



**Policy and Regulatory Affairs**

Radio Park, Henley Road, Auckland Park, 2092  
Private Bag X1 Auckland Park 2006, Gauteng,  
South Africa.

E-mail: [skosanasf@sabc.co.za](mailto:skosanasf@sabc.co.za)

Tel +27 011 714-4217 Fax +27 11 714-4508  
[www.sabc.co.za](http://www.sabc.co.za)

**04 December 2017**

Refilwe Ramatlo  
ICASA  
164 Katherine Street  
Sandton  
2146

**E-Mail:** [subscriptioninquiry@icasa.org.za](mailto:subscriptioninquiry@icasa.org.za) | [RRamatlo@icasa.org.za](mailto:RRamatlo@icasa.org.za)

Dear Ms Ramatlo,

**SABC SUBMISSION ON THE ICASA DISCUSSION DOCUMENT: INQUIRY INTO  
SUBSCRIPTION TELEVISION BROADCASTING SERVICES**

Attached hereto, please find the SABC's submission on the ICASA Discussion Document:  
Inquiry into subscription television broadcasting services.

We trust that this is in order.

Yours sincerely,

**Fikile Skosana**  
**Policy and Regulatory Affairs**

## **CONTENTS PAGE**

<b>0. COVERING LETTER FROM SABC CHAIRPERSON, BONGUMUSA MAKHATHINI</b>	<b>Page 1</b>
<b>1. PUBLIC SERVICE MANDATE AND SCOPE OF THIS INQUIRY</b>	<b>Page 9</b>
1.1 THE PUBLIC SERVICE MANDATE	
1.2 SCOPE OF THIS INQUIRY	
<b>2. AMENDMENT OF EXISTING REGULATIONS: MUST CARRY, SPORTS RIGHTS AND DIGITAL MIGRATION REGULATIONS</b>	<b>Page 16</b>
2.1 AMENDMENT OF MUST CARRY REGULATIONS	
2.2 AMENDMENT OF SPORTS RIGHTS REGULATIONS	
2.3 AMENDMENT OF DIGITAL MIGRATION REGULATIONS	
<b>3. AMENDMENT TO LEGISLATION</b>	<b>Page 25</b>
3.1 AMENDMENT AMENDMENT OF SECTION 60(4) OF THE ECA	
<b>4. NEW REGULATIONS AND LICENCE CONDITIONS IN TERMS OF SECTION 67(4) OF THE ECA</b>	<b>Page 27</b>
<b>5. CONCLUSION</b>	<b>Page 28</b>
<b>6. ANNEXURE: SABC'S REQUEST TO ICASA TO REVIEW MUST CARRY REGULATIONS</b>	<b>Page 30</b>



**Office of the Chairman: SABC Board**  
28<sup>th</sup> Floor, Radio Park, Henley Road  
Auckland Park, 2094  
Private Bag X1, Auckland Park, 2006  
Johannesburg, Gauteng, South Africa  
Tel +27 11 714-3786/ 2400, Fax +27 11 714-2404  
[www.sabc.co.za](http://www.sabc.co.za)

04 December 2017

Ms. Refilwe Ramatlo

ICASA

[subscriptioninquiry@icasa.org.za](mailto:subscriptioninquiry@icasa.org.za)

Dear Ms. Ramatlo

**WRITTEN SUBMISSION BY THE SABC ON THE DISCUSSION DOCUMENT ON THE INQUIRY INTO  
SUBSCRIPTION TELEVISION BROADCASTING SERVICES ("THE DISCUSSION DOCUMENT")**

The SABC welcomes the opportunity to make written representations on the Discussion Document published by the Authority on 25 August 2017. As you are aware, the SABC is the only public broadcaster in South Africa and is a creature of statute - the Broadcasting Act, 1999 – which sets out our detailed, regulated public broadcasting mandate. With our five television channels and 19 radio services, the SABC stands on its own in vernacular broadcasting in South Africa, with services in all official languages, in addition to San, Khoi and sign language.

While the SABC is a public broadcaster, it is also a 'for profit company' in terms of both the Broadcasting Act and the Company Act. Therefore, in order that we may properly fund our public service obligations, we have to compete commercially to attract advertising and sponsorship - which currently forms approximately 75% of the SABC's total revenue base.

**Competition and the Sustainability of Public Broadcasting**

This inquiry takes place at a critical juncture for the South African broadcasting industry when major questions on future competition in the industry and the sustainability of public broadcasting have yet to be answered. It also takes place in the context of uncertainty around

the future digital platforms for the existing free-to-air (FTA) television broadcasters and the proliferation of Over the Top (OTT) television players using broadband infrastructure.

The SABC notes that a similar process commenced in 2008 but unfortunately the Authority was unable to complete it. The Authority now has the unenviable but important task of resolving some of the most pressing regulatory issues faced by the South African television broadcast industry since the advent of democracy and independent regulation in 1994.

The legislative framework envisages that the Authority promotes fair competition but at the same time protect the integrity and viability of public broadcasting services.

In section 2 of the Broadcasting Act, the objects provide, inter alia, that broadcasting policy must:

- (h) ensure fair competition in the broadcasting sector; and*
- (l) establish a strong and committed public broadcasting service which will service the needs of all South African society;*

Section 2 of the Electronic Communications Act, 2006 (the ECA), goes further and provides, inter alia, that the Authority must:

- (f) promote competition within the ICT sector;*
- (t) protect the integrity and viability of public broadcasting services;*

### **Scope of the Inquiry**

In this context, the SABC strongly believe that this inquiry and ICASA's suggested pro-competitive measures should not be narrowly confined to the subscription broadcasting market but should also focus on how the lack of competition in subscription broadcasting has

impacted the entire South African television broadcast industry. Types of broadcasters cannot be neatly boxed into separate markets as subscription broadcasters compete with FTA broadcasters for audiences, advertising and sponsorship revenue, content and sports rights and the acquisition of top South African television content. It is the SABC's submission that ineffective competition in the subscription television market has negatively impacted the entire television broadcasting industry. As the Authority states in paragraph 1.2.12 of the Discussion Paper:

*"Free-to-air channels are accordingly competing for a smaller proportion of total revenue than in other benchmark countries".*

In the Discussion Paper, the Authority defines markets for subscription content and subscription channel provision as well as for technical services and retail distribution of subscription TV channels. While these definitions may be correct, if the inquiry does not also focus on how ineffective competition in all these markets has negatively impacted the broad South African television market, including FTA broadcasters, it would be a missed opportunity to deal with competition and regulatory issues holistically. The strong interrelationship between the FTA broadcasting market and competition in the subscription television market should not be ignored.

### **Summary of SABC Submission**

In summary, the SABC submission explains why funding the SABC's public mandate is a statutory imperative and how advertising is still the Corporation's largest source of revenue by far. We also consider the scope of the inquiry and submit why it is important to address issues in the broader television broadcasting market. In order to promote competition and ensure the



sustainability and viability of the public broadcaster, the SABC proposes three types of regulatory interventions in the South African television broadcasting market.

1. Firstly, the SABC has requested that the Authority amend existing regulations such as the Must Carry, the Sports Broadcasting Services Regulations, 2010 (“Sports Rights Regulations”) and the Digital Migration Regulations.

On 21 November 2017 the SABC made a written request to the Authority to amend the 2008 Must Carry regulations in order to allow for “commercial negotiations” between the SABC and subscription broadcasters, as required by section 60(3) of the ECA. A copy of this written request has been attached for ease of reference as Annexure A. However, this submission includes more detail on some of the unintended, commercial consequences of the current Must Carry Regulations.

The SABC submits that the Authority should begin a process to amend the Sports Rights Regulations to, inter alia, clarify issues left uncertain by the 2010 regulations, in particular to prevent abuse of dominance in the hoarding of sports rights and the exercise of sub-licensing rights to the public broadcaster.

2. Secondly, the SABC proposes amendments to legislation. We have requested that the Authority make a recommendation to Parliament with respect to the amendment of section 60(4) of the ECA which has failed to cap advertising revenue by subscription broadcasters, as originally intended by the legislature. The Subscription Broadcasting Regulations of 2006 were also ineffective as a result of the loophole in the enabling legislation. Given the gross subscription revenue now enjoyed by DSTV, taken with the total South African ad revenue pie, it is impossible for DSTV’s advertising and sponsorship revenue to ever exceed subscription revenue and therefore there is no ad revenue cap

for DSTV which now commands 48% of the television advertising revenue in South Africa.

The public broadcaster is correctly required by law and policy to make available all its programming for free. It therefore follows that advertising and sponsorship revenue is the SABC's primary source of revenue. The SABC not only has to compete with other FTA broadcasters for an ever shrinking pot of advertising revenue but also with the dominant subscription broadcaster which can also draw on approximately R20bn in subscription revenue. This is clearly not what was intended by the legislature. An amendment to section 60(4) of the ECA should allow the Authority prescribe a much more effective approach to capping advertising and sponsorship revenue for subscription broadcasters.

3. Thirdly, the Authority should prescribe new, pro-competitive regulations and licence conditions in terms of section 67(4) of the ECA. These regulations should, as required, "impose pro-competitive licence conditions on those licensees having significant market power" in order "to remedy the market failure".

### **Why has licensing competition not been effective?**

The licensing of other subscription broadcasters has not curbed the market power enjoyed by MCA, the dominant subscription player, for the following reasons:

- MNET was given first mover advantage in subscription television over 30 years ago as part of an exclusive concession granted by the apartheid government, followed by the launch of a second broadcasting service, DSTV in 1995. Both MNET and DSTV are owned and controlled by MCA. Despite the fact that controlling two television broadcasting

licences was contrary to the control provisions in the Independent Broadcasting Authority Act at the time, it was eventually condoned by the Authority;

- MNET was allowed an “Open Window” to market its services to FTA audiences for 21 years until it was closed by the Authority in 2007;
- Unlike the heavy-touch, public interest regulation imposed on the public broadcaster, both MNET and DSTV have been treated to extremely light-touch broadcasting regulation since their inception, with no intervention yet by competition authorities;
- MCA, as the dominant player with significant market power, has also grown its subscriber base exponentially through long-term and exclusive sports and premium content rights. More pertinent for the SABC, our 3 FTA channels continue to bring added value to certain DSTV subscription packages without DSTV having to pay for these channels in terms of the Must Carry regulations.

#### **SABC’S ongoing competitive and commercial relationship with MCA**

The SABC Board acknowledges that MCA is not just a competitor for television advertising and sponsorship revenue but has been an important SABC commercial partner for channel distribution and as a sub-licensor of sports rights.

However, the Board has had to recently distance itself from alleged unlawful and unethical behaviour that led up to the signing of the Channel Distribution Agreement with MCA (“the Multichoice Agreement”) between 2013 -2016.



In a statement issued on 29 November 2017, the SABC Board reiterated its commitment to independence from both political and commercial interests. As required by the Broadcasting Act and our competition laws, the SABC cannot allow any competitor or commercial operator to interfere with and unduly influence SABC policy and commercial strategy.

The MCA Agreement was first brought to Parliament's attention during the Ad Hoc Committee's inquiry into the SABC last year and, like the 2017 interim board before us, the SABC Board and management will continue to cooperate with any investigation into the alleged wrongdoing that led up to the signing of this Agreement.

#### **Clean break from the past**

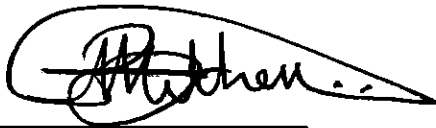
In making our submission to enhance competition in the television broadcasting industry, this SABC Board is determined to make a clean break from the past – a past which often saw weak governance and compliant commercial strategy from the SABC in its negotiations and engagements with MCA, other broadcasters and content providers. The SABC views this inquiry as an opportunity to correct the imbalances in the current market structure in order to allow all broadcasters compete fairly.

The SABC Board is committed to always acting in the public interest as it seeks to promote and sustain public broadcasting in South Africa. We trust that our submission today will assist the Authority in taking corrective action and intervene in an industry to ensure its competitiveness and sustainability going forward.

Please note that this covering letter forms part of the submission itself.

The SABC looks forward to the next phase of the public consultation process and hereby requests an opportunity to further amplify our submission in the oral hearings.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Makhathini', is written over a horizontal line.

Mr B E Makhathini

SABC Board Chairperson

## 1. THE PUBLIC SERVICE MANDATE AND SCOPE OF THIS INQUIRY

### 1.1 THE PUBLIC SERVICE MANDATE

- 1.1.1 As South Africa's only public broadcaster, the SABC plays a unique constitutional role in South Africa – a role that has been enshrined in legislation, regulations and licence conditions. As recognised recently by our courts:

*"The SABC has a unique role and responsibility to play as the public service broadcaster. The high rates of illiteracy in the country, the limited distribution and cost of newspapers and the cost of subscription television makes SABC be the primary source of information for the majority of South Africans."*<sup>1</sup>

- 1.1.2 There is no other South African broadcaster which has the SABC's comprehensive range of public mandate obligations.

- 1.1.3 For ease of reference and to emphasise the importance of funding the public service mandate, these obligations are reproduced here (underlining is our own emphasis):

- 1.1.4 Central to the SABC's Charter is the following public service mandate requirement in section 6(4) of the Broadcasting Act:

(4) The Corporation must encourage the development of South African expression by providing, in South African official languages, a wide range of programming that-

(a) *reflects South African attitudes, opinions, ideas, values and artistic creativity;*

---

<sup>1</sup> Matojane J in SOS and others v Minister of Communications and others, 17 October 2017

- (b) *displays South African talent in education and entertainment programmes;*
- (c) *offers a plurality of views and a variety of news, information and analysis from a South African point of view;*
- (d) *advances the national and public interest.*

1.2 In terms of section 8 of the Broadcasting Act, the SABC's objectives are –

- (a) *to make its services available throughout the Republic;*
- (b) *to provide sound and television broadcasting services, whether by analogue or digital means, and to provide sound and television programmes of information, education and entertainment funded by advertisements, subscription, sponsorship, licence fees or any other means of finance;*
- (c) *to acquire from time to time a licence or licences for such period and subject to such regulations, provisions and licence conditions as may be prescribed by the Authority;*
- (d) *to provide, in its public broadcasting services, radio and television programming that informs, educates and entertains;*
- (e) *to be responsive to audience needs, including the needs of the deaf and the blind and account on how to meet those needs;*
- (f) *to provide other services, whether or not broadcasting or programme supply services, such services being ancillary services;*
- . (g) *to provide television and radio programmes and any other material to be transmitted or distributed by the common carrier for free to air reception by the public subject to section 33 of this Act;*
- . (h) *to provide to other bodies by such means and methods as may be convenient, services,*

*programmes and materials to be transmitted or distributed by such bodies and to receive from such other bodies services, programmes and materials to be transmitted by stations of the Corporation for reception as above;*

- . (i) to commission, compile, prepare, edit, make, print, publish, issue, circulate and distribute, with or without charge, such books, magazines, periodicals, journals, printed matter, records, cassettes, compact disks, video tapes, audio-visual and interactive material, whether analogue or digital and whether on media now known or hereafter invented, as may be conducive to any of the objects of the Corporation;*
- . (j) to establish and maintain libraries and archives containing materials relevant to the objects of the Corporation and to make available to the public such libraries and archives with or without charge;*
- . (k) to organise, present, produce, provide or subsidise concerts, shows, variety performances, revues, musical and other productions and performances and other entertainment whether live or recorded in connection with the broadcasting and programme supply services of the Corporation or for any purpose incidental thereto;*
- . (l) to collect news and information in any part of the world and in any manner that may be thought fit and to establish and subscribe to news agencies;*
- . (m) to carry out research and development work in relation to any technology relevant to the objects of the Corporation and to acquire by operation of law, registration, purchase, assignment, licence or otherwise copyright and designs, trademarks, trade names and any other intellectual, industrial and commercial property rights;*
- . (n) to nurture South African talent and train people in production skills and carry out research and development for the benefit of audiences;*
- . (o) to develop, produce, manufacture, purchase, acquire, use, display, sell, rent or dispose of sound recordings and films and materials and apparatus for use in connection with*



*such sound recordings and films;*

- . (p) *to develop and extend the services of the Corporation beyond the borders of South Africa.*

1.1.5 The public mandate is further extended by the requirements to broadcast sport of national interest and events of national importance (dealt with under Sports Rights Regulations below). Considering the significant scope and cost of the current public mandate it is of financial necessity that the SABC is able to fairly compete for revenue from advertising and sponsorship sources. Thus, it is very important that the Authority creates a regulatory framework that enables the SABC to deliver on its public service mandate and still remain financially sustainable in accordance with section 2(t) of the ECA.

1.1.6 The lack of competition in the subscription broadcasting market has seen one private sector player grow to control 41% of all television households in South Africa, with sufficient market power to impact not only on the public broadcasters' advertising revenue share but also on the acquisition of content and sports rights.

1.1.7 As the following BRC Tams Snapshot demonstrates, DSTV has 41% TV household share with nearly 6 million households out of a total of 14 million TV households in South Africa.

## BRC TAMS SNAPSHOTS...



TOTAL TV HOUSEHOLDS H/H

**14 006 143**



FREE TO AIR (FTA)

**8,221,606**



DSTV

**5,784,537**



OVHD

**700,307**



TOTAL TV HOUSEHOLDS H/H

**14.00 MILLION**



No, of TV CHANNELS

**111**



Source: Broadcast Research Council (BRC) TAMS Update October 2017

### 1.2 SCOPE OF THIS INQUIRY

1.2.5 While the SABC generally agrees with the Authority's theoretical approach to defining relevant markets and market segments, we are concerned that the Authority has chosen to only focus on the subscription television market (and related channel, content, retail and technical services markets).

1.2.6 The focus on subscription television is necessary in order to understand and deal with the barriers to entry to the subscription market in particular, of which there are many.

However, the Authority should not stop there. The SABC submits that the broader television broadcasting market should also be defined and an analysis done on the impact ineffective competition in the subscription television market has had on the broader South African television market. Given the subscription broadcasters' competition with FTA broadcasters for advertising and sponsorship revenue, sport and premium content rights and top SA television content, it does not follow that the market should only be defined as the narrower subscription TV market.

- 1.2.7 By focusing mainly on whether FTA services are substitutable with subscription television services, and concluding that they are not, the Authority could potentially fail to deal with the most glaring consequence of ineffective competition in the subscription television market, that is the massive impact this has had on the whole South African television industry.
- 1.2.8 By allowing a monopoly to grow and become powerfully entrenched over the years, MCA has taken on FTA broadcasters and now has 40% of all television households and nearly half of all potential television advertising revenue in South Africa.
- 1.2.9 It should be noted from Figure 4: Television Broadcasting Value Chain<sup>2</sup>, that, excluding transmission networks, the SABC also operates on every level of the television broadcasting value chain, including retail distribution, content aggregation and channel packaging and content production/acquisitions/commissioning. It underscores the Authority's point that it is possible and necessary to define the television broadcasting market more broadly.

---

<sup>2</sup> Discussion Paper, page 51

1.2.10 Lastly, there are also competition challenges in the technical services market. As a vertically integrated operator, MCA self-provides the signal distribution service through its subsidiary company, Orbicom, which will always prioritise the services of the main business. In the past, MCA intentionally facilitated bandwidth squeeze of three SABC Must Carry channels and as a result the picture quality of the SABC channels was affected leading to audience complaints about picture quality at that point. Following this challenge, the SABC had to request MCA to address this matter with changes made to the Must Carry agreement in order to disallow bandwidth squeeze, which is currently not regulated.

## 2. AMENDMENT OF EXISTING REGULATIONS: MUST CARRY, SPORTS RIGHTS AND DIGITAL MIGRATION REGULATIONS

### 2.1 AMENDMENT OF MUST CARRY REGULATIONS

2.1.1 On 21 November 2017 the SABC made a formal request for ICASA to review and amend the following regulations: *The Extent to Which Subscription Broadcasting Services Must Carry the Television Programmes Provided by The Public Broadcast Service Licensee* ("The Must Carry Regulations") set out in Gazette No. 31500 On 10 October 2008. (A signed copy of this request, including the SABC's proposed amendments is attached as Annexure A).

2.1.2 When we refer to the SABC's Must Carry Channels, we are referring to the SABC's three free-to-air ("FTA") television channels, SABC 1, SABC 2 and SABC 3, which are required by law to be carried by Subscription Broadcasting Services ("SBS") Licensees that have 30 or more channels:

2.1.3 We repeat elements of our main submission here that:

2.1.3.1 clause 6(1) of the regulations has enforced non-payment by SBS Licensees for the three SABC Must Carry Channels. This clause provides that:

*"The PBS Licensee must offer its television programmes, at no cost, to a SBS Licensee upon request from the SBS Licensee".*

2.1.3.2 This provision is ultra vires the enabling legislation, namely subsection (3) of section 60 of the Electronic Communications Act, 2006 ("the ECA") which envisages "commercially negotiable terms" being agreed between the SABC



and SBS Licensees; and

2.1.3.3 by reviewing and amending the regulations to comply with the enabling legislation, the Authority will be fulfilling one its core statutory objectives as set out in section 2(t) of the Electronic Communications Act, 2006 which is to *“protect the integrity and viability of public broadcasting services”*

2.1.2 It is the SABC’s view that the 2008 regulations have unfortunately failed to protect the viability of the public broadcaster and it is on this basis that we submit that the Authority should urgently commence a separate, public regulatory process to review the Must Carry Regulations.

2.1.3 Notwithstanding this current Discussion Paper process, the SABC requested that the Must Carry regulatory review should commence as soon as possible as a separate process for the following reasons:

2.1.3.1 The SABC’s relatively simple, proposed amendments to clauses 6(1) and 7(1) of the regulations only seek to bring the Must Carry Regulations in line with the enabling legislation and create the correct regulatory framework for commercial negotiations between the public broadcaster and SBS Licensees (see Annexure A for proposed amendments).

2.1.3.2 Because the Authority narrowly defined the scope of this inquiry to the subscription television market, the Must Carry regulations were understandably not dealt with directly.

- 2.1.3.3 While the SABC, MCA and other SBS Licensees may indeed commence commercial negotiations in good faith before the Must Carry Regulations are amended, it is still possible the SBS Licensees will rely on the *ultra vires* provision which effectively ‘zero rates’ the SABC Must Carry Channels and enforces a precedent-setting, non-commercial negotiating environment.
- 2.1.3.4 The SABC entered into a Must Carry Channel Distribution Agreement with MCA on 1 April 2011, as amended on 3 March 2015. In terms of this Agreement, MCA relied on the problematic 2008 regulations to contractually guarantee non-payment for the SABC’s 3 Must Carry television channels.
- 2.1.3.5 The Must Carry Regulations were gazetted over nine years ago and are, in any event, due for a separate review process. At the time the regulations seemed to be drafted on the basis that the “must carry obligation” was an onerous one for SBS Licensees and that these broadcasters would be ‘doing the public broadcaster a favour’ by carrying its channels as part of an SBS television bouquet. On the contrary, the SABC Must Carry Channels have commercially benefited MCA and other subscription broadcasters at the expense of the public broadcaster, a point which was argued by the public broadcaster at the time.
- 2.1.4 Notwithstanding our call for a separate process, the SABC is hereby making a formal submission to this inquiry for the review and amendment of the Must Carry Regulations in the event the Authority determines that the requested review would take place more expeditiously through this current inquiry process.
- 2.1.5 Some of the unintended, anticompetitive consequences of Must Carry ‘for free’ are

as follows:

- 2.1.5.1 SBS receive free access to SABC content on their bouquet – content that has partly been acquired through public funding. In some instances, the SABC bids for the same content rights against MCA. However, whether or not the SABC wins that tender often becomes irrelevant because MCA or other SBS will still gain free access to that content through the must carry obligations. Without any material commercial benefit to the SABC, this gives SBS licensees an unwarranted competitive edge and leverage at the expense of the public broadcaster and public funding. This is highly disadvantageous to the SABC given its huge investment in content which it often acquires through a competitive process.
- 2.1.5.2 SABC FTA channels are often used by SBS to promote the uptake of their bouquets and packages as a driver to get more subscribers, without any commercial benefit to the public broadcaster. In fact, the SABC's leading South African television programmes (*Uzalo, Generations, Skeem Saam, Muvhango, Tjovitjo and Isidingo*) are the most watched shows on the DSTV bouquets in terms of audience numbers. All DSTV packages offers SABC 1, 2 and 3 and, because of the strong SA content programming pull, the SABC channels consistently appear in the Top 15 most watched channels on MCA with little to no commercial value to the SABC as demonstrated in the graph below.
- 2.1.5.3 The Must Carry 'for free' regulation also creates distortions in the Sports Rights area. The SABC often acquires expensive sub-licensed rights from a subscription broadcaster, such as MCA, to broadcast national sporting events. Under the Must Carry regulations and notwithstanding the fact that the SABC has duly paid for these rights, MCA then benefits from the SABC's retransmission of these events through the Must Carry channels on DSTV. Other subscription broadcasters, which have no rights to broadcast these events, would especially benefit under the Must Carry regime by being able to

broadcast the events (albeit on a delayed or delayed live basis), without incurring acquisition or sub-licensing costs.

- 2.1.6 In order to deal with all these distortions which are clearly unfair on the public broadcaster, the SABC submits that the Must Carry regulations must be amended to comply with the enabling legislation to allow for commercial negotiations between the parties.

## **2.2 AMENDMENT OF SPORTS BROADCASTING SERVICES REGULATIONS (“SPORTS RIGHTS REGULATIONS”), 2010<sup>3</sup>**

- 2.2.1 The Sports Rights Regulations on national sporting events provide a list of sporting games or tournaments that are expected to be broadcast by the FTA broadcasters which include the SABC. Therefore, the SABC is expected to broadcast the listed events in the regulations. This gets more complex when considering the SABC’s public service obligations to the general public. To date, the broadcast of listed events such as the PSL and Bafana Bafana games have yielded negative financial returns relative to the high cost of the rights investment made.
- 2.2.2 The Authority has not made it clear in the Sports Rights Regulations that the bidding process for subsidiary rights should be open and transparent. The Authority has also not specified that the process of determining the subsidiary rights be fair, or set criteria on which fairness would be judged. Consequently, MCA utilises this lacuna in the regulations by imposing stringent sub-licensing terms and conditions on FTA broadcasting services that do not give FTA broadcasters sufficient time to advertise the events in order to realise return on investment;

---

<sup>3</sup> Government Gazette No.33079, 7 April 2010

- 2.2.3 SuperSport, as a subsidiary of MCA, remains the biggest driver of subscribers because of premium sport content carried on this platform. Whilst the SABC accepts the intent of the Sports Rights Regulations and the Authority's objective to ensure that FTA broadcasters also carry listed national sporting events, sport rights have become very expensive and FTA services continue to bear the brunt of uncompetitive sublicensing conditions that impinge on the SABC getting any return on investment from the acquisition of sport rights.
- 2.2.4 In certain instances, it is possible that FTA broadcasting services are paying more than 50% towards the primary rights acquisition via sublicensing or secondary rights, thereby becoming a significant funder of MCA primary sport rights. It is the SABC's submission that it very important that the Sports Rights Regulations should be amended to deal with the pricing of secondary rights.
- 2.2.5 In particular, for Super Rugby games, the SABC is only permitted to broadcast delayed live broadcasts through its sublicensing rights. SuperSport has locked-in all important sporting codes and therefore FTA broadcasting services struggle to access these rights on reasonable terms. Regulatory intervention is required in order to deal with hoarding of sports rights and locking-up of sports rights.
- 2.2.6 The key challenges and proposed solutions regarding the Sports Rights Regulations are therefore as follows:
- 2.2.6.1 The acquisition and production of sports broadcast rights are generally expensive and requires huge financial investment. Whilst the Sports Rights Regulations do not prescribe that the SABC should broadcast all of the listed National Sporting Events, the SABC has consistently faced public pressure and condemnation when it has failed to broadcast some of these events.



- 2.2.6.2 The regulations term all agreements “commercial” although the ECA does not provide that subscription broadcasters can set commercial terms for subsidiary rights. This has resulted in subscription broadcasting services demanding high prices from FTA broadcasters for subsidiary rights.
- 2.2.6.3 The Authority should make it clear in the regulations that the bidding process for subsidiary rights be open and transparent and should specify that the process of determining the subsidiary rights be fair, or set criteria on which fairness would be judged.
- 2.2.6.4 Regarding anti-hoarding provisions, the revised regulations should cater for instances when the subscription broadcasting service does not intend to broadcast the event, or be a part of it. In such cases it should be required that the rights be offered to the public broadcaster at a nominal fee.
- 2.2.6.5 Subscription broadcasters with market power should not be allowed to “lock-up” rights for years because this arrangement substantially lessens competition in the broadcasting television market as other broadcasters are unable to access desirable content which then makes their programming less attractive to audiences. It appears that subscription television broadcasters are prepared to ‘overpay’ for content in order to extend its window of exclusivity and lock out FTA and subscription broadcasting competitors. This is not in the interests of the public which is thereby deprived of timely sports programming.
- 2.2.6.6 Subscription broadcasters with market power should be required to conclude agreements for the on-selling of rights at least 3 to 6 months before the

broadcast of the particular event in order to enable the sub-licensor to sell advertising space around such events. The practice has been that the subscription broadcaster concludes negotiations with the sub-licensee in the month or the week in which the event is to be broadcast. Consequently, a sub-licensee is unable to sell advertising space given the time constraints. Additionally, the practice of late, sub-licensing also precludes the SABC from applying for exemption to the Authority from the relevant programming licence conditions obligations when programming of national interest is broadcast. The Authority expects the SABC to apply for exemptions at least four weeks prior the event but the current sub-licensing practices does not enable the SABC to meet this time frame.

2.2.6.7 Where another broadcaster decides not to buy the full rights from a subscription broadcaster but opts for certain packages, such as local team games and the quarterfinals, semi-finals and finals, subscription broadcasters should be obligated to sell such packages at a reasonable rate.

2.2.6.8 In other cases, subscription broadcasters sublicense the rights to big games but then only allow the broadcasts to be used on a delayed basis. This arrangement makes the event less attractive and it inhibits the sub-licensor from generating revenue as advertisers are reluctant to advertise when there is a delayed broadcast. It also gives rise to viewer dissatisfaction with the public broadcaster and, potentially, the regulator.

2.2.7 The SABC submits that the Sports Rights Regulations be reviewed and amended to take into account the anti-competitive effects outlined above.

2.2.8 The SABC is approaching government with respect to access grant finance in order that the SABC may meet its public mandate to offer the South African public full access to

sports of national interest, as well non-commercial, developmental and minority sports. Sports programming is costly from both a rights acquisition and production point of view and therefore the SABC is in discussions about how best this part of our public mandate may be funded, either wholly or partly. It should be noted that no assurance has been received that government will respond positively to these requests in a time of fiscal austerity.

## **2.3 AMENDMENT TO DIGITAL MIGRATION REGULATIONS**

- 2.3.1 Regulation 6(3) read with Regulations 7(7) and (5) of the ICASA Digital Migration Regulations, 2012, prescribe a lengthy channel authorization process for channels that fall within the public service division of the SABC whilst commercial broadcasters are allowed a quick administrative process for channel authorization. This can have an anti-competitive impact on the public broadcaster.
- 2.3.2 In terms of these regulations the Authority may call for a public consultation processes prior to authorizing any channel of the SABC which falls within its public service division. The challenge is that public consultation processes are normally lengthy. Consequently, this process could take away the SABC's opportunity to be responsive to audience needs by providing appealing content quickly. Essentially, regulation 6.3 could deprive the SABC of scheduling flexibility and the Authority should consider streamlining this process to take the SABC's concerns into account.

### **3. AMENDMENT TO LEGISLATION**

The SABC has identified an important legislative and regulatory change that could assist in promoting competition in the television broadcasting market:

#### **3.1 AMENDMENT TO SECTION 60(4) OF THE ECA**

3.1.1 With the ever increasing cost of its public service mandate and nearly 80% of its revenue coming mainly from advertising and sponsorship, the SABC's financial sustainability is compromised with its advertising revenues under threat. Subscription broadcasters, however, have an extra layer of revenue - subscriptions revenue – in addition to nearly half of television advertising revenue. (TV licence revenue is currently only approximately 12% of total SABC revenue.)

3.1.2 Section 60(4) of the ECA provides that:

*Subscription broadcasting services may draw their revenues from subscriptions, advertising and sponsorships, however, in no event may advertising or sponsorship, or a combination thereof, be the largest source of annual revenue.*

3.1.3 The intention of the legislators was to cap advertising and sponsorship revenue for subscription broadcasters and therefore protect FTA broadcasting services that depend on the same advertising and sponsorship revenue for their survival and financial sustainability. Unfortunately, the “advertising cap” envisioned in this section 60(4) has become totally ineffective in that MCA's subscription revenue is so high that it is not possible for advertising or sponsorship revenue “or a combination thereof” to exceed subscriptions. There is therefore no effective legislative and regulatory cap on advertising and sponsorship revenue. The original intention of the legislature is therefore not being followed.

3.1.4 As demonstrated by the most recent Adynamix revenue data for 2017, MCA has nearly half of the total television ad revenue market in South Africa, after consolidating MNET and DSTV advertising revenue. As at September 2017, this consolidated share amounted to 48%, with the SABC at 36% and e.tv at 16% of total television advertising revenue.

**Television Advertising Revenue Share: 2017 Year to Date (YTD)**

COMBINED MEDIA TYPE	COMBINED YTD TOTAL	REVENUE %
SABC 1,2,3	5,479,600,568	36
ETV	2,520,971,796	16
MNET& DSTV	7,303,899,491	48
<b>GRAND TOTAL</b>	<b>15,304,471,855</b>	<b>100</b>

*Source: Adynamix January-September Ad Revenue totals for 2017*

3.1.5 Section 60(4) was based on the understanding that subscription broadcasters should have their advertising revenue capped, given their access to subscription revenues as a primary source of income.

3.1.6 The SABC hereby submits that the Authority propose amendments to the legislation to allow the regulator to prescribe regulations that place an effective revenue cap on the ad and sponsorship revenue on subscription broadcasters. The current provision no longer provides a solution to the problem it sought to originally solve.



#### **4. NEW REGULATIONS AND LICENCE CONDITIONS IN TERMS OF SECTION 67(4) OF THE ECA**

The SABC supports the Authority's proposed pro-competitive measures to be imposed through regulation and licence conditions. These include:

- 4.1 The shortening of exclusive contracts
- 4.2 Introduction of unbundling of sports rights
- 4.3 Imposition of rights splitting
- 4.4 Opening up a dominant firm's network and declaration of a STB as an essential facility;
- 4.5 The enforcement of an advertising revenue cap; and the
- 4.6 Introduction of set top box interoperability

The SABC intends to further amplify its views on these pro-competitive measures during the oral hearings.

## 5. CONCLUSION

The SABC has made the following submissions:

5.1 The Authority should take into account the SABC's dependence on advertising revenue, the corporation's public mandate and the legislative imperative to protect the integrity and viability of the public broadcaster, whilst at the same time promoting fair competition in the television broadcasting industry.

5.2 This inquiry and the Authority's suggested pro-competitive measures should not be narrowly confined to the subscription broadcasting market but should also focus on how the lack of competition in subscription broadcasting has impacted the entire South African television broadcast industry. The strong interrelationship between the FTA broadcasting market and competition in the subscription television market should not be ignored.

5.3 Taking into account the market power of the dominant subscription television broadcaster and its negative impact on competition in the subscription television market as well as on the viability of the public broadcaster, the SABC has proposed three types of regulatory interventions:

5.3.1 Firstly, the SABC has requested that the Authority amend existing regulations, such as the Must Carry, Sports Rights and Digital Migration Regulations.

5.3.2 Secondly, the SABC proposes amendments to section 60(4) of the ECA and for new regulations to be prescribed in that regard.

5.3.3 Thirdly, the SABC supports the Authority's proposed new, pro-competitive regulations and licence conditions terms of section 67(4) of the ECA

The SABC thanks the Authority for the opportunity to make this written representation and we look forward to further elaborating in our oral hearing.

---

For further information contact:

Philly Moilwa, GM: Regulatory Affairs, SABC

082 903 2544

(011) 714-3927

[moilwap@sabc.co.za](mailto:moilwap@sabc.co.za)

## **ANNEXURE**

### **SABC REQUEST TO THE AUTHORITY AMEND MUST CARRY REGULATIONS, 21 NOVEMBER 2017**



**Office of the Chairman: SABC Board**  
28<sup>th</sup> Floor, Radio Park, Henley Road  
Auckland Park, 2094  
Private Bag X1, Auckland Park, 2006  
Johannesburg, Gauteng, South Africa  
Tel +27 11 714-3786/ 2400, Fax +27 11 714-2404  
[www.sabc.co.za](http://www.sabc.co.za)

21 November 2017

Mr Paris Mashile  
Acting Chairperson  
ICASA  
164 Katherine Street  
Sandton  
2146

E-mail: [chairperson@icasa.org.za](mailto:chairperson@icasa.org.za)

Dear Mr Mashile

**SABC REQUEST FOR URGENT ICASA REVIEW AND AMENDMENT OF REGULATIONS: EXTENT TO WHICH SUBSCRIPTION BROADCASTING SERVICES MUST CARRY THE TELEVISION PROGRAMMES PROVIDED BY THE PUBLIC BROADCAST SERVICE LICENSEE ("THE MUST CARRY REGULATIONS") SET OUT IN GAZETTE NO. 31500 ON 10 OCTOBER 2008**

As you are aware, a new SABC Board was appointed by the President on 16 October 2017 and I had the honour of being appointed as the Chairperson. We look forward to having an introductory meeting with yourself and the ICASA Councillors as soon as our schedules permit.

Given the urgent governance and financial imperatives identified by the Parliamentary Ad Hoc Committee on the SABC, the new Board is currently implementing mechanisms to restore public faith in the Corporation. In particular, the very real threat to the SABC's financial sustainability is well known and most recently detailed in our first quarter report to Parliament on 7 November 2017.

The main causes of the current financial crisis are clearly spelt out in Parliament's Ad Hoc Committee report. The SABC Board has taken strong steps to stabilise the Corporation and we will deal with those accountable for wrongdoing, recovering as much as possible through the courts and the SIU. We also commit to keeping Parliament, the Authority and the public apprised of key developments in this regard as we move forward.

Less well known are some of the regulatory challenges faced by the SABC which have over the years put continued pressure on the public broadcaster's finances. The focus of this submission - the Must Carry Regulations (as gazetted on 10 October 2008) - has had a serious impact on the SABC from a potential revenue point of view. For ease of

**South African Broadcasting Corporation SOC Limited: Registration Number: 2003/023915/30**

**Non-Executive Directors:** Mr B E Makhathini (Chairperson); Ms F C Potgieter-Gqubule (Deputy Chairperson); Ms R Kalidass; Ms K T Kweyama; Mr M Markovitz; Mr J Matisonn; Mr D K Mohuba; Mr K Naidoo; Mr J H Phalane; Mr V Rambau; Mr M G Tsedu  
**Executive Directors:** Ms N P Philiso (Acting Group Chief Executive Officer); Ms B L Tugwana (Acting Chief Operations Officer); Ms T S Dlamini (Acting Chief Financial Officer)  
**Company Secretary:** Ms L V Bayi

reference, when we refer to the SABC's Must Carry Channels, we are talking about the SABC's three free-to-air ("FTA") television channels, SABC 1, SABC 2 and SABC 3, which are required by law to be carried by Subscription Broadcasting Services ("SBS") Licensees that have 30 or more channels.

It is the SABC's submission that:

- Clause 6(1) of the regulations has enforced non-payment by SBS Licensees for the three SABC Must Carry Channels. This clause provides that:  
***"The PBS Licensee must offer its television programmes, at no cost, to a SBS Licensee upon request from the SBS Licensee"***.
- This provision is ultra vires the enabling legislation, namely subsection (3) of section 60 of the Electronic Communications Act, 2006 ("the ECA") which envisages ***"commercially negotiable terms"*** being agreed between the SABC and SBS Licensees; and
- by reviewing and amending the regulations to comply with the enabling legislation, the Authority will be fulfilling one its core statutory objectives as set out in section 2(t) of the Electronic Communications Act, 2006 which is to: ***"protect the integrity and viability of public broadcasting services"***

It is the SABC's view that the 2008 regulations have unfortunately failed to protect the viability of the public broadcaster and it is on this basis that we submit that the Authority should urgently commence a separate, public regulatory process to review the Must Carry Regulations.

The SABC has welcomed the Authority's Discussion Document: Inquiry into Subscription Television Broadcasting Service (***"Subscription TV discussion document"***) and also intends to participate in that process insofar as anti-competitive practices and market structure issues impact on the sustainability, viability and integrity of public broadcasting services.

But the SABC hereby requests that the Must Carry regulatory review should commence as soon as possible as a separate process for the following reasons:

1. The SABC's relatively simple, proposed amendments to clauses 6(1) and 7(1) of the regulations only seek to bring the Must Carry Regulations in line with the enabling legislation and create the correct regulatory framework for commercial negotiations between the public broadcaster and SBS Licensees (see Appendix for proposed amendments).



2. The Must Carry regulations were understandably not dealt with in the Subscription Television discussion document as that paper deals more directly with anti-competitive conditions in the industry and proposes several pro-competitive measures to address market structure. The SABC cannot afford to wait until the conclusion of this large, broader competition-related inquiry before the 'error' in the Must Carry Regulations is corrected. It is not an understatement to say that the viability of the public broadcaster is at stake here.
3. While the SABC, Multichoice Africa ("MCA") and other SBS Licensees may indeed commence commercial negotiations in good faith before the Must Carry Regulations are amended, it is still possible the SBS Licensees will rely on the ultra vires provision which effectively 'zero rates' the SABC Must Carry Channels and enforces a precedent-setting, non-commercial negotiating environment.
4. The SABC entered into a Must Carry Channel Distribution Agreement with MCA on 1 April 2011, as amended on 3 March 2015. In terms of this Agreement, MCA relied on the problematic 2008 regulations to contractually guarantee non-payment for the SABC's 3 Must Carry television channels.
5. The Must Carry Regulations were gazetted over nine years ago and are, in any event, due for a separate review process. At the time the regulations seemed to be drafted on the basis that the "must carry obligation" was an onerous one for SBS Licensees and that these broadcasters would be 'doing the public broadcaster a favour' by carrying its channels as part of an SBS television bouquet. The SABC will demonstrate in the public process that, on the contrary, the SABC Must Carry Channels have commercially benefited MCA at the expense of the public broadcaster.

In the interests of transparency and the public interest, we have copied known SBS Licensees about our request for the urgent regulatory review of the Must Carry Regulations. For the public, interested parties and any SBS Licensees we may have inadvertently left out, the SABC will also be making this letter available on our website and other channels.

The SABC Board will be briefing the Parliamentary Portfolio Committee on Communications as part of our report back on the Ad Hoc Committee and Public Protector recommendations on 24 November 2017.

When the Must Carry Regulations are gazetted for review, the SABC intends making more detailed legal, regulatory and commercial submissions why the 2008 regulations should be amended by the Authority.

We look forward to your response and thank you for your urgent consideration of our request



**MR BONGUMUSA E. MAKHATHINI**  
**CHAIRPERSON: SABC BOARD**

Copy:

Mr Kwezi Mtengenya, Multichoice Africa:  
Mr Norman Ndivhuho Munzhelele, e.sat:  
Mr Ronald Reddy, Starset:  
Mr Luyanda Mangquku, WoWtv:  
Dr VF Mahlati, Siyaya TV:

[Kwezi.Mtengenya@multichoice.co.za](mailto:Kwezi.Mtengenya@multichoice.co.za)  
[Ndivhuho.Munzhelele@etv.co.za](mailto:Ndivhuho.Munzhelele@etv.co.za)  
[rreddy@starset.co.za](mailto:rreddy@starset.co.za)  
[luyanda@wowtv.co.za](mailto:luyanda@wowtv.co.za)  
[socialwheel@live.com](mailto:socialwheel@live.com)



## APPENDIX

### PROPOSED AMENDMENT TO MUST CARRY REGULATIONS AS PUBLISHED IN GOVERNMENT GAZETTE NO. 31500 ON 10 OCTOBER 2008

The SABC hereby proposes that the Regulations be amended as follows:

#### **Regulation 6(1):**

Delete the words "*The PBS Licensee must offer its television programmes at no cost, to SBS Licensee upon a request from the SBS Licensee*" and replace it with the words "The PBS Licensee must offer its television programmes on commercially negotiable terms upon a request from SBS Licensee".

#### **Regulation 7(1)**

Delete the words "*The PBS Licensee bears the cost of transmission of the broadcast signal to the Licensee*" and replace it with the words "The PBS and the SBS Licensees shall negotiate the transmission costs on commercial terms".

---