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Attention: Mr Pascalis Adams
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4 May 2022

Dear Sir

AME LTD RESPONSE TO DRAFT REGULATIONS REGARDING STANDARD TERMS AND CONDITIONS FOR INDIVIDUAL LICENCES UNDER CHAPTER 3 OF THE ECA

AME Ltd is a listed company which holds an interest in several commercial broadcasting licensees ("AME"). We present our comments on the draft amendments ("Amendments") to the Regulations on Standard Terms and Conditions, 2010, as amended in 2016 ("Regulations") below, for your consideration.

At the outset, however, we consider it useful to provide some general comments on the context in which these amendments have been made. This, of course, includes the recent lifting of the lockdown occasioned by the COVID-19 pandemic, and the return to lockdown resulting from the catastrophic floods in KwaZulu Natal, as well as the high rate of unemployment and Government's focus on the creation of jobs and stabilising the economy. We also consider the Ukraine/Russia conflict to be relevant given its effect on many of the countries with whom South Africa has trade agreements and South Africa itself, specifically in relation to commodities and fuel.

The reason for context is to ensure that when considering any change to the regulatory framework for electronic communications and broadcasting, ICASA is required to take account of the **public interest**.

The 26 objects of section 2 of the Electronic Communications Act, 2005 ("ECA") read with the powers and duties conferred on ICASA under the ICASA Act, 2000 ("ICASA Act") are matters which ICASA must bear in mind when acting in the public interest. Of these, we consider subsections (a), (d), (e), (f), (g), (h), (i), (j), (k), (l), (o), (p), (r), (s), (y) and (z) to be of direct application to the process followed in making, and to the substance of, the Amendments. For your convenience, we have set out the provisions of these subsections on **Annexure A** to this letter.

Within this context, we also note that regulation is not an end in itself, it must have a purpose. To paraphrase the language of the Promotion of Administrative Justice Act, 2000, decisions which constitute "actions" (such as the Amendments) must be rationally connected to the purpose for which they are made, and the reasons given for them by the administrator, that is ICASA in this case. The usual point of departure in making changes to a regulatory framework is the need to adjust a scheme to take account of the passage of time, the workability of the scheme, to prevent some harm or prejudice, and to promote some good or improvement, or any one or more of these goals. ICASA is specifically required to take account of the potential consequences of making or not making any changes on affected parties.

Turning now to the Amendments, we note the following:

1. ICASA tends in the Amendments to leave matters to the internal committee known as the Complaints and Compliance Committee ("CCC") for determination, despite the specific legislative purpose of this committee being solely directed at resolving disputes or investigating complaints, and thereafter making recommendations to ICASA within the narrow confines of sections 17B(b) and 17E(2) of the ICASA Act. This cannot be correct as the CCC is a functionary that supports but does not replace the exercise of the powers and duties of ICASA.

2. Regulations and laws are in themselves, rules that must be complied with – there is no need to state that they must be complied with, this is not sensible. If they were not intended to be complied with then why put them in place at all other than as guidance? ICASA clearly intends the Amendments to constitute rules that must be complied with since it provides penalties for non-compliance. Legal drafting practise dictates that anything that is unnecessary or likely to cause confusion be omitted. Compliance with laws and regulations is a self-evident requirement.

3. When insisting on information being provided, forms being completed, or behaviour being curtailed, ICASA must ask itself if these requirements and rules are appropriate, having regard to the obligation on it to regulate in the public interest, and to ensure that regulation is rationally connected to its purpose, and therefore, that harm likely to result unless the rules are put in place must be identified, and the good (such as fulfilment of a particular object of the ECA) should similarly be identified. Amendments must be made to achieve either one of these, not for the sake of making amendments. For example, will the amendments close a loophole that has enabled licensees to escape penalty, or will they protect consumers, promote investment, or assist in making South Africa an inviting place to do business?

4. Having regard to the fact that the Regulations run in tandem with the Regulations on Process and Procedures in respect of Applications, Amendments, Renewals, Surrender and Transfer of Individual Licences, 2010 (also amended in 2016 and again in 2018) ("Process Regulations"), the two must say the same thing or at least not contradict one another, and nor should one create a process that is not reflected in the same way, in the other. ICASA also proposes to amend these Process Regulations as well and comments from AME will be submitted by 15 May. We therefore refer to these Process Regulations from time to time, to illustrate how the Amendments affect the Process Regulations, or ought to be brought in line with them. This is another illustration of how relevant context is – and the Amendments unfortunately pay no attention to this aspect.

5. There are areas that ought to be considered for amendment that have not been amended.

6. We now consider the Amendments in turn:

    a. The definition of "days" is unnecessary since regulations are secondary to primary law, and always governed by primary law. If ICASA intended "days" to be interpreted differently from the definition in the primary law (ECA and ICASA Act) then a new definition would have to be inserted and a reason given to depart from the primary law. The definition of "days" should be omitted.

    b. The definition of "Effective Date" does not make sense. To make sense it should read, "<u>means the date specified in the licence which may be a date other than the date of signature</u>".

c. We do not understand the definition of “News”, and unfortunately the explanation in paragraph 2.1.3 of the Explanatory Memorandum (“Reasons”) does not clarify this at all. Having looked up some compliance reports, it is not possible to tell from those that there is a need to redefine “news”, but if ICASA believes that there is, then there are a plethora of definitions to be found in various sources including the dictionary. For example, “news” can mean new information, especially about recent events; or noteworthy information and in particular, information not previously known, however in our view and in our research, “news” includes current affairs. This definition needs to be recrafted, having regard to generally accepted definitions.

d. The same can be said of the changes to “public service announcement”. A quick scan of internet resources suggests that a useful definition could be, “a message in the public interest disseminated without charge, with the objective of raising awareness of, and changing public attitudes and behavior towards, a social issue”. If ICASA is minded to include reference to “disasters” and “grave danger” it could do so, but it is not necessary since a traffic incident could have no impact on anyone’s safety, but still require motorists to avoid the area, and thus constitute subject matter for a “public service announcement”. Why would a definition out of step with the more regularly used or commonly understood definitions be used?

e. The amendment to **regulation 2** seems very sensible on its face, but not for the reason given by ICASA.

    i. Companies have trading names, and it is perfectly reasonable to expect these to be different from the names of the companies themselves. Likewise, station names may be completely different from the owners’ names. Primedia is such an example, as all of its licences are issued in the name of Primedia Pty Ltd, but each licensee has a different trading name (947, 702, Cape Talk, and KFM). We are not aware of any station that has a name similar to any other station, but if this is the case, then those stations ought to deal with one another in settling a dispute about entitlement to use brands, trademarks and other intellectual property. The reason to amend regulation 2 ought to be simply that it makes sense having regard to commercial realities. Furthermore, giving notice to ICASA of a change in trading name is valuable

so that ICASA is aware of the station names in use – they should not, for example, cause offence or be rude.

ii. Regulation 2(1)(a) should refer to the name of the licensee AND the trading name, not "and/or", because ICASA presumably wants to know about any changes to BOTH names.

iii. We do not know why it is necessary to continue to refer to faxes as means of communications.

iv. Sub-regulation (2) refers to a fee which appears to be a penalty for late notification, but if this is the case, then ICASA must specify what that fee is. One of the principles of fair administrative action is that a person must know the case they must meet. If they are to be subject to a penalty, they must know what it is at the earliest possible instance. Determining such a fee "from time to time" is an inappropriate use of power and does not provide certainty, which is one of the cornerstones of regulation.

v. Paragraph 2.2.3 of the Reasons is interesting in light of the recent judgement of the CCC which was endorsed by ICASA. In the judgement in relation to the complaints by Primedia Pty Ltd and Kagiso Media Pty Ltd[1], paragraph [37], the chairperson makes the comment that a listener would be uninterested in the change of shareholding of a licensee, and thus the implication is that a change in shareholding can be given using a notice to ICASA under regulation 2. This is at odds with the Reasons at paragraph 2.2.3 where ICASA states that "*the process of any changes in shareholding will be subject to an approval by the Authority and will be guided and prescribed in terms of the Process and Procedure Regulations for individual licences*." It would be useful for ICASA to align its comments on this regulation.

f. **Regulation 5** is one of the areas where our comments at paragraphs 1 and 2 above become most relevant. First, the CCC should not be given power that sits with

[1] Case no. 427/2021.

ICASA and ICASA only, in terms of a statute. Second, if a licensee fails to commence operations, this could be the subject of a complaint to the CCC in terms of existing laws (the ICASA Act). Third, a regulation cannot direct the CCC towards a particular finding – the ICASA Act already provides which findings may be made by the CCC and each of those depends entirely on the facts. ICASA purports in this regulation to subvert the discretion of the CCC by stipulating that failure to commence operation ought to result in "cancellation of the licence". It cannot do so since it is for the CCC to make this recommendation. The Amendments purport to amend primary law in this regulation.

g. **Regulation 6(2)** is simply not phrased well ("being aware" in the last line should be "becoming aware") however the operation of this regulation read with regulation 6(3) is simply unworkable. One cannot separate these events out by hours and weeks and notice periods in the way that is suggested because those time periods are likely, in sub-regulation (3), to overlap.

    i. By this we mean that if a licensee cannot provide licensed services for a period of more than 7 days, they will already have been unable to provide services for 6 hours. The licensee would have to give ICASA notice within 24 hours under sub-regulation (2), only to have to apply for exemption under sub-regulation (3) after another 24 hours, when this sub-regulation requires the 7 days to have passed before the 48 hours' notice can be given; alternatively sub-regulation (3) requires notice to be given ONLY if a licensee anticipates that it will not be able to provide service for 7 days – and no licensee can possibly know for sure whether or not this will be the case.

    ii. In the latter instance, when would the 48 hours' notice be measured from and how would ICASA know when this was? If, for example, floods destroy towers or fibre in a particular area so that this area loses communications, it would likely be impossible to give notice to ICASA within 6 hours of the flood commencing, and it would also likely be impossible to know whether the damage would be repaired in 7 days, and therefore to give 48 hours' notice.

iii. In any event, what purpose does this regulation serve? What does ICASA intend to do when it receives notice? What does ICASA expect a licensee to do other than to give notice? There is no rational reason for these regulations, particularly not in the manner in which they have been written. ICASA says at paragraph 2.4.1 that this change will ensure that "Licensees notify the Authority prior to losing fifty percent of broadcasting hours during the performance period". However, the performance period is between 05h00 and 23h00 and is applicable ONLY in relation to the calculation of local content. Regulation 6(2) does not refer to the performance period so the 6 hours could realistically be in the middle of the night and therefore outside the performance period. This reason makes no sense at all, and certainly does not assist either the licensee or ICASA.

iv. The reasoning given in paragraph 2.4.2 of the Reasons is similarly nonsensical, particularly when considered in light of our paragraph 3 above. If licensees are affected in any way and unable to provide services for any reason, then they can advise ICASA of this issue at the time that they report to ICASA in terms of the Compliance Procedure Manual Regulations, 2011 ("Compliance Regulations"). For the Reasons given to actually have application to regulation 6(2) or (3) of the Amendments, regulation 6 would have to refer to the Compliance Regulations and indicate – for the avoidance of doubt – that the licensee will, on notice to ICASA of the failure to provide service, be exempted from its obligations under the Compliance Regulations. The reference to "leeway" is insufficient as a reason for the change, and inadequate in practise.

v. The use of the word "wherein" at the beginning of regulation 6(3) is curious, overly formal, and does not meet the context.

h. The amendment to **regulation 14** is acceptable. However, having regard to the widely varying penalties in other regulations, it would be helpful (and appropriate) for ICASA to review all of its penalties and explain where it derives the figures and option for imprisonment from, and why one regulation merits much higher fines, while another, much lower fines, and why one regulation might apply a fine per day, while

another a lump sum fine. This regulation is an example of exactly this issue – regulation 14(1) refers to a fine of R5 million or 10% of the licensee's turnover! The relationship between this sub-regulation and the regulations it purports to apply to does not support the quantum of the fine and the Reasons do not refer to the provisions of sub-regulation (1) when amending sub-regulation (2) – which refers to R100,000. The randomness is not conducive to regulatory certainty nor does it appear to be rationally conceived.

i. **Annexure A**:

   i. There seems to be a part missing from the template now provided. It is unclear how the current terms of a licence will be transposed into the new template.

   ii. Currently the Schedule to the licence contains the general terms and conditions but some of these have now moved to Part A or Part B. Where do the balance of the terms (e.g. news and format obligations) go?

   iii. When will this process take place as the Amendments seem to require all licences to be re-issued but neither they nor the Reasons say this nor do they indicate how ICASA will deal with these changes.

7. Changes not currently proposed but necessary:

   a. As we indicate above, ICASA needs to take account of context including its mandate to regulate in the public interest.

   b. Having regard to our paragraphs 3 and 4 above, we suggest ICASA consider other amendments to the Regulations:

      i. "BS" should be "BCS" to align with acceptable abbreviations in other regulations and licences;

      ii. "Licensee" does not need to refer to "issued with a licence" since a person would not be granted a licence if they did not qualify to get one, and once

they have one, they are – as a matter of fact and law – a licensee. Furthermore, "licensee" is already defined in the ECA (see our paragraph 2 above).

iii. Since ICASA has now replaced the "Schedule" with Parts 1 and 2, the word "Schedule" has no application and should be deleted.

iv. Regulation 2 is not in line with regulation 14A of the Process Regulations – why not? They are intended to deal with the same thing – the Amendments are to deal with when notices are required and regulation 14A with the content of such notices, but the regulations are different from one another. This will cause confusion (as it already does since the regulations are not currently aligned).

v. Regulation 5(3) seems to allow for an extremely lengthy extension of time to commence operations. This is at odds with the penalty proposed for a failure to commence, which is to "cancel" the licence.

vi. Shouldn't an extension be limited to a shorter period, for example, a maximum of 6 months? At present, the extension could be 12 or 24 months, which is equivalent to an extra one or 2 years of rights for which no other licensee will qualify, than the licensee that has failed to commence operations! In the case of broadcasters, that means that frequencies allocated to that licensee then sit dormant or used in an inefficient manner, while existing licensee that may wish to extend their footprint, or applicants who may wish to enter the broadcasting service market will not be able to do so because those frequencies sit with an entity that has not launched its service. Furthermore, on application for a licence, an applicant is expected to submit a business plan and funding plan for ICASA's consideration. If the licensee is not able to commence service then there must be something wrong with those plans, and they should not be licensed nor continue to hold a licence. Limiting the duration of an extension is critical for this reason as well.

vii. Regulation 9(1) refers to “documents or books not ordinarily required”. What are these intended to be? The 2016 amendment included this reference but ICASA has rights only to information that is specifically relevant to carrying out its duties. Why would ICASA need to ask for things “not ordinarily required”? The right to request information is adequate and in line with its monitoring and enforcement powers. ICASA cannot and should not give itself powers it does not otherwise have under primary legislation.

viii. Regulation 9(3) is unnecessary – it is one of those clauses that sets out what is already the case in law and in other regulations. It should be omitted.

ix. The reference in regulation 9(4) to “syndication/network of programmes and programme syndication” is not defined and it is difficult to understand the basis on which this clause continues to be required.

1. A licensee is awarded a licence on the basis that it offers a different or unique proposition for which that licensee has conducted market research and a demand and needs study prior to being awarded its licence. ICASA is not permitted to interfere in the commercial operations of licensee, but ICASA is required to promote investment in the sector. Why, then, is ICASA restricting a licensee’s right to share programming with another licensee if both continue to comply with the conditions of their licences, and if they comply with the format they are licensed to provide?

2. As we have explained in the introduction to this letter, the existing economic hardships in South Africa mean that many radio stations are struggling to survive, with a potential loss of jobs resulting from closures, business rescue, and cost-cutting. There is no reasonable explanation for prohibiting syndication, provided the licensee complies with its licence conditions. If listeners don’t like the programming on offer, the market will dictate the result to the station. This regulation ought to be deleted in our view.

3. Furthermore, in a recent judgement of the CCC in which it rejected a complaint by Primedia Pty Ltd against Radio Pretoria[2], 7 affiliated stations were not found to have infringed this regulation because they – in the chairperson's view – all had similar licence conditions and operated in different areas. It is notable that all of these "affiliates" had separate licences, and that community stations are limited to communities of common interest or geography. While this licensee argued successfully that it was serving the same community of interest (namely the "boere community"), it nonetheless broadcast the identical programmes across 8 stations and 8 different areas. ICASA endorsed the finding of the CCC and thus Radio Pretoria and the 7 other community licensees are authorised to continue.

4. We believe this is precisely what other licensees do when they syndicate programming – the distinction made by the CCC between "affiliates" and "licensees" simply because the licences are community broadcasting licences, is in our view, incorrect.

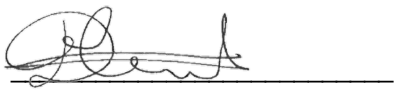
5. The principle upheld by ICASA, however, is that where you broadcast the same programmes in different geographic areas, you are NOT contravening regulation 9(4). This, therefore, also suggests that regulation 9(4) should be deleted.

x. Regulation 10 uses the words "public service announcement" which definition ICASA proposes to amend. However, given the meaning of this term, we submit that regulation 10(2) is unnecessary – if it is a right of a licensee to broadcasting these announcements then it may do so at will – it does not need permission. Furthermore, there is no definition in the Regulation of "Public Service Institution" which makes a nonsense of (2).

[2] Case no. 414/2021.

Please contact the writer for any further information or queries, and please note that we wish to participate in any hearings that ICASA may hold in relation to the Amendments.

Yours faithfully



D M TILTMANN
CHIEF EXECUTIVE OFFICER

ANNEXURE A:

SECTION 2 (SELECT OBJECTS OF THE ECA)

(a) promote and facilitate the convergence of telecommunications, broadcasting, information technologies and other services contemplated in this Act;…

(d) encourage investment and innovation in the communications sector;

(e) ensure efficient use of the radio frequency spectrum;

(f) promote competition within the ICT sector;

(g) promote an environment of open, fair and non-discriminatory access to broadcasting services, electronic communication networks and to electronic communications services;

(h) promote the empowerment of historically disadvantaged persons, including Black people, with particular attention to the needs of women, opportunities for youth and challenges for people with disabilities;

(i) encourage research and development within the ICT sector;

(j) provide a clear allocation of roles and assignment of tasks between policy formulation and regulation within the ICT sector;

(k) ensure that broadcasting services and electronic communications services, viewed collectively, are provided by persons or groups of persons from a diverse range of communities in the Republic;…

(l) provide assistance and support towards human resource development within the ICT sector;…

(o) subject to the provisions of this Act, promote, facilitate and harmonise the achievement of the objects of the related legislation;

(p) develop and promote SMMEs and cooperatives;…

(r) promote the development of public, commercial and community broadcasting services which are responsive to the needs of the public;

(s) ensure that broadcasting services, viewed collectively—

(i) promote the provision and development of a diverse range of sound and television broadcasting services on a national, regional and local level, that cater for all language and cultural groups and provide entertainment, education and information;

(ii) provide for regular— (aa) news services; (bb) actuality programmes on matters of public interest; (cc) programmes on political issues of public interest; and (dd) programmes on matters of international, national, regional and local significance;

(iii) cater for a broad range of services and specifically for the programming needs of children, women, the youth and the disabled;…

(y) refrain from undue interference in the commercial activities of licencees while taking into account the electronic communication needs of the public; and

(z) promote stability in the ICT sector.