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### **REGULATORY IMPACT ASSESSMENT REPORT ON THE MUST CARRY REGULATIONS**

1. The Independent Communications Authority of South Africa (“the Authority”) issued a media release of its intention to conduct a Regulatory Impact Assessment (“RIA”) on the Must Carry Regulations (“the Regulations”) published in Government Gazette No 31500 of 10 October 2008.
2. The Authority thus initiated a RIA on 25 September 2018, which included questionnaires to solicit information from stakeholders affected by the Regulations.
3. The Authority has since received responses to the RIA on the Regulations. No public hearings were held.
4. The Authority hereby publishes the RIA Report on the Regulations.

A handwritten signature in black ink, appearing to be 'Botlenyana Mokhele', written over a horizontal line.

**BOTLENYANA MOKHELE**

**ACTING CHAIRPERSON**

**19 MARCH 2019**

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

# **Regulatory Impact Assessment on Must Carry Regulations**

**March 2019**

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## 1. Introduction

- 1.1. In 2008, the Independent Communications Authority of South Africa (“ICASA / the Authority”) published the ICASA Must Carry Regulations of 2008<sup>1</sup> (“the Regulations”). In terms of the Regulations, a Subscription Broadcasting Service (“SBS”) Licensee is required to carry the television programmes of a Public Broadcasting Service (“PBS”) Licensee at no cost to the SBS Licensee. This has brought about a number of complaints from the PBS Licensee, resulting in the need to consider the effect of the Regulations in the past 13 years and further consider the need to review the Regulations. The Regulations have further been in place for an extended time without an amendment or review.
- 1.2. Pursuant to the aforementioned complaints from the PBS Licensee, the Authority decided to conduct a Regulatory Impact Assessment (“RIA”) to ascertain the effectiveness of the Regulations. A RIA is the best available tool to consider the submissions of all relevant stakeholders, including the public, on the effectiveness of the Regulations and to ensure that the interests of all stakeholders are safeguarded through an inclusive and evidence-based process.
- 1.3. The Authority thus initiated a Regulatory Impact Assessment on 25 September 2018, which included questionnaires directed to the public, the PBS licensee, the SBS licensees and other broadcast service licensees to solicit information from stakeholders affected by the Regulations. ICASA received responses from:
- South African Broadcasting Corporation (SOC) Ltd (“SABC”);
  - e.tv;
  - Multichoice (Pty) Ltd (“Multichoice”); and

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<sup>1</sup> Published under General Notice 1271 in Government Gazette 31500 of 10 October 2008

- Save our SABC (“SOS”)/Media Monitoring Africa (“MMA”).

1.4. This RIA Report will deal with the following issues in separate sections:

- Legislative framework;
- Implementation of current Regulations;
- Universal access;
- Cost analysis of the Regulations;
- Benefits of the Regulations;
- Must Carry in a Digital Terrestrial TV environment;
- Conclusion; and
- Recommendations.

## **2. Legislative Framework**

2.1. Prior to the promulgation of the Electronic Communications Act, 2005 (Act No. 36 of 2005), as amended (“ECA”), the Independent Broadcasting Authority Act, 1993 (Act No. 153 of 1993) (“the IBA Act”) governed broadcasting and in turn, the relationship between the public broadcaster and the subscription broadcasters.

2.2. In June 2005, the Authority published a Position Paper on Subscription Broadcasting<sup>2</sup> in terms of the IBA Act. In that Position Paper it was stated that:

*“The Authority shall prescribe, in licence conditions, the extent to which satellite/cable subscription television broadcasting services may carry the public service television channels of the SABC. The SABC shall be required to offer its public service channels subject to agreed terms. Digital*

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<sup>2</sup> Independent Communications Authority of South Africa, Subscription Broadcasting Services Position Paper, 01 June 2005.

*terrestrial subscription television services shall be required to reserve a channel for public access television”.*

- 2.3. Subsequent to the publication of the Authority’s position above, the ECA was promulgated. Section 60 (3) thereof provides that:

*“The Authority must prescribe regulations regarding the extent to which subscription broadcast services must carry, subject to commercially negotiable terms, the television programmes provided by a public broadcast service licensee”.*

- 2.4. The Authority consequently exercised the powers granted to it in section 60(3) of the ECA and prescribed the Regulations, which state in Regulation 6(1) that, *“(t)he PBS Licensee must offer its television programmes, at no cost, to a SBS Licensee upon a request from the SBS Licensee”.*

### **3. Implementation of the Regulations**

- 3.1. The wording of regulation 6(1) in the Regulations that the SBS Licensees are required to carry the programmes of a PBS Licensee at no cost is, at face value, in direct contradiction to section 60(3) of the ECA that requires ICASA to *“prescribe regulations regarding the extent to which subscription broadcast services must carry, subject to commercially negotiable terms ...”.* Thus, the SABC has identified this apparent inconsistency as rendering regulation 6(1) to be *ultra vires*.

- 3.2. The apparent inconsistency between section 60(3) and regulation 6(1) of the Regulations is however given context in the Position Paper<sup>3</sup> published prior to the promulgation of the Regulations and the submissions by stakeholders made thereto. The Position Paper shows that stakeholders, such as Multichoice, had foreseen the need for PBS and SBS to agree on

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<sup>3</sup> Government Gazette No 31081 of 22 May 2008.

each other's remuneration and a cost structure that is transparent, non-discriminatory and fair. This included a proposition that the PBS must offer its channels to all broadcasters. However, the SABC disputed the must-offer aspect, as it is not an obligation in terms of legislation.

- 3.3. Further, in relation to the discussion of the contractual terms, stakeholders highlighted that section 60(3) of the ECA did not grant the Authority powers to ascertain the commercial terms of must carry contracts between the PBS licensee and SBS licensees.
- 3.4. To arrive at a position that catered for all parties, the Authority resolved in the Position Paper to ensure that there would be no discrimination amongst SBS licensees, the Authority would exempt both the PBS and SBS from paying a fee to the other or receiving financial compensation for must-carry or offer obligations. In terms regulation 4 of the Regulations, all SBS licensees must carry the PBS licensee television programmes as part of their service offerings and are further required to submit a request to the PBS licensee to carry such programmes.
- 3.5. Furthermore, regulation 6 requires the PBS licensee to offer its television programmes, upon request from an SBS licensee, free of charge and deliver the signal to the SBS at its own cost. The SBS licensees would however incur the cost of broadcasting the must carry channels. Any other cost in excess, which is not related to the delivery of the signal or carriage of channels, would be based on commercial negotiations between the broadcasters.<sup>4</sup> It is therefore on this premise that the different wording of "at no cost" in the Regulations came about.
- 3.6. However, this RIA process endeavoured to determine whether the current financial and operational status of all broadcasters involved warrant that

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<sup>4</sup> Page 28 in the Must Carry Position Paper Government Gazette 31081 of 22 May 2008

the provisions in section 60(3) and the Regulations should be aligned with each other and the extent to which this should be effected.

#### 4. Universal Access

- 4.1. The Regulations are driven by a central public interest principle of universal access as per the White Paper on Broadcasting Policy of 1998<sup>5</sup>, to ensure that PBS programming is available to all citizens, targeting those citizens that use subscription services as their preferred means of access to television.
- 4.2. The public broadcaster has limited analogue network coverage. The network does not extend to 100% geographic coverage; thus, it does not provide coverage to 100% of the population and is therefore not universally accessible to the South African public. Its geographic reach differs for the three television channels it offers on analogue network.
- 4.3. SABC 1 has the most extensive coverage reach, followed by SABC 2 and 3 as reflected in Table 1.

*Table 1: SABC Terrestrial Transmitter network coverage*

<b>SABC terrestrial transmitter network coverage of the population</b>		
SABC 1	SABC 2	SABC 3
91.2%	92.5%	82.1%

Source: South African Broadcasting Corporation Corporate Plan FY2016/17 to FY2018/19, page 22

- 4.4. The must-carry obligation in the Regulations extends coverage reach of the PBS licensee to areas where there may be no coverage and viewers use satellite as a means to access broadcasting services, in particular public service programming. The Regulations have thus ensured that the PBS

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<sup>5</sup> Department of Communications, 'White Paper on Broadcasting Policy', 4 June 1998.



licensee is able to, through public interest television programming on subscription satellite services, provide universal coverage to citizens. Based on the figures in Table 1, the Regulations have facilitated access to public broadcasting to the remaining 9% of the population that falls outside the SABC's analogue network coverage area for SABC 1, the remaining 8% not reached by SABC 2's analogue signal and 18% not reached by SABC 3's analogue signal.

- 4.5. In addition to providing for audiences outside the analogue network coverage, consumers are afforded an opportunity to access public service programming without incurring the cost of purchasing an antenna or receiver in addition to the subscription satellite dish and a set-top-box.
- 4.6. Out of a total of more than 14 million television households, just below 8 million homes are Free-to-Air (FTA) viewing households.<sup>6</sup> Whereas about 6.5 million are DStv viewing households.<sup>7</sup> The latter household number includes audiences not covered by the SABC and those who, for convenience and cost, might choose to access the SABC through the subscription platform.
- 4.7. From the general DStv viewing numbers provided, it is notable that there are a number of audiences that have benefited through these Regulations.<sup>8</sup> The Authority holds the view that without the Regulations, the cost of an extra antenna would be an inhibiting factor for millions of audiences. The audiences outside the SABC analogue network coverage would have been denied access to public broadcasting content.
- 4.8. Table 2 below shows the total number of audiences that have benefitted from the Regulations. The table shows the number of SABC viewers who

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<sup>6</sup> Retrieved from <https://brcsa.org.za/brc-tams-update-october-2018/>

<sup>7</sup> Retrieved from <https://brcsa.org.za/brc-tams-update-october-2018/>

<sup>8</sup> Multichoice submission on the Regulatory Impact Assessment ("RIA") of the Must Carry Regulations 2018.

access its television services on terrestrial platform and those who watch it on DStv.

*Table 2: Total number of audiences per platform*

Platforms	SABC 1	SABC 2	SABC 3	Combined Total
Terrestrial viewers	1 621 426	787 061	334 832	2 743 319
SABC Viewers on DStv	382 162	155 740	53 491	591 393
Percentage of SABC Viewers on DStv	24%	20%	16%	22%

Source: Multichoice submission on the Regulatory Impact Assessment ("RIA") of the Must Carry Regulations 2018, page 5

4.9. Using audience figures in Table 2 above, the Regulations have ensured that a combined total of 591 393 viewers have access to public broadcasting television programming. The figure includes viewers that reside outside the public broadcaster's coverage area, but have access to SBS via satellite, and those that use subscription services as their preferred means of access to television.

4.10. The public broadcaster acknowledges that the Regulations have been effective "...because the SABC Channels (SABC 1, SABC 2 and SABC 3) are available to members of the public through (a) the terrestrial platform, (b) OpenView, (c) DTT, as well as on the SBS platform. Therefore, there is universal access of the SABC Channels."<sup>9</sup>

4.11. However, despite enhanced access, the SABC argues that the Regulations do not advance the legislative mandate of protecting the financial viability of the public broadcaster. The summary of the public broadcaster's argument is that the method chosen to advance the universal access

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<sup>9</sup> SABC submission on the Regulatory Impact Assessment ("RIA") of the Must Carry Regulations, page 2.

mandate should not negate the fact that the Regulations have proven to be an onerous burden on its finances.<sup>10</sup>

4.12. Multichoice is of the view that the Regulations have been effective and continue to be effective as the public interest television programmes are accessible to 100% of the population. According to Multichoice *"At present, DStv provides the SABC with access to approximately 7 million households. On average 21.6% of SABC viewers - roughly 2 out of 10 SABC viewers - watch SABC 1, 2 and 3 on DStv, rather than on the Sentech terrestrial network or other platforms. In fact, more than a million DStv subscribers are outside the SABC terrestrial coverage."*<sup>11</sup>

4.13. SOS Coalition and MMA submit that the Regulations have enabled the public, who ordinarily would not have access to PBS television programmes, to access them. They submit that through the Regulations *"...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."*<sup>12</sup>

4.14. However, SOS Coalition and MMA argue that limiting the effectiveness of these Regulations to the total number of audiences and/or television viewing households that are now able to access PBS television programmes is short sighted. They argue greater access to PBS television does not mean that the Regulations have achieved their intended objective as per section 60(3) of the ECA.

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<sup>10</sup> SABC submission on the Regulatory Impact Assessment ("RIA") of the Must Carry Regulations 2018.

<sup>11</sup> Multichoice submission on the Regulatory Impact Assessment ("RIA") of the Must Carry Regulations 2018, page 16.

<sup>12</sup> SOS Coalition and Media Monitoring Africa submission on the Regulatory Impact Assessment ("RIA") of the Must Carry Regulations 2018, page 8.

- 4.15. They are of the view that *"...section 60(3) of the ECA enshrines the "Must Carry, Must Pay" principle for subscription broadcasting services and requires ICASA to provide for same in its regulations."*<sup>13</sup> They share a similar view with the SABC that SBS licensees ought to pay to carry PBS content.
- 4.16. e.tv posits that the Regulations have been effective in ensuring the universal access to public service programming. The commercial free-to-air broadcaster is of the view that *"...the must carry objectives to a large extent have been able to ensure that public interest content is widely available to the majority of South African television viewers."*<sup>14</sup> However, e.tv is of the view that the Regulations' effectiveness in extending accessibility of public service programming has not *"translated into tangible benefits for the public broadcaster"*. e.tv argues that *"... the subscription television broadcast services licensees should be compensating the free to air broadcast service licensees."*<sup>15</sup>
- 4.17. It is evident from the submissions by the SABC, Multichoice, e.tv and SOS/MMA that the Regulations are effective in ensuring that public broadcasting television services are universally accessible to the public.

## **5. Cost Analysis of the Regulations**

- 5.1. The Authority has always been cognisant that there are costs to be incurred by offering or carrying television programming on the PBS licensee and the SBS licensees, respectively, as per regulation 4(1) of the Regulations. In the Position Paper on must-carry the Authority emphasized that the

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<sup>13</sup> SOS Coalition and Media Monitoring Africa submission on the Regulatory Impact Assessment ("RIA") of the Must Carry Regulations 2018.

<sup>14</sup> e.tv submission on the Regulatory Impact Assessment ("RIA") of the Must Carry Regulations 2018, page 6.

<sup>15</sup> e.tv submission on the Regulatory Impact Assessment ("RIA") of the Must Carry Regulations 2018, page 6.

Regulations should not be imposed as a form of financial support for any of the broadcasters but rather to promote the objectives of universal access.

- 5.2. In the RIA questionnaire sent to stakeholders, the Authority requested information on the breakdown of re-transmission costs. Only Multichoice submitted annual cost information from 2008 to 2019. Such costs include: capital expenditure, fibre contribution and satellite capacity costs.
- 5.3. In reply, the SABC noted that the costs include the cost of transmitting their content in a readable format to the SBS licensee, but omitted providing cost figures.
- 5.4. In its submission, Multichoice states that in 2008 it installed a Standard Definition Multiplexer ("SD MUX") for SABC channels which was later upgraded in 2012. In 2018, a High Definition Multiplexer ("HD MUX") was installed so that the PBS channels could be broadcast in HD, thus in total the SBS Licensee has incurred approximately R7,371,695 in capital expenditure since the inception of the Regulations. Fibre contribution costs have remained constant at R618,840 annually from 2008 to 2019 in SD transmission, in 2018 however when the SABC channels started being broadcast in HD, fibre contribution costs rose to R840,000 annually. Finally, satellite capacity costs have been varying annually since 2008 due to fluctuating exchange rates. Multichoice has incurred R55 million in costs thus far to comply with the Regulations.<sup>16</sup>
- 5.5. With regards to the PBS channels that should be available to the SBS licensees as part of the must-carry obligation, the SABC is of the view that SABC 3 should not be freely offered as part of must-carry channels. The SABC argues that since SABC 3 is a commercial channel and privately funded, it should be excluded from the must carry obligations. The SABC

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<sup>16</sup> Multichoice submission on the Regulatory Impact Assessment ("RIA") of the Must Carry Regulations 2018.

further proposes that the wording of the Must Carry Regulations must be reviewed urgently.<sup>17</sup> The SABC argues that by reviewing and amending the regulations to comply with the enabling legislation, the Authority will be fulfilling one of its core statutory objectives as set out in section 2(t) of the ECA, which is to "*protect the integrity and viability of public broadcasting services*".

- 5.6. The definition of the public broadcasting service in the ECA means any broadcasting service provided by the SABC or any other public state-owned entity. Thus, the definition in the ECA does not make a distinction between the public or commercial services. Furthermore, the definition of "public broadcasting service" in the Broadcasting Act mirrors that contained in the ECA and specifically states that the "public broadcasting service" includes the commercially operated service of the public broadcaster, thus casting the net wider than it is in terms of the ECA.
- 5.7. In relation to content rights, the SABC argues that the Regulations have undermined the SABC's investment in content. The Public broadcaster is of the view that audience measurement figures confirm that SABC's content benefits the SBS licensees.<sup>18</sup> SABC 1 is the most watched channel on the pay tv platform, with a market share for SABC 1 being 11.6%. SABC 2 is the third most watched channel with a market share of 4.5%.<sup>19</sup> Thus, the SABC argues that the Regulations "*...enable the SBS Licensee to benefit from the SABC content which drives the take-up of the SBS packages and consequently, the SBS licensee gets higher subscription fee revenue from this arrangement.*"<sup>20</sup>

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<sup>17</sup> SABC Submission on the ICASA Discussion Document: Inquiry into Subscription Television Broadcasting services.

<sup>18</sup> SABC submission on the Regulatory Impact Assessment ("RIA") of the Must Carry Regulations 2018, annexure b.

<sup>19</sup> SABC submission on the Regulatory Impact Assessment ("RIA") of the Must Carry Regulations 2018, annexure b.

<sup>20</sup> SABC submission on the Regulatory Impact Assessment ("RIA") of the Must Carry Regulations 2018.

5.8. The audience figures demonstrate that the Regulations have not been about access only, they have given audiences who might not have easily accessed PBS, access to some of the most popular programming. The SABC argues that PBS programming is among the most watched content in the subscription television segment. Two SABC channels, SABC 1 and SABC 2, are among the most watched channels on pay television as reflected in Table 3 below:

*Table 3: The most watched Channels on Pay Television*

	<b>CHANNEL</b>	<b>SHARE%</b>	<b>AR VIEWERS</b>
1	SABC 1	12.1	422 923
2	Mzansi-Magic	5.4	190 248
3	e.tv	5.1	178 620
4	SABC2	4.4	153197
5	Mzansi-Bioskop	3.9	135 740
6	Africa Magic Epic	2.8	97 668
7	Cartoon Network	2.4	84 703
8	Channel 0	2.3	81 218
9	Mzansi Wethu	2.1	73 594
10	Zee World	1.7	59492
11	M-Net Movies Action	1.5	52 010
12	Kyk-NET	1.5	51 386
13	M-Net Movies Zone	1.5	50 696
14	eNCA	1.4	48965
15	TLC Entertainment	1.3	46480
16	SABC3	1.3	46 335
17	Boomerang	1.3	46 077
18	TCM	1.2	43 582
19	Studio Universal	1.2	43 002
20	Disney Junior	1.2	40 510
21	SuperSport 10	1.0	35 949
22	SABCNEWS	1.0	35887
23	M-Net Movies All Stars	1.0	34 951
24	SuperSport 4	1.0	33 810
25	Dumisa	0.9	33 127
26	MTV Base	0.9	33125
27	One Gospel	0.9	33 008
28	Nat-GeoWild	0.9	32 908
29	SuperSport 3	0.9	31 680

30	Mzansi Magic Music	0.9	29 852
31	Universal Channel	0.8	28 311
32	CBS Reality	0.8	27653
33	TRACE Urban	0.7	23 273
34	M-Net	0.6	21 804
35	Disney Channel	0.6	19 626
36	SuperSport 1	0.5	18 841
37	Moja Love	0.5	17 767
38	Kyk-NET & kie	0.5	17 474
39	10 Xtra	0.5	15 909
40	SuperSport Update	0.5	15 812
41	FOX Entertainment	0.4	15 438
42	Telemundo	0.4	12 505
43	SuperSport 9	0.4	12 364
44	Nick Toons	0.3	11 851

Source: Table 4. SABC submission on the Regulatory Impact Assessment ("RIA") of the Must Carry Regulations 2018.

5.9. Informed by audience figures as shown above, e.tv is of the view that SBS licensees "...have benefitted from carrying the PBS television programmes, since PBS programmes are the most watched on SBS platforms. Although PBS is able to get all the advertising as a result of this, SBS get much more in terms of subscription fee payed by the subscribers."<sup>21</sup> While the SABC argues that "[t]he Must Carry Regulations have certainly been a huge advantage to SBS licensees. Over the years audience measurement figures have confirmed that the SABC Content has been beneficial to SBS. The SABC content is still the most watched content on the SBS platform...Over and above that, the SABC gains no value from offering its channels to SBS licensees despite spending billions of Rands on the commissioning of South African content and on the acquisition of sports rights."<sup>22</sup>

5.10. Multichoice is of the view that there is no direct benefit to the SBS licensees. Multichoice argues that, "[t]he inclusion of the must carry channels on their platform does not promote the take-up of DSTV above other pay TV

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<sup>21</sup> e.tv submission on the Regulatory Impact Assessment ("RIA") of the Must Carry Regulations 2018, page 9.

<sup>22</sup> SABC submission on the Regulatory Impact Assessment ("RIA") of the Must Carry Regulations 2018, page 3.



*services. Moreover, because the must carry channels are already available for free, they do not promote the uptake of pay TV generally.*"<sup>23</sup> In addition, Multichoice argues that the SBS licensees provide audiences with choice from their wide range of channels, and that is the principal reason that audiences actually pay for the service.

- 5.11. What e.tv and the SABC are arguing is that the SBS licensees have gained more subscribers as a result of popular programming by the PBS channels. The SABC further states that "*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.*"<sup>24</sup>
- 5.12. The argument that SBS licensees have experienced subscriber growth as a result of the popularity of PBS channels is unsubstantiated. The argument does not delve into the reasons for subscriber growth, but merely makes an assumption based on the popularity of programmes. The popularity of the SABC television programming on pay television cannot just be attributed to audiences outside the SABC's coverage area. Evidence to support the SABC and e.tv arguments would have to include a survey comprising all the factors behind subscriber growth for SBS.
- 5.13. PBS channels are freely available on the SABC analogue network to more than 80% of the population. There is no compelling reason why 80% of the population would choose to pay for services that are available free of charge. The only people who might subscribe to the SBS licensees because of PBS content are those who are in areas outside the SABC analogue network. Their subscription would be primarily driven by lack of freely available access to PBS services.

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<sup>23</sup> Multichoice submission on the Regulatory Impact Assessment ("RIA") of the Must Carry Regulations 2018.

<sup>24</sup> SABC submission on the ICASA Discussion Document: Inquiry into Subscription Television Broadcasting Services 2017, page 21.

## **6. Benefits of the Regulations**

6.1. It is the Authorities view that the Regulations have been beneficial to all stakeholders and to the public in the following manner:

6.1.1. The Regulations have ensured that audiences that reside outside the public broadcaster's coverage area can access PBS channels. Audiences that use subscription services as their preferred means of access can also access PBS channels without having to spend extra money to purchase an antenna or receiver in addition to the SBS satellite receivers.

6.1.2. In areas outside the SABC analogue network, the SBS licensees benefit from the need to access PBS services. The latter benefit by getting subscribers who have no access to freely available PBS analogue network. In turn, the SABC benefits from an increased audience base, which ordinarily it would not have access to because of lack of access to the PBS analogue network and subsequently channels. Increased audience numbers are important in attracting advertisers.

6.1.3. The additional coverage provided by SBS refers to a number of households that access the PBS programmes through economically convenient SBS platform as submitted by Multichoice.

## **7. Must-Carry in a Digital Terrestrial TV environment**

7.1. The move towards digital television has elicited different views about the necessity of must-carry in a digital environment. According to Nikoltchev and Closs (2005), the argument against must-carry in a digital environment is that from an economic perspective *"must-carry rules are essentially measures which distort competition and are no longer justified in the digital*

*environment*".<sup>25</sup> Amongst other reasons for this stance is the fact that digital technology provides for increased capacity, which enables anyone seeking access to networks a space for broadcasting.

- 7.2. The argument for must-carry in a digital environment is that it should be seen as a part of universal access to content and not be limited to transmission scarcity. However, the must-carry objective is to promote economic convenience for the audiences who receive public service programming primarily through subscription services.<sup>26</sup>
- 7.3. The SABC shares similar sentiment with Nikoltchev and Closs against the must-carry regulations in a digital environment. The PBS argues that, in a digital environment, the Regulations will distort competition as SBS licensees have been and will continue to commercially benefit at the expense of the public broadcaster.<sup>27</sup>
- 7.4. However, Multichoice is of a different view as it submits that the Regulations will still be necessary to achieve universal access of public broadcasting programming in the digital era because Digital Terrestrial Television ("DTT") platform will not be as widespread as access to the current analogue terrestrial platform. According to Multichoice, *"It is likely that the DTT population coverage will be smaller as the SABC is arguing for the coverage of the DTT network to be reduced from its current levels to below that of the current analogue network and lower than the 84% specified in the BDM Policy. The difficulties of getting the migration to DTT underway have been well documented and access to DTT STBs and IDTVs is still low."*<sup>28</sup> Thus,

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<sup>25</sup> Nikoltchev, S. & Closs, W. (2005). To have or not have Must- Carry Rules. European Audiovisual Observatory.

<sup>26</sup> Nikoltchev, S. & Closs, W. (2005). To have or not have Must- Carry Rules. European Audiovisual Observatory.

<sup>27</sup> The SABC submission on the Review of Public Broadcasting Policy, 31 August 2018.

<sup>28</sup> Multichoice submission on the Regulatory Impact Assessment ("RIA") of the Must Carry Regulations 2018, page 29.

Multichoice argues that carriage on the SBS platform will continue to enhance coverage even in the digital broadcasting era.

- 7.5. The 2015 Broadcasting Digital Migration Policy, as amendment (“BDMP”) sets out parameters of migrating from analogue to digital. Clause 7.2 therein prescribes that the SABC should aim to cover 84% of the population through a DTT network and may cover the remaining 16% of the population through Direct-to-Home (“DTH”) satellite network which shall have a footprint covering the entire country, thus enabling analogue switch-off.<sup>29</sup> It is therefore the view of the SABC that there will be no need for the Regulations in a digital television environment, as it will make its television programming universally available through the DTH and DTT Television technology.<sup>30</sup>
- 7.6. However, despite the SABC submission that there will be no need for the Regulations in a digital television environment, the Authority holds the view that convenient universal access to the SABC channels in the digital environment is not guaranteed. The SABC argues that clause 7.2 of the BDMP should be amended to give greater flexibility in rolling out digital television services. It argues that it is costlier to operate and maintain DTT network compared to operating DTH, thus it favours the latter.<sup>31</sup>
- 7.7. It is the Authorities’ view that opting for DTH to roll out digital television services will require audiences to purchase DTH gap filler set-top boxes. There will be universal access for many if there are subsidies or free distribution of DTH gap filler set-top boxes. The population that falls outside the SABC DTT network coverage and cannot afford to purchase DTH gap filler set-top boxes will not access public television programming. In light of the above, the Regulations will continue to be necessary and relevant in

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<sup>29</sup> Government Gazette.38583. Vol. no. 597 of 18 March 2015

<sup>30</sup> SABC submission to ICASA RIA on Must Carry Regulations. 26 October 2018.

<sup>31</sup> The SABC submission on the Review of Public Broadcasting Policy, 31 August 2018.

a digital environment until all audiences are guaranteed universal access to the PBS channels.

## **8. Conclusion**

- 8.1. The implication of the wording of regulation 6(1) in the Regulations is that the PBS licensee offers its television programmes free of charge and deliver the signal to the SBS at its own cost. In terms of the Regulations, the SBS thus incurs the cost of broadcasting for the must-carry obligations. The wording of “*at no cost*” was accompanied by the stance that the PBS and SBS licensees would receive no financial compensation for fulfilling their must-carry obligations. Thus, the PBS licensee would deliver the signal to the SBS at its own cost and the SBS licensees would incur the cost of broadcasting. It was therefore on this premise that the different wording of “*at no cost*” in the Regulations came about in an effort by the Authority to be non-discriminatory and fair and to ensure that universal access was prioritised over financial gain. However, this model of implementation of section 60(3) of the ECA has not been acceptable to all stakeholders and has been considered to be ultra vires.
- 8.2. Nonetheless, with regards to universal access, the Regulations have been effective and have ensured that PBS channels are universally accessible as evident from the figures and statistics on the use of DStv cited above. The Regulations have enabled the public, who ordinarily would not have access to PBS television programmes due to coverage deficiencies, to access PBS television programmes.
- 8.3. In relation to the cost analysis on the impact of the Regulations, all licensees incur costs by offering or carrying television programming as per regulation 4(1) of the Regulations. SBS licensees incur transmission costs, which include (amongst others) fibre contribution costs and satellite capacity costs. While the PBS incurs costs that include the cost of transmitting their content in a readable format to the SBS licensee.

- 8.4. The PBS licensee further highlighted that there are content costs not accounted for in favour of SBS licensees. The PBS licensee, however, failed to provide empirical evidence or figures to quantify the content costs in favour of the SBS licensee. Thus, the PBS licensee is at variance with the Authority's position to exempt both the PBS and SBS from paying a fee to the other or receiving financial compensation for must-carry or offer obligations. The payment exemption is regarded as undermining the effectiveness of the Regulations.
- 8.5. The Authority cannot therefore make a conclusive finding at this stage on whether the resultant implementation of the Regulations on costs carried by the PBS and SBS licensees warrant that the Regulations be amended. However, the figures provided by Multichoice on costs incurred (although one-sided) are indicative of a need to probe the matter further through an Inquiry.
- 8.6. The Inquiry will enable the Authority to reach a comprehensive and accurate conclusion on the effectiveness of the regulations and consequently whether the Regulations require amendment.