

Independent Communications Authority of South Africa
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<https://www.icasa.org.za/news/2018/regulatory-impact-assessment-on-must-carry-regulations>

**REGULATORY IMPACT ASSESSMENT OF THE ICASA MUST CARRY
REGULATIONS (“MUST CARRY”).**

Questionnaire for the Public

RM Mohlologa (Chairperson), N Gongxeka-Seopa, P Kadi, P Mashile, Dr. K Modimoeng, BC Mokhele,
Adv. D Qocha, T Semane, PJ Zimri (Councillors), WA Ngwepe (CEO)

CONTACT DETAILS OF THE RESPONDENT

Please complete the table below. Where there is more than one contact person please include the full details of the additional contact person/s in the format provided below.

Prefix (Mr., Mrs., MS, Prof, etc.)	Ms
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Background

The Independent Communications Authority of South Africa ("the Authority") is conducting a Regulatory Impact Assessment ("RIA") on the Must Carry Regulations published in Government Gazette No. 31500 of 10 October 2008.¹

The Must Carry Regulations are meant to regulate the extent to which the Subscription Broadcasting Services ("SBS") must carry the television programmes provided by the Public Broadcast Service Licensee ("PBS"); to provide the terms and conditions under which the SBS licensees will carry the television programmes of the PBS licensee; determine transparent, equitable and reasonable terms and conditions under which the PBS licensee may offer its television programmes to the SBS licensees; and provide exemptions for certain SBS licensees from compliance with these regulations.

The Authority seeks to obtain information and views on the effectiveness and impact of the Must Carry Regulations from stakeholders.

The Authority therefore requests you to please complete a questionnaire as accurately as possible. When providing written responses, as well as supporting evidence and data, please indicate clearly to which question the information pertains.

Should there be any questions or further clarification required, kindly address your questions to shlongwane@icasa.org.za or egopane@icasa.org.za

Please complete and submit data in terms of the questionnaire within twenty-two (22) working days from the date of this questionnaire being published on the ICASA website.

Thank you in advance for taking time to complete a questionnaire.

¹ Government Gazette No. 31500 of 10 October 2008 Vol no. 520

Section 1. Objective of Must Carry

The Must Carry obligation is driven by a policy goal to ensure that PBS television programming is available to all citizens, targeting those citizens that use subscription services as their preferred means of access to television. It is a part of universal service obligations imposed on subscription services.

Please answer the following questions:

1. Describe your organization, its positioning in the broadcasting sector and its key objectives.

- (a) The SOS Support Public Broadcasting Coalition (SOS) is a civil society coalition that advocates for the presence of robust public broadcasting in the public interest to deepen our constitutional democracy.
- (b) SOS campaigns for an independent and effective public broadcaster. We engage with policy makers, regulators, and law makers to secure changes to promote citizen friendly policy, legislative and regulatory changes to public and community broadcasting public broadcasting.
- (c) The Coalition campaigns for the above by:
 - (i) Lobbying for transparency and accountability by all institutions governing public and community broadcasting: Parliament, the Ministry and Department of Communications, the Media Development and Diversity Agency (MDDA), the SABC, the Universal Service and Access Agency of South Africa (USAASA) and to the Competition Commission.
 - (ii) Promoting a constructive, engaged role with all stakeholders, including industry bodies such as the National Association of Broadcasters (NAB) and the National Community Radio Forum (NCRF), as well as a range of NGOs, CBOs, campaigns and others.
 - (iii) Researching international best practices to inform all aspects of our work.

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- (d) As part of its lobbying work the Coalition writes submissions, commissions research, engages the media, organises public meetings and where appropriate pickets and protests.
- (e) Overall, the work that SOS does has helped to contribute to the growing public understanding of the SABC as “our” public broadcaster – one that must not be captured by the state or by a particular faction of the ruling party, and one that must service the information and entertainment needs of the citizens of the country.
- (f) MMA is Media Monitoring Africa (“MMA”) is an NGO that has been monitoring the media since 1993. We aim to promote the development of a free, fair, ethical and critical media culture in South Africa and the rest of the continent. The three key areas that MMA seeks to address through a human rights-based approach are, media ethics, media quality and media freedom.
- (g) MMA’s vision is a just and fair society empowered by a free, responsible and quality media.
- (h) In the last 25 years we have conducted over 200 different media monitoring projects – all of which relate to key human rights issues, and at the same time to issues of media quality. MMA has, and continues to challenge media on a range of issues always with the overt objective of promoting human rights and democracy through the media. In this time MMA has also been one of the few civil society organisations that has consistently sought to deepen democracy and hold media accountable through engagement in policy and law making processes.
- (i) MMA has made submissions relating to Public Broadcasting, as well as numerous presentations to Parliaments Portfolio Committee on Communication as well as the National Council of Provinces. In addition, MMA has made submissions to Broadcasters, the Press Council, the South African Human Rights Commission and the Independent Communications Authority of South Africa (ICASA). MMA also actively seeks to encourage ordinary citizens to engage in the process of holding media accountable through the various means available.

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2. Who are your members and what is the criteria for membership?

- a. SOS is a voluntary association open to organisations and individuals that sign up to the SOS Coalition's Vision for Public Broadcasting in South Africa. The coalition represents trade unions, non-governmental organisations (NGOs), community-based organisations (CBOs), community media, independent film and TV production sector organisations; academics, freedom of expression activists and concerned individuals.
- b. MMA is Media Monitoring Africa ("MMA") is an NGO that has been monitoring the media since 1993. We aim to promote the development of a free, fair, ethical and critical media culture in South Africa and the rest of the continent.

3. Do you think the PBS television programmes are accessible to the public? If not, what are some of the challenges in accessing the PBS television programmes?

According to the latest BRC RAMS research¹, PBS Television is accessible to the 14 million TV owning households. However, nearly half of these households (6.45 million) are accessing PBS television through DStv. Consequently, accessing PBS television via DStv is an essential requirement in order to ensure practical access to PBS television.

4. Are you affected by the Must Carry regulations? If so, How?

SOS and MMA make certain general observations, focusing on matters of public interest. Our contributions in advocating for a public-interest-focused public broadcaster have been recognised by the broadcasting sector, the media, the courts, and Parliament as being immensely valuable.

¹ <http://brcsa.org.za/brc-tams-update-october-2018/> at slide 25.

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5. What do you understand to be the objective of the Must Carry Regulations?

To ensure universal access to PBS television programming in South Africa.

6. Do you think the Must Carry Regulations have achieved the intended objective?

(a) The Must Carry Regulations have not achieved the intended objectives.

Section 60(3) of the Electronic Communications Act, 2005 (ECA) provides that ICASA must prescribe regulations regarding the extent to which subscription broadcast services must carry, subject to commercially negotiable terms, the television programs provided by a public broadcast service licensee (our emphasis). While ICASA has indeed prescribed Must Carry Regulations², the results have not been beneficial to the SABC precisely because the Must Carry Regulations were drafted in a manner that was *ultra vires* the ECA.

(b) The Must Carry Regulations provides at section 6(1) that the PBS licensee that “must offer its television programmes, at no cost, to a SBS [Subscription Broadcasting Service] Licensee upon a request from the SBS Licensee”.

(c) This is *ultra vires* the ECA because that Act specifies that this Must Carry be subject to “commercially negotiable terms” which does not empower ICASA to promulgate regulations that provide that PBS programming is to be offered to a subscription broadcaster “at no cost” as it has, unlawfully, done in section 6(1) of the Must Carry Regulations.

(d) It is quite clear that the section 60(3) of the ECA enshrines the “Must Carry, Must Pay” principle for subscription broadcasting services and requires ICASA to provide for same in its regulations. However ICASA, in making its regulations, has not complied with the legislative requirements set out in section 60(3) and instead has provided for a “Must Carry, Must Not Pay Anything” principle in its regulations.

² Notice 1271 published in Government Gazette Number 31500 dated 10 October 2008.

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(e) Consequently, SOS and MMA are calling for section 6(1) of the Must Carry Regulations to be amended as follows:

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

(f) In our view such an amendment would accord with the requirements of section 60(3) of the ECA.

(g) However, it is arguable that such an amendment might lead to:

a. the SBS Licensee unreasonably refusing to carry the PBS television programming; alternatively

b. the PBS Licensee demanding unreasonable commercial terms.

(h) Consequently, SOS and MMA also suggest an amendment to section 8 of the Must Carry Regulations to provide for the resolution of any disputes with the introduction of a new subsections (1) – (7) (such that the existing section 8 becomes subsection (8) thereto), to read as follows:

(1) “A PBS Licensee must respond to a request for its television programmes by and SBS Licensee within seven (7) days of receipt of the request stating its proposed commercial terms therefor.

(2) The parties must finalise a Must Carry agreement within thirty (30) days from the date of request.

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

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- (4) Where the Authority, after considering all relevant information, determines that the dispute warrants further investigation then the Authority shall:
 - (a) within fourteen (14) days, provide the PBS Licensee with a copy of the SBS Licensee's notification;
 - (b) afford the PBS Licensee a reasonable opportunity to respond to the allegations in writing within 14 days of its having been provided with a copy of the notification by the Authority; and
 - (c) afford the SBS Licensee a reasonable opportunity to reply in writing to the PBS Licensee's response within fourteen (14) days of its having been provided with the SBS Licensee's response.
- (5) The Authority may call for oral representations after the submissions made by the parties referred to in subsection (3) and (4).
- (6) Notwithstanding the provisions of subsection (5), the Authority may determine the matter on the basis of the representations submitted to it by the parties.
- (7) The Authority must, within fourteen (14) days of the end of the period referred to in subsection (3) or (4)(c), as the case may be, or such longer period as may be reasonably necessary which period shall not be longer than thirty (30) days, furnish the parties to the dispute with its final decision.
- (8) The SBS licensee must submit a copy of the agreement to the Authority within thirty 30 days of the agreement being signed."

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7. Do you think the Must Carry Regulations have enabled the public, who ordinarily would not have access to PBS television programmes, to access PBS television programmes?

SOS and MMA are of the view that this is undoubtedly the case given the latest TAMS figures set out in our responses to question 3 above.

8. What do you consider to be the advantages and disadvantages of the Must Carry Regulations?

- (a) The only advantage of the current Must Carry Regulations is that DStv subscribers have ready access to the SABC in a manner that is more convenient than having to access the SABC directly via the SABC's own FTA signal.
- (b) The signal failure of the Must Carry Regulations is that they are *ultra vires* the ECA as more fully set out above and that in promulgating same, ICASA has effectively undermined the Financial Viability of the SABC.
- (c) While section 60(3) of the ECA requires that fees be paid for channels subject to the Must Carry Regulations are "subject to commercially negotiable terms", the Must Carry Regulations themselves, at section 6(1) thereof, provides that the Public Broadcasting Service licensee must offer a television programmes, at no cost, to a subscription licensee upon a request from the subscription licensee" (our emphasis).
- (d) In SOS and MMA's respectful view this is undermining the financial viability of the SABC which ICASA is enjoined to protect in terms of section 2(t) of the ECA, and, in any event is *ultra vires* the provisions of section 60(3) of the ECA.

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9. Other than the Must Carry Regulations, what other mechanisms would you suggest to achieve universal access to the PBS television programmes?

One of our members, Cape TV is also adamant that the “Must Carry” rules applicable to the SABC ought to apply to community broadcasters too. This is because most community television broadcasters are entirely dependent on DSTV for the majority of their audiences. Consequently we are of the view that ICASA must interrogate whether or not the “Must Carry” rules applicable to the SABC ought to apply to community broadcasters too.

10. Will the Must Carry Regulations still be necessary to achieve universal access to the PBS television programmes in the digital television environment?

- (a)** In our view, it is likely that Must Carry Regulations will remain necessary in the digital television environment.
- (b)** However, the reality of DTT is likely to be long in the future, particularly given the Minister of Communications’ recent announcement that government will no longer subsidise the Set Top Box for poor households.
- (c)** Consequently, until such time as analogue television switch off has occurred as a result of the successful migration to DTT, Must Carry Regulations are required to remain in place.
- (d)** Further, if Must Carry Regulations are to be done away with in the DTT environment, this will require a prior amendment to the ECA to remove section 60(3).

11. What will be the impact of repealing the Must Carry Regulations?

- (a)** SOS and MMA are of the respectful view that ICASA is not legally entitled to repeal the Must Carry Regulations as the promulgation thereof is a peremptory obligation imposed upon ICASA in terms of

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section 60(3). Any purported attempt to repeal same will undoubtedly be met by an approach to the High Court for judicial review of the decision.

- (b) However, as has been more fully set out in its response to question 6 above, the Must Carry Regulations must be amended to bring them in line with the peremptory legal requirements provided for in section 60(3) of the ECA which provides for the negotiation of commercial terms for Must Carry arrangements.