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GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

NO. 1951

31 March 2022

**Independent Communications Authority of South Africa**

350 Witch-Hazel Avenue, Eco Point Office Park

Eco Park, Centurion

MUST CARRY AMENDMENT REGULATIONS, 2022

The Independent Communications Authority of South Africa hereby amends the ICASA Must Carry Regulations, 2008 (published in Government Gazette No. 31500 on 10 October 2008, in terms of section 4 of the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000), as amended, read with sections 60(3) of the Electronic Communications Act, 2005 (Act No. 36 of 2005), as amended, to the extent reflected in the Schedule.

A handwritten signature in black ink, appearing to read 'Dr. Keabetswe Modimoeng', written over a horizontal line.

DR KEABETSWE MODIMOENG**CHAIRPERSON****DATE: 30/03/2022**

SCHEDULE

1. DEFINITIONS

In these regulations “the Regulations” means the regulations published by Government Notice No. 1271 (Government Gazette No. 31500) of 10 October 2008.

2. AMENDMENT OF REGULATION 1 OF THE REGULATIONS

2.1 Regulation 1 of the Regulations is hereby amended by the substitution of the definition “Must Carry Channel” of the following definition:

“**Must Carry Channel**’ means the television programmes comprising a channel of the PBS Licensee to be added to the SBS Licensee in accordance with Regulation 4”;

2.2 Regulation 1 of the Regulations is hereby amended by the substitution of the definition “Non-Must Carry Channels” of the following definition:

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

3. AMENDMENT OF REGULATION 3 OF THE REGULATIONS

3.1 Regulation 3 of the Regulations is hereby amended by the addition of the following sub-regulation 2:

“(2) The PBS and the SBS licensees must negotiate the carriage of PBS channels.”

4. SUBSTITUTION OF REGULATION 4 OF THE REGULATIONS

4.1 The following regulation is hereby substituted for regulation 4 of the Regulations:

- “(1) All SBS Licensees must carry the channels of the PBS Licensee designated as must carry channels as part of the service offering, subject to Regulation 5.
- (2) The SBS Licensee must submit a request to carry the television programmes of the PBS licensee within six (6) months of the coming into effect of the Must Carry Amendment Regulations, 2022 or within six (6) months from the date of issuance of a new SBS Licence or within six (6) months from the date that an obligation to add Must Carry Channels is triggered as a result of a licensee adding new channels that amount to twenty-nine (29) channels or more.
- (3) The SBS Licensee must commence to transmit the must carry channels within three (3) months of receipt of the must carry channels from the PBS Licensee.
- (4) The SBS Licensee:
- (a) whose service offering consists of more than twenty-nine (29) channels is subject to the obligation to carry the television programmes of the PBS Licensee;
 - (b) must ensure that the thirtieth (30th) channel added to its SBS is a must carry channel of the PBS licensee;
 - (c) must ensure that every twentieth (20th) channel added to its SBS over the minimum thirty (30) channels is a must carry channel (being the 50th, 70th, 90th channels and so forth) in accordance with regulation 3;

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

5. AMENDMENT OF REGULATION 6 OF THE REGULATIONS

5.1 Regulation 6 of the Regulations is hereby amended by the substitution for sub-regulation (1) of the following sub-regulation:

“(1) The PBS licensee must offer its television programmes, subject to commercially negotiable terms, to the SBS licensee upon a request from the SBS licensee.”

5.2 Regulation 6 of the Regulations is hereby amended by the substitution for sub-regulation (2) of the following sub-regulation:

“(2) The PBS licensee must offer its television programmes to the SBS licensee within three (3) months from the date of conclusion of the agreement on commercially negotiable terms.”

5.3 Regulation 6 of the Regulations is hereby amended by the insertion after sub-regulation (2) of the following sub-regulation:

“(2A) The agreement contemplated in sub-regulation (2) above must be concluded within three (3) months from the date of receiving a request for the Must Carry Channels.”

6. INSERTION OF REGULATION 6A IN THE REGULATIONS

6.1 The following regulation is hereby inserted in the Regulations after regulation 6:

“6A. NEGOTIATION OF COMMERCIALY AGREEABLE TERMS

- (1) Should the parties to a commercial negotiation fail to conclude an agreement within three (3) months as contemplated in regulation 6(2A), the parties may request an extension in writing to the Authority to finalise the agreement.
- (2) A request for extension must be lodged with the Authority before the lapse of the three (3) months period mentioned in regulation 6(2A) above.
- (3) The duration of extension granted by the Authority in terms of regulation 6A(1) must not exceed a period of thirty (30) working days.
- (4) If the parties fail to conclude the agreement, they must refer the dispute to the Authority in writing within five (5) days of reaching a breakdown in negotiations.
- (5) The Authority may refer any failure to comply with these Regulations or any unresolved dispute to the CCC for resolution."

7. SUBSTITUTION OF REGULATION 7 OF THE REGULATIONS

7.1 Regulation 7 of the Regulations is hereby amended by the substitution for regulation 7 of the following regulation:

"7. TRANSMISSION OF TELEVISION PROGRAMMES

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

8. SUBSTITUTION OF REGULATION 9 OF THE REGULATIONS

8.1 Regulation 9 of the Regulations is hereby amended by the substitution for regulation 9 of the following regulation:

"9. MONITORING COMPLIANCE WITH THE REGULATIONS

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

9. INSERTION OF REGULATION 9A IN THE REGULATIONS

9.1 The following regulation is hereby inserted in the Regulations after regulation 9:

"9A. TRANSITIONAL ARRANGEMENT

The arrangement between the licensees in terms of the 2008 Must Carry Regulations will continue to be applicable until such time as the parties have concluded the commercial agreement in terms of regulation 6(2A), read with regulation 6A."

10. SUBSTITUTION OF REGULATION 10 OF THE REGULATIONS

10.1 The following regulation is hereby substituted for regulation 10 of the Regulations:

"10. CONTRAVENTION AND FINES

- (1) Any person that contravenes regulations 4(2), 4(3), 5(2), 6, 6A(1), 6A(2), 6A(4), 6A(6), 7 and 9 is liable to a fine not exceeding R1 000 000,00 (one million Rands).
- (2) Any person that contravenes any regulations not specified in sub-regulation (1) is liable to a fine not exceeding R100 000,00 (one hundred thousand Rands).

- (3) Any person that repeatedly contravenes any regulation in the Regulations is liable to a fine not exceeding R1 000 000,00 (one million Rands). "

11. SHORT TITLE AND COMMENCEMENT

These Regulations are called the Must Carry Amendment Regulations, 2022 and will come into force upon publication thereof in the Gazette.

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

NO. 1952

31 March 2022



Independent Communications Authority of South Africa

350 Witch-Hazel Avenue, Eco Point Office Park

Eco Park, Centurion

Private Bag X10, Highveld Park 0169

REASONS DOCUMENT

MUST CARRY AMENDMENT REGULATIONS, 2022

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ACKNOWLEDGEMENTS

The Independent Communications Authority of South Africa ("the Authority/ICASA") would like to acknowledge all stakeholders who participated in the process aimed at reviewing ICASA Must Carry Regulations, 2008.

The following stakeholders submitted written representations to the Draft Must Carry Amendment Regulations, 2021 (Draft Regulations)¹.

- 1) MultiChoice.
- 2) The South African Broadcasting Corporation ("SABC").
- 3) eMedia Investments.
- 4) Media Monitoring Africa (MMA) and Support Public Broadcasting (SOS).

¹ Government Gazette 44338 of 26 March 2021

1. INTRODUCTION AND BACKGROUND

- 1.1 This Reasons Document analyses the stakeholders' submissions to the Draft Regulations and provides the Authority's reasons on its decision to amend the ICASA Must Carry Regulations, 2008. On 13 December 2019, the Authority published the Discussion Document on the Review of the ICASA Must Carry Regulations, 2008 ("the Discussion Document"),² in accordance with section 4B of the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000) ("ICASA Act"). The purpose of the Discussion Document was to solicit comments from stakeholders on the review of the ICASA Must Carry Regulations, 2008.
- 1.2 The closing date for the written representations on the Discussion Document was extended from 06 March 2020 to 31 March 2020 due to requests from stakeholders. The Authority received two (2) written submissions to the Discussion Document from MultiChoice and the SABC. Subsequent to that, the Authority analysed the submissions and published the Draft Must Carry Amendment Regulations, 2021³ for comments. Thereafter the Authority held public hearings on 28 June and 07 July 2021.
- 1.3 In terms of the amended Must Carry Regulations, the SBS and PBS must negotiate and agree on the carriage fees of television programmes of the PBS in line with these regulations. The Authority does not have the mandate to get involved in the commercial negotiations.
- 1.4 The Authority has now finalised the process of amending the Must Carry Regulations and is satisfied that the new regulations will promote access to the public broadcasting programmes by members of the public. This Reasons Document provides the reasons for the amendments to the published Regulations.

² Government Gazette 42902 of 13 December 2019

³ Government Gazette 44338 of 26 March 2021

2. SPECIFIC AMENDMENTS TO REGULATIONS

The specific amendments to the Regulations must be read with section 3 on submissions from stakeholders for detailed analysis on the submissions and the Authority's decisions.

2.1 DEFINITIONS: REGULATION 1

2.1.1 The Authority have decided to substitute the definition of "Must Carry Channels" and "Non-Must Carry Channels" as follows;

'Must Carry Channel' mean the television programmes comprising a channel of the PBS Licensee to be added to a SBS Licensee in accordance with Regulation 4;

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

2.1.2 MultiChoice suggested that the word bouquet in the definitions of Must Carry Channel and Non-Must Carry Channel be replaced with the word subscription broadcasting service. The reason given by MultiChoice is that the choice of description overlooks the fact that in the multi-channel environment, subscription broadcasters typically offer multiple bouquets. The Authority supports the proposal from MultiChoice and has decided to amend the two definitions to delete the word "bouquet" and replace it with "subscription broadcasting service". The Authority has made the necessary changes through the regulations.

2.2 TELEVISION PROGRAMES TO BE CARRIED: REGULATION 3

2.2.1 Regulation 3(2) is amended by insertion of the following provision;

"3.2 The PBS and the SBS licensees must negotiate the carriage of PBS channels."

The purpose of the insertion is to provide certainty that the parties to the agreement should negotiate carriage as the Authority does not have the mandate to get involved in the commercial negotiations.

2.3 OBLIGATION TO CARRY TELEVISION CHANNELS: REGULATION 4

2.3.1 Regulation 4(2) of the Regulations is amended as follows:

"4(2) A SBS Licensee must submit a request to carry the television programmes of the PBS licensee within six (6) months of the coming into effect of the Must Carry Amendment Regulations, 2022 or within six (6) months from the date of issuance of a new SBS Licence or within six (6) months from the date that an obligation to add Must Carry Channels is triggered as a result of a licensee adding new channels that amount to twenty-nine (29) channels or more."

2.3.2 Regulation 4(2) is amended to recognise that an obligation to add Must Carry Channels is triggered as a result of a licensee adding new channels that amount to twenty-nine (29) channels or more. This is especially for SBSs that have been exempted from carriage due to their size.

2.3.3 Regulation 4(5)(b) and 4(5)(c) of the Regulations are amended as follows:

"4(5)(b) ... must ensure that the thirtieth (30th) channel added to its SBS is a must carry channel of the PBS licensee.

4(5)(c) ... must ensure that every twentieth (20th) channel added to its SBS over the minimum thirty (30) channels is a must carry channel (being the 50th, 70th, 90th channels and so forth) in accordance with Regulation 3.”

2.3.4 The above regulations are amended to replace the word bouquet with Subscription Broadcasting Service.

2.3.5 Regulations 4(4) and 4(7) are deleted to give the SBS and PBS the avenue to negotiate Must Carry contract. Therefore Regulation 4 has been substituted to give effect to the new numbering of the Regulation as a result of deleting certain clauses.

2.4 COMMERCIALLY NEGOTIABLE TERMS: REGULATION 6A

2.4.1 The Authority has provided a framework for commercial negotiations in relation to the carriage of PBS television programmes to ensure certainty on the negotiation process as follows;

- “(1) Should the parties to a commercial negotiation fail to conclude an agreement within three (3) months as contemplated in regulation 6(2A), the parties may request an extension in writing to the Authority to finalise the agreement.
- (2) A request for extension must be lodged with the Authority before the lapse of the three (3) months period mentioned in regulation 6(2A) above.
- (3) The duration of extension granted by the Authority in terms of regulation 6A(1) must not exceed a period of thirty (30) working days.
- (4) If the parties fail to conclude the agreement, they must refer the dispute to the Authority in writing within five (5) days of reaching a breakdown in negotiations.

(5) The Authority may refer any failure to comply with these Regulations or any unresolved dispute to the CCC for resolution.”

2.4.2 The purpose of inserting Regulation 6A is to align the regulations with section 60(3) of the ECA that the subscription broadcast service licensees must carry television programmes provided by public broadcasting service licensees subject to commercially negotiable terms.

2.4.3 If the negotiating parties fail to reach an agreement after exhausting the processes of resolving the disputes such as arbitration, the parties must refer the dispute to the Authority in writing within five (5) days of reaching a breakdown in negotiations. The Authority will, through the CCC, investigate the dispute to ascertain matters such as the reasonableness of the negotiations. It worth noting that the Authority will not interfere in the commercial nature of the negotiations.

2.4.4 The timeframe for negotiations seeks to ensure that the negotiating parties do not negotiate in perpetuity whereby the Regulations will not be fully implemented.

2.5 TRANSITIONAL ARRANGEMENT: REGULATION 9A

2.5.1 The Authority inserted Regulation 9A as follows;

“9A. The arrangement between the licensees in terms of the 2008 Must Carry Regulations will continue to be applicable until such time as the parties have concluded the commercial agreement in terms of regulation 6(2A), read with regulation 6A.”

2.5.2 The Authority believes that this provision will ensure that the process of commercial negotiations do not hinder the carriage and thereby, access of PBS channels.

2.6 CONTRAVENTIONS AND PENALTIES

2.6.1 Regulation 10 of the Regulations is hereby substituted as follows:

"10. CONTRAVENTION AND FINES

- (1) Any person that contravenes regulations 4(2), 4(3), 5(2), 6, 6A(1), 6A(2), 6A(4), 6A(6), 7 and 9 is liable to a fine not exceeding R1 000 000,00 (one million Rands).
- (2) Any person that contravenes any regulations not specified in sub-regulation (1) is liable to a fine not exceeding R100 000,00 (one hundred thousand Rands).
- (3) Any person that repeatedly contravenes any regulation in the Regulations is liable to a fine not exceeding R1 000 000,00 (one million Rands).

2.6.2 The Authority has included Regulations 6A(1), 6A(2), 6A(4), as cause for being penalised. These sections are central to the conclusion of commercial agreement and the success of Must Carry regulations.

2.6.3 Regulation 4(6) is removed from Regulation 10(1)(a) from attracting a penalty for non-compliance. In the Draft Regulations⁴ the Authority had proposed the insertion of regulation 4(6) under sub-regulation 10 (1)(a) of the Regulations as a cause for being penalized under this Regulation. However, Regulation 4(6) merely speaks to the addition of channels accordance with Regulations 4(5)(b) and 4(5)(c) and the applicability of sub regulations 7 and 9 into the penalties

⁴ Published in Government Gazette 44338 of 26 March 2021

clause. Inclusion of Regulation 4(6) into the penalties clause outlined in regulation 10(1)(a) will be difficult to enforce and the Authority amended the Regulations accordingly to remove 4(6).

2.6.4 Regulation 10 has been amended to provide clarity that the Authority will impose a fine, once it has been determined by the CCC that a licensee has contravened a regulation in the Regulations. The 2008 Regulations provided for a discretion on whether to impose a fine or not. The fine is meant to indicate the seriousness for which the Authority views these Regulations and is meant as a deterrent to non-compliance.

3. SUBMISSIONS RECEIVED AND AUTHORITY'S DECISIONS

3.1 RATIONALE FOR MUST CARRY RULES

3.1.1 This section considers the submissions from stakeholders and provides the Authority's decisions and reasons regarding the Must Carry Amendment Regulations.

3.1.2 MultiChoice quotes the Authority's position regarding the purpose of the Must Carry Regulations. The Authority's position in the Findings Document as quoted by MultiChoice is that:

"Must Carry must be driven by a central public interest principle of universal access to ensure that PBS programming is available to all citizens, targeting those citizens that use SBS as their means of access to television".⁵

3.1.3 MultiChoice reasons that the SABC was established with the public mandate to service the needs of all South African society. According to MultiChoice, to enable the SABC to achieve its universal access mandate, Sentech was established as a common carrier broadcasting signal distributor, with a

⁵ MultiChoice submission: Draft Must Carry Amendment Regulations, 2021, page 16

statutory obligation to carry the SABC and to provide universal access for all South Africans to broadcasting services.⁶

3.1.4 MultiChoice is further of the view that Must Carry rules advance universal access further, by ensuring that pay TV subscribers are able to view the public broadcasting channels conveniently through the pay TV services to which they subscribe, without having to switch platforms to access the PBS content.⁷

3.1.5 MultiChoice states that the universal access objective of Must Carry has long been recognised by the SABC when it stated that it was to ensure that content of the SABC is ubiquitous on all broadcasting platforms and that, South African viewers, whichever platform they choose to use to access their television programming, have ready access to public service content.

3.1.6 MultiChoice indicates that it supports the Authority's position in paragraph 2.37 of the Findings Document, that Must Carry must be driven by universal access, targeting those citizens that use SBS as their means of access to television. This principle underscores the Must Carry Regulations and should inform their amendment.⁸

3.1.7 MultiChoice submits that the SABC's assertion that, compared to Europe, where the insertion of the Must Carry Regulations is meant to address the coverage challenges of the subscription broadcasters' consumers, in South Africa, the Must Carry regulations are implemented to address the coverage interruptions for all consumers in order to satisfy the universal access concerns, is flawed.⁹

3.1.8 In its submission, MultiChoice quotes the 2014 National Integrated ICT Policy Green Paper that recognized the Must Carry rules are prevalent in a

⁶ Ibid, page 16

⁷ Ibid, page 16

⁸ Ibid, page 18

⁹ Ibid, page 66

number of countries and are aimed at ensuring that audiences have easy access to public interest content. The reference continues that, the aim of the Must Carry rules is to ensure that audiences do not have to switch platforms to access the public interest content.¹⁰

3.1.9 The Authority still holds its view as expressed in the Findings Document that the rationale for Must Carry is to ensure universal access to public broadcasting services. This rationale is expressed in the fact that even the members of the public who do not struggle with reach also benefit from the must-carry rules. Must Carry is driven by a central public interest principle of universal access to ensure that PBS programming is available to all citizens, targeting those citizens that use SBS as their means of access to television.

3.2 MUST CARRY AND UNIVERSAL ACCESS

3.2.1 MultiChoice states that it agrees with the Authority, in that Must Carry Regulations have been effective in ensuring universal access to PBS television programmes, and that they will continue to be necessary and relevant in a digital environment to ensure universal access to public broadcasting services.¹¹

3.2.2 MultiChoice submits that research shows that even though most subscribers can access the SABC terrestrially, a significant number of the SABC's audiences prefers to watch SABC over a pay TV service. According to MultiChoice, thirty one percent (31%) of SABC1's and twenty five percent (25%) of SABC2's audience are made up of DSTV subscribers. MultiChoice points out that it is therefore possible that the SABC's audience numbers would fall significantly, and universal access would be weakened if Must Carry Channels were not carried.¹²

¹⁰ Ibid, page 66

¹¹ Ibid, page 18

¹² Ibid, pages 18 - 19

- 3.2.3 Further, MultiChoice argues that when pay TV subscribers watch SABC channels on pay TV services, they are “back-counted” as SABC viewers. As a result, SABC is able to monetise and sell this audience to advertisers. MultiChoice denies allegations made by the SABC that Must Carry Channels boost its subscription or advertising revenue.¹³
- 3.2.4 MultiChoice states that given the evidence provided during the inquiry, which demonstrates the universal access benefits of Must Carry, it believes the Authority has reached the correct conclusion in respect of the purpose, effectiveness and ongoing relevance of Must Carry.¹⁴
- 3.2.5 MultiChoice is of the view that the Findings Document mistakenly frames the universal access benefit as being only in relation to the SABC’s analogue network coverage. For example, it states that “through Must Carry, the public can access the PBS’s channels where the public broadcasting signal does not reach.” MultiChoice states that there is already 100% national free-to-view SABC coverage, including public broadcasting signal coverage.¹⁵
- 3.2.6 MultiChoice states that the Findings Document, in the absence of evidence to support the claim, states that “the SBS benefit by getting subscribers who have no access to freely available PBS analogue network.”¹⁶ MultiChoice disputes the assertion that people subscribe to DSTV in order to gain access to the SABC channels.¹⁷
- 3.2.7 MultiChoice is otherwise happy with the Authority’s position regarding the primary purpose of Must Carry.¹⁸

¹³ Ibid, page 19

¹⁴ Ibid, page 19

¹⁵ Ibid, page 20

¹⁶ Ibid, page 22

¹⁷ Ibid, page 22

¹⁸ Ibid, page 24

- 3.2.8 MultiChoice submits that the universal services access rationale for Must Carry regulations is to ensure that subscribers do not have to switch platforms to access PBS content. As a result, MultiChoice submits that the legislature decided that the Must Carry obligation on pay TV is in the public interest, even though it requires SBS to carry the channels of one of their competitors.¹⁹
- 3.2.9 Furthermore, MultiChoice raises concerns that Must Carry obligations are restrictions on pay TV broadcasters in order to assist in the achievement of universal access objectives. According to MultiChoice, Must Carry obligations limit their right to freedom of expression and their commercial interests. In other words, pay TV operators incur the opportunity cost of not carrying other channels of their choice, which they could commercialise to generate subscription and advertising revenue.²⁰
- 3.2.10 MultiChoice submits that it is keen to ensure that the new regime is no less effective than the existing one and that the Must Carry channels will continue to be carried by pay TV broadcasters on reasonable terms and continue to advance universal access. MultiChoice emphasises that if the SABC channels were not carried by pay TV broadcasters, pay TV subscribers would have to take additional steps to view the SABC services thereby undermining universal access.²¹
- 3.2.11 SABC submits that the interests of the public broadcaster and SBS are not aligned on this matter. SBS licensees have therefore become accustomed to accessing SABC's expensively produced, popular content at no cost. SABC requires the Authority to make regulations that are reasonable, fair and that "protect the integrity and viability of the public broadcaster".²²

¹⁹ Ibid, page 6

²⁰ Ibid, page 7

²¹ Ibid, page 8

²² SABC, Submission on the ICASA Draft Must Carry Amendment Regulations, 2021, page 6

3.2.12 While the SABC notes the Authority's position, that the rationale for the Must Carry Regulations is to ensure universal access to public broadcasting platforms, it argues that because of the very nature of subscription services (which can be switched off for non-payment), they cannot be relied upon for permanent universal access. Further it is the SABC's submission that its three Must Carry channels are already universally and freely accessible through other non-subscription broadcasting platforms. Therefore, for Multichoice, Must Carry is not about universal access for subscribers, but about convenience for SBS subscribers and commercial benefit for the company.²³

3.2.13 It is the SABC's submission that all South African audiences are already "guaranteed access to the PBS channels". It argues that it is **commonly accepted** that the sector has evolved to the point that the three SABC 'Must Carry channels' are now accessible on several free, non-subscription broadcasting platforms simultaneously and that the Authority review its position that access to SABC's three channels is not yet guaranteed.²⁴

3.2.14 MultiChoice submits that during the public hearings, the SABC suggested that MultiChoice misconstrued the concept of universal access, stating that MultiChoice confuses it with subscriber convenience.²⁵

3.2.15 Multichoice argues that even though pay TV homes are able to watch the SABC through means other than pay TV, it is a principle of universal access that subscribers should be able to watch the channels through the pay TV service to which they subscribe.²⁶

3.2.16 **The Authority still holds the view posited in the 2007 ICASA Must Carry Discussion Document, that universal access to programming**

²³ SABC, Submission on the ICASA Draft Must Carry Amendment Regulations, 2021, pages 7-8

²⁴ Ibid, pages 8-9

²⁵ MultiChoice submission: Draft Must Carry Amendment Regulations, 2021, page 11

²⁶ Ibid, page 13

of public broadcaster is central to Must Carry Regulations.²⁷ Audiences must be able to access the programmes of the PBS in all geographical areas within the Republic of South Africa. With regards to the channels of SABC being available through other non-subscription services, the Authority provides that these non-subscription services are not regulated to provide Must Carry channels.

Subscriber Convenience vs Universal Access

3.2.17 SABC argues that Must Carry is less to do with universal access and more to do with SBS licensees' commercial benefit. It alleges that while MultiChoice advocates that universal access be the guiding principle in Must Carry Obligations, it disregards this notion by wanting to only carry popular SABC's channels and depriving defaulting subscribers' access to those SABC channels which are meant to be freely accessible (*own emphasis*). However, it is SABC's contention that its Must Carry channels are already universally and freely accessible through other non-subscription platforms like SAPO and Sentech.²⁸

3.2.18 SABC further argues that while DStv or other SBS subscribers may be inconvenienced if the SABC withdrew the three channels after failing to agree on commercial terms, they still have a very real opportunity of accessing three SABC channels without having to pay a subscription.²⁹

3.2.19 The Authority maintains that Must Carry must be driven by a central public interest principle of universal access to ensure that PBS programming is available to all citizens, targeting those citizens that use SBS as their means of access to television.

²⁷ SABC, Submission on the ICASA Draft Must Carry Amendment Regulations, 2021, page 14

²⁸ Ibid, pages 7-8

²⁹ Ibid, page 8

3.3 SUBSCRIPTION BROADCASTING SERVICES BENEFITS

- 3.3.1 MultiChoice refutes the SABC's assertion that if the broadcasting services were accessible throughout the country, the Must Carry obligations were not going to be necessary on the basis that, prior to the Must Carry regulations being effected, the SABC already had 100% free to air coverage throughout the country. Thus, the Must Carry obligations were not merely about the geographical coverage but further, to ensure that the pay television audiences also gain access to the public broadcasting services programming. The Must Carry obligation is applied largely because it ensures universal coverage on private platforms where the public broadcasting services may not necessarily be available.³⁰
- 3.3.2 MultiChoice rejects the SABC's assertion that the SBS should pay the public broadcaster for the significant contribution the latter made towards the recognition and increase in the audiences' uptake of the former with an intention to enjoy the public broadcaster's content³¹.
- 3.3.3 MultiChoice indicates that the SABC has not provided any evidence to substantiate its claims that the former gained audience based on the latter's content. Rather, MultiChoice adds that the audiences subscribe to subscription broadcasting to vary their programming content through exclusive platforms offered by the SBS³².
- 3.3.4 MultiChoice highlights that its transmission of the public broadcaster's content is not necessarily based on their popularity but largely on the Must Carry obligations. MultiChoice further adds that, in fact, the transmission of the public broadcaster's content promotes universal access and assists the public broadcaster to achieve its own mandate. As it stands, the SABC

³⁰ MultiChoice submission: Draft Must Carry Amendment Regulations, 2021, page 67

³¹ Ibid, page 67

³² Ibid, page 67

enjoys significant financial gains even though this was not the intention of the Must Carry obligations.³³

3.3.5 The Authority notes that there was an existing agreement between MultiChoice and the SABC before the Must Carry Regulations came into force, which resulted in no fee being paid for the carriage of the SABC channels by MultiChoice.³⁴

3.3.6 However, the decision of the Authority is that payment, if any, regarding the transmission of must carry channels must be negotiated by both PBS and the SBS in line with section 60(3) of the ECA.

3.4 PUBLIC BROADCASTING SERVICES COSTS AND BENEFITS

3.4.1 MultiChoice indicates that, despite ICASA's numerous attempts to access the SABC's claims that it incurs the costs of the Must Carry obligations even though transmitted through the SBS, the SABC so far has failed to provide the Authority with such evidence³⁵.

3.4.2 MultiChoice continues that in fact, it is the one that covers the costs associated with the transmission costs of the Must Carry obligations. MultiChoice also motivates that as Must Carry does not involve the commercial supply of content, the issue of content costs does not arise. Rather, it involves the simultaneous transmission by SBS licensees of content that is already broadcast by the SABC.³⁶

3.4.3 MultiChoice advances that the Must Carry obligations require the instant transmission by the SBS of the content from the public broadcaster. If the

³³ Ibid, page 68

³⁴ ICASA Discussion Document on Must Carry Obligations September 2007, Government gazette 300305, page 7

³⁵ MultiChoice submission: Draft Must Carry Amendment Regulations, 2021, page 68

³⁶ Ibid, page 68

SBS is forced to pay for the content, it will increase the subscribers' instalments in order to recover the costs it would incur. If the SBS is to stop carrying the Must Carry content, this would immediately terminate the transmission of the public broadcaster's content³⁷.

3.4.4 MultiChoice believes that by transmitting the SABC's content, the latter enjoys double revenues in that, it gains profits from advertising revenue and also that the audiences that watch the public broadcaster's content on subscription broadcasting platforms, is being sold to the advertisers³⁸.

3.4.5 MultiChoice disagrees with the SABC's assertion that it is not able to benefit from the advertising targeting the audiences on the subscription broadcasting services. MultiChoice substantiates that the SABC is able to determine and control the advertising material on their Must Carry channels and subsequently receives all of the revenue. This is because the SABC audiences on the MultiChoice platform are back counted and added to the public broadcaster's figures, thus enabling the SABC to sell greater advertising audience and obtain greater revenue³⁹.

3.4.6 **The Authority's decision is that it would not request additional cost information from stakeholders as the PBS and the SBS must negotiate the terms and conditions of Must Carry and reach an agreement in terms of section 60(3) of the ECA. Section 60(3) stipulates that the Authority should, "... 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 licensee."** The Authority is of the view that the costs of Must Carry will be taken into consideration by the parties when they conclude their

³⁷ Ibid, page 68

³⁸ Ibid, page 68

³⁹ Ibid, page 69

agreement as per section 60(3) of the ECA regarding the carriage of the PBS programmes.

3.5 COSTS TO CONSUMERS

3.5.1 MultiChoice contradicts the SABC's view that the audience is being triple charged through the television licenses, the subscription fees and the municipality taxes. Instead MultiChoice argues that the audiences are not forced to watch any television programming through the subscription broadcasting platform, but rather that they have a choice of which platform they wish to do so from⁴⁰.

3.5.2 MultiChoice emphasises that it does not impose additional costs to the consumers but simply retransmits the SABC channels through a multiplex set as part of the subscription broadcasting bouquets. Conversely, it is the SABC's insistence that the SBS should pay for the Must Carry obligations that would lead to the consumers being charged⁴¹.

3.5.3 **The Authority's decision is that it does not have a mandate to dictate costs related to Must Carry as the negotiable terms are of commercial nature. The costs related to Must Carry should be negotiated by the parties involved, being the PBS and the SBS.**

3.6 COST OF CONSUMER EQUIPMENT

3.6.1 MultiChoice submits that the SABC misunderstood the Authority's Regulatory Impact Assessment (RIA) Report Clause 4.7 about the costs that the audience / consumers will likely incur for an extra antenna. The SABC has argued that the Authority's findings insinuate that it is expensive,

⁴⁰ Ibid, page 69

⁴¹ Ibid, page 70

whereas it (being the SABC) similarly assumes that the subscription broadcasting services infrastructure is free⁴².

- 3.6.2 MultiChoice expands that the Authority's RIA findings were not about the comparison of the infrastructure used by the subscription broadcasters versus the public broadcaster, but rather the need to avoid consumers securing multiple sets of equipment that perform the same duties. The essence was for the audience / consumers to secure an effective equipment that would assist in accessing content meant to improve diversity⁴³.
- 3.6.3 MultiChoice refers to the Must Carry Obligations 2007 Discussion Paper, which stipulated that the objectives of the Must Carry obligations is to promote the accessibility of important programming content that is also of public interest on a variety of platforms and with economic convenience, without extra spending on an antenna for the subscription satellite and set top boxes⁴⁴.
- 3.6.4 **The Authority's decision is that issues concerning the obligation of delivering Must Carry channels to SBS by the PBS, and the subsequent measures of ensuring that those channels reach subscribers on the SBS are best addressed by the parties in commercial agreements. The Authority will not scrutinize the commercial nature of agreements, as stated above, other than to receive same from licensees to ensure that there is compliance with the Regulations. This is in line with the spirit of object 2(y) of the ECA which enjoins ICASA to refrain from undue interference in the commercial activities of licensees while considering the electronic communication needs of the public.**

⁴² Ibid, page 71

⁴³ MultiChoice submission: Draft Must Carry Amendment Regulations, 2021, page 71

⁴⁴ Ibid, page 71

3.7 ENCRYPTION OF THE FREE TO AIR (FTA) CHANNELS THROUGH THE DSTV

- 3.7.1 MultiChoice denies the SABC's assertion that there is a loophole in the regulations that entitles the SBS to encrypt their SABC channels so that it forces the audience subscribers to pay for the free to air content. Multichoice argues that the SBS are compelled by the regulations to encrypt their services. It relies on the High Court ruling in the eBotswana case where the free to air operators', (Open View and Sentech Satellite), signals had to be encrypted in order to hinder the spill over into the other territories in the satellite footprint area.⁴⁵
- 3.7.2 MultiChoice reiterates that the ECA refers to the subscription broadcasting services provided to the audiences upon payment and thus the consumers can only access the DSTV content strictly upon paying for the services provided⁴⁶.
- 3.7.3 **The Authority is of the view that Must Carry programmes should be available to audiences at all times, including those that use subscription broadcasting to access television. The public interest benefit ascribed to Must Carry is impeded when the non-paying subscription customers do not have access to Must Carry programmes on the SBS platforms. However, the Authority recognises the definition of subscription broadcasting services, that consumers can only have access to the content provided through SBS platform upon payment of a fee.**

⁴⁵ Ibid, page 70

⁴⁶ Ibid, page 70

3.8 COMPETITION

- 3.8.1 MultiChoice disputes the SABC's position that the Must Carry obligations distort market competition because whether the SBS bids for premium content or not, it will still be eligible to transmit the public broadcaster's services⁴⁷.
- 3.8.2 MultiChoice motivates that the public broadcaster's content is created for the public good and all that the SBS does is to retransmit that content to another platform on which it can be accessed⁴⁸. MultiChoice adds that the Must Carry obligations merely promote and extend the availability of the public broadcasting programming to the audience that are, in any event, entitled to watch the free to air content⁴⁹.
- 3.8.3 eMedia argues that it has public service obligations like those of the SABC, via its license conditions, which warrant that the Must Carry Regulations should extend beyond the SABC to it (as FTA broadcasters are subject to public service obligations).⁵⁰
- 3.8.4 eMedia states that section 60(3) of the ECA, read together with the remaining provisions of the ECA and ICASA Act do not limit the Authority's discretion and ability to extend the Regulations beyond their current scope to include other commercial FTA broadcasters with a public mandate. It submits that it is legally permissible to extend Must Carry Regulations so that SBS are obliged to carry the channels of private FTA broadcasters with a public service mandate.⁵¹

⁴⁷ Ibid, page 72

⁴⁸ Ibid, page 72

⁴⁹ Ibid, page 72

⁵⁰ etv, comments and submissions on the Draft Must Carry Amendment Regulations 2021, pages 2 and 5-6

⁵¹ Ibid, pages 3-4

- 3.8.5 **The Authority maintains that the enabling provision on the regulation of Must Carry is clear in terms of television programmes to be carried, being public broadcasting service programmes. The inclusion of carriage of other FTA services would require a legislative amendment to provide regulatory certainty.**

3.9 AUDIO AND AUDIO-VISUAL CONTENT SERVICES (AAVCS) DRAFT WHITE PAPER

- 3.9.1 The SABC is of the view that Clause 5.2.7.12 of the AAVCS Draft White Paper proposes that the Must Carry provision in section 60(3) of the EC Act, *requiring public broadcasters to offer their channels to subscription broadcasters who "must carry"*, should be repealed.⁵²
- 3.9.2 The SABC supports the White Paper's proposal to scrap the Must Carry provision as this will give the SABC an opportunity to commercially utilise its content through carriage agreements, whilst achieving its obligation for universal service and access of its services. SABC believes that the public broadcaster has been prejudiced by Must Carry regulations which requires that the SABC should offer its expensively procured channels and programmes for free to well-resourced subscription broadcasters.⁵³
- 3.9.3 The SABC states that it anticipates that the legislation will be changed in accordance with the Draft White paper's proposal which is to give effect to the removal of Must Carry rules and obligations. ***As an interim solution***, the SABC suggests that the Authority should gazette the Must Carry Regulations as soon as possible. However, according to SABC the most significant change on carriage of these channels by SBS must be "*subject to commercial negotiations*" and must include a 'sunset clause', to the

⁵² Ibid, page 9.

⁵³ Ibid, page 9-10.

effect that the regulations would be formally repealed once the proposals in the White Paper has been legislated.⁵⁴

3.9.4 SABC submits that once the statutory provisions enabling Must Carry regulations are repealed, the regulations would by necessity have to fall away. The pro-competition, non-exclusivity provision in the Draft White Paper can therefore be stated as a principle in the enabling statute without further regulations having to be prescribed.⁵⁵

3.9.5 MultiChoice is concerned that the Authority has not given stakeholders an opportunity to reflect on the implications for this process arising from the draft White Paper's proposal to amend the legislation to remove Must Carry.⁵⁶ Therefore, MultiChoice recommends that the Authority place the proposed amendments to the Must Carry Regulations on hold pending policy certainty,⁵⁷ and prioritise other regulatory processes which are unaffected by the White Paper. The Authority could resume the Must Carry amendment process once (and if) there is a clear policy position which warrants the continuation of the process.⁵⁸

3.9.6 Furthermore, MultiChoice is of the view that the Authority understates the potential impact of the White Paper, which proposes to do away with Must Carry completely.⁵⁹

3.9.7 MMA and SOS are of the view that the Authority is not legally entitled to repeal the Must Carry Regulations as the promulgation thereof is a peremptory imposed to the Authority in terms of section 60(3). SOS and MMA further states that any purported attempt to repeal same will

⁵⁴ Ibid, page 9.

⁵⁵ Ibid, page 9.

⁵⁶ MultiChoice submission, Draft Must Carry Amendment Regulations, 2021, page 14

⁵⁷ Ibid, page 15

⁵⁸ Ibid, page 15

⁵⁹ Ibid, page 15

undoubtedly be met by any approach to the High Court for judicial review of the decision.⁶⁰

3.9.8 MultiChoice is of the view that the current Must Carry regulations have been found to work well, mentioning evidence that PBS have been carried uninterrupted on pay TV. MultiChoice expands that there has been no disputes or findings of non-compliance, the universal access benefits have been well documented in RIA report and evidence provided to the Authority during the course of this inquiry.⁶¹

3.9.9 MultiChoice submits that considering that Must Carry obligations are a restriction on pay TV broadcasters, it does not oppose reasonable and appropriate Must Carry obligations in the advancement of universal access. Therefore, MultiChoice submits that it accepts the Must Carry obligations if it is commercially viable to do so and that the Regulations are reasonable and balanced. However, it submits that the carriage of the SABC channels means that the Pay TV operator incurs the opportunity cost of not carrying its own channels or other channels from which it could draw revenue.⁶²

3.9.10 **The Authority maintains that the Must Carry Regulations would be in place until such time that a decision is taken to repeal them.**

3.10 BENEFITS OF MUST CARRY

3.10.1 MMA and SOS are of the view that the only advantage of the current Must Carry Regulations is that DStv subscribers have access to the SABC channels in a manner that is more convenient than having to access the SABC directly via the SABC's own FTA signal.⁶³

⁶⁰ MMA and SOS, Joint submission on the Draft Must Carry Amendment Regulations, page 4.

⁶¹ MultiChoice submission, Draft Must Carry Amendment Regulations, 2021, page 2

⁶² Ibid, page 2

⁶³ MMA and SOS submission on the Regulatory Impact Assessment ("RIA") of the Must Carry Regulations 2018, page 12

3.10.2 The SABC states that Must Carry Channels are of great value to the current SBS operators, StaSat and MultiChoice. The consumers of SABC channels on the DSTV platform pay subscription fees which benefit MultiChoice⁶⁴.

3.10.3 **The Authority acknowledges the different views from stakeholders about who really benefit with regards to the benefits of Must Carry Regulations.**

3.10.4 **The Authority is of the considered view that Must Carry Regulations should benefit the public at large through access to the PBS channels.**

3.11 IMPACT OF BROADCAST LIKE PLATFORMS

3.11.1 MMA and SOS submit that they are concerned that the review of the Regulations can be viewed as a decade too late, reasoning that, while it is important that the dominance of MultiChoice is acknowledged, the horse has long since bolted and there is no longer a cart, but a motor manufacturing plant in its place being the digital reality.

3.11.2 MMA and SOS are also of the view that imminent threats to the South African broadcasting audio and audio-visual content services are not coming from the dominance of MultiChoice alone, but from global large and powerful organisations, and multi-national audio and audio-visual content providers/OTT services. MMA and SOS indicate that they would like to alert the Authority to the urgent and critical need for a coherent, holistic, and converged digital policy and regulations.⁶⁵

3.11.3 **The Authority's decision is that a coherent, holistic, and converged digital regulations will be developed once the Ministry has**

⁶⁴ SABC, Submission on the ICASA Draft Must Carry Amendment Regulations, 2021, page 2.

⁶⁵ MMA and SOS: Joint submission on the Draft Must Carry Amendment Regulations, page 4

concluded its process on Audio and Audio-Visual Content Services (AAVCS) Draft White Paper. The current legislation only mandates the Authority to regulate traditional broadcasting services.

3.12 DIGITAL BROADCASTING

3.12.1 SABC submits that the ICASA Findings and Position Document, in clause 9.7, provides that the Authority finds it necessary for Must Carry Regulations to continue in a digital environment, **until such time that audiences are “guaranteed access to the PBS channels”**. It is the SABC’s considered view that universal access of public broadcasting services is currently being realised through analogue, DTT, DTH and streaming platforms.⁶⁶

3.12.2 MMA and SOS submit that they welcome the draft Must Carry Regulations but warn that much larger existential questions regarding the universal availability of FTA television content are looming, given the failures in the roll-out of DTT thus far and the short timetable set for analogue signal switch-off proposed by the Department of Communications and Digital Technologies.⁶⁷

3.12.3 MMA and SOS are of the view that if the analogue signal is switched off in March 2022, the country will not be in a position to have universal access to devices to enable the reception of digital terrestrial broadcasting. At that point decisions should be made on whether to use existing SBSs and FTA satellite services such as Open View to ensure universal access to digital television, including all FTA services provided by public, community and commercial broadcasters. MMA and SOS allude that there will then be a need for new policy and regulations on how such satellite services will be

⁶⁶ SABC: Submission on the ICASA Draft Must Carry Amendment Regulations, 2021, page 8.

⁶⁷ MMA and SOS, Joint submission on the Draft Must Carry Amendment Regulations, Page 4

required to contribute towards ensuring that FTA content that used to be available on an analogue FTA basis remains accessible to the public.⁶⁸

3.12.4 MMA and SOS point out that until such time as analogue television switch off has occurred as a result of the successful migration to DTT, Must Carry Regulations should remain in place. Further, if Must Carry Regulations are to be done away with in the DTT environment, this will require a prior amendment to the EC Act to remove section 60(3).⁶⁹

3.12.5 MMA and SOS argue that according to the latest BRC RAMS research, PBS Television is accessible to the 14 million TV owning households. However, nearly half of these households (6.45 million) are accessing PBS television through DSTV. Consequently, accessing PBS television via DStv is an essential requirement in order to ensure practical access to PBS television channels.⁷⁰

3.12.6 **The Authority provides that Must Carry Regulations should continue in a digital environment, until such time that the ECA is amended to remove the provision on Must Carry.**

3.13 PROCEDURAL ISSUES

3.13.1 MultiChoice emphasises that the SABC's failure to provide evidence on costs to substantiate its argument during RIA and the inquiry is a concern.⁷¹ MultiChoice criticises the Authority in failing to interrogate SABC's submission which was full of errors and misrepresentations on the pivotal issues which are pointed out as follows:

- SBS carry the PBS at the SABC's cost;

⁶⁸ Ibid, page 4

⁶⁹ MMA and SOS submission on the Regulatory Impact Assessment ("RIA") of the Must Carry Regulations 2018, page 13

⁷⁰ Ibid, page 8

⁷¹ MultiChoice submission, Draft Must Carry Amendment Regulations, 2021, page 10

- SABC does not derive advertising revenue from audiences viewing the SABC channels on pay TV services; and
- the SABC channels boost pay TV uptake.⁷²

3.13.2 MultiChoice raises a concern that despite the clear evidence it provided on these pivotal issues, the Authority merely found that there are different views on the advantages of the Must Carry Regulations.⁷³ MultiChoice states that it was disappointing that other participants, including the SABC, did not accede to the Authority's request to provide the necessary data and evidence to support their arguments and address the questions raised.⁷⁴

3.13.3 Furthermore, MultiChoice is concerned that despite the Authority's acknowledgement that the parties held widely different views, the Authority proceeded to publish a final findings and positions document and decided not to hold public hearings as required in terms of Section 4B of the ICASA Act and thus not giving stakeholders an opportunity to make representations on the Findings Document. As a result, parties have not had an opportunity to highlight and express their views on the key aspects of their written representations on the Discussion Document.⁷⁵ Accordingly, the findings, positions and the proposed amendments that flow from them, are therefore not evidence-based, leaving a shaky foundation for the proposed amendments.⁷⁶

3.13.4 MultiChoice posits that Authority's hearings on the Draft Regulations will not address the stated purpose of the Inquiry, which was to assess whether there is a need to amend the Regulations in the first place. Since the Findings Document lays the foundation for the proposed amendments, a prior meaningful engagement on the underlying inquiry should have been completed first. Therefore, MultiChoice is of the view that the findings,

⁷² Ibid page 12.

⁷³ Ibid, page 11-13

⁷⁴ MultiChoice submission, Draft Must Carry Amendment Regulations, 2021, page 7

⁷⁵ Ibid, page 14

⁷⁶ Ibid, page 5

positions, and the proposed amendments, are not evidence-based, and they leave a shaky foundation for the proposed amendments.⁷⁷

3.13.5 MultiChoice is of the view that the Must Carry Regulations impose a restriction on subscription broadcasters, and have a direct and substantial impact on MultiChoice, and therefore wished they had made oral representations on the Discussion Document as they have a right to be heard.⁷⁸

3.13.6 The Authority does not require a full breakdown of Must Carry costs to make this regulation as Must Carry is subject to commercially agreeable terms. The Authority is satisfied that having conducted a RIA, publishing a Discussion Document, Draft Regulations and holding a public hearing on the Draft Regulations will enable the Authority to make sound decisions with regards to Must Carry.

3.14 ALIGNING REGULATIONS TO LEGISLATION

3.14.1 MMA and SOS submit that the Must Carry Regulations require an amendment to be in line with the law. They indicate that they welcome the approach by the Authority to ensure that the finalised Must Carry Regulations are in line with the existing law. They believe that the Draft Regulations are supportive of their position on Must Carry, which is must carry must pay.⁷⁹ SOS and MMA states that they support the rationale of the Authority for the Must Carry regulations, specifically in 2.29 of the ICASA Must Carry Findings Document, 2021 that *"the purpose of the Must Carry rule in South Africa is to advance universal access of the television programming of the public broadcaster."*⁸⁰

⁷⁷ Ibid, page 15

⁷⁸ MultiChoice submission, Draft Must Carry Amendment Regulations, 2021, page 15

⁷⁹ MMA and SOS: Joint submission on the Draft Must Carry Amendment Regulations, pages 2-3

⁸⁰ Ibid, page 2

3.14.2 SOS and MMA would like to bring to the attention of the Authority the following points that they made in the ICASA Must Carry public questionnaire, namely⁸¹:

"(a) The Must Carry Regulations have not achieved the intended objectives, reasoning that, while ICASA has prescribed Must Carry Regulations, the results have not been beneficial to the SABC precisely because the Must Carry Regulations were drafted in a manner that was ultra vires the ECA.

(b) Section 60(3) of the ECA enshrines the "Must Carry, Must Pay" principle for subscription broadcasting services and requires ICASA to provide for same in its Regulations. However, ICASA in making its Regulations, has not complied with the legislative requirements set out in section 60(3) and instead has provided for a "Must Carry, Must Not Pay Anything" principle."

3.14.3 MMA and SOS states that in promulgating the Regulations, ICASA has effectively undermined the financial viability of the SABC which ICASA is enjoined to protect in terms of section 2(t) of the ECA.⁸²

3.14.4 The Authority would like to reiterate that Must Carry must be driven by a central public interest principle of universal access to ensure that PBS programming is available to all citizens, targeting those citizens that use SBS as their means of access to television. Section 60(3) does not give the Authority powers to mandate must carry must pay but rather to ensure carriage through commercially negotiable terms.

⁸¹ Ibid, page 3

⁸² MMA and SOS submission on the Regulatory Impact Assessment ("RIA") of the Must Carry Regulations 2018, Page 12

3.15 EXTENDING MUST CARRY TO OTHER FREE TO AIR BROADCASTERS

3.15.1 eMedia states that its channels, in line with its license conditions are targeted at a broad spectrum of the general public by providing news, entertainment, information programming, and children's programming in various languages⁸³. Its license contains numerous provisions as to the nature, manner, and extent such public service programming must be provided. According to eMedia, many of the programming requirements set out in its license are similar to those imposed on the SABC, for an example, much like SABC, e-tv has a local content obligation including the obligation of 45% of broadcast time that consists of local television content⁸⁴.

3.15.2 eMedia submits that having analysed various sections in relevant legislation such as the ECA, ICASA Act and the Constitution, it appears clear to eMedia that the Authority can make regulations on any matter consistent with the objects of the Act (ICASA Act). It states that to extend the regulations past the SABC is in furtherance of the ECA, ICASA Act and the Constitution; as this would lead to the promotion of broadcasting services, prevent discrimination and further the Authority's public interest imperative. eMedia indicates that s60(3) does speak of the SABC and subscription broadcasters, however, according to eMedia, this does not stop the Authority from introducing further regulations that allow commercial free-to-air broadcasters to be carried by subscription broadcasters if this promotes the objects of the Act⁸⁵.

3.15.3 eMedia further alludes that the ECA is subject to the ICASA Act as such cannot dictate or override the ICASA Act in the case of inconsistency between the two (that the ICASA Act speaks of regulating broadcasting and the objects of the Act while the ECA speaks of 60(3) and its

⁸³ eMedia, Must Carry Legal Opinion 2021, page 5

⁸⁴ Ibid, page 13

⁸⁵ Ibid, page 11

applicability to the public broadcaster). They submit that MultiChoice is of the view that there could be no further regulations on an already regulated matter even if it is to promote of the objects of the Act. eMedia argues that this is unbusinesslike, inconsistent with Act and is insensible. They give the example of advertising which is not specifically dealt with but there are regulations to the effect. As such, eMedia's view is that the Authority can further regulate to allow free to air broadcasters to be carried by subscription broadcasters⁸⁶.

3.15.4 eMedia is of the view that the extension of s60(3) would be in line with the Authority's objectives because it would further express the objects of the ECA, promote freedom of expression in terms of section 16 of the Constitution and would promote equality between etv and the SABC since they have similar public interest obligations. etv has a coverage and local content quota to fulfil such as the SABC, including a language requirement with respect to news, drama, information programming and children's programming. A further employment equity, education and skills development requirement is placed on etv like the SABC. eMedia submits that it has a prescribed advertising quota, with no reliance on subscription fees unlike MultiChoice. Further the argument is that MultiChoice does not have many of the requirements placed on etv.⁸⁷

3.15.5 eMedia submits that according to Section 16 of the Constitution, it has the right to be heard and for the public to receive information provided by etv. eMedia adds that without protection, it is subject to MultiChoice who can unilaterally switch off eMedia services at its own discretion as the dominant player in the market for competition sake or for any reason. eMedia states that this would be to the detriment of consumers.⁸⁸

⁸⁶ Ibid, page 11

⁸⁷ Ibid, page 13.

⁸⁸ Ibid, page 15

- 3.15.6 Further, the opinion states that because eMedia has similar public service obligations, to not treat it as the SABC would be discriminatory, unjustifiable, arbitrary, and irrational to not include it in the Must carry Regulations and treat the SABC better than free to air broadcasters. It thus should be extended and switch-off of free services must not be allowed.⁸⁹
- 3.15.7 eMedia indicates that the most recent share audience figures from June 2021, has revealed that eMedia's audience share was 34.26% and SABC's share was 30,75%, accordingly it is clear that FTA channels are the most watched in South Africa with 65% television audiences⁹⁰. eMedia submits that because of its numerous public service obligations in its license, it truly serves the public interest⁹¹. During the oral hearings eMedia mentioned that population reach is 77% and what is important is the share of television audience⁹².
- 3.15.8 MultiChoice states that eMedia's arguments that the Authority should extend the Must Carry obligations beyond the SABC to apply also to other free-to-air broadcasters are without merit. This is because the Authority does not have the power to extend the Must Carry obligation beyond the SABC to other free-to-air broadcasters. Another reason is that section 60(3) of the ECA is limited to the channels of the SABC. This excludes eMedia and other free-to-air broadcasters since they are not public broadcast service licensees.⁹³
- 3.15.9 MultiChoice provides that the proposal for subscription broadcasters to carry free-to-air channels such as eMedia cannot be applied legally by the Authority.⁹⁴ MultiChoice states that it is a central principle of law that organs of state may not exercise power and perform function beyond their

⁸⁹ Ibid, page 16

⁹⁰ eMedia: Supplementary Submission Draft Must Carry Amendment Regulations, 2021, page 3

⁹¹ eMedia, Must Carry Legal Opinion 2021, page, 13

⁹² eMedia: Supplementary Submission Draft Must Carry Amendment Regulations, 2021, page 2

⁹³ MultiChoice Legal Opinion 2021: The legality of certain proposals for the Must Carry Regulations, page, page 4.

⁹⁴ Ibid, page 3

mandate. MultiChoice states that eMedia acknowledges that section 60(3) requires the Authority to make regulations requiring a Must Carry rules for the SABC channels, but on the other hand contends that *"this provision, read together with the remaining provisions of the ECA and the ICASA Act do not limit the Authority's discretion and ability to also extend the Regulations to other commercial free-to-air broadcasters with a public service mandate"*.⁹⁵

3.15.10 MultiChoice states that eMedia fails to identify any law that would empower the Authority to extend the Must Carry regime to free-to-air broadcasters. MultiChoice states that eMedia seeks to rely on the Authority's regulation, the ECA and ICASA Act which cannot be used to regulate the Must Carry issues.⁹⁶ The Authority could not rely on its general regulation-making power in section 4 of the ECA, because that section empowers the Authority to make regulations concerning any matter which in terms of this Act or the related legislation must or may be as determined by regulations⁹⁷.

3.15.11 MultiChoice argues that section 4 also allows the Authority to make regulations concerning *any technical matter necessary or expedient for the regulation of the services*". MultiChoice points out that the imposition of a duty to carry channels from broadcasters other than the SABC is not a "technical matter" or a "matter of procedure or form".

3.15.12 MultiChoice states that in *Arse v Minister of Home Affairs and Others*, the SCA explained that: *"Where two enactments are not repugnant to each other, they should be construed as forming one system and as re-enforcing one another. ... 'Where different Acts of Parliament deal with the same or kindred subject-matter, they should, in a case of uncertainty or ambiguity, be construed in a manner so as to be consonant and inter-*

⁹⁵ Ibid, page 5.

⁹⁶ Ibid, page 5.

⁹⁷ Ibid, page 6.

dependant, and the content of the one statutory provision may shed light upon the uncertainties of the other.”⁹⁸

3.15.13 MultiChoice submits that section 4(3)(j) of the ICASA Act only contemplates regulations “*consistent with*” the objects of the ECA. MultiChoice states that it would violate that presumption and principle to interpret the Authority’s general regulation making powers to empower the Authority to extend Must Carry to free-to-air broadcasters when section 60(3) of the ECA only empowers the Authority to do so in respect of the public service broadcaster.⁹⁹

3.15.14 MultiChoice is of the view that even if the Authority did have the power to extend the Must Carry obligation to other free-to-air broadcasters, e.tv is still wrong when it says that a choice by the Authority to exclude free to air broadcasters other than the SABC would be “*arbitrary, irrational, unjustifiable and discriminatory*”. Further, MultiChoice states that Parliament made a choice, via section 60(3) of the ECA, to require that the Must Carry regime only need be implemented in respect of the SABC’s channels¹⁰⁰.

3.15.15 MultiChoice concludes that it cannot then be “*arbitrary, irrational, unjustifiable and discriminatory*” for the Authority to act consistently with this choice made by Parliament when it makes regulations. MultiChoice points out that if the Authority were to prescribe Must Carry regulations that also required the carriage of channels from free to air broadcasters like eMedia, this would be unlawful and invalid.¹⁰¹

3.15.16 **The Authority maintains that there is currently no legislation empowering it to include commercial broadcasting services such as etv in the Must Carry Channels. Section 60(3) of the ECA is**

⁹⁸ Ibid, page 7.

⁹⁹ Ibid, page 7.

¹⁰⁰ Ibid, page 8.

¹⁰¹ Ibid, page 9.

explicit regarding broadcasting services that should form part of the Must Carry. The ECA only caters for the public broadcaster to be the only one carried by the SBS.

3.16 PROPOSED AMENDMENTS TO DRAFT REGULATIONS

MultiChoice raises a concern that the new draft Must Carry Regulations pose a risk that the public interest benefits delivered through the current Regulations could be reversed. MultiChoice further raises concerns that the several provisions of Draft Regulations are unclear and would probably be difficult to implement. Therefore, it proposes the following amendment:¹⁰²

- The purpose of the Regulations to be amended, to reflect the principles underlying the Must Carry Regulations in line with RIA.
- To clarify and align the key terms, for instance the definitions terms has been used inconsistently and/or interchangeably with other terms.
- Simplified, clearer, timing and sequencing of the negotiation framework
- Amendments to substantive provisions to address ambiguity and related concern
- To ensure that contraventions and fines provisions are balanced and appropriate.
- Proposed wording to give effect to the Authority's proposed transitional arrangement.

MultiChoice submits that it is committed to comply with the Must Carry obligations only if the Regulations are reasonable, balanced, proportionate and lawful and do not place undue burden on the pay tv licensee.¹⁰³

¹⁰² MultiChoice submission, Draft Must Carry Amendment Regulations, 2021, page 3

¹⁰³ MultiChoice submission, Draft Must Carry Amendment Regulations, 2021, page 26.

The Authority is of the view that Must Carry Regulations will not pose a risk on the public interest benefits. Further, the Authority's Regulations will be reasonable, balanced, proportionate and lawful. The Authority will attend to the proposals above in the relevant sections where such proposals are clearly outlined.

3.16.1 DEFINITIONS

3.16.1.1 **Carry:** MultiChoice highlight that the term "carry" is used, but not defined, in the Regulations.¹⁰⁴ Therefore, it proposes that the Authority define the term "carry" to mean "to simultaneously retransmit a Must Carry Channel on the subscription broadcasting service of an SBS Licensee"¹⁰⁵.

3.16.1.2 **The Authority's decision is that there is no need to define the word carry because in the past there were no implementation or interpretation issues regarding the concept, and it is a universally used concept in terms of Must Carry obligations.**

3.16.1.3 **Channel:** MultiChoice raises concern that the draft Regulations proposes the inserting of a definition of "channel", while it is defined in section (1) of the ECA, as meaning of single defined programming service of a broadcasting services licensee.¹⁰⁶ Therefore, MultiChoice submits that it is not necessary to define the terms channel in the Must Carry Regulations¹⁰⁷ and proposes deletion of the definition.¹⁰⁸

¹⁰⁴ Ibid, page 31

¹⁰⁵ Ibid, page 49

¹⁰⁶ Ibid, page 30

¹⁰⁷ Ibid, page 30

¹⁰⁸ Ibid, page 49

3.16.1.4 However, MultiChoice further submits that in the event that the Authority considers to defines the term "channel" in the Regulations, it must ensure that is consistent with the definition in the ECA.¹⁰⁹

3.16.1.5 The Authority has considered MultiChoice's concern regarding the definition of the word channel and taken a decision that the definition of channel in the ECA will prevail.

3.16.1.6 Must Carry Channel and "Non-Must Carry Channels: MultiChoice proposes that on the definitions of Must Carry Channel and "Non-Must Carry Channels the word "bouquet" should be deleted and replaced with word "subscription broadcasting service".¹¹⁰ MultiChoice argues that the Draft Regulations' proposal of inserting a definition of "bouquet", in order to provide clarification for the term used in the Draft Regulations is confusing or/and unclear. The term "bouquet" is used in the definitions of "Must Carry Channel" and "Non-Must Carry Channels" and in Reg. 4(1A), 4(5)(b) and 4(5)(c), usually in the context of the addition of a PBS channel to the bouquet of an SBS licensee.¹¹¹

3.16.1.7 The Regulations seem to use the term "bouquet" interchangeably with a service or service offering of an SBS licensee. MultiChoice advises that choice of description overlooks the fact that in the multi-channel environment, subscription broadcasters typically offer multiple bouquets. They therefore suggest that it would make more sense to refer to the subscription broadcasting service as is currently done in Reg. 5(1), rather than the bouquet of an SBS. To avert the apparent confusion, MultiChoice recommends that the Authority replace the term "bouquet" with the term "subscription broadcasting service" in Reg. 4(1A), 4(5)(b) and 4(5)(c)

¹⁰⁹ Ibid, page 31

¹¹⁰ MultiChoice submission, Draft Must Carry Amendment Regulations, 2021, page 31

¹¹¹ Ibid, page 31

and in the definitions of "Must Carry Channel" and "Non-Must Carry Channels" in Regulation 1.¹¹²

3.16.1.8 eMedia proposes that the definition of Must Carry Channel to refer to the television programmes comprising a channel of both the PBS Licensee and FTA Licensee. Furthermore, it proposes that FTA should be added to the bouquet of a SBS Licensee in accordance with Regulation 4. In addition, eMedia proposes that Authority should amend the definition of "Non-Must Carry Channels" to mean the television programmes comprising a channel of either the PBS Licensee or an FTA Licensee which the SBS Licensee voluntarily adds to its bouquet in the absence of an obligation imposed by these Regulations."

3.16.1.9 **The Authority has considered the two proposals from stakeholders about both definitions of Must Carry Channel and Non-Must Carry Channels, however, it will not accept the proposal that both definitions should include both FTA and PBS to mean the television programmes comprising a channel of both the PBS Licensee and FTA Licensee as this not in line with legislation. The Authority accepts the proposal to delete bouquet and replace it with subscription broadcasting service. This will attract amendment to other provisions in the Regulations such as regulation 5 (1) to remove the word bouquet and replace it with subscription broadcasting service.**

3.16.1.10 **Television programmes of the PBS licensee:** Regulation 3(1) provides that "all the free-to-air PBS programmes comprising a channel broadcast by a PBS Licensee as part of its broadcasting service are subject to Must Carry obligations". MultiChoice argues that given this definition, it is not necessary to refer to "*the television programmes of the PBS Licensee*" in full in each of Regulations 4(2), 4(5), 5(1), 5(3), 5(3)(a),

¹¹² Ibid, page 32

5(3)(b), 6(1), 6(2). They instead propose that the Authority replace the phrase "*the television programmes of the PBS Licensee*" in Regulations 4(2), 4(5), 5(1), 5(3), 5(3)(a), 5(3)(b), 6(1), 6(2) and 7 with a reference to "*the Must Carry Channels*".¹¹³

3.16.1.11 The Authority is of the view that the usage of television programmes of the PBS Licensee in these provisions as related by MultiChoice does not affect the implementation of the Regulations and therefore the wording in the Regulations will be retained.

3.16.1.12 Inclusion of the word "or FTA Licensee" in the definitions: E-tv proposes the following amendments to the definitions; eMedia proposes that the words "or FTA Licensee" should be inserted after the words "...a PBS Licensee" where they appear in the definition.¹¹⁴

3.16.1.13 Furthermore, eMedia proposes that the Authority insert the definition of "FTA licensee to mean a free-to-air Service Licensee which has a public service obligation."

3.16.1.14 Must Carry: eMedia suggests that the definition of "Must Carry" should mean the set of rules that oblige a SBS Licensee to carry the television programmes broadcast by a PBS and FTA Licensee."

3.16.1.15 The Authority notes eMedia's proposal that the word FTA licensee should be inserted where the wording "PBS Licensee" appears and also proposed the insertion of a definition for FTA licensee.

3.16.1.16 The Authority's decision is that it will not accept the proposal as it is not in line with the legislation. The Legislation mandate the carriage of public broadcasting service television programmes.

¹¹³ Ibid, page 33

¹¹⁴ etv: Comments and submissions on the Draft Must Carry Amendment Regulations 2021, page 15

3.16.2 PURPOSE OF THE REGULATIONS

3.16.2.1 SABC submits that the Authority should stick to the dictates of section 60(3) of the ECA which empowers the regulator to prescribe the extent to which SBS must carry PBS TV programmes.¹¹⁵

3.16.2.2 **The Authority agrees with the SABC in that the Authority can only make regulations per the empowering legislation.**

3.16.2.3 etv requests an amendment of Regulation 2 of the Regulations as amended by the Draft Regulations – **“Purpose of the Regulations”** by inserting the words *“and any FTA Licensee”* after the words “PBS Licensee” where they appear in section 2(a) (aA) and (b) of the 2008 Regulations.¹¹⁶

3.16.2.4 MultiChoice proposes the insertion of the rationale for the Must Carry Regulations particularly the public interest mandate of ensuring that South African citizens that do not have access to public broadcasting service channels have same. MultiChoice proposes that the Authority should amend the purpose of the Regulations to be in line with RIA Report and the Findings Document.

3.16.2.5 MultiChoice raises concern regarding Regulations 2(Aa) and 2(b), reasoning that the Regulations contradict the Authority’s position in the Findings Document regarding the Authority’s involvement in the commercial negotiations of Must Carry. According to MultiChoice, the Regulations suggest that the Authority is the one that will determine the terms and conditions of must carry through the Must Carry Regulations.

¹¹⁵ SABC: Additional submissions on the ICASA Draft Must Carry Amendment Regulations, 2021, page 5

¹¹⁶ etv: Comments and submissions on the Draft Must Carry Amendment Regulations 2021, page 16

To that end, MultiChoice suggests that Regulation 2 should instead reads as follows:¹¹⁷

- The PBS Licensee is established as the public broadcaster to service the needs of all South African society, to be responsive to audience needs and to make its services available throughout the Republic.
- Must Carry rules are driven by a central public interest principle of universal access to make public broadcasting programming available to all citizens, targeting those citizens that use subscription broadcasting services as their means of access to television.
- The objective of Must Carry Regulations is to make Must Carry Channels conveniently accessible to subscribers, by requiring SBS Licensees to carry the Must Carry Channels on their subscription broadcasting service.
- The purpose of these regulations is to:
 - (a) Prescribe the extent to which SBS licensees must carry, subject to commercially negotiable terms, the Television Programmes provided by the PBS licensee.
 - (b) Provide exemptions for certain SBS Licensees from compliance with these Regulations.
 - (c) Set out the obligations on the PBS Licensee to offer, and SBS Licensees to carry, the Must Carry Channels, subject to commercially negotiable terms.
 - (d) create a framework for PBS and SBS licensees to commercially negotiate terms to which the carriage of Must Carry Channels will be subject.
 - (e) Regulate all other matters incidental hereto.¹¹⁸

3.16.2.6 The Authority has considered the input made and is of the view that it is not necessary to amend regulation 2 to reflect that the

¹¹⁷ MultiChoice submission, Draft Must Carry Amendment Regulations, 2021, page 30.

¹¹⁸ Ibid, page 30.

terms and conditions for Must Carry will be subject to commercially negotiable terms. Section 60(3) of the ECA already mandate that Must Carry should be subject to commercially negotiable terms.

3.16.3 TELEVISION PROGRAMMES TO BE CARRIED

3.16.3.1 SABC submits that Regulation 3(1) must be amended to reflect that the Must Carry channels are defined as SABC1, SABC 2 and SABC 3 and should exclude SABC Sport, SABC Education or any other SABC television channel either existing or to be developed. The public broadcaster requests the Authority to allow it the discretion to add the carriage of additional channels, subject to commercial negotiations.¹¹⁹

3.16.3.2 The SABC welcomes the Authority's decision that the commercial terms for the carriage of the three 'Must Carry channels' should be negotiated by PBS and SBS licensees, without the interference of the Authority.¹²⁰

3.16.3.3 The Authority can only make regulations as empowered by the ECA and accordingly, all content that is of public interest, including sport of national interest must be carried. The Authority cannot impart regulatory powers to the SABC to discretionally add or carry channels that may be classified as Must Carry in the future.

3.16.3.4 Because SABC is a public broadcaster, all its television broadcasting programmes, whether still under development, must be subject to the Must Carry regulations and include SABC Sport, SABC Education and any other SABC television channel to

¹¹⁹ SABC: Additional submissions on the ICASA Draft Must Carry Amendment Regulations, 2021, pages 7 - 8

¹²⁰ SABC, Submission on the ICASA Draft Must Carry Amendment Regulations, 2021, Page 13

be developed. Should the SABC have non-linear channels or be content providers to other broadcasters or any other company, these will not be expected to be carried under the must carry rules.

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

3.16.3.5 MultiChoice points out that the Regulations refer to "*Must Carry Channels*", which is the term defined in Regulation 1. In the proposed new Regulation 3(2), the Authority proposes that "*The PBS and the SBS Licensees must negotiate the carriage of PBS channels*". To avert apparent confusion, MultiChoice propose that the Authority amend Regulation 3(2) to refer to the carriage of "Must Carry" Channels instead of "PBS" channels.¹²¹

3.16.3.6 MultiChoice proposes that the Authority considers reinserting the word "television" as it appears to have been deleted from Regulation 3(1) before the word "channel", so that it is clear that the Must Carry obligations apply only to the television channels broadcast by the PBS licensee. MultiChoice further proposes that, for the avoidance of doubt, Regulation 3(1) should be subject to Regulation 4(5) (incremental Must Carry obligations) and Regulation 5 (exemption from compliance with the regulations). MultiChoice advises that the wording of Regulation 3(1) should read as follows:

"Subject to Regulations 4(5) and 5, all the free-to-air PBS programmes comprising a television channel broadcast by a PBS Licensee as part of its broadcasting service are subject to Must Carry obligations."¹²²

¹²¹ MultiChoice submission, Draft Must Carry Amendment Regulations, 2021, page 33

¹²² Ibid, pages 37 - 38

3.16.3.7 eMedia proposes the deletion of the word "PBS" after the words "All free-to-air" where they appear in amended regulation 3 titled "**Television Programmes to be Carried.**" It suggests that the Authority insert the words "or any FTA Licensee" after the words "PBS Licensee" wherever they appear in **Regulations 3, 4, 5 and 6** of the Regulations as amended by the Draft Regulations.¹²³

3.16.3.8 The Authority's view is that the inclusion of free-to-air broadcasters in the definitions of the Must Carry Regulations will be in contravention with the provision of section 60(3) of the ECA. Section 60(3) of the ECA is explicit regarding broadcasting services that should form part of the Must Carry. The ECA only caters for the public broadcaster to be the only one carried by the SBS.

3.16.3.9 With regards to adding the word "television" in Regulation 3(1), the Authority is of the view that Regulation 3(1) of the 2008 Must Carry Regulations refer to television and will thus be retained as is.

3.16.4 OBLIGATION TO CARRY TELEVISION PROGRAMMES

3.16.4.1 MultiChoice proposes that Regulation 4(1) be amended to read as follows; "all SBS Licensees must carry the channels of the PBS Licensee designated as must carry channels as part of the service offering, subject to Regulation 5 and 7A".¹²⁴

3.16.4.2 MultiChoice submits that the Authority has proposed amending Regulation 4 to require a SBS Licensee to ensure that the Must Carry Channels are available on its bouquet at all times. MultiChoice indicates

¹²³ etv: Comments and submissions on the Draft Must Carry Amendment Regulations 2021, page 16

¹²⁴ MultiChoice submission, Draft Must Carry Amendment Regulations, 2021, page 51

that it is unclear what the Authority is implying with regards to Regulation 4(1A). It states that Regulation 4(1A) requires a SBS licensee to (a) add the Must Carry Channels to all of the bouquets which it provides on its SBS and (b) to simultaneously re-transmit the Must Carry Channels on its SBS 24/7/365.¹²⁵

3.16.4.3. MultiChoice states that it supports the proposal to have Must Carry Channels at all times, in principle. However, it cautions that it may be unable to meet this requirement should the SABC fail to make the Must Carry Channels available for carriage at all times. It further argues that SBS licensees cannot be held accountable to have contravened the Must Carry Regulations in circumstances where the SABC has not made the Must Carry Channels available for carriage at all times. MultiChoice suggests that the SABC should be required to take all reasonable and necessary steps within its control to ensure that the Must Carry Channels are carried on SBS in accordance with the Must Carry Regulations.¹²⁶

3.16.4.4 Multichoice alludes that it is concerned that the requirement for the Must Carry Channels to be available "at all times" is absolute. The word "all" requires continuous indefinite availability of the Must Carry Channels on the SBS' bouquets. However, MultiChoice outlines instances where compliance is compromised such as business interruptions, link failure, planned or unplanned repairs or maintenance, or other temporary downtime. MultiChoice suggests that temporary interruptions for reasons beyond the control of the licensee, or which are necessary for the purposes of the SBS licensee's security or operational requirements, should not constitute a contravention of Regulation 4(1A).¹²⁷

¹²⁵ Ibid, page 38

¹²⁶ Ibid, pages 38 - 39

¹²⁷ Ibid, page 39

3.16.4.5 MultiChoice proposes that Regulation 4(1A) be amended to read as follows:

"(1A) The SBS licensee and the PBS licensee must take all reasonable and necessary steps within their control to ensure that the Must Carry channels are carried on all of the bouquets provided on the subscription broadcasting service concurrent with the broadcast of those channels by the PBS licensee. Provided that an SBS licensee will not be held to have contravened this regulation due to circumstances beyond its reasonable control or due to downtime not exceeding 24 continuous hours."¹²⁸

3.16.4.6 MultiChoice submits that its understanding is that the proposed Regulation 4(1A) require SBS licensee to continue to carry the Must Carry Channels while the PBS and SBS licensees negotiate commercial terms under the amended Regulations with an intention to give effect to the Authority's proposed transitional arrangements. It however proposes that the new regulations should contain an express transitional provision to give effect to the Authority's proposed transitional arrangements to ensure that the Must Carry Channels continue to be carried on SBS at all times while the parties are negotiating.¹²⁹

3.16.4.7 MultiChoice is of the view that as it might be suggested by anyone that the effect of Regulation 4(1A) is to require SBS to provide the Must Carry Channels to members of the public without paying subscription fees (i.e. to persons who do not subscribe to an SBS), it disagrees with this interpretation and it is firmly opposed to such an obligation being introduced.¹³⁰ MultiChoice argues that the ECA does not permit the Authority to require SBS licensees to provide the Must Carry Channels to non-subscribers and that subscription broadcasting service may only be "*provided to a subscriber upon payment of a fee*". MultiChoice reiterates

¹²⁸ MultiChoice submission, Draft Must Carry Amendment Regulations, 2021, page 39

¹²⁹ Ibid, pages 39 - 40

¹³⁰ Ibid, page 40

that the ECA empowers them to encrypt its output signal. MultiChoice further outlines that the power ECA grants ICASA is therefore explicitly limited to regulating the extent to which subscription broadcasting services provide the Must Carry Channels to subscribers.¹³¹

3.16.4.8 MultiChoice submits that the ECA defines "Free-to-air service" as "*a service which is broadcast and capable of being received without payment of subscription fees*". MultiChoice indicates that its licence condition contains an obligation to "*ensure that the output signal of its subscription broadcasting service is encrypted*".¹³² It invokes the Amendment of M-Net's Broadcasting Licence in terms of Section 52(1)(d) of the Independent Broadcasting Authority Act, 1993: Ruling and Reasons, ICASA, 2 June 2005 to emphasize that subscription broadcasters cannot lawfully be required to provide the Must Carry Channels to non-subscribers. They insist that such an obligation would not be legally permissible and is likely to be struck down as *ultra vires* and invalid on other grounds. MultiChoice is of the view that to the extent that this is the intent of Regulation 4(1A), it should be deleted.¹³³

3.16.4.9 eMedia submits that the Regulations need to ensure that the free-to-air channels (being the SABC channels and e.tv), continue to be available to MultiChoice audiences when MultiChoice turns off a subscriber's access to its services by reason of non-payment. To allow the contrary to take place would negate the concept of universal access. The same would apply to any other competitive subscription broadcaster.¹³⁴

3.16.4.10 eMedia mentions that the Pay TV operator GOtv (owned by MultiChoice) is required not to switch off subscribers who do not pay their subscriptions from their access to FTA channels. Initially subscribers were cut off for

¹³¹ Ibid, page 40

¹³² Ibid page 40

¹³³ Ibid, pages 40 - 41

¹³⁴ eMedia Legal Opinion 2021, Draft Must Carry Amendment Regulations, page 16

non-payment of subscription fees. Complaints were laid by subscribers against GOtv and another broadcaster StarTimes. The Kenyan regulator directed all licensed DTT broadcast signal distributors and DTT Pay TV providers to remove restrictions to enable reception of all FTA broadcast signals from all other DTT platforms¹³⁵. GOtv carries the six following channels:

- KBC – public broadcaster.
- KTN – commercial FTA channel.
- NTV – FTA channel.
- K24 – FTA channel.
- Citizen TV – FTA channel.
- Kass TV – FTA channel¹³⁶.

3.16.4.11 In light of the above, eMedia is of the view that the comparison with Kenya must be seen in conjunction with the delay in digital migration which has resulted in a number of viewers watching free to air channels via satellite and not on DTT. eMedia proposes that the Authority should without delay consider prohibiting subscription broadcasters from cutting off the subscribers when subscription fees have not been paid¹³⁷.

3.16.4.12 eMedia is of the view that, Kenya case study should spur the Authority to instruct that, viewers should not be barred from receiving FTA channels from any platform¹³⁸.

3.16.4.13 eMedia submits that it is unlikely that a viewer who has already invested in a DSTV decoder and the satellite dish will also install an OpenView decoder or DTT set-top-box. eMedia is emphasizing that everyone should have a right to receive FTA channels even if they do not pay their

¹³⁵ eMedia: Supplementary Submission Draft Must Carry Amendment Regulations, 2021, page 6

¹³⁶ Ibid, page 6

¹³⁷ Ibid, page 6

¹³⁸ Ibid, page 5

subscriptions for whatsoever reason including in cases of unaffordability.¹³⁹

3.16.4.14 With respect to the proposal by eMedia for the continuance of MultiChoice's services if a subscription is terminated due to non-payment, MultiChoice states that the Authority does not have specific or general regulatory power to impose this provision. MultiChoice argues that section 60(3) of the ECA requires subscription broadcasters to carry public broadcasting services to subscribers. They read section 60(3) as follows: "The Authority must prescribe regulations regarding the extent to which a broadcasting service provided to a person who lawfully accesses, uses or receives a retail service of a licensee referred to in Chapter 3 upon payment of a fee must carry, subject to commercially negotiable terms, the television programmes provided by a public broadcast service licensee¹⁴⁰."

3.16.4.15 eMedia submits that the Authority should retain and not delete Regulation 4(4) of the Regulations¹⁴¹. Regulation 4(4) states that "the SBS licensee must bear the costs of carriage of the television programmes of the PBS Licensee on its distribution platform in compliance with these regulations".

3.16.4.16 eMedia suggests that the Authority should delete regulation 4(5) of the Regulations and replace it with the following:

"A SBS Licensee must ensure that every tenth channel added to its bouquet is a Must Carry Channel. The order in which Must Carry Channels will be carried by an SBS Licensee will be determined by the Authority taking into consideration the public service mandate of each such channel, with priority being given to existing terrestrial public and

¹³⁹ Ibid, page 7

¹⁴⁰ MultiChoice Legal Opinion 2021: The legality of certain proposals for the Must Carry Regulations, page 10, 11

¹⁴¹ etv: Comments and submissions on the Draft Must Carry Amendment Regulations 2021, page 16

*commercial television channels ahead of any digital incentive channels added pursuant to the Digital Migration Regulations.*¹⁴²

3.16.4.17 MultiChoice request clarity with regards to Regulation 4(2) that refers to the coming into effect of the principal Regulations (i.e. the 2008 Must Carry Regulations). It would like to know if there is an obligation for an existing SBS Licensee to request to carry an existing PBS.¹⁴³ Regulation 4(2) is not amended and as such remains in force.

3.16.4.18 MultiChoice would like to know why the PBS Licensee require three months from the date of conclusion of the commercial negotiations to "offer" its television programmes to the SBS Licensee. Furthermore, it would like to enquire as to when Must Carry Channels are considered to have been "received" from the PBS Licensee for the purposes of Regulation 4(3).¹⁴⁴ Regulation 4(3) states that "the SBS licensee must commence to transmit the must carry channels within three months of receipt of the must carry channels from the PBS licensee".

Must Carry Must Pay

3.16.4.19 The MMA and SOS proposes must carry must pay with regards to Must Carry Regulations. They submit that the creative industry should benefit from the must carry must pay. They are of the view that the Authority should prescribe a commercially agreeable fee that the SABC should set aside to benefit the creative industries that create the content to be carried by subscription broadcasters. MMA and SOS suggest that 35% of the must carry fee should be paid to the independent producers whose content is carried as part of Must Carry as follows;

¹⁴² Ibid, Page 16

¹⁴³ MultiChoice submission, Draft Must Carry Amendment Regulations, 2021, pages 34 - 35

¹⁴⁴ Ibid, page 35

- 15% to be paid to the independent producers of independently commissioned programmes that are part of Must Carry.
- 10% to be paid to the principal writers of independently produced programming.
- 10% to be paid to the principal actors performing in the independently produced programmes.

Further, they would like the payments from the SABC to the above members of the independent production sector to be made within 90 days of payment by the qualifying subscription broadcasters.¹⁴⁵

3.16.4.20 eMedia submits that, as the SABC and e.tv channels drive audiences to DStv and contribute to subscription revenue, they ought to be paid by the subscription broadcasters who carry and broadcast these channels. Free-to-air programmes, including e.tv, are consistently the top shows on DStv and there are costs associated with creating the content which drives such audiences hence the must carry obligation should be a “must carry, must pay” obligation.¹⁴⁶ eMedia alludes that this would more than compensate MultiChoice for the costs it alleges it incurs in carrying these channels and justifies a “must pay” provision being introduced into the Regulations.¹⁴⁷

3.16.4.21 eMedia states that the regulation should state that the SBS Licensee is obliged to pay the PBS and FTA Licensee whose programmes must be carried by the SBS Licensee on an amount agreed upon by them. Further, eMedia states that the regulation should state that this amount together with all other commercially agreed terms, must be reduced to writing in the Agreement.¹⁴⁸

3.16.4.22 MultiChoice states that eMedia proposes that where a subscription broadcaster carries channels under the Must Carry regime, the

¹⁴⁵ MMA and SOS: Joint submission on the Draft Must Carry Amendment Regulations, page 2 - 3

¹⁴⁶ etv: Comments and submissions on the Draft Must Carry Amendment Regulations 2021, page 11

¹⁴⁷ Ibid, page 13 - 14

¹⁴⁸ Ibid, page 17

subscription broadcasters must also pay the broadcaster concerned for the right to do so. In other words, it proposes that the Must Carry obligation should be a "Must Carry, Must Pay" obligation. Furthermore, it states that SOS and MMA adopt the same position as eMedia. SOS and MMA maintain that "*section 60(3) of the ECA enshrines the 'Must Carry, Must Pay' principle for subscription broadcasting services and requires ICASA to provide for same in its regulations.*"¹⁴⁹ MultiChoice states that the fact that some of the commercially negotiable terms relates to payment, it does not necessarily denote that the subscription television has to pay the public broadcaster. Instead, the case studies in other countries corroborate that, the public broadcaster is the one that is obligated to pay the subscription broadcaster.¹⁵⁰

3.16.4.23 MultiChoice states that the SABC does not hold this position. It alludes that the SABC understands that the ambit of section 60 (3) of the ECA is limited and that the SABC may only be compelled to offer its programmes if commercially negotiated terms have been agreed upon. MultiChoice is of the view that SOS/MMA and eMedia are incorrect as a matter of law since must carry, must pay is not envisioned by section 60(3) of the ECA.¹⁵¹ It states that the Authority has already rightly rejected the idea that a Must Carry regime can be used to fund the SABC. It refers to the Authority's Findings Document paragraph 2.38 that:

*"Payment regarding the transmission of must carry channels must be negotiated by both PBS and the SBS in terms of section 60(3) of the ECA. The PBS has an obligation to serve the public by producing content that is in the public interest."*¹⁵²

¹⁴⁹ MultiChoice Legal Opinion 2021: The legality of certain proposals for the Must Carry Regulations, page 14

¹⁵⁰ MultiChoice: Supplementary submission Draft Must Carry Amendment Regulations, 2021, page 16

¹⁵¹ Ibid, page 14

¹⁵² Ibid, page 15 - 16

3.16.4.24 MultiChoice submits that the ECA's section 60 (3) gives the Authority limited powers to determine the SBS's must carry obligations¹⁵³. MultiChoice argues that the Must Carry Must Pay regime is against the commercial negotiable terms principle because it compels the SBS to pay for the channels even if it does not intend to. It ignores the fact that the SBS may not be benefitting material value from the said content and that the SBS might not agree with the commercial negotiations. This is directly at odds with the idea of "*commercially negotiable terms*". MultiChoice adds that the Authority's regulations must be subject to commercially negotiable terms. MultiChoice inserts that on this basis alone, the Must Carry Must Pay regime would be unlawful and invalid.¹⁵⁴

3.16.4.25 MultiChoice makes a list of cases which attest to the phrase subject to commercially negotiable terms in section 60 (3) of the ECA. Some aspects of the negotiable terms are piracy provisions, representations and warranties, rights and obligations in respect of the insertion of logos and rights and obligations in the event of transmission failure, indemnities and limitations of liability, remedies for breach of contract and confidentiality¹⁵⁵.

3.16.4.26 MultiChoice highlights that, even if the ECA's 60 (3) stipulations were broad so as to accommodate the Must Carry Must Pay regime, the prescripts of Section 16 (1) of the Constitution of the Republic of South Africa, Act 106 of 1996 (the Constitution), would pose a more fundamental problem. Section 16(1) of the Constitution articulates that everyone has the right to freedom of expression, which includes ... freedom of the press and other media¹⁵⁶. MultiChoice elaborates that the important element on the right to freedom of press is the right of the

¹⁵³ Ibid, page 15

¹⁵⁴ MultiChoice Legal Opinion 2021: The legality of certain proposals for the Must Carry Regulations, page 15

¹⁵⁵ MultiChoice: Supplementary submission Draft Must Carry Amendment Regulations, 2021

¹⁵⁶ MultiChoice Legal Opinion 2021: The legality of certain proposals for the Must Carry Regulations, page 16

media to decide what materials to publish or broadcast. In this current scenario, this would include the right to determine which materials should not be published¹⁵⁷.

3.16.4.27 MultiChoice states that foreign legal jurisprudence has repeatedly clarified that the core part of the right to freedom of the media is the right to decide what to publish or broadcast and what not to publish or broadcast. The statute which compels publication or broadcasting of particular items at least limits the right to freedom of expression and the media¹⁵⁸. MultiChoice believes that even though the South African Courts have not considered the principle thus far, when faced with the issue they will likely follow the foreign legal jurisprudence on the matter. MultiChoice motivates that the SCA (Supreme Court of Appeal) has already embraced the notion that, *the right to freedom of expression confers on the media the discretion to determine what means of communication would be most effective in relation to engaging the public and communicating and relaying information and events to it.*¹⁵⁹

3.16.4.28 MultiChoice states that if the right to freedom of the media includes the discretion to determine what means of communication would be most effective, it would then be logical to include the right to determine what not to publish or broadcast at all¹⁶⁰. MultiChoice argues that any law which compels the media to publish or broadcast certain content limits the rights to freedom of expression and the media as encapsulated in Section 16 of the Constitution¹⁶¹.

3.16.4.29 MultiChoice indicates that in case where the legislative and regulatory regimes require Must Carry Must Pay, as suggested by SOS / MMA and

¹⁵⁷ Ibid, page 16

¹⁵⁸ MultiChoice Legal Opinion 2021: The legality of certain proposals for the Must Carry Regulations, pages 16 - 17

¹⁵⁹ Ibid, page 17

¹⁶⁰ Ibid, page 17

¹⁶¹ Ibid, page 17

eMedia's submissions, this would be tantamount to compelling subscription broadcasters to broadcast certain specified channels to the subscribers. This will therefore limit the rights to freedom of expression and the media of the subscription broadcasters concerned. MultiChoice enquires if the Must Carry Must Pay regime would survive the rigors of the Section 36 (1) of the Constitution.¹⁶²

3.16.4.30 MultiChoice insists that the Must Carry without Must Pay would be a permissible limitation of the right to freedom of expression¹⁶³. MultiChoice is concerned that the impact of the Must Carry Must Pay regime would be severe to the existence of the SBS in that;

- it would be expected to use its own infrastructure and financial resources to purchase the PBS and other FTA materials irrespective of whether it wants to secure such channels. The situation can be exacerbated by the fact that the SBS is already a competitor to both the public broadcaster and the other FTA;
- the Authority's own research studies reflect few foreign case studies, ie. Estonia, that support the Must Carry Must Pay regime. This further discards the argument that the Must Carry Must Pay regime is a permissible limitation of the rights of freedom of expression and the media; and
- if the intention is to ensure that the SABC materials reaches a great portion of the South African population as possible, the Must Carry without Must Pay is the most effective mechanism to employ¹⁶⁴.

3.16.4.31 The Authority advises that, the ECA restricts itself to the PBS programmes as the only ones that are to be carried by the SBS. The ECA does not cater for the carriage of other FTAs by the SBS.

¹⁶² Ibid, pages 17 -18

¹⁶³ MultiChoice Legal Opinion 2021: The legality of certain proposals for the Must Carry Regulations, page 18

¹⁶⁴ Ibid, pages 18 - 20

3.16.4.32 The Authority would like to reiterate that it is in the public interest to ensure that the public have access to Must Carry channels. The Authority recognises that the requirement to have PBS programmes at all times is not in line with the definition of SBS. Therefore, the Authority will not require that SBS do not switch off the Must Carry channels when the members of the public cannot afford to subscribe. According to the ECA, subscription broadcasting service is defined as a broadcasting service provided to a subscriber upon payment of a fee¹⁶⁵. As such, the Authority has decided to delete regulation 4(1A) of the Draft Amendment Regulations 2021.

3.16.4.33 The Authority is of the view that whilst the Kenyan Broadcasting Regulator sheds an alternative solution, the circumstances in South African differ in terms of the definition of subscription broadcasting service, as the SBS can only be accessed by consumers upon payment of a fee.

3.16.4.34 The Authority notes the concerns raised by MultiChoice in relation to the alternative suggestion it provides regarding Regulation 4(1a). The Authority recognizes that there will be circumstances whereby the PBS fails to provide the Must Carry channels due to natural incidents, both of which can deter the SBS to fulfil its Must Carry mandate. However, the Authority refers to the expectation that, under ordinary circumstances, the SBS will fulfil its Must Carry mandate as prescribed in the Regulations.

3.16.4.35 The Authority has decided that 3 months for negotiation of contract will provide sufficient time for the parties to negotiate. Further, the parties will be given another 3 months to implement

¹⁶⁵ Section one of the Electronic Communications Act No. 36 of 2005, as amended

the agreement. In total, six months to fulfil the requirements of the regulations will be sufficient for both parties. The timeframe provided is the maximum timeframe provided by the Authority.

3.16.4.36 The Authority's decision is that it will not impose must carry must pay as the legislation provides for commercially negotiable terms. The carriage of Must Carry channels should be negotiated and the decision whether to pay or not should consider the intention of must carry that, it is not a means for providing support for any broadcaster nor independent producer, but to ensure that the public broadcast programming is available to the public, including those who have SBS as their only means for access to broadcasting content. Section 60(3) states that Must Carry should be subject to commercially negotiable terms therefore the Authority will not get involved in the commercial part of Must Carry including who must pay who.

3.16.4.37 With regards to Regulation 4(2) the Authority's decision is that all SBS licensees, including the current ones involved in Must Carry, should request carriage due to the change in certain provisions of the Must Carry Regulations as a result of the amendment. The SBS licensee should request to carry the PBS channels within the ambit of the new must carry framework. The regulations have changed to require that the parties negotiate commercial terms, instead of Must Carry at no costs as mandated by the 2008 Regulations. Requesting carriage will be the first step towards concluding commercially negotiable terms.

3.16.4.38 The PBS Licensee requires three months from the date of conclusion of the commercial negotiations to "offer" its television programmes to the SBS Licensee as per draft Regulation 6(2), the

three months is the maximum timeframe for offering Must Carry channels after conclusion of negotiations.

3.16.4.39 The Authority will not vary its decision in the 2008 Regulations to require that Must Carry should start after the 29th channels of the SBS and addition of further Must Carry channels should be after every 20th channel. This will ensure a balance between Must Carry and sustainability of SBS licensees.

3.16.5 EXEMPTION FROM COMPLIANCE WITH THE REGULATIONS

3.16.5.1 MultiChoice states that it is surprised by the SABC's current and sudden renege on its initial definition that the Must Carry obligations ought to apply to individual programming and not to the whole channel as the latter has numerous compositions that entail intellectual property, operational costs and scheduling amongst others. MultiChoice states that it is in its 2007 submission on Must Carry obligations that the SABC argued that the Must Carry must be applied to channels but not specific programming. According to MultiChoice, since all of the SABC content must be transmitted to the public, the broadcaster is not in a position to dictate which of the programming should be transmitted and which one should not.¹⁶⁶

3.16.5.2 eMedia proposes amending **Regulation 5** by replacing the words "twenty-nine (29) channels" with the words "*ten (10) channels*" where they appear in **Regulation 5(1) and 5(3)**. eMedia proposes the insertion of a new sub-regulation 1 to replace the proposed sub-regulation 1 in the Draft Regulations. According to eMedia, the new insertion should state that upon request by the SBS Licensee, a PBS or FTA Licensee must

¹⁶⁶ MultiChoice submission, Draft Must Carry Amendment Regulations, 2021, page 73

offer its Television Programmes contained on a Must Carry Channel to an SBS Licensee which is to be provided on commercially agreeable terms.¹⁶⁷

3.16.5.3 Further, eMedia proposes the insertion of sub-regulation 2 to replace the proposed sub-regulation 2 in the Draft Regulations. According to eMedia, the proposed sub-regulation 2 in the Draft Regulations should state that any PBS or FTA Licensee whose channels must be carried by the SBS Licensee, must offer its Television Programmes which are contained in any Must Carry Channel, to the SBS Licensee within one (1) month of the conclusion of the Agreement or a determination by the Chair of the terms of the Agreement.”¹⁶⁸

3.16.5.4 The Authority would like to state that the Must Carry Agreement should be concluded in terms of section 60(3) of the ECA.

3.16.5.5 The Authority maintains that the SBS must start carrying the SABC’s channels if it provides 29 channels. The Authority will not interfere in the commercial agreements of licensees. Therefore, the Authority will not get involved in the negotiations.

3.16.6 OBLIGATION TO OFFER TELEVISION PROGRAMMES

3.16.6.1 The SABC submits that Regulations 6(2) and 6(2A) must provide that if no commercial agreement can be reached after 90 days and after a bona fide attempt by the parties to do so, the SABC has the right to hold back the channels from any SBS without any penalty from ICASA or punitive regulatory consequence as envisaged in Regulation 10. The SABC states that the concepts of ‘must offer’ and ‘subject to commercial terms’ are therefore in conflict and untenable. The SABC submits that the Authority should rather require the public broadcaster to enter into commercial

¹⁶⁷ etv: Comments and submissions on the Draft Must Carry Amendment Regulations 2021, page 17

¹⁶⁸ Ibid, page17

negotiations with SBS to seek agreement on the commercial terms of carriage for the SABC's three 'Must Carry' channels, namely SABC 1, SABC 2 and SABC 3. Regulations 6(1), 6(2) and 6(2)A should be amended to reflect the above SABC's submissions.¹⁶⁹

3.16.6.2 The Authority has provided the mechanism to address instances where there is no agreement in commercial negotiations and therefore there is no need for the SABC to hold back its channels. However, this does not mean that parties should negotiate in bad faith. The Authority provides that the Must Carry negotiations must be bona fide to comply with the Regulations.

3.16.6.3 The Authority have included penalties in these Regulations to address instances of non-compliance when such arise.

MultiChoice: Regulation 6

3.16.6.4 MultiChoice submits that the proposed sub-regulations 6(1) to 6(2A) should be removed except for the sub-regulation 6(3) with respect to the delivery of must carry signal being unencoded and in a compatible format.¹⁷⁰

3.16.6.5 MultiChoice suggests that the Authority's proposal to replace the phrase "*at no cost*" in Regulation 6(1) to the phrase "*subject to commercially agreeable terms*" is understandable, however section 60(3) requires SBS licensees to "*carry, subject to commercially negotiable terms*". MultiChoice proposes that the Authority amends Regulation 6(1) to refer to "*commercially negotiable terms*", which is the language used in section 60(3) of the ECA.¹⁷¹

¹⁶⁹ SABC: Submission on the ICASA Draft Must Carry Amendment Regulations, 2021, pages 14 – 15.

¹⁷⁰ MultiChoice: Submission on the Draft Must Carry Amendment Regulations, 2021, pages 61 – 62.

¹⁷¹ MultiChoice: Submission on the Draft Must Carry Amendment Regulations, 2021, page 32.

3.16.6.6 MMA and SOS state that the Must Carry Regulations unlawfully provides in section 6(1) that the PBS licensee “must offer its television programmes, at no cost, to a SBS licensee upon a request from the SBS Licensee”. This, according to MMA and SOS, is ultra vires the ECA because the Act specifies that Must Carry be subject to “commercially negotiable terms” which does not empower ICASA to promulgate regulations that provide that PBS programming is to be offered to a SBS at no cost.¹⁷²

3.16.6.7 MMA and SOS are calling for regulation 6(1) of the Must Carry Regulations to be amended as follows:

“6(1) The PBS Licensee must offer its television programmes, **[at no cost]** on commercially negotiable terms, to a SBS Licensee upon request from the SBS Licensee.”¹⁷³

3.16.6.8 MMA and SOS state that as much as such an amendment would accord with the requirements of section 60(3) of the ECA, they are worried that it might lead to the SBS Licensee unreasonably refusing to carry the PBS television programming or alternatively the PBS Licensee demanding unreasonable commercial terms.¹⁷⁴

3.16.6.9 The Authority’s decision is that Must Carry should be subject to commercially negotiable terms in line with section 60(3) of the ECA. The Authority has removed “at no costs” in the Regulations.

¹⁷² MMA and SOS: Joint submission on the Draft Must Carry Amendment Regulations, page 3

¹⁷³ Ibid, page 10

¹⁷⁴ Ibid, page 10

3.16.7 NEGOTIATION OF COMMERCIALY AGREEABLE TERMS

3.16.7.1 MultiChoice states that regulations 4, 6 and 8 set out the framework for Must Carry negotiations. MultiChoice submits that the regulations read together and in chronological order provide as follows: *"A SBS Licensee must submit a request to carry the television programmes of the PBS Licensee within six (6) months of the coming into effect of these regulations, or within six (6) months from the date of issue of the Subscription Broadcasting licence, whichever occurs first."* *"The PBS Licensee must offer its television programmes, subject to commercially agreeable terms, to a SBS Licensee upon a request from the SBS Licensee. "The commercial negotiations contemplated in regulation 6(2) above must be concluded within 90 days from the date of receiving a request for the Must Carry channels."*¹⁷⁵

3.16.7.2 MultiChoice states that the Regulations provides that the PBS Licensee must offer its television programmes to a SBS Licensee within three (3) months from the date of conclusion of the commercial negotiations and that the SBS Licensee must submit to the Authority a copy of the agreement within 30 days of the agreement being signed. Further, MultiChoice is unclear and seeks to understand why the PBS Licensee require three months from the date of conclusion of the commercial negotiations to "offer" its television programmes to the SBS Licensee.¹⁷⁶ MultiChoice state that the regulations further state that the SBS Licensee must commence to transmit the must carry channels within three (3) months of receipt of the must carry channels from the PBS Licensee.¹⁷⁷

3.16.7.3 MultiChoice argues that the timing and sequencing of the negotiation framework is rigid, long-winded and unclear. MultiChoice states that the

¹⁷⁵ MultiChoice: Submission on the Draft Must Carry Amendment Regulations, 2021, pages 33 - 34.

¹⁷⁶ MultiChoice: Supplementary submission Draft Must Carry Amendment Regulations, 2021, page 8

¹⁷⁷ MultiChoice: Submission on the Draft Must Carry Amendment Regulations, 2021, pages 33 - 34.

Authority's framework can be simplified by stating that an SBS Licensee must, in writing, request the PBS Licensee to carry one or more Must Carry Channels within a specified period from the coming into operation of the Amendment Regulations or the date of issue of the SBS licence, whichever occurs first, or from the time that an obligation to add another Must Carry Channel is triggered.¹⁷⁸

3.16.7.4 According to MultiChoice the PBS and SBS Licensee must commence commercial negotiations within 15 days of a request and must negotiate the terms in good faith, having regard to the purpose of the Regulations. MultiChoice argues that in addition to 180 days from the request to carry, or such further period as may be agreed to by the parties and notified to the Authority, the PBS and SBS Licensee must conclude a written must carry agreement setting out the commercially negotiated terms.¹⁷⁹

3.16.7.5 MultiChoice states that the SBS Licensee must notify the Authority, within 30 days from the date of signature of the Agreement by the party signing last in time, that the parties have concluded an Agreement in terms of the Must Carry Regulations. The PBS and SBS Licensees must both take all of the reasonably necessary steps within their control in order for the SBS to add the Must Carry Channel/s to its SBS service within 90 days from the signature of the Agreement, or such further period as may be agreed by the parties and authorised by the Authority. The negotiation framework must be subject to the transitional arrangements proposed by the Authority.¹⁸⁰ MultiChoice suggest the insertion of a negotiation framework to the regulations as Regulation 7A.¹⁸¹

3.16.7.6 MultiChoice states that eMedia suggests the amendment of the proposed sub regulation (2A) in the Draft Regulations so that the agreement

¹⁷⁸ Ibid, page 36.

¹⁷⁹ Ibid, page 36.

¹⁸⁰ Ibid, page 36.

¹⁸¹ MultiChoice: Submission on the Draft Must Carry Amendment Regulations, 2021, pages 62 - 63

contemplated in regulation 6(2), must be concluded within 60 days from the date upon which a PBS or FTA Licensee offers a Must Carry Channel to a SBS Licensee".¹⁸²

3.16.7.7 MultiChoice states that eMedia further proposes the insertion after sub-regulation 6(2A) and to be numbered 6(3), that if the PBS or FTA Licensee and the SBS Licensee cannot agree on the commercial terms for the purposes of concluding the Agreement within the time period contemplated in regulation 6(2A), the matter shall be referred to the Chairperson for final determination of the commercial terms to be included in the Agreement. MultiChoice states that eMedia further submits that the Chairperson shall determine the procedure to be followed for purposes of reaching a decision, which decision shall be reached within 30 days of a referral to the Chairperson and which decision shall be final and binding on the referring parties".¹⁸³

3.16.7.8 Multichoice expands that eMedia and SOS/MMA argued that if a subscription broadcaster and the public broadcaster cannot reach an agreement on commercial terms, then the Authority can resolve the dispute and determine the terms on which the channels will be carried. Further, MultiChoice states that according to SOS and MMA, the Authority must resolve any dispute about the terms. MultiChoice submits that the legal advice it received indicated that the dispute resolution proposals by eMedia and SOS/MMA are impermissible and contrary to section 60(3) of the Electronic Communications Act.¹⁸⁴

3.16.7.9 Further, MultiChoice states that it argues in line with the Authority's Findings Document that it would be undue interference and the parties

¹⁸² Ibid, page 18.

¹⁸³ Ibid, page 18.

¹⁸⁴ MultiChoice: Supplementary submission Draft Must Carry Amendment Regulations, 2021, page 3.

themselves can determine how disputes will be resolved as part of their commercial agreement.¹⁸⁵

3.16.7.10 The SABC in its supplementary submission states that the SBS Licensee must notify the Authority in writing, within 30 days of last signatory signing agreement that it has concluded an agreement with the PBS.¹⁸⁶ Further, the SABC states that the Must Carry Amendment regulations must become immediately enforceable from the day of coming into effect.¹⁸⁷ If agreement cannot be concluded in terms of Regulation 7A time periods, the parties may agree to an independent arbitration process. Failure to resolve a dispute by an arbitration will allow the SBS to cease carrying Must Carry Channels.¹⁸⁸

3.16.7.11 The Authority is of the view that the negotiation process in the Must Carry Amendment Regulations 2022 requires a detailed level of planning by the concerned broadcasters. The Authority is considering the decision-making process within the negotiating organisations when deciding on the timeframe for requesting Must Carry Channels, negotiating, offering the channels and submitting an agreement to the Authority. The timeframes set are maximum timeframes that the broadcasters should take, and they can have a shorter period within which to complete the Must Carry stages.

3.16.7.12 The Authority will not ask the parties to negotiate within 15 days of request for Must Carry channels by the SBS. This is based on the fact that after a request there should be a response from the PBS. Thereafter a negotiating team will be put together and

¹⁸⁵ Ibid, page 3.

¹⁸⁶ SABC: Additional submissions on the ICASA Draft Must Carry Amendment Regulations, 2021, page 10.

¹⁸⁷ Ibid, page 11

¹⁸⁸ Ibid, page 11.

15 days might not be adequate. The 6 months of requesting Must Carry channels by SBS provides latitude for broadcasters to make arrangements for the negotiations.

3.16.7.13 The SBS is expected to submit the agreement to the Authority as Section 60 of the ECA is a restriction on subscription broadcasting services.

3.16.7.14 The Authority's view is that the proposed Regulations allow parties to conclude the Must Carry agreement in terms of section 60(3) of the ECA and the Authority will not be involved in the negotiations of the commercial agreements. In terms of section 2(y), the Authority is not empowered to interfere in the commercial negotiations.

3.16.7.15 Should the parties to a commercial negotiation fail to conclude a contract within three (3) months, the parties may request an extension in writing to the Authority to finalise the contract. If the negotiating parties fail to reach an agreement after exhausting the processes of resolving the disputes such as arbitration, the parties must refer the dispute to the Authority in writing within five (5) days of reaching a breakdown in negotiations. The Authority will, through the CCC, investigate the dispute to ascertain matters such as the reasonableness of the negotiations. The Authority will not interfere in the commercial nature of the negotiations.

3.16.7.16 The SABC submits that subscription channels must, as required by Regulation 4(5) of the Must Carry, make and submit a written request for permission to carry the must carry channels from the public

broadcaster¹⁸⁹. The SABC states that the subscription broadcasting licensee must indicate in the written submission, if the request also includes the coming into effect of the Must Carry Amendment Regulation, 2021 or the date of issue of the relevant Subscription Broadcasting Service Licensee. Further, the SABC states that the SBS must indicate the addition of every twentieth (20th) channel to its subscription broadcasting service which triggers the addition of a must carry channel by the said subscription broadcasting service license to its services from time to time and the launch of a new Non - Must Carry channel on the broadcasting service of the public broadcasting service licensee, from time to time¹⁹⁰.

3.16.7.17 The SABC points out that the PBS Licensee and the SBS Licensee must engage in commercial negotiations within fourteen days (14) from receiving of a written request from the SBS Licensee in terms of sub regulation 7A (1) and must negotiate the commercial terms in good faith having regard to the purpose of these regulations specified in Regulation 2¹⁹¹. The SABC states that the PBS and SBS must conclude the commercial agreement within 90 days (three months) on the proviso that the SBS has written and submitted a request, and that the Authority has also been notified in a written formality¹⁹².

3.16.7.18 The SABC submits that, pursuant to regulation 7A, the SBS can then add the Must Carry channels to its subscription broadcasting services within 30 days (thirty) after both the SBS and PBS licensees have signed their consensual agreement and has been authorized by the Authority¹⁹³. The SABC argues that once the commercial terms are agreed upon, it is the PBS that must assume all the relevant steps in order that the SBS can

¹⁸⁹ SABC: Additional submissions on the ICASA Draft Must Carry Amendment Regulations, 2021, page 9.

¹⁹⁰ Ibid, page 9.

¹⁹¹ SABC: Additional submissions on the ICASA Draft Must Carry Amendment Regulations, 2021, page 9.

¹⁹² Ibid, page 10.

¹⁹³ Ibid, page 10.

transmit Must Carry channels on its subscription broadcasting service as per the existing regulations¹⁹⁴.

3.16.7.19 The SABC states that provided that the PBS Licensee is not regarded as in breach of the prescribed Must Carry regulations, it is not allowed to conclude an exclusive agreement with a SBS Licensee¹⁹⁵.

3.16.7.20 The SABC states that the SBS should inform the Authority in writing about the commercial agreement it has reached and signed with the PBS within a period of 30 days.¹⁹⁶

3.16.7.21 The SABC submits that the Must Carry Amendment Regulations should be immediately enforceable on the day they come into effect, and the timelines provided for under regulations 7A subsequently apply.¹⁹⁷

3.16.7.22 The SABC states that, in addition to other related regulations on Must Carry, the SBS must continue to transmit all the must carry channels that it had carried prior to the signed commercial agreement with the PBS.¹⁹⁸

3.16.7.23 The SABC submits that if the SBS and PBS parties fail to reach a commercial agreement, they are both allowed to pursue a legal arbitration in line with the regulation 7A (3). Further, the SABC states that if parties fail to reach an agreement, the SBS will have to stop broadcasting the PBS content.¹⁹⁹

3.16.7.24 The Authority's decision is that the PBS Licensee and the SBS Licensee must engage in commercial negotiations and conclude

¹⁹⁴ Ibid, page 10.

¹⁹⁵ Ibid, page 10.

¹⁹⁶ Ibid, page 10.

¹⁹⁷ SABC: Additional submissions on the ICASA Draft Must Carry Amendment Regulations, 2021, page 11.

¹⁹⁸ Ibid, page 11.

¹⁹⁹ Ibid, page 13.

the agreement within three (3) months after request to carry Must Carry channels has been received by the PBS from the SBS.

3.16.7.25 The Authority's view is that Must Carry Regulations do not impose restrictions regarding offering channels to other television players by PBS.

3.16.7.26 The Authority's decision regarding notification by SBS after concluding a contract is that the SBS should send information in writing about the commercial agreement it has reached and signed with the PBS within a period of 30 days.

3.16.7.27 The Authority's decision regarding the effective date of the Regulations is that the Must Carry Amendment Regulations will be immediately enforceable on the day they are published in the government gazette.

3.16.7.28 The Authority's decision is that the SBS must continue to transmit all the Must Carry channels that it has been carrying as per the arrangement between the licensees in terms of the 2008 Must Carry Regulations until the parties have agreed on Must Carry in line with the new Regulations, and the PBS has offered the Must Carry channels to the SBS. This is to ensure that the public have access to Must Carry channels whilst the parties are negotiating or resolving any deadlock that might result from negotiations on Must Carry.

3.16.8 TRANSMISSION OF TELEVISION PROGRAMMES

3.16.8.1 MultiChoice notes that the SBS Licensees are required to transmit simultaneously and without any alteration all Must Carry programmes that are identified as Must Carry programmes on the Must Carry

Channels. The Must Carry Regulations should expressly state that the SBS Licensee will not bear any responsibility or liability arising from any of the programming or advertising broadcast on the Must Carry Channel. MultiChoice submits that liability is limited for subscription broadcasters for advertising or for programming and a negotiation framework is therefore proposed as sub-regulation 7A.²⁰⁰

3.16.8.2 MultiChoice therefore propose that the Authority renumber Regulation 7 as Regulation 7(1) and insert a new Regulation 7 (2) to read as follows: “(2) An SBS licensee which carries the Must Carry Channels on its SBS in accordance with these Regulations will not bear any responsibility or liability to any person arising from any of the programming or advertising broadcast on the Must Carry Channel.”²⁰¹

3.16.8.3 The SABC insists that, as the subscription broadcasting service licensee, MultiChoice must simultaneously transmit the entire television programmes on Must Carry channels without any alterations. The SABC emphasizes that the subscription licensee with Must Carry obligations, will not shoulder any responsibility to any person arising from any programming or advertising broadcast on the same Must Carry channel.²⁰²

3.16.8.4 The Authority notes that both MultiChoice and the SABC have a common understanding in the Must Carry Regulations that the SBS will not be liable to any person arising from any programming or advertising broadcast on the same Must Carry channel. However, MultiChoice has urged the Authority to consider a rearrangement of Regulation 7 and introduction of Regulation 7.2 to insulate SBS licensees from any responsibility or liability with

²⁰⁰ MultiChoice: Submission on the Draft Must Carry Amendment Regulations, 2021, page 54

²⁰¹ Ibid, page 54

²⁰² SABC: Additional submissions on the ICASA Draft Must Carry Amendment Regulations, 2021, Annexure, page 9

regards to programming and advertising broadcast on a Must Carry Channel.

3.16.8.5 It is the Authority's decision that both the PBS and SBS must ensure seamless transmission of Must Carry Programming. The Authority monitors compliance with regards to SABC's license conditions and regulations hence the PBS is held accountable of its programming and this applies to Must Carry Channels from the SABC.

3.16.9 MONITORING COMPLIANCE

3.16.9.1 MultiChoice submits that it supports the proposed change in Regulation 9 to require licensees to report annually no later than six months after their financial year end²⁰³.

3.16.9.2 MMA and SOS submit that the SBS licensee must submit a copy of the agreement to the Authority within thirty (30) days of the agreement being signed.²⁰⁴

3.16.9.3 MultiChoice notes that Regulation 8 of the current Must Carry Regulations requires SBS Licensees to submit a copy of the Must Carry agreement to the Authority. MultiChoice is not opposed to this requirement in the context of the current Must Carry Regulations, where the Must Carry Agreement is unlikely to contain any commercially sensitive terms. However, since the Authority has proposed shifting to a Must Carry regime characterised by commercial negotiations, the agreement to be concluded between SBS licensees and the SABC will be a negotiated

²⁰³ Ibid, page 43

²⁰⁴ MMA and SOS: Joint submission on the Draft Must Carry Amendment Regulations, page 11

confidential commercial agreement, which is more likely to contain sensitive terms.²⁰⁵

3.16.9.4 MultiChoice submits that it is not necessary to provide a copy of the Agreement to the Authority to demonstrate compliance. MultiChoice is of the view that it should suffice for the SBS licensee to notify the Authority, in writing, that it has concluded a Must Carry Agreement with the SABC. They further insist that should it be necessary, the Authority could ask the SABC to confirm conclusion of a Must Carry Agreement with the relevant SBS Licensee. It is advised that under exceptional circumstances, the Authority could call for a copy of the Agreement in terms of s4(3)(g) of the ICASA Act.²⁰⁶

3.16.9.5 MultiChoice submits that the term "agreement" in Regulation 8 must be in capital letter "C" to make it clear that it is referring to the Must Carry Agreement, as defined in Regulation 1. MultiChoice further submits that the Authority amend Regulation 8 to require the SBS licensee to notify the Authority, in writing, within 30 days from the signature of the Agreement by the party signing the Agreement last in time (to cater for different signature dates by the parties), that it has concluded a Must Carry Agreement with the PBS Licensee.²⁰⁷

3.16.9.6 MultiChoice further proposes the insertion of a transitional clause for the current agreement prior to the introduction of the envisaged 2021 Regulations.²⁰⁸

3.16.9.7 The SABC advises that licensees must submit individual compliance reports within six months (6) after the end of their financial year²⁰⁹.

²⁰⁵ MultiChoice: Submission on the Draft Must Carry Amendment Regulations, 2021, page 42

²⁰⁶ Ibid, page 42

²⁰⁷ Ibid, page 43

²⁰⁸ Ibid, pages 42 and 48

²⁰⁹ SABC: Additional submissions on the ICASA Draft Must Carry Amendment Regulations, 2021, Annexure, page 11

3.16.9.8 The Authority acknowledges the proposal of a transitional clause for the remainder of the period leading up to the carriage through the amended Must Carry Regulations. After publication of the Must Carry Regulations, 2022, the SBS will continue to carry the PBS channels in line with the arrangement between the licensees in terms of the 2008 Must Carry Regulations until such time as the parties have concluded the commercial agreement in terms of regulation 6(2A), read with regulation 6A. This is to ensure that the public have access to Must Carry channels whilst the parties are negotiating or resolving any deadlock that might result from negotiations on Must Carry.

3.16.9.9 The Authority's decision is that the SBS must submit a signed agreement as proof that an agreement has been reached. The Authority will receive the agreement for the purpose of ensuring compliance with Regulations. The Authority will not further scrutinize the commercial nature of agreements save to ascertain compliance.

3.16.9.10 It is the Authority's decision that both the PBS and SBS should provide compliance reports with regards to Must Carry Regulations. However, although the Authority is not involved in the commercial nature of agreements between negotiating parties, the onus should be on the licensees to ensure full compliance and provide such evidence to the Authority.

3.16.10 DISPUTE RESOLUTION

3.16.10.1 SOS and MMA suggest an amendment to section 8 of the 2008 Must Carry Regulations to provide for the resolution of any disputes with the introduction of new subsections to read as follows²¹⁰:

Where the reasonableness of any commercial terms proposed by a PBS Licensee for its television programming in term of regulation 6(1) is disputed by a SBS Licensee, the SBS Licensee must notify the Authority in writing of such dispute, setting out the details of the alleged unreasonableness within fourteen (14) days of the dispute arising.

Where the Authority, after considering all relevant information, determines that the dispute warrants further investigation then the Authority shall:

- (a) within fourteen (14) days, provide the PBS Licensee with a copy of the SBS Licensee's notification;
- (b) afford the PBS Licensee a reasonable opportunity to respond to the allegations in writing within fourteen (14) days of its having been provided with a copy of the notification by the Authority; and
- (c) afford the SBS Licensee a reasonable opportunity to reply in writing to the PBS Licensee's response within fourteen (14) days of its having been provided with the SBS Licensee's response.

The Authority may call for oral representations after the submissions made by the parties.

The Authority may determine the matter on the basis of the representations submitted to it by the parties.

²¹⁰ MMA and SOS submission on the Regulatory Impact Assessment ("RIA") of the Must Carry Regulations 2018, pages 10-11

The Authority must, within a reasonable period necessary which period shall not be longer than thirty (30) days, furnish the parties to the dispute with its final decision.

3.16.10.2 The SABC supports the view that the Authority should not be involved in the Licensee's commercial negotiations regarding Must Carry, as this will amount to interference in commercial activities of licensees, which is contrary to the objects of the ECA, in particular section 2(y). The arbitration process as a tool for dispute resolution should not be regulated by the Authority but must be decided upon by the parties themselves, should they agree. If there is a deadlock, it would be the responsibility of the parties to notify the Authority of a deadlock and the developments of the arbitration process (if any)²¹¹.

3.16.10.3 MMA and SOS submit that it will not be in the public interest for the subscription broadcaster and the public broadcaster to walk away in case of a deadlock during commercial negotiations for must carry must pay. They argue that whilst Dstv and SABC alluded that the Authority cannot play a role in the commercial negotiations, section 4(3)(j) of the ICASA Act and section 4(1) of the ECA read with section 60(3) of the ECA is broadly sufficient to provide the Authority with the role to deal with a deadlock in commercial negotiations.²¹²

3.16.10.4 MMA and SOS state that the Authority should play a similar role that it plays in disputes regarding interconnection, facilities leasing and sports broadcasting rights. They further indicate that it might be some time in future whereby the public do not need access to SABC programmes through the subscription broadcasting platform. They believe that if

²¹¹ SABC: Additional submissions on the ICASA Draft Must Carry Amendment Regulations, 2021, page 8

²¹² MMA and SOS: Joint additional submission on the Draft Must Carry Amendment Regulations, pages 3

ICASA does not prescribe a role to play during deadlocks, the broadcasters might act unreasonably during the negotiations, and this will affect the public interest.²¹³

3.16.10.5 MultiChoice states that the Authority's dependence on section 60(3) of the ECA to intervene in case of a standoff between two negotiating parties as a mediator is inadequate to make it lawful. MultiChoice is of the view that the Authority cannot mediate Must Carry disputes because (a) section 60(3) of the ECA provides that Must Carry obligations are subject to commercially negotiable terms and (b) the ECA does not empower the Authority to resolve Must Carry disputes.²¹⁴

3.16.10.6 MultiChoice is of the view that ICASA does not have a right to impose dispute resolution on commercial negotiations.²¹⁵ According to MultiChoice's submission, if the Authority is to determine the terms on which the channels are to be carried, rather than those terms being determined by agreement between the parties, then this would not comply with the requirement that the channels are to be carried on commercially negotiable terms and therefore such a regulation would be contrary to section 60(3).²¹⁶

3.16.10.7 MultiChoice insists that section 60(3) of the ECA, does not give the Authority or the CCC the authority to resolve any disputes which arise from the failure to negotiate in good faith or to reach agreement on the terms and conditions of carriage as contemplated under section 60(3) of the ECA. MultiChoice further states that section 60(3) of the ECA only gives the Authority the limited powers to prescribe regulations regarding

²¹³ Ibid, pages 4 - 5

²¹⁴ MultiChoice: Supplementary submission Draft Must Carry Amendment Regulations, 2021, page 3

²¹⁵ Ibid, page 3

²¹⁶ Ibid, page 3

the extent to which a subscription broadcasting service must carry programmes provided by the public broadcaster.²¹⁷

3.16.10.8 MultiChoice argues that there is no other provision of the ECA or the related legislation which empowers the Authority to resolve any disputes which arise from the failure to negotiate in good faith or to reach agreement on the terms and conditions of carriage.²¹⁸

3.16.10.9 MultiChoice concurs with the Authority's position that it should not be involved in the commercial negotiations and instead, for the parties to adopt a suitable dispute resolution mechanism to resolve whatever impasse that arises.²¹⁹

3.16.10.10 MultiChoice points out that the Authority is not lawfully entitled to determine the terms on which an SBS must carry channels if it cannot reach a commercial agreement with the relevant broadcaster.²²⁰

3.16.10.11 MultiChoice argues that submission made by MMA and SOS on dispute resolution during hearing on dispute resolution were unsubstantiated as they hinged on irrelevant sections of the ECA, specifically section 37 and section 43.²²¹ MultiChoice argues further that this confirms the potential unlawfulness of the approach.²²²

3.16.10.12 MultiChoice states that of all legislation empowering both the Authority to draft the regulations and the CCC in terms of sections 21, 25, 33, 37, 40, 43, 46 and 60(2) of the ECA, none of the cited provisions relate to Must Carry.²²³

²¹⁷ Ibid, page 5

²¹⁸ MultiChoice: Supplementary submission Draft Must Carry Amendment Regulations, 2021, page 5

²¹⁹ Ibid, page 3

²²⁰ Ibid, page 4

²²¹ Ibid, page 4

²²² Ibid, page 4

²²³ Ibid, page 4

3.16.10.13 MultiChoice highlights that there are contrasting empowering and disempowering provisions made by parliament that while sections 21, 25, 33, 37, 40, 43, 46 and 60(2) of the ECA confer powers to the Authority to act in a dispute resolution, this is not the case with regards to Must Carry Section 60(3).²²⁴

3.16.10.14 MultiChoice notes that the SABC is also in agreement with the viewpoint that the Authority is not empowered to resolve disputes between the public broadcaster and a subscription broadcaster arising out of section 60(3) of the ECA.²²⁵ MultiChoice further advises that any person convinced of a violation of section 60(3) of the ECA or Must Carry Regulations may approach the Authority within 60 days for recourse.²²⁶

3.16.10.15 The Authority notes that there is general agreement with respect to the dispute resolution mechanisms and that they be left to contracting parties to the exclusion of the Authority. MultiChoice believes that a dispute related to the Must Carry Obligations may not be resolved by the CCC since the current provisions in the ECA are unable to address Must Carry related disputes. The one dissenting view considered the effect of a deadlock in negotiations and that this would lead to a negative impact on consumers. One stakeholder submits that where the reasonableness of commercial negotiations is disputed by a party to negotiation, the concerned party should notify the Authority and the Authority will decide whether to investigate the matter.

3.16.10.16 The Authority's decision is that, should the parties to commercial negotiations fail to conclude a contract within three

²²⁴ Ibid, page 5

²²⁵ MultiChoice: Supplementary submission Draft Must Carry Amendment Regulations, 2021, page 5

²²⁶ Ibid, page 5

(3) months, the parties may request an extension in writing to the Authority to finalise the contract. A request for extension must be lodged with the Authority before the lapse of the three (3) months period mentioned in regulation 6(2A) above. The duration of extension granted in terms of regulation 6A(1) must not exceed a period of thirty (30) days. If the negotiating parties fail to reach an agreement after exhausting the processes of resolving the disputes such as arbitration, the parties must refer the dispute to the Authority in writing within five (5) days of reaching a breakdown in negotiations. The Authority will, through the CCC, investigate the dispute to ascertain matters such as the reasonableness of the negotiations. The Authority will not interfere in the commercial nature of the negotiations

3.16.10.17 Should there be a contractual deadlock between parties, the 2008 Must Carry obligations are to continue nonetheless so as not to negatively impact consumers.

3.16.11 CONTRAVENTIONS AND PENALTIES

3.16.11.1 MultiChoice submits that the Authority proposes including some of the proposed sub-regulations as part of the clauses that may result in a fine if contravened. MultiChoice views some of the proposed contraventions and fines as unduly harsh.²²⁷ A transitional period of six (6) months is proposed as well as allowing the current agreement to lapse before the 2021 Regulations apply²²⁸.

²²⁷ MultiChoice: Submission on the Draft Must Carry Amendment Regulations, 2021, page 43

²²⁸ Ibid, page 48

Penalties: negotiation framework

3.16.11.2 MultiChoice submits that the Authority has proposed a fine of up to one million rand in respect of each of the applicable regulations, as follows; Regulation 4(2) (requirement for SBS Licensee to submit a request to carry); regulation 4(3) (requirement for SBS Licensee to commence to transmit the Must Carry Channels within three (3) months of receipt of the channels from the PBS Licensee); and regulation 6 (obligation for PBS Licensee to offer television programmes). These all deal with the negotiation framework. MultiChoice alleges that reg 4 and 6 are particularly unclear and unworkable and therefore unduly harsh to impose such severe penalties in respect of such unclear provisions nor should the penalties apply cumulatively to these provisions²²⁹.

3.16.11.3 The Authority is of the view that Regulations 4 and 6 are clear and workable and as such does not agree with MultiChoice's sentiments. Further, the rationale behind these provisions is to ensure that there is negotiation and offering of channels as per Regulation as the Authority wants to avoid a deadlock between the parties to the detriment of consumers. To the extent that there is resistance from either party, such is reportable to the Authority's CCC. Lastly, the proposed fine is a maximum fine, and a far lesser fine could be imposed. The fine is meant to indicate the seriousness for which the Authority views these Regulations and is meant as a deterrent to non-compliance.

Penalties: failure to conclude commercial negotiations within ninety (90) days

3.16.11.4 MultiChoice notes that the Draft Regulations provide that the failure to conclude commercial negotiations within ninety (90) days from receiving a request for the Must Carry Channels is punishable by a fine of up to one million rand. This MultiChoice submits, is without a provision for the

²²⁹ Ibid, page 44

negotiation period to be extended beyond the stipulated ninety (90) days²³⁰.

3.16.11.5 MultiChoice further supports the sentiment that it is necessary to provide clear time frames for the negotiation and conclusion of commercial agreements to provide certainty to the SBS and PBS on what is expected of them in terms of time frames. However, MultiChoice is of the firm view that time frames should not lead to the imposition of a penalty in circumstances where, despite good faith negotiations, the parties are unable to reach agreement in the specified period or at all²³¹.

3.16.11.6 MultiChoice expands that the Authority has proposed a shift to a Must Carry regime centred on the requirement for SBS to carry subject to commercially negotiable terms. The Authority's position is that the SBS and PBS will have to negotiate to reach an agreement²³².

3.16.11.7 MultiChoice commits to negotiating with the SABC in good faith. But, as the Authority, recognises, there is a risk that the "*the parties will take long to reach an agreement*" and/or that the parties will be unable to reach agreement at all²³³.

3.16.11.8 MultiChoice submits that the Regulations must contemplate the reasonable possibility that negotiations could take a longer period than ninety (90) days to reach agreement, or the parties are, despite good faith negotiations, unable to agree²³⁴.

3.16.11.9 MultiChoice further submits that provided the negotiations are conducted in good faith on the part of both parties, a licensee should not

²³⁰ MultiChoice: Submission on the Draft Must Carry Amendment Regulations, 2021, page 44.

²³¹ Ibid page 44

²³² Ibid page 44

²³³ Ibid page 44.

²³⁴ Ibid page 44

be penalised if, despite good faith negotiations, it is unable to reach agreement within the specified period or at all. To do so would be unreasonable and unfair. MultiChoice additionally proposes that to the extent that a party does not negotiate (a) at all or (b) in good faith, its failure to do should be referred to the CCC in terms of the ICASA Act²³⁵.

3.16.11.10 The Authority is of the view that the potential scenario of agreement not being reached and negotiations taking longer than three (3) months is plausible. The Authority has provided for an extension if the negotiations are not finalised within three (3) months. However, again, due to the seriousness of non-compliance in relation to not finalising negotiations after the extension granted, or deadlock in negotiations, the Authority is of the concerted view that it will take measures, such as imposing a fine. The fine mentioned in the Regulations is a maximum fine and a scale is applicable depending on the seriousness of the breach.

Penalties: Exemptions from Must Carry

3.16.11.11 MultiChoice is of the view that the contravention of regulation 5(2), which provides that a Licensee may only be exempted from the Must Carry Regulations where it has notified the Authority in writing and the Authority has approved the exemption in writing, failing which is punishable by a fine of up to one million rand in terms of regulation 10(1)(a); is unduly harsh, given that the intention of the Regulations is to exempt such licensees from the Must Carry Regulations²³⁶.

3.16.11.12 The Authority's view is that the said fine is necessary to avoid instances where the Authority is unaware of licensees that are or not compliant to the Regulations due to the seriousness of these Regulations and the impact of non-compliance on consumers.

²³⁵ Ibid page 44

²³⁶ Ibid page 45

Further the fine is set at a maximum of one million rand providing a scale, such scale allows the Authority to set appropriate penalties based on the seriousness of the contravention and highlights how serious the Authority takes such contravention.

Penalties: reg 4(6)

3.16.11.13 MultiChoice states that the reference to Regulation 4(6) in the penalty provision is unclear, since Regulation 4(6) merely provides that where channels are added in accordance with Regulations 4(5)(b) and 4(5)(c), Regulations 7 and 9 will apply to such channels. They also pose a potential anomaly as a contravention of regulation 7 is punishable under regulation 10(1)(a), but Regulation 8 is not²³⁷.

3.16.11.14 MultiChoice believes that it is not clear whether the Authority's intention is to incorporate a contravention of regulation 8 into regulation 10(1)(a) by reference, but if that is the intention, it would be unduly harsh and inappropriate²³⁸.

3.16.11.15 The Authority notes and agrees with MultiChoice's submission that the inclusion of Regulation 4(6) which speaks to the addition of channels and the applicability of sub regulations 7 and 9 into the penalties clause is unworkable and the Authority will amend the Regulations accordingly.

Penalties: Catch-all

3.16.11.16 MultiChoice concludes that every contravention in the Regulations not listed in regulation 10(1)(a) is punishable by a fine of up to R100, 000, given the catch-all in sub-regulation 10(1)(b). This they find to be excessively wide and harsh. MultiChoice attempted to demonstrate this by the use of an example wherein the submission of a Must Carry

²³⁷ MultiChoice: Submission on the Draft Must Carry Amendment Regulations, 2021, page 45

²³⁸ Ibid page 45

Agreement or a compliance report to the Authority arrives one-week late which would result in a fine of up to R100, 000²³⁹.

3.16.11.17 MultiChoice recommends that the proposed contraventions and fines be streamlined in line with the above-mentioned submissions and the proposed penalties adjusted appropriately²⁴⁰. Further, MultiChoice submits that the flow in regulation 10 needs to be corrected so that sub-regulation (1)(a) follows on from regulation 10(1)²⁴¹.

3.16.11.18 The SABC indicates the relevant and appropriate section in the ICASA Act that can be enacted to impose fines on any broadcasting licensees that may breach the terms of the Must Carry Regulations²⁴².

3.16.11.19 The Authority does not view Regulation 10(1)(b) to be harsh. The proposed fine is a maximum fine, and a far lesser fine could be imposed. The fine is meant to indicate the seriousness for which the Authority views these Regulations and is meant as a deterrent to non-compliance.

3.16.12 SHORT TITLE AND COMMENCEMENT

Transitional arrangements

3.16.12.1 The SABC submits that transitional arrangements need to be included in the Must Carry Amendment Regulations, 2021 and proposes the following texts on clause 10 of the Amendment Regulations:²⁴³

²³⁹ MultiChoice: Submission on the Draft Must Carry Amendment Regulations, 2021, page 46

²⁴⁰ Ibid, page 46

²⁴¹ Ibid, page 46

²⁴² SABC: Additional submissions on the ICASA Draft Must Carry Amendment Regulations, 2021

²⁴³ SABC: Additional submissions on the ICASA Draft Must Carry Amendment Regulations, 2021, Annexure, pages 12 -13

- 1) These Regulations are called the Must Carry Amendment Regulations, 2021, and will come into force on the date of the publication thereof in the Government Gazette.
- 2) Notwithstanding any other provision of these Regulations, the Must Carry Channels carried by an SBS Licensee immediately prior to the publication of the Must Carry Amendment Regulations, 2021 shall continue to be carried on an SBS in accordance with the Agreement concluded between that SBS Licensee and the PBS Licensee and submitted to the Authority under the ICASA Must Carry Regulations, 2008 until such time as:
 - (a) a new Agreement is concluded by the parties in terms of the amended regulations within the Regulation 7A time periods; or
 - (b) the parties fail to find agreement within the Regulation 7A time periods.
- 3) Should the parties fail to find agreement within the Regulation 7A timelines then:
 - (a) The parties may at their own discretion agree to independent arbitration; or failing that
 - (b) Within 60 days of the expiry of the period for negotiation in terms of Regulation 7A(3) or such longer period as the parties may agree in writing, the SBS shall cease carrying the Must Carry Channels on its subscription services, and the parties shall inform the Authority, the public and the SBS subscribers accordingly.
- 4) The Authority takes cognisance of a government policy process that may lead to the repeal of the enabling statutory provision for these regulations, namely section 60(3) of the Electronic Communications Act, 2005. Should section 60(3) of the ECA be repealed then the agreement concluded in terms of Regulation 8(1) between an SBS Licensee and a PBS Licensee should remain in force until the

termination of that Agreement, or for a period mutually agreed to by the parties.

3.16.12.2 MultiChoice submits that under the proposed new regime, the public and subscription broadcasters will negotiate the terms and reach an agreement on the carriage of Must Carry Channels. MultiChoice believes that it is possible that the new regime will be as successful as the current one, but there is also a risk that the parties might not reach agreement (e.g. on the apportionment of transmission costs) and that the gains achieved under the current regulations will then be undone.²⁴⁴

3.16.12.3 MultiChoice acknowledges that the Authority has noted the risks that no commercial agreement is reached resulting in no universal coverage and convenient access to PBS channels on the SBS platform (black out), in which case the objectives of universal coverage and convenient access will not be achieved.²⁴⁵

3.16.12.4 MultiChoice is of the view that the Authority is not alone in recognising this risk. Ofcom identified a real risk that without Must Carry rules, public service broadcasters in the UK "*may find it difficult to agree fair terms for their content and may not be available on certain TV platforms*".²⁴⁶

3.16.12.5 MultiChoice submits that universal access would undoubtedly be harmed if the parties failed to reach agreement. MultiChoice states that, like the Authority, it wishes to avoid a reduction in universal access or to inconvenience subscribers as a result of the amendments.²⁴⁷

3.16.12.6 MultiChoice further states that it supports the Authority's position that the current Regulations will apply until the subscription broadcasting

²⁴⁴ MultiChoice: Submission on the Draft Must Carry Amendment Regulations, 2021, page 46

²⁴⁵ Ibid, Page 46

²⁴⁶ Ibid, Page 47

²⁴⁷ MultiChoice: Submission on the Draft Must Carry Amendment Regulations, 2021, page 47

services broadcast the Must Carry Channels in line with the reviewed Regulations to ensure that if the parties take long to reach an agreement there is no impediment to accessing public broadcasting service programmes. However, MultiChoice notes that the Draft Regulations do not contain wording to expressly give effect to the Authority's position and therefore suggest that the new Regulations should contain an express transitional provision to give effect to the Authority's position, to ensure that the Must Carry Channels continue to be carried in accordance with the current arrangement until the parties have concluded a new agreement under the new Regulations.²⁴⁸

3.16.12.7 MultiChoice further proposes that the amendments to the Must Carry Regulations should come into operation six months after they are gazetted to allow the affected parties to arrange their affairs in order to comply with the new Regulations.²⁴⁹

3.16.12.8 MultiChoice proposes that the Authority amend clause 10 of the Amendment Regulations and Regulation 8(2) of the principal Regulations to include commencement and transitional arrangements, to read as follows:

"Short title, commencement and transitional arrangements;

(1) These Regulations are called the Must Carry Amendment Regulations, 2021, and will come into force six months after the date of the publication thereof in the Government Gazette.²⁵⁰

(2) The Must Carry Channels carried by an SBS Licensee immediately prior to the publication of the Must Carry Amendment Regulations, 2021 shall continue to be carried on an SBS in accordance with the Agreement concluded between that SBS Licensee and the PBS Licensee and submitted to the Authority under the ICASA Must Carry

²⁴⁸ Ibid, page 47

²⁴⁹ Ibid, page 49

²⁵⁰ Ibid, page 48

Regulations, 2008 until such time as the Must Carry Channels are carried by that SBS Licensee in accordance with a new Agreement concluded by the parties in terms of the amended Regulations."²⁵¹

3.16.12.9 MultiChoice proposes a phase approach in implementing the Regulations

It suggests that the effective date of the regulation should be extended to six (6) months after the publication of the final regulations²⁵². This is to allow the parties time to arrange their respective affairs and to make the necessary plans, strategies and budgets in order to commence negotiations as soon as the amendment Regulations come into effect. This will promote stability, predictability and universal access.²⁵³

3.16.12.10 MultiChoice submits that furthermore, the public and subscription broadcasting services must seek to conclude a written Must Carry agreement setting out the commercially negotiated terms within 180 days from the request to carry, or such further period as may be agreed to by the parties and notified to the Authority²⁵⁴. Therefore, MultiChoice submits that the primary consideration during the interim period should be to maintain the status quo and avoid a drop in subscribers' access to the SABC Must Carry channels while the new regime is being phased-in and negotiated.²⁵⁵

3.16.12.11 The Authority notes that there is a risk that PSB and SBS licensees may not agree on commercially negotiable terms in line with section 60 (3) of the ECA. This will affect universal access as PBS Must Carry channels will not be available on the SBS platforms. MultiChoice suggests that the Authority add a clause in the Regulations to stipulate that must carry channels will

²⁵¹ MultiChoice: Submission on the Draft Must Carry Amendment Regulations, 2021, page 48

²⁵² MultiChoice: Supplementary submission Draft Must Carry Amendment Regulations, 2021, page 6

²⁵³ Ibid, page 8

²⁵⁴ Ibid, page 6

²⁵⁵ Ibid, page 7

continue to be carried until an agreement is reached in line with the new Regulations.

3.16.12.12 The Authority's decision is that if PBS and SBS licensees fail to agree on commercially negotiated terms in line with section 60 (3) of the ECA, the PBS Must Carry Channels must continue to be carried on SBS platforms in line with current agreement concluded under the Must Carry Regulations, 2008 whilst the deadlock is being resolved.

3.16.12.13 The Authority's decision is that it is not necessary to wait six months after publication of the regulations for them to come into effect. Already the Regulations allows six months for the SBS to submit a request to carry the Must Carry Channels after publication of the regulation. This is sufficient time to allow for planning, budgeting and any other activities that need to be undertaken after the publication of the Regulations.

4. CONCLUSION

- 4.1 The Authority after consultation with stakeholders, is concluding the process to review the 2008 Must Carry Regulations and is satisfied that the amended provisions will improve the regulation of must carry. Going forward, Must Carry Regulations will be subject to commercially negotiable terms to be agreed upon by the parties concerned. The Regulations have considered that during negotiations the public should have access to the television programmes of the public broadcast service licensee.
- 4.2 The Authority has noted issues raised regarding the AAVCS process and will follow the developments emanating from this process, specifically for issues that could have an impact on the Regulations.

- 4.3 This review is in line with section 60(3) of the ECA and matters outside the prescripts of section 60(3) could not be addressed within this process.

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