

Explanation of the Implications of the Proposed Amendments, with Specific Reference to Section 10 of the Electronic Communications Act, 2005

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.

1.3 Before doing so, we note that the form does not require an applicant to set out the implications of the proposed amendment with specific reference to subsections 10(1)(e), (g) and (h). The rationale for not requiring arguments regarding the implications of these subsections is, in our view, because these relate to amendments which are required by Icasa by way of a decision following a recommendation by its Complaints or Compliance Committee; in terms of a regulation; or simply the exercise of its discretion when it is of the opinion that this is necessary in respect of universal service and access.

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

2.1 This section empowers Icasa 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 strictly speaking directly 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 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).

2.4 15% Music Ceiling on Weekends:

2.4.1 We note, for example, that that Power FM, for example, a talk station operating on the more financially-profitable FM band, is licensed to broadcast a minimum (note not a maximum) of 30% music in terms of clause 4 of the schedule to its licence.

2.4.2 While we would welcome such a lenient clause (from a talk/music split perspective) being imposed in Cape Talk's licence, it is important that ICASA note that Primedia is not applying for such a drastic change. Instead, the licensee is applying for the 15% ceiling on music broadcast on Cape Talk to be relaxed on weekends and public holidays by making it mandatory only in respect of working days, that is, Monday to Friday, excluding public holidays.

2.5 50% Local News Quota:

2.5.1 We are not aware of a single other commercial station operating in the Cape which is required to broadcast 50% local news. While there are obligations to cover local news from within their coverage areas (KFM, for example, has such an obligation) there is no fixed percentage obligation.

2.5.2 As Cape Talk is required to operate on a commercial basis, it has found it increasingly difficult to maintain audience interest in news bulletins that have a 50% Cape-based news requirement as this is directly affecting the station's ability to provide the amount of national and international news that its audience demands.

2.5.3 Cape Talk wishes to point out that the amendment application in respect of the local news obligation is not aimed at entirely eliminating local news from its bullets – far from it, but merely to ensure that the inclusion of such news is based on genuine newsworthiness and not on an artificial floor for coverage that is not responsive to audience needs in respect of news content, as has been more fully set out in the confidential Appendix 3.2 to this application.

2.6 Cape Talk respectfully submits that the granting by Icasa of its application for the licence amendments would "make the terms and conditions of the individual licence consistent with the terms and conditions being imposed generally in respect of all individual licences of the same type" as expressly required in terms of section 10(1)(a).

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 strictly speaking directly relevant to this application as section 10(1)(b) envisages a situation in which Icasa *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). Nevertheless, we are of the view that section 10(1)(b) assists Cape Talk's arguments because it is precisely to ensure fair competition between licensees that this application is being made, for the reasons already enumerated and set out in paragraph 2 above.
- 3.4 Cape Talk consequently respectfully submits that the granting by Icasa its application for the licence amendments would contribute to "fair competition between licensees" as expressly required in terms of section 10(1)(b).
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 Cape Talk's application is being made in terms of section 10(1)(c) of the ECA. This section empowers Icasa 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 Icasa 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 Cape Talk's licence amendment application does not concern radio frequency spectrum issues in any way and so the licence amendment cannot possibly "militate against orderly frequency management".
- 4.4 Similarly, if the licence amendments are not approved by Icasa, Cape Talk's licence conditions would remain more onerous than those of certain other commercial stations in respect of both maximum amounts of music playable and local news obligations. Given the conditions imposed on other commercial operators, we would argue that the amendments sought cannot be said to "prejudice the interests of other licensees". In any event, the public notice and comment procedure provided for in section 10(2) read with section 9(2) to (6) enables Icasa to consider Cape Talk'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)(e) 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 We think it important to point out that aspects of this subsection are not relevant to this application as section 10(1)(e) envisages a situation in which Icasa *mero motu* imposes amendments to licences upon licensees to the extent necessitated by technological change or in the interests 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 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). In any event, the amendments being applied for have nothing to do with the radio frequency spectrum nor, directly, with technological changes and, consequently, they can have no implications in respect of section 10(1)(e).
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 Cape Talk’s arguments in favour of Icasa granting the amendment application, because, as is demonstrated below, Cape Talk’s application is in support of a number of the objects of the ECA, which, Cape Talk submits, is impressive given that a number of these objectives do not pertain to broadcasting *per se* but focus on other aspects of electronic communications.
- 6.4 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, the ultimate shareholders in Cape Talk exceed the 30% HDI requirement in the ECA. Consequently, if Icasa were to approve the applied-for amendments, the approval would be promoting BBBEE empowerment as it would, undoubtedly, make it easier for the black shareholders in

Primedia, who are from a diverse range of communities in South Africa, to return the station to profitability and experience renewed economic benefits as a result.

- 6.5 Section 2(i) of the ECA requires Icasa to “encourage... development within the ICT sector”. There is no doubt that Cape Talk contributes significantly to the broadcasting sector because of the millions invested through it. If Icasa were to decline to approve the amendments, Icasa might, perhaps inadvertently, undermine the objects of section 2(j) of the ECA as Cape Talk would be unable to be self-sustaining and Icasa could find yet another market failure in the form of yet another shuttered AM talk radio-formatted station.
- 6.6 Section 2(k) of the ECA requires Icasa to “ensure that broadcasting services..., viewed collectively, 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, Cape Talk’s staff complement represents a number of communities in the Western Cape and includes a number of women on staff. We see capacity-building as one of the strongest aspects of Primedia’s legacy in the broadcasting sector and we are delighted that Cape Talk, the only greenfields licence in Primedia’s stable, 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 continue to contribute in this regard.

6.7 CONFIDENTIALITY IN RESPECT OF THIS PARAGRAPH HAS BEEN GRANTED BY ICASA

- 6.8 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....”.

CONFIDENTIALITY IN RESPECT OF THE REST OF THIS PARAGRAPH HAS BEEN GRANTED BY ICASA

6.9 Section 2(w) of the ECA requires Icasa to “ensure that broadcasting services are effectively controlled by South Africans”. This objective is, of course, met by Cape Talk and we continue to be proud to assist Icasa in meeting this object of the ECA.

6.10 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”. 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 of shareholders 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. Icasa should only refuse Cape Talk’s amendment application if it is convinced that there is no need for a commercial MW talk radio service in the Western Cape. CONFIDENTIALITY IN RESPECT OF THE REST OF THIS PARAGRAPH HAS BEEN GRANTED BY ICASA

6.11 Section 2(z) of the ECA requires Icasa to “promote stability in the ICT sector”. Cape Talk is proud of its record of commercial success in the challenging MW band. But it is concerned that if Icasa were to refuse to approve the amendments, Icasa will, perhaps inadvertently,

undermine the object of section 2(z). CONFIDENTIALITY IN RESPECT OF THE REST OF THIS PARAGRAPH HAS BEEN GRANTED BY ICASA

7. We trust that Icasa will give due consideration to all of Cape Talk'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.