



THE SABC SUBMISSION ON THE ICASA MUST CARRY REGULATIONS DISCUSSION DOCUMENT NOTICE

31 MARCH 2020

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1. Introduction

The SABC is South Africa's public broadcaster, established in terms of the Broadcasting Act of 1999, as amended and incorporated in accordance with the Companies Act 61 of 1973, as amended. The Broadcasting Act required the re-organization of the SABC into two operational divisions i.e. the public service and a public commercial service. Currently, the SABC has nineteen (19) radio stations and seven (7) Television Channels (SABC 1, 2 & 3, SABC Encore, SABC News, SABC Parliament & SABC Sport as authorised by ICASA) with which it provides public broadcasting services.

The SABC as the only public broadcaster within the Republic of South Africa has to deliver a public service mandate which informs, educates and entertains all citizens. The SABC is also mandated to ensure that public broadcasting services reach all citizens, in all official languages. In the interest of the promotion of universal service and access, the SABC endeavours to be a digitized national public broadcaster that provides its services through all platforms.

2. Background

On 13 December 2019, the Independent Communications Authority of South Africa ("ICASA"), published a Discussion Document Notice (Government Gazette No.42902), with respect to the Review of Must Carry Regulations for public comment. Interested stakeholders were invited through this Notice to make comments by 31 March 2020. The SABC would like to thank the Authority for affording it extended period for engagement on this review process. Should the Authority decide to hold public hearings on the subject matter, the SABC would like to participate in such.

3. OVERVIEW ON THE MUST CARRY DISCUSSION DOCUMENT

3.1 The SABC acknowledges and appreciates the Authority's attempt to resolve the existing anti-competitive behaviors in the broadcasting sector through various inquiries. However, it is unfortunate that the Discussion Document is silent about the progress made to date with respect to the review of the Sports Broadcasting Services Regulations and the Subscription Broadcasting Services Regulations/ Competition Inquiry. The SABC is of the view that the Authority should take the industry into its confidence and clarify how the review of Must Carry Regulations will interface with other processes, i.e. the review of Sports Broadcasting Regulations and the Subscription Broadcasting Services Regulations since these regulations have similar regulatory bottlenecks which are competition-related in nature.

3.2 The SABC acknowledges the international benchmarking study ("the study") conducted by the Authority with the view to compare the South African Must Carry regime to that of other countries. It is noted with concern that this study was only confined to: a) the existence of Must Carry regulations in various countries, and b) whether there is/was pay or no-pay for the Must Carry obligations. Regrettably, the study is lacking, in that, it does not consider the funding model of various public broadcasters in the countries concerned. It cannot be that Must Carry obligations in the study are considered in isolation and without consideration of the funding model of public broadcasters in those countries because for Must Carry obligations to succeed, they must be adequately resourced.

For example, in the United Kingdom, BBC public service mandate is fully funded by government¹ and licence fees which are tightly regulated for efficiency; in contrast, the South African public broadcaster is largely funded through commercial revenue.

¹<https://www.bbc.com/aboutthebbc/governance/licencefee>

It is worth noting that the SABC TV licence fee of R265 has remained unchanged since 2013. TV licence fees were supposed to be increased once every 5 years but that has not been the case. The UK licence fee is £154.50 which is 1000% higher than South Africa’s licence fees. Currently the SABC TV licence fee amounts to 72c a day. In 2020 this is very little if anything that one can buy for 72c a day. However, for this average daily fee of 72c a day, the public broadcaster presents the licence fee payer with 18 radio services and 5 TV channels (including those on DStv platform). In essence it can be said that TV licence fee revenue is not sufficient for the public service mandate. Thus, it is submitted that the Authority should, amongst other things, consider the funding model of public broadcasters in those foreign jurisdictions in order to have a holistic picture of their Must Carry regulatory frameworks.

The table below indicates the SABC revenue breakdown percentages over the last 7yrs

SABC REVENUE BREAKDOWN (%)	2019	2018	2017	2016	2015	2014	2013
Advertising Revenue	69%	71%	71%	70%	70%	68%	69%
Sponsorship Revenue	6%	6%	5%	6%	6%	7%	6%
Trade Exchanges	2%	1%	1%	2%	2%	2%	2%
Licence Fees	15%	14%	14%	14%	15%	16%	15%
Government Grants	3%	3%	4%	3%	3%	2%	4%
Revenue: Content & Commercial Exploitation	0%	1%	1%	2%	1%	1%	1%
Revenue Websites	0%	0%	0%	0%	0%	0%	0%
Other Revenue	3%	3%	3%	2%	2%	2%	1%
Revenue							
Other Income	1%	1%	1%	2%	1%	3%	2%
Revenue & Other Income	100%						

The table of revenue above indicates that the SABC is largely funded by commercial revenue unlike other public broadcasters. Thus, there is a need for the Authority to create a regulatory environment which enable the SABC to source commercial revenue in order to deliver on the unfunded public service mandate. Furthermore, the ECA enjoins the Authority to safeguard and protect the viability of

public broadcasting services. Therefore, it is submitted that Must Carry Regulations should not bar the SABC from exploiting its content for revenue generation purposes.

3.3 Further the SABC's view on the study is that the Authority's interpretation of universal service and access is flawed in that, in Europe Must Carry was introduced for consumers who could afford to have both SBS/cable broadcasting services and public broadcasting services. It had nothing to do with reach/coverage constraints as is the case in South Africa.

3.4 In contrast, for South Africa Must Carry is premised on the need to resolve coverage constraints but the consumer must still pay for the SABC coverage in the guise of subscription fees. As such, the Authority's study should consider the cost at which the public acquired SABC Must Carry channels through the Subscription Broadcasting Services ("SBS") platform.

4. THE SABC'S UNFUNDED PUBLIC MANDATE

4.1 In terms of section 8(b) of the Broadcasting Act of 1999 ("the Broadcasting Act"), the SABC must be funded through advertisements, subscription, sponsorship, licence fees and any other means of finance. At this juncture, the SABC derives seventy seven percent (77%) of its revenue from advertising, fifteen percent (15%) of revenue from television licence fees, five percent 5% from other revenue and government grants amount to three percent (3%) of the SABC's total revenue base. Meaning, the SABC competes with all broadcasters for the both the commercial revenue and audience growth.

4.2 The SABC submits that as the Must Carry regulations are reviewed, the Authority should strive to protect the viability of public broadcasting services in accordance with section 2(t) of the ECA. This principle is also reflected in the Triple Inquiry

Report² and it states that when protecting the viability of the public broadcaster, the Authority will need to regulate the broadcasting environment as a whole, to ensure that each sector is viable and can compete fairly. It further states that the ideals and expectations of what can be delivered by the public broadcaster have to be weighed against the realities of a competitive, globalized environment. Consequently, the Authority has to be alive to competition realities, and regulations which inhibit progress or viability for the SABC.

4.3 It should be noted that there are certain legislative and regulatory bottlenecks, i.e. the Broadcasting Act, TV Licence Fee Regulations, Sports Broadcasting Services Regulations, Broadcasting Policy and Digital Migration Regulations, which inhibit the financial viability of the SABC and have also reduced potential revenue and created unfair competition conditions. For example, the DTT regulations restrict the SABC to an 84% DTT coverage which is substantially higher than 16% DTH which the SBS competitors are using with no restrictions imposed on them. The SABC is very concerned that the ICASA Digital Migration Regulations and Digital Migration Policy restrict the extent to which the SABC can utilize the DTH technology. The net effect of this restriction is that the SABC has no flexibility to use a technology that is cost effective and efficient. To this end, the SABC has engaged the policymaker on the problematic legislation and will further engage ICASA on the regulations. Thus, the SABC submits that the legislative and regulatory framework should create an enabling environment which allows the public broadcaster to perform and deliver on its mandate. Therefore, the Authority has to consider the unintended consequences brought by the abovementioned legislation and regulations.

4.4 On 04 December 2017, during the review of the Subscription Broadcasting Services Regulations the SABC requested the Authority to recommend legislation amendment to Parliament with respect to the advertising revenue cap for SBS³.

² Independent Broadcasting Authority Triple Inquiry Report 1995, clause 8.4

³ The SABC Submission on the ICASA Discussion Document: Inquiry into Subscription Television Broadcasting Services, 04 December 2017 , page 25

Section 60(4) of the ECA which states that SBS subscription fee revenue should not exceed the advertising and sponsorship revenue or the combination thereof. SBS has managed to increase its subscription base with the assistance of the SABC channels, to the extent that the limitation of section 60(4) of the ECA has become out-dated. The spirit and the letter of this provision recognise that the free-to-air broadcasting services also depend on the same advertising revenue for survival and financial sustainability; hence, this legislative restriction was introduced for SBS.

- 4.5 Thus, the SABC submits that the Authority should make recommendation in accordance with section 4(3) (a) of the ICASA Act of 2000, to the policymaker and Parliament for the amendment section 60(4) of the ECA. The amendment will allow the Authority 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. It is therefore recommended that section 60(4) of the ECA be amended as follows:

Subscription broadcasting services may draw their revenues from subscriptions, advertising and sponsorships, however, with respect to any one subscription broadcasting service, in no event may advertising or sponsorship, or a combination thereof, be more than 25% of the total television advertising revenue in the Republic or such lesser percentage as may be prescribed by the Authority. The Authority shall also prescribe detailed requirements for compliance with such regulations and the monitoring thereof

5. DEFINITION OF TV PROGRAMME VS CHANNEL

- 5.1 The Authority, in its Position Paper on Must Carry obligations noted that it interpreted the term “television programmes” to refer to channels rather than

individual programmes on channels⁴. It is worth noting that neither the Broadcasting Act nor the ECA defines the term “television programme” as used in section 60(3). The ECA defines channel as ‘*a single defined programming service of a broadcasting service licensee*’. The same definition is also stated in the Broadcasting Act. Regrettably, in the absence of legislative definition the Authority opted to define a TV programme as a channel for purposes of the Authority’s expediency.

5.2 It is worth noting that a channel is a specific brand with its own numerous compositions with cost. A channel is a separate intellectual property which includes scheduling, on-air personalities, operation costs, FCC, etc. A channel is a different entity compared to a TV programme. For purpose of Must Carry obligations, the SABC can easily create TV programmes of public interest nature which can be Must Carry TV programmes as per the original intention of the legislature.

6. OBSERVATIONS ON THE REGULATORY IMPACT ASSESSMENT REPORT

The SABC wishes to correct some assumptions made in the Regulatory Impact Assessment Report of 2019 (“the RIA report”) as follows:

6.1 Assumption with respect to the public benefiting from Must Carry:

In terms of clause 8.2, the Authority concluded that the public has benefited from the Must Carry regulations without assessing the cost attached to that benefit⁵. In

⁴ ICASA Position Paper and Notice of intention to prescribe regulations regarding Must Carry obligations, Government gazette No. 31081, 22 May 2008, clause 9, page 18

⁵ ICASA Regulatory Impact Assessment Report on the Must Carry Regulations , 19 March 2019, page 21

reality, the public has been taxed thrice to access public broadcasting services. The public paid 1) TV licence fees, 2) SBS/MultiChoice subscription fee (even if it is R29 which is charged by MultiChoice), it is still too much for the majority of consumers, and 3) and other related taxes such as municipality tariffs.

According to the understanding of audiences, TV licence fees help the SABC to deliver its public service mandate. So to make consumers pay for the SABC content again through SBS subscription fees is tantamount to double jeopardy for the consumer.

The Authority must consider the *lacuna* in the regulations, which enables SBS to encrypt the SABC Channels with the view to compel subscribers to pay subscription fees. So SBS uses the SABC Channels to lure subscribers into various subscription packages and further charges them a fee for access to free-to-air services. As a matter of principle, free-to-air services should not be accessed through subscription fee.

6.2 Assumption with respect to the SABC benefiting from Must Carry:

In clause 4.7 of the RIA Report, the Authority states its position that without the Must Carry Regulations, the cost of the extra antenna would be an inhibiting factor for millions of audiences⁶. This statement insinuates that any device used for terrestrial SABC services, in this case the antennae, is expensive; however the cost of devices used for SBS are assumed to be free. Therefore, this statement is lopsided and favours SBS over FTA terrestrial television.

6.3 Assumption on DTT and DTH transmissions:

The SABC has noted the Authority's position on the pending digital migration project which says that it is not guaranteed that SABC will have universal coverage of its

⁶ *Ibid*, page 9

services⁷. This view is also shared by MultiChoice. It should be borne in mind that the digital migration project is a national project, led by government and furthermore, this project is meant for the public good and interest. Therefore, it is unfair to penalize the SABC for the delay in the implementation of the project through imposition of unfavourable Must Carry regulations.

It should be noted that clause 7.7 of the RIA Report, makes an argument that if there is no subsidy or free distribution of DTH set-top-boxes for people who are outside the current SABC terrestrial coverage, those members of the public will not have access to SABC Channels. The Authority further assumes that this group of people will not afford the DTH set-top-boxes. However, this statement is also lopsided and favours SBS over the FTA; it assumes that the SBS set-top-boxes are affordable, which is not correct. The reality is, if poor members of the public cannot afford DTH gap filler set-top-boxes, they would also not afford the SBS set-top-boxes.

The SABC is of the view that the DTH and DTT are issues of policy to which the SABC will make a substantive submission in the broadcasting policy process. Thus, it is submitted that the Must Carry regulation should focus on the prescripts of the law which permit parties to negotiate commercial terms.

7. UNIVERSAL SERVICE AND ACCESS OF PUBLIC BROADCASTING.

⁷ *Ibid*, page 20

- 7.1 The high levels of inequalities in South African should be taken into consideration when regulations are developed⁸. In October 2019, the World Bank reported that South Africa's inequality rates are high and persistent; the World Bank further reported that approximately 55, 5% of the South African population is living in poverty and have increased since 2019, while 25% of the population is experiencing food poverty. Statistics South Africa has recently reported that South Africa's official unemployment rate has remained unchanged at 29, 1% in Q4:2019 compared to Q3:2019.⁹ In light of abovementioned statistics, it is submitted that the exiting inequalities and high unemployment rate should influence and shape ICASA regulations.
- 7.2 It has always been the responsibility of government to promote universal service access of public broadcasting services. The original intent was for Sentech, government and the SABC to roll-out of public broadcasting services to all. The Broadcasting Policy of 1998 provides that *"in the area of signal distribution, the network and infrastructure must be extended to cover the entire country"*¹⁰ The SABC holds the view that if its broadcasting services were accessible across the country, the Must Carry regime would not have been necessary.
- 7.3 The fact that universal service and access of public broadcasting services was not realised, does not mean that the Authority should permit SBS to exploit the SABC and take over the responsibility of the accessibility of public broadcasting services.
- 7.4 It is proposed that there should be a contribution by SBS towards sustenance of public broadcasting services and to the public in general. Currently, public interest content is carried by SBS at the SABC's cost; ideally the SBS should be paying a tariff to carry PBS. Thus, the SBS contribution to development of public broadcasting is necessary. The SABC has significantly contributed to the success of SBS as could be seen through the demand of SABC channels on SBS platform

⁸ https://databank.worldbank.org/data/download/poverty/33EF03BB-9722-4AE2-ABC7-AA2972D68AFE/Global_POVEQ_ZAF.pdf

⁹ <http://www.statssa.gov.za/publications/P0211/P02114thQuarter2019.pdf>

¹⁰ White Paper on the Broadcasting Policy, 1998, clause 1.3.9

over the years. Therefore, it is only fair to have a contribution made by SBS towards the sustenance of public broadcasting services.

7.5 In the early days of SBS, SABC channels were not encrypted with the understanding that it is a free-to-air services and subscribers could access the channels despite failing to pay the subscription. However, once SBS realised the value proposition of the SABC channels, they began to encrypt SABC channels in order to compel audiences to pay subscription fees. The SABC Channels continue to perform well, to the benefit of SBS, and the table below confirms this assertion.

Table 1: Top 30 Programmes across channels only (as at January 2020)

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	24.2	62.5	8,710,135
2	GENERATIONS THE LEGACY	Mon-Fri	20:00	SABC 1	Soap opera	20.0	53.4	7,208,029
3	SKEEM SAAM	Mon-Fri	18:30	SABC 1	Drama	14.2	45.6	5,104,600
4	SCANDAL	Mon-Fri	19:30	e.tv	Soap opera	11.8	33.2	4,245,011
5	MAD BUDDIES	Sat	20:00	e.tv	Movies	11.4	32.4	4,107,239
6	MUVHANGO	Mon-Fri	21:00	SABC 2	Drama	10.8	31.3	3,902,940
7	FULL VIEW	Tue	18:00	SABC 1	News	9.8	32.0	3,519,075
8	THE KARATE KID	Sat	19:00	e.tv	Movies	9.7	32.6	3,508,898
9	IMBEWU: THE SEED	Mon-Fri	21:30	e.tv	Drama	9.4	32.1	3,387,059
10	SGUD'SNAYS!	Mon	19:30	SABC 1	Sitcom	9.1	24.5	3,263,035
11	XHOSA NEWS	T/T/S/Sun	19:00	SABC 1	News	8.8	27.1	3,175,903
12	ZULU NEWS	M/W/F/Sun	19:00	SABC 1	News	8.6	25.9	3,083,907
13	MAKOTI	Wed	19:30	SABC 1	Drama	8.2	24.1	2,959,848
14	RHYTHM CITY	Mon-Fri	19:00	e.tv	Drama	8.2	24.4	2,936,479
15	CENTRAL INTELLIGENCE	Sun	20:00	e.tv	Movies	8.1	29.5	2,903,526
16	KHUMBUL' EKHAYA	Wed	21:00	SABC 1	Magazine	8.0	23.9	2,865,669
17	ABSA PREMIERSHIP BLACK LEOPARDS VS KAIZER CHIEFS	Sat	16:30	SABC 1	Sport	7.6	27.0	2,739,867
18	POLICE STORY 3	Fri	21:00	SABC 1	Movies	7.4	24.6	2,676,785
19	MINA NAME	Wed	19:30	SABC 1	Drama	7.4	20.1	2,661,310
20	UZALO OMNIBUS	Sun	12:00	SABC 1	Drama	7.4	31.9	2,647,872
21	THROWBACK THURSDAY	Thu	19:30	SABC 1	Music	7.3	20.7	2,628,943
22	GUARDIANS OF THE GALAXY	Sun	20:00	e.tv	Movies	7.2	23.6	2,603,935
23	RUN ALL NIGHT	Sun	20:00	e.tv	Movies	6.9	22.3	2,484,946
24	ZOOTROPOLIS	Sat	20:00	e.tv	Movies	6.9	22.4	2,476,095
25	NYAN NYAN	Tue	18:00	SABC 1	Reality	6.8	24.5	2,460,061
26	SKEEM SAAM -R	Mon-Fri	09:30	SABC 1	Drama	6.8	37.8	2,453,761
27	REAL GOBOZA	Sat	19:30	SABC 1	Magazine	6.8	20.9	2,433,093
28	ABSA PREMIERSHIP GOLDEN ARROWS VS KAIZER CHIEFS	Sat	15:30	SABC 1	Sport	6.8	27.5	2,431,536
29	SHUGA: DOWN SOUTH	Sun	19:30	SABC 1	Variety	6.7	20.8	2,427,406
30	VELAPHI-R	Mon-Fri	10:00	SABC 1	Sitcom	6.7	35.2	2,421,439

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

99	THE QUEEN	Mon-Fri	21:00	Mzansi Magic	Drama	2.9	8.4	1,040,446
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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)

Table 1 figures affirm the popularity of SABC programmes; hence the argument that the SABC must be allowed to negotiate commercial terms in order to exploit its content and generate better revenue.

Table 2: Top 30 programmes on multichannel (viewing via DStv) (as at January 2020)

TOP 30 PROGRAMMES : MULTICHANNEL: ADULTS 15+ - 05:00-23:00 (Viewing via DStv)

	PROGRAMME TITLE	DAY	START	CHANNEL	GENRE	AR	SHR %	AR VIEWERS
1	UZALO	Mon-Fri	20:30	SABC 1	Drama	22.9	56.6	3,904,210
2	THE KARATE KID	Sat	19:30	e.tv	Movies	9.7	32.6	3,508,878
3	GENERATIONS THE LEGACY	Mon-Fri	20:00	SABC 1	Soap opera	18.2	46.1	3,109,720
4	SKEEM SAAM	Mon-Fri	18:30	SABC 1	Drama	13.6	39.9	2,319,310
5	SCANDAL	Mon-Fri	19:30	e.tv	Soap opera	9.8	25.7	1,662,071
6	FULL VIEW	Tue	18:00	SABC 1	News	8.8	26.0	1,494,195
7	MUVHANGO	Mon-Fri	21:00	SABC 2	Drama	8.4	22.6	1,438,494
8	ZULU NEWS	M/W/F/S/Sun	19:00	SABC 1	News	8.2	22.9	1,404,118
9	IMBEWU: THE SEED	Mon-Fri	21:30	e.tv	Drama	8.2	25.7	1,390,118
10	XHOSA NEWS	T/T/S/Sun	19:00	SABC 1	News	8.0	22.4	1,359,448
11	SGUD'SNAYSI	Mon	19:30	SABC 1	Sitcom	7.3	18.6	1,243,660
12	KHUMBUL' EKHAYA	Wed	21:00	SABC 1	Magazine	7.2	19.8	1,225,792
13	MAD BUDDIES	Sat	20:00	e.tv	Movies	7.0	17.9	1,185,893
14	RHYTHM CITY	Mon-Fri	19:00	e.tv	Drama	6.5	18.1	1,111,075
15	MAKOTI	Wed	19:30	SABC 1	Drama	6.4	16.8	1,086,170
16	NYAN NYAN	Tue	18:00	SABC 1	Reality	6.0	18.7	1,026,506
17	THE QUEEN	Mon-Fri	21:00	Mzansi Magic	Drama	6.0	16.2	1,025,554
18	ABSA PREMIERSHIP BLACK LEOPARDS VS KAIZER CHIEFS	Sat	16:30	SABC 1	Sport	5.9	18.7	1,007,418
19	CECILIA'S ESCAPE	Mon	19:30	SABC 1	Drama	5.8	14.6	981,972
20	UZALO OMNIBUS	Sun	12:00	SABC 1	Drama	5.7	22.0	977,459
21	ABSA PREMIERSHIP GOLDEN ARROWS VS KAIZER CHIEFS	Sat	15:30	SABC 1	Sport	5.7	20.2	964,717
22	THROWBACK THURSDAY	Thu	19:30	SABC 1	Music	5.6	15.2	959,142
23	MINA NAWE	Wed	19:30	SABC 1	Drama	5.5	14.0	939,177
24	POLICE STORY 3	Fri	21:00	SABC 1	Movies	5.3	16.3	907,610
25	SKEEM SAAM -R	Mon-Fri	09:30	SABC 1	Drama	5.2	25.5	887,136
26	MUVHANGO -R	Mon-Fri	09:00	SABC 1	Drama	4.9	25.3	828,021
27	LIVE AMP	Fri	19:30	SABC 1	Music	4.7	13.9	800,963
28	OUR PERFECT WEDDING	Sat	20:00	Mzansi Wethu	Drama	4.6	12.6	790,756
29	POLICE STORY 2	Fri	21:00	SABC 1	Movies	4.4	15.8	749,710
30	LOVE LETTER	Mon	21:00	SABC 1	Drama	4.4	12.3	747,924

In terms of table 2, SABC tv programmes dominate as the most watched programmes. Of the top ten (10) most watched programs on the DStv platform, seven (7) are SABC channels. Thus, there is merit in recognizing the value proposition of the SABC channels.

8. LEGISLATIVE PROVISION WITH RESPECT TO MUST CARRY REGULATIONS

- 8.1 It is the SABC's view that the provision in Must Carry Regulations which determines what needs to be paid, was conceived *ultra vires* and should be urgently revised by the Authority. The Authority should not have through the regulation dictated the commercial terms and conditions for the Must Carry parties as that is tantamount to interference in the commercial dealings of the operators. The Authority needs to correct this anomaly and align the regulations to the precepts of the law.
- 8.2 It is the SABC's view that the 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*, in that section 60(3) 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.
- 8.3 The SABC understands the ambit of section 60 (3) is limited in that the SABC may only be compelled to offer its channels if commercially negotiated terms have been agreed upon. In terms of the Senior Counsel's legal opinion, attached herein as **(Annexure A)**, it is argued that the phrase "commercially negotiable terms" is not defined in the ECA and must be given its ordinary meaning in common parlance. Those, included in the phrase were terms which would deal with the payment of money in respect of must-carry obligations because payment terms, above all, are those which are typically sought in commercial negotiations and, once negotiated, are included in the terms of any commercial contract.
- 8.4 Thus, commercial terms are both monetary and non-monetary in nature and would include any issue that parties would wish to regulate in the contract and can take the form of a commercially negotiated term. Although the Must Carry

Regulations do not provide for all elements of commercial contracting, they preclude negotiation on a very material commercial term; cost of carriage. Thus, it is submitted that the intentions of the law must apply; the parties to Must Carry should negotiate the commercial terms without the Authority prescribing certain commercial terms.

8.5 Section 2(y) of the ECA further enjoins the Authority to “refrain from undue interference in the commercial activities of licensees (own emphasis) while taking into account the electronic communications needs of the public”. The determination by the Authority through the regulations regarding the costs of transmissions between the parties is in direct conflict with section 2(y) of the ECA. This is a matter to be left to the parties for negotiation.

9. DISCUSSION DOCUMENT QUESTIONS

9.1 What is the purpose of Must Carry in South Africa?

First and foremost, Must Carry is an European concept which was intended to address the inequalities of access to public service content because there were dominant commercial cable broadcasting services who were not necessarily interested in nation building goals. Thus, the idea was provision of PBS content of public service nature and importance. It was not meant for universal service from a reach point of view. Additionally, PBS in Europe was not in demand or popular and as such, government had to compel cable broadcasters to carry PBS in order to drive national goals. In contrast, the South African PBS is popular and does not necessarily require such support from SBS.

The South African Must Carry regulations were introduced to advance the accessibility of public broadcast services. Terrestrial environment with its confinements could not assist the SABC to reach and cover all citizens. Thus, it is important for the Authority to dissect the context of each jurisdiction and the rationale behind the prescription of Must Carry obligations

However, in the digital environment public broadcasting services could easily be available on multiple platforms. To this end, the SABC has been approached by distribution platforms that are willing to carry SABC services at a fee. Thus, the current Must Carry regulations have become a barrier for SABC as it prevents all possibilities of exploiting and monetising its content.

9.2 What are the advantages and disadvantages of Must Carry regulations?

9.2.1 Advantages

Those who could afford SBS subscription fees were able to access public broadcasting services but for those who default on subscription fees are blocked from accessing SABC services, despite the fact that SABC channels are free-to-air channels. For those who could not afford subscription fees at all and did not have the SABC terrestrial channels; it means they had no access to public broadcasting services.

9.2.2 Disadvantages

- a) One of the major conceptual problems with Must Carry obligations is that it unjustifiably distorts competition and intervenes in market freedom. This is highly disadvantageous and prejudicial to the SABC given its huge investment in content which it acquires through competitive process and also public funds.

- b) SABC could not derive advertising revenue from audiences sitting on the SBS platform.
- c) SABC Channels have boosted and assisted in the uptake of subscriptions for SBS operators. Free-to-air channels and programmes are still the most watched channels or programmes on the SBS platform but that value proposition is disregarded by the Authority.
- d) The SABC often acquires expensive sub-licensed rights from a subscription broadcaster such as Multichoice to broadcast national sporting events. Under the must-carry regulations and notwithstanding the fact that the SABC has duly paid for these rights, Multichoice then benefits from the SABC's retransmission of these events through the Must Carry channels. Other subscription broadcasters having acquired no rights to broadcast these events, would especially benefit under the regime by being able to broadcast the events (albeit on a delayed or delayed live basis), without incurring acquisition or sub-licensing costs.
- e) In so far as exclusivity premium content is concerned, the SABC has no privilege of having exclusive content, like its competitors, particularly SBS. By virtue of Must Carry channels, the SABC bids for premium content with SBS but whether SBS has bade for that content or not, it will be transmitted on the SBS platform. The net effect is the perpetuation of unfair competition (exclusive and copyrighted content acquired through public funding is unduly shared with competitors) .Thus, in the interest of fair competition subscription broadcasters should not unduly benefit from the SABC sport and other content which is acquired through public funding. Therefore, there should be a regulatory invention to correct this anomaly.
- f) The SABC has been negatively affected during negotiations with content distributors due to the Must Carry obligation. When dealing with distributors, especially international and African distributors, they tier their fees and windows of broadcast. First tier is pay-tv, followed by other services such as Over the top services (OTT) then free to air TV. In the case of Must Carry, distributors see SABC's presence on Pay TV as another window, thus requiring further fees for such rights. In the absence of

revenue streams for the SABC, the broadcaster cannot increase any license fee thus losing out on the content, which ultimately affects the citizens of the country.

g) The SABC is not paid for its services and assets thus it cannot update its funding models to ensure financial sustainability in a highly competitive environment.

9.3 How should ICASA monitor compliance? Should it be done on an annual basis?

The current monitoring provisions are sufficient. It is submitted that the Authority should conduct technical monitoring to ensure that the SABC's signal and the picture quality is fine.

9.4 Should ICASA play a role in the negotiation of contracts for Must Carry? Should ICASA provide a framework for commercial agreements?

Section 2(y) of the ECA provides that the Authority should refrain from undue interference in the commercial activities of licensees. Flowing from this provision, it is submitted that the contract negotiation process should be left to parties/licensees.

9.5 What is the proposed dispute resolution mechanisms required? What should agreements be concluded subsequent to receiving a must offer or must-carry request?

One of the dispute resolution mechanisms that can be employed is pre-agreements that can be entered into by parties prior to contract negotiations. Pre-agreements could assist with the outline of rules of engagement during contract negotiations. This could be prescribed in the regulations in order to avoid unnecessary deadlocks and delays.

In cases of deadlocks of negotiations, parties could jointly agree on the arbitration process in accordance with the Arbitration Act No.42 of 1965, as a tool for dispute resolution can be resolved. Through this process, parties may jointly appoint an arbitrator and agree on the terms of reference with respect to the arbitration process. This proposal is premised on the fact that arbitration could be a cost effective, expeditious and preferred mechanism for resolving commercial disputes.

At the point at which parties reach a deadlock, it could be the responsibility of parties to notify the Authority of the deadlock and the developments of the arbitration process.

9.6 What are the compliance burdens associated with Must Carry regulations and how can they be addressed?

The major burden is the disregard of the value of the SABC Channels and the distortion of competition in the sector as indicated in 9.2.2 above.

9.7 What changes should be considered in the digital environment with regards to Must Carry regulations?

It is noted that the Broadcasting Digital Migration Policy of 2008, in clause 2.3.5. , provides that the Must Carry regime must still continue in the digital environment. However, this provision was coined in 2008 before the introduction of various additional distribution platforms. Now, there is a plethora of content providers who competes with the SABC for the same audiences.

Thus, there is a need for a conducive regulatory environment that will enable the SABC to be financially viable and deliver on the public service mandate. As such, it is submitted that the parties to Must Carry must be permitted to negotiate commercial terms without the Authority's interference.

9.8 Should Must Carry exemption for subscription broadcasting services with less channels (less than 29 channels) apply?

If the Authority can align the Regulations to section 60(3) the issue of a threshold will not arise; thus, all carriers of SABC content will be paying for its channel.

9.9 What are the SABC and SBS costs for Must Carry compliance (breakdown of costs for the previous 3years).What are cost drivers and cost associated cost for Must Carry?

- a) In terms of the Must Carry regulations the SABC is obliged to bear the transmission cost of the broadcast signal to the SBS licensee;
- b) Lost opportunity to generate revenue for premium content, such as, listed sporting events and local dramas.

9.10 Should SABC and SBS share the cost of Must Carry?

Section 60(3) of the Electronic Communications Act (ECA) should apply and parties should negotiate the commercial conditions of Must Carry.

9.11 What are the cost of Must Carry obligations in the analogue and digital environment?

According to Regulation 7(1) of the Regulations, the SABC is obliged to bear the transmission cost of the broadcast signal to the SBS licensee. Meaning, the SABC will incur the transmission cost for both digital and analogue broadcasting for all SBS that

<p>carry SABC Must Carry channels. It is the SABC's view that all Must Carry related costs should be negotiated by broadcasters instead of them being prescribed in the regulations.</p>
<p>9.12 Should Must Carry obligations apply in the dual illumination period? What will be the impact of Must Carry during dual illumination period?</p> <p>In the dual illumination period, the SABC will incur additional transmission costs which is the cost of the digital link. Therefore, the Must Carry obligations should not be applicable to the SABC during this period.</p>
<p>9.14 Should Must Carry apply to all SABC programmes or certain TV programmes? What should be the criteria for the choice of Must Carry programmes?</p> <p>The SABC is of the view that section 60(3) of the ECA speaks to TV programmes and not TV channels. Thus, TV programmes that are of public interest nature can be packaged for the purpose of Must Carry. However, the parties should be free to negotiate terms whether on programme or channel.</p>
<p>9.15 What are the benefits of offering channels for Must Carry?</p> <p>Please refer to 9.2.1</p>
<p>9.16 What are the benefits of carrying the public broadcasting channels?</p> <p>Please refer to 9.2.2</p>
<p>9.17 Any other issue that ICASA must consider?</p>

ANNEXURE: A (Must Carry Legal Opinion)