



Independent Communications Authority of South Africa

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**APPLICATION FOR THE AMENDMENT OF AN INDIVIDUAL COMMERCIAL
SOUND BROADCASTING SERVICE LICENCE BY CLASSIC FM SOUTH
AFRICA (PTY) LTD IN TERMS OF SECTION 10 OF THE ELECTRONIC
COMMUNICATIONS ACT 36 OF 2005**

REASONS FOR DECISION

SEPTEMBER 2021

1. INTRODUCTION

This document sets out the reasons for the decision taken by the Independent Communications Authority of South Africa (“the Authority”) to grant the amendment of the Individual Commercial Sound Broadcasting Service (“I-CSBS”) Licence belonging to Classic FM South Africa (Pty) Ltd (“the Applicant”).

2. BACKGROUND

- 2.1. On 08 April 2020, the Authority received an application from the Applicant to amend its I-CSBS Licence.
- 2.2. The application was submitted using regulation 11 (Form C) of the Individual Licensing Processes and Procedures Regulations 2010¹ (“the Regulations”).
- 2.3. The Applicant requested confidentiality which was granted by the Authority in terms of section 4D of the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000), as amended (“the ICASA Act”) for the following information:
 - 2.3.1 Identity Number of the Applicant’s contact person;
 - 2.3.2 The letter from the Business Rescue Practitioner to the Authority; and
 - 2.3.3 A presentation which contained interviews with industry leaders.
- 2.4. On 25 August 2020, the Authority published the Applicant’s amendment application in General Notice No. 450 (*Government Gazette* No. 43648), inviting interested persons to submit written representations within fourteen (14) working days, which was 14 September 2020.
- 2.5. On 14 September 2020, Kagiso Media submitted written representations in response to the above published notice. Details of Kagiso Media’s written representations and the response thereto by the Applicant are provided below in paragraphs 13 to 14.12.

¹ As amended by *Government Gazette* No. 39871 of 30 March 2016.

- 2.6. On 15 September 2020 additional written representations were received by the Authority from Kaya FM and Luthuli Media Corporation.
- 2.7. Both Kaya FM and Luthuli Media Corporation's written representations were submitted late. The Authority advised the two entities of same and as such their representations were not considered. The decision in this regard was also communicated to the Applicant.
- 2.8. The Authority elected not to hold public hearings as it was of the view that the application was clear, notwithstanding the written representations received.
- 2.9. On 26 February 2021, the Authority approved the Applicant's amendment application. The I-CSBS licence reflecting the amended licence conditions for the Applicant was issued on 30 April 2021.

3. APPLICABLE LEGISLATIVE FRAMEWORK

3.1. The following legislative and regulatory provisions are applicable when dealing with the amendment application of an individual licence:

3.1.1. Section 10 of the Electronic Communications Act, 2005 (Act No.36 of 2005), as amended (EC Act) which provides that:

"(1) The Authority may amend an individual licence after consultation with the licensee-

(a) to 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;

(b) for the purpose of ensuring fair competition between licensees;

(c) 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;

(f) where the Authority is satisfied that the amendment is necessary to ensure the achievement of the objectives of this Act;

- (g) *if the amendment relates to the universal access or universal services and is necessary, in the opinion of the Authority, as a result of-*
- i. changed circumstances in the market; or*
 - ii. lack of electronic communications network services, broadcasting services, electronic communications services in specifically identified areas of the Republic.*
- (h) *if the amendment is in accordance with Chapter 10 and any regulations that have been made under it.*

(2) The provisions of section 9(2) to (6) apply, with the necessary changes, to the amendment of an individual licence."

3.1.2. Regulation 9 (1) of the Licensing Processes and Procedures Regulations, 2010 ("the Regulations") and provides that *"an application to amend a licence must be in the format as set out in Form C and it must be accompanied by the applicable fee."*

3.1.3. Schedule 1 of the General Licence Fees Regulations as published in *Government Gazette* No. 42370 of 01 April 2019 ("Fees Regulations").

4. DISCUSSION AND ANALYSIS

4.1. Application of Section 10 (1) of the EC Act:

4.1.1. Classic FM's amendment application was made in terms of Section 10(1) the provisions of section 10 (1)(a), (b), (c) and (f) of the ECA which states that:

"The Authority may amend an individual licence after consultation with the licensee..."

- (a) to make the terms and conditions of the Applicant's licence consistent with the terms and conditions imposed generally in respect of all individual licences of the same type;*

- (b) for the purpose of ensuring fair competition between licensees;*
- (c) 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; and*
- (f) where the Authority is satisfied that the amendment is necessary to ensure the achievement of the objectives of the Act.*

5.2. Prescribed Format

5.2.1. The prescribed format for the amendment of an I-CSBS licence is contained in regulation 11 (Form C) of the Regulations, which states that an application to amend a licence must be:

- (a) in the format set out in Form C; and
- (b) accompanied by the applicable fee.

5.2.2. The amendment application was submitted in terms of regulation 11 (Form C) of the Regulations. The Applicant has made the required payment of Sixty-three thousand Eight hundred and four rands (R63 804.00) for the amendment of its I-CSBS licence and provided proof of payment.

5.3 Application of section 9 (2) to (6) of the EC Act:

5.3.1. The Authority followed the process outlined in section 9 (2) to (6) of the EC Act in the following manner:

- (a) Section 9(2)(a) of the EC Act requires the Authority to invite interested persons to apply and submit written representations in relation to the applications for individual licences within a period mentioned in the notice². On 25 August 2020, the Authority gave notice of the applications in Government Gazette No. 43648.

² Government Gazette No. 43518 of 20 July 2020

- (b) Section 9 (2) (d) of the EC Act requires the Authority to give interested persons an opportunity to submit written responses to any representations submitted in terms of section 9 (2) (a) EC Act. The Authority and the Applicant only considered the written representation from Kagiso Media as it was submitted before the deadline. The Applicant responded to Kagiso Media 's written representations and the said response made available for public scrutiny at the Authority's library.
- (c) Section 9 (2)(e) of the ECA provides that the Authority may conduct public hearings with respect to the applications received. The Authority decided not to hold public hearings. The Authority had to balance the urgent nature of the application by Classic FM which had been necessitated by the deteriorating financial position of the Applicant and forced it to go under business rescue to avoid becoming insolvent and the requirement to consult interested parties.
- (d) Section 9 (4)(a) of the ECA provides that applications, representations, responses and other documents relating to an application which are submitted to the Authority must be open to public inspection during the normal office hours of the Authority. Due to the implementation of the National State of Disaster in relation to Covid-19 and the applicable regulations at the time, the Authority was only able to make the applications available for public scrutiny on its official website.
- (e) In terms of section 9 (5) of the ECA, the Authority must notify the Applicant of its decision, the reasons for its decision and any licence conditions applicable after the consideration of the application and any representations received. The Authority notified the Applicant of its decision, on 08 March 2021. The reasons for the Authority's decision are contained in this Reasons document.
- (f) In terms of section 9 (6) of the ECA, whenever the Authority grants an individual licence, the Authority may impose such additional terms and conditions as may be prescribed in terms of section 8 of the EC Act. The Authority did not impose any additional terms and conditions to the

amended licence save for the 50/50 split in terms of the Applicant's Format.

6. PROPOSED AMENDMENTS OF THE LICENCE AND REASONS THEREOF

6.1. The Applicant sought approval from the Authority to amend its broadcasting format from Classical Music to include Old Skool and R&B music amongst other genres. The Applicant proposed to amend clause 5.1 and clause 5.2 of its licence which provided as follows:

6.1.1. Clause 5.1

"The Licensee shall provide Classical music;"

The Applicant proposed that its format be changed from classical music to Old Skool and R&B music, amongst other genres. The Applicant further suggested the option of offering classical music to its listeners on an online platform.

6.1.2. Clause 5.2

"The Licensee shall not change more than 15 percent (15%) of its format between 05h00 and 23h00."

The Applicant proposed the deletion of clause 5.2.

The Applicant further proposed to amend the following clauses:

6.1.3. Clause 6.1

"The Licensee shall develop local music and contribute towards the Licensee's South African music quota by hosting soirees at least quarterly. This shall be accompanied by an on-air promotion of the artists concerned."

The Applicant requested that Clause 6.1 to be deleted.

6.1.4. Clause 6.2

"The Licensee shall contribute to the development of local music by offering a minimum of one million rand (R1 000 000) per annum in free on-air advertising at a reduced cost, allocated at its discretion for concerts,

workshops, free live on-air interviews, the promotion of soirees and development of new artists whose music aligns with its format.”

The Applicant requested that Clause 6.2 read as follows:

The Applicant shall contribute towards the development of local artists by providing on-air advertising for concerts or live interviews at no cost or at a reduced rate to the value of at least R400 000 per annum.

6.1.5. Clause 7.1

“The Licensee shall broadcast news on a regular basis for a minimum of fifty (50) minutes each day between 05h00 and 23h00.”

The Applicant proposed to broadcast thirty (30) minutes of news each day.

6.1.6. Clause 7.3

“The Licensee shall provide the Classic Business Programme on all weekdays.”

The Applicant proposed that Clause 7.3 be deleted.

6.1.7. Clause 8.2

“The Licensee shall train and provide at least short-term employment opportunities to empower two (2) interns per year.”

The Applicant proposed that Clause 8.2 should read as follows:

The Applicant shall contribute towards the development of local artists by providing on-air advertising for concerts or live interviews at no cost or at a reduced rate to the value of at least R400 000 per annum.

6.1.8. Clause 8.3

“The Licensee shall conduct presenting training throughout the year.”

The Applicant proposed to make contributions to the “Hot Cares” charity which was created by a community radio station which manages various charitable community initiatives, or such other institution of similar aim and benefit.

6.1.9. Clause 9.1

"That Huntrex creates a trust with a shareholding equal to that held by the Liberty Foundation with the express aim of ensuring the direction of dividends earned, to the development of South African music, arts and culture."

The Applicant proposed to provide ongoing assistance to the broader community in the form of annual fundraising events or such other initiatives that will have a similar aim and benefit.

6.1.10. Clause 9.2

"The Licensee shall offer presenting training to two (2) individuals from community stations annually."

The Applicant proposed to make contributions to the "Hot Cares" charity which was created by a community radio station which manages various charitable community initiatives, or such other institution of similar aim and benefit.

7. REASONS PROVIDED BY THE APPLICANT FOR THE PROPOSED AMENDMENTS:

7.1. Clause 5.1

7.1.1. "The Licensee shall provide Classical music".

The Applicant stated that the format under which it currently operates has been applied for over two decades. According to the Applicant, over this period it has observed that public taste in music has changed significantly and so have the ways in which music can be accessed.³ The Applicant further emphasised that classic music is no longer appealing to its listeners, as a result, the Applicant's listenership has been negatively affected. The Applicant stated that changing its current format would attract more advertisers leading to new investments.

7.1.2. The Applicant further emphasised that approving the proposed format will make its platform more attractive which will satisfy the statutory requirement in the ECA to use frequencies efficiently, and more importantly, the public

³ The primary amendment, page 2 of the amendment application.

interest will be fulfilled by ensuring that broadcasting services are provided by persons or groups or persons from a diverse range of communities (section 2(e) and (k)).

- 7.1.3. The Applicant indicated that the proposed amendment will promote the development of public, commercial and community broadcasting services which are responsible for catering to the needs of the public; and that it will further promote the provision and development of a diverse range of sound broadcasting services on a national, regional, and local level, which cater for all language and cultural groups.
- 7.1.4. In support of its proposed amendment application, the Applicant attached a research report by Bowmans Competition Department wherein its current music was analysed. It was found that the music format is not appealing to a diverse range of listeners. The research also found that most of its current listenership is white, middle-aged to older males.
- 7.1.5. The Applicant provided the statistics report regarding population growth in the Gauteng Province. The report was compiled by the SAARF RAMS between 2009 – 2019. The report indicates that the black population has grown by 83% whilst the white population has grown by 11%. The report further indicates that the age 50+ white population, which is the Applicant's target market, decreased by 12%. According to the report, the Applicant's listenership has decreased by 68%.
- 7.1.6. The Applicant further attached a report from Radio New Zealand, a classical music radio station which states that its audience has drastically declined, and the radio station has opted to provide its classical music programme online.
- 7.1.7. The Applicant mentioned that its format is unpopular to most people residing in its coverage area and as a result it is unable to attract advertisers. The Applicant emphasised that if the status quo remains, it could become insolvent.
- 7.1.8. The Applicant, therefore proposed that its format be changed from classical music to Old Skool and R&B music, amongst other genres.

7.1.9. The Applicant further indicated that it will offer classical music to its listeners on an online platform and subsequently, on request by the Authority, provided a communication strategy/ plan to the Authority on how it would inform existing listeners of the proposed change in format.

7.2. **Clause 5.2**

"The Licensee shall not change more than 15 percent (15%) of its format between 05h00 and 23h00."

The Applicant proposed that the deletion of clause 5.2 will enable the Applicant to play the proposed format of Old Skool and R&B music on a regular basis and it will ensure fair competition amongst other licensees.

8. Amendment of Clauses which the Applicant indicated will be in line with other Individual Broadcasting Service Licensees

8.1. **Clause 6.1**

"The Licensee shall develop local music and contribute towards the Licensee's South African music quota by hosting soirees at least quarterly. This shall be accompanied by an on-air promotion of the artists concerned."

8.1.1. The Applicant stated that no other individual broadcaster has the obligation contained in clause 6.1 and pointed out that it will comply with the South African Music Content Regulations, 2016 which apply to all broadcasters. According to the Applicant, the cost to host "soirees" is expensive and does nothing to advance local music unless it is well attended. The Applicant compared its licence terms and conditions with that of other individual licensees like iGagasi 99.5 FM, Y-FM, Jacaranda FM, Highveld, East Coast Radio, Smile FM, Kaya FM and K-FM and found that none of these licensees have a clause that is similar to clause 6.1.

8.1.2. The Applicant therefore requested that Clause 6.1 should be deleted.

8.2. Clause 7.1

"The Licensee shall broadcast news on a regular basis for a minimum of fifty (50) minutes each day between 05h00 and 23h00".

8.2.1. The Applicant stated that the cost to produce and read news is significant. However, the Applicant believes that there is a greater need to emphasise local conditions and events rather than news in the traditional format. The Applicant also indicated that traffic, weather, local special events, local community needs amongst others, would be of greater benefit to its listeners than a relatively arbitrary number of minutes of news which must be sourced from third parties at a cost. Consequently, the Applicant proposed to broadcast thirty (30) minutes of news each day.

8.3 Clause 7.3

"The Licensee shall provide the Classic Business Programme on all weekdays"

8.3.1. The Applicant acknowledged that this programme was its own undertaking. It stated further that most individual sound broadcasters have a slot during prime time where business issues are discussed. According to the Applicant, broadcasters who offer a programme on business issues do so voluntarily and there is no obligation to do it. The Applicant indicated that its focus currently is on operating a sustainable business and having a specific programme obligation of this sort would result in unnecessary costs and an increased financial burden to the investors.

8.3.2. The Applicant proposed that Clause 7.3 be deleted.

8.4. Clause 8.2

"The Licensee shall train and provide at least short-term employment opportunities to empower two (2) interns per year."

8.4.1. The Applicant indicated that its training would be provided through "Hot Cares" initiative which provide training to a bigger number of candidates than the current training opportunity provided to two interns.

8.5. Clause 8.3

"The Licensee shall conduct presenting training throughout the year."

- 8.5.1. The Applicant proposed to make contributions to the "Hot Cares" charity which was created by a community radio station which manages various charitable community initiatives, or such other institution of similar aim and benefit.

8.6. Clause 9.1

"That Huntrex creates a trust with a shareholding equal to that held by the Liberty Foundation with the express aim of ensuring the direction of dividends earned, to the development of South African music, arts and culture."

- 8.6.1. The Applicant proposed to provide ongoing assistance to the broader community in the form of annual fundraising events or such other initiatives that will have a similar aim and benefit. Providing free training to the value of at least R400 000 per annum through the "Hot Radio Training Academy" or similar institution.

8.7. Clause 9.2

"The Licensee shall offer presenting training to two (2) individuals from community stations annually."

- 8.7.1. The Applicant provided the same reasons as indicated under paragraphs 8.4 and 8.5 above, that its training would be provided through "Hot Cares" initiative which provide training to a bigger number of candidates than the current training opportunity provided to two interns. Further that it will make contributions to the "Hot Cares" charity which was created by a community radio station which manages various charitable community initiatives, or such other institution of similar aim and benefit.

9. Proposed Undertakings and Obligations

- 9.1. The Applicant indicated that it has been unable to pay for its operations and was unable to secure additional funding. As a result, the shareholders applied for business rescue in the High Court. The Applicant stated that its investors are

committed to ensuring that it is commercially viable and continues to provide meaningful content to its listeners.

- 9.2. The Applicant indicated that it has considered the clauses contained in the licences of other commercial sound broadcasting licensees and believes that there are similar and additional undertakings that can be offered by the Applicant which would be more meaningful than clauses 6.2, 8.2, 8.3, 9.1 and 9.2 of its current licence. The Applicant is of the view that amending these clauses would meet the requirements of the EC Act and the needs of commercial sound broadcasting in the current economic circumstances. The Applicant proposed the following undertakings:
 - 9.2.1. Providing free training to the value of at least R400 000 per annum through the "Hot Radio Training Academy" or similar institution.
 - 9.2.2. The Applicant shall contribute towards the development of local artists by providing on-air advertising for concerts or live interviews at no cost to the artists or at a reduced rate to the value of at least R400 000 per annum;
 - 9.2.3. Contributions to the "Hot Cares" charity which was created by the community station of the same name, which manages various charitable community initiative, or such other institution of similar aim and benefit;
 - 9.2.4. Ongoing assistance to the broader community in the form of annual fundraising events or such other initiatives as may have a similar aim and benefit; and
 - 9.2.5. The streaming of classical music on a dedicated online platform.
 - 9.2.6. The Applicant proposed that clauses 6.2, 8.2, 8.3, 9.1 and 9.2 be replaced with the above proposed content.

10. Section 10 of the EC Act and Processes and Procedures Regulations

10.1. The Applicant indicated that this application is in line with the provisions of section 10 (1)(a), (b), (c) and (f) of the EC Act. According to the Applicant, it took into consideration the provisions of section 10 in the following manner:

10.1.1. The amendments sought will make the terms and conditions of the Applicant's licence consistent with the terms and conditions imposed generally in respect of all individual licences of the same type - section 10 (1)(a);

10.1.2. The amendments will ensure fair competition between licensees - section 10 (1)(b);

10.1.3. The amendment application will in no way militate against orderly frequency management and will not prejudice the interests of other licensees - section 10 (1)(c); and

10.1.4. The application will enable the Authority to continue to ensure the achievement of the objects of the ECA - section 10 (1)(f).

10.2. The Applicant further stated that granting the proposed amendments will be in line with numerous objects of the EC Act and will ensure the continued support of investors in the Applicant, and its sustainability. The Applicant further states that its current format is outdated and if its application is rejected, the Authority would not be promoting any objects of the EC Act and would certainly not contribute to stability in the broadcasting sector or the efficient use of the spectrum.

10.3. The Applicant indicated that it will offer an alternative to the traditional classical format to cater for listeners who still have an interest in this format and that it is still committed to supporting local classical music by promoting local content.

11. REPRESENTATION BY KAGISO MEDIA

11.1. Kagiso Media objected to the amendment by Classis FM on the basis that:

11.1.1. It is a South African company that directly or indirectly owns shares in the following radio stations: East Coast Radio, Jacaranda FM, OFM, Algoa FM, Kaya FM, Heart FM and iGagasi 99.5.⁴

11.1.2. That it considers itself a key stakeholder in the commercial broadcasting sector, and as such an interested person. Thus, is of the opinion that the amendment application warrants a public hearing as the matters pertaining to the amendment application cannot be adequately dealt with by the Authority alone. To this end, it requested that public hearings be held and further requested to make oral presentations should the public hearings be held.

Amendment of Clause 5.1 and 5.2

11.1.3. The amendment of clause 5.1 and 5.2 as proposed by the Applicant will have consequences of undermining certain regulatory processes that are aimed at establishing and maintaining the competitive landscape in the commercial sound broadcasting sector and will work against the best interests of the incumbent players in the commercial sound broadcasting sector. Kagiso Media further advanced its objection as follows:

The Regulatory Framework

11.1.4. The relevant sections of the EC Act that the Authority should consider when assessing any amendment application brought to it are sections 10(1), 10(2) and sections 9(2) to (6) as well as the objectives of the EC Act. To this end, the application does not satisfy the applicable

⁴ Page 1 of Kagiso Media Submission.

objects of the EC Act and the requirements provided for in section 10(1)(c).⁵

Formats

11.1.5. Formats are generally understood in the market to refer to the type of programming that may be broadcast by public or commercial sound broadcasting service licensees. The format is hence the parameter for what a radio station will present to the listeners and for what listeners can expect from the radio station. In the music context, formats typically refer to the type of music content that may be broadcast on a particular radio station.

11.1.6. Formats are distinguishable from music genres which are categories of music. A format can comprise of multiple music genres, meaning that several different music genres may form part of and may be broadcast under a particular format. Accordingly, the Authority should maintain a firm hold on the management of formats provided by sound broadcasting licensees, to avoid similar content being provided by broadcasters in the same area because this would negatively impact diversity in the services offered to consumers and will ultimately have a detrimental effect on competition in the sector.

11.1.7. Given the above, the Applicant's application for amendment does not consider the principles enunciated in section 2 and section 51 of the EC Act, the critical imperative of maintaining diversity and fair competition in the sound broadcasting sector.

11.1.8. The proposed amendment of the format by the Applicant is materially different from the current format and identity of the Applicant.⁶

⁵ Pages 3-5 of the Submission.

Objects Relating to the Proposed Amendments of Clause 5.1 and 5.2

Target Audience

11.1.9. The Applicant has traditionally serviced a niche market that mainly comprises of older audience members over the age of 50 years and/or highly affluent listeners that are mainly in the SLM 8-10. The majority of commercial sound broadcasting service licensees whose transmitters are near the Applicant's transmitter typically offer a range of services that mainly target audience members that are in SLM 6-10. Thus, the programming content offered by the Applicant to its niche market has always promoted diversity in the market.

11.1.10. Changing the Applicant's format from a niche format will result in:

11.1.10.1. little or no diversity in the services provided by the commercial sound broadcasting licensees that transmit their services in close proximity to the Applicant's transmitters;

11.1.10.2. the Applicant's traditional audience losing the one service which currently caters exclusively to their specific needs; and

11.1.10.3. an increase in the number of commercial sound broadcasters targeting audiences in SLM 6-10 which will in turn lead to commercial broadcasters targeting the same advertisers and competing for the same advertising revenue.

11.1.11. Accordingly, implementing the amendments proposed by the Applicant will have an undesired effect of contracting rather than expanding the competitive landscape. Kagiso Media further attached a graph showing that commercial sound broadcasters are currently facing tough trading conditions.⁷

⁶ Pages 6-7, No. 5.1 – 5.6 of Kagiso Media Submission.

⁷ Radio Market Growth – Historical – page 9 of Kagiso Media Submission.

The deviation from Classic FM's original format - New licence application

11.1.12. It is critical for the Authority to consider the enquiry in section 51 in addition to section 10 of the EC Act in order to maintain diversity and competition in the sound broadcasting sector. This will enable the Authority to determine whether any format proposed by the Applicant is different from the existing formats in the market. The procedure outlined in section 10 of the EC Act read together with objects of the Act in section 2 do not adequately deal with the issues dealt with in section 51 of the EC Act and accordingly the Authority should conduct a needs analysis.

11.1.13. The fact that the format proposed by the Applicant presents a material shift from the existing format and is likely necessitated by the ownership restructure; it is thus appropriate that the application be treated as new application and conduct an enquiry contemplated in section 51 of the EC Act when considering the Applicant's amendment application.⁸

Objects of the EC Act

11.1.14. The Authority should determine whether granting of this amendment application in particular clauses 5.1 and 5.2 of the Applicant's licence promotes the objects of the Act. Kagiso Media further submitted that the Applicant does not provide details as to how the objects of the EC Act will be promoted by its proposed amendment.

11.1.15. Kagiso Media is of the view that it would be difficult for the Authority to assess whether the format changes proposed by the Applicant considered or respond to the needs of the public in circumstances where an enquiry to this effect has not been conducted by the Authority. For these reasons, Kagiso Media submits that the application failed the test of compliance with the objects of the EC Act.⁹

⁸ Pages 9-11 of Kagiso Media Submission.

Vagueness of the proposed amendments

11.1.16. The amendment application is not clear in terms of whether the Applicant seeks to remain a Classical Music radio station and include Old Skool and R&B amongst other genres. Further, the Applicant did not provide sufficient information with regards to the amendment of clauses 5.1 and 5.2 and as such the Authority should reject the proposed amendment.¹⁰

Dominant Genre

11.1.17. The Applicant did not specifically indicate which music genres will be the predominant genre or in what general proportion the Applicant intends to mix the genres to create its overall format. It was unclear whether the intention is to keep classical music and remain the dominant genre while Old Skool and R&B receive less airplay or whether Old Skool and R&B will be the dominant genres, with classical music receiving less airtime. This information is important as clause 5.2 of the Applicant's licence states that the Applicant shall not change more than 15% of its format between 05h00 and 23h00. On this basis, it is important to get conclusive information as to how the proposed amendment of genres will interplay to avoid a complete deviation by the Applicant on its current format.

The definition of Old Skool and R&B

11.1.18. The proposed music format by the Applicant is not descriptive enough to be understood by the audiences and it is not a description that is commonly used or understood in a professional radio programming sense and has never been applied previously by the Authority.

11.1.19. R&B for example is a genre as encompassing a wide range of music genres and includes elements of pop, soul, funk, hip-hop, electronic music and jazz. Accordingly, if the Applicant's amendment application was granted, the Applicant would deviate from its original licensed format and this may result in the Applicant providing the same format provided by other

⁹ Pages 11-12 of Kagiso Media Submission.

commercial broadcasters in the sector like Radio 2000, Metro FM, Kaya FM, 94.7, Jacaranda FM and Radio 702.

11.1.20. Further, if this Application is approved, it will have an impact on Hot 91.9 FM, a community radio, which uses the phrase Old Skool and R&B and this is an unfair competition between a commercial broadcaster and a community radio station.¹¹

Other Proposed Amendments

Clause 6.1

11.1.21. The regulations on local content serve the broader economic objective of encouraging economic development and job creation in the music industry. Commercial sound broadcasters, under the Music Regulations, Government Gazette 39844 must ensure that a minimum of 35% of the musical works broadcast are South African music. Accordingly, the obligation in clause 6.1 cannot and should not be deleted or amended in any way.¹²

Clause 7.1

11.1.22. All commercial sound broadcasting licensees are legally obliged to broadcast news content daily and therefore there is no rationale or legal basis justifying the relaxation for the Applicant of its news broadcast.¹³

Clause 8.2

11.1.23. All commercial broadcasters have an obligation to identify and grow new local talent, and therefore there is no benefit in reducing or elimination this obligation by the Applicant for the commercial broadcasting sector.¹⁴

¹⁰ Pages 12-14 of Kagiso Media Submission.

¹¹ Page 14 to 18 of Kagiso Media Submission.

¹² Page 19, No. 7.31.

¹³ Page 19 – 20, No. 7.3.2.

¹⁴ Page 20, No. 7.3.3.

Clause 9.2

11.1.24. The development of the community broadcasting sector is important as community broadcasters' primary service and benefit is towards marginalised communities and constitute a critical avenue through which such communities express their history, heritage, languages, culture and experiences. In order to bridge the skills gap that exists between community broadcasters and commercial sound broadcasting licensees, commercial broadcasters are required to in some way assist in the development of the community broadcasting sector. Accordingly, any reduction or elimination of obligation contained in clause 9.2 of the Applicant's licence would have a negative impact on skills development within the community broadcasting sector.

11.1.25. The Authority should accordingly refuse and not implement the amendments as proposed by the Applicant. Approving the proposed amendments will undermine the objects of the EC Act and will significantly prejudice several other licensees and may negatively impact the commercial sound broadcasting sector as a whole.¹⁵

12. RESPONSE BY THE APPLICANT

In response to Kagiso Media's representation, the Applicant indicated that:

12.1. Kagiso Media failed to consider the supporting information on its amendment application and based its submission on assumptions. As a result, its submission was largely irrelevant and without foundation. The Applicant submitted that Kagiso Media did not request a copy of the Application from the Authority and its submission was not based on factual material.

12.2. Kagiso Media incorrectly conflates the requirements for an application for amendment with the requirements for an application for a new broadcasting service licence. This is so because Kagiso Media in its submission suggested that the Authority should follow the process of an application for a new licence

¹⁵ Page 19 – 20, No. 7.3.4.

when analysing the Applicant's amendment application. The Applicant maintained that it has followed the process for an amendment application as contemplated in section 10 of the EC Act.

- 12.3. Classical music has lost its appeal in the market and that music evolves with time. It is for that reason that the Applicant is proposing to add Old Skool and R&B to its genres. Classical music would be catered for on a streaming platform. The Applicant also pointed out the different formats contained in different commercial broadcasters in the country, for example, Jacaranda FM's format is stated as: "*adult contemporary or golden oldies format providing a mix of music and information that is community based*".¹⁶
- 12.4. The genres offered by other licensees differ from the Applicant's proposed format and as such there would still be competition in the sector if its proposed music format is approved. The Applicant maintains that diversity in the industry would still be maintained as existing Licensees are offering differing genres.
- 12.5. The amendment of the proposed clauses in its licence would not prejudice the interests of other licensees as indicated by Kagiso Media. The Applicant maintained that frequencies of other existing Licensees would not in any event be adversely affected.

Reduction of News

- 12.6. The Applicant emphasised that it was not removing news broadcast as indicated by Kagiso Media but was simply reducing the news broadcast duration time from fifty (50) minutes to thirty (30) minutes. The Applicant further emphasised that if the amendment application was to be approved by the Authority, it would increase investment opportunities which will enable it to operate a viable business.
- 12.7. The Authority is of the view that the thirty (30) minutes of news each day applied for by the Applicant will be in line with similar clauses for other commercial sound licensees such as Heart FM and Igagasi FM.

¹⁶ Page 6 – 7 of the Applicant's response to Kagiso submission.

Hot 91.9 FM RESPONSE

- 12.8. Hot 91.9 FM responded to this submission, indicating that they have no objection to the Applicant's proposed format based on the following reasons:
- 12.9. Its geographical coverage is in Randburg and significantly smaller than the coverage of the Applicant, which covers Johannesburg.
- 12.10. The operating environments for community sound broadcasters and a commercial broadcaster substantially differ specially with regards to programme formatting, advertising, talk content and so on; and
- 12.11. The local content music requirements for community licensees is currently at 80% and the requirement for individual licensees is at 30%. As such there would be no overlap of the same music broadcast by the two broadcasters.

13. AUTHORITY'S DECISION AND REASONS

13.1. Public Hearings:

- 13.1.1. The Authority noted the representations made against the Applicant but was of the considered view that a public hearing was not necessary. The Authority is always guarded by the need, if any, to clarify written submissions further through oral representations. In the instance where the submissions by the interested parties and the responses from the Applicant are clear and sufficient, the Authority is of the opinion that public hearings would not have served any purpose as the submissions and responses were sufficient.
- 13.1.2. The Authority also had to balance the urgent nature of the application by Classic FM which had been necessitated by the deteriorating financial position of the Applicant and forced it to go under business rescue to avoid becoming insolvent and the requirement to consult interested parties.

13.1.4. The Authority is therefore satisfied that it exercised its discretion not to hold hearings lawfully as provided for in the Act.

13.2. **Clause 5.1**

13.2.1. **Decision:**

13.2.2. The Authority decided to refuse the Applicant full amendment in respect of clause 5.1 (format). Clause 5.1 was structured as follows:

"The Applicant shall provide 50% Classic Music and 50% Old Skool and RnB Music.

13.2.3. **Reason for Decision:**

13.2.4. The Applicant applied for its licence during a stiff competitive process and stood out as intending to provide a niche service in the form of Classical music. In considering the amendment, the Authority was of the view that removing the obligation completely and allowing for classical music to be provided on an online, platform, will prejudice its loyal listeners across the racial and cultural spectrum who may not necessarily have means to tune in on the online platforms but are dependent on the traditional platform.

13.2.5. The Authority noted the Applicant's submission that music taste of listeners evolves and that the population that is attracted to classic music is a small portion of Johannesburg people mostly white and above the age of 50 years. The information before the Authority was devoid of the detailed breakdown in terms of numbers of listeners across the spectrum (all racial and demographic groups) in the coverage area to assess the veracity of the findings by the Applicant or the SAARF and BRC RAMS research as the Applicant's application. Be that as it may, the Authority was of the view that the regular and classical music listener despite the decline, must not be isolated but still catered for on the traditional platform.

13.2.6. Additionally, the Authority also noted Kagiso Media's representation that the amendments were vague, and that the Applicant should not be allowed to shift from its niche music format of classic. Nevertheless, in the Authority's assessment having considered the fact that the Applicant has been under business rescue process and that it needs to attract advertisers with the new proposed music genres of Old Skool and R&B in order to remain relevant in the broadcasting industry; the Authority in promoting competition and stability in the ICT sector, resolved to the classical music quota being reduced to 50% and the proposed offering be introduced and remain at 50%. This in the Authority's considered view would be ideal to attract the new audience and advertising for the sustainability and viability of the radio station and still promote diversity.

13.3. Clause 5.2

13.3.1. Decision:

The Authority approved the deletion of Clause 5.2 as applied for by the Applicant.

13.3.2. Reason for Decision:

In the Authority's assessment, retaining clause 5.2 of the Applicants licence which provides that "the Applicant shall not change more than 15% of its format between 05h00 and 23h00" in addition to the 50/50 split allow the Applicant to deviate from the 50% classical music and 50% Old Skool and RnB split by including any other genres of its choice, as long as it is within the 15% deviation. To this end, the Authority's decision restricts the Applicant to this 50% Classical music and 50% Old Skool and RnB format. Deviation from this prescription is not permissible for the duration of the licence period.

13.4. Clause 6.1

13.4.1. Decision:

The Authority approved the deletion of Clause 6.1 as applied for by the Applicant.

13.4.2. **Reason for Decision:**

In considering the deletion of the clause, the Authority took into account two factors as follows:

- That the Applicant was put under business rescue due to its financial instability and hosting Soirees would not assist the Applicant in its endeavour to ensure financial stability in the short and long term; and
- The Applicant undertook to comply with the South African Music Content Regulations, 2016 which include the 35% minimum of the of the musical works broadcast.

On this basis of the above, the Authority was satisfied that the Applicant would still be able to comply with the minimum requirements and refusal in this regard as per the representation by Kagiso Media would not be rational.

13.5. **Clause 6.2**

13.5.1. **Decision:**

The Authority approved the amendment of Clause 6.2 as follows: "The Applicant shall contribute towards the development of local artists by providing on-air advertising for concerts or live interviews at no cost or at a reduced rate to the value of at least R400 000 per annum".

13.5.2. **Reason for Decision:**

The Authority was of the view that the proposed undertaking by the Applicant is achievable and can replace the previous clause as suggested by the Applicant. The Authority was satisfied by the Applicant's proposed alternatives to the licence conditions to mitigate the impact of removing the clauses from the licence. To this end, the Authority was satisfied that no one will be prejudiced by the alternative proposed by the Applicant.

13.6. **Clause 7.1**

13.6.1. **Decision:**

The Authority approved the amendment of this Clause as applied for by the applicant and reduced news to 30 minutes daily.

13.6.2. **Reason for Decision:**

The Authority assessed the reasons advanced by the Applicant against those advanced by Kagiso Media. The Authority further considered the argument advanced that the cost to produce news is significant together with the fact that the Applicant has recently been through a business rescue process, and the Authority is of the view that the reduction of minutes of news as proposed is sensible.

Additionally, the Authority was of the view that the thirty (30) minutes of news each day applied for by the Applicant will be similar to the conditions imposed on other commercial sound licensees. In considering the approval of the amendment, the Authority was mindful that these may have been promises of performance however, in terms of reduction of news bulletins, regard was had to the precedents in granting such amendments by the Authority. The Authority has previously approved amendment applications for the reduction of news notably by Heart and iGagasi FM, amongst others.

Section 2(s) (ii)(aa) of the EC Act lists one of the objectives of the Act as to ensure that broadcasting services viewed collectively provide for regular news services.

Although legislation does not prescribe the duration of news to be carried by broadcasters, individual licensees provide no less than 30 minutes of news each day. The Authority is of the considered view that reduction of news from fifty (50) to thirty (30) minutes each day as proposed by the Applicant, will still be in line with the provision of section 2(s) (ii)(aa) of providing regular news services.

13.7. **Clause 7.3**

13.7.1. **Decision:**

The Authority approved deletion of Clause 7.3 as proposed by the Applicant.

13.7.2. **Reason for Decision:**

The Authority, having considered the fact that the Applicant has recently been through a Business Rescue process, was of the view that it is fundamental to ensure stability and sustainability of the Applicant's service in the ICT sector. To this end, the Authority acceded to the request that the clause be deleted.

13.8 **Clause 8.2**

13.8.1. **Decision:**

The Authority approved amendment of Clause 8.2 as follows: "The Licensee shall provide training to the value four hundred thousand rand (R400 000) per annum through the "Hot Cares Training Academy".

13.8.2. **Reason for Decision:**

The Authority was of the view that the proposed undertaking by the Applicant is achievable and can replace the previous clause as suggested by the Applicant. The Authority was satisfied by the Applicant's proposed alternatives to the licence conditions to mitigate the impact of removing the clauses from the licence. To this end, the Authority was satisfied that no one will be prejudiced by the alternative proposed by the Applicant.

13.9. **Clause 8.3**

13.9.1. **Decision:**

The Authority approved amendment of Clause 8.3 as applied for by the applicant follows: "The Licensee shall contribute towards the development of local artists by providing on-air-advertising for concerts or live interviews at no cost or at a reduced rate to the value of four hundred thousand rand (R400 000) per annum.

13.9.2. Reason for Decision:

The Authority was of the view that the proposed undertaking by the Applicant is achievable and can replace the previous clause as suggested by the Applicant. The Authority was satisfied by the Applicant's proposed alternatives to the licence conditions to mitigate the impact of removing the clauses from the licence. To this end, the Authority was satisfied that no one will be prejudiced by the alternative proposed by the Applicant.

13.10. Clause 9.1**13.10.1. Decision:**

The Authority approved amendment of Clause 9.1 as follows: "The License shall make contributions to the "Hot Cares" charity which was created by the community station of the same name, which manages various charitable community initiatives, or such other institution of similar aim and benefit".

13.10.2. Reason for Decision:

The Authority was of the view that the proposed undertaking by the Applicant is achievable and can replace the previous clause as suggested by the Applicant. The Authority was satisfied by the Applicant's proposed alternatives to the licence conditions to mitigate the impact of removing the clauses from the licence. To this end, the Authority was satisfied that no one will be prejudiced by the alternative proposed by the Applicant.

13.11. Clause 9.2**13.11.1. Decision:**

The Authority approved amendment of Clause 9.2 as follows: "The Licensee shall provide ongoing assistance to the broader community in the form of annual fundraising events, or such other initiatives as may similar aim and benefit".

13.11.2. Reason for Decision:

The Authority was of the view that the proposed undertaking by the Applicant is achievable and can replace the previous clause as suggested by the Applicant. The Authority was satisfied by the Applicant's proposed

alternatives to the licence conditions to mitigate the impact of removing the clauses from the licence. To this end, the Authority was satisfied that no one will be prejudiced by the alternative proposed by the Applicant.



DR. KEABETSWE MODIMOENG
CHAIRPERSON

DATE: 17 / 09 / 2021