

**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.

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). Nevertheless, we are of the view that section 10(1)(a) assists Vuma's argument because it is precisely to enable it to bring its licence conditions in line with its competitors in the market that this application is being made. In this regard:

2.3.1 To the best of our knowledge, neither of Vuma's direct competitors in the KZN market, namely, East Coast Radio nor Igagasi, have additional requirements in respect of the

2.3.2 percentage of South African music to be played over and above the floor requirements of 35% established in terms of section 3(2) of the South African Music Content

Regulations published in Notice 344, Government Gazette No 39844 dated 23 March 2016 (the SA Music Regs); and

- 2.3.3 Similarly, to the best of our knowledge no other commercial broadcaster, and certainly neither of Vuma's direct competitors in the KZN market, namely, East Coast Radio nor Gagasi, has a requirement to broadcast a particular genre of music with a religious format, such as gospel. Indeed religious programming generally is a feature of community sound broadcasters, and to a much more limited extent, the SABC as the public broadcaster.
- 2.4 As Vuma is required to operate on a commercial basis, it has found it increasingly difficult to attract advertisers and audiences with the kind of playlist that results from a licence condition that requires a "programming format that is exclusively and predominantly gospel music led" matched with a 50% local content requirement. This is particularly so when its direct competitors face no such restrictions. Moreover, it appears that Icasa has taken the approach with other licensees that where a licence specifies one genre (such a gospel) there is flexibility to play other genres on condition that the genre in respect of which the licence was granted (in this instance gospel) is played more than any other genres and is thus predominant. Taking this approach with Vuma, by granting the amendment, would fulfil the requirements of this section of the ECA.
- 2.5 Vuma wishes to point out that:
- 2.5.1 the amendment application in respect of local content is not to entirely eliminate additional local content obligations over and above those required in terms of the SA Music Regs, but merely to bring such additional obligations to a reasonable level (40%) to ensure that Vuma is able to continue to operate commercially without endangering its continued holding of the licence by falling to meet such additional local content obligations; and
- 2.5.2 the amendment application in respect of the gospel genre, is not to eliminate the traditional gospel focus of the station, but merely to position the station's gospel focus in a manner that enables Vuma to continue to operate commercially without endangering its continued holding of the licence by falling to meet an exclusively gospel playlist.
- 2.6 Vuma 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 Vuma’s argument 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 Vuma consequently respectfully submits that the granting by Icasa its application for the licence amendments would ensure “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 Vuma’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 Vuma’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, Vuma’s licence conditions would remain more onerous than those of its immediate competitors in respect of both local

content and a limited format right to play one genre almost exclusively. Given the conditions imposed on its direct competitors, 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 Vuma’s competitors legitimate concerns, if any, as part of the amendment process. There has been no objection by any competitors that Vuma plays music genres other than gospel as it continues to play gospel more than any other genre. It is only the ambiguity in the wording of the licence that has caused confusion.

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 this subsection is not relevant to this application as:

5.2.1 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 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); and

5.2.2 in any event, the amendments being applied for have nothing to do with technological changes or the radio frequency spectrum 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 Vuma’s arguments in favour of Icasa granting the amendment application, because, as is demonstrated below, Vuma’s application is in support of no fewer than 11 of the 26 objects

of the ECA, which, Vuma 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 regulation.

- 6.4 Section 2(d) of the ECA requires Icasa to “promote investment... in the communications sector”. The shareholders in the licence (past and present) have invested substantially in Vuma, to the tune of over R80 million in the past six years, to turn it from an entirely unsustainable commercial venture into a more viable operation with, subject to the licence amendments being approved, room to grow. If Icasa were to decline the amendments applied for, it might, perhaps inadvertently, undermine the objects of section 2(d) of the ECA as Vuma will be seen as being an unattractive commercial investment option..
- 6.5 Section 2(e) of the ECA requires Icasa to “promote competition within the ICT sector”. Vuma finds itself unable to compete aggressively with its commercial competitors for advertising, given the number of advertisers who have now made it clear that an overly-Christian focused commercial station is not an appropriate vehicle for advertisers who are, or who wish to target, members of the Hindu or Muslim faith, two significant non-Christian faiths which are prevalent in the station’s coverage area. In any event, it now appears, notwithstanding the initial research conducted by Vuma (then One-Gospel), that advertisers tend to equate religious programming with community broadcasting services. Consequently, unlike our competitors, Vuma is attempting to use a niche-focused format to build a mass audience. This is not easy. If Icasa were to decline to approve the amendments in respect of clause 4 of its licence, Icasa might, perhaps inadvertently, undermine the objects of section 2(e) of the ECA as Vuma will be seen by advertisers as not “as commercial” as competitor stations such as East Coast Radio and Gagasi.
- 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, the ultimate shareholders in Vuma are now 100% Black. 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 100% black shareholders in Vuma, who are from a diverse range of communities in South Africa, to deepen the economic success of Vuma and experience real economic empowerment as a result.
- 6.7 Section 2(i) of the ECA requires Icasa to “encourage... development within the ICT sector”. There is no doubt that Vuma contributes significantly to the broadcasting sector because of the millions invested, through it, in a secondary market. If Icasa were to decline to approve the amendments, Icasa might, perhaps inadvertently, undermine the objects of section 2(j) of the ECA as Vuma will not be nearly as attractive as a development proposition to commercial investors.

- 6.8 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, Vuma’s staff complement is overwhelmingly black African and Vuma is exceptionally proud of the fact that it is training and promoting, through progressive human resources policies, skilled young, Black, women and men, many of whom are from rural KwaZulu-Natal (KZN), who are running the station. We see capacity-building as one of the strongest aspects of Vuma and are delighted that our station 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.
- 6.9 Section 2(r) of the ECA requires Icasa to “promote the development of... commercial... broadcasting services which are responsive to the needs of the public”. Vuma respectfully submits that the licence amendments being applied for are required precisely because our current research, conducted in a changed and changing environment, indicates the need to respond to the programming tastes of the public, and in particular, our target audience in our broadcast coverage area. If Icasa were to decline to approve the amendments, Icasa might, perhaps inadvertently, undermine the objects of section 2(r) of the ECA as Vuma will not be in a position to be responsive to the needs of its target audience and the public more broadly;
- 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....”.

Vuma is proud of the fact that it is the only gospel-aligned commercial station in South Africa, let alone KZN and it contributes significantly to meeting the ECA’s objectives around diversity of broadcasting services. Our licence amendment applications do not seek to

undermine Vuma's unique programme offering and contribution to broadcasting diversity in the commercial radio sector. However, the licence amendments are necessary in order to secure Vuma's financial viability. If Icasa were to refuse to approve the amendments, Icasa will, perhaps inadvertently, undermine the objects of section 2(s) of the ECA as Vuma will not be able to continue to be financially sustainable which will undermine the station's ability to continue to contribute to programming diversity in KZN.

- 6.11 Section 2(w) of the ECA requires Icasa to "ensure that broadcasting services are effectively controlled by South Africans". Every person involved in Vuma, whether at an ownership, board, or staff level is a South African. We are 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". 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. Icasa should only refuse Vuma's amendment application if it is convinced that the communication needs of the public are such as to justify such undue interference. We are of the view that the opposite is true in this case and that the communication needs of the public 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". Vuma is proud of how it has managed to stabilize its financial situation over the past few years but we are concerned that if Icasa were to refuse to approve the amendments, Icasa will, perhaps inadvertently, undermine the object of section 2(z) by preventing Vuma from continuing to be financially stable.
- 7. We trust that Icasa will give due consideration to all of Vuma'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.