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**GENERAL NOTICE**

**Independent Communications Authority of South Africa**

*General Notice*

651	Electronic Communications Act (36/2005): Position paper and notice of intention to prescribe regulations regarding must carry obligations in terms of section 4 (4) read with section 60 (3).....	3	31081
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# GENERAL NOTICE

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## NOTICE 651 OF 2008



Independent Communications Authority of South Africa

### INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

**POSITION PAPER AND NOTICE OF INTENTION TO PRESCRIBE REGULATIONS REGARDING MUST CARRY OBLIGATIONS IN TERMS OF SECTION 4(4) READ WITH SECTION 60(3) OF THE ELECTRONIC COMMUNICATIONS ACT NO 36 OF 2005.**

- (1)** The Independent Communications Authority of South Africa ("ICASA") hereby declares its intention, in terms of section 4(4)(a) of the Electronic Communications Act, 2005 (Act No 36 of 2005) ("the Act"), to make the regulations published herewith ("the draft regulations")
- (2)** ICASA hereby gives notice that it is inviting interested parties, in terms of section 4(4)(b) of the Act, to make written representations on the draft regulations **and not on the position paper.**
- (3)** A copy of the draft regulations is available on the Authority's website at <http://www.icasa.org.za> and in the ICASA Library at 164 Katherine Street, PinMill Farm, Sandton Block D, between 08h30 and 16h30, Monday to Friday.
- (4)** Interested parties who wish to make written representations on the draft regulations are required to submit such representations to ICASA **by no later than 16h00 on 4 JULY 2008** by post, hand delivery or electronically (in Microsoft Word) for the attention of :

Ms Mamedupe Kgatshe  
Independent Communications Authority of South Africa  
Private Bag X10002  
Sandton  
2146

Delivery address: Block D, Pinmill Farm, 164 Katherine Street, Sandton

Where possible, written representations should also be e-mailed to:  
[mkgatshe@icasa.org.za](mailto:mkgatshe@icasa.org.za) or [dmashile@icasa.org.za](mailto:dmashile@icasa.org.za)

**Enquiries** can be directed to the: **Project Leader - Ms. Mamedupe Kgatshe**

(W): 011 566 3009 / 3671

(C): 083 709 0221 / 079 517 6114

- (5) Persons making written representations are requested to indicate if they wish to make oral submissions in the event that ICASA decides to conduct oral hearings in terms of Section 4(6) of the Act.
- (6) Further to the comments on the regulations, interested parties are requested to submit a template for reporting in terms of regulation 10.**
- (7) All written representations submitted to ICASA pursuant to this notice will be made available for inspection by interested persons at the ICASA library and copies of such representations will be obtainable on the payment of the prescribed fee.
- (8) At the request of any person who submits written representations pursuant to this notice, ICASA may determine that such representations or any portion thereof is confidential in terms of section 4D of the ICASA Act 3 of 2000, as amended. If the request for confidentiality is refused, the person making the request will be allowed to withdraw such representations or portion thereof.
- (9) With respect to written representations or portions thereof determined to be confidential in terms of paragraph 6 above, ICASA may direct that the public or any member or category thereof, shall not be present while any oral submissions relating to such representations or portions therefore are being made; provided

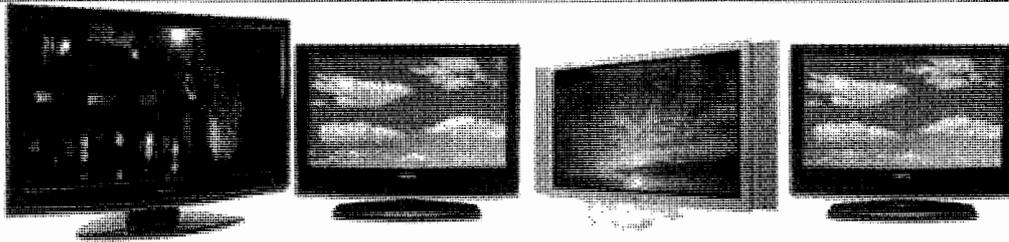
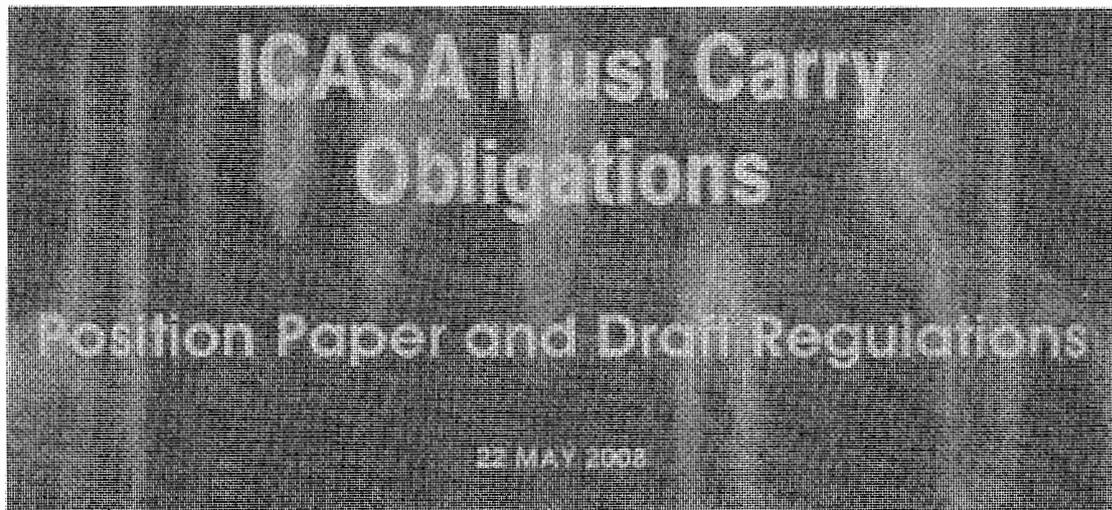
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that interested parties shall have been notified of this intention and allowed to object thereto. The Authority will consider the objections and notify all interested parties of its decision.

**PARIS MASHILE  
CHAIRPERSON**



Independent Communications Authority of South Africa  
Pinmill Farm, 164 Katherine Street, Sandton  
Private Bag X10002, Sandton, 2146



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**ACKNOWLEDGEMENTS**

The Independent Communications Authority of South Africa ("the Authority") would like to acknowledge the contributions of all licensees, media organizations, individuals and stakeholder organisations who participated in the production of the Discussion Paper, Position Paper and Draft Regulations on Must Carry Obligations.

**ICASA**

Mr Robert Nkuna (Councillor and Chairperson of the hearings)

Mr Zolisa Masiza (Councillor)

Mr Dimakatso Mashile

Mr Lekaota Motloung

Mr Bethuel Makola

Mr Thato Mahapa

Mr Paseka Maleka

Ms Mamedupe Kgatshe (Project Leader)

Ms Letty Masilo

Ms Nozipho Mvulane

Ms Marschelle Tillek (Administration Officer and Logistics)

**LIST OF SUBMISSIONS**

We thank the following organisations who made submissions:

1. **E-TV/E-SAT**
2. **MultiChoice Africa (Pty) Ltd**
3. **On Digital Media (Pty) Ltd**
4. **Telkom Media (Pty) Ltd**
5. **Walking on Water Television (Pty) Ltd**
6. **SABC**

## **A. INTRODUCTION**

### **1. BACKGROUND**

This Position Paper is the culmination of a public consultation process in accordance with section 4B of the Independent Communications Authority of South Africa Act<sup>1</sup> ("The ICASA Act"), coupled with a process in accordance with section 4(4) of the Electronic Communications Act, 36 of 2005, for the prescribing of regulations. The process included public hearings as part of the enquiry into the prescription of regulations in terms of Section 60(3) of the Electronic Communications Act<sup>2</sup> ("The ECA"), regarding the imposition of Must Carry Obligations on subscription broadcasting services ("The Must Carry Regulations").

Section 60(3) states:

"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".

As part of the public consultation process, the Authority published a Discussion Paper in Government Gazette No. 30305 (Notice No. 1150) dated 14 September 2007 inviting interested parties to make written representations on the notice of intention to make regulations in respect of the must carry obligations. The notice and discussion paper were published in accordance with section 4B of the ICASA Act and pursuant to the section quoted above. The closing date for submissions was set as 29 October 2007. The Authority received six (6) submissions<sup>3</sup> and held public hearings on 11 and 12 December 2007.

The primary purpose of the Position Paper and Draft Regulations on Must Carry Obligations is to:

- proceed towards the development of final regulations on must carry obligations in accordance with section 60(3) of the ECA;

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<sup>1</sup> Act 13 of 2000 as amended.

<sup>2</sup> Act 36 of 2005, as amended.

- Invite comments from interested and affected parties as required by section 4(4)(b) of the ECA.

The regulatory statutes prior to the enactment of the ECA did not expressly provide for the imposition of Must Carry rules. In the absence of a legal framework, the Authority formulated a position in its "Position Paper on Subscription Broadcasting". This Position Paper was published in terms of section 28 of the Independent Broadcasting Authority Act<sup>4</sup> in June 2005, wherein it stated:

"[T]he 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 terrestrial subscription television services shall be required to reserve a channel for public access television"<sup>5</sup>.

Section 60(3) brings clarity and legal certainty to the concept of Must Carry Obligations.

The Position Paper is divided into three major sections: Submissions, Findings with an Annexure containing Regulations. The Submissions section summarizes the written and oral submissions, reflecting questions posed by the Discussion Paper and the main debates around Must Carry Obligations. This is followed by the Findings section where the Authority's findings and decisions are explained. The Regulations section contains the draft Must Carry Regulations.

## **2. THE PUBLIC PROCESS**

Subsequent to the publication of Notice 1150 of 14 September 2007, the Authority received six (6) written submissions by the closing date. The submissions were made available to the public at the Authority's library, on its website and in its regional

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<sup>3</sup> See Acknowledgements.

<sup>4</sup> Act 153 of 1993

<sup>5</sup> Page 75 of the Position Paper on Subscription Broadcasting Services

offices. The six stakeholders and interested parties made their oral submissions from 11 to 12 December 2007 at the Authority's offices in Johannesburg.

In terms of section 4(4) read with section 17 of the ICASA Act, the Council of the Authority delegated a Committee of Council ("the Committee"), comprising of the members of Council and Staff, to consider the submissions and conduct hearings.

In considering the submissions before, during and after hearings the Committee was primarily guided by the provisions of the ECA and other relevant legislation and regulations.

## B. SUBMISSIONS

The discussion paper posed several questions and the submissions answered those questions specifically. Further, the responses were not strictly limited to the order of the questions in the discussion paper, some responses to the questions overlapped.

In analyzing the submissions, both written and oral, the Authority decided to adopt central themes to lead the discussions. This part of the paper has been structured in that format.

### 3. ADOPTION OF THE CURRENT ARRANGEMENT

In 2003, MultiChoice applied for a permission to continue broadcasting its DStv service in terms of Section 4(1) of the Broadcasting Act No. 4 of 1999. In the absence of an enabling regulatory framework on must carry obligations, MultiChoice negotiated with the SABC and e.tv to carry their channels on its DStv bouquet. *"MultiChoice has been carrying public service channels on its DStv bouquet in terms of a commercial agreement with the SABC. The commercially agreed terms between them is that MultiChoice bears the cost of carriage and any ancillary and variable costs and, the SABC receives no payment for the supply of channels. MultiChoice also includes the monthly listings of the programme schedules of the SABC's public service channels on its electronic programme guide ("EPG") at no cost to the SABC. In addition, MultiChoice carries SABC's pay tv channel (SABC Africa) in terms of a commercial agreement entered into between them...."*<sup>6</sup>.

When asked on whether to benchmark on this arrangement for must carry, the stakeholders were reluctant to continue with this kind of arrangement. ODM submitted that *"the current arrangement between MultiChoice and the free to air services (SABC and e-TV) was put in place prior to the licensing of commercial subscription broadcasting services and the impending promulgation of must carry regulations. As such it should have no bearing on the current processes to define regulations. Instead all subscription broadcasting licensees should be regulated in terms of the proposed regulations to be published by the Authority. The same rules should apply equally to all licensees in the same category making provision only for the different types of services to be offered by each licensee...."*<sup>7</sup>.

<sup>6</sup> Page 2, MultiChoice submission

<sup>7</sup> Page 3, ODM submission

WOW was of the view that “[t]he arrangement between MultiChoice and the free-to-air television services could be based on certain ‘classified’ negotiated terms and conditions (among the parties concerned) which we may not all be aware of and therefore considering, let alone accepting, this arrangement as a benchmark for the implementation of must carry obligations is not at all recommended. We suggest that this arrangement be not used as a benchmark in implementing must carry obligation by all subscription television services”<sup>8</sup>.

SABC supported other broadcasters by arguing that “[w]e do not believe that the existing relationship between free-to-air broadcasters and MultiChoice should be used, in any manner or form, as a benchmark in the implementation of must-carry obligations by subscription broadcasters. This relationship occurred in the absence of a legislative imperative on the part of subscription broadcasters to carry the free-to-air broadcasters and also in the absence of any regulatory oversight by the Authority. The parties entered into the relationship of their own accord and it was on a commercial basis at the time. [The SABC is not familiar with] the commercial terms in the arrangement between MultiChoice and e.tv....”<sup>9</sup>.

The above submissions are firm on their rejection for benchmarking on the current arrangement between MultiChoice and free-to air-channels, implying that the introduction of the ECA was an answer to the carrying of the Public Broadcast Service Licensee’s television programmes by the Subscription Broadcasting Services Licensees for creating a more predictable and transparent approach for carriage of those television programmes.

#### 4. MODEL FOR IMPLEMENTING MUST CARRY

Section 60 (3) of the ECA imposes the obligation on all Subscription Broadcasting Service Licensees. The Authority had asked whether it should consider imposing one model across all Subscription Broadcasting Service Licensees or whether it had to consider various models in the application of the legislative framework. The broadcasters were of the view that there should not be different models to ensure

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<sup>8</sup> Page 2, WOW submission

<sup>9</sup> Page 30, SABC submission

fairness, equity and transparency, calling for one model that will apply to all subscription broadcasters. The need for one model would still require the accommodation of the necessity for exemptions, taking into account relevant factors.

ODM submitted that *"it is important that .... all the regulations are equally binding on all licensees in the same category"*<sup>10</sup>. E-TV, on the other hand, suggested that there should be two models for must carry; being *"[o]ne where the qualifying channels are carried by the pay-TV platform with no payment being made by the qualifying channel....[including] all national (minimum 80% population coverage) free-to-air terrestrial broadcasters which have a significant public service mandate"*. The second model would be *"[o]ne where the qualifying channels are carried by the pay-TV platform on a commercial basis in circumstances where any payment made by the qualifying channel to the pay-TV platform does not exceed the actual proportionate satellite carriage costs of that channel, such costs to be transparent and equitable" .... Those will be ... "[a]ll the other free-to-air channels"*<sup>11</sup>.

The SABC stated that *"subscription broadcasters on the DTT platform need to be considered... [together with]...partial exemptions from the must carry regulations...to small, niche subscription broadcasters"*<sup>12</sup> when prescribing a model for must carry obligations.

Telkom Media's view was that there *"should be a common underlying approach to must carry obligations... [and]...such unified approach (as in some countries) result in different rules for different subscription broadcasters"*<sup>13</sup>. The approach will have to justify the need for exemptions.

## 5. COST MODEL FOR MUST CARRY OBLIGATIONS

The cost for must carry plays an important role in discharging the must carry obligations. The costs that will be incurred by the subscription broadcasters in carrying the television programmes, on the one hand and those that will be incurred

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<sup>10</sup> Page 3, ODM submission

<sup>11</sup> Page 5, e.tv submission

<sup>12</sup> Page 31 SABC submission

<sup>13</sup> Page 7, Telkom Media submission

by the Public Broadcaster in offering their programmes on the other hand, cannot be overlooked. It is therefore important to set a prudent pricing framework which does not disadvantage any of the affected broadcasters. The ECA allows the Authority to prescribe the extent of carriage and also leaves room for commercial negotiations between the Subscription Broadcasting Services Licensees and the Public Broadcasting Service Licensees. When setting a cost model the Authority should consider the delivery of the signal to the Subscription Broadcasting Services Licensees and the reservation of space for transmission of the carried channels. The Authority considered the possibility of free carriage (being the carriage of the Television programmes without paying each other) and carriage with some form of compensation.

MultiChoice in its submission, advised the Authority to closely look at the cost of carriage by pointing out that “[h]istorically, across Europe, “must carry” obligations have sometimes been imposed without any provision being made for recompense for the costs incurred in carriage. Ofcom notes that the cost of providing MTS [managed transmission services] is considerable, both in terms of investment in upgrades to existing infrastructure, new transmission equipment and in ongoing costs....[and thus there should be]....a reasonable opportunity to recover [the] costs, including a reasonable level of profits [for broadcasters providing MTS]. These should properly reflect the levels and nature of the investments they are required to make, the innovation they have undertaken and the risks they have borne.....Ofcom therefore considers that the option of imposing “must carry” obligations with no provision for payment should be rejected”<sup>14</sup>.

MultiChoice proposed “that if any obligation in respect to remuneration is to be imposed, that obligation should be at the cost of the public broadcasting service whose public service programming is required to be made accessible in the public interest, to all members of the public”<sup>15</sup>.

ODM stated that “subscription broadcasters should not be forced to pay for must carry channels as well as pay for the cost of transmission. The must carry channels

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<sup>14</sup> Page 6, MultiChoice submission

<sup>15</sup> Page 7, MultiChoice submission

*must be made available to the subscription broadcasters at the point of combination of channels for distribution to the subscriber*<sup>16</sup>.

*e.tv submitted that there is a "need for the Authority to become involved in providing a cost-based model to guide the transactions between operators...No pay TV platform should be required to pay a free-to-air channel to be carried on its platform"*<sup>17</sup>.

## **6. COST OF CARRYING BEING PASSED ON TO THE CONSUMERS**

Internationally, other jurisdictions consider the likelihood of costs being passed on to consumers when they implement similar must carry obligations and develop measures to counteract the possibility of costs being passed to consumers.

MultiChoice submitted that "[a]ny payments that a subscription broadcasting service will be required to make to the public broadcasting service for its channels, will form part of its content costs which will ultimately affect the monthly subscriptions paid by the consumer. Insofar as these public service channels are already available to free-to-air viewers who pay television licence fees to receive them, they will be required to pay twice for channels which they already receive on the terrestrial platform. MultiChoice is accordingly of the view that the Authority should not impose a general rule requiring subscription broadcasting services to pay the public broadcasting service for the content which it is required to carry"<sup>18</sup>.

SABC is of the view that "subscription broadcasters should be left to determine the feasibility of passing on costs to consumers in the context of a competitive market. This issue goes to the pricing models of all respective subscription broadcasters and does not distort their market"<sup>19</sup>.

*"While in principle, e.tv submits that the cost of carrying the must-carry channels should not be passed on to the consumer by subscription broadcasters, this will be*

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<sup>16</sup> Page 4-5, ODM submission

<sup>17</sup> Page 6 and 12, e.tv submission

<sup>18</sup> Page 6, MultiChoice submission

<sup>19</sup> Page 32, SABC submission

*difficult to implement in practice as there are a range of factors which may result in a subscription broadcasters increasing their pricing*<sup>20</sup>.

ODM believes that "[t]he net cost of carriage will be passed on to the subscribers. They should not be further burdened with the costs of the channels, which in effect they have already contributed towards through their TV licenses"<sup>21</sup>.

## 7. MUST OFFER PRINCIPLE

The Authority considered the imposition of both 'must carry and must offer' and the possible related constraints. Several submissions argued that in order to have a level playing ground, the Authority should impose the principle of 'must offer' on the SABC alongside the must carry obligations as these two principles relate to one another. Parties stated that separating these principles would create an uncompetitive environment due to the fact that different programmes have different commercial value.

MultiChoice submitted that "[a]ccordingly, and in order to give effect to the "must carry" obligation of subscription broadcasting services, s60(3) must be interpreted to include a "must offer" obligation on the public broadcasting service. Simply put, a must carry obligation (or right to compulsory distribution) and a "must offer" obligation are two sides of the same coin. ....This notwithstanding, the regulations should provide that where the parties agree to pay each other, the cost structure agreed upon must be transparent, non-discriminatory and fair. It is imperative, in this regard, for the regulations to contain a provision requiring the public broadcasting service to offer its public service channels to all subscription broadcasting services on non-discriminatory terms"<sup>22</sup>.

E-TV agreed with MultiChoice that "[b]oth subscription broadcasters and public service broadcasters have financial constraints which may inhibit them in regard to must-carry or must-offer obligations. [It further submitted] that if a reasonable

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<sup>20</sup> Page 9, e.tv submission

<sup>21</sup> Page 4, ODM submission

<sup>22</sup> Page 4, MultiChoice submission

*framework is established to regulate must-carry and must-offer, such constraints are not unreasonable*<sup>23</sup>.

SABC disputed the concept of must offer arguing that “[w]hilst the obligation to carry the SABC public service channels is mandatory on subscription broadcasters, there is no such corollary obligation on the SABC to offer its channels to subscription broadcasters. Section 60(3) places no obligation on the part of the SABC to offer its channels to subscription broadcasters”<sup>24</sup>.

## 8. COMMERCIAL VERSUS PUBLIC WINGS ON MUST CARRY

The discussion paper asked whether both divisions of the SABC ought to be included in the Must Carry Framework. The question centred on the inclusion of SABC 3 as it falls within the commercial service division of the Public Broadcaster.

As section 9 of the Broadcasting Act 4 of 1999 separates the public broadcaster into two separate divisions, being the public service division and the commercial division, the question arose whether the two divisions should receive similar status in the context of Must Carry. E.TV argued that a dispensation that includes the commercial service division (SABC 3) whilst excluding itself (e.TV) may appear to be unfair given the nature of the obligations imposed upon itself. E.TV submitted that “a private free-to-air commercial broadcaster with significant public service obligations, like e.tv, should be afforded the same must-carry status as the SABC”<sup>25</sup> for various reasons including that the SABC competes with e.tv for advertising revenue, which is its sole revenue generation stream, “e.tv has greater public service obligations than SABC 3”<sup>26</sup> and other jurisdictions include channels with significant public service obligations irrespective of whether they are privately or publicly owned<sup>27</sup>.

The argument was extended further at the hearings when ETV argued that section 11(1)(a) of the Broadcasting Act requires that the commercial services of the Public Broadcaster ought to receive the same regulatory dispensation as other commercial

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<sup>23</sup> Page 10, e.tv submission

<sup>24</sup> Page 4, SABC submission

<sup>25</sup> Page 2, e.tv submission.

<sup>26</sup> Page 3, e.tv submission.

<sup>27</sup> Ibid.

services<sup>28</sup>. Telkom media supported the latter argument and submitted that "...SABC should not be given more advantages than e.tv"<sup>29</sup>. It also made common cause with the argument that the must carry framework only extends to public service channels of the SABC.

Although On Digital Media (ODM) did not make substantive arguments in relation to this issue, it did submit however that its interpretation is that only the services located within the Public Service Division of the Public Broadcaster should be included in the Must Carry Framework in line with its interpretation that the Public Broadcaster only includes the services located within the Public Service Division. It also appeared that Walking On Water (WOW) supported the approach when it stated that "[d]ue to the fact that SABC 3 is a commercial broadcaster, all its programs should be exempt from being imposed over subscription broadcasters to be carried..."<sup>30</sup>. However, there appears to be a conflict of opinions from the WOW submission as it is also stated that "the difference between SABC commercial and SABC public service is only a matter of perception and...both streams of the public broadcaster are in fierce competition with subscription broadcasters, [thus] a single approach to the must carry obligations should be applied for both SABC business units"<sup>31</sup>.

Seemingly, MultiChoice agreed with the latter suggestion that the entire complement of services of the Public Broadcaster be included in the framework for Must Carry regardless of the business unit the service is located in. However, it appears unclear as the original submission stated that; "all the public service channels of the public broadcasting service...must be made eligible for carriage"<sup>32</sup>. Nonetheless, the principle is accepted to be that all the services of the Public Broadcaster should be included in the framework and principles informing exemptions should be developed as part of the framework.

The SABC argued that "there is no legal basis to differentiate between channels based on which division [of the SABC] they are located"<sup>33</sup> and submitted further that

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<sup>28</sup> Page 5-6 e.tv submission

<sup>29</sup> Page 12, Telkom Media submission.

<sup>30</sup> Page 9, Walking on Water submission.

<sup>31</sup> Page 10, Walking on Water submission.

<sup>32</sup> Page 14, MultiChoice submission.

<sup>33</sup> Page 17, SABC submission.

*“although the SABC3 is located in the commercial division of the SABC, it is...a licensed public service broadcaster and....should be covered by the must carry regulations”*<sup>34</sup>. The basis for the inclusion also stems from the public service obligation imposed by section 11(1) (d) of the Broadcasting Act which *“mandates the commercial service division of the SABC to subsidise the public services to the extent recommended by the Board and approved by the Minister”*<sup>35</sup>.

## 9. PROGRAMME VERSUS CHANNELS

The discussion paper had asked whether the Must Carry framework ought to apply to a selection of television programmes or to whole/complete channels of the public broadcaster. The question arose from the wording of section 60(3) which uses the words “television programmes” as opposed to the defined “channels”.

Common to the submissions, with the exception of WOW, was the opinion that interpreting television programmes to mean channels would be more practical and in line with international best practice. The SABC submitted that the legal authority for interpreting the section to have intended to refer to channels emanates from a purposive interpretation of the section and cited several sources for the interpretation<sup>36</sup>. For reference purposes, the ECA defines “channel” to mean *“a single defined programming service of a broadcasting services licensee”* whilst the Broadcasting Act defines “channel” to mean *“a single defined programming service of a licensee other than a video-on-demand programming service”* and neither of the statutes define “television programmes”.

The two definitions of a “channel” make reference to a “programming service” which has in turn, not been defined. However, the Broadcasting Act further defines “broadcaster” to mean *“a...[person]...who composes or packages television...programme services for reception by...subscribers”*. Thus it appears that a broadcaster would be a person who aggregates programme services and offers these aggregated services to subscribers or members of the public. Consequently, a channel would be a single defined aggregation of these programme services, implying that a broadcaster would be offering channels to the eventual subscribers

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<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Page 13-14, SABC Submission.

and that a programme service would form a component of the channel offered by a broadcaster.

## 10. TIMEFRAMES FOR IMPLEMENTATION

From the nature of the responses to the question on exemptions, the Authority found the question on the timeframes for implementation to have been addressed as part of the general exemptions from the obligations. As a result, some of the responses may have been addressed as part of the discussions on the basis for exemptions from the obligation. A case in point would be Telkom Media whose approach to exemptions and implementation timeframes is that the regulations should not be applicable until such times that the subscription broadcaster reaches a certain audience/subscriber size<sup>37</sup>. ODM also proposed a similar model which was based on the number of channels provided by the subscription broadcaster<sup>38</sup> coupled with a three (3) year lead period "*presumably to allow the...[subscription broadcaster]...to build up a sufficiently large subscriber base to justify the universal service and access obligations*"<sup>39</sup>. Similarly, e.tv proposed that a "*reasonable lead-in period*" be expended before the obligations could be effective on new subscription broadcasters<sup>40</sup>.

WOW TV proposed that the Authority develop an implementation plan that phases in the obligations over a period of time to allow "*the new subscription broadcasters time to stabilize before burdening them with must carry obligations*"<sup>41</sup>. WOW then proposed that the implementation plan take into account a number of factors including:

- *The investment required to meet the must carry obligation on the subscription broadcasters and whether the must carry obligation will not impose additional investment requirements on the subscription broadcaster. If the must carry obligations mean more investment for the subscription broadcasters, then more time should be given to neutralize the*

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<sup>37</sup> Page 16, Telkom Media submission

<sup>38</sup> With a minimum of 20 Channels before the obligation applies to a specific broadcaster.

<sup>39</sup> Page 9, ODM submission

<sup>40</sup> Page 13, ODM submission

<sup>41</sup> Page 14, e.tv submission

*effects of having to make additional investments to cater for must carry obligations.*

- *That the must carry obligations will not favour the public broadcaster more than they bring advantage to the public.*
- *Considering and acknowledging instances where the must carry obligation may not be appropriate, for example, in the situation of the niche Christian based subscription broadcaster - Walking on Water Television, where the must carry obligations will never become appropriate.*
- *Leaving the broadcasters to agree on the must carry of content without forcing the subscription broadcasters to carry the public broadcasters...<sup>42</sup>.*

MultiChoice was however, of a different opinion that *"the Authority does not have jurisdiction in terms of s60(3) of the ECA to determine the time frames for the commencement of the implementation of must carry obligations, as these obligations are made subject to commercially negotiable terms between the subscription broadcasting service and the public broadcasting service... [T]he time frames relating to implementation of the must carry obligations would be dependent on the successful commercial negotiations between the parties. This is the clear intention of s60(3) of the ECA"*<sup>43</sup>.

## 11. CONTRACTS

The discussion paper enquired into the suitability of prescribing standard terms and conditions to regulate the agreements that would be entered into by the Licensees. The paper further asked whether such terms and conditions, if prescribed, should extend to the commercial agreements concluded by the Licensees.

ODM [proposed] that *"the Authority establishes a standard contract for must carry in line with the objectives of the must carry regulation. The Authority should also perform a dispute resolution function if the parties reach a deadlock in the negotiations. However disputes can be avoided through specific ex-ante regulation....that clearly set out requirements for compliance and policy objectives behind the regulations"*<sup>44</sup>.

<sup>42</sup> Page 14 – 15, *ibid*.

<sup>43</sup> Page 12, MultiChoice submission.

<sup>44</sup> Page 6, ODM submission

e.tv is of the view *“that it would be advisable for the subscription broadcaster and the must-carry channel to enter into a contract to regulate their relationship as there may be a range of negotiated terms (in addition to must-carry) which the parties will need to agree on”*<sup>45</sup>.

MultiChoice submitted that Section 60 (3) only allows the Authority to prescribe regulations regarding the extent to which a subscription broadcasting service may carry the content of the public broadcasting service. It excludes the Authority from interfering in any commercial arrangement which is entered into between the parties. *“The Legislature recognized this as the domain of the contracting parties, otherwise they would have expressly provided for such intervention”*<sup>46</sup>.

*“The SABC proposes to publish standard terms and conditions applicable to all subscription broadcasters without discrimination, [and the] proposed model also envisages the entering into a contract with each subscription broadcaster in respect of additional terms and conditions such as price and other matters. The terms of this further agreement shall not derogate from the published standard terms and conditions applicable to all broadcasters”*<sup>47</sup>.

## 12. CONFLICT RESOLUTION AND COMPLIANCE

Conflicts that can arise due to must carry are those related to;

- commercial agreements between the subscription broadcaster and the public broadcaster,
- refusal to carry/offer television programmes for Must Carry.

The latter one can be resolved by the Authority by specifying in the regulations the terms and conditions for carriage whilst the former can be contained in the contract of agreement between the concerned parties. The Authority currently monitors and enforces compliance with the regulations through the Monitoring and Compliance Unit. If disputes cannot be resolved, the matter may be referred to the CCC. This is applicable only to the regulations that are enforced by the Authority. For the concept

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<sup>45</sup> Page 10, e.tv submission

<sup>46</sup> Page 11, MultiChoice submission

<sup>47</sup> Page 33, SABC submission

of negotiating commercial terms, the ECA does not give the Authority powers to delve into such matters.

On this issue, ODM suggested that *"no additional measures than these comprehensive regulations are required"*<sup>48</sup>. e.tv supported that by stating that *"the Authority need not set additional measures to deal with compliance with the must-carry obligations as the existing legislative and regulatory mechanisms are sufficient to deal with this"*<sup>49</sup>.

In terms of commercial negotiations MultiChoice felt that *"s60(3) of the ECA, in contrast, does not provide the Authority or the CCC with the authority to resolve any disputes which arise from the inability or unwillingness of the public broadcasting service and the subscription broadcasting service to **negotiate or agree on the terms and conditions of carriage** as contemplated under s60(3) of the ECA. s60(3) of the ECA only provides the Authority with the limited power to prescribe regulations regarding the extent to which a subscription broadcasting service may carry programmes provided by a public broadcasting service"*<sup>50</sup>.

### 13. FILING WITH THE AUTHORITY

The discussion document asked whether any agreements entered into between the Subscription Broadcasting Service Licensee and the Public Broadcast Services Licensee should be filed with the Authority. If they have to be filed with the Authority it should be clear, especially on commercial negotiations, whether they are for public consumption or there is some element of confidentiality.

MultiChoice was of the opinion that *"...in the interests of transparency, the regulations ought to contain a clause requiring the parties to file with the Authority all agreements relating to must carry for approval before they are implemented. These agreements must be open to public inspection"*<sup>51</sup>. The SABC also supported the sentiment that *"commercial agreements should ... be filed with the Authority"*<sup>52</sup>. ODM

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<sup>48</sup> Page 9, ODM submission

<sup>49</sup> Page 13, e.tv submission

<sup>50</sup> Page 11, MultiChoice submission

<sup>51</sup> Page 8, MultiChoice submission

<sup>52</sup> Page 36, SABC submission

suggested that it is not necessary since *"this would add administrative costs and burden on the Authority and the licensees. The regulations should clearly spell out the requirements and the parties simply required to inform the Authority and report on compliance as directed by the Authority in the regulations. As proposed, a standard contract should be provided by the Authority"*<sup>53</sup>.

e.tv submits that *"the must-carry regulations to be established by the Authority should set out the criteria for broadcasters to qualify for must-carry status. After such regulations come into effect, all broadcasters will have to comply with them and it will therefore be unnecessary for the Authority to authorize individual channels as must-carry channels. In the event that there is a dispute between the parties as to what constitutes a must-carry channel, the aggrieved party could approach the Authority on the basis that the alleged defaulting party is not complying with the regulations."* e.tv further submitted that *"it is unnecessary to require all agreements relating to must-carry to be filed with the Authority before they are implemented"*<sup>54</sup>.

#### 14. EXEMPTIONS

The discussion paper enquired into the feasibility of implementing exemption from the obligation to carry the programmes of the public broadcaster. The discussion looked at the legality of creating exemptions as well as the basis for granting such exemptions if there was indeed a power to grant the exemptions.

The majority of the submitters appeared to agree that it was necessary to include exemptions in the framework without expanding on the source of the power. SABC submitted that the powers of the Authority in terms of section[60(3)] included the power to *"determine, on application, whether or not to exempt a subscription broadcaster from carrying some of the designated channels"*<sup>55</sup>. The legal justification for the creation of an exemption, in the opinion of the SABC, came from the use of the words *"regarding the extent"* as used in section 60(3). However, the SABC was of the opinion that the exemption could not amount to an absolution on the part of the subscription broadcaster. Put differently, any exemption created by the Authority

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<sup>53</sup> Page 9, ODM submission

<sup>54</sup> Page 11, e.tv submission

<sup>55</sup> Page 3 SABC submission

would have to reserve a minimum amount of channels that would have to be carried as there cannot be a total exemption from the obligation<sup>56</sup>. The remainder of the submissions appeared to support the idea of exemptions without providing the justification for the idea.

A related issue that followed the discussion was the basis for such exemptions if the decision was to grant exemptions. As the discussion paper has spoken to the category of Niche broadcasters, the responses were premised on that categorization as a basis for granting exemptions. The SABC submitted that *“the regulations should allow for small, niche subscription operators to apply for partial exemption from compliance with the [regulations]. The SABC proposes that a determination of whether an operator is niche or not should not be based on channel capacity only but rather on a range of different factors”*<sup>57</sup>. The SABC then proposed the type of factors that could be considered by the Authority in evaluating whether an entity is a Niche broadcaster<sup>58</sup>.

Walking on Water, as with SABC, focused on Niche broadcasters as they also deemed themselves to be such a broadcaster based on the type of programming and the target market for the service they provide. WOW defined Niche broadcasters as *“broadcasters with a distinct focus and offering to a defined market segment...[who]...have identified a particular focus or a particular pursuit which the current broadcasting regime is under serving if at all”*<sup>59</sup>. WOW argued that imposing the Must Carry obligation on this type of broadcasters would defeat their very existence. WOW further sought to *“emphasize that a niche broadcaster is not defined by the audience it attracts (target market), the size it grows to become or anything outside itself”*<sup>60</sup>.

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<sup>56</sup> Ibid.

<sup>57</sup> Page 26 – 27, SABC submission

<sup>58</sup> Ibid. [T]he SABC should be involved in any decision regarding the channels to be carried by any subscription broadcaster which has been granted a partial exemption [and]...only Walking on Water (from the five(5) licensed subscription broadcasters) indicated its intention to provide a service aimed at a niche market.

<sup>59</sup> Page 11, WOW submission.

<sup>60</sup> Page 11 – 12, WOW submission

Telkom Media did not, however, focus on Niche broadcaster but rather proposed a different basis for determining the extent of the exemptions which basis would be the objectives of the must carry regulations. The submission made common cause with the discussion paper in accepting Universality as an objective of must carry and proposed that *“such rules [on exemptions] should apply to those services whose subscribers access programming primarily through the subscription service...The distinction should...not be between niche and other multi channel broadcasters, but be based on the objectives underlying the must-carry obligations”*<sup>61</sup>. With that objective in mind, Telkom Media then suggested that the distinction be made between start-up operations as opposed to existing operators and the exemption should be granted to new entities until such time that the exemption lapsed. The time could be determined by reaching a specified amount of subscriber. e.tv also used the distinction between new and existing operators as the basis and proposed a specific implementation plan aimed at ensuring that the obligation does not become a financial burden<sup>62</sup>. Similar to Telkom Media’s submission, the exemption would prevail until a specified subscriber base is attained.

## 15. EFFECTIVE DATE

The Authority recognizes that this is a new regulatory environment and the success of must carry needs to be measured over time. The regulatory approach to must carry should take into account the views of broadcasters on the factors related to the effective date for the implementation of Must Carry to come up with a solution on how to approach the issue. From the ODM point of view *“[c]urrent [Subscription Broadcasters] can begin immediately; all other should have a choice to begin at any time within three years of obtaining a licence”*<sup>63</sup>.

e.tv suggested that *“...must-carry rules should be implemented with immediate effect subject to a reasonable lead-in period”*<sup>64</sup>. MultiChoice agreed with e.tv on a reasonable period for the implementation of the obligations by articulating that *“...the Authority should impose a requirement that the terms governing the carriage of the public service programming/channels must be reasonable, fair and non-*

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<sup>61</sup> Page 14, Telkom Media submission

<sup>62</sup> Page 8, e.tv submission

<sup>63</sup> Page 9, ODM submission

<sup>64</sup> Page 13, e.tv submission

*discriminatory and that such agreement be implemented within a reasonable period of time.*<sup>65</sup> On the same note, it further submitted that “[i]ikewise, the Authority does not have jurisdiction in terms of s60(3) of the ECA to determine the time frames for the commencement of the implementation of must carry obligations, as these obligations are made subject to commercially negotiable terms between the subscription broadcasting service and the public broadcasting service. Therefore, the time frames relating to implementation of the must carry obligations would be dependent on the successful commercial negotiations between the parties. This is the clear intention of s60(3) of the ECA”<sup>66</sup>. ODM submitted that “the Authority must notify subscription broadcasters at least 18 months prior to the introduction of any new public broadcasting services that may fall into this category”<sup>67</sup>.

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<sup>65</sup> Page 12, MultiChoice submission

<sup>66</sup> Ibid

<sup>67</sup> Page 4, ODM submission

## **C. FINDINGS**

Similar to the approach under B, above, the findings are also grouped according to the related topics.

### **16. ADOPTION OF CURRENT ARRANGEMENT**

Prior to the promulgation of the ECA, MultiChoice carried the free-to-air channels together with SABC Africa on the basis of negotiations outside the Authority's jurisdiction. The terms and conditions of the existing arrangement, including accounting and conflict resolution measures, were negotiated outside the guidance or regulation of the Authority. This means that what has happened hitherto was dependent on the preferences of the operators.

The introduction of the ECA brings about a new angle to the carriage of the television programmes of the Public Broadcast Services Licensee by the Subscription Broadcasting Service Licensees. As per the mandate of the ECA the Authority should come up with a new regulatory framework that will govern Must Carry in South Africa. The broadcasters also feel strongly that the legislative framework provides for a predictable, transparent approach based on the principle of fairness for the concerned broadcasters. Based on the submissions and the objects of the ECA, the Authority has decided not to adopt the arrangement between MultiChoice and the free-to-air channels as a template.

### **17. MODEL FOR IMPLEMENTING MUST CARRY**

From the submissions it clearly indicates that the model to be used for must carry should be a standard one that is applicable to all the broadcasters. As Telkom Media mentioned the Authority should consider a common underlying approach which will talk to what kind of exemptions are necessary for Must Carry Obligations.

In setting a cost model, the Must Carry Obligations should not be imposed as a form of financial support for any of the broadcasters. The Authority would like all the parties to view the designation of the obligations as a collective shared obligation aimed at fulfilling the objects enunciated in the ECA, as related to the broadcasting

environment. In order to ensure that there is no discrimination in the treatment of various subscription broadcasting services licensees, the Authority will exempt both the public broadcasting services and subscription broadcasting services from receiving financial compensation or paying a fee to each other for the must carry/offer obligations. The Public Broadcast Service Licensees should offer their designated Television Programme free of charge, and, should deliver the signal to the Subscription Broadcasting Service Licensees at its own cost in an acceptable quality. The Subscription Broadcasting Service Licensees will incur the costs of broadcasting the television programmes for must carry obligations. Any other cost over and above that (i.e. not related to the delivery of the signal or the carriage of the channels) will be based on commercial negotiations between the broadcasters themselves.

#### **18. MUST OFFER**

The Authority supports the contention in most submissions that the must carry obligations need to be mirrored by a must-offer requirement, and should not be interpreted as an obligation on subscription broadcasting services to pay public broadcasting service for carriage of such channels. Evidence from international benchmarking and best practice supports this contention. The Authority concludes that it will subject the designated Public Broadcasting Service Television Programmes to 'must-offer' obligations and expects the SABC to offer the designated television programmes on request.

The Subscription Broadcasting Service Licensees argued that the absence of must offer might constraint the must carry obligation and hence frustrate the intentions and objectives of this regulation. Therefore it is important that the Authority impose the must offer obligation.

#### **19. TELEVISION PROGRAMMES TO BE CARRIED**

SABC 3 is offered as part of the commercial service division. The definition of public broadcasting service in the ECA means any broadcasting service provided by the SABC or other public state-owned entity. Thus the definition in the ECA does not make a distinction between the public service or commercial divisions. 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, arguably casting the net wider than it is in terms of the ECA.

In terms of section 60(3), public service broadcasting has been identified as the beneficiary of must carry obligations and it appears to that the intention of the legislators was to include all the broadcasting services of the public broadcaster in the Must Carry Framework. Thus the commercial broadcasting services of the public broadcaster ought to be included in the Must Carry framework despite the various arguments contrary to this view. Furthermore, the argument that section 11(1)(a) of the Broadcasting Act requires that the commercial service division be subjected to the same regulatory approach as other commercial services in terms of the Broadcasting Act fails to recognize that the Must Carry Regulations address the obligations imposed on Subscription Broadcast Service Licensees and do not seek to set out a dispensation for the Public Broadcaster. Section 11(1)(a) would be more relevant in a process that seeks to outline the regulatory dispensation for the Commercial Services Division.

The inclusion of other commercial free-to-air broadcaster in the Must Carry regulations against the backdrop of the inclusion of the SABC Commercial services cannot be considered as section 60(3) extends to the public broadcaster and is silent on such other services. Furthermore, the Authority is also not going to pronounce on the necessity or lack thereof for a separate dispensation to deal with this issue as it has not fully considered the issues attendant thereto. As a result, all Free-to-Air Commercial Services will have to negotiate their individual arrangements for access and carriage in a commercial agreement to be reached with the respective Subscription Broadcasting Service Licensees until such time that there is a different dispensation.

Therefore the television programmes of the Public Broadcaster are subject to Must Carry. Subscription Broadcasting Service Licensees will have the discretion and right to appropriate compensation or remuneration from other free-to-air commercial services licensees.

## **20. PROGRAMME VERSUS CHANNELS**

The Authority has decided that the reference to “television programmes” and not “channels” can be interpreted in line with what appears to be consensus amongst the submitters for the various reasons advanced. It would also appear from the contextual interpretation that “television programmes” was used as an equivalent for “channels” although the terms are not interchangeable.

Whilst the Authority understands the views expressed around the issue of using the term channels rather than television programmes, it has decided that the Must Carry obligations will relate to the carriage of television programmes. The obligation will extend to the entire television programmes comprising a channel within the service offering of the Public Broadcaster.

## **21. CONTRACTS FOR MUST CARRY**

On issues of the contract for the smooth implementation of must carry, the Authority is convinced that there should be two forms of contracts being;

- one for commercial negotiations between the stakeholders; and
- the terms of carriage that is guided by the prescribed regulations.

After conclusion of agreements, the broadcasters need to file copies with the Authority for record purposes rather than for approval. The Authority will not scrutinize the commercial nature of the agreements as that is left to the parties to negotiate.

## **22. CONFLICT RESOLUTION AND COMPLIANCE**

The Authority, through its monitoring and compliance unit, ensures that all the broadcasters adhere to the prescribed regulations. In cases of non-compliance with the regulations, various mechanisms are employed to remedy the matter including assistance by the Authority where there is a need and willingness to correct the non-compliance. In other instances, matters are referred to the Complaints and Compliance Commission (CCC) which will adjudicate the matter and recommend sanctions for ICASA Council's decision. The Authority has decided that disputes

arising from compliance with the regulations will be dealt with in the same manner to overcome non-compliance and to resolve conflicts which may arise as a result of the regulations on Must Carry.

The Authority will not be involved if the parties do not reach an agreement on commercial negotiations. It would be up to the parties to adopt suitable dispute resolution mechanisms as part of the commercial agreements.

### **23. EXEMPTIONS AND TIMEFRAMES**

Taking into account the similarities and diversity in views expressed, the Authority has noted that there is underlying consensus on the need for exemptions. However, there is no consensus on the basis for or formulation of such exemptions. Others argue for complete exemption in given circumstances on the one hand, with SABC arguing that there could never be complete exemptions without really justifying the view.

The Authority has interpreted section 60(3) to give it the discretion to create an exemption in appropriate circumstances, resulting from the use of the words "extent to which". Furthermore, the Authority does not interpret the phrase to exclude a complete exemption in appropriate circumstances. Thus, in applying the discretion, the Authority has decided to create an exemption that will be based on the size of the subscription service provider and not the type of programming offered. This will avoid overly burdening smaller entities with significant obligations that threaten their viability or casting exemptions so wide as to lead to an absurdity. The Authority also notes that this manner of creating exemptions does not incorporate, as a basis, the type of programming provided by the licensed subscription broadcaster. However, this manner is largely based on the decision that the entire "television programmes" comprising a channels of the Public Broadcaster will be the subject of the must carry framework as opposed to individual programming. An exemption based on programming would be more relevant in an environment where Subscription Broadcasters are not required to carry the entire complement of television programmes within a channel.

In coming to a decision on the manner for implementing exemptions, the Authority had to balance the objectives of the must carry obligations against the economic

interests of the subscription broadcasters. Thus, the model for the exemption is such that the obligation on a subscription broadcaster will be limited in relation to the number of channels that the subscription broadcaster will provide. For starters, a subscription broadcaster must be providing a minimum of thirty (30) channels before they can incur the must carry obligation. Thereafter, every twentieth (20<sup>th</sup>) channel that the subscription broadcaster adds shall be allocated to a channel of the public broadcaster.

The Authority has decided that “significant uptake by end-users” of the service offering of a Subscription Broadcaster is a relative indicator that is not easily identifiable. However, the total number of channels provided by a Subscription Broadcaster is a relatively transparent tool to use as an indicator and is objective, fair and transparent. As a result, Subscription broadcasters would have to commence discharging the obligation once they have reached a minimum of thirty (30) channels as offered as part of their service offering. These minimum channels need not be offered in one bouquet. Only when the broadcaster decides to add a twentieth channel over and above the minimum thirty (30) channels, would the broadcaster have to add a Public Broadcaster’s channel in the discharge of the Must Carry obligations. Thus the thirtieth, fiftieth, seventieth, ninetieth channels and so forth would have to be Must carry channels. Preference would then be given to the channels located within the Public Broadcaster’s public service division.

By necessary implication, the obligation will be incremental in nature and will always be relative to the size of the broadcaster concerned. This ensures that the financial viability of the Subscription Broadcaster will not be compromised as broadcasters are encumbered in relation to the size of their operations and the obligation is discharged equitably and fairly as amongst broadcasters.

This model of applying exemptions makes the discussion on the definition of Niche broadcasters and on timeframes for implementation moot points that require no further consideration.

## D. DRAFT MUST CARRY REGULATIONS

### 1) Objectives

The objectives of these regulations are to:

- (a) Ensure that the Subscription Broadcasting Service (SBS) Licensee carry the programmes of the Public Broadcasting Service (PBS) Licensee;
- (b) Ensure that the PBS Licensee offer its programmes to the SBS Licensee on transparent, equitable and reasonable terms;
- (c) Provide the extent to which certain Subscription Broadcasting Licensees may be exempted from complying with these regulations; and
- (d) Regulate all other matters incidental hereto.

### 2) Definitions

In these Regulations, any word or expression has the meaning assigned to it in the Electronic Communications Act (Act No 36 of 2005) and the Broadcasting Act (Act 4 of 1999), unless otherwise specified –

“**Act**” means the Electronic Communications Act (Act No. 36 of 2005);

“**Agreement**” means the agreement concluded between a Public Broadcasting Service Licensee and a Subscription Broadcasting Service Licensee, governing the carriage of Public Broadcasting Service television programmes by a Subscription Broadcasting Service Licensee;

“**Must Carry**” means the set of rules that obliges a licensed Subscription Broadcaster to carry the television programmes broadcast by a Public Broadcasting Service licensee;

“**PBS Licensee**” means Public Broadcasting Service Licensee;

“**SBS Licensee**” means Subscription Broadcasting Service Licensees;

**“Television Programmes”** means television programmes broadcast by the Public Broadcasting Service Licensee to be carried by the Subscription Broadcasting Service Licensee in terms of section 60(3) of the Act;

**3) TELEVISION PROGRAMMES TO BE CARRIED**

All the television programmes broadcast by a Public Broadcast Service licensee as part of its broadcasting service will be subject to Must Carry obligations.

**4) OBLIGATION TO OFFER TELEVISION PROGRAMMES**

(1) The PBS Licensee must offer its television programmes to a SBS Licensee upon a request from the SBS Licensee.

(2) The PBS Licensee must offer its television programmes to a SBS Licensee within three (3) months from the date of the request submitted by a SBS Licensee.

(3) The PBS Licensee must deliver its signal to the SBS Licensee in an unencoded and compatible format;

**5) OBLIGATION TO CARRY TELEVISION PROGRAMMES**

(1) Upon the commencement of these regulations, all the SBS Licensees must carry the television programmes of the PBS Licensee as part of the service offering, subject to Regulation 9.

(2) The SBS Licensee must bear the costs of carriage of the television programmes of the PBS Licensee on its distribution platform in complying with these regulations.

**6) TRANSMISSION OF TELEVISION PROGRAMMES**

(1) The PBS Licensee must bear the costs of transmission of the broadcast signal to the SBS Licensee

(2) The SBS Licensees are required to transmit simultaneously and without any alteration, the entire television programmes of the PBS Licensee.

**7) FILING OF TERMS AND CONDITIONS**

The SBS Licensee must submit a copy of the agreement governing any commercial arrangements entered into with the PBS Licensee in relation to terms and conditions for carriage within thirty (30) days of such agreement being concluded and signed.

**8) DISPUTE RESOLUTION**

In the event of a dispute between the PBS Licensee and SBS Licensee, regarding any matter regulated herein, either party may refer the dispute to the Complaints and Compliance Committee (CCC) for adjudication.

**9) EXEMPTION FROM COMPLIANCE WITH THE REGULATIONS**

- (1) The obligation on the SBS Licensee to carry television programmes of the PBS Licensee shall:
  - (a) not be applicable to SBS Licensees whose service offering has twenty-nine (29) channels or less;
  - (b) be applicable to a SBS Licensee whose service offering consists of thirty (30) channels or more;
  - (c) ensure that the thirtieth channel that the SBS Licensee adds to its bouquet is a channel of the PBS Licensee, in accordance with Regulation 6;
  - (d) ensure that every additional twentieth (20<sup>th</sup>) channel of the SBS Licensee, over the minimum twenty-nine (29) channels, is a channel of the PBS Licensee (being the 30<sup>th</sup>, 50<sup>th</sup>, 70<sup>th</sup>, 90<sup>th</sup> channels and so forth), in accordance with Regulation 6.
- (2) Regulations 4 and 5 shall be applicable to the addition of channels added in accordance with Regulation 9 (1)(c) and (d), subject to Regulation 9(4).

- (3) The addition of channels in accordance with regulation 9(1)(c) and (d) shall prioritize the addition of channels of the PBS Licensee located within the Public Service Division of the PBS Licensee in terms of the Broadcasting Act 4 of 1999.
- (4) The exemptions above do not preclude any SBS Licensee from carrying the channels of a PBS Licensee upon request, on commercial terms, until such time that:
- (a) Regulation 9(1) (a) ceases to apply;
  - (b) Regulation 9(1) (c) and/or (d) is/are applicable.
- (5) A SBS Licensee shall only be exempt in accordance with Regulation 9(1) where:
- (a) written notice has been submitted to the Authority by the SBS Licensee; and
  - (b) approval of such exemption has been granted in writing by the Authority.

#### **10) MONITORING COMPLIANCE WITH THE REGULATIONS**

Licensees shall submit a compliance report annually to demonstrate compliance with these regulations.

#### **11) EFFECTIVE DATE**

These regulations shall be effective from the date of publication in the Government Gazette.

**12) CONTRAVENTION AND FINES**

In terms section 17E(2)(b) of the ICASA Act, the Authority may impose a fine not exceeding One Million Rands (R1 000 000) for each contravention of these regulations.

**13) SHORT TITLE**

These regulations shall be called the ICASA Must Carry Regulations, 2008.

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