



**Independent Communications Authority of South Africa**

350 Witch-Hazel Avenue, Eco Point Office Park

Eco Park, Centurion.

Private Bag X10, Highveld Park 0169

Telephone number: (012) 568 3000/1

**APPLICATION FOR THE AMENDMENT OF AN INDIVIDUAL COMMERCIAL SOUND  
BROADCASTING SERVICE LICENCE BY PRIMEDIA (PTY) LTD IN RESPECT OF  
567 CAPE TALK IN TERMS OF SECTION 10 OF THE ELECTRONIC  
COMMUNICATIONS ACT, 2005 (ACT NO. 36 OF 2005), AS AMENDED**

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**REASONS FOR DECISION**

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**AUGUST 2022**

## **1. INTRODUCTION**

This document sets out the reasons for the decision of the Independent Communications Authority of South Africa ("the Authority / ICASA") in relation to the application for the amendment of the Individual Commercial Sound Broadcasting Service ("I-CSBS") licence by Primedia (Pty) Ltd with regards to 567 Cape Talk ("the Applicant").

## **2. BACKGROUND**

- 2.1. The Applicant holds both the Radio Frequency Spectrum ("RFS") and I-CSBS licences to provide commercial sound broadcasting services in the Western Cape Province. Both licences expire on 16 December 2028.
- 2.2. On 31 March 2021, the Applicant lodged an application with the Authority for the amendment of its I-CSBS licence in terms of section 10 (1)(c) of the Electronic Communications Act, 2005 (Act No 36 of 2005) ("the EC Act").
- 2.3. The application was lodged in terms of section 10 (1)(c) of the Electronic Communications Act, 2005 (Act No 36 of 2005) ("the EC Act"), read with regulation 9 (Form C) of the Processes and Procedures Regulations for Individual Licences, 2010<sup>1</sup> as amended ("the Regulations").
- 2.4. The Applicant requested confidentiality in terms of section 4D of the Independent Communications Authority of South Africa Act, 2000 (Act No 13 of 2000) ("the ICASA Act") on the following information:
  - 2.4.1. The Applicant's covering letter;
  - 2.4.2. Appendix 3.2 – Reasons for Amendment Application; and
  - 2.4.3. Appendix 3.3 – Implications of the Amendment Application.
- 2.5. On 21 June 2021, the Authority took a decision not fully to grant confidentiality to the Applicant's covering letter, Appendixes 3.2 and 3.3.2. Some of the information requested to be treated as confidential did not satisfy the criteria set

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<sup>1</sup> As amended by Government Gazettes No. 39871 of 30 March 2016 and 42087 of 5 December 2018.

out in section 4D (4) of the ICASA Act for the granting of confidentiality. Subsequently, on 25 June 2021, the Applicant submitted an amendment application for public viewing that excluded the information that the Authority did not grant confidentiality on.

- 2.6. On 15 July 2021, the Authority published a notice<sup>2</sup> in the Government Gazette inviting interested parties to submit written representations and responses in relation to the application within fourteen (14) working days from the date of publication of the notice. The closing date for written representations was on 4 August 2021.
- 2.7. By 4 August 2021, the Applicant and the Authority had received written representations from Cape Town Radio (Pty) Ltd, trading as Smile FM ("Smile FM"), objecting to the Applicant's amendment application.
- 2.8. On 11 August 2021, the Applicant responded to the objections submitted by Smile FM, within five (5) working days of receiving the objection.
- 2.9. The Authority elected not to hold public hearings in terms of section 9 (2)(e) of the EC Act, as it was of the view that the application was clear, notwithstanding the written representations received.
- 2.10. On 11 April 2022, the Applicant was informed of the Authority's decision regarding its application to amend its I-CSBS licence. The Applicant's amended I-CSBS licence was issued on 20 April 2022.

### **3. APPLICABLE LEGISLATIVE FRAMEWORK**

- 3.1. The Applicant's amendment application was made in terms of the provisions of section 10 (1)(c) of the EC Act which states that:

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

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<sup>2</sup> General Notice No. 673, Government Gazette No. 44852 published on 15 July 2021.

*(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.”*

3.2. Section 10 (2) of the EC Act which stipulates that:

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

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

3.2.1.1 Section 9(2)(a) of the EC Act requires the Authority to give notice of the application in the Gazette and invite interested persons to apply and submit written representations in relation to the applications for individual licences within a period mentioned in the notice<sup>3</sup>. On 15 July 2021, the Authority gave notice of the application in General Notice No 673, Government Gazette No 44852.

3.2.1.2 Section 9(2)(b) of the EC Act requires the Authority to include the percentage of equity ownership to be held by persons from historically disadvantaged groups, which must not be less than 30%, or such other conditions or higher percentage as may be prescribed under section 4(3)(k) of the ICASA Act. The Applicant's amendment application had no bearing on its equity ownership, and, as such, the Authority did not include the percentage of equity ownership to be held by persons from disadvantaged groups.

3.2.1.3 Section 9(2)(c) of the EC Act requires the Authority to set out the proposed licence conditions that will apply to the licence. The Government Gazette published on 15 July 2021 stated the clauses that the Applicant was requesting the Authority to amend and the proposed new clauses.

3.2.1.4 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

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<sup>3</sup> Government Gazette No. 43518 of 20 July 2020.

in terms of section 9 (2) (a) EC Act. On 4 August 2021, The Authority and the Applicant received written representations from Smile FM. On 11 August 2021 the Applicant responded to Smile FM 's written representation.

- 3.2.1.5 Section 9(2)(e) of the EC Act requires the Authority to conduct public hearings with respect to the applications received. The Authority decided not to hold public hearings as it was of the view that the application was clear, notwithstanding the written representations received.
- 3.2.1.6 Section 9(3) of the EC Act provides that the Authority may require an applicant or an interested party who has submitted written representations in terms of subsection (2)(a) to furnish the Authority, within the period specified by the Authority, with such further information as may be reasonably necessary in order to consider the application. The Authority did not request further information, apart from affording the Applicant an opportunity to respond to written representation that were received.
- 3.2.1.7 Section 9 (4)(a) of the EC Act provides that applications, representations, responses, and other documents relating to an application which are submitted to the Authority must be open to the public for 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 made the applications available for public scrutiny on its official website and in its library.
- 3.2.1.8 Section 9(4)(b) of the EC Act provides that the Authority must, at the request of any person and on payment of such fee as may be prescribed, furnish him or her with copies of documents requested by such person. The Authority did not receive any requests for copies of documents related to the Applicant's amendment application.
- 3.2.1.9 Section 9 (4)(c)(i) and (ii) of the EC Act provides that the Authority may, at the request of the applicant or person who has submitted representations or responses, decide that:

- (i) (aa) *any document or information that is commercially sensitive, or;*

*(bb) any other matter reasonably justifying confidentiality, is not open to public inspection, if such document or information can be separated from the application, representations or other documents in question*

*(ii) For the purposes of this subsection, commercially sensitive document, information or other matter reasonably justifying confidentiality, excludes documents or information that should, as a matter of law be generally available to the public”.*

The Applicant was partially granted confidentiality and such documents where confidentiality was granted, were duly separated from the application for public inspection.

3.2.1.10 Section 9 (4)(d) of the EC Act provides that, if the Authority refuses to a request referred to in paragraph (c)(i), the applicant or person concerned may withdraw the document or information question. The Applicant was satisfied with the confidentiality granted by the Authority, none of its documents were withdrawn.

3.2.1.11 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 11 April 2022. The reasons for the Authority's decision are contained in this Reasons document.

3.2.1.12 In terms of section 9 (6) of the ECA, whenever the Authority grants an individual licence, the Authority must do so on standard terms and conditions applicable to the type of licence, as prescribed in terms of section 8, and may impose such additional terms and conditions as may be prescribed in terms of section 8(3) of the EC Act. The Authority did not impose any additional terms and conditions to the amended licence. The Authority noted that other similarly placed Licensees are not required to broadcast news from their area of broadcast, but rather the clause relating to the provision of news only stipulates the percentage of news that would be carried by the Licensee. Hence the Authority approved the deletion of clause 5.2.

3.3. Regulation 9 (Form C) of the Regulations states as follows:

*"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."*

3.4. The amendment application was submitted in terms of regulation 9 of the Regulations. The Applicant made the required payment of sixty-six thousand four hundred and twenty rands (R66 420.00) for the amendment of its I-CSBS licence and provided proof of payment.

#### **4. PROPOSED AMENDMENTS OF THE LICENCE BY THE APPLICANT**

4.1 The Applicant sought approval from the Authority to amend **Clause 4 (Format)** and **Clause 5 (General Programming Obligations)** of its I-CSBS licence as follows:

##### **Clause 4 – Format**

4.1.1.1. Clause 4 of the Applicant's I-CSBS licence reads as follows:

*"A talk-based service with a maximum of fifteen percent (15%) music programming."*

4.1.1.2. The Applicant requested that the Authority approves its proposal to play more music on weekends and public holidays than it currently does, while ensuring that its talk radio format is kept as is during the week, as most of its listeners engage in talk on radio during the week. The Applicant therefore applied to the Authority for the approval of Clause 4 of its licence to read as follows:

##### **"4. FORMAT**

*A talk-based service with a maximum of:*

*4.1 fifteen percent (15%) music programming during weekdays, that is, Monday to Friday excluding public holidays; and*

4.2 *80 percent (80%) music programming on Saturdays, Sundays and public holidays."*

- 4.1.1.3. On further engagements between the Authority and the Applicant, the Applicant subsequently submitted an updated proposal wherein it proposed that 40% of the 80% of music on weekends and public holidays shall be South African music.

#### **4.2. Clause 5 – General Programming Obligations**

- 4.2.1. Clause 5 of its I-CSBS Licence read as follows:

*"5.1 The Licensee shall broadcast news on a regular basis for a minimum of thirty (30) minutes each day between 05h00 and 23h00;*

*5.2 Local news shall constitute at least fifty percent (50%) of its total news component; and*

*5.3 Should the Licensee source news material from a source other than itself, the source(s) thereof shall be disclosed during news broadcast."*

- 4.2.2. The Applicant proposed that Clause 5.2 be deleted, and Clause 5 should read as follows:

*"5.1 The licensee shall broadcast news on a regular basis for a minimum of thirty (30) minutes each day during the performance period, which news, measured over the period of a day, is to cover local, national and international news.*

*5.2 Should the Licensee source news material from a source other than itself, the source(s) thereof shall be disclosed during the news broadcast."*



## **5. REASONS PROVIDED FOR THE PROPOSED AMENDMENTS**

### **5.1. Clause 4 - Format**

- 5.1.1. The Applicant indicated that most of its listeners participate more meaningfully in talk radio programmes during the week than they do on weekends and public holidays. It is for this reason that it proposed the reduction of talk programming on public holidays and weekends. The Applicant proposed that the 15% ceiling of music broadcast on weekends be relaxed, and the Applicant be allowed to broadcast 80% music on weekends and public holidays.
- 5.1.2. The Applicant stated that the COVID-19 Pandemic has affected Cape Town with regards to tourism.
- 5.1.3. The Applicant further highlighted challenges in relation to the cost of Music vs Talk Radio and the need to recognise the audience tastes on Business Days vs Weekends and Public Holidays<sup>4</sup>. In this regard, it stated that:
  - 5.1.3.1. The costs of broadcasting talk radio programming are significantly higher than those related to music programming due primarily to the cost of production staff and external contributors. Consequently, the provision of talk programmes even on weekends affects its sustainability;
  - 5.1.3.2. Talk radio is particularly driven by the drive time slots, which are peak times, that is early morning and late afternoon Mondays to Fridays (excluding public holidays). Peak times are when motorists are in their vehicles travelling to work, coming back from work and when dropping and fetching children from schools. These activities are primarily limited to weekdays;<sup>5</sup>
  - 5.1.3.3. Talk radio listenership drops off significantly on weekends and public holidays as listeners need a respite from discussions of current affairs. The Cape

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<sup>4</sup> Appendix 3.2 – Paragraph 3.

<sup>5</sup> Appendix 3.2 – Paragraph 3.2.

Town audience is less interested in talk radio programmes on weekends and public holidays and prefers to listen to music;<sup>6</sup> and

- 5.1.3.4. Its listeners would not be negatively affected by the proposed change as the talk vs music format will remain unchanged during the week.

## 5.2. **Clause 5.2 - General Programming Obligations**

- 5.2.1. The Applicant stated that Primedia is exceptionally proud of the prominence of its news services, Eyewitness News ("EWN") as an impartial and trusted source of news nationally.
- 5.2.2. The Applicant stated that Clause 5.2 of its licence was imposed when the greenfield Cape Talk licence was granted, and argues that it is no longer necessary or useful, and rather hinders its ability to provide news coverage at national, regional, and international events demanded by the audience.
- 5.2.3. In support of its proposed amendment application, the Applicant attached a research report on its news broadcast conducted by Audience Research International in 2019<sup>7</sup>. The report indicates that people are less interested in listening to the news happening in the Western Cape only. According to the research report, interest in Western Cape news was rated at 45%, whereas national, international, business and political news received higher ratings ranging from 62% to 79%.<sup>8</sup>
- 5.2.4. The Applicant indicated that Cape Town based news will remain on EWN as most of Primedia's assets are in the Western Cape office, and its audience demands coverage of Parliamentary affairs.
- 5.3. The Applicant stated that, as a commercial radio station operating on medium wave, it is the weakest in the Primedia stable in terms of profit. The Applicant indicated that the measures taken to sustain it are not enough to sustain the radio station in the future. The Applicant believes that the repeal of the 50% Cape

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<sup>6</sup> Appendix 3.2 – Paragraph 3.3.

<sup>7</sup> Page 4-5, Appendix 3.2 of the application.

<sup>8</sup> Page 3-4 Appendix 3.2 of the Reasons for the Proposed Amendment Document.

Town based news will improve its financial status. The Applicant's precarious financial situation has been emphasised in the application on confidential basis.

## 6. IMPLICATIONS OF THE PROPOSED AMENDMENTS

6.1. In its application, the Applicant notes that the application is brought in terms of section 10(1)(c) of the EC Act, which empowers the Authority to amend an individual licence to the extent requested by the licensee. It further posits that the Authority's discretion to refuse an application in terms of this section is limited to instances where the amendment would '*militate against orderly frequency management and prejudice the interests of other licensees.*'

6.2. In this regard, the Applicant argued that:

6.2.1. The amendment application before the Authority does not relate to radio frequency spectrum issues in any way;

6.2.2. If the licence amendments were to be rejected, the licence conditions in their current state remain more onerous than those of other commercial stations in respect of both maximum amounts of music playable and local news obligations;

6.2.3. If approved, the amendments sought cannot be said to "*prejudice the interests of other licensees*".

6.3. The Applicant further noted that although sections 10(1)(b) and 10(1)(f) are not directly relevant to this application, as they envisage a situation in which the Authority initiates the amendments, it is of the view that both sections are relevant for the following reasons:

6.3.1. Section 10(1)(b)<sup>9</sup> – the application demonstrates that the proposed amendments seek to ensure fair competition between licensees; and

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<sup>9</sup> Section 10(1)(b) of the EC Act.

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

(b) for the purpose of ensuring competition between licensees.

6.3.2. Section 10(1)(f)<sup>10</sup> – the application is in line with multiple objects of the EC Act as illustrated below.

6.4. In its application, the Applicant asserts that the approval of the application would promote the following objects of the EC Act:

Object of the Act	How the Applicant seeks to promote it
Section 2(h) - <i>"promote broad-based black economic empowerment with particular attention to the needs of women, opportunities for youth and challenges for people with disabilities"</i>	The Applicant asserts that its HDI ownership exceeds the minimum requirement of 30%, and, as such, the approval of the proposed amendment would promote Broad-based Black Economic Empowerment ("B-BBEE") of the Applicant's HDI shareholders.
Section 2(i) - <i>"encourage research and development within the ICT sector"</i>	The Applicant posits that it contributes significantly to the broadcasting sector because of the millions it has invested, and, if the Authority were to decline the proposed amendments, it might inadvertently undermine this object as the Applicant would be unable to sustain itself, and there may be another market failure in the form of another shattered AM talk radio station.
Section 2(j) - <i>"provide assistance and support towards human resource development within the ICT sector"</i> .	The Applicant states that it considers capacity-building as a key element of Primedia's legacy in the broadcasting sector, and is delighted that, as the only greenfield licence in Primedia's stable, it has been able to promote this object of the ECA. It further notes that its staff complement represents several communities in the Western Cape and includes several women.

<sup>10</sup> Section 10(1)(f) of the EC Act.

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

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

Object of the Act	How the Applicant seeks to promote it
<p>Section 2(k) - <i>"ensure that broadcasting services and electronic communications services viewed collectively, provided by persons or groups of persons from a diverse range of communities in the Republic"</i></p>	<p>The Applicant states that its HDI ownership exceeds minimum requirement of 30%, and, as such, the approval of the proposed amendment would promote Broad-based Black Economic Empowerment ("B-BBEE") of the Applicant's HDI shareholders.</p>
<p>Section 2(s) - <i>"ensure that broadcasting services, viewed collectively-</i></p> <p style="padding-left: 40px;"><i>(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;</i></p> <p style="padding-left: 40px;"><i>(ii) provide for regular –</i></p> <p style="padding-left: 80px;"><i>(aa) news services;</i></p> <p style="padding-left: 80px;"><i>(bb) actuality programs on matters of public interest;</i></p> <p style="padding-left: 80px;"><i>(cc) programs on political issues of public interest; and</i></p> <p style="padding-left: 80px;"><i>(dd) programs on matters of international, national, regional, and local significance;</i></p> <p style="padding-left: 40px;"><i>(iii) cater for a broad range of services...".</i></p>	<p>The Applicant states that it is the only MW commercial talk-radio station in the Western Cape, and, as such, it contributes significantly to the EC Act's objectives on diversity of services.</p>

Object of the Act	How the Applicant seeks to promote it
Section 2(w) - "ensure that broadcasting services are effectively controlled by South Africans".	According to the Applicant, it presently meets this object and promises to continue assisting the Authority in meeting this object.
Section 2(y) - "refrain from undue interference in the commercial activities of licensees while taking into account the electronic communication needs of the public".	<p>The Applicant is of the view that this is a vitally important object to bear in mind when considering applications for commercial licence amendment in terms of section 10(1)(c) of the EC Act – amendments requested by licensees – as commercial operators of broadcasting licences:</p> <ul style="list-style-type: none"> <li>(i) understand and have detailed knowledge of the commercial aspects of their licences; and</li> <li>(ii) understand the needs of audiences and of shareholders in a way that would be difficult 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.</li> </ul> <p>The Applicant further suggests that the Authority should only refuse its amendment application if it is convinced that there is no need for a commercial medium wave talk radio service in the Western Cape.</p>
Section 2(v) - <i>"ensure that commercial and community broadcasting licences, viewed collectively, are controlled by</i>	The Applicant states that its HDI ownership exceeds the minimum requirement of 30%, and, as such, the

Object of the Act	How the Applicant seeks to promote it
<i>persons or groups of persons from a diverse range of communities in the Republic”.</i>	approval of the proposed amendment would promote Broad-based Black Economic Empowerment (“B-BBEE”) of the Applicant’s HDI shareholders.
Section 2(z) of the EC Act states that one the Authority’s objectives is to: “promote stability in the ICT sector”.	The Applicant is proud of its record of commercial success in the challenging medium wave band, but is concerned that if the amendments were declined, that might inadvertently undermine section 2(z).

- 6.5. The Authority concurs with the Applicant that section 10(1)(c) of the EC Act<sup>11</sup> is applicable to the Applicant’s news provision, as it will allow it to be aligned to other individual commercial sound broadcasters who only provide 30 minutes of news with no obligation to provide a certain percentage of it as local news. Accordingly, this amendment will, in the Authority’s view, not prejudice the interests of other licensees.
- 6.6. Additionally, the Authority is of the view that section 10(1)(a)<sup>12</sup> is also applicable, as it allows the Authority to amend a licence for the purpose of ensuring consistency between similarly placed licensees.
- 6.7. Furthermore, in the Authority’s view, section 2(z)<sup>13</sup> of the EC Act is also applicable as the Applicant’s amendment application of its news will provide stability in the ICT sector by ensuring that the Applicant recovers from its financial distress and continues to provide broadcasting services.

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<sup>11</sup> “The Authority may amend an individual licence after consultation with the licensee- (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.”

<sup>12</sup> “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.

<sup>13</sup> One the Authority’s objectives is to: “promote stability in the ICT sector”.

## **7. WRITTEN REPRESENTATIONS AND RESPONSES**

### **Cape Town Radio (Pty) Ltd ("Smile FM") Representations**

7.1. By the closing date of 4 August 2021, both the Applicant and the Authority had received written representations from Smile FM objecting to the amendment by the Applicant. Smile FM states that it objects to both proposed amendments by the Applicant for the reasons set out below:

7.1.1. With respect to the amendment of Clause 4 in relation to the removal of the obligation to have talk on weekends, Smile FM contends that:

7.1.1.1. The Applicant is the only commercial talk station in the Western Cape Province and, as such, a change of this nature fundamentally changes the identity of the station.

7.1.1.2. The Applicant's assertion that it seeks to "play more music on weekends than is currently the case while ensuring that its Talk Radio Format stays exactly as is during the week which is when most of its listeners engage in talk radio." is not entirely correct. Smile FM is of the view that the proposed amendment as currently formulated means that the Applicant does not need to broadcast any talk at all on the weekend.

7.1.1.3. The Applicant's assertion that the amendments are necessary if it is to remain financially viable as an AM commercial station is in direct contradiction to the Applicant's response in its complaint against both LM Radio and Magic FM, which are commercial sound broadcasters broadcasting on AM frequencies ("the AM stations"). Smile FM alleges that, in response to the Applicant's complaint against the AM stations, in relation to the difficult economic position of the AM stations, the Applicant indicated that the proposed amendments by LM Radio and Magic FM will directly affect Primedia stations in terms of profitability.

7.1.1.4. Although the Applicant's argument is based on a complaint about whether or not those radio stations are allowed to "simulcast" their programming, in essence its concern is self-serving as the Applicant is saying that no station



should be able to reduce costs if to do so affects its own profitability and no station should be able to reduce its costs if that means it might reduce the Applicant's profitability, but that is exactly what it wishes to do through this amendment. Smile FM is of the view that the arguments put forward by the Applicant in its application are focused on its economic wellbeing, not a need, or public good.

- 7.1.1.5. The Applicant's statement in paragraph 2.2 of Appendix 3.2 of its application, which states that: *"The Covid-19 Pandemic has been particularly devastating for Cape Talk which has always been at best a marginal station"*, is incorrect. Smile FM believes that, as part of the largest group of radio stations in South Africa - which in its view are only business units and not self-standing or separate companies and as such should be considered holistically - it is likely that all the stations including Cape Talk enjoy the benefits of Primedia's dominance<sup>14</sup> in sound broadcasting.
- 7.1.1.6. Smile FM indicated that the Applicant is *"The home of premium radio stations: 947, 702, KFM, and Cape Talk, award-winning news radio station from EWN, as well as social initiatives, Lead SA and Crime Line, Primedia Broadcasting represents big brands, big personalities and attracts lucrative audiences"*<sup>15</sup> Smile FM therefore, believes that the Applicant has not been affected by COVID-19 pandemic to the extent that its dominant position in the commercial sound broadcasting market has significantly diminished.
- 7.1.1.7. The Applicant was granted an exemption in terms of the previous South African Content Regulations because it is a talk-based station, in terms of

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<sup>14</sup> Smile FM uses the definition of 'dominance' as per section 7 of the Competition Act, 89 of 1998 ("Competition Act") that states, *"A firm is dominant in a market if (a) it has at least 45% of that market; (b) it has at least 35%, but less than 45% of that market, unless it can show that it does not have market power; or (c) it has less than 35% of that market but has market power."*

It further quotes the EC Act definition of "significant market power", in section 61 (5) *"A licensee has significant market power in a market or market segment if that licensee (a) is dominant."* Smile FM notes that *"both definitions end up at the same place — which is the definition of market power with reference to market share. In the case of commercial sound broadcasting, the relevant markets can be considered to be both listeners and advertising revenue."* Smile FM maintains that Primedia holds the lion's share of both markets.

<sup>15</sup> Smile FM attached a slide presentation for advertisers for 2019, which states that *"81% of the Cape Talk audience is in SEM 9 — 10 and 52% listen exclusively to Cape Talk."*

which it is allowed to reduce its obligation to 15% of SA music content rather than 35% as stipulated in regulation 3(2) of the SA Music Regulations, 2016. Smile FM is concerned that if the amendment to Clause 4 is granted, the exemption subsists, meaning that the Applicant will not be obliged to meet the 35% requirement and will be competing against other commercial music stations for music listeners over the weekends, without having to comply with less onerous obligations than other stations;

- 7.1.1.8. It seems presumptuous for the Applicant to argue that listeners' requirements can be so definitively determined as between weekends and weekdays, talk and music. Smile FM is of the view that there are doubtless listeners who tune into the Applicant for talk on weekends and posits that this is confirmed in the Applicant's own advertising offering. Additionally, although Smile FM agrees that current affairs may attract less attention during public holidays and weekends, there are other 'types' of talk programmes that remain relevant to a loyal talk radio audience during those periods, such as lifestyle, profile interviews, cultural talk topics, nation building, NGO involvement, sport, art, literature, and the performing arts;
- 7.1.1.9. The argument sought to be advanced by the Applicant under section 10(1)(a) of the EC Act, is totally irrelevant to this amendment and cannot be compared to the amendment of any other individual licence. According to Smile FM, there is no legal basis on which to grant this amendment, and the Applicant's application does not offer any support for the contention that the amendments will make its licence conditions consistent with the terms and conditions *"being imposed generally in respect of all individual licences of the same type."*
- 7.1.1.10. The Application is silent on the details of its music offering to ensure diversity which is - according to Smile FM - a key objective of the EC Act as provided in Section 2(k). If the amendment is approved, the Applicant will own two (2) commercial broadcasting licensees which will broadcast music in the same area. Smile FM is of the view that the Applicant's statement that its music offering will not be the same as its commercial music station, KFM, which broadcasts on the FM frequency in the same area. The Applicant has offered no indication of the type of music format it proposes (other than it will not

include local content) nor does it indicate how it will, as a result of this amendment, ensure diversity; and

7.1.1.11. The information provided in the Application is surely inadequate for the Authority to consider how this amendment will advance diversity provision to the audience Cape Town audience. Smile FM is also of the view that it is inadequate to sustain the argument that *"the application will not prejudice the interests of other licensees"*, which phrase is, in any event, taken out of context.

7.1.2. With respect to the amendment of Clause 5.2 in relation to the requirement to provide 50% local news, Smile FM contends that:

7.1.2.1. removing this obligation in its entirety could result in more syndication and simulcasting by Primedia, specifically in relation to 702 and Cape Talk. It further notes that programming on Cape Talk is already syndicated from 18h00-24h00 from 702. Additionally, Smile FM is of the view that there would be a loss of jobs for Cape Town-based staff, and local news serving the Cape Town community. which could alienate the local Cape Town audience and will obviously dilute diversity in the market;

7.1.2.2. if times have changed and audiences no longer want the same talk content, then the Authority should take consumer interest into account when considering the amendment. It, however, notes that, in terms of the ICASA 2020 Compliance Report for Cape Talk for the period 2018/2019, in relation to the obligation contained in its licence *"567 cape Talk's local news constitute(s) more than fifty percent (50%) of its overall news component. Most of the stories broadcast were from in and around the Western Cape area."*;

7.1.2.3. talk content is still in demand and local news is still highly desirable as indicated in early 2021 studies from the Broadcasting Research Council. In addition, Smile FM states that, the EC Act, in section 2(s)(i), (ii)(aa) and (ii)(dd), contains a peremptory requirement that broadcasters should provide programmes to the public on matters of international, national, regional and local significance. This is not a requirement that the Authority can ignore as it is the primary legislation that it is bound to uphold.

- 7.1.2.4. the Applicant's talk obligation is in fact what it relies on distinguish itself from other licensees, as per its website where it states that: *"Cape Talk is a premium multimedia platform that is inspired to empower its audience through honest, truthful and insightful conversations...Cape Talk is the talk station that connects audiences to their community, their city and beyond."*
  
- 7.1.2.5. the Applicant's argument in its application in relation to the importance of local news is confusing, and posits that, if the Applicant believes that the provision of local talk is so important, distinctive and so obvious to its format, then why are they amending the clause.
  
- 7.1.2.6. although the Applicant's contention in Paragraph 4.4 of Appendix 3.2, that its 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"*, is correct, the Applicant is not the same as other licensees and has not advanced sufficiently persuasive legal or factual arguments as to why it should be permitted to vary its format in the proposed manner
  
- 7.1.2.7. Smile FM further argued that the early 2021 Broadcasting Research Council study has shown that talk is still content that is in high demand and that local news is still highly desirable.<sup>16</sup> In this regard, Smile FM attached results of a market study into the content listened to on the radio commissioned by the Broadcasting Research Council conducted in early 2021. The attached report of listening trends on radio submitted by Smile FM indicates that 74% of listeners prefer music followed by news at 70%. The report does not show any information on the local news.

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<sup>16</sup> Smile FM submission, page 7, paragraph 2.5.

## **The Applicant's response to the Representations**

7.2. The Applicant responded to the objections made by Smile FM in its representations on 11 August 2021, and asserts that:

- 7.2.1. it does not intend to completely cut out broadcasting talk radio on weekends and public holidays, but rather to reduce it to a maximum of 20% of the performance period i.e., to broadcast 3.6 hours of talk radio during the performance period during weekends and public holidays;
- 7.2.2. it is not applying to become a music station, but rather for a relaxation of its talk obligations on weekends and public holidays only to better respond to changing audience tastes and to reduce costs in exceptionally tough economic climate as per confidential statements submitted to the Authority in support of the application.
- 7.2.3. the proposed amendments are nothing new as its talk/music obligations are measured over a week and therefore the station already broadcasts a more music-intensive offering on weekends than on weekdays in line with its existing licence conditions. Therefore, Smile FM's averments that there is no indication of how it will contribute to diversity is – in the Applicant's view – disingenuous, as no change in the format obligations in respect of Mondays to Fridays (excluding public holidays) has been applied for;
- 7.2.4. with respect to the reference made by Smile FM to the complaint lodged at the Complaints and Compliance Committee ("CCC") against the ongoing simulcasting of over 90% of their programming by Magic and LM Radio, it is of the view that CCC processes have no relation or relevance to the amendments applied for;
- 7.2.5. the averments made by Smile FM that "*the amendments requested are not based on need or public good*" are incorrect, and it reiterates that any station that is not viable is unsustainable in the long run. The fact that such a station is part of a larger group of stations is irrelevant to the question of the sustainability of that station. The Applicant states that the application is in

respect of a single station, namely Cape Talk, and the profitability of that station and not the Primedia group as a whole;

- 7.2.6. the Authority should avoid regulating for market failure where it could;
- 7.2.7. the claim relating to the Applicant's "dominance" in respect of talk and music radio is incorrect as Primedia does not exercise market power in the commercial radio market or in any other market."<sup>17</sup> The Applicant further states that, as it broadcasts on a medium wave frequency in a commercial radio market dominated by FM stations, it can in no way be described as dominant;
- 7.2.8. it would be wrong in law for the Authority to take Smile FM's approach that "*each station need not be considered on its own*" as this is not how the broadcasting statutory and regulatory regime is set up. The Applicant is of the view that each licence is in respect of a particular service/station which is required to comply, independently, with its legal obligation, whether in terms of statute, regulations or licence conditions;
- 7.2.9. Smile FM's objection which refers to listenership figures for KFM, 702 and 947 is not, in the Applicant's view, relevant, as the amendment application submitted to the Authority is for Cape Talk and not other Primedia's stations;
- 7.2.10. the allegation by Smile FM that the Applicant does not now, nor will it comply with the SA Music Content Regulations<sup>18</sup>, is incorrect. The Applicant states that it complies with the requirement that least 35% of all music played on the station constitutes South African music as defined in the EC Act and in the SA Music Content Regulations. It further notes that the exemption applicable to all talk stations in terms of the previous SA Music Content Regulations is no longer applicable and, as such, it does not presently operate under the exemption. The Applicant indicated that it cannot answer for any indications to the contrary made by ICASA's compliance report in the 2020 Cape Talk Annual Compliance Report;

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<sup>17</sup> Cape Talk response to Smile FM's submission - page 2, paragraph 5.4.1.

<sup>18</sup> Published under Government Notice 344 in *Government Gazette* 39844 of 23 March 2016.

- 7.2.11. the audience research done on the appropriate balance of talk/music mix on weekdays vs weekends and public holidays was provided to the Authority in the confidential bundle. The Applicant further notes that it understands the importance of news and invests heavily in it – more so than any other station – and that the research graphs relied on by Smile FM in its objection do not provide granular detail as what kind of news the Applicants audience requires;
- 7.2.12. Smile FM’s averments on the implications and requirements of section 10 of the EC Act are - in the Applicants view - unsound in law. It further indicates that it provided responses to all the required aspects of the amendment application form (Form C) which require an applicant to discuss the implications of any amendments regarding sections 10(1)(a), (b), (c), (d) and (f);
- 7.2.13. Smile FM’s contention that section 10(1)(c) of the EC Act relates only to amendments being applied for in respect of frequency changes is flawed. The Applicant puts forward the following arguments to support its view:
  - 7.2.13.1. Section 10(1)(c) of the EC Act clearly envisages that amendments requested by a licensee may be granted by the Authority provided they will not militate against orderly frequency management and will not prejudice the interests of other licensees. The Applicant is therefore of the view that the second requirement would be entirely superfluous if it were only to qualify the first;
  - 7.2.13.2. The EC Act would have created an impossible lacuna if section 10(1)(c) was interpreted to relate only to spectrum issues, as it would mean that the only possible amendments which could be requested by a licensee would be those relating to spectrum issues. That would – in the Applicant’s view - throw the entire electronic communications sector into chaos; and
  - 7.2.13.3. The effect of the proper interpretation of section 10(1)(c) *“as ICASA and its forerunner, the IBA, has consistently done since the transition to democratic broadcasting 27 years ago is that amendments that do not involve spectrum issues can still be rejected by ICASA if they prejudice the interests of other licensees.”*
- 7.2.14. The Applicant is aware of the legal limits of programme sharing and syndication, and has never been found by the Authority to have violated the syndication regulations, and, as such, Smile FM’s objection that the

amendment "*will open the door for Cape talk to be syndicated with its Johannesburg-based sister station 702.*" is misplaced;<sup>19</sup>

- 7.2.15. The allegation by Smile FM that the Applicant's broadcast portfolio includes EWN is incorrect as EWN is not a broadcaster and does not operate under the legislative and/or regulatory structures applicable to broadcasting licensees;
- 7.2.16. The Applicant noted the repeated use by Smile FM in its objection of an advertising presentation that the Applicant produced in 2019. In this regard, the Applicant stated that the presentation was made prior to the COVID-19 pandemic which has irrevocably changed the media landscape both locally, internationally and in South Africa;
- 7.2.17. With respect to Smile FM's assertion that the amendment has no bearing on the promotion of section 2(h) of the EC Act, which speaks to BBBEE, the Applicant argues that the amendments to the licence would restore the station to profitability, which is obviously in the interests of its BBBEE shareholders;
- 7.2.18. The Applicant indicated that in relation to further investment in the station, it has merely stated the obvious, being that it is presently not viable and that commercial investors will not continue to remain invested in a non-viable business. The financial statements demonstrating the non-viability of the station were submitted to the Authority on a confidential basis;
- 7.2.19. The Applicant denies the allegation by Smile FM that, if the amendments were approved, it would have "*a severely detrimental effect on the commercial sound broadcasting market in Cape Town and its surrounds.*"<sup>20</sup> It is the Applicant's view that any adversity affecting the commercial sound broadcasting market in Cape Town cannot be attributed to the amendments as is demonstrated by the lack of any objections from commercial and public-commercial broadcasters operating in the Western Cape other than Smile FM. It further noted that Smile FM has failed to demonstrate how the proposed amendments would prejudice it.

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<sup>19</sup> The Applicant's response to Smile FM's submission - page 5, paragraph 6.3.

<sup>20</sup> The Applicant's response to Smile FM's submission - page 7, paragraph 9.



- 7.2.20. The Authority has considered the written representations made by Smile FM and the Applicant's responses. Regarding the amendment to format, the Authority concurs with Smile FM that, should the amendment to broadcast 80% music on weekends and public holidays be granted, the Applicant's identity will drastically change. The Authority is of the considered view that the proposed 80% music is four times more than the currently allowed maximum. There are already music radio stations in the radio station's service area. Listeners looking for music have more than one option.
- 7.2.21. The Authority further engaged with the Applicant and suggested that the Applicant consider reducing the proposed percentage of music. However, the Applicant was not amenable to modify the 80%. The Authority also considered the Applicant's submission post engagement with the Applicant, and was not satisfied with the response that 40% of the 80% of music on weekends and public holidays shall be South African music:
  - 7.2.21.1. there is no reduction in the 80% music format;
  - 7.2.21.2. the Applicant failed to indicate what genres will it play if it goes for this type of format as proposed.
- 7.2.22. In the Authority's assessment, if approved, this will result in unfair advantage to other stations which will be competing with the Applicant on weekends and public holidays. On this basis, the Authority was of the view that the Applicant be refused to play only 80% music on weekends and public holidays.
- 7.2.23. The Authority noted the argument by Smile FM that the financial performance of the Applicant should not be separated from Primedia. However, in the Authority's assessment, each station's financial performance under Primedia should be assessed on its merit, independent of Primedia's stations as a stable.
- 7.2.24. Smile FM is incorrect in stating that the Applicant is currently exempted from complying with the SA music quota as stipulated in the Regulations and that the Applicant will not comply with the Regulations. The Applicant is enjoined to comply with the minimum 35% local music quotas. In its Reasons Document for the 2016 Local Content Regulations, the Authority stipulates that regulation 2 of the Regulations applies to all sound broadcasting licensees including those

who devote less than 15% of their broadcast time during performance period to music.

- 7.2.25. The Authority noted the issue raised by Smile FM regarding the complaint brought before the Authority by Primedia against LM Radio and Magic FM. However, this is a separate matter which has no bearing on the Applicant's amendment application.
- 7.2.26. In terms of the proposed deletion of news, the Authority noted Smile FM submission that there is a need for local news. However, the Authority has considered that this obligation of providing local news is not included in other individual licensees of the same type as the Applicant. Smile FM has failed to demonstrate that the provision of 50% local news by the Applicant would adversely affect the Applicant's listeners or the broadcasters in the Western Cape. The listening trends research provided by Smile FM commissioned by the Broadcasting Research Council did not reveal that listeners are mostly attracted to local news.
- 7.2.27. Based on the foregoing, the Authority recommended that the Applicant's proposed amendment on local news be granted, except for the 80% music on weekends and public holidays.

## **8. ANALYSIS OF THE REASONS FOR AMENDMENT**

- 8.1. Having considered the above reasons provided by the Applicant for the proposed amendments, the Authority decided as follows:

### **8.1.1. Clause 4 (Music on Weekends and Public Holidays)**

- 8.1.1.1. With respect to the arguments relating to the cost of production of talk radio, the Authority is satisfied with the reasons provided and supporting documentation relating to the Applicant's financial situation.
- 8.1.1.2. In terms of audience preferences over the weekend, the Applicant submitted a Radio Audience Measurement Survey, reflecting a decline in listenership of the radio station during weekends. Although the survey demonstrates that

the Applicant's listeners have little interest in talk programmes over the weekends and public holidays, the Authority has considered that the Applicant is licensed as a talk radio station. The Applicant's proposed 80% music programming is four (4) times more than the currently allowed maximum of 15%.

- 8.1.1.3. Further, the Authority is obligated to ensure diverse programming, and there are already music radio stations in the same area as the applicant, namely Magic FM and the Applicant's sister station, KFM. Therefore, diversity amongst the broadcasters will not be realised on weekends and public holidays if the Applicant's amendment as proposed is granted.
- 8.1.1.4. The Authority engaged with the Applicant to discuss whether the Applicant might consider modifying its proposed 80% music programming format for weekends and public holidays. The Applicant subsequently submitted an updated proposal wherein it proposed that 40% of the 80% of music on weekends and public holidays shall be South African music.
- 8.1.1.5. The Authority noted that the updated proposal still did not address the Authority's fundamental concern that the Applicant is proposing to play 80% music programming overall on weekends and public holidays; and, therefore, playing 40% of South African music as proposed does not reduce the overall 80% music programming to be played.
- 8.1.1.6. The Authority further considered that section 10(1)(a) requires the Authority 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. In that regard, if 80% of music is approved for a talk radio station, other talk stations would likely apply for the same amendment, and there would be no diversity in the market.
- 8.1.1.7. Accordingly, in the Authority's considered view, should the amendment to broadcast 80% music programming be approved, it would result in a lack of diversity of radio services available in the Western Cape area and will prejudice the other licensees licensed as music radio stations broadcasting in the same area in terms of listenership and advertising. Section 10(b) requires

the Authority to ensure that there is fair competition between licensees. It is the Authority's view that a talk radio station should compete with another talk radio station and not with other music radio stations.

- 8.1.1.8. Considering the above, the Authority rejected the amendment sought by the Applicant in terms of format (broadcast 80% of music on weekends and public holidays). Section 10(f) requires the Authority to satisfy itself that the amendment is necessary to ensure the achievement of the objectives of the EC Act. The Authority is of the view that none of the objects of the EC Act would be realised if the Applicant's format to broadcast 80% music on weekends and public holidays is approved.

## **8.2. Clause 5.2 (Deletion of 50% Local News Requirement)**

- 8.2.1. In considering this proposed amendment, the Authority noted that other similarly placed licensees are not required to broadcast news from their area of broadcast, but rather the clause relating to the provision of news only specifies the percentage of news that would be carried by the Licensee.
- 8.2.2. The Authority is therefore of the view that the thirty (30) minutes of news that the Applicant currently provides each day is in line with similar clauses for other commercial sound licensees, notably Classic FM, Heart FM and iGagasi FM amongst others. Further section 10(1)(c) of the EC Act states that "*the Authority may amend an individual licence after consultation with the licensee - 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.*" The Authority is of the view that by amending clause 5 of the Applicant's licence, interests of other licensees will not be prejudiced.
- 8.2.3. The Authority further considered that section 10(1)(a) of the EC Act requires the Authority 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. By removing the local news obligations on the Applicant's licence, the Applicant would provide news same as other licensees of the same type.

- 8.2.4. Additionally, Section 2(s) (ii)(aa) of the EC Act stipulates that one of the primary objectives of the EC Act is to:

*"ensure that broadcasting services viewed collectively -*

*...*

*(ii) provide for regular-*

*...*

*(aa) news services;"*

- 8.2.5. Having considered the fact the Applicant has been financially affected by the changes in the environment such as the COVID-19 Pandemic, together with the high costs of sourcing local news, and the fact that other licensees do not have a specific clause that requires them to offer local news, the Authority approved the deletion of clause 5.2.

- 8.2.6. The Applicant further requested that clause 5.1 be amended to include the following:

*"which news, measured over the period of a day, is to cover local, national and international news".*

- 8.2.7. The Authority considered the request from the Applicant and was of the considered view that this proposed amendment is reasonable as the Applicant will still carry local, national, and international news without the obligation to carry 50% local news. The amendment of Clause 5.1 was granted as requested.

## **9. CONCLUSION**

- 9.1. The Authority considered the proposed amendments and reasons provided by the Applicant and noted the following:

- 9.1.1. The Applicant's proposal to broadcast 80% music programming on weekends and public holidays if granted, will not contribute to diversity of music

programming as envisaged in the EC Act, because there are already music radio stations in the Western Cape Province.

- 9.1.2. As a result, these music radio stations will be prejudiced by a talk radio station on weekends and public holiday, thus resulting in unfair competition amongst broadcasters of the same type. The Authority took into consideration section 10(1)(a), (c) and (f) of the EC Act to come to its decision.
- 9.1.3. The Authority was satisfied with the reasons provided by the Applicant regarding the proposed amendment of clause 5 (programming obligations). It is the Authority's view that the amendment will ensure viability and stability for the Applicant. On this basis, the Authority decided that clause 5 should be amended as proposed by the Applicant. The Authority came to its decision with regards to the amendment of clause 5 by considering section 10(1)(a) and (c) of the EC Act.

## 10. THE AUTHORITY'S DECISION

The Authority decided on the Applicant's amendment I-CSBS licence as follows:

Existing clause 4	Proposed amendment to clause 4
<p><b><u>"4. Format:</u></b></p> <p><i>A talk-based service with a maximum of fifteen percent (15%) music programming."</i></p>	<p><b><u>"4. Format:</u></b></p> <p><i>A talk-based service with a maximum of fifteen percent (15%) music programming.</i></p> <p><i>4.1 a maximum of fifteen percent (15%) music programming on weekdays, that is, Monday to Friday excluding public holidays; and</i></p> <p><i>4.2 eighty percent (80%) music programming on Saturdays, Sundays and public holidays.</i></p> <p><i>4.3 40% of the 80% music programming on Saturdays, Sundays and public holidays shall be South African Music."</i></p>

**Decision:**

The Applicant's proposed amendment was rejected.

**Existing clause 5****"5. General Programming Obligations**

- 5.1 The Licensee shall broadcast news on a regular basis for a minimum of thirty (30) minutes each day between 05h00 and 23h00;
- 5.2 Local news shall constitute at least fifty percent (50%) of its total news component; and
- 5.3 Should the Licensee source news material from a source other than itself, the source(s) thereof shall be disclosed during news broadcast."

**Proposed amendment to clause 5****"5. General Programming Obligations**

- 5.1 The licensee shall broadcast news on a regular basis for a minimum of thirty (30) minutes each day during the performance period, which news, measured over the period of a day, is to cover local, national and international news.
- 5.2 Should the Licensee source news material from a source other than itself, the source(s) thereof shall be disclosed during the news broadcast."

**Decision:**

The Applicant's proposed amendment was approved.



**DR CHARLES LEWIS**  
**ACTING CHAIRPERSON**

**DATE:** 19 / 8 / 2022