the must carry obligation and hence frustrate the

intentions and objectives of this regulation. Therefore it is important that the Authority impose the must offer obligation."⁹⁷

275 The inclusion of a must offer obligation allows significant benefits to flow to the SABC, most notably the achievement of universal access and also various commercial benefits. Please refer to paragraphs 89 to 110 above.

16. What are the benefits of carrying the public broadcasting channels?

276 As the Authority's RIA Report found, the "*Regulations have been beneficial to all stakeholders and to the public*".⁹⁸ The RIA Report found that the Must Carry Regulations achieve the public interest principle of universal access. A number of audiences have benefitted from the Regulations,⁹⁹ amongst other things because the carriage of the public broadcasting channels:

276.1 Extends coverage reach of the PBS licensee to areas where there may be no coverage¹⁰⁰ and facilitates access to public broadcasting to the population that falls outside the SABC's analogue network coverage area.¹⁰¹ Without the Regulations, audiences outside the SABC analogue network coverage would have been denied access to public broadcasting content.¹⁰²

276.2 Affords consumers an opportunity to access public service programming without incurring the cost of purchasing an antenna or receiver in addition to the subscription satellite dish and STB.¹⁰³ Without the Regulations, the cost of an extra antenna would be an inhibiting factor for millions of audiences.¹⁰⁴

⁹⁷ Pg 28 of the Position Paper

⁹⁸ Para 6.1 of the RIA Report

⁹⁹ Para 4.8 of the RIA Report

¹⁰⁰ Para 4.4 of the RIA Report

¹⁰¹ Para 4.4 of the RIA Report

¹⁰² Para 4.7 of the RIA Report

¹⁰³ Para 4.5 of the RIA Report

¹⁰⁴ Para 4.7 of the RIA Report

277 Between 17 and 31 percent of the SABC's viewers access the Must Carry channels over DStv rather than the terrestrial platform.

278 Please refer to paragraphs 89 to 129 above regarding the benefits arising from the Must Carry Regulations.

17. Are there any other issues that the Authority will have to consider regarding the amendment of regulations on Must Carry?

279 No. The architecture of the Must Carry framework is sound.

GLOSSARY

2007 Discussion Paper	Discussion Document on Must Carry Obligations, ICASA, September 2007, published under notice number 1150, Government Gazette number 30305, 14 September 2007
Broadcasting Act	The Broadcasting Act No. 4 of 1999
CCC	The Complaints and Compliance Committee established by the Authority in terms of section 17A of the ICASA Act
Discussion Document	Discussion Document on the Review of the ICASA Must Carry Regulations, 2008 published under notice number 650, Government Gazette number 42902, 13 December 2019
DCMS	The UK Department for Digital, Culture, Media and Sport
ECA	The Electronic Communications Act No. 36 of 2005
EU	The European Union
FCC	The USA Federal Communications Commission
ICASA or the Authority	The Independent Communications Authority of South Africa established in terms of s3 of the ICASA Act
ICASA Act	The Independent Communications Authority of South Africa Act No. 13 of 2000
Must Carry Regulations	ICASA Musts Carry Regulations published under notice number 1271, Government Gazette number 31500, 10 October 2008
Position Paper	ICASA Must Carry Obligations Position Paper, 22 May 2008, published under notice number 651, Government Gazette number 31081, 22 May 2008
RIA Report	Regulatory Impact Assessment Report on the Must Carry Regulations, ICASA, 19 March 2019
SABC	The South African Broadcasting Corporation
UK	The United Kingdom

ANNEXURE A: INTERNATIONAL BENCHMARKING

Overview

- 1 The Discussion Document benchmarked against the European Union, the United Kingdom, Australia, the United States of America, India and Ireland. The reason for doing so, according to the Discussion Document, was because *"like the Authority, the broadcasting industry in the said countries have three (3) tiers, namely public, commercial and community."*¹⁰⁵
- 2 Respectfully, that statement overlooks key differences which distinguish the broadcasting sector in those countries.
- 3 The broadcasting regulatory environment in the USA, India and Australia may have broadcasters who can be described as public, commercial or community, but the broadcasting regulatory environment in which they developed and operate are dramatically different from that in South Africa in terms of history, structure, delivery platforms and licensing models.
- 4 That is not to say that ICASA must only benchmark against countries which share similar histories, structures, legislation or licensing models. However, it is important to recognise key differences when benchmarking, as they directly affect the reason why those jurisdictions draft and implement regulations in a specific way, compared to jurisdictions whose legislative and regulatory models are more similar to the South African model.
- 5 The European Union provides a good benchmark, because of the similarities between the broadcasting environment of EU member states and South Africa.
- 6 It should be kept in mind, however, that EU member states have a wide discretion on how they implement European Directives, resulting in a diverse range of policy options depending upon the historical development of the broadcasting regime of each member state.

¹⁰⁵ Pg 39 of the Discussion Document

- 7 In determining whether to or not to have Must Carry, the South African policy maker was faced with two key international models: The US Model and the European Model. It is clear from the focus of the legislation on "must carry" of the programming of the public broadcaster that South Africa adopted the EU Model.
- 8 We will accordingly reflect first on the position in the USA and the EU.

USA

- 9 Although the South African approach to Must Carry has been informed by the European model, for the sake of completeness we will deal briefly with the US model first.
- 10 We reflected on the USA model in paragraphs 63 to 66 above, and explained why the USA model does not provide a useful benchmark for evaluating the South African Must Carry Regulations. We do not repeat it here.
- 11 The policy decision on which Must Carry Model to follow has already been taken at the level of primary legislation (the ECA). The legislature opted to follow the European model, with a focus on universal access and public interest channels (public service broadcasting).
- 12 The Discussion Document states that "*The television market in the USA consists of public, commercial and community broadcasting transmitted through various platforms*" and notes that "*The PBS is an American public broadcaster established in terms of the Public Broadcasting Act of 1967.*"¹⁰⁶
- 13 The implication is that this is similar to our three tiers of broadcasting in South Africa and therefore comparable. However, in practice the broadcasting environment is fundamentally different and not comparable at all. A key difference between South Africa and the USA is that broadcasting in the USA was established in its formative years by private corporations and not the state. More to the point, the USA does not have a national public broadcaster similar

¹⁰⁶ Pg 37 of the Discussion Document

to the "BBC type" model found in Europe and most of Africa. The growth of public service broadcasting in the USA grew from the grassroots at local schools and universities, which later joined forces in the National Association of Educational Broadcasters based on co-operation and alliances to provide local non-commercial educational TV in the 1950s. The first major federal aid to public service broadcasting came into being under the Educational Television Facilities Act in 1962.¹⁰⁷

- 14 The second major federal aid was the Public Broadcasting Act of 1967. This Act did not establish a national public broadcaster called PBS as suggested in the ICASA Discussion Document. Instead, it authorised federal operating aid to stations providing public service broadcasting content through a new agency called the Corporation for Public Broadcasting (CPB) which was specifically prohibited from owning stations or producing programmes. In 1969, the Public Broadcasting Service (PBS) was incorporated by 4 public service broadcasters, including the Presidents of the Corporation for Public Broadcasting and the National Educational Television (NET) as a new non-profit organisation to interconnect national, regional, state and local non-commercial television stations and take on the functions of NET.¹⁰⁸ It is a private, non-profit organisation whose members are most, but not all, of the non-commercial, educational licensees in the USA. The PBS provides member stations with programming in cultural, educational and scientific areas, in children's content and in news and public affairs. It does not, however, produce this programming. The programming is produced and shared by the member's stations, independent producers and other international content producers.
- 15 So instead of a single national Public Broadcaster that is established by the state through legislation to deliver on a public mandate, the USA has a number of non-profit local, regional and national stations established by a range of civil

¹⁰⁷ Television in the United States, A potpourri of genres, Encyclopaedia Britannica, <https://www.britannica.com/art/television-in-the-United-States/A-potpourri-of-genres> [accessed 13 March 2020]

¹⁰⁸ Television in the United States, A potpourri of genres, Encyclopaedia Britannica, <https://www.britannica.com/art/television-in-the-United-States/A-potpourri-of-genres> [accessed 13 March 2020]

society, educational institutions and private interest groups to deliver public interest programming over the air to the public and who have in the most part agreed to interconnect and share programming.¹⁰⁹

- 16 Similarly, the USA does not have national commercial broadcasting licensees structured in the same way that South Africa has approached the licensing of commercial broadcasters. Instead, similar to the bottom up development of non-commercial educational broadcasting in USA, the commercial broadcasters have emerged first as local stations in terms of the licensing model in the USA, which can be characterised as decentralised and market orientated.
- 17 The Discussion Document noted the four main traditional networks in the USA, but failed to note that, unlike South Africa, each local media market has its own licensed television stations which may be affiliated with, owned or operated by a television network. Stations sign affiliation agreements with one of the major television networks for the local rights to carry their programming. These agreements tend to be exclusive, so if a station is affiliated with one network it will not carry the programming of the other networks. To ensure that localism is not lost, the regulator in the USA has restricted the amount of network programming that local stations can run and local stations supplement network programming with their own locally produced, independently produced or syndicated programming. Community television in the sense of geographic or community of interest owned or operated by a community as is the case in South Africa, tends in the USA, as noted by Discussion Document, to primarily be provided on cable platforms as a public access type channel. This is in sharp contrast to the South African model of licensing terrestrial frequency to a geographic community or a community of interest on a highly regulated basis.
- 18 It is against this broadcasting environment that the Federal Communications Commission ("**FCC**"), which was concerned with the preservation of localism in the licensing of local over the air broadcasting stations, approached the creation of the must carry policy tool in the USA.

¹⁰⁹ https://www.swissinfo.ch/eng/npr--pbs-and-cpb_the-story-of-us-public-media/43877508

- 19 The first must carry rules were put in place in the USA in 1965 and 1966 when cable systems had begun to multiply. These rules compelled cable networks to carry all over-the-air broadcast channels in their area of operations that would have been received if the subscriber households had antennas.¹¹⁰
- 20 The Discussion Document¹¹¹ correctly pointed out that these rules were challenged as being unconstitutional and a violation of a cable operator's first amendment rights to carry signals which they selected themselves based on their audience needs. However, the Discussion Document did not consider why they were found to be unconstitutional (other than breaching the first amendment). It is submitted that this reason is particularly relevant considering that the SABC has publicly stated that one of the reasons for Must Carry must be the economic viability of the SABC.
- 21 The rationale the FCC provided to the court for creation of these first must carry rules was that without regulation cable subscribers would disconnect antennas and stop watching local over-the-air television and this would affect the economic viability of local broadcasters. In other words, the first must carry rules were conceptualised by the US regulator as a protectionist measure for local television so that they retained access to audiences who were no longer receiving television over-the-air and thereby access to advertising revenue which is driven by audience reach.¹¹²
- 22 The court determined that the must carry rules were unconstitutional in their current form as other less burdensome measures were available and no critical government objective was given as a rationale.¹¹³
- 23 The growth of cable and the erosion of traditional local over-the-air broadcasting audiences remained a strong concern of the FCC. When cable began to become

¹¹⁰ *The Saga of Cable TV's "Must Carry" Rules: Will a New Phoenix Rise from the Constitutional Ashes?*, Conrad, M.A. 1990 Pace Law School Journal, Vol. 10, Issue 1, Article 2, pg 11. Available at <https://digitalcommons.pace.edu/plr/vol10/iss1/2> ("**the US Cable TV article**")

¹¹¹ Pg 38 of the Discussion Document

¹¹² Pg 26 of the US Cable TV article

¹¹³ Pgs 28 – 31 of the US Cable TV article

the dominant viewing platform, it drew the attention of Congress as well. As mentioned in the Discussion Document,¹¹⁴ in 1992 Congress enacted the Cable Television Consumer Protection and Competition Act to promote the availability of diverse views and information and to ensure consumer interests were protected in the reception of cable service. The 1992 Act established new standards for television broadcast station signal carriage on cable systems.

- 24 However, the Discussion Document¹¹⁵ failed to articulate the opt in or opt out nature of the must carry model in the USA. Under these rules, each local commercial television broadcast station was given the option of selecting mandatory carriage (must carry) or retransmission consent for each cable system serving the same market as the commercial television station. This selection takes place every three years. If a local commercial station elects "must carry" it is entitled to request cable carriage in its local market. Election of the must carry right instead of retransmission consent is a privilege given to local over-the-air television broadcasters. There is no corresponding reciprocal right provided to cable operators to demand the carriage of any local over-the-air television station.¹¹⁶

European Union

- 25 In paragraphs 55 to 61 above we discussed Article 31 of the EU Universal Service Directive and discussed key aspects of the European Must Carry model. In this section, we will comment on ICASA's International Benchmarking of EU member states.
- 26 As mentioned previously, member states have a certain leeway in how they choose to implement Article 31 of the Universal Service Directive, resulting in a diverse approach to Must Carry regulation in the EU based on national policy choices, local circumstances and the broadcasting environment in the country.

¹¹⁴ Pg 38 of the Discussion Document

¹¹⁵ Pg 38 of the Discussion Document

¹¹⁶ See USA Federal Communications Commission's Cable Television Website, at <https://www.fcc.gov/media/engineering/cable-television> [Accessed 13 March 2020], and pg 3 of the EU Must Carry Report

- 27 There are some observable general trends, which is supported by the EU international benchmarking reported on in the Discussion Document.
- 28 There is common cause (based on Article 31) that the purpose is to ensure access to public service broadcasting on significant platforms.
- 29 In some member countries the Must Carry regulations apply to all networks with a significant number of users, in others only to specific networks and yet other cases only to cable networks, although the general trend in recent years seems to be towards a technology neutral approach to platforms.
- 30 In terms of channels identified for Must Carry, the general trend is towards channels offered by the national public broadcasters, but there are members states where it can also include cultural channels or commercial channels regarded as having a public service broadcasting nature. However, when going beyond the public broadcaster channels, international experience suggest that there needs to be legally sound evidence to support that action by national governments. In some countries there is a maximum transmission capacity on a network that can be used for must carry purposes and in others no specific maximum transmission capacity has been set.¹¹⁷
- 31 On the issues of cost in relation to Must Carry, it is acknowledged that if an operator is compelled by a law to carry a range of TV channels at its own cost, this places the operator at an economic disadvantage. Similarly, if a broadcaster is compelled by a law to offer content to operators of platforms so that they can add these channels to their channel bouquet and the broadcaster must then pay the retransmission fees for its channel/s it also would be economically

¹¹⁷ Pgs 21-22 of the EU Must Carry Report

disadvantaged. The 2015 study relied upon by ICASA in its international benchmarking of EU member states that the solution is that:

"In the majority of must-carry regimes the broadcasters should not charge for their content, and the distributors should not charge for the transmission of the channels".¹¹⁸

- 32 There are administration costs and remuneration for copyright which are dealt with in some member state laws and are dealt with in different ways depending upon the approach adopted in those jurisdictions. In some cases, such as Germany, copyright fees are paid by operators, but consequently they in turn receive payments for carriage from the broadcasters. In some countries, such as Latvia, Sweden, Denmark and Finland, legislation specifically excludes or exempts the retransmission of must carry channels from copyright fees. Austria is an interesting example where it is specifically stated in copyright law that where there are national PSB must carry channels on cable platforms, it is the PSB who is communicating to the public and not the cable operators. The Austrian example is supported by the doctrine of "mere conduit", in other words the cable operator is only being used as technical facility which therefore does not lead to an act which is subject to copyright.¹¹⁹ This approach makes sense, as it cannot be that in addition to an imposed obligation to provide access to its network for Must Carry channels, the cable operator is also expected to pay for the copyright of the content being transmitted over its network. That would be disproportionate and not aligned with Article 31 of the Universal Service Directive.
- 33 The general trend appears to be to let the network and public content service provider negotiate on the distribution costs for transmission and copyright costs to the extent that they arise. The channels can be provided duty-free with the public content provider having prepaid the copyright related costs of being re-transmitted on a different platform when it originally negotiated contracts with the underlying rights holders.¹²⁰

¹¹⁸ *Access to TV Platforms: must-carry rules, and access to free-DTT* Kevin, D and Schneeberger (Eds.) 2015 Council of Europe: European Audiovisual Observatory for the European Commission. Pg 30 ("**the COE Report**")

¹¹⁹ Pg 17 of the EU Must Carry Report

¹²⁰ Pg 8 of the EU Must Carry Report

- 34 IPTV and cable operators in France launched a constitutional challenge to the obligation to carry local public channels free of charge. In 2016 the Constitutional Court ruled that the obligation was in the public interest and compliant with the Constitution. However, the Constitutional Court did clarify that in terms of costs *"the obligation was, moreover, limited to the transport and broadcasting of the services' programmes, without any requirement to carry out connection or civil engineering work. The legislator also explicitly intended to exclude the responsibility to bear the cost of digitising programmes from the scope of the obligation."*
- 35 It is thus these additional costs of delivering the channel to the premises of the operator which must be negotiated on and do not fall under the requirement that the local public channels be carried free of charge.¹²¹
- 36 Of the 29 member states analysed in the table in the Discussion Document,¹²² there was only one country where the national legislation gave free to air broadcasters the right to request a reasonable charge for re-transmitting their television programmes. That member state was Estonia, which we will discuss in more detail below.

Estonia

- 37 The must carry rules in Estonia do not apply to satellite. They are imposed only on cable, IPTV and DTT networks and require the carriage of the public service television channels and free DTT channels.
- 38 In the mid-2000s, Estonian free to air commercial broadcasters faced a decrease in audiences and consequently losses in revenues due to increasing competition from satellite, cable and IPTV. The switch from terrestrial analogue to digital transmission in 2010 increased that competition as the number of channels grew on the DTT platform. This prompted the Estonian Parliament to support commercial free to air broadcasters by amending the Estonian Electronic

¹²¹ Pg 30 of the COE Report

¹²² Pgs 9 – 31 of the Discussion Document

Communications Act in 2012 to allow free to air broadcasters to request cable operators (not IPTV or DTT) to pay a reasonable fee for retransmitting their services and thereby create an opportunity for additional revenue.¹²³ As pointed out in the Discussion Document,¹²⁴ there is no provision on how the calculation of cost is done. The explanatory note to s90(11) of the Estonian Electronic Communications Act indicates that the reasonable charge will be agreed between the parties i.e. mutual negotiations and a contract. In practice, it is unknown if the public service broadcasting channels receive a fee as it has not been a matter of public discussion.

- 39 However, it is known that cable operators refused to pay the charges demanded by the private commercial broadcasters for free to air channels. The end result of this is that as of 1 August 2017 the free to air commercial channels TV3, Kanal 2, Kanal 11 and TV 6 no longer fall under the must carry regime as they switched from being free to air channels to being Pay TV channels only. It is estimated that 90 per cent of the viewing population will be unaffected by this change as they are already subscribers to Pay TV.¹²⁵

United Kingdom

- 40 The Discussion Document provided a great deal of detail on the legislative and regulatory framework in the UK¹²⁶ and we will not repeat that information.
- 41 It is worth noting that the Must Carry rules apply only to the core Public Service Broadcasting channels (i.e. the BBC's channels, ITV1, Channel 4/S4C and Channel 5). The rules do not apply to the HD variants of these channels or portfolio channels operated by the Public Service Broadcasters (e.g. ITV2, ITV3,

¹²³ *The Winding Road on the Media Landscape: The Establishment of Estonian (Television) Broadcasting between 1992 and 2016*, Jõesaar, A, Journal of European Television History and Culture, 2017
https://www.researchgate.net/publication/320125800_The_Winding_Road_On_The_Media_Landscape_The_Establishment_Of_Estonian_Television_Broadcasting_Between_1992_And_2016

¹²⁴ Pg 24 of the Discussion Document

¹²⁵ *Kanal 2, TV3 to leave free to air television*, 21 June 2017 <https://news.err.ee/603395/kanal-2-tv3-to-leave-free-to-air-television>

¹²⁶ Pgs 32 – 36 of the Discussion Document

More4, 5USA, and so forth). There is no provision for compensation, such as carriage fees, for the network provider under the UK legislation. The "must-offer" obligations require those broadcasters who are subject to the Must Carry rules to make their core channels (available in digital form) available to networks (subject to the need to agree terms) so as to ensure that those services are available for reception by as many members of the public as possible. These must offer requirements are included in the licences of all PSBs. No provision is made for compensation for PSBs.¹²⁷

42 The British government sees Must Carry regulation as supporting the principle of *"universal availability which governs access to licensed PSB services on all major platforms..."*. In the view of the government the underpinning regulatory framework must deliver on the objective of zero net fees, i.e. no net payments between all platform operators and the PSBs for the carriage of the licensed PSB channels.¹²⁸

43 In 2017, s34 of the Digital Economy Act, 2017 repealed s73 of the Copyright, Designs and Patents Act 1988 which provided that copyright was not infringed when a broadcast was retransmitted by cable (within the broadcast area). Prior to the repeal government responded in its 2015 consultation on the Balance of Payments between TV Platforms and Public Service Broadcasters to stakeholder concerns that a repeal of s73 would result in commercial PSBs seeking retransmission fees from cable providers. Government's view was that –

"the 'must offer' licence conditions (made under section 272 of the Communications Act 2003) prohibit the imposition of any charge by the PSBs that is attributable (directly or indirectly) to the conferring of an entitlement to receive their services via the cable network. This means that following a repeal of section 73 the PSBs will not be able to seek retransmission fees from cable providers as this would amount to a prohibited charge."¹²⁹

44 In particular, the UK government was concerned that commercial PSBs' revenues come primarily from advertising, and that PSBs' arrangements for

¹²⁷ s272, 273 and 272(3)(b) of the Communications Act, 2003. The must-offer provisions state that the objective of the provision is that the arrangements between the broadcaster and the network provider will prohibit the provider from charging customers for reception of the channels

¹²⁸ Pg 5 of the DCMS Balance of Payments Report

¹²⁹ Pg 18 of the DCMS Balance of Payments Report

buying underlying rights is for broadcasts via any means to viewers of all platforms. Any further payment for retransmission by cable platform providers for PSB channels that have already been broadcast would remunerate PSBs twice for the same broadcast. The intention of the repeal of s73 is not to charge cable platforms retransmission fees – it is to allow PSBs to charge internet based streaming services of TV programmes who claim copyright exemption in s73 who exploit PSB content, including the selling of advertising around the service, without any benefit flowing to the PSBs.¹³⁰

Ireland

- 45 The Republic of Ireland is an EU member state and its Must Carry rules as such must comply with Article 31 of the EU Universal Service Directive. It is therefore not clear why the Discussion Document deals with Ireland separately from the analysis of other EU member states.
- 46 The Discussion Document correctly notes that Must-Offer rules are imposed on the public broadcaster RTE, TG4 and the s70 television programme service provider (Virgin Media Ireland), under s77(11) and (12) of the Broadcasting Act, 2009. These broadcasters must therefore ensure that their "Must-Offer" services are always offered for re-transmission on any appropriate network and satellite television services available in Ireland. The terms of use of any agreement between public service broadcasters and the platform operator must be fair, reasonable and non-discriminatory.¹³¹
- 47 The Discussion Document is silent on the issue of retransmission fees in the Republic of Ireland. This is odd, as it is surely relevant to this inquiry that Irish broadcasters subject to "Must-Carry" and "Must-Offer" obligations (RTE, TG4 and Virgin Media) are not permitted to charge network providers such as Sky, Virgin Media and Eir retransmission fees for the content they provide.¹³²

¹³⁰ Pg 13 of the DCMS Balance of Payments Report

¹³¹ s77(11) - 12) of the Broadcasting Act, 2009
(<http://www.irishstatutebook.ie/eli/2009/act/18/section/77/enacted/en/html#sec77>) [Visited 18 February 2020] and

¹³² Pgs 43 – 44 of the Discussion Document

- 48 It is interesting to note that in 2017, when the Broadcasting Amendment Bill was before the legislature in Ireland, RTE called for an amendment to the section (s77) that would allow RTE to charge platform providers for the privilege of including its content in pay TV packages. Virgin Media's response to this proposal before the Joint Oireachtas is particularly relevant considering the SABC's similar proposal in South Africa:

"Virgin Media and its parent company, Liberty Global, have always held the view that every society needs a strong, financially independent state broadcaster that offers public services within a clearly defined public service remit. However, a harsh light needs to be shone on why RTE is pushing so hard to be allowed to charge TV operators for content. Unfortunately, the answer lies in the fact that RTE mistakenly believes this will produce a large financial windfall that can solve its budgetary challenges while avoiding the hard decisions that would otherwise be required to manage costs. We believe it is not in the interests of the public to throw money at the problem so as to shield RTE from these financial realities. RTE needs instead to confront cost inflation and reform itself in order to deliver on its public service mandate effectively and efficiently, both now and in the future.

Let us consider RTE's specific request because it is important we have a clear understanding of what is at play here. In its own words, RTE is seeking a simple change to section 77(11) and the insertion of two seemingly innocuous words, "and payment", to the "must offer" provision which is a requirement on RTE to give its content to platform providers. RTE has claimed this is a simple request because retransmission fees exist elsewhere. However, in all other instances, in all other markets, retransmission fees mean something very different from what RTE is proposing for Ireland. Indeed, there is no like-for-like in any other market comparable to the Irish situation. In no other market where our parent company has business operations is there a case whereby the local state broadcaster is allowed to levy a fee on platform providers for content that it "must offer" to platform providers."¹³³

- 49 The Irish Parliament is currently reviewing the Broadcasting (Amendment) Bill 2019, but no amendment to s77 of the 2009 Act has been included in the Bill. Consequently, retransmission fees as part of the must carry regime will not be introduced in the foreseeable future in the Republic of Ireland.

¹³³ Oireachtas Joint and Select Committees, Joint Oireachtas Committee on Communications, Climate Action and Environment, Pre-Legislative Scrutiny of the General Scheme of the Broadcasting (Amendment) Bill 2017 and Retransmission Fees: Discuss (Resumed), 3 October 2017 (<https://www.kildarestreet.com/committees/?gid=2017-10-03a.171>) [Visited 13 March 2020]

Australia

- 50 Australia differs from South Africa in that it has not one, but three national public broadcasters, the Australian Broadcasting Corporation (ABC), the Special Broadcasting Service (SBS) and National Indigenous Television. The ABC (like the SABC in South Africa) is based on the BBC model of public broadcasting. However, the commercial television environment is more similar to that of the USA, in that rather than national commercial broadcasters, the country was initially divided into licence areas for each major city and regional area numbering almost 50 areas. A process of aggregation began in the 1990s leading to the regional market being merged, resulting in some stations having to merge or form partnerships. There are three main metropolitan networks and multiple regional television networks. Australian community broadcasting was established in the 1990s and is similar to South Africa in that regard.¹³⁴ The main provider of cable and satellite television in Australia is Foxtel. There are a number of other smaller cable and satellite service providers.
- 51 The Discussion Document dwelt at length on the considerations of the Australian Law Reform Commission ("**ALRC**") on Must Carry, and yet failed to state the fundamental difference between Australia and South Africa with regards to must carry regulation:¹³⁵ There is currently no "must-carry" regime in Australia.
- 52 Accordingly, Australian subscription broadcasters are not obliged to carry free-to-air broadcasts. It is therefore surprising to see the statement in the Discussion Paper that:

"Under Australia's Must Carry regime, free-to-air broadcasters have the option of either requiring that they be carried on cable or on satellite platform, or requiring that the free to air broadcaster be remunerated where the satellite platform chooses to re-transmit the signal."¹³⁶

¹³⁴ Media of the people: broadcasting community media in Australia, 2 April 2014, Parliament of Australia, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1314/Media [accessed 13 March 2020]

¹³⁵ Pgs 41 – 42 of the Discussion Document

¹³⁶ Pg 41 of the Discussion Document

- 53 Carriage of free to air broadcasters on subscription broadcasting platforms does take place, but it does so in terms of a retransmission scheme that creates exceptions or exemptions in Copyright law. Retransmission is defined in the Copyright Act as *"a retransmission of a broadcast, where the content of the broadcast is unaltered and either simultaneous with the original transmission or delayed"*¹³⁷ in the case of different time zones to an equivalent local time. The Broadcasting Services Act then provides immunity against any action for infringement of copyright that might be brought by the original broadcaster for the retransmission of a free-to-air broadcast.
- 54 This exception essentially allows subscription broadcasters to retransmit free to air broadcasts, without the permission or remuneration of the broadcaster (except that a retransmission copyright licence fee must be paid if the retransmission is outside the original broadcast area).
- 55 This immunity does not extend to the underlying rights holders, unless the retransmission is provided by a self-help provider. However, as a retransmission might not take place if the operator retransmitting has to track down all the underlying rights holders, the Copyright Act provides a statutory licensing scheme for the underlying works that provides that the copyright of the underlying rights holders is not infringed if an equitable remuneration is paid. In practise then Screenrights collects licence fees, identifies the programmes that are retransmitted and pays royalties to the rightsholders. In relation to this remuneration, the Copyright Tribunal has concluded that the benefit to subscription television consumers of the retransmissions can best be described as convenience of having to use only a single remote to access subscription and free-to-air channels.
- 56 This approach to royalties and copyright works best where the subscription broadcaster has the freedom to choose to retransmit or not to retransmit based on the costs involved. It differs significantly from a must carry regime where the

¹³⁷ *Copyright and the Digital Economy*, Final Report, ALRC Report 122, 2013, Australian Law Reform Commission, Sydney, pg 374

subscription broadcaster is compelled to carry the free to air channels and copyright is usually pre-cleared by the free-to-air broadcasters, depending on the jurisdiction.¹³⁸

57 In practice, Foxtel's policy is that commercial free to air broadcasters are required to pay the cost of satellite capacity if they want their channels retransmitted due to the significant costs of satellite bandwidth. The result is that metropolitan free to air channels and regional commercial free to air broadcasters may not be retransmitted by Foxtel if they do not cover these costs and Foxtel cautions subscribers that where they do provide access to Freeview channels via the Foxtel set top box these channels do not form part of their service. Foxtel's advanced set top box the IQ3, for example, has attempted to assist satellite subscribers by allowing a TV aerial to be connected to the IQ3 allowing the subscriber to access in one place the satellite channels and the terrestrial free to air channels available in that local area.¹³⁹

58 The Discussion Document refers to a "*Must Carry Inquiry conducted in Australia*".¹⁴⁰ It should be noted that the ALRC was conducting an Inquiry into Copyright and the Digital Economy and, as part of this inquiry, the ALRC considered whether the retransmission scheme for free to air broadcasts should be repealed as the original policy intent to extend the reach of free to air broadcasting services had been achieved. As part of this inquiry it considered a range of options, including a must carry regime, if it proposed the repeal of the retransmission scheme for free to air broadcasts. The ALRC did not suggest as indicated in the Discussion Document that "*a US-style 'Must Carry' regime should be implemented for Australia.*"¹⁴¹ The ALRC considered the introduction of a "Must Carry" regime in Australia, but concluded that it could make no proposal on whether reform of the retransmission exception applying to

¹³⁸ *Copyright and the Digital Economy*, Final Report, ALRC Report 122, 2013, Australian Law Reform Commission, Sydney, pg 375

¹³⁹ <https://community.foxtel.com.au/t5/TV-Shows/What-Free-To-Air-FTA-channels-can-I-receive-on-Foxtel/td-p/523>

¹⁴⁰ Pg 41 of the Discussion Document

¹⁴¹ Pg 41 of the Discussion Document

broadcast copyright should involve the imposition of Must Carry obligations on subscription broadcasters, as this issue did not directly concern the operation of copyright exceptions. Further, the ALRC felt that the policy rationales for must carry regimes are based primarily on communications policy and are not issues that can, or should, be driven by reform of copyright laws.¹⁴²

India

- 59 India is the most heavily regulated telecoms market in the world. The private broadcasting market developed on the cable platform primarily because the public broadcaster was given sole monopoly on the terrestrial broadcasting frequency platform. The result of this was that cable broadcasting was regulated very much in the same way as a telecoms network, rather than a broadcasting network.
- 60 This approach has continued under the Telecoms Regulatory Authority of India ("TRAI") with rather interesting approaches such as the use of traditional telecoms regulatory tools such as interconnect being applied to the cable broadcasting platform with mixed results initially, and requiring a number of amendments to make it more or less workable.
- 61 India from a broadcasting regulatory perspective can be described as unique in some of the approaches it has adopted around broadcasting. As a result of this Telecoms focus, India should not be given undue weight in a benchmarking exercise.

¹⁴² *Copyright and the Digital Economy*, Final Report, ALRC Report 122, 2013, Australian Law Reform Commission, Sydney , pg 403

ANNEXURE B: MULTICHOICE'S COSTS TO COMPLY WITH THE MUST CARRY REGULATIONS

ANNEXURE B: COSTS TO COMPLY WITH MUST CARRY REGULATIONS

SABC SD Channel Costing: 2008 - 2020														SABC HD Costing		
	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2018	2019	2020
Capex Investment - Required for SD & HD Headends	R 2,047,563	R -	R -	R -	R 2,049,943	R -	R -	R -	R -	R -	R -	R -	R -	R 3,274,189	R -	R -
Annual Costs																
Fibre Contribution	R 618,840	R 618,840	R 618,840	R 618,840	R 618,840	R 618,840	R 618,840	R 618,840	R 618,840	R 618,840	R 618,840	R 618,840	R 618,841	R 840,000	R 840,000	R 840,000
Satellite Capacity Cost	R 2,596,209	R 3,187,935	R 2,798,120	R 2,596,176	R 2,688,351	R 3,103,373	R 3,696,199	R 4,036,829	R 5,028,944	R 5,089,380	R 4,685,545	R 5,260,781	R 5,442,188	R 12,394,829	R 13,916,520	R 14,396,400
	R 3,215,049	R 3,806,775	R 3,416,960	R 3,215,016	R 3,307,191	R 3,722,213	R 4,315,039	R 4,655,669	R 5,647,784	R 5,708,220	R 5,304,385	R 5,879,621	R 6,061,029	R 13,234,829	R 14,756,520	R 15,236,400
Total Cost Per Annum	R 5,262,611	R 3,806,775	R 3,416,960	R 3,215,016	R 5,357,135	R 3,722,213	R 4,315,039	R 4,655,669	R 5,647,784	R 5,708,220	R 5,304,385	R 5,879,621	R 6,061,029	R 16,509,018	R 14,756,520	R 15,236,400
Total SD Cost: 2008 - 2020	R 62,352,457															
Total SD and HD Cost: 2008 - 2020	R 108,854,395															

- Notes:
- 1] The SD Mux for SABC was first installed in 2008 and refreshed in 2012
 - 2] The HD Mux as installed in 2018
 - 3] The exchange rates used was supplied by MultiChoice Finance
 - 4] The fibre contribution costs remained flat for the period under review
 - 5] The variations in the satellite costs are due rate of exchange fluctuations
 - 6] No additional costs were incurred for Monitoring and Uplinking, hence these costs are excluded from the numbers

R62,352,457

Cost for SABC HD Channels for the IS20B satellite DTH platform

1. Assumptions

SABC HD channels:

- o SABC 1
- o SABC 2
- o SABC 3

Rate of exchange (USD)

Rate of exchange (EURO)

3

1. CAPEX required to establish SABC Headend

1+1 EM4004 encoders to be installed at the SABC

Site switches (switch uplink feeds RNB SMD)

Appear TV cards and cams for monitoring (RNB)

2 professional receivers for monitoring (Samrand and Randburg)

2 Nimbras (at SABC)

4 Cisco switches (for IP multicast - 2@SABC, 2@SMD)

Installation and wiring costs

2. OPEX required

2.1 Fibre contribution costs (SABC to Randburg) - increase to 200MBps

SABC Samrand Primary link

SABC Samrand Secondary link (via Randburg)

2.2 IS20/IS36 Satellite Capacity Costs - HD Services

	2018		2019		2020	
	12.91		14.50		15.00	
	15.22					
	96,310 €	R1,465,917				
		R440,000				
\$ 450		R5,812				
\$ 18,000		R232,461				
		R600,000				
		R480,000				
		R50,000				
Total CAPEX	R3,274,189		Total CAPEX	R0	Total CAPEX	R0
Telemedia	R300,000		Telemedia	R300,000	Telemedia	R300,000
Globecast	R540,000		Globecast	R540,000	Globecast	R540,000
	R840,000			R840,000		R840,000
Satellite Capacity Cost per MHz	\$3,328	per MHz	\$3,328		\$3,328	
Satellite capacity usage efficiency	1.613	MBps per MHz	1.613		1.613	
Rate per MBps	\$2,666	per MBps	\$2,666		\$2,666	
Average MBps per channel	10	MBps	10		10	
Cost per HD IS36 Channel Per Annum	\$319,920		\$319,920		\$319,920	
Total Satellite Capacity Cost for all 3 SABC channels Per annum	\$ 959,760.00	R12,394,829	\$ 959,760.00	R13,916,520	\$ 959,760.00	R14,396,400
Total OPEX cost per annum		R13,234,829		R14,756,520		R15,236,400
Total Cost (OPEX + CAPEX)		R16,509,018		R14,756,520		R15,236,400

Notes:

The HD mux was installed in 2018



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1. INTRODUCTION

1. The Independent Communications Authority of South Africa (“**ICASA**”) has notified its intention to conduct a Regulatory Impact Assessment (“**RIA**”) on the Must Carry Regulations of 2008¹. The Must Carry Regulations require subscription broadcast services (“**SBS**”) to carry specified public broadcast service (“**PBS**”) channels. Pursuant to the notification, ICASA has issued questionnaires to the broadcasting industry to gather information that may inform the RIA.
2. Genesis Analytics (“**Genesis**”) has been retained by MultiChoice South Africa to provide an economic perspective on the RIA tool as a means to inform regulatory design, and the application of that tool in the context of Must Carry Regulations. Genesis is an economics-based consultancy and the Competition and Regulatory Economics (CRE) practice specialises in competition law and economic regulatory matters, providing independent expert economic assessments for competition authorities, sector regulators (including ICASA) and private firms.
3. We discuss below in the introduction the primary objective and approach of an RIA. We then proceed to apply the RIA principles to the Must Carry Regulations, first setting out the essential features of the current Must Carry Regulations and their stated objective. We then proceed to identifying how one may assess the various benefits and costs of the regulations, as well as evaluating any alternatives to the current regulations. In terms of the assessment of must carry, our focus is primarily on the type of evidence ICASA may seek to gather in order to understand the benefits and costs of the regulations, as well as the alternatives to the current design. In so doing we provide an economic perspective on some of the key debates around the Must Carry Regulations, such as the ‘must carry, must pay’ debate. The one debate we do not traverse is in respect of which channels and content may be classified as PBS and subject to the regulations as those decisions are not shaped by economics per se.
4. **The objective of and approach to RIA.** A RIA is a tool used to assist policy makers and/or regulators evaluate the impact of regulatory interventions imposed in pursuit of policy objectives. RIA is a comparative tool that aims to add structure to the regulatory decision-making process. As a consequence, the RIA process includes determining the policy objectives, identifying various interventions available to achieve those objectives and determining as well as comparing the impact that those interventions would have. This allows policy makers and regulators to select the optimal interventions to implement. The Organisation for Economic Co-operation and Development (“**OECD**”) stated the following in respect of RIA:

“RIA helps to improve the design of regulations by assisting policy makers in identifying the best solution to address a policy problem. RIA examines the costs and benefits of regulation and non-regulatory alternatives of achieving policy goals, in order to identify the approach that is likely to deliver the greatest net benefit to society. RIA can assist in promoting policy coherence by pointing to the tradeoffs inherent in regulatory proposals, and identifying who is likely to benefit from a regulation and who will bear the costs. RIA

¹ Government Gazette No. 31500 of 10 October 2008

can also improve the use of evidence in policy making and help avoid regulatory failure arising from unnecessary regulation, or failing to regulate when regulation is needed.”²

5. RIA can employ a number of analytical methods to evaluate different interventions such as cost-benefit analysis, reviews of experiences in other countries, literature reviews, consultation and surveys.³ This evidence-based approach of RIA “...adds structure, predictability and methodological clarity to assessment while also ensuring the right information is available for decision making.”⁴ Thus RIA can add credibility to regulatory decisions and provide affected parties with an objective guide to the likely impact of interventions.
6. RIA is often forward-looking in nature and considers what objectives need to be achieved and then which interventions may achieve this objective. However, it may also be used as a tool to evaluate existing regulations as part of a review as to whether they should be adjusted going forward. This is the case with the proposed ICASA RIA.
7. The essential features of an RIA are an assessment of the benefits of regulatory intervention, the costs of interventions and the potential unintended consequences or risks associated with the intervention. The primary purpose of RIA is to ensure that when an intervention is undertaken, its benefits exceed the costs that it imposes.
 - 7.1. *Benefits of the regulation.* The benefits are assessed in terms of the specific objective that the regulation is intended to achieve.⁵ A RIA should seek to provide some measurement of the actual benefits in order to evaluate these against the costs of the regulations. This measurement should be evidence-based to ensure an objective assessment. It is important to focus on benefits that actually aid in the achievement of the stated objective. Some interventions may have other unintended benefits which may be considered but which are typically not the focus of the RIA unless they aid in achieving the same stated objective.
 - 7.2. *Cost of interventions.* In determining the costs of interventions, a) both the direct and indirect costs of regulation should be taken into account, and b) the costs should include both monetary costs of compliance and implementation, as well as any non-monetary costs. In undertaking an RIA, it is important to consider the total cost of regulation as well as the incidence of cost (on government, private companies and citizens). The total cost will be weighed up against the total benefits, and the incidence of costs will assist in determining if any single party disproportionately bears the burden of achieving those benefits. Where possible, all costs that are identified need to be quantified to allow for objective comparison to the benefits. This too should be evidence-based to ensure an objective process.
 - 7.3. *Unintended consequences and risks.* Regulatory interventions designed to achieve a specific objective may often have unintended consequences as a result of their design or introduce risks to achieving the stated objectives. Unintended consequences are additional costs to the proposed regulation and therefore need to be considered and their likelihood assessed. Should there be a strong likelihood of unintended consequences or risks in achieving the objectives manifesting, then

² Organisation for Economic Co-operation and Development (2017), *Government at a Glance 2017*, page 164.

³ Organisation for Economic Co-operation and Development (2008), *Introductory Handbook for Undertaking Regulatory Impact Analysis (RIA)*, pages 18 – 19.

⁴ The South African Presidency (2012) - *Guidelines for the Implementation of the Regulatory Impact Analysis/Assessment (RIA) Process in South Africa*.

⁵ *Ibid*, page 13.

alternative forms of regulation or options that mitigate such risks should be considered.⁶

8. It is relevant to note that in February 2015 Cabinet approved the use of Socio-Economic Impact Assessment System (“**SEIAS**”) to replace RIA in assisting the formulation of policies, legislations and regulations⁷. SEIAS contains many of the same considerations as RIA such as the analysis of costs and benefits of regulations. However, in addition to the elements of RIA, SEIA builds on RIA by also evaluating the proposed interventions on their alignment with the National Development Plan and support of national priorities. Specifically, interventions need to be evaluated based on their impact on⁸:
 - 8.1. Social cohesion and security (safety, food, financial, energy and etc.);
 - 8.2. Economic inclusion;
 - 8.3. Economic growth; and
 - 8.4. Environmental sustainability.
9. As discussed next, the one element from the SEIAS list that may be relevant to that of the Must Carry Regulations is social cohesion.

⁶ Cabinet Office Regulatory Impact Unit (2003), Better Policy Making: A Guide to Regulatory Impact Assessment, page 13.

⁷ Department of Planning, Monitoring and Evaluation (2015), Presentation on Socio-Economic Impact Assessment System (SEIAS), Available: <https://www.dpme.gov.za/keyfocusareas/Socio%20Economic%20Impact%20Assessment%20System/SEIAS%20Documents/Presentation%20on%20SEIAS-%20Nov%202015.pdf>.

Also see Parliamentary Monitoring Group (2017), Socio-Economic Impact Assessment System: Department of Planning, Monitoring and Evaluation briefing, 22 February 2017, Available: <https://pmg.org.za/committee-meeting/24010/>.

⁸ Department of Planning, Monitoring and Evaluation (2015), Socio-Economic Impact Assessment System (SEIAS) Guidelines. page 6.

2. MUST CARRY REGULATIONS AND THEIR OBJECTIVE

10. This section briefly outlines the essential features of the ICASA Must Carry Regulations and the objective rationale for such regulations. It is this objective against which the benefits of regulations must be assessed and against which the costs should be weighed up.

2.1. ICASA MUST CARRY REGULATIONS

11. Section 60 (3) of the Electronics Communications Act 2005 (Act No. 36 of 2005) required that ICASA “...prescribe regulations regarding the extent to which subscription broadcast services must carry, subject to commercially negotiable terms, the television programmes provided by a public broadcast service licensee.” On the basis of the requirement to prescribe regulations, ICASA proceeded to engage in a public consultation process in terms of section 4B of the Independent Communications Authority of South Africa Act (Act 13 of 2000). That process culminated in a Position Paper⁹, which set out the submissions and findings of ICASA, as well as the proposed regulations for final comment. The process then culminated in the issuing of Must Carry Regulations later that year¹⁰.
12. The essence of the Must Carry Regulations are as follows:
 - 12.1. All channels and programmes that form part of broadcast service of the PBS are subject to must carry (clause 3).
 - 12.2. All SBS licensees must carry the PBS channels on their platform (clause 4). However, services with under 29 channels are exempt, and for services with more than 29 channels the obligation is for 1 PBS channel for every 20 channels thereafter (clause 4).
 - 12.3. In turn, the PBS licensee must offer its PBS channels at no cost to the SBS operators upon request (clause 6).
 - 12.4. The PBS will cover the costs of getting the unencrypted signal to the SBS whereas the SBS will cover the costs of transmitting the PBS channels on its platform to its subscribers (clause 7).

2.2. THE POLICY OBJECTIVES ADDRESSED BY MUST CARRY RULES

13. The PBS has the underlying objective of providing citizens with access to public interest programming and promoting a common identity. Given the public interest role that such services seek to play, there is usually a desire by governments to ensure that there is universal access to the PBS. For instance, ICASA itself notes in its review of universal access and obligations that universal access in broadcasting consists not only of

⁹ Government Gazette No 31081 of 2008 ICASA Position Paper and Notice of Intention to Prescribe Regulations Regarding Must Carry Obligations

¹⁰ Government Gazette No 31500 of 2008 ICASA Regulations regarding the extent to which subscription broadcasting services must carry the television programmes provided by the public broadcast service licensee

programming content that caters for all cultures and languages, but also “*physical access to broadcast programmes*”.¹¹

14. Must carry rules or obligations have been identified as a means to achieve universal access to PBS programming globally. South Africa is no different and the same universal access objective is stated by ICASA in the original notice of intention to make Must Carry Regulations.¹² Must Carry Regulations are seen as furthering universal access to PBS through two principle means, namely:

- 14.1. Extending the reach to geographic areas that do not receive the PBS signal; and

- 14.2. Extending access to citizens that subscribe to a SBS platform but either do not have equipment (antennas etc.) to receive the PBS signal or for whom the inconvenience of switching between platforms may diminish their actual viewership of the PBS.

15. **Access to PBS in areas lacking transmission coverage.** There are frequently limits to the reach of terrestrial transmission of the PBS signal as it may simply be uneconomic to extend infrastructure to remote and sparsely populated parts of the country. In contrast, satellite transmission used by many SBS platforms typically incorporate these areas within the satellite footprint.

- 15.1. The limitations on the terrestrial transmission footprint means that households in those areas are denied access to the PBS completely. To the extent these households then subscribe to an SBS in order to get video entertainment, enforcing must carry obligations on SBS ensures that these households get access to PBS which they would otherwise not.

- 15.2. ICASA appreciates that in the South African context there are natural limits to the terrestrial signal and in this scenario satellite SBS platforms may play a vital role in achieving universal access by providing access to PBS channels where otherwise there would have been none. As expressed in ICASA's Subscription Broadcasting Services Position Paper:

“The advantage of must-carry rules is that they extend the reach of the public broadcaster and other free-to-air broadcasting services to areas where there may be no coverage, and therefore, serve the public interest by ensuring that viewers who use cable or satellite as a means of access to broadcasting services have access to, in particular, public service programming.”¹³

16. **Access to PBS for households on other platforms.** In addition to citizens that are not reached by the terrestrial PBS signal, the increased popularity of SBS platforms means that many households use these as their primary means of getting video entertainment content. As a result, many of these households have invested in equipment to receive the SBS service and may not have the equipment necessary to receive the PBS terrestrial signal, or may not maintain the equipment that they had in place prior to subscribing to a SBS platform. Must carry rules ensure that these households get access to PBS channels

¹¹ Government Gazette Notice 807 of 2010, Independent Communications Authority of South Africa Discussion Document: Universal Services and Access Obligations Review, 17 August 2010, page 25.

¹² Government Gazette Notice 1150 of 2007, Independent Communications Authority of South Africa, Notice of Intention to make Regulations in Respect of the Must-Carry Regulations, pages 11 and 12.

¹³ Independent Communications Authority of South Africa (2005), Subscription Broadcasting Services Position Paper, 1 June 2005, page 46.

because in the absence of such rules these households may be unwilling or unable to invest in the necessary equipment to receive PBS channels.

- 16.1. For instance, in the US the Supreme Court in *Turner v. FCC* upheld the must carry rules imposed by the Cable Television Consumer Protection and Competition Act of 1992. In doing so the Court took note of the fact that a large proportion of households with television sets subscribed to cable. This had replaced over-the-air broadcast as the primary means to view television content in many of those households. The court also noted that in some instances over-the-air broadcast was not accessible:

"... [m]ost subscribers to cable television systems do not or cannot maintain antennas to receive broadcast television services, do not have input selector switches to convert from a cable to antenna reception system, or cannot otherwise receive broadcast television services."

The Court held that in the absence of must carry rules, cable operators would be able to "...terminate the retransmission of the broadcast signal, refuse to carry new signals, or reposition a broadcast signal to a disadvantageous channel position". Due to the large number of households that used cable as a primary means to receive television, the Court held that such outcomes would be counter to what the regulations intended to achieve.¹⁴

- 16.2. A similar rationale was expressed by ICASA, stating in its Notice of intention to make regulations in respect of Must Carry that:

*"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."*¹⁵

17. Similar reasoning seems to also be applied in the EU where must carry regulations are invoked once a critical mass of households are primarily focused on a platform, including an SBS platform. Whilst there is no specific reference to a lack of terrestrial PBS signal equipment, the premise is still about reaching households that are on another platform and not related to the lack of PBS signal coverage. Must carry obligations are provided for by Article 31 of the Universal Service Directive which states that must carry obligations may be imposed on entities that provide:

*"... electronic communications networks used for the distribution of radio or television broadcasts to the public where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcasts."*¹⁶

18. It is also generally recognised that even if a household that subscribes to a SBS platform has the necessary equipment to receive the terrestrial PBS signal, the inconvenience of switching to that equipment from their SBS platform may result in a reduction in PBS

¹⁴ United States Supreme Court *TURNER BROADCASTING SYSTEM, INC. v. FCC*, (1994) No. 93-44 Argued: January 12, 1994 Decided: June 27, 1994.

¹⁵ Government Gazette Notice 1150 of 2007, Independent Communications Authority of South Africa, Notice of Intention to make Regulations in Respect of the Must-Carry Regulations, page 12.

¹⁶ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive).

viewing. This is in part because the subscriber is likely to make use of their electronic programme guide (“**EPG**”) on their SBS platform to be informed as to what programmes are available and to search for programmes that may be of interest to them. If the PBS channels are not reflected on the EPG then the household may not be informed as to what programmes are available and less likely to watch them as a result. The result would be that these households would then engage less with the PBS, undermining the universal service and public interest objectives underlying public broadcasting.

3. BENEFITS AND THE ACHIEVEMENT OF THE STATED OBJECTIVE

19. As outlined in the discussion on RIA's, the benefits of regulations need to be assessed against their stated objective. As such, the question for ICASA's RIA would be whether the existing Must Carry Regulations have provided universal coverage and improved access to the PBS channels amongst the population, and whether they will achieve that going forward. In determining the extent of benefits, which is necessary when evaluating whether the costs outweigh such benefits, the relevant question is how much of the population is reliant on must carry to receive the PBS channels on the basis of coverage or convenience through a SBS platform.

3.1. COMPLIANCE

20. The first relevant question in assessing the benefits of the current Must Carry Regulations is whether they have been successful in ensuring that the PBS channels are available on SBS operator bouquets in order to provide convenient access to subscribers on those platforms.
21. This is relevant in the RIA context because the actual carriage of PBS channels is a necessary condition for ensuring universal coverage and convenient access. In addition, in considering alternatives to the current regulations as part of the RIA process, ICASA will need to determine whether alternatives are likely to result in carriage of PBS channels or not. For instance, one alternative is to have no must carry regulations and rely on commercial negotiations only for PBS carriage on the SBS platforms. In assessing that alternative ICASA will need to consider the risks that no commercial agreement is reached resulting in a "blackout" of the PBS channels on the SBS platform, in which case the stated objective of universal coverage and convenient access may not be achieved.
22. On this measure the current regulations have been successful and achieved the stated objective. Factually the PBS channels are available on both the DStv and StarSat SBS platforms.

3.2. EXTENT OF BENEFITS

23. The second relevant question for the RIA is the extent of benefits achieved by the Must Carry Regulations, as it is these benefits that would need to be evaluated against the costs. Given the problem that these regulations are designed to address, the extent of benefits may be measured in a number of ways.

3.2.1. Coverage of areas not reached by PBS transmission

24. One rationale for the regulations is to provide reach through SBS operators to households in geographical areas not covered by the existing PBS analogue transmission. The benefit may be measured in two ways, namely:
- 24.1. *Population provided with coverage through SBS.* The first approach is to determine how much of the population are provided with potential access to the PBS channels through SBS coverage of an area not covered by the PBS transmission. This measures the benefit of providing universal coverage even if some households do

not practically take advantage of that coverage by actually subscribing to a SBS platform. This is relevant because it measures availability of the service, as even in areas covered by the PBS transmission some households may elect not to receive the free service. It also demonstrates the potential for access because household take up of SBS services in these areas will likely evolve over time.

24.1.1. On this measure, the SABC indicates that coverage through analogue and Digital Terrestrial Television (“**DTT**”) distribution channels is currently 91.2% of the population for SABC 1, 92.5% for SABC 2 and 82.1% for SABC 3.¹⁷

24.1.2. As satellite SBS providers carrying the PBS channels under the Must Carry Regulations provide universal coverage through their satellite footprints, the benefit based on this measure would be the additional coverage of roughly 8-9% of the population for SABC 1 and 2, and 18% for SABC 3.

24.2. *Actual access through SBS in uncovered areas.* A second means of measuring the benefit would be to determine how many households in the geographic areas not covered by the PBS terrestrial transmission actually get access to the PBS channels through subscribing to a SBS operator.

24.2.1. This would require the SBS operators to determine how many subscribers they have in particular geographic areas where there is no PBS transmission. We do not have access to such information.

24.2.2. However, what we can infer is that the number of households accessing PBS through SBS operators in these areas is more than likely increasing and hence more benefit being realised. This is logical because the overall number of television households subscribing to a SBS platform has increased markedly since the regulations were enacted. This is in large part driven by the increased availability of cheaper bouquets which reduce the price entry point for SBS. For instance, the DStv Easyview bouquet is priced at R29 per month which enables many more households to afford an SBS service in areas where there is not even a PBS service.

3.2.2. Convenient access for households on SBS platforms

25. The other category of households that must carry regulations seek to address are those that have subscribed to a SBS platform but fall within geographic areas where there is a PBS transmission service. These SBS households in turn may fall into two groups to which the benefits differ slightly, namely those with existing equipment to receive the PBS signal and those without.

25.1. *Households without equipment to receive the PBS signal.* The first group are households that view through the SBS platform and do not have the requisite analogue terrestrial antenna equipment to receive the PBS channels. The benefits of must carry for these households and society is larger as absent must carry these households may not make the requisite investment in the equipment required to

¹⁷ SABC Annual Report 2018, page 12.

receive the PBS channels and therefore not have access. Alternatively there is an additional cost to the household to gain access in the first place.

- 25.2. *Households with equipment to receive the PBS signal.* The second group are households that have existing equipment to receive the PBS signal, but for whom there is a potential inconvenience to doing so (operating outside of the SBS platform EPG) making it less likely that they will view PBS channels. This benefit is lower than the first group, as the households can technically access the PBS channels if they wish to. However, there is still a benefit as the inconvenience is considered likely to result in these households either not watching PBS channels or watching far less than they would otherwise.
26. Absent a household survey by ICASA it may be difficult to distinguish between these two groups of SBS platform households. This is because even an SBS operator is unlikely to have knowledge of the equipment at their subscriber's homes. However, doing so is also maybe unnecessary as benefits accrue to both sets of SBS households, even if the quantum of benefit may differ. Indeed, this would seem to be the reason why EU must carry provisions are triggered purely based on the share of television households subscribing to a SBS platform. The benefit may then be measured in one of two ways.
- 26.1. First, one may measure the benefit as simply the number of households that subscribe to an SBS platform relative to total television households. This represents the total number of households to which more convenient access to PBS channels are provided as a result of Must Carry Regulations. This is essentially a coverage rather than access measure, as it does not assess whether the PBS channels are actually viewed or not.
- 26.1.1. On this measure the Must Carry Regulations would seem to provide fairly extensive and increasing benefits due to the growth in SBS households in South Africa. When the regulations were first introduced there were only 1.84 million SBS households which accounted for 20.3% penetration of 9.1 million total television households.¹⁸ In contrast, by 2017 there were 6.94 million households subscribing to an SBS platform and which accounted for 52% penetration of 13.3 million total television households.¹⁹
- 26.2. Alternatively, one may measure the benefit by the proportion of PBS channel audience that view the channel through their SBS platform. This measure provides some indication of the additional household reach actually achieved for PBS channels through carriage on the SBS platforms. Whilst some of these households may have viewed the PBS channels absent Must Carry Regulations, that proportion is difficult to determine.
- 26.2.1. This measure similarly suggests a large and increasing benefit derived from Must Carry Regulations. TAMS data indicates that 21.6% of the national audience on SABC 1,2 & 3 are DStv subscribers which are viewing through their SBS platform. This is up from 13.7% five years ago²⁰.

¹⁸ All Media and Products Study (AMPS), 2008RB household data.

¹⁹ BRC Establishment Survey

²⁰ TAMS Data, Adults 15+, Apr - Sep 2013 vs 2018, 06:00-24:00

3.3.

FORWARD-LOOKING ASSESSMENT

27. It is also important for ICASA to consider how coverage benefits may change on a forward-looking basis given known changes to PBS transmission, namely the digital migration and analogue switch-off (“**ASO**”) that will occur. This is because future benefits may differ to historic benefits, and the primary purpose of an RIA assessing existing regulations is whether such regulations will continue to provide those benefits.
28. **Coverage benefits.** It is our understanding that digital migration and ASO are likely to result in reduced terrestrial PBS transmission coverage relative to the current analogue signal and therefore Must Carry Regulations will provide greater coverage benefits in future.
- 28.1. In terms of the migration plan, there has been a deliberate decision to make use of satellite to achieve universal coverage in areas where the population does not make extending the DTT signal economical. We understand that the SABC has proposed that the DTT coverage for the PBS channels should be lower than that of analogue and even below the 84% which is allowed for in the BDM Policy²¹.
- 28.2. This suggests that the coverage benefits of the ‘must carry’ regulations will increase substantially post ASO for SABC 1 and 2 from under 10% to over 16%, whereas they are unlikely to change materially for SABC 3.
29. **Convenience benefits.** Digital migration and ASO mean that PBS channels will only be available through the DTT transmission and Sentech DTH transmission (for selected households) going forward.²² As a result, all households wanting to access the PBS channels will need to invest in a DTT / DTH gapfiller set top box (STB) and antenna / dish as their existing receiving equipment will no longer work.
30. In this context, the benefits of must carry will be greater as far fewer SBS households will have the requisite equipment to receive the PBS channels outside of the SBS platform than is currently the case. This is because they are far less likely to make that investment if they already have a SBS bouquet that provides entertainment and especially if that service provides the PBS channels under existing Must Carry Regulations.
31. **Indirect benefits.** There is also an indirect benefit of Must Carry Regulations to the digital migration process, namely that existing SBS households do not need to incur the expense of purchasing a DTT / DTH gapfiller STB.
- 31.1. There is a benefit to these households insofar as it reduces their expenditure to receive the PBS channels.
- 31.2. There is also a benefit to the state in the form of cost savings insofar as some of these households would otherwise have qualified for a DTT / DTH gapfiller STB subsidy based on a needs test.

²¹ SABC submission on PBS Review, 31 August 2018, page 44.

²² However, this service is an encrypted signal that can only be received by Sentech STBs. These STBs have only been provided to existing TV households who qualify for government subsidy and are not generally available to the public. See: *Sentech Select Committee on Communications and Public Enterprises*. Available: <https://pmg.org.za/files/170208sentech.pptx>. Therefore, most people who are not in the DTT coverage area are still likely to use either DSTv, OpenviewHD and StarSat as the STBs are available to the general public.

- 31.3. Finally, there is a benefit to the digital migration process itself insofar as reaching the target level of digitisation in order to trigger ASO. The target is more easily reached as all SBS households automatically qualify as having migrated to digital, and therefore fewer households need to make the transition to digital in order to reach the targets. This lowers the number of households needing to be subsidized by government.

4. COSTS AND UNINTENDED CONSEQUENCES

32. As outlined in the discussion of the RIA approach, an assessment of the costs of a particular regulation should include both direct and indirect costs, as well as the incidence of those costs.

4.1. DIRECT COSTS

33. The direct costs involved in achieving compliance with the existing Must Carry Regulations are easily identifiable as being the cost of transmission of the PBS channels.
- 33.1. These include the transmission from the PBS to the SBS provider and then the transmission of the SBS provider to their subscription base. Such costs can be easily quantified by the PBS and SBS providers and are already included in the ICASA information request.
- 33.2. Typically the larger of the two costs is the transmission of the PBS channels to the SBS subscription base as it may involve investment in additional capacity to carry the channels (such as transponder capacity for satellite SBS platforms). As the incidence of these costs is on the SBS licensee, some countries take a view that a carriage fee can be charged by the SBS licensee to the PBS licensee to defray such costs.
- 33.2.1. For example, Article 31 of the Universal Service Directive indicates that member states may require remuneration to be paid “...*in respect of measures taken in accordance with this Article...*”.²³ However, this is not the case for the ICASA Must Carry Regulations.
- 33.2.2. In the UK a regime exists for the charging of technical platform charges to channels hosted on satellite platforms and as a result the PBS channels have historically paid for carriage on such platforms.

4.2. INDIRECT COSTS

34. Whilst the direct costs may be easy to identify and quantify as part of the RIA, the potential indirect costs (or unintended consequences) may be less so.
35. The one potential indirect cost is that imposed on the SBS licensee, namely the opportunity cost of broadcasting other channels that may generate more subscription revenue (rather than the direct costs of transmission). However, this opportunity cost can only really arise in the context of material capacity constraints on the total number of channels that can be broadcast. Such a cost is also of less interest from a historic assessment perspective because the Must Carry Regulations include mechanisms to mitigate this opportunity cost by limiting their application to SBS licensees with at least 29 channels.
36. Rather, it seems that the primary potential indirect cost that has been raised against the current regulations by licensees is the claim by the SABC that the regulations prevent it from negotiating a commercial fee from the SBS operators for the re-broadcast of its PBS

²³ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive).

channels. The SABC argues that SBS licensees benefit commercially from the PBS channels and the must carry / must offer structure of regulations prevent it from extracting compensation for this benefit. In economic terms this may be classified as a potential opportunity cost to the regulations or a potential unintended consequence. If the SABC is correct that it could extract a commercial fee, then the must offer rule with no fee would prevent it from achieving that fee. Either way, the RIA will need to evaluate this claim as to whether there is a cost and if so to try quantify it. This is the exercise to which we now turn.

4.2.1. Basis for claim of indirect costs to PBS

37. The basis for which the SABC states it would otherwise successfully negotiated a fee is that the channels it provides have attractive content and are popular, providing benefits to SBS operators in terms of content and audience. Whilst ICASA will itself have to assess this claim in its RIA, there are a number of good economic reasons and other evidence which indicates that such an opportunity cost is unlikely to exist, or if so is unlikely to be substantial. The primary reason for this is that the PBS licensee also benefits from Must Carry Regulations.

4.2.2. Economic theory perspective on claim

38. In terms of economic theory and commercial practice, a commercial negotiation where there is only benefit derived by one side is likely to result in a payment to the other party as that is the only means of ensuring an agreement is reached and the transaction occurs. In essence, the payment constitutes the only benefit for the other transacting party.
39. However, in the case of where both parties benefit, it may be mutually beneficial to conclude a transaction even if no actual money changes hands. This is precisely because both parties benefit and therefore payment to one party may be unnecessary. Payment may only occur where the relative benefits to one party are disproportionately larger than to the other party.
40. This is well illustrated in another area of communications where ICASA is active, namely telecommunications and in particular Internet service provision. Internet service providers (“ISPs”) benefit from access to content hosted by other ISPs and hence there are commercial arrangements to access each other’s hosted content to provide subscribers with the whole world wide web. However, the common commercial outcome amongst ISPs of similar size are Internet peering arrangements where neither party charges the other for access to the content. This is because both benefit from access to each other’s content. Payment is only typical where the one party is substantially larger than the other and hence the content hosted and related benefit is vastly disproportionate.

4.2.3. Benefits to SBS and PBS licensees

41. In the context of commercial negotiations between SBS and PBS licensees for carriage of the channels, not only do both sides benefit, but also the benefit to the SBS licensee is unlikely to be substantial. This suggests that a large commercial fee to the PBS licensee is unlikely if they were commercially negotiated rather than stipulated through Must Carry Regulations.

42. **Benefits small to SBS.** The benefits to the SBS operator of carrying PBS channels, regardless of their quality of content, is unlikely to be large for the simple reason that those channels are already freely available to subscribers.

42.1. Such channels cannot be subscription drivers precisely because households already have access to them for free. Similarly, they cannot be useful as retaining subscriptions as households would still have access if they terminated their SBS subscription. As a result, their only benefit is that the SBS operator can provide convenient access to the channels to its subscribers.

42.2. In this context, the fact that such channels are actually watched by many subscribers is not evidence that they are subscription drivers but rather that convenient access reduces the barriers to households on the SBS platform from accessing and viewing content they would otherwise get free anyway. This is in essence what must carry regulations are designed to achieve.

42.3. This reasoning was echoed by the Copyright Tribunal of Australia in *Audio-Visual Copyright Society Ltd v Foxtel*. The Tribunal concluded that although there are convenience benefits that result from SBS providers retransmitting FTA channels, these benefits accrue to subscribers (who are not parties to the notional bargain between PBS and SBS).²⁴ The Tribunal also noted that subscription to SBS is not driven by access to FTA channels, stating:

"We are not persuaded that a significant number of people would be influenced in their decision to subscribe or continue to subscribe to Pay TV by the fact that only a single remote control is needed to change between FTA and Pay TV programs..."

It is our firm view that subscribers subscribe in order to watch the Pay TV channels".²⁵

43. **Benefits to PBS material.** Whilst there are benefits to the SBS operator, there are also material benefits accruing to the PBS operator.

43.1. Commercially, the PBS operator generates revenues to fund its operations through advertising and license fees. The former is the most prominent in South Africa and advertising revenues are dependent on the size and quality of the audience it attracts.

43.2. Being on the SBS platform and within the EPG is highly likely to raise the audience that the PBS attracts. This is related to the reasoning for the must carry rules in the first place, namely that absent must carry there are many households that would not access the PBS channels (due to a lack of coverage or equipment) or view the channels less due to inconvenience (not being on the same platform and integrated into the EPG).

43.3. Furthermore, as the SBS subscriber base is typically a more affluent household, their audience are also disproportionately valuable to advertisers and hence raises the overall quality of audience for the PBS.

²⁴ Audio-Visual Copyright Society Ltd v Foxtel Management Pty Ltd (No 4) - [2006], Copyright Tribunal of Australia, paragraph 161.

²⁵ Audio-Visual Copyright Society Ltd v Foxtel Management Pty Ltd (No 4) - [2006], Copyright Tribunal of Australia, paragraph 370.

44. **Evidence from commercial negotiations.** Indeed, the evidence from commercial agreements between SBS and PBS licensees in South Africa outside of the Must Carry Regulations are entirely consistent with this reasoning as none have resulted in a payment to the PBS licensee, let alone a substantial one.
- 44.1. As ICASA itself noted in terms of the public consultation process and its position paper on Must Carry Regulations, prior to the regulations coming into effect MultiChoice had a commercial agreement with the SABC to carry its channels²⁶. Under that agreement, MultiChoice did cover the transmission costs of carriage but did not pay the SABC a fee for its PBS channels. That agreement reflected the outcome of commercial negotiations and is therefore a useful ‘natural experiment’ as to the likely outcomes of such commercial negotiations and hence whether the SABC is sacrificing a material commercial fee.
- 44.2. Similarly, we understand that the commercial agreement between MultiChoice and e.tv for the carriage of its free-to-air (“FTA”) channel, which is not subject to Must Carry Regulations, also does not involve a commercial fee for the channel itself. This is in contrast to other channels produced by e.tv but which are not available on the analogue FTA broadcast and for which a fee is paid.
- 44.3. In both these contexts where there is no must offer obligation by the FTA broadcasters, they would only agree to have their channels carried for no fee if they believed that they also benefited in some way. Clearly these benefits are what they derive from advertising revenues based on DStv viewership and are what make being on the platform worthwhile even in the absence of a fee.

4.2.4. International experience

45. The international experience is also consistent with this reasoning. Internationally it is not common practice for SBS licensees to provide any commercial fees to PBS when they carry PBS channels on their platforms under a must carry obligation. In fact, the opposite is more common, namely that PBS licensees are required to compensate SBS licensees for the costs of carriage over their networks. This is indicative that other jurisdictions do not believe there are large opportunity costs to the PBS which are undermined by must carry-must offer type rules.
46. **European Union.** In the EU, Article 31 (2) of the Universal Service Directive provides for member states to determine “...*appropriate remuneration, if any, in respect of measures taken in accordance with this Article while ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks.*”. This grants member states the option of requiring that appropriate remuneration is paid for the measures taken by network operators and not remuneration to the PBS licensee for the content that it provides.²⁷ Thus in the EU, it is envisioned that if remuneration were to be paid in order to make the implementation of a must carry rule viable, this would be due to the SBS licensee. It is important to note that Article 31 does not specify whom is required to pay this remuneration (the member state or the channel that wishes to be carried by the SBS licensee).

²⁶ Government Gazette No 31081 of 2008 ICASA Position Paper and Notice of Intention to Prescribe Regulations Regarding Must Carry Obligations

²⁷ Berg, A. (2003), Must carry: A brief outline, EBU Dossiers 2003/1, European Broadcasting Union, Available: https://www.ebu.ch/CMSimages/en/leg_p_mustcarry_acb_2003_tcm6-8268.pdf.

- 46.1. Illustrative of how such a directive has been implemented, in the UK must carry rules are outlined under Section 64 of the Communications Act of 2003. The Act also has a must offer obligations for PBS. The Act contains no provisions that require SBS to pay any compensation to PBS.
- 46.1.1. However, what is interesting is that up until recently commercial agreements resulted in the BBC paying SBS licensees for carriage on their platforms given the fact that they are entitled to charge platform access fees.
- 46.1.2. The recent renegotiations resulted in these fees being dropped, but still no fees being paid to the BBC for its FTA channels despite the BBC making similar claims to those of the SABC (namely large benefits to the SBS licensees)²⁸. This is yet another ‘natural experiment’ as to the likely outcomes of commercial negotiations between SBS and PBS licensees outside of the must carry context.
- 46.2. Similarly, in France Article 34.2 of the Act²⁹ requires all distributors of services via a network (cable, satellite and online platform providers) to carry public service channels, local and regional channels as well as the parliamentary channel on a must carry basis.^{30,31} However, the legislation does not make provision for distributors to pay remuneration to the channels that are carried on the various platforms. Distributors are required to bear the cost of transport and distribution from the location of editing.³²
- 46.2.1. In yet another ‘natural experiment, Canal+ recently removed the FTA channels of broadcaster TF1 from their platform in France after TF1 requested carriage fees from operators. TF1 and Canal+ failed to reach agreement following 18 months of negotiations, with Canal+ citing TF1’s financial requirements as “*unreasonable and unfounded*”, especially where Canal+ was being asked “*to pay to continue distributing its channels available free of charge on DTT and on the internet*”.³³
47. **United States.** The United States’ Cable Television Consumer Protection and Competition Act of 1992 provides for must carry rules for local non-commercial terrestrial broadcast channels and a must carry option (alongside a commercial option) for local commercial terrestrial channels. Under the must carry option the channels are provided to the SBS at no cost under a must offer rule.³⁴ In addition, as the FCC *Must Carry Order*³⁵ states, the channels subject to must carry are required to bear the costs of delivering the signal that will be broadcast to the operators’ distribution facilities:

²⁸ See <https://www.theguardian.com/media/2014/feb/28/bbc-bskyb-agree-retransmission-deal>

²⁹ Law n° 86-1067 of 30 September 1986 on freedom of communication.

³⁰ Kevin, D. and Schneeberger, A. (2015), Access to TV platforms: must-carry rules and access to free-DTT, European Audiovisual Observatory for the European Commission page 27 and 113.

³¹ In addition, all distributors of services via a network other than satellite are required to make any “...*local public-initiative services intended to provide information on local life*” available to their subscribers, free of charge. Thus, these distributors are required to carry local public television services i.e. local programmes on general channels, cable channels that show local news and local channels. European Audiovisual Observatory (2016), Regional and local broadcasting in Europe, page 80 & 33.

³² European Audiovisual Observatory (2016), Regional and local broadcasting in Europe, pages 33 – 34.

³³ Briel, R (2018), Canal+ stops distribution of TF1 channels, Broadband TV News, 2 March 2018, Available: <https://www.broadbandtvnews.com/2018/03/02/canal-stops-distribution-of-tf1-channels/>.

³⁴ Federal Communications Commission, Cable Carriage of Broadcast Stations, Available: <https://www.fcc.gov/media/cable-carriage-broadcast-stations>.

³⁵ Federal Communications Commission, Implementation of the Cable Television Consumer Protection and Competition Act of 1992 - Broadcast Signal Carriage Issues, 16 July 1993.

"It is the television station's obligation to bear the costs associated with delivering a good quality signal to the system's principal headend. This may include improved antennas, increased tower height, microwave relay equipment, amplification equipment and tests that may be needed to determine whether the station's signal complies with the signal strength requirements..."³⁶

4.2.5. Conclusion on indirect costs

48. The evidence and economic logic indicates that the alleged opportunity cost identified by the SABC is unlikely to exist, and if it does, is unlikely to be large (and may be offset by the costs of carriage by the SBS in any event). As a result, it seems that the current regulatory rule is unlikely to impose high opportunity costs on the PBS.

4.3. FORWARD LOOKING ASSESSMENT OF COSTS

49. The forward-looking assessment of costs seems unlikely to change materially from the historic perspective.
- 49.1. The direct costs of the must carry obligations seem unlikely to increase and if anything may diminish slightly if prices for fiber links and transponder capacity decline.
- 49.2. The potential opportunity cost for the PBS licensee is also unlikely to change. If anything, digital migration may make it even less likely that a commercial agreement would result in fee payable to the PBS licensee for its PBS channels. This is because the SBS platforms should become more important in providing access to audiences for PBS channels, as outlined in the discussion of overall policy benefits above. As such, the PBS licensee benefits more from the carriage agreement and therefore more willing to offer carriage for no fees.
- 49.3. The potential opportunity cost for SBS licensees on the new DTT platform may be no different to any other capacity constrained SBS providers. As a result, the mitigation elements to the existing Must Carry Regulations are likely to remain appropriate. Indeed, imposing must carry on the DTT SBS licensees may also offer no additional benefits as the PBS channels will be unencrypted and therefore available on their STBs in any event. As a result, applying must carry rules to them would also seem pointless.

³⁶ Federal Communications Commission, *West Coast Christian Television, Inc. v. Adelphia Cable* (DA 00-505), paragraph 8, quoting *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 - Broadcast Signal Carriage Issues*, 16 July 1993.

5. ALTERNATIVE ARRANGEMENTS

50. A RIA process typically also considers alternative forms of regulation, including no regulation, and whether these alternatives offer a better means of addressing the stated objective (i.e. does it achieve the same benefits with reduced costs and risks or not). This assessment is also pertinent in the context of a review of existing regulations. A full assessment of the benefits, costs and risks of alternatives is only necessary for alternatives that offer potential rather than ones that can be ruled out quickly as unlikely to work.
51. In this report we focus on the specific alternative put forward by the SABC which is a must carry / must pay regulation. In addition, we also consider a no regulation regime. We note that in a number of countries there are regulations in place that seek to cover the retransmission of commercial terrestrial FTA channels, which is fundamentally different to how PBS channels may be treated. These regulatory regimes have limited relevance to the discussion on universal coverage of PBS channels for public interest purposes. For instance:
- 51.1. In the US local commercial FTA licensees³⁷ are provided with two options for signal carriage, namely either mandatory carriage (must carry) or negotiated retransmission consent. Broadcasters may choose a new carriage option every three years, but once the selection is made they then have to operate under the regulations of that option for the three years.³⁸ However, for local non-commercial licensees³⁹ there is only a must carry / must offer regime in place.
- 51.2. In Australia, there are no must carry rules and a retransmission regime is in place in respect of FTA channels which include both PBS and commercial FTA channels.⁴⁰ This regime allows the retransmission of FTA channels by SBS platforms, without the permission or remuneration of the broadcaster. However, when a SBS platform retransmits FTA channels, compensation is paid to the rights holders of the content that is on the channels and not the original broadcaster.⁴¹

³⁷ A local commercial channel is defined as a channel that is "...licensed and operating on a channel regularly assigned to its community by the Commission (FCC) that... is within the same television market as the cable system." Cable Television Consumer Protection and Competition Act of 1992 Section 614 (h) (1).

Note: A commercial station is considered local if "...if it is assigned to the same television market as the subscriber's cable system". (See European Audiovisual Observatory (2012), IRIS plus 2012-5: Must-carry: Renaissance or Reformation?, page 42.)

³⁸ Federal Communications Commission, Cable Carriage of Broadcast Stations, Available: <https://www.fcc.gov/media/cable-carriage-broadcast-stations>.

³⁹ A local non-commercial educational channel is a channel that "...is owned and operated by public agency, nonprofit foundation, corporation or association... and has as its licensee an entity which is eligible to receive a community service grant, or any successor grant thereto, from the Corporation for Public Broadcasting, or any successor organization thereto... or is owned and operated by a municipality and transmits predominantly noncommercial programs for educational purposes." Cable Television Consumer Protection and Competition Act of 1992 Section (k) (1).

Note: A local station in this instance is a station that "...is licensed to cities within 50 miles of the subscriber's cable system". (See European Audiovisual Observatory (2012), IRIS plus 2012-5: Must-carry: Renaissance or Reformation?, page 42.)

⁴⁰ A retransmission is defined as "where the content of the broadcast is unaltered and either simultaneous with the original transmission or delayed until no later than the equivalent local time." Australian Law Reform Commission (2013), Copyright and the Digital Economy, ALRC Report 122, Final report.

⁴¹ SBS licensees pay licence fees for retransmitting the FTA programming. These licence fees are then collected by Screenrights (a not-for-profit membership organization) and paid out to the rights holders of the content as royalties. Australian Law Reform Commission (2013), Copyright and the Digital Economy, ALRC Report 122, Final report, page 375.

5.1. MUST CARRY / MUST PAY

52. The SABC has proposed regulations where SBS licensees must both carry the PBS channels and must pay the PBS licensee for doing so. We are not aware of this type of regulation being adopted by other major jurisdictions. The reason is most likely because economic reasoning alone demonstrates that it poses considerable challenges, risks and costs relative to the must carry / must offer regulation without any real additional benefits as against the underlying objective.
53. The primary difficulty with such regulations is the enormous complexity involved in any actual determination of the appropriate fee for carriage of the PBS channels and the risk of unduly imposing high costs on SBS licensees (and their subscribers).
 - 53.1. There can be no ordinary commercial negotiations under such regulations in order to discover an appropriate fee through negotiations. This is because the price discovery process of a commercial negotiation relies on the ability of either party to walk away from the negotiations and not conclude an agreement. It is that ability to walk away which reveals what fee is acceptable to both parties in order to ensure the transaction happens.
 - 53.2. A must carry / must pay regulation completely changes the nature of any such commercial negotiation and upsets the ordinary bargaining dynamic. This is because the SBS licensee is unable to walk away from the negotiations by dint of the Must Carry Regulations. This means that it is ultimately forced to accept the fee proposed by the PBS licensee even if such a fee is unreasonable. This risks imposing a substantial unwarranted cost on the SBS licensees through such regulation.
 - 53.2.1. To the extent this is passed on to their subscribers, this imposes a cost on citizens that otherwise would get the PBS for free.
 - 53.2.2. Indeed, this poses a further philosophical question in respect of this type of regulation namely that certain citizens pay far more for public interest programming relative to other citizens merely because of their choice to also subscribe to an SBS platform.
 - 53.3. As a result of this potential for abuse, there would have to be a deadlock breaking mechanism either as part of the regulatory design or by default through litigation in the Courts. However, for either ICASA or the Courts as the potential arbitrator in such a dispute there is no simple means of determining an appropriate fee and resolving the dispute.
 - 53.3.1. The commercial price is not one simply based on the costs of producing the PBS channels as these are common to the normal terrestrial mandate of the PBS operator. Rather a commercial price would have to be based on the relative value derived by the SBS operator, as well as that to be derived by the PBS operator. Whereas the potential revenue benefits that might accrue to the PBS operator might be more easily determined (and yet still not accurately), it is simply unlikely that a regulator could measure the value to the SBS operator.

- 53.3.2. The other risk is what happens during dispute resolution and whether the PBS service is carried or not by the SBS licensees. If not, then this regulation would also potentially undermine the benefits of universal service. The recent case of Canal+ and TF1 in France where the channels were taken off the platform despite 18 months of negotiations demonstrates the possibilities.⁴²
54. A must carry / must pay regulation not only faces these challenges, but also would appear to be an inferior alternative to either the current must carry / must offer regulation or no regulation on any version of the balance of benefits.
- 54.1. If a likely commercial outcome of negotiations unconstrained by a must pay requirement would be a low or no fee for the PBS channels, then a must pay rule can only result in high costs both in terms of unwarranted fees imposed on the SBS licensees and the administration of disputes over those fees (borne by ICASA and/or the Courts). Under this circumstance, a must carry / must offer regulation such as that currently in place is a superior alternative as it eliminates these costs whilst still not imposing any opportunity cost on the PBS licensee as they would not otherwise have got a commercial fee in any event or the fee would be small and hence the cost low.
- 54.2. Alternatively, if the likely outcome of commercial negotiations unconstrained by a must pay requirement would be a substantial fee to the PBS licensee because of a material difference in the relative benefits to the SBS licensee relative to the PBS licensee, then a no regulation alternative would still be superior to a must pay regime. This is because not only would the commercial negotiation reveal the appropriate price for the PBS channels which negotiations constrained by the must pay rule cannot, but also the risks of no carriage would be low as the SBS licensees would value carrying the PBS channels.
55. Indeed, if the PBS licensee was truly confident that unconstrained commercial negotiations would yield agreement for carriage at a substantial fee, then it would be satisfied with the no regulation approach. It is typically where it is not confident of such an outcome that it may prefer the must pay regulation as that assists in strengthening its bargaining position in order to extract a high but unwarranted fee from the SBS platforms.

5.2. NO REGULATION

56. A RIA should also consider whether no regulation as an alternative delivers superior outcomes to all regulation alternatives. This would typically be where the costs of regulation outweigh the benefits, either because the benefits can be achieved without regulation or where regulation imposes substantial costs (of compliance or unintended consequences).
57. Whether or not no regulation around the carriage of PBS channels is a superior option or not ultimately depends on the assessment of the likely outcomes of removing the Must Carry Regulations.

⁴² Briel. R (2018), Canal+ stops distribution of TF1 channels, Broadband TV News, 2 March 2018, Available: <https://www.broadbandtvnews.com/2018/03/02/canal-stops-distribution-of-tf1-channels/>.

- 57.1. If it is likely that negotiations between the PBS and SBS licensees will result in an agreement to carry all the PBS channels regardless of any must carry obligation, then a no regulation approach may be superior. This is because the must carry regulations would be unnecessary to achieve the benefits of universal service, and there is scope for unconstrained commercial negotiation.
- 57.1.1. However, such an approach may result in inferior outcomes for the PBS licensee relative to the must carry alternative if such negotiations result in the PBS licensee paying for carriage. In other words, the incidence of direct costs may differ to the must carry alternative, even if the total costs are the same as under regulation.
- 57.2. However, if there is some risk that the SBS licensees may not reach agreement with the PBS licensee to carry all PBS channels (and not just some) for whatever reason (such as a perceived lack of value or unreasonable demands), then a no regulation approach would be inferior. This is because all or some (if only a subset of PBS channels are carried) of the benefits associated with universal service of PBS channels would be lost.
- 57.2.1. In the event that the review finds that no carriage fee is likely to result from normal commercial negotiations in any event, then the Must Carry Regulation would be superior as it imposes no additional costs on the PBS licensee but also removes all risk of losing the benefits of universal service. This may explain why many jurisdictions such as the EU, US and SA in the past have adopted the must carry / must offer regulations.

6. CONCLUSION

58. ICASA aims to conduct a RIA on its Must Carry Regulations that are applied to SBS licensees and require eligible licensees to carry designated PBS channels, namely SABC 1, 2 & 3. A RIA provides an evidence-based comparative tool that can assist policy makers and/or regulators evaluate the impact of regulatory interventions imposed in pursuit of policy objectives. In the case of Must Carry Regulations, that objective is universal coverage of public interest programming as delivered by PBS channels. A RIA aims to assess whether the benefits of an intervention exceed the costs, and also how that intervention compares to alternative interventions and no intervention at all.
59. On the benefit aspect, a backward looking assessment should look at whether the regulations have been complied with and universal coverage provided, and the extent of the benefit. Whilst ICASA will need to undertake its own assessment, but it would seem that as against relevant measures for these the regulations have been successful in delivering benefits.
- 59.1. There is compliance and that compliance has ensured that almost 10% of the population with no PBS signal whatsoever are covered.
- 59.2. Roughly half of SA TV households are able to receive PBS channels through an SBS platform, and these SBS viewers account for over 20% of PBS audience figures.
60. On a forward-looking basis it seems the benefits delivered by Must Carry Regulations are likely to increase as the PBS terrestrial signal coverage will reduce relative to current levels, and digital migration is likely to leave households on SBS platforms without any alternative means of accessing PBS channels.
61. The direct costs of transmitting the PBS channels over the SBS platforms are easily quantifiable. In terms of indirect costs, the SABC has raised a concern that it faces an opportunity cost insofar as the regulations prevent it from negotiating a commercial fee for the PBS channels. Whilst ICASA will need to assess this claim, economic logic and evidence from negotiations outside of Must Carry Regulations all point against the existence of such a cost (or its materiality).
- 61.1. PBS channels cannot drive subscriber take up or retention because the household already has access to those channels free. In contrast, the carriage may be of far more material benefit to PBS licensees as it broadens the audience base which drives advertising revenues. As both parties benefit from a carriage arrangement, a no payment by either party is a probable commercial outcome.
- 61.2. This is supported by evidence from where negotiations have taken place with FTA channels, including PBS channels, outside of the Must Carry Regulations and which precisely yielded that outcome.
62. On a forward looking basis this is unlikely to change, and if anything the value to the PBS licensee is likely to increase due to the expected increased dependency on SBS licensees to reach their audience.
63. On the back of the SABC concerns, it has raised an alternative form of regulation, namely a must carry / must pay regulation, which ICASA too will need to assess. We have not

found precedent for this in other major jurisdictions and economic logic can shed light on the reasons why.

- 63.1. Essentially such regulations alter the bargaining dynamic, leading scope for SBS platforms to be charged high and unwarranted fees to carry the PBS channels. It is also likely to mire the process in litigation which a regulator is unlikely to be able to resolve satisfactorily given the difficulties in evaluating an appropriate or reasonable fee.
 - 63.2. Whilst this may serve the interests of PBS channels, it does not serve the stated objective of such regulations. It also imposes a large cost / unintended consequence that existing regulations do not. It also does so in the context where ordinary commercial negotiations are unlikely to have yielded a commercial fee for the PBS channels in any event.
64. The other alternative ICASA will need to assess is that of no regulation whatsoever. This is only likely to be superior to existing regulations if ICASA can be confident that in the absence of Must Carry Regulations there will be agreement by all SBS licensees to offer carriage to the PBS channels and achieve the same benefits as is currently the case. If such an outcome is not certain, a no regulation approach presents the risk that the benefits of the stated objective are not achieved.