

**Explanation of the Implications of the Proposed Amendments, With Specific Reference to
Section 10 of the Electronic Communications Act, 2010**

1. INTRODUCTION
 - 1.1 Section 3.3 of Form C requires an applicant to set out the implications of the proposed amendments with specific reference to subsections 10(1)(a), (b), (c), (d) and (f) of the Electronic Communications Act, 2005 (the ECA).
 - 1.2 We set out our views on these implications below.
2. IMPLICATIONS OF THE LICENCE AMENDMENTS APPLIED FOR IN RESPECT OF SECTION 10(1)(a) OF THE ECA:
 - 2.1 This section empowers the Authority to make terms and conditions of an individual licence consistent with the terms and conditions being imposed generally in respect of all individual licences of the same type.
 - 2.2 We think it important to point out that this subsection is not relevant to this application as section 10(1)(a) envisages a situation in which ICASA *mero motu* imposes amendments to licences upon licensees in order to standardise licence conditions across individual licence types, in this instance, commercial sound broadcasting services.
 - 2.3 The above situation is different to the one presented to the Authority by Kfm which is an application to amend a licence in terms of section 10(1)(c) that is, an amendment, requested by the licensee. (our emphasis).
3. IMPLICATIONS OF THE LICENCE AMENDMENTS APPLIED FOR IN RESPECT OF SECTION 10(1)(b) OF THE ECA:
 - 3.1 This section empowers ICASA to amend an individual licence “for the purpose of ensuring fair competition between licences”.
 - 3.2 We think it important to point out that this subsection is not directly relevant to this application as section 10(1)(b) envisages a situation in which the Authority *mero motu* imposes amendments to licences upon licensees in order to ensure fair competition between licences.
 - 3.3 The above situation is different to the one presented to ICASA which is an application to amend a licence in terms of section 10(1)(c) that is, an amendment, requested by the licensee. (our emphasis).

4. IMPLICATIONS OF THE LICENCE AMENDMENTS APPLIED FOR IN RESPECT OF SECTION 10(1)(c) OF THE ECA:

4.1 This section is the one most directly relevant because Kfm's application is being made in terms of section 10(1)(c) of the ECA. This section empowers the Authority to amend an individual licence "to the extent requested by the licensee provided it will not militate against orderly frequency management and will not prejudice the interests of other licensees".

4.2 We think it important to recognise that section 10(1)(c) clearly indicates that while the Authority does have a discretion to refuse to grant an application to amend a licence, the key bases on which it may exercise its discretion to refuse are if such an amendment would:

4.2.1 "militate against orderly frequency management" or

4.2.2 "prejudice the interests of other licensees".

4.3 With respect to the 9 additional transmitter sites (and the FM frequencies to be used thereon) which are the subject of this Kfm amendment application (four gap fillers and five coverage expansion sites) all of them are listed as being SPA CML (that is, spare and available for commercial use) in Annexure A (VHF/FM Frequency Assignments) to the Band Plan for Terrestrial Broadcasting contained in Notice 298, Government Gazette No. 36321 dated 2 April 2013 (the Band Plan).

4.4 However, we are advised by Sentech SOC Ltd, the common carrier signal distributor licensed by the Authority in terms of the Electronic Communications Act, 2005 (the ECA) (Sentech) that in fact one of the transmitter sites and frequencies (namely Kimberly – 95.4 MHz) has in fact been licensed to another operator, namely, Beat FM, as a result of a licence amendment application approved by the Authority in 2018¹. The amendment application was noteworthy because in 2015 Beat FM was licensed² to broadcast in the "Free State" as provided for in Clause 2 of the Schedule to its licence and the Kimberly frequency was the only non-Free State frequency subsequently applied for and approved by the Authority.

4.5 However as ICASA is aware, since being licensed in 2015, Beat FM has never come on air, not even subsequent to it being granted the additional frequencies applied for in 2018 on the basis, ostensibly, of these being vital to its viability. Indeed this failure to commence broadcasting was the subject of various protracted proceedings before the Authority's

¹ See: Application for the Amendment of a Radio Frequency Spectrum Licence Issued to Beat FM – Reasons for Decision – October 2019.

² Licence 023/COMMERCIAL/R/DEC/15

Complaints and Compliance Committee (CCC) in 2019 following the referral thereof by the Authority's own CCC³.

- 4.6 Beat FM's licence period is due to expire on 7 December 2025 which means that the period within which the station is required to apply for its renewal has already commenced. It is unclear if Beat FM intends to apply for the renewal its licence and if so, on what basis, given that a number of valuable FM frequencies have been awarded to it and yet, for more than nine years (nearly the full term of the licence) these have never been used. This, despite the clear provisions of Regulation 5(1)(a) of the Standard Terms and Conditions Regulations for Individual Licences⁴ making it a peremptory obligation for a licensee "to commence operation of the broadcasting service specified in the Licence... twelve months from the date of issue in respect of free to air sound" and despite the CCC ruling further clarifying and reiterating Beat FM's obligation to commence operating.
- 4.7 Sentech has advised Kfm that it supports this amendment application. Indeed it cannot be in the public interest or in the interests of efficient spectrum management for spectrum to be assigned to a broadcaster which, in turn, simply fails to commence operations with the consequence being that the frequency remains unused and is unable to be reassigned to another broadcaster which could be contributing to a vibrant radio environment in the public interest.
- 4.8 We also think it noteworthy that the Kimberly frequency – 95.4 MHz - was also part of an earlier Invitation to Apply (ITA) Process in 2012⁵ which was re-started in 2016. However, in terms of the Authority's Reasons for Decision on the Licensing Process for Individual Commercial Free-to-Air Sound Broadcasting Service Licences: Northern Cape⁶, "none of the applications received complied with all the requirements stipulated in the ITA"⁷.
- 4.9 Taken together it is clear that none of the Northern Cape ITA applicants were able to meet the requirements to be licensed nor, in Beat FM's case, was it able to even launch operations, much less successfully operate a sustainable and viable radio station with partial coverage in the Northern Cape.
- 4.10 Where does this leave "orderly frequency management"? It is trite that spare commercial FM frequencies are available to be applied for by an existing commercial sound broadcaster such as Kfm (or indeed any other). Indeed this is what happened in 2018 when Beat FM's application for, *inter alia*, Kimberly – 95.4 MHz was successful. Indeed it is in the public interest for scarce finite physical resources such as the spectrum used to provide FM sound

³ CCC Judgment in Case No. 358/2019.

⁴ Notice 523, Government Gazette No. 33294, dated 14 June 2010 (as amended).

⁵ Gazette No. 35000 dated 2 February 2012.

⁶ Dated February 2017.

⁷ At pg. 14.

broadcasting services to be utilized in the public interest – that is to provide actual broadcasting services.

- 4.11 Consequently, Kfm submits that its application for all applied-for frequencies, both the gap-fillers and the ones which would extend Kfm’s existing coverage area, is clearly in favour of orderly frequency management and would boost the efficiency of spectrum use as the Authority is required to ensure. This is the case even where a particular frequency, in this case, Kimberly – 95.4 MHz, has been assigned to another commercial sound broadcasting service, in circumstances where the broadcaster in question has never actual utilised the frequency because it has failed to even commence broadcasting operations despite promising to do so for the almost the entirety of its licence period.
- 4.12 We would further argue that Kfm’s amendment application cannot be said to “prejudice the interests of Beat FM” because it has had uninterrupted enjoyment and use rights in respect of Kimberly – 95.4 MHz and has, failed to commence broadcasting on that frequency for more than six years.
- 4.13 We also submit that Kfm’s amendment application cannot be said to “prejudice the interests of other licensees” because a competitor does not have the right to simply prevent available unused spectrum from being assigned to an operator on the basis that it, without more, prejudices its interests. In any event, the public notice and comment procedure provided for in section 10(2) read with section 9(2) to (6) of the ECA enables the Authority to consider Kfm’s competitors’ legitimate concerns, if any, as part of the amendment process.
5. IMPLICATIONS OF THE LICENCE AMENDMENTS APPLIED FOR IN RESPECT OF SECTION 10(1)(d) OF THE ECA:
- 5.1 This section empowers ICASA to amend an individual licence “to the extent necessitated by technological change or in the interest of orderly frequency management”.
- 5.2 Kfm thinks it important to point out that this subsection is not relevant to this application as section 10(1)(e) envisages a situation in which the Authority *mero motu* imposes amendments to licences upon licensees to the extent necessitated by technological change or in the interest of orderly frequency management. That situation is very different to the one presented to ICASA which is an application to amend a licence in terms of section 10(1)(c) that is, an amendment, requested by the licensee (our emphasis).
- 5.3 In any event, we have set out above why Kfm submits that its application is “in the interest of order frequency management” precisely because using available and currently-unused scarce spectrum resources is efficient use of the radio frequency spectrum because it will increase the diversity of broadcasting services available to the public in the gap filler or proposed extended coverage areas.

6. IMPLICATIONS OF THE LICENCE AMENDMENTS APPLIED FOR IN RESPECT OF SECTION 10(1)(f) OF THE ECA:

- 6.1 This section empowers ICASA to amend an individual licence “where the authority is satisfied that the amendment is necessary to ensure the achievement of the objectives of this Act”.
- 6.2 We think it important to point out that this subsection is not strictly speaking directly relevant to this application as section 10(1)(f) envisages a situation in which ICASA *mero motu* imposes amendments to licences upon licensees in order to achieve the objectives of the ECA.
- 6.3 The above situation is different to the one presented to ICASA which is an application to amend a licence in terms of section 10(1)(c) that is, an amendment, requested by the licensee. (our emphasis). Nevertheless, we are of the view that section 10(1)(f) assists Kfm’s arguments in favour of the Authority granting the amendment application, because, as is demonstrated below, Kfm’s application is in support of a number of the objects of the ECA.
- 6.4 Section 2(d) of the ECA requires Icasa to “promote investment... in the communications sector”. The shareholders in Kfm (past and present) have invested substantially in Kfm to turn it into the operational success story it is today and, subject to the licence amendments being approved, with room to grow, particularly in the Northern Cape.
- 6.5 Section 2(e) of the ECA requires Icasa to “promote competition within the ICT sector”. It is clear that the Northern Cape is an area with few prospects for success for the commercial sound broadcasting sector given the myriad licensing and broadcasting operational failures that have beset the Authority’s previous efforts in the province. Kfm is an already successful station with a track record of driving economic development in its coverage area. It brings to the Northern Cape market an opportunity for an existing licensee to expand into new coverage areas which have lacked a new market entrant for over a decade.
- 6.6 Section 2(h) of the ECA requires ICASA to “promote broad-based black economic empowerment...” and section 2(v) of the ECA requires Icasa to “ensure that commercial... broadcasting licences, viewed collectively, are controlled by persons or groups of persons from a diverse range of communities in the Republic”. As ICASA is aware, Primedia is B-BBEE empowered company and its B-BBEE shareholders, who are from a diverse range of communities in South Africa, would, as a result of the licence amendment, be given the opportunity to deepen the economic success of Kfm and of their investments in the Licensee.
- 6.7 Section 2(i) of the ECA requires ICASA to “encourage... development within the ICT sector”. There is no doubt that Kfm contributes significantly to the broadcasting sector because of the millions invested by its shareholders, through it, in the broadcasting sector. If the

Authority were to approve the amendments, the Authority, would be supporting the objects of section 2(j) of the ECA as Kfm would be able to make and drive economic development in the Northern Cape. This would be done not only through the additional fees to Sentech (and the concomitant investment made in providing operational signal distribution services in the Northern Cape) but also with the ability to provide advertisers of goods and services in the Northern Cape with an additional platform to reach audiences, including outside of the Northern Cape. Further, the Promises of Performance, made as part of the Kfm application, are all aimed at ensuring that Kfm becomes rooted in the Northern Cape and makes material commitments to the community of the Northern Cape.

- 6.8 Section 2(k) of the ECA requires ICASA to “ensure that broadcasting services..., viewed collectively, are provided by persons or groups of persons from a diverse range of communities in the Republic” and section 2(j) of the ECA requires ICASA to “provide assistance and support towards human resource development within the ICT sector”. As ICASA is aware, Kfm’s staff complement is extremely diverse and Kfm is exceptionally proud of the fact that it is training and promoting, through progressive human resources policies, skilled young, Black, women and men. Kfm sees capacity-building as one of its greatest strengths and it is delighted that it has been able to promote the objects of the ECA in this way and we are of the view that should ICASA approve the amendments, it will be possible to contribute even more in this regard, including by way of training and internships for people in the Northern Cape as is contained in Kfm’s Additional Promises of Performance which form part of this application.
- 6.9 Section 2(r) of the ECA requires Icasasa to “promote the development of... commercial... broadcasting services which are responsive to the needs of the public”. Kfm respectfully submits that the licence amendments being applied for are required precisely because the gap fillers being applied for will allow more people in our existing coverage area to access our responsive broadcasting service. Further, Kfm’s research indicates that people in the proposed expanded coverage areas would welcome access on their radios to Kfm and are excited about the prospect of being able to listen to Kfm in places where this has not been possible to date.
- 6.10 Section 2(s) of the ECA requires to “ensure that broadcasting services, viewed collectively,
- (i) promote the provision and development of a diverse range of sound... Broadcasting services on a... regional... level, that cater for all language and cultural groups and provide entertainment, education and information;
 - (ii) provide for regular –
 - (aa) news services;

(bb) actuality programs on matters of public interest;

(cc) programs on political issues of public interest; and

(dd) programs on matters of international, national, regional and local significance;

(iii) cater for a broad range of services....”.

Kfm is proud of its standing as a leading music station with an upbeat, conversational style of presenting that has captured the imaginations of its target audiences. But it is not only about the music. The Licensee of Kfm also operates a highly-regarded news service, Eye Witness News (EWN), that is part and parcel of the fabric of Kfm and which is highly sought after by audiences. These factors mean that Kfm contributes significantly to meeting the ECA's objectives around diversity of broadcasting services. Our licence amendment application seeks to bring Kfm's unique programme offering for new audiences, contributing to diversity of services available to the public.

- 6.11 Section 2(w) of the ECA requires Icasa to “ensure that broadcasting services are effectively controlled by South Africans”. As the Authority is aware, Kfm is proudly South African company owned and controlled by South Africans. Kfm is proud to assist ICASA in meeting this object of the ECA.
- 6.12 Section 2(y) of the ECA requires ICASA to “refrain from undue interference in the commercial activities of licensees while taking into account the electronic communication needs of the public”. With respect, we think this is a vitally important object to bear in mind when considering an application for a commercial licence amendment in terms of section 10(1)(c) of the ECA, that is, an amendment application requested by a licensee. Commercial operators of broadcasting licences understand and have detailed knowledge of the commercial aspects of their licences, they understand the needs of audiences and advertisers in a way that would be hard for a regulator to second-guess, particularly for a regulator that is, in the main, staffed by people outside of the particular coverage area in question. We are of the view that the communication needs of the people of the Northern Cape are in favour of approving the applied for licence amendments.
- 6.13 Section 2(z) of the ECA requires ICASA to “promote stability in the ICT sector”. Kfm is at stable stalwart of the broadcasting sector, and we look forward to working with the Authority to bring that stability to the Northern Cape which has been unable, to date, to attract commercial sound broadcasters capable of operating sustainably, or at all, in that market.
7. We trust that the Authority will give due consideration to all of Kfm's arguments regarding the positive implications of the amendment application with regard to the requirements of section 10 of the ECA, when considering the merits of the amendment application before it.