



29 Stiglingh Road,
Edenburg 2191
082-3701266

RESPONSE TO OBJECTIONS TO THE TRANSFER APPLICATIONS

ICASA
Licensing Unit
Attention: the Chairperson, Professor Charley Lewis
Copy: Ms Fikile Hlongwane and the Licensing Unit
By email: fhlongwane@icasa.org.za; chairperson@icasa.org.za; and licensing@icasa.org.za

11 July 2023

A copy of this letter will be delivered to:

Dr BD Koma
Veteran Broadcasters Forum
By email: pduplessis1@gmail.com and komab@ymail.com

and

Mr Peter Wassenaar
Kriek Wassenaar and Venter Inc
3rd Floor, HB Forum Building
13 Stamvrug Street
Val de Grace
Pretoria, 0184
By email: peter@kriekprok.co.za

Dear Sirs

RESPONSE TO OBJECTIONS RAISED IN RELATION TO THE TRANSFER OF OWNERSHIP OF THE INDIVIDUAL COMMERCIAL SOUND BROADCASTING AND RADIO FREQUENCY LICENCES OF EXTRISERVE PTY LTD (IN BUSINESS RESCUE) TO MEDIADYNAMIX PTY LTD

The application for transfer of the licences of Extriserve Pty Ltd (in business rescue) ("Extriserve"), represented in this transaction by Mr George Nell, the business rescue practitioner, was objected to by two entities:

1. the office of Dr Bernard D Koma, alternatively Bagaka Community Radio Service, alternatively, the Veteran Broadcasters Forum, collectively referred to as "**Bagaka**"; and

Directors: LB Johnstone; L Benn; KR Perritt; AA Johnstone

2. attorneys for Leninamix Pty Ltd (“Leninamix”), T&W Management Pty Ltd (“T&W”) and LM Radio Pty Ltd (“LM Radio”), collectively referred to as **“the legal representatives”**.

As the Bagaka submission was short, we propose to include a response to both submissions in this letter for convenience.

The transferee in this application is Mediodynamix Pty Ltd (“Mediodynamix”). This response is submitted by Mediodynamix.

1. Response to Bagaka

1.1 The objection is said to be made by various parties on behalf of other parties so it is not easy to discern which of the parties has an interest in the application. However, as paragraph 4 on page 1 states that “In terms of an agreement, BAGAKA RADIO will be adopted by EXTRISERVE with the aim of empowering this service”, we assume that it is the licensee that is the objector.

1.2 If this is the case, we assume the licensee is aware of the process for the transfer of a licence, which is the process Mediodynamix is involved in now, which Bagaka objects to. It is not possible to be “adopted” as suggested by Bagaka.

1.3 There are several reasons why this reference is important:

- 1.3.1 Licences must be transferred on application and subject to ICASA’s approval and therefore an agreement to “adopt” a licensee is not possible. It is therefore not a valid ground of objection to state that Bagaka objects on the basis that it is being “adopted” by Extriserve (in business rescue).
- 1.3.2 We have been an interested party in the business rescue process since its initiation and we are not aware of the business rescue practitioner having approved any agreement with Bagaka or anyone else in relation to the activities mentioned by them in paragraph 4 on page 1 of their objection. In fact, given that Extriserve remains in business rescue, it does not appear to be legally possible to conclude any such agreement and Bagaka does not provide any proof of this. We attach a letter from the business rescue practitioner for Extriserve confirming that there is no such agreement. This ground of objection is irrelevant.
- 1.3.3 Mediodynamix is an empowered entity. This is one of the most important criteria for the success of an application for transfer of a licence. The status of Bagaka or Extriserve in this regard is irrelevant to this application and so this ground of objection is also irrelevant.
- 1.3.4 The business rescue practitioner has approved the transaction in terms of which the assets of Extriserve, being its commercial sound broadcasting and radio frequency spectrum licences, are being transferred to Mediodynamix if this transaction is approved by ICASA. If our application is approved, Extriserve will cease to be a licensee. As a result, the objection set out on page 2 is irrelevant to our application because to our knowledge, Bagaka has no legal claim to the Extriserve licences and Extriserve is in the process of transferring its licences to Mediodynamix.
- 1.3.5 Finally, the 4 bullet points set out on page 4 of the objection are not a consequence of the transaction between Extriserve and Mediodynamix at all, but an unrelated matter which has no bearing on the transfer application.

1.4 In the circumstances, the arrangements between Extriserve and Bagaka are not germane to our application nor do they have any bearing on it whatsoever. We respectfully submit that the objection should be dismissed.

2. Response to the legal representatives

2.1 At the outset we note that there appears to be confusion as to the nature of the transaction that gave rise to the transfer application. Pursuant to the business rescue process in relation to Extriserve (the shareholder of LM Radio Pty Ltd), the licences held by Extriserve in relation to the commercial sound broadcaster (radio station) called “LM Radio” were sold to Mediadynamix in a transaction approved by the business rescue practitioner. The licences can only be transferred on application to ICASA, with ICASA’s approval, in terms of section 13 of the ECA read with the Process and Procedure Regulations, 2023 which amend the Process and Procedure Regulations, 2010. It is the transfer application that is the subject of the public consultation process launched by ICASA on 9 June 2023, when the application was notified to interested parties by publication in the Gazette.

2.2 In the document lodged with ICASA and ourselves by the legal representatives:

2.2.1 paragraph 2.1 states that *“Leninamix took a majority interest in T&W Management during the business rescue proceedings of T&W Management, which has now been successfully completed to secure control over and rescue the LM Radio station. The procurement of T&W Management specifically included the takeover of all the business and interests of LM Radio as a commercial radio and music station and as an independent business and brand”*; and

2.2.2 paragraph 2.2 states that *“T&W Management owns 100% of all shares issued in LM Radio Pty Ltd, the owner of the LM Radio trademarks. T&W Management is the LM Radio brand station operator, licensed by LM Radio Pty Ltd and Extriserve. T&W Management is also a shareholder in Extriserve”*.

2.3 The so-called “radio station” named LM Radio is not the subject of this transfer application. This application is only relevant to the transfer of the commercial sound broadcasting and radio frequency licences in the name of Extriserve, in business rescue, pursuant to a transaction approved by the business rescue practitioner in which Mediadynamix purchased the two licences.

2.4 This application does not seek to deal with trademarks or the former LM Radio station.

We turn now to deal with the objection under the heading **“Defective Notice in the Government Gazette”**.

2.5 First, the legal representatives have stated in paragraph 7 that ICASA has failed to “set out the proposed licence conditions that will apply to the licence” and therefore that the Notice is defective.

2.5.1 This indicates a misunderstanding of the nature of a transfer of licence application and suggests that the legal representatives have not read the full application. This is because a transfer application means that the licences, as they stand (and if the application is approved) are transferred as is, with the conditions that attach to the licences in the form in which they are issued to Extriserve, alternatively LM Radio Pty Ltd. This means that the licence conditions are indeed set out in the Notice.

2.5.2 More importantly, this objection is an objection to the process followed by ICASA rather than the application made by Mediadynamix and we do not need to respond further.

2.6 Second, in paragraph 8, the legal representatives state that, “*the Objectors deem the application to be a veiled application of the transfer of the licence to a new commercial radio station and not a continuation of the current LM Radio. Accordingly, the Objectors require clarification from the Authority regarding the content, scope and nature of the specific proposed conditions, whether new or continuing, which will apply to the applicant on the potential success of the application.*”

2.6.1 There are several responses that can be made to this statement but we mention just two. This is not the appropriate forum for a request of this kind, as the legal representatives should know.

2.6.2 Although the first sentence is difficult to understand, reference to a “veiled application to a new commercial radio station” seems to have nothing to do with the allegation that the licence conditions have not been published, and therefore is irrelevant to the objection set out in the heading.

2.7 Paragraphs 10 to 13 restate the objection on the basis that the Notice is defective. As we note in point 2.6 above, this has nothing to do with our application and accordingly we do not address it further as we assume ICASA will deal with this.

The next heading in the objection is “**No transfer of LM Radio Business**”. We deal with this below.

2.8 Since this application is provided for in section 13 of the ECA and in the Process and Procedure Regulations, which require the applicant and transferee to complete Form G, which we have done, it seems that the legal representatives have again misunderstood the nature of the application. They say, “*The applicant’s application has not sufficiently contextualised the nature of the transfer from Extriserve to the applicant*”.

2.8.1 The applicant is Extriserve, represented by the business rescue practitioner, and the transferee is Mediadynamix, as indicated by the relevant sections of Form G and our covering letter. The legal representatives have confused the parties in paragraph 14.

2.8.2 Mediadynamix has not sought to acquire the business of LM Radio, but only the licences. We agree with paragraphs 14 and 15 and it is quite clear from the application that we have every intention of creating our own business as a commercial sound broadcaster and have secured funding to do so if the licences are transferred. This type of transaction happens frequently in both the broadcasting and electronic communications sectors and is a legitimate way of entering the market as a new entrant and an investor, which increases competition in the market and affords the listener more choice.

2.8.3 Paragraph 16, 17 and 18 are irrelevant to the application because the application has nothing to do with the business of LM Radio. The applicant is Extriserve and the transferee in this application is Mediadynamix. The transferee has no relationship to LM Radio and does not intend to create such a relationship as we intend to create a new radio station.

2.8.4 Paragraph 19 states that “*...the commercial and proprietary rights of the Objectors have been infringed upon, as a result of which the Objectors directed their attorneys to request that the Authority provide them with access to all portions of the so-called confidential portion of the applicant’s application that refer to or make reference to LM Radio and/or the format, programming, advertiser base, listener profile and corporate and marketing strategies of LM Radio...*”.

Directors: LB Johnstone; L Benn; KR Perritt; AA Johnstone

- (a) This assertion contains some defamatory statements and we are advised that we should reserve our rights in this regard which we do.
- (b) The Objectors do not have any grounds on which to claim that they should inspect potential competitor materials including our business plan and strategy. The writer was, as the Objectors confirm, the Managing Director of LM Radio as it was, until April 2023, and prior to that I have held positions with major stations around South Africa for more than [20] years. I am highly experienced and familiar with the operations of a radio station and there is no restriction in operation on my ability to ply my skills in the commercial sound broadcasting market. I have been in radio almost all my adult life and I intend to continue to be in radio. It is what I know. Most radio stations operate along similar lines, as do competitors in most regulated industries including banking, insurance, mining and telecommunications. There is no escaping the fact that running a business in a particular industry will inevitably mean that the business is structured along similar lines. What distinguishes a good, successful or competitive business from others in the industry is experience, quality, innovation, strategy and also access to investment. This does not mean nor do we admit that any part of the application is based on the “proprietary information of LM Radio in an attempt to pass the applicant’s new commercial radio station off as being the same as, or comparably similar to, that of LM Radio.”
- (c) It bears noting that in relation to format, the most common format in South Africa and internationally, is an “adult contemporary” format. A review of the commercial sound broadcasting stations in South Africa reveals the following:
- i. the KFM format provides that it *“shall have a programming format of talk and music in an **adult contemporary** format providing a mix of music and information (including coverage of community affairs)”*;
 - ii. The Good Hope licence provides that *“it shall be a sound broadcasting service in **Contemporary Hit Radio** Rhythmic format...[and it] shall take reasonable steps to provide programming that reflects the cultural and tradition [sic] needs of its audience”*;
 - iii. Smile’s licence provides that *“...the music to be broadcast will include amongst other genres, South African Pop, South African Afrikaans music, International Pop and International Gold”*;
 - iv. Kaya’s licence requires it to offer an *“African-focussed **adult contemporary jazz** music format”*;
 - v. Jacaranda’s licence requires it to offer *“music in an **adult contemporary** or golden oldies format providing a mix of music and information that is community-based”*;
 - vi. Power FM has a format that is described as *“a full-service **adult contemporary** talk radio station with up to 70% of the airtime devoted to talk and at least 30% to music”*;
 - vii. Gagasi FM (a Kagiso station) is described as being required to *“have a programming format of music in an **adult contemporary jazz** format”*. An historical ICASA compliance report notes that Gagasi complies with its licence in this respect as it plays *“R&B with Rock influences, Soul, Pop and Easy Listening”*. In the 2018 compliance report, ICASA refers to Soul as “Classic Soul”. We are not sure what the difference is but again, it would seem that ICASA allows significant latitude in assessing compliance with formats;
 - viii. Heart FM has as its format *“**adult contemporary jazz**”*;
 - ix. OFM has *“a programming format of music in an **adult contemporary** format...”*; and

- x. the format of East Coast Radio which operates in KwaZulu Natal, is “a programming format of music in an **adult contemporary** format”.
- (d) The choice of a format is based on listener preferences, what works for a listener base in a particular area. The more listeners a station can attract, the more advertising it is likely to attract. However, as can be seen from (c) above, having the same or a similar format as another station is hardly a bar to attracting listeners or advertisers. There is no legal prohibition on this and no one can patent or copyright a format anywhere in the world. In most regions in South Africa there are overlapping coverage areas i.e. areas in which more than one radio station can be heard, and this ensures that listeners have a choice – to listen to their preferred DJs, programmes, music, news and other entertainment. Radio 5 overlaps with 947 which also overlaps with Hot 1027 FM and even Jacaranda, and similar music (sometimes the same songs) are played by all of these stations. The fact that the legal representatives and their clients believe that every station is completely different and ought not to have any similarities or it could be accused of “passing-off” suggests that they do not understand the radio environment.
- (e) This is no reason at all to allow a fishing expedition or to inspect the documents of a potential competitor, particularly during a process which the legal representatives were well aware would take place as a natural consequence of the business rescue of Extriserve and the acquisition by Mediadynamix of its licences.

2.8.5 Paragraphs 19 to 23 are irrelevant to this process and they misconstrue the nature of the legal process for transfer of licences, the rights of Mediadynamix to enter the radio market and create competition, and the obligations of ICASA under the ECA.

The third heading of the objection is “**New commercial station**”.

2.9 Unfortunately, many of the arguments raised in the previous section are simply repeated here. The sector law – the ECA – permits transfers of all individual licences specifically to ensure that new entrants can access the market and inject capital, innovation and competition. The station proposed by Mediadynamix to be operated will have a new name and will be a new corporate entity, all of which is set out in the application.

2.9.1 Paragraph 27 again states that “the applicant” is applying for a new licence. This is wrong. Mediadynamix is the transferee, not the applicant. We are not applying for a new licence but applying for a transfer of existing licences in order to create a new business. We do not need to nor are we relying on anything from LM Radio and we do not need LM Radio’s permission to make this application.

2.9.2 We do not understand paragraph 29 – we are not obliged to “*show that [we] will be able to provide the same public offering to listeners and advertisers as that of LM Radio*”. This statement in any event contradicts the next sentence which states that we are relying on “the reputation and good name of LM Radio”. We are not doing this. We are not creating music, we are playing a particular format. The LM Radio name does not belong to us and we have said as much in our application. Of course, our programming will be different – we will employ new people in our business and have a brand-new line-up. We are not required to indicate that we are “separate” from LM Radio.

2.9.3 Paragraph 30 ignores the history of the licensing of commercial sound broadcasting and the vast number of transfers of licences that have taken place since the ECA was passed in 2005 and commenced in 2006. It also seems to ignore the content of our application.

Directors: LB Johnstone; L Benn; KR Perritt; AA Johnstone

- 2.9.4 Paragraph 31 repeats content regarding LM Radio which we have already dealt with. Until such time as ICASA considers the application and decides whether to approve it or not, we cannot sign a binding legal or commercial agreement with anyone because we would be in default if ICASA refused to approve our application. It is common practise to enter into a non-binding relationship with Sentech (as the broadcast signal distributor) in anticipation of bringing an application like our's.
- 2.9.5 We do not deal further with the statement made (again) in paragraph 32. We do not have nor have we said that we have any such rights.
- 2.9.6 Paragraph 33 suggests that the legal representatives are not familiar with the requirements of the Process and Procedure Regulations, 2010, as amended, in relation to the report on competition.¹ We do not know what is meant by "both available radio spectrums". If Mediadynamix is successful in this application, it will apply to ICASA for spectrum in the FM range, which means that it need not consider AM competitors as a key part of our strategy. The legal representatives do not indicate what they consider (based on the law) a "prescribed form" to require in this regard.
- 2.9.7 Paragraph 34 also fails to indicate what a "proper Consumer Analysis Report" is and how our report has fallen short. Once again, we note the reference to LM Radio – we do not need to refer to LM Radio's business as we will establish a new business. Whether or not LM Radio continues as a streaming service (if this is permitted by ICASA) has nothing to do with us or our application, although we anticipate that it will continue and that we will naturally become a competitor because of the need and desire for the format currently offered by LM Radio (and we again draw your attention to our points earlier in this response, regarding the commonality of format in the radio industry).
- 2.9.8 We do not understand what is meant in paragraph 35 in relation to "consumers' welfare and interest". The report deals extensively with the increase in choice for consumers and the diversity to be offered by the new station if the transfer of licences is approved. We intend to meet demand for the music that listeners like. We deny that LM Radio has any exclusivity in relation to its format. If this were the case, radio stations around the world would have to invent new 'formats' when they are playing the same music. One cannot have a heavy rock format and not play heavy metal songs, for example. One cannot have a classical format without playing classical music. 947 does not play Jacaranda's music – they both play music that listeners like to listen to.
- 2.9.9 It bears noting that ICASA has accepted both the competition and consumer reports.

The last section of the objection is the **Conclusion**. It simply repeats the earlier arguments.

We believe that the legal representatives have misunderstood or are simply unfamiliar with the commercial sound broadcasting environment in practise and in law. This is no reason to take issue with the application for transfer of the Extriserve licences which has been approved by the business rescue practitioner in terms of a process that the legal representatives' clients are part of, and have full knowledge of.

Lyndon Johnstone



CEO: MediaDynamix (PTY) Ltd

¹ The application was made prior to the 2023 amendments, but it makes no difference here.

