



# THE SABC SUBMISSION ON THE ICASA DRAFT MUST CARRY AMENDMENT REGULATIONS, 2021

**21 May 2021**

## **1. Introduction**

- 1.1 The SABC would like to thank the Independent Communications Authority of South Africa (ICASA) for the opportunity to make a written submission on the Draft Must Carry Amendment Regulations (Draft Regulations), Government Gazette No. 44338 of 26 March 2021. Indeed, this process is long-overdue and should be concluded as soon as possible, with the view to foster regulatory certainty. In this submission the SABC will focus on unresolved issues. The SABC hereby requests the opportunity to make further oral representations when the opportunity arises.
- 1.2 The SABC is mandated to deliver a public value proposition of educating, informing and entertaining all South Africans in all official languages in line with the Broadcasting Act 4 of 1999 (“the Broadcasting Act”). The SABC delivers on its mandate through 18 radio stations plus Channel Africa, 7 television channels and other digital platforms. Furthermore, section 8(a) of the Broadcasting Act enjoins the SABC to make its services available throughout the Republic.

## **2. Value of SABC channels to Subscription Broadcasting Services**

- 2.1 Considering this statutory universal service obligation, the SABC is a public service media organisation which delivers content, programmes and channels via all platforms accessible by South Africans. This obligation is executed in accordance with the SABC’s mission of being a high-performing, financially viable, multiplatform national public broadcaster that provides compelling information as well as quality education and entertainment content.

2.2 Before addressing the regulations, the SABC will firstly restate its position on the value and continued popularity of SABC channels

2.3 The SABC maintains its position that the Must Carry Channels are of great value to the current SBS operators, StarSat and MultiChoice. Both. The consumers of SABC channels on the DSTV platform pay subscription fees which benefit MultiChoice. By MultiChoice’s admission, there is a sizeable portion of ‘SABC audiences’ on their platform<sup>1</sup> and without any doubt those audiences contribute to subscription fees. The table below indicates the steady growth of MultiChoice’s bouquets from 2009-2019.

**%Reach of TV Services into SA Households**

% REACH INTO HH	AMPS							ES		
	2009AB	2010AB	2011AB	2012AB	2013AB	2014AB	2015AB	2017AB	2018AB	2019AB
Any Pay TV								43.6	50.6	55.4
HH pay subscription DStv service	17.4	20.0	25.1	26.7	31.0	35.4	37.5	43.3	50.4	55.1
DStv Premium (full service)	11.8	11.5	12.4	11.6	12.1	12.3	12.0	7.9	7.7	7.2
DStv Extra								1.2	1.6	2.6
DStv Family						0.6	0.7	3.7	4.9	6.5
DStv Compact	5.2	7.6	11.7	13.4	16.4	19.5	20.3	24.7	26.7	26.5
DStv Select	0.2	0.4	0.6	0.9	0.8	0.7	0.7			
DStv Easy View	0.3	0.3	0.4	0.7	1.0	1.0	1.2	1.7	2.4	2.4
DStv Access (previously Lite)			0.1	0.2	0.4	0.8	1.9	4.1	7.1	9.9
StarSat subscription			1.4	1.2	1.0	0.6	0.5	0.3	0.2	0.4
OVHD						0.1	0.5	1.0	2.0	2.8
No Pay TV (SABC & e.tv only)								43.3	36.3	28.9

Please note that ES is not trendable with AMPS

<sup>1</sup> MultiChoice Submission on the ICASA Discussion Document on the Review of Must Carry Regulations, 2008, point 118, at page 32.

- 2.4 While MultiChoice claims that the SABC benefits from HD and catch-up services for its programmes<sup>2</sup>, it fails to indicate that this catch-up service is an exclusive service for subscribers of their premium bouquet. Furthermore, the catch-up service is designated for the most popular content. For example, SABC Encore and/or SABC educational content were never included on the catch services target higher LSMs/ SEMs and are not designed to advance universal service of public broadcasting service. In fact, catch up services were designed to increase subscriber convenience for the DSTV premium subscribers, utilising the SABC premium content without cost to the SBS.
- 2.5 TAMS data continue to show that SABC does not require assistance of SBS to advance universal access because its channels are already popular and universally available. The table below indicates that the SABC carries the number one most watched drama in the country, Uzalo. It further indicates that SABC commands popularity with 19 programmes on the top 30 most watched programs across all channels.

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<sup>2</sup> MultiChoice Submission on the ICASA Discussion Document on the Review of Must Carry Regulations, 2008, point 11, at page 3 and point 123-125, at page 34.

**TOP 30 PROGRAMMES ACROSS CHANNELS ONLY: ADULTS 15+ - 05:00-23:00 (NATIONAL MARKET)**

PROGRAMME TITLE	DAY	START	CHANNEL	GENRE	AR	SHR %	AR VIEWERS
1 UZALO	Mon-Fri	20:30	SABC 1	Drama	18.6	55.5	7,194,839
2 GENERATIONS THE LEGACY	Mon-Fri	20:00	SABC 1	Soap opera	15.0	44.6	5,816,532
3 SCANDAL	Mon-Fri	19:30	e.tv	Soap opera	10.7	32.0	4,122,822
4 SKEEM SAAM	Mon-Fri	18:30	SABC 1	Drama	10.3	34.7	3,980,619
5 MUVHANGO	Mon-Fri	21:00	SABC 2	Drama	9.0	29.9	3,488,262
6 RHYTHM CITY	Mon-Fri	19:00	e.tv	Drama	8.7	27.2	3,355,890
7 ZULU NEWS	M/W/F/Sun	19:00	SABC 1	News	8.3	25.5	3,199,620
8 IMBEWU	Mon-Fri	21:30	e.tv	Drama	8.2	32.9	3,174,601
9 SGUD'SNAYSI	Mon	19:30	SABC 1	Sitcom	8.1	24.0	3,119,647
10 DSTV PREMIERSHIP KAIZER CHIEFS VS ORLANDO PIRATES	Sun	15:00	SABC 1	Sport	7.6	30.4	2,941,966
11 XHOSA NEWS	T/T/S/Sun	19:00	SABC 1	News	7.5	24.8	2,889,230
12 TOMB RAIDER	Sun	20:00	e.tv	Movies	6.4	25.1	2,466,026
13 SPIDER-MAN 3	Sat	20:00	e.tv	Movies	6.1	24.8	2,372,509
14 LIVE AMP	Fri	19:30	SABC 1	Music	6.1	18.6	2,342,606
15 SWELA	Wed	19:30	SABC 1	Drama	5.9	16.4	2,290,627
16 UMPHEFUMULO	Sun	19:30	SABC 1	Drama	5.9	19.5	2,281,120
17 SLUMBER PARTY	Sun	19:30	SABC 1	Drama	5.7	17.7	2,188,907
18 UNYEMBEZI LWENTUTHWANE	Wed	19:30	SABC 1	Drama	5.7	15.9	2,186,576
19 I WAS BLIND	Sun	19:30	SABC 1	Drama	5.5	17.0	2,140,521
20 FEMININE LOTUS	Wed	19:30	SABC 1	Drama	5.5	16.3	2,123,024
21 KHUMBUL' EKHAYA	Wed	21:00	SABC 1	Magazine	5.5	19.4	2,109,748
22 UZALO -R	Mon-Fri	09:00	SABC 1	Drama	5.3	35.8	2,055,811
23 DURBAN GEN	Mon-Fri	18:30	e.tv	Drama	5.2	17.4	2,000,299
24 SPIDER-MAN	Sat	20:00	e.tv	Movies	5.1	22.4	1,946,025
25 THE MAN FROM U.N.C.L.E.	Sat	20:00	e.tv	Movies	5.0	18.8	1,938,108
26 THE MUMMY (MOVIE)	Sun	20:00	e.tv	Movies	5.0	20.9	1,931,025
27 SKEEM SAAM -R	Mon-Fri	09:30	SABC 1	Drama	4.9	30.6	1,897,927
28 MY FIRST	Mon	18:00	SABC 1	Documentary	4.9	18.9	1,878,528
29 SPIDER-MAN 2	Sat	20:00	e.tv	Movies	4.7	18.2	1,826,937
30 PLATE IT UP	Wed	18:00	SABC 1	Actuality	4.7	18.5	1,801,812

The first Dstv programme in the National Market (excl Super Sport) comes in at :

85 GOMORA	Mon-Fri	19:30	Mzansi Magic	Drama	2.6	7.9	1,014,023
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*Note that viewing of terrestrial channels on other platforms are included in figures in this table covering the National Market (back-added)*

Source: BRC TAMS –March 2021

2.6 It is also worth noting that even SABC 2 enjoys consistent viewership on DSTV.

Muvhango which is broadcast on SABC 2 commands a significant 23.8% share on the DSTV platform. It is noteworthy that MultiChoice, in its submission to the Authority, acknowledges the impact and the popularity of SABC 1 on the DSTV platform and the numbers below indicate that SABC1 programmes are very popular; hence MultiChoice is interested in the “universal coverage” of these selected and popular channels.

### **3. SABC Submission on the new proposed Must Carry regulations**

#### **3.1 “Universal Access” vs “Subscriber Convenience”**

3.1.1 It should be noted that the SABC is not surprised that, as the Authority concludes throughout its Findings, that there is “no consensus” about Must Carry and related issues. Simply put, there is no consensus because the interests of the public broadcaster and SBS are not aligned on this matter. The public broadcaster’s position has always been that, even if the regulations served a purpose 13 years ago, they were founded on an ultra vires interpretation of the Act by failing to apply the requirement for “commercial negotiations” between the parties.

3.1.2 The SBS have therefore become accustomed to accessing SABC’s expensively produced, popular content at no cost and does not want this to end.

3.1.3 Given the different interests of the SABC and SBS, there may never be 100% consensus on the finalisation of these regulations. However, it is this exactly this type of contested public policy issue that underlines the important role of the Authority as an independent regulator in the public interest. The Authority is also required to make regulations that are reasonable, fair and that “protect the integrity and viability of the public broadcaster”

3.1.4 It should not be the role of a commercial SBS licensee to determine how universal access of public broadcasting should be determined. As the SABC argues below, it is more accurately about convenience for SBS subscribers and commercial benefit for SBS licensees. “Subscriber convenience” must be differentiated from universal access as a regulatory concept.

3.1.5 The SABC notes the Authority's position that the rationale for the must carry is to ensure universal access to public broadcasting platforms<sup>3</sup>. Furthermore, MultiChoice has submitted that the universal access of public broadcasting services should be a guiding principle in the development of the revised must carry regulations<sup>4</sup>. It further states that other side issues should be overridden by the public interest with respect to accessibility of SABC channels. In the same vein, MultiChoice disregards the very principle it advocates for, as it wants to carry popular SABC channels only. It also deprives its defaulting subscribers from accessing SABC Channels which are meant to be freely accessible.

3.1.6 The SABC is not submitting that SBS should be allowed to provide free to air access to SABC channels on its platform. On contrary, the strict regulatory distinction between SBS and free to air public broadcasting services would prevent that and must be maintained. However, the SABC is simply demonstrating that, because of the very nature of subscription services, these can be switched off for non-payment and cannot be relied upon for permanent universal access.

3.1.7 Notwithstanding the position of the Authority and Multichoice which seeks to make carriage by Multichoice synonymous with the universal access principle, it is the SABC's submission that its three must carry channels are already universally and freely accessible through other non-subscription platforms. Any member of the public, including the indigent (through SAPO and Sentech), can now acquire an alternative way of accessing the three SABC channels.

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<sup>3</sup> ICASA Findings and Positions Document on the Review of the ICASA Must Carry Regulations, 2008, clause 2.29, at page 14

<sup>4</sup> MultiChoice Submission on the ICASA Discussion Document on the Review of Must Carry Regulations, 2008, point 13, at page 101 (Genesis Report)

3.1.8 Therefore, for Multichoice, Must Carry is not about universal access for subscribers. Rather, at its core, Must Carry is now about convenience for SBS subscribers and commercial benefit for the company.

3.1.9 The SABC submits that “subscriber convenience” is a completely different concept to “universal access” to the SABC by the public. While DStv or other SBS subscribers may be inconvenienced if the SABC withdrew the three channels after failing to agree commercial terms, they still have a very real opportunity of accessing three SABC channels WITHOUT having to pay a subscription.

3.1.20 Therefore, the SABC respectfully differs with this conclusion by the Authority, namely:

*“Application in the digital broadcasting environment*

3.7 *The Authority finds that the Must Carry Regulations will continue to be necessary and relevant in a digital broadcasting environment until all audiences are guaranteed access to the PBS channels”.*

It is the SABC’s submission that all South African audiences are already “guaranteed access to the PBS channels.”

3.1.21 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 platforms simultaneously. These platforms include satellite via OpenView and Sentech’s DTH box, via DTT on STBs and IDTVs also carried by Sentech and via streaming on the TelkomOne mobile app. This is only the beginning of the SABC’s streaming strategy with a fully-fledged SABC streaming platform to be launched within the next 8-12 months. Even though SABC News, SABC Sport and SABC



Education are not party of the proposed Must Carry regime, the SABC submits that members of the public have the very real possibility of accessing all SABC television programmes and channels outside of the SBS universe. This is a very different situation to 2008 when the regulations were first prescribed and this change in universal access should be acknowledged by the Authority.

3.1.22 The SABC respectfully requests the Authority to review its position that access to SABC's three channels is not yet guaranteed. The Authority's view is inconsistent with the facts on the ground and the very real, free options for access to the public broadcaster's television channels. It is also inconsistent with the policy direction indicated by government as set out in the Draft White Paper.

### **3.2 Audio and Audio-Visual Content Services (AAVCS)- Draft White Paper**

3.2.1 Clause 5.2.7.12 of the AAVCS Draft White Paper proposes that the Must Carry provision in section 60(3) of the Electronic Communications Act (ECA), requiring public broadcasters to offer their channels to subscription broadcasters who "must carry", should be repealed. It further provides that subscription broadcasters will no longer be required by law to carry public broadcasting but may do so only after agreeing on commercial terms of carriage or transmission with the SABC.

3.2.2 The SABC supports the White Paper proposal to scrap the Must Carry law requiring the public broadcaster to offer its channels to subscription broadcasters who "must carry" these channels. This will give the SABC an opportunity to commercially exploit its content through carriage agreements, whilst achieving universal service and access to its services at the same time. It is the SABC's

view that the carriage agreements or *transmission consents* will contribute significantly to the public broadcaster's revenues. As submitted to ICASA during the current regulatory review of Must Carry regulations, the public broadcaster has been prejudiced by Must Carry regulations which have required the SABC to offer its expensively-procured channels and programmes for free to well-resourced subscription broadcasters.

The draft White Paper recognises that:

*“While Must Carry rules served their intended universal access objective, they may distort the market going forward in a changing environment of intense competition for audiences and content, particularly, for the public broadcaster who currently has to offer its content to subscription broadcasters for free. To allow the public broadcaster to negotiate retransmission consent agreements on commercial terms with other AAVCS in South Africa and internationally, the enabling provisions in law for Must Carry regulation will be repealed. However, in the public interest, the retransmission consent agreements for public broadcasting services broadcast free to air may not be offered exclusively to a single subscription audio or audiovisual content service in South Africa”.*

3.2.3 As such, it is anticipated that the legislation will be changed accordingly; to give effect to the removal of must carry rules and obligations. As an interim solution, the SABC submits that the ICASA Must Carry Regulations, including the most significant change carriage of these channels by SBS must be “subject to commercial negotiations” should be gazetted by the Authority as soon as is reasonably possible. However the regulations must include a ‘sunset clause’, to the effect that the regulations would be formally repealed once the proposals in the White Paper have been legislated. It is the SABC's view that, should the statutory provisions enabling Must Carry regulations be repealed, the

regulations would by necessity have to fall away. The SABC submits that the pro-competition, non-exclusivity provision in the White Paper can be stated as a principle in the enabling statute without further regulations having to be prescribed.

### **3.3 Comments on the specific Draft Regulations**

#### **3.2.1. Must Carry in the digital environment**

3.2.1.1 The ICASA Findings and Position Document<sup>5</sup>, 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”.

3.2.1.2 As stated above, 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. Despite regulatory bottlenecks and challenges with the Broadcasting Digital Migration Policy, the SABC currently achieves universal access of public broadcasting television services through an accepted multiplatform, multichannel strategy via analogue, DTT, DTH and streaming platforms. This is in accordance with the SABC’s ongoing mission of being accessible to all. The SABC is currently on target to fully migrate its televisions services from analogue to digital broadcasting platforms by April 2022. The migration is being done in

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<sup>5</sup> ICASA Findings and Positions Document on the Review of the ICASA Must Carry Regulations, 2008, clause 9.7, at page 24

such a way as to ensure 'analogue only' households will not lose access to SABC's television services in the transition. The relevant channels are currently live on both DTT and DTH platforms and can be accessed through subsidised DTT and DTH STBs, through acquiring IDTVs and/or through an OpenView decoder and dish.

### **3.4 Regulation 3 – Defining the Must Carry channels**

- 3.4.1 The draft regulations have extended the ambit of the 'Must Carry' concept to "all the free to air PBS programs comprising a channel broadcast by a PBS licensee as part of its broadcasting service are subject to Must Carry obligations".
- 3.4.2 This would extend the SABC's Must Carry obligations to SABC Sport, SABC Education and any other current channel or future channel to be developed. SABC News is already carried by Multichoice in terms of a commercial agreement signed in 2018 and subject to its own, negotiated terms of distribution.
- 3.4.3 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 do not include SABC Sport, SABC Education or any other SABC television channel either existing or to be developed. The public broadcaster may, in its discretion, add the carriage of these additional channels, subject to commercial negotiations.

### **3.5 Commercial Negotiations: Regulations 3(2), 6(1), 6(2) and 6(2)A**

- 3.5.1 It has been the SABC's long-standing view that the current provisions of regulation 6(1) and 7(1), dictating that the SABC should make its broadcasting

content available at no cost and prescribing that the SABC should bear the costs of transmission to subscription broadcasters, are ultra vires. The newly appointed SABC Board in November 2017 urgently requested the Authority to deal with this misapplication of the law in the regulations.

3.5.2 Section 60(3) of the ECA specifically states that the programmes must be carried “subject to commercially negotiable terms”. It is only the ‘extent’ to which these programmes must be carried by the subscription broadcast licensees that may be determined by way of regulation, including for example, the minimum content and/or manner of broadcasting and/or scheduling of the programmes.

3.5.3 The SABC understands the ambit of section 60 (3) of the ECA is limited, in that, the SABC may only be compelled to offer its programmes if commercially negotiated terms have been agreed upon. In terms of Senior Counsel’s legal opinion, already submitted to the Authority, it is explained that the phrase “commercially negotiable terms” is not defined in the ECA and should therefore be given its ordinary meaning in common parlance. This would include the payment of carriage fees by SBS for the carriage of the Must Carry channels. Payment terms are core to any commercial negotiations and, once negotiated, are included in the terms of any commercial contract.

3.5.4 While it has taken nearly four years to reach this point, 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<sup>6</sup>. As such, SABC supports the proposed regulation 3(2) which states that PBS and SBS licensees must negotiate the carriage of ‘PBS channels’. The channels should preferably be defined as the Must Carry

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<sup>6</sup> ICASA Findings and Positions Document on the Review of the ICASA Must Carry Regulations, 2008, at , clause 7.4, page 21

Channels and, as submitted elsewhere, these channels will be limited to SABC 1, SABC 2 and SABC 3, with the addition of other channels at the discretion of the SABC and subject to commercial negotiation.

### **3.6 Regulation 6**

3.6.1 Regulation 6 (1) provides: “The PBS Licensee must offer its television programmes, subject to commercially agreeable terms, to a SBS Licensee upon a request from the SBS Licensee”

3.6.2 Regulation 6(2) provides The PBS licensee must offer its television programs to a SBS licensee within three months from the date of conclusion of the commercial negotiations”

3.6.3 Regulation 6(2)A provides “the commercial negotiations contemplated in regulation 6(2) must be concluded within 90 days from the date of receiving a request for the Must Carry channels”

3.6.4 These three draft regulations, as currently drafted, have the potential to further create a deadlock and regulatory uncertainty for the negotiating parties. While the parties are supposed to reach agreeable terms, the regulation puts an obligation on the one party (the PBS Licensee) to offer its channels. Regulation 6(1) therefore contains an inherent contradiction and tension that, if not recognised, could defeat the proper application of the regulations

3.6.5 The SABC submits that the regulation 6(2) and 6(2A) must provide that if no commercial agreement can be found, 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.

3.6.6 It does not make regulatory sense to require the parties to enter commercial regulations according to the Act, but then determine that – even after the failure to find commercial agreement – the public broadcaster could still be forced to offer the three channels against its financial interests. 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 commercial 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, SABC 3.

3.6.7 Therefore, regulation 6(1) 6(2) and 6(2)A should be amended to reflect the above SABC submissions.

#### **4. Conclusion**

In summary the SABC submits:

- 4.1 The Must Carry regulations must be amended as proposed including a sunset clause for when the enabling law is repealed.
- 4.2 The regulations – which provide for commercial negotiations – are thus an interim measure until Must Carry is repealed in its entirety.

The SABC looks forward to making further oral representations as well as the conclusion of this inquiry so to promote regulatory certainty and to ensure the stability and viability of the public broadcaster.