
GENERAL NOTICE

NOTICE 1150 OF 2007



INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA (ICASA)

NOTICE OF INTENTION TO MAKE REGULATIONS IN RESPECT OF THE MUST-CARRY OBLIGATIONS

The Independent Communications Authority of South Africa (“the Authority”) hereby gives notice that it intends making the following regulations in terms of subsection 60(3) of the Electronics Communication Act, 2005 (“the EC Act”), which states 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”.

Written submissions on the issues raised by the discussion paper are invited from all interested parties. The closing date for submissions is **Monday 29 October 2007** by no later than 16h00 (there will be no extensions), by post, hand delivery, facsimile transmission or electronically (Microsoft Word or Adobe PDF file) for the attention of and should be directed to:

Contact Person	Ms Mamedupe Kgatshe
Physical Address	ICASA HEAD OFFICE Pinmill Farm Block D 164 Katherine Street Sandton 2146
Postal Address	ICASA Private Bag X10002 Sandton 2146
Fascimile	011 556 3246

Where possible, written representations should also be e-mailed to: mkgatshe@icasa.org.za or lmofokeng@icasa.org.za

Submissions will be considered by the Authority's officials in the preparation for drafting the regulatory provisions for the must-carry obligations regulations.

Specific questions have been posed to submitters at the end of most of the Sections. Comment on the potential costs and benefits of proposals are also sought.

ICASA may post all or parts of any written submission on its website at www.icasa.org.za.

ICASA will consider you to have consented to posting by making a submission, unless you clearly specify otherwise in your submission.

Please advise if you have any objection to the release of any information contained in a submission, and in particular, which part(s) you consider should be withheld, together with the reason(s) for withholding the information. ICASA will take into account all such objections when responding to requests for copies and information on submissions to this document.

Persons submitting written representations are further invited to indicate whether they require an opportunity to make oral representations and the estimated duration thereof, which duration shall not exceed one hour.

ICASA will review and analyse all comments received from stakeholders in response to this consultation/discussion document, in order to draft the proposed regulatory provisions. The draft provisions will then be published for public comment in the Government Gazette.

PARIS MASHILE
CHAIRPERSON

DISCUSSION DOCUMENT ON MUST CARRY OBLIGATIONS SEPTEMBER 2007

INDEX

1.0	PURPOSE OF THE DISCUSSION DOCUMENT	5
2.0	INTRODUCTION AND BACKGROUND	5
2.1	BACKGROUND OF MUST CARRY IN SOUTH AFRICA	7
3.0	INTERNATIONAL BENCHMARKS	9
3.1	THE EUROPEAN UNION (EU)	10
3.1.1	The Netherlands	13
3.1.2	United Kingdom.....	13
3.1.3	Finland.....	14
3.1.4	France	14
3.1.5	Spain.....	15
3.2	MUST CARRY IN OTHER COUNTRIES.....	16
3.2.1	Australia	16
3.2.2	India.....	16
3.2.3	China	17
3.2.4	United States of America.....	17
3.2.5	Canada	19
3.3	CONCLUSION.....	21
4.0	WHICH PUBLIC SERVICES ARE ELIGIBLE TO BE CARRIED	22
5.0	PRICING FRAMEWORK	24
6.0	CONFLICT RESOLUTION AND COMPLIANCE ISSUES	25
7.0	TIME FRAMES FOR THE IMPLEMENTATION OF MUST CARRY	26
8.0	GENERAL AND ADDITIONAL ISSUES	26
9.0	BIBLIOGRAPHY	27

1.0 PURPOSE OF THE DISCUSSION DOCUMENT

The purpose of this discussion document is to:

- commence a process towards the development of regulations on must carry obligations in accordance with section 60(3) of the Electronic Communications Act of 2005 (ECA)¹;
- Invite comments from interested and affected parties as required by section 4B (2) of ICASA Act as amended in 2006.

2.0 INTRODUCTION AND BACKGROUND

The ECA was proclaimed in January 2006 and enacted in July 2006, amending the Broadcasting Act No 4 of 1999, while entirely repealing both the Telecommunications Act No. 103 of 1996 and the Independent Broadcasting Authority Act No. 153 of 1993 (the IBA Act).

The introduction of the ECA brought about a new approach in the implementation of must carry obligations. In particular, section 60 (3) of the ECA 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”.

The legal certainty created by section 60(3) of the ECA drastically changes the previous situation; by allowing the Authority to prescribe regulations regarding the implementation of must carry obligations, setting out a mechanism through which public broadcasting service programming will be carried by satellite and cable subscription television broadcasting services².

¹ The Electronic Communications Act, 2005 (“the EC Act”) was proclaimed in January 2006 and enacted in July 2006, amending the Broadcasting Act No 4 of 1999, while entirely repealing both the Telecommunications Act No. 103 of 1996 and the Independent Broadcasting Authority Act No. 153 of 193 (the IBA Act).

² The Electronic Communications Act, 2005 (“the EC Act”) defines “subscription broadcasting services” to mean a broadcasting service provided to a subscriber upon payment of a fee

The provisions of the ECA follow the publication, in June 2005, of a Position Paper on Subscription Broadcasting by the Authority in terms of the IBA Act. The Position Paper states 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 terrestrial subscription television services shall be required to reserve a channel for public access television”³.

The above provision was made in the absence of a comprehensive legislative framework, as the IBA Act was silent on must carry obligations, a situation which has been remedied by the recent legislative developments.

There is no doubt that the implementation of must carry will be of interest to both the subscription television services and the public broadcasting services, and as soon as there is regulatory clarity, all stakeholders will be expected to start implementing must carry regulations in a fair and transparent manner.

The Authority is aware of situations where the implementation of must carry obligations is also subject to commercial agreements, between the public service broadcasting and the subscription broadcasting services. In such cases, the necessary caution should be exercised that the provisions for commercial agreements do not negate the overriding principle of universality, which gives rise to must carry obligations.

For the purposes of subsection 60(3) of the ECA, the Authority is also interested in assessing the interpretation and meaning of “subject to commercially negotiable terms”, which the Authority believes that the legislature has left sufficiently vague to provide flexibility and discretion to the Authority in carrying its mandate for providing a regulatory framework and guideline for “Must Carry Obligations and Rules” in South Africa.

Subsequent to the receipt of submissions from industry and other interested parties, the Authority will draft regulations on must carry for further public consultation as required

³ Page 75 of the Position Paper on Subscription Broadcasting Services

by legislation. This process will culminate in the publication of final regulations in a Government Gazette for implementation.

The proposed regulatory provisions, besides providing greater legal certainty, are also intended to ensure that the additional subscription television services are licensed within a more predictable, stable and transparent regulatory environment.

2.1 BACKGROUND OF MUST CARRY IN SOUTH AFRICA

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 eTV to carry their channels on its DSTV bouquet free of charge. Multichoice currently carries SABC 1, SABC 2, SABC 3, and e-TV free of charge, while the SABC pays for the carriage of SABC Africa.

The terms and conditions of the existing arrangement, including accounting and conflict resolution measures, were negotiated outside the guidance of the Authority. This means that what has happened hitherto was dependent on the preferences of the operators, without the Authority providing the necessary terms and conditions to ensure that a level playing field is created ahead of the licensing of new subscription television services.

The advent of the ECA, which coincides with the imminent introduction of additional subscription broadcasting services, necessitates a complete rethink of the existing arrangement, in favour of a more predictable and a transparent approach, based on the principle of fairness to all concerned parties.

The Discussion Paper on Subscription Broadcasting Services⁴ asked if subscription broadcasters should have must-carry obligations and the following responses emerged;

MultiChoice submitted that as a general rule it opposed the imposition of must carry rules. Multichoice is willing to accept a requirement that satellite subscription television broadcasting services carry all the South African national free-to-air terrestrial television broadcasting services, provided reciprocal must offer rules are imposed on these

⁴ Page 46-48 of the Position Paper on Subscription Broadcasting Services

services. *“If must carry rules are imposed, they ought to relate only to national free-to-air terrestrial television services, but not to regional or local television broadcasting services. In other words, in the current context, the must carry rules ought to relate only to SABC1, 2, and 3, and e.tv”*. Multichoice welcomed the carrying of national free-to-air channels on condition that “must-offer” obligations were imposed.

Deukom submitted that it would make little sense, given the fact that almost all of Deukom’s subscribers are German speaking, to compel Deukom to carry South African channels. *“The costs of complying with this obligation would immediately make the services of Deukom uneconomical. The same would apply to most niche broadcasters”*.

The SABC submitted that while wanting to ensure that audiences have access to free-to-air channels over subscription systems, free-to-air channels also need to be commercially compensated for the provision of content to subscription operators, who are essentially their competitors. *“A further consideration is that not all subscription operators may have the channel capacity to carry all free-to-air channels. In these circumstances and given the potential of must-carry rules to undermine commercial relationships between subscription and free-to-air operators, a blanket approach to must-carry rules may not be appropriate. The presence of free-to-air channels on subscription platforms may rather be something which is left to the different operators to negotiate and finalise or something which is considered when subscription operators are licensed and their licence conditions are set. As a general rule, however, the SABC must stress its view that if free-to-air channels are to be carried by subscription television the free-to-air channels must be remunerated for the provision of this content on commercial terms”*.

The SABC also submitted that internationally “must carry” are applicable only in relation to the carrying of the public broadcasting services since they are fully publicly funded. *“If you look at all of those countries the channels or the programming of the national public broadcaster were more or less fully paid for through public funds which is the opposite in South Africa. As I indicated earlier the national public broadcaster is more than 80% funded through commercial income. In other words, the same commercial operator, the subscription operator is our competitor in the same market. There is no competition between a cable television network in Canada with the CBC, or a cable operator in the Netherlands with NOB. There is no competitor because they are funded through government funds and this is why the regulator could impose that those programmes or*

those channels that were funded through clear public funds or government funds must be carried without any commercial transaction going ahead. We cannot have that in this environment because the environment is totally different. We cannot just transpose that notion even if it is a noble one. We have to customise it to our environment”.

The SABC opposed must-carry obligations and urged the Authority to stipulate “must-pay” obligations in the event of imposing must-carry obligations.

Sentech urged the Authority not to promote legislative must carry obligation. *“While Sentech agrees that it might be important for an appropriate subscription broadcaster to carry, for example, one or more of the SABC’s channels on its bouquet, this ought to be done by way of appropriate licence conditions rather than blanket must carry obligations applicable to all subscription broadcasters irrespective of the essential characteristics of their broadcasting services”.*

- 1. Should the arrangement between Multichoice and the free to air television services (SABC and e-TV) be used as a benchmark in the implementation of must carry obligations by all subscription television services?**
- 2. Should there be one model of implementing must carry obligations by all subscription services?**

3.0 INTERNATIONAL BENCHMARKS

The Authority believes that must carry should be used for positive reasons in order to achieve positive outcomes. As such, must carry obligations should be used as a tool to facilitate the equal development of public and commercial broadcasting services. Any discussion of must carry should be preceded by consensus on the policy objectives that give rise to must carry obligations. It is important to ensure that the vested interests that will undoubtedly underpin the development of must carry regulations do not negate the twin challenge to promote the universality of public service broadcasting programming.

In most parts of the world, especially in Europe, discussions have always located must carry as part of universal service obligations, imposed on subscription services. Must carry is driven by a policy goal to ensure that public service broadcasting programming

is available to all citizens, targeting those citizens that use subscription services as their preferred means of access to television.

This, indeed, does not exempt public broadcasters from continuing to extend coverage to all citizens, particularly those in the under serviced communities. It is generally presumed that any citizen of a particular country has interest on the developments taking place within the country, and therefore should be able to receive public service programming. Access to public service broadcasting programming is thus seen more as a right to which every citizen is entitled to, and not a privilege.

As much as the discussion on must carry has been ongoing for sometime, it does not seem like there is a single model or a consensus view of doing things. Different countries are dealing with the issue taking into consideration, their prevailing social and economic circumstances. Therefore as much as South Africa should draw lessons from the experiences of others, there is a compelling reason to be guided by the local context.

Must carry obligations promote the accessibility of important programming content that is of public interest on a variety of platforms and with economic convenience for the consumer who continues to receive public service programming without spending extra cost to purchase an antenna or receiver in addition to the subscription satellite dish and set-top-boxes.

3. Should the Authority impose the principle of “must offer” on the SABC, to offer identified programmes to all subscription television services?

3.1 THE EUROPEAN UNION (EU)

The EU does not prescribe regulations; it only gives general advice, to guide member states in the development of their individual regulations. The EU requires its member states to impose certain must carry obligations on network operators for sound and television broadcasting as prescribed by Article 31 of the Universal Directive under

European Law⁵. They should be imposed in order to meet the general interest of objectives defined by member states.

The reasons for must carry are to ensure the universal access and to offer diversity of programs to the general public. Must carry obligations are imposed on network operators who provide multiple channels on a single frequency, requiring them to reserve a channel(s) in their networks for the transmission of must carry programs. This impact on their profit margins since a space reserved for their own programmes is used to carry public broadcasting programs that are of public interest. In this case, a potential broadcast licensee enters the market being prepared to implement must carry obligations.

Must carry obligations, in the European Union, are usually imposed to carry public service broadcasting although commercial and community broadcasters are included in other countries provided they have public interest obligations. Countries that are affected by the EU must carry obligations include France, the Netherlands, Spain, and the United Kingdom; where public broadcasting system is still held in high regard, and issues of access, culture and language remain prominent, like in South Africa

In some countries, about 50% or more of the cable television network is dedicated to must carry channels, resulting in network operators passing on the costs of must carry to subscribers. This practice has raised new questions about the implementation of must carry obligations without dealing with consumer protection measures.

The EU does not provide clear conditions on how the commercial and public broadcasters pay for must carry obligations. It provides, however, that there should be no discrimination – all broadcasters should be treated in an equitable and fair manner. In countries which have introduced payments for must carry obligations, the approach have been to leave pricing issues to the concerned parties as long as it is transparent and equitable.

Some countries in the EU provide that in a situation where there is a likely hood of costs being passed on to consumers, the state subsidises the network operators. The guide

⁵ European Commission: Communications Services: Policy and Regulatory Framework. 'Must carry obligations under the 2003 regulatory framework for electronic communications networks and services' July 2002, p.2

for general pricing model in the EU is based on the provision that: member states should first consider the cost of each element of the network used to fulfil the must carry obligations, and secondly the cost of the network itself plus the profit supposed to be made if the network was not used for must carry.⁶

The EU requires its member states to prescribe obligations that are limited to what is necessary to meet clearly defined general interest objectives, that are transparent and proportionate and those that take into consideration the technology and market dynamics⁷. Proportionality means that the aim to carry public broadcast programmes must be a legitimate one, and less burdensome.

- 4. How much space (in % terms) should the subscription broadcasters reserve for the transmission of the public broadcasters' programmes?**
- 5. How if at all, will the reserved transmission space affect the profit margins of subscription broadcasters?**
- 6. Can the cost of carrying the public broadcasters' programmes be passed on to the consumers by subscription broadcasters? How can this be fairly addressed?**
- 7. What is the suggested cost model (terms of carrying the public broadcaster's programmes) for the smooth implementation of must carry to deliver the intended mandate?**
- 8. What is the anticipated revenue before and after the addition of carried programmes?**
- 9. Can there be a flat structure for all subscription broadcasters when it comes to the commercial terms related to must carry obligations irrespective of the magnitude of the subscription broadcaster and whether it is cable or satellite?**
- 10. What broadcasting technologies will be used by the subscription broadcasters and how will these technologies affect the prices attached to must carry?**

⁶ European Commission: Communications Services: Policy and Regulatory Framework. 'Must carry obligations under the 2003 regulatory framework for electronic communications networks and services' July 2002, p.3

⁷ European Commission: Communications Services: Policy and Regulatory Framework. 'Must carry obligations under the 2003 regulatory framework for electronic communications networks and services' July 2002, p.4

3.1.1 The Netherlands

In the Netherlands, cable operators have obligations to transmit the three national public TV channels, 5 national radio channels, and public regional broadcaster within the same licensed footprint of the cable network. The same applies for local public broadcasting services which are within the same municipality as the licensed cable network. In addition, all Dutch-language television programmes and two Dutch-languages radio programmes of the national Belgian public broadcasting organisation must be carried by the cable operator.

3.1.2 United Kingdom

In the United Kingdom, there are regulatory provisions to impose must carry obligations for carriage programmes of all genuine public service broadcasters, community channels and commercial free to air broadcasters, through the Communications Act of 2003. Section 64 of the Act provides a framework for imposing must-carry obligations by means of a direction and allows Ofcom to set general conditions of entitlement in relation to must carry obligations and that general conditions can only impose must carry obligations in relation to a specified list of services and in relation to networks of a certain type.

The section further points out that the effect of the must-carry requirement should be confined to networks by means of which public electronic communications services are provided that are used by a significant number of end-users as their principal means of receiving television programmes. This must-carry requirement is extended to digital television broadcast signals for all the digital programming of the BBC, as well as digital signals of Channels 3, 4, 5, S4C Digital and digital public teletext service.

In 2005 Ofcom published and set out proposals to impose must-carry obligations on the transmission of specific public service television broadcasting content in a digital form over the terrestrial transmission network.

Network Operators have noted that the required carriage of different digital channels would consume scarce capacity and deny them potential revenue streams. Network operators argue that they incur significant costs in providing dedicated capacity to carry public service programming on their systems, while, on the contrary, public

broadcasters argue that they are neither able nor liable to pay or to contribute towards costs⁸.

3.1.3Finland

Must carry obligations in Finland are contained in the duty to distribute certain Television and Radio Broadcast section 42 of the Act on Television and Radio Operations of 1998⁹. The subscription broadcasters are supposed to carry the television and radio programmes that should be broadcast in the concerned municipality where the communities are supposed to receive the network via ordinary receiver equipment. The subscription broadcasters have to carry those programmes without compensation.

This Act applied mainly to the analogue broadcasting period. For digital transformation the new law demanded that cable operators carry the Finish Broadcasting Company's regional and national radio and television broadcast programmes which can be viewed without charge or compensation. This does not affect the method of access to Pay-TV since consumers are not expected to bear the burden. If the cable operators might have to upgrade their technology to get new multiplexes that will increase the capability to handle data, and on the other side consumers upgrade their set-top-boxes, then both consumers and the operators will bear the costs.

3.1.4France

The law of 1966 permits the regulatory authority to require cable television operators who have been in operation for more than three years to simulcast terrestrial broadcasts which are normally received in the area. In 1986 the French Law on Freedom of Communication was introduced as amended in 2000. It then required the cable operators to carry programmes covering public service broadcasters, community channels and commercial broadcasters including French and other foreign channels that are of public interest¹⁰. These include programmes received through satellite and others normally received in the area. Must carry might further include the allocation of a channel, fully or shared, to the non-profit organisations, communal authorities or for communal information whereby an operator would have to pay a fee to the authorities concerned.

⁸ NTL (2004). Public Service Television Broadcasting Review: Consultation Response, June 2004. NTL, Hampshire.

⁹ An inventory of EU 'must-carry' regulations: A report to the European Commission, Information Society Directorate, page 18

¹⁰ An inventory of EU 'must-carry' regulations: A report to the European Commission, Information Society Directorate, page 20

Although must carry rights are granted to all types of channels there is no specific definition for must carry right holders. The regulator decides whether or not to impose must carry obligations on cable television operators. On the other hand the broadcasters can oppose their programmes being carried if the offer is not in line with their public service missions. The Law is not clear on whether the must carry obligations apply to both digital and analogue thus some digital broadcasters do not include must carry.

The regulating authority which is the Council for Audio-visual may impose sanctions on those broadcasters who do not comply after consultation with them and the penalty is a maximum of 3% turnover.

11. Are there any constraints which could prevent the public broadcaster from offering their channels to the subscription broadcasters? Are there any constraints that can prevent the subscription broadcasters from carrying the channels of the public broadcaster?

3.1.5 Spain

In Spain, not only the programmes of the national and regional public service broadcasters must be transmitted, but also the programmes of the national and regional private analogue terrestrial broadcasters. Programmes of local terrestrial TV broadcasters can also be carried, subject to a request. The economic compensation, which must be paid to cable operators by those broadcasters, can be freely established by parties. If parties are unable to reach an agreement, the authority that awarded the concession to the cable operator must settle the dispute.

Under the Spanish Cable Telecommunications Act, cable operators are obliged to reserve 40% of the capacity used for the provision of audio-visual services for independent content providers, under the condition there are enough of them requesting access to the cable network. This is in order to stimulate the audio-visual industry and to prevent cable operators from taking advantage of their control of the infrastructure. For the definition of the independence of the content provider the share capital and voting rights are taken into account. The bodies which are in charge of enforcing this obligation are the relevant regional authorities and in the case of Madrid and Catalonia the media authorities.

3.2 MUST CARRY IN OTHER COUNTRIES

3.2.1 Australia

In Australia, the Australian Communications and Media Authority (ACMA), has imposed must carry obligations. The current debate is whether the must carry obligations and requirement for community television should be imposed or placed on existing digital carriers immediately so that the sustainability of the community sector is not jeopardised as it rapidly loses access to viewers who make the transition to digital broadcasting.

3.2.2 India

In terms of section 8(1) of the Cable Television Network (Regulation) Act, 1995, Cable operators must carry 2 Doordarshan terrestrial channels and one regional language channel of a state in the prime band satellite mode on frequencies other than those carrying terrestrial frequencies. Such Doordarshan channels are re-transmitted without any deletion or alteration of any programme transmitted on such channels. With regard to DTH, clause 7.6 of the DTH license says that the "The Licensee shall provide access to various content providers/channels on a non-discriminatory basis".

The Telecom Regulatory Authority of India, TRAI, has taken a view that no regulation on "must carry" is required at the present stage for cable operators as there is capacity constraint on the cable systems due to analogue transmission.

However as and when capacity is augmented, the "must carry" regulation will be introduced. This is largely due to the fact that the capacity constraint has direct bearing on the competition amongst broadcasters and the fact that new and future channels are competing to get space on the cable spectrum, where they are usually not carried on the system or have to pay carriage fees to the cable operator. TRAI has argued that the digitalisation of TV channels would augment the channel carrying capacity, which is relevant to the issue of "must carry", but may not necessarily ensure the solution to the problems.

TRAI, in order to ensure adherence with the provisions of the Cable Act by the cable operators and to protect the interests of the viewers in particular, has directed all the cable operators to strictly carry Doordarshan channels on their cable services in Prime Band and certain other Doordarshan Channels in Non-Prime band, as by the above law.

Any violation of this direction may lead to prosecution of the errant cable operators under the provisions of the TRAI Act, 1997.

3.2.3 China

In China, the regulator, SARFT, requires that 4 of state-owned broadcaster CCTV's channels (including the prime time CCTV-1) be carried on the basic FTA tier offered by cable networks while all municipal authorities require certain provincial and city channels to be carried on relevant cable networks. SARFT has also decreed that digital cable networks in Shanghai, Guizhou, Chongqing, Beijing and Sichuan must carry the CCTV package of six digital pay TV channels.

3.2.4 United States of America

In the United States, in line with the 1992 Cable Act, cable television operators have a statutory obligation to reserve up to one-third of their channel capacity for the compulsory carriage of significantly viewed local, terrestrial broadcast television stations. Must-carry requirements ensure that cable television subscribers still have the option of viewing local terrestrial broadcast signals.

The Act provides the statutory authority for the Federal Communications Commission (FCC) to impose transitional DTV must-carry obligations. Such a rule must accomplish the important governmental objectives of preserving free, over-the-air broadcast television, promoting competition and diversity in the television market, and facilitating the timely transition to a national DTV system.

Congress may direct the FCC to study and construct recommendations for rules (and, if necessary, statutory changes) to address the potentially related issues of mandatory carriage of multiple broadcast signals and better serving the needs and interests of viewers in different governmental jurisdictions.

In its mandate to promote must carry obligations, the FCC considered;

- The availability of capacity to carry free-to-air channels without displacing other programmes or services;
- Whether dual carriage will be possible during transition to digitisation and if so what will be the procedure and processes for such carriage. During that period

some broadcasters that need to be carried will be broadcasting on analogue, thus interruption has to be minimised; and

- The cooperation and participation of the operators is important in this instance.

Must carry obligation in the US include the following;

- The cable operators are obliged to carry non-commercial educational television stations together with the cable operators' number of usable activated channels.
- Low power television stations can request carriage if they meet the requirements to do so but a cable operator cannot carry a low power television in lieu of a full power television station.
- Cable operators are prohibited from carrying duplicative signals or degrade a television's signal.
- Direct Satellite broadcasters do not have must carry obligations. content

Cable and Satellite Operators in the United States are said to be paying for the right to carry channels that are popular. Some of the cable and satellite operators hold the view that for them to comply with the must carry rules they will have to sacrifice the channels they could use for videos to must carry channels that might not create viewership.

They thus opposed must carry obligations through the courts, as they maintain that must carry obligations seemed to undermine their rights to freely and competitively use their transmission space. The other challenge was that must-carry should not be applied to DBS operators as the broadcasters who qualified for must carry have argued in favour of must-carry for economic gain, not for the universal access and services purposes.

The courts ruled that the obligations are not only legally binding but also comprehensive¹¹. They are comprehensive in the sense that subscription broadcasters benefit from must carry by getting a compulsory licence for the retransmission of copyright broadcast video content at attractive rates.

One compromise solution being currently advanced by public TV supporters is a request that the FCC grant special digital carriage status to public broadcasting, arguing that they have by federal law a special mission and status. They argue that such a

¹¹ Rob Frieden, Analogue and digital must-carry obligations of cable and satellite television operators in the United States. 2006, page 231

limited new must carry rule would allow public broadcasting to lead the way in developing new DTV programming services that could be adopted by commercial television later, once its success is proven.

In terms of compliance, television stations can file complaints with the FCC if cable and satellite operators do not comply with the law on must carry.

13. Should the consent for carriage be in the form of a contract?

14. What role, if any, should the Authority play in the negotiation of contracts?

3.2.5Canada

The direction issued by the Canadian Radio-Television and Telecommunications Commission (CRTC) emphasized Canadian content as an integral part of its must carry obligations.

Firstly, the direction provides that there should be at least one channel reserved for educational broadcasting by cable television operators. The time reserved on such channels or transmission facility for a provincial authority shall be used for broadcasting the following types of programming:

- (a) Programming designed to be presented in such a context as to provide a continuity of learning opportunity aimed at the acquisition or improvement of knowledge or the enlargement of understanding of members of the audience to whom such programming is directed and under circumstances such that the acquisition or improvement of such knowledge or the enlargement of such understanding is subject to supervision or assessment by the provincial authority using any appropriate means; and
- (b) Programming providing information on the available courses of instruction or involving the broadcasting of special education events within the educational system.¹²

Secondly cable television operators and wireless system operators must carry programmes of the public broadcaster, local and regional stations and educational programmes. Satellite operators must carry programmes of the public broadcaster and

¹² CRTC: Directions issued to the Canadian Radio-Television and Telecommunications Commission respecting the reservation of Cable Channels 'Reservation of educational broadcasting time and facilities. www.crtc.gc.ca/eng/LEGAL/CHANNEL.HTM

of at least one affiliate of each national television networks licensed on a national basis. Additionally all operators are required to carry all Canadian specialty and Pay TV services appropriate for their markets.¹³

Canadian broadcasting services takes into context the promotion of local content in terms of its programming. The CRTC has prescribed rules in its must carry that directs the operators to ensure that the distribution of programmes are composed of and reflects Canadian content. These obligations impose financial commitment that requires broadcasting distribution undertaking such as cable operators with more than 2000 subscribers to contribute at least 5% of their gross annual broadcasting revenues to the creation and presentation of Canadian programming.

The creation of Canadian programs will demand the following contributions:

- With the exception of small cable companies, all broadcasting distribution undertakings must contribute a minimum of 5% of their gross annual revenues derived from broadcasting activities to contribute to the creation and presentation of Canadian programming.
- Direct-To-Home distributors must allocate the entire 5% programming contribution to an independently-administered production fund. The CRTC also provides incentives to cable companies so that a portion of the 5% contribution can be devoted to the production of 'local' expression for the communities they serve. With respect to pay and specialty television services, the CRTC sets minimum Canadian content and spending levels on an individual service basis, relative to the supply, cost and nature of programming, revenue potential, and the competitive environment.
- Canadian content transmission requirements for some services are as high as 100%, with movie services subject to transmission requirements for local content in the range of 25-30%. Expenditure requirements, which set minimum spending targets for Canadian content as individual conditions of licence, can be as high as 71% of gross annual revenues.¹⁴

¹³ http://www.afc.gov.au/downloads/policies/append_paytvsub03.pdf

¹⁴ http://www.afc.gov.au/downloads/policies/append_paytvsub03.pdf

3.3 CONCLUSION

It is apparent from the above cases that must carry obligations have received both positive and negative reactions from broadcasters, operators and regulators. Regulators emphasise the importance of must carry due to the reason that it can partly fulfil the mandate of universal access to broadcast material that is of public interest.

Arguments against must carry articulate that the local content which justifies must carry is not applicable in the digital environment as the subscription channels could fulfil that mandate without having to carry the public broadcasters and other free-to-air channels. The arguments also establish that must carry regulations will inhibit competition between the carried channels and the subscription broadcasters allowing more advantage to the public broadcaster to monopolise the broadcasting sector.

Most of the network operators are of the view that public broadcasters must be subjected to must offer obligations where they should be bound by legislation to make their channels available to the network operators. For cable operators turning a channel that generates income into a channel to transmit must carry programmes appears to be problematic if the retransmission space is not being compensated for since they will have to rely on other methods of generating income

Learning from other countries, the Authority needs to develop a mutually beneficial regulatory framework to give tangible effect to the legislative provisions to promote universal access, and all players must observe and implement their respective obligations. The obligation to carry that will be imposed on subscription broadcasters must be complemented by a related obligation on the public broadcasters to offer its programmes to the commercial services through the principle of "must offer".

While it should be expected that the discussion on Must carry has potential to elicit self interest from the concerned role players, it is important that this does not eschew the quest to achieve the stated national legislative goals and fair competition. Must carry obligations should be addressed in a commercially sensible way, taking into consideration the subjectivity of the agreements that might arise in compliance to the regulations.

In concluding, it is clear from the international benchmarking and practices carried out by the Authority that the future of must carry obligations and rules faces a challenge by the digital convergence environment, where consumers are hungry for content, using the Internet, cable TV and Digital Video Recorders to find something that satisfies them. Although this benchmarking suggests that must carry rules must be reassessed with the advent of digital broadcasting and alternative delivery mechanisms, there is a deliberate acknowledgement that there may be a continuing need for "must carry" rules for public service broadcasting.

15. Will the programmes carried have an impact on competition between the public broadcaster and the subscription broadcaster? If yes, what impact would that be and how can it be dealt with?

16. Should the entire programmes in the SABC channels be carried or should there be a choice of certain programmes for carriage? If certain programmes from the public broadcaster have to be chosen for carriage what will be the criteria of such choice? How do we treat SABC 3 being a commercial broadcaster?

17. Should the programmes to be carried be authorised by the authority to ensure that they are of local content and they reflect the public interest mandate?

4.0 WHICH PUBLIC SERVICES ARE ELIGIBLE TO BE CARRIED

Trends across the globe suggest that there is a need for pluralistic content offer to the public offered in a variety of platforms. Must carry obligations will allow those programmes that relates to democracy, cultural and socio-economic development to be within the easy reach of South Africans including those with subscription television services. In 1995, the Authority published the Triple Inquiry Report which noted that the SABC was central to the promotion of democracy, and the advancement of cultural and socio-economic development.

Although not a legislative requirement, the Triple Inquiry Report laid the necessary ground for subsequent legislative developments, including the Broadcasting Act, to emphasise the unassailable role of the SABC in the development of South Africa. In 2006, the Authority conducted a public review of the SABC's universal service obligations, ostensibly with a view to ensure that the mandate of the SABC remains

intact with regard to meeting the information and communication needs of South Africans. The review resulted in the imposition of additional service obligations on different SABC services, both radio and television.

Since the SABC is subjected to universal access to programming and to provide programmes that are of public interest, it follows that the SABC's public services should be eligible to be carried by subscription services. This is in line with section 60(3) of the EC Act, which identifies public service broadcasting as the beneficiary of must carry obligations.

On the face of it, it may appear logical to suggest that all services of the public broadcasters should be treated equally because all of them carry significant programming content of public interest. This argument, of course, negates another reality that SABC 3 can be said to be a competitor to other commercial services, both terrestrial and subscription, thus its inclusion in the package could distort competition.

In terms of section 11(d) of the Broadcasting Act of 1999, the position of SABC 3, however, should not be looked in isolation, without the role it plays in subsidising the other services, in light of the division of the SABC into commercial and public service wings.

This arrangement makes SABC 3 one of the significant players in meeting the objective of section 2(t) of the ECA around the protection of the viability of the public broadcasting services. Indeed the emphasis on the public service responsibilities carried by the SABC should not result in over regulation, which may result in the distortion of the market. A delicate balance is necessary to spread the incentives to both the SABC and the commercial services.

The law makes it clear that all subscription broadcasting services, without exception, should be required to implement must carry obligations. A number of options should thus be considered around the choice of public service programmes that are supposed to be carried by subscription services.

18. Should there be separate approaches to must carry obligations for SABC commercial and SABC public services?

19. Should the same must carry obligations imposed on other subscription broadcasters be applied to the public broadcaster should it be licensed to provide subscription services?

20. To what extent should we distinguish niche broadcasters? Should the must carry obligations be drafted to have exceptions for such? How do we define niche broadcasters (is it the size of a broadcaster, the target market for that broadcaster or the content provided on that platform)?

5.0 PRICING FRAMEWORK

Pricing plays an important role in the implementation of must carry obligations. It is therefore important to set a prudent pricing framework which does not disadvantage any of the affected operators. The fact that the ECA suggest that must carry should be based on a mutually agreed commercial agreement should not be a reason to negate the twin challenge to provide universal access.

In most countries where the public channels or programmes are still popular, network operators see the free carriage, transmission and retransmission of these channels as a great possibility of increasing the attractiveness of their packages. The direct opposite holds in countries where the commercial channels have been more popular than the public channels, the market forces have been left to leave the carriage issues for to commercial negotiations which have been seen as doing the job better. In these countries the extension of must carry obligations are perceived as unnecessary, illegitimate and highly intrusive intervention on market freedom. They are unnecessary taking into account the emergence of new technologies and a move to a multi-platform digital environment.

In terms of who pays whom, there are different international precedents. In some countries the following pricing approach is used: the public broadcaster pays for the network carriage, while the network operator pays for the content. Negotiations of what price to pay for the service provided is left to commercial negotiations between the two parties. In a situation where the parties have to pay each other, there will be a need to ensure that the cost structure is transparent, equitable and fair.

Alternatively, it can be argued that since must carry is implemented for the purposes of achieving universal access, both parties should provide a service without expecting any payment. This could be underpinned by a view that must carry exists for the purposes of public good; it is not a classical commercial dealing. While this option may augur well for the purposes of focusing on the central objective, on the other hand, it is constrained by the existing legislative requirement which calls for a commercial agreement to be entered into between parties.

- 21. Should the public broadcaster and the subscription television services pay each other for their respective offerings?**
- 22. In this case, should the Authority provide a cost based model to guide the transactions between the operators or should this be left to broadcasters with the Authority's role being that of a facilitator?**
- 23. Should there be a requirement that all agreements related to must carry be filed with the Authority for approval before they are implemented?**

6.0 CONFLICT RESOLUTION AND COMPLIANCE ISSUES

The Authority has a vested interest to ensure that the implementation of the regulations arising from this discussion is successful to yield a desired effect. To achieve this, the necessary climate for smooth implementation of the must carry and must offer obligations should be created, especially with regard to conflict management. Outside the tariff matters raised above, the Authority will subject complaints and compliance issues in terms of processes established under section 17(c) of the ICASA Act No. 13 of 2000 as amended¹⁵, which also establishes the Complaints and Compliance Committee.

- 24. Should the Authority set additional measures to deal with compliance with the obligations?**
- 25. If so, please elaborate**

¹⁵ Amended by the ICASA Amendment Act No. 3 of 2006

7.0 TIME FRAMES FOR THE IMPLEMENTATION OF MUST CARRY

There is no doubt that to an extent must carry has cost implications on both players, a reason why the Authority should determine a reasonable time frame for the commencement of the implementation of must carry obligations. The Authority also recognises that this is a new regulatory environment and the success of must carry need to be measured over time.

26. What factors should be taken into consideration when setting the time frame for the application of must carry?

27. When should the subscription broadcasters start implementing the must carry obligations?

8.0 GENERAL AND ADDITIONAL ISSUES

The Authority welcomes comments on additional issues of interest, not included in this document.

28. Are there any other issues that the Authority may have to consider which have not been raised in this discussion document?

9.0 BIBLIOGRAPHY

1. Appendix C. National Subscription Television Regulations
Available online at http://www.afc.gov.au/downloads/policies/appendpaytvsub_03.pdf.
Accessed on 20 April 2007
2. Braverman, B and Frappier, D. 2003, Digital Must-Carry and Forced Access: Government-Mandated Access to Cable Distribution Networks in the US and the EU. **Communications and Strategies**. 49(1): 43 - 66
Available online at: http://www.idate.org/fic/revue_telech/338/C&S49_BRAVERMAN%20&%20al.pdf. Accessed on 29 June 2007
3. Broadcasting Act No 4. of 1999
4. CTRC 'Reservation of educational broadcasting time and facilities. **Directions issued to the Canadian Radio-Television and Telecommunications Commission respecting the reservation of Cable Channels.**
Available online at www.ctrc.gc.ca/eng/LEGAL/CHANNEL.HTM
Accessed on 20 April 2007
5. Electronic Communications Act, No. 36 of 2005
6. European Commission Communications Services. 2002 'Must carry obligations under the 2003 regulatory framework for electronic communications networks and services' **Policy and Regulatory Framework: Brussels**. 1 - 8
Available online at http://ec.europa.eu/information_society/policy/ecomms/doc/todays_framework/digital_broadcasting/working_doc_must_carry.pdf
Accessed on 3 May 2007
7. Frieden, R, 2006, Analogue and digital must-carry obligations of cable and satellite television operators in the United States.
8. Fikentscher, A., Merkel, K. (2004), "Technical bottlenecks and public service broadcasting", *Regulating Access to Digital Television*, European Audiovisual Observatory, Strasbourg, Vol. Vol. 99.

9. Independent Communications Authority of South Africa, 2005, **Position Paper on Subscription Broadcasting Services**. Johannesburg: ICASA
10. ICASA Act No. 13 of 2000
11. Sanders, S, 2001, An inventory of EU 'must-carry' regulations: A report to the European Commission, Information Society Directorate, **Legal Counsel Worldwide**. Available online at <http://ec.europa.eu/archives/ISPO/infosoc/telecompolicy/en/OVUM-mustcarry.pdf>. Accessed on 18 April 2007
12. Telecom Regulatory Authority of India. Press Release No.50/2007. TRAI direct cable operators to carry Doordarshan Channels. Available online at <http://www.trai.gov.in/trai/upload/PressReleases/465/pr29may07no50.pdf>. Accessed on 23 July 2007
13. Telecom Regulatory Authority of India. Consultation Paper on Digitalisation of Cable Television. 3rd January 2005. Available online at http://www.scattmag.com/govt%20policies/consulpaper_digitisationofcatv-jan05.pdf. Accessed on 23 July 2007