



ELECTRONIC COMMUNICATIONS ACT, 2005 (ACT NO. 36 OF 2005)

**APPLICATIONS FOR INDIVIDUAL COMMERCIAL SOUND BROADCASTING SERVICE
LICENCES IN THE PRIMARY MARKETS**

1. The Independent Communications Authority of South Africa ("the Authority") hereby gives notice of the availability of the reasons for decision in respect of the applications for individual commercial sound broadcasting licences in Gauteng, KwaZulu-Natal and Western Cape Provinces.
2. The reasons for decision are available during the Authority's normal office hours at the ICASA library, Block D, Pinmill Farm, 164 Katherine Street, Sandton OR at the ICASA website: www.icasa.org.za

A handwritten signature in black ink, appearing to read 'M. S.', with a horizontal line underneath it.

DR STEPHEN MNCUBE
CHAIRPERSON

**INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH
AFRICA**

**LICENSING PROCESS FOR INDIVIDUAL COMMERCIAL FREE-TO-AIR SOUND
BROADCASTING SERVICE LICENCES**

REASONS FOR DECISION

PART I: GENERAL

MAY 2012

GLOSSARY OF TERMS, ABBREVIATIONS AND ACRONYMS

ABC	Audit Bureau of Circulation
Act	Electronic Communications Act 36 of 2005
AMPS	All Media and Product Survey conducted by the SAARF
Authority	Independent Communications Authority of South Africa
BBBEE Act	Broad-based Black Economic Empowerment Act 53 of 2003
BEE	black economic empowerment
Broadcasting Frequency Plan	the Final Terrestrial Broadcasting Frequency Plan, 2009 published under GN 1538 in <i>Government Gazette</i> 32728 of 18 November 2009
Broadcasting Act	Broadcasting Act 4 of 1999
CCC	Complaints and Compliance Committee established by the Authority in terms of section 17A of the ICASA Act
CIPC	Companies and Intellectual Property Commission
Content Regulations	South African Music Content Regulations published under GN 153 in <i>Government Gazette</i> 28453 of 31 January 2006
Companies Act	Companies Act 61 of 1973

DJ	disc jockey
draft ICT Charter	the draft Information and Communication Technology Sector Charter in terms of the BBBEE Act published by the Minister of Trade & Industry for public comment under GN 341 in <i>Government Gazette</i> 34359 of 10 June 2011
ERP	effective radiated power
ESOP	employee share ownership programme
HDP	historically disadvantaged person
IBA	Independent Broadcasting Authority
IBA Act	Independent Broadcasting Authority Act 153 of 1993
I-BS	individual broadcasting service
ICASA Act	Independent Communications Authority of South Africa Act 13 of 2000
ICT Charter	Information, Communication and Technology Charter to be published in terms of the BBBEE Act
IDC	Industrial Development Corporation
ITA	Invitation to Apply for individual commercial free to air sound broadcasting service licences in primary markets, published by the Authority under GN 330 in

JSE	Johannesburg Stock Exchange Limited
LSM	Living Standards Measure developed by the SAARF
MDDA	Media Development and Diversity Agency established by the Media Development and Diversity Agency Act 14 of 2002
the Minister	the Minister of Communications
NEF	National Empowerment Fund
new Companies Act	Companies Act 71 of 2008, which replaced the Companies Act with effect from 1 May 2011
Ownership and Control Discussion Document	Discussion Document on Ownership and Control published by the Authority under GN 1532 in <i>Government Gazette</i> 32719 of 17 November 2009
Ownership and Control Findings Document	Findings Document on the Review of Ownership and Control of Commercial Services and Limitations on Broadcasting, Electronic Communications Services and Electronic Communications Network Services, published by the Authority under GN 624 in <i>Government Gazette</i> 34601 of 15 September 2011
Position Paper	Position Paper on the Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences, published by the Authority on 13 January 2004

Private Sound Position Paper	Position Paper on Private Sound Broadcasting Services, published by the IBA on 16 May 1996
Processes and Procedures Regulations	Regulations Regarding the Processes and Procedures for Individual Licence Applications, published by the Authority under GN 398 in <i>Government Gazette</i> 30916 of 31 March 2008
R&B	Rhythm and Blues
RAMS	Radio Audience Measurement Survey conducted by the SAARF
Reasons Document	the document setting out the Authority's decisions and reasons in the primary markets licensing process comprising Part I (General), Part II (Cape Town), Part III (Durban) and Part IV (Gauteng)
SAARF	South African Advertising Research Foundation
SABC	South African Broadcasting Corporation Limited
SAPA	South African Press Association
Standard Terms and Conditions	Schedule 1 of the Standard Terms and Conditions for Individual Licences, published under GN R523 in <i>Government Gazette</i> 33294 of 14 June 2010
TAMS	Television Audience Measurement Survey conducted by the SAARF

A INTRODUCTION

1. This document sets out the reasons for the decisions of the Independent Communications Authority of South Africa (“the Authority”) in relation to the application for individual commercial free-to-air sound broadcasting service (“I-BS”) licences in the primary markets of Gauteng and the metropolitan areas of and surrounding Cape Town and Durban.
2. The background against which the licensing process was conducted is as follows:
 - 2.1 In 1996, the Authority’s predecessor-in-law, the Independent Broadcasting Authority (“IBA”) published a Position Paper on Private Sound Broadcasting Services (“the Private Sound Broadcasting Position Paper”) detailing the policy approach that the IBA intended to follow in the licensing of commercial sound broadcasting services. The Private Sound Broadcasting Position Paper was prepared in the context of the Independent Broadcasting Authority Act 153 of 1993 (“the IBA Act”) in terms of which broadcasting services in South Africa were regulated at the time.
 - 2.2 In 2003, the Authority conducted a review of the policy framework for the ownership and control of commercial sound broadcasting services, which culminated in the publication of the Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences Position Paper on 13 January 2004 (“the Position Paper”). Like the Private Sound Broadcasting Position Paper, the Authority’s review was conducted and the Position Paper prepared in the context of the IBA Act read with the Broadcasting Act 4 of 1999.
 - 2.3 In the Position Paper, the Authority stated its intention to license

additional commercial sound broadcasting services in primary markets (being Gauteng and the metropolitan areas of and surrounding Cape Town and Durban) and secondary markets (being geographical markets, including mainly metropolitan areas, outside the primary markets).¹

2.4 Pursuant to the publication of the Position Paper, the Authority licensed three commercial sound broadcasting services in the secondary markets in Mpumalanga, North West and Limpopo provinces in 2007.² The Authority made a commitment to grant at least three new commercial licences in primary markets.³

2.5 On 19 July 2006, the Electronic Communications Act 36 of 2005 (“the Act”) came into force. The Act repealed and replaced the IBA Act and certain provisions of the Broadcasting Act. Many of the provisions of the IBA Act were re-enacted in Chapter 9 of the Act.

2.6 Like the IBA Act, the Act provides for three broad categories of broadcasting services: public, commercial and community.⁴ For the

¹ See the Position Paper, para 12, p 39.

² In the Position Paper (para 8.1 read with para 12.1), the Authority envisaged granting licences in secondary markets (i.e. towns situated outside of the primary markets, being Gauteng, Durban and Cape Town) in four provinces, namely Limpopo, Mpumalanga, Northern Cape and North West. The invitation to apply for these secondary market licences was published in *Government Gazette* No 27474 of 8 April 2005. In the event, no applications were received for a licence in the Northern Cape.

³ Position Paper, para 12.3.

⁴ A “broadcasting service” is defined in the Act as –

“any service which consists of broadcasting and which service is conveyed by means of an electronic communications network but does not include -

- (a) a service which provides no more than data or text, whether with or without associated still images;
- (b) a service in which the provision of audio-visual material or audio material is incidental to the provision of that service, or
- (c) a service or a class of service, which the Authority may prescribe as not falling within this definition”.

“Broadcasting” is, in turn, defined as –

“any form of unidirectional electronic communications intended for reception by -

purposes of the Act, commercial broadcasting is defined as “a broadcasting service operating for profit or as part of a profit entity but excludes any public broadcasting service”. In terms of the Act, the broadcasting services operated by the South African Broadcasting Corporation Limited (“SABC”) are public broadcasting services.

- 2.7 In terms of section 5(3)(b) of the Act, an individual licence is required to provide commercial broadcasting and public broadcasting services of national and regional scope whether provided free-to-air or by subscription.
- 2.8 The process to be followed by the Authority when awarding individual licences is as follows – ⁵
- 2.8.1 The Authority must invite applications for individual licences by publishing a notice in the *Government Gazette*.
- 2.8.2 In the invitation, the Authority must stipulate the percentage of equity ownership to be held by historically disadvantaged persons (“HDPs”), which must not be less than 30% or such higher percentage prescribed by the Authority.
- 2.8.3 The Authority must invite interested parties to submit representations in relation to applications for individual licences within a particular period.
- 2.8.4 The Authority may conduct a public hearing in relation to any application for an individual licence.

(a) the public;
(b) sections of the public; or
(c) subscribers to any broadcasting service,
whether conveyed by means of radio frequency spectrum or any [ECN] or any combination thereof”
⁵ Sections 9(2) and (5) of the Act.

2.8.5 After considering an application for an individual licence and any representations received in relation to that application, the Authority must notify the applicant of its decision, the reasons for its decision and any licence conditions that are applicable to a successful applicant, and publish that information in the *Government Gazette*.

2.9 The Authority published the Regulations Regarding the Processes and Procedures for Individual Licence Applications, 2008 (“the Processes and Procedures Regulations”) in March 2008. (The Processes and Procedures Regulations were subsequently replaced by the Regulations Regarding the Processes and Procedures for Individual Licence Applications, 2010 published under GN R522 in *Government Gazette* 33293 of 14 June 2010. The procedural requirements that were applicable at the time that applications were submitted in response to the ITA were those set out in the Processes and Procedures Regulations.) The Processes and Procedures Regulations provided certain further practical details in relation to the manner in which applications for individual licences must be submitted to the Authority. In particular, regulation 6(1) of the Processes and Procedures Regulations, provided that, where “information included in an application changes at any time after submission thereof but before the Authority has made a decision”, the applicant must, within 14 days of such change, notify the Authority and request that the application be amended. The Authority may then, in its discretion, either grant or refuse an applicant’s request to amend its application.⁶ The Authority could grant a request to amend an application where this would not unfairly prejudice other interested parties, impede the expeditious and proper consideration of the application, or materially change the application.⁷

⁶ Regulation 6(1) of the Processes and Procedures Regulations.

⁷ Regulation 6(2) of the Processes and Procedures Regulations.

- 2.10 The Authority published a notice inviting interested persons to apply for Individual Commercial Free-to-Air Sound Broadcasting Service Licences for the provision of broadcasting services under GN 330 in *Government Gazette* 32072 of 27 March 2009 (“the ITA”). The closing date for the submission of applications was stated to be 16h00 on 31 September 2009.⁸ The ITA included a list of FM and AM (medium wave (“MW”)) frequencies that were available for commercial sound broadcasting services in the three primary markets, the sites from which radio services on these frequencies were to be transmitted, together with the maximum effective radiated power (“ERP”) or effective monopole radiated power for each frequency.
- 2.11 The Authority then published an erratum under GN 1026 in *Government Gazette* 32456 of 28 July 2009 clarifying and amending the ITA, in which it was recorded that the Authority would issue one licence in each primary market (being Gauteng, Cape Town and Durban), that licences would not be awarded in respect of MW frequencies and that the closing date for applications was 30 September 2009 (as opposed to 31 September 2009). The three available FM frequencies were indicated to be: 98.9 MHz (Gauteng), 103 MHz (KwaZulu-Natal) and 90.4 MHz (Western Cape). Following the publication of this erratum, the Authority received numerous submissions relating to the closing date of submission of applications, particularly from interested parties whose initial plans to apply for licences to operate on MW frequencies were impacted by the changes outlined in the erratum. The Authority accordingly published a notice under GN 1273 in *Government Gazette* 32072 of 16 September 2009 extending the closing date for applications to 30 November 2009 at 16h00.
- 2.12 On 14 June 2010, the Authority gave notice that, in response to the ITA, it had received 41 applications for I-BS licences in the primary

⁸ Paragraph 14 of the ITA.

markets and listed particulars of the applications in the schedule to the notice.⁹ The Authority also invited interested parties to submit written representations on the applications. The closing date for the submission of such representations was initially set as 26 July 2010, but was ultimately extended to 10 August 2010.¹⁰ The closing date for the submission of responses to the representations was extended to 21 September 2010 (having previously been 7 September 2010).¹¹

- 2.13 The dates for the public hearings in respect of the licence applications were published under GN 1001 in *Government Gazette* 33664 dated 21 October 2010.

⁹ Published under GN 598 in *Government Gazette* 33299 of 14 June 2010.

¹⁰ Published under GN 726 in *Government Gazette* 33408 of 23 July 2010.

¹¹ Published under GN 850 in *Government Gazette* 33527 of 3 September 2010.

B THE INVITATION TO APPLY

3. As stated above, on 27 March 2009 the Authority published an ITA for I-BS licences for the provision of commercial free-to-air sound broadcasting services in the primary markets in terms of sections 9(1) and (2), read with section 63(1), of the Act.
4. The applications were required to comply, amongst other things, with the following:
 - 4.1 each application had to be accompanied by a non-refundable application fee of R50 000.00;¹²
 - 4.2 all applications had to be submitted in the format provided for in Schedule “A” to the ITA;¹³
 - 4.3 an original and 25 copies of the application had to be submitted.¹⁴
5. The ITA stated that “[f]ailure to comply with any of these requirements may render the application liable to disqualification”.¹⁵
6. Applications had to be submitted to the Authority by no later than 16h00 on 30 November 2009.¹⁶ Certain applications received in response to the ITA were submitted after the 16h00 cut-off time, and some applicants submitted some copies of their applications before the 16h00 cut-off time and the remainder of the requisite copies after the 16h00 cut-off time.

¹² ITA, Schedule A, paragraph 12.

¹³ ITA, Schedule A, paragraph 15.

¹⁴ ITA, Schedule A, paragraph 3.

¹⁵ ITA, Schedule A, paragraph 15.

¹⁶ ITA, Schedule A, paragraph 14, as amended by the erratum published under GN 1026 in *Government Gazette* 32456 of 28 July 2009.

7. Regulation 8(3)(c) of the Process and Procedures Regulations provides that the Authority may, on good cause shown, condone the late filing of an application.
8. The applicants concerned advanced various reasons for the late or incomplete submission of their applications.
9. The Authority decided to grant condonation of the late applications and submission of insufficient number of the copies of some applications.
10. The information that was required to be included in an application submitted in response to the ITA was as follows:
 - 10.1 general information, including the name of the applicant, the proposed station name, the licence applied for (including the relevant frequency, licence area, maximum ERP and maximum effective antenna height), main contact persons, and specialist contact persons;¹⁷
 - 10.2 information on the applicant's corporate status, including:
 - 10.2.1 the applicant's legal form, authorising resolutions, and any control rights in respect of the governance and management of the applicant;
 - 10.2.2 details of the applicant's senior management, including whether any senior manager was an officer or employee of a political party, held shares in the applicant or had any other media interests, together with relevant supporting documents e.g. an authorising resolution, the applicant's memorandum and articles of association and any shareholders' agreement concluded between the applicant and its shareholders; and

¹⁷ ITA, Section 1, pp 7 – 9.

- 10.2.3 information in relation to the applicant's staffing and personnel;
- 10.2.4 information in relation to the applicant's general history and development strategy;
- 10.2.5 details of external consultants and advisors who assisted the applicant;
- 10.2.6 information regarding the other activities of the applicant and its members who hold more than 5% of its total issued share capital in: advertising agencies, non-South African interests, newspapers, other broadcasting interests, political parties, movements, bodies or alliances, local authorities and other publicly-funded bodies;¹⁸
- 10.3 programming information, including details of the proposed programme service, the programme schedule, the format and content, including the balance between music and speech programming, where relevant, details of the proposed South African music output, details of the proposed news output, broadcast hours, details of any programming to be originated from outside the licence area, syndicated programming and automated local output (i.e. programming without presentation or pre-recorded programming), and proposed languages;¹⁹
- 10.4 information on the demand, need and support for the proposed service, including:
- 10.4.1 the appeal of the programme service, evidence of demand,

¹⁸ ITA, Section 2, pp 10 – 16.

¹⁹ ITA, Section 3, pp 16 – 21.

need and support for the proposed service (including primary market research), the size and composition of the expected audience along with research in this regard, local support for the proposed service, and other radio services in the proposed coverage area;

10.4.2 the manner in which complaints would be dealt with and the applicant's operations would comply with relevant codes;²⁰

10.5 financial information, including the applicant's business plan, projected financial statements, details of total funding requirements and the sources of such funds, the applicant's fixed assets, details of the applicant's issued share capital, proposed investors, voting rights, non-voting shares, lenders, means of raising capital, details of any loans, the applicant's bank facilities or other credit arrangements, any grants and donations awarded to the applicant, forecasted advertising revenue, and forecasted sponsorship income;²¹ and

10.6 technical information, including the details of persons who would provide signal distribution services, transmission sites, transmission equipment, transmitter maintenance, studio location, studio layout, studio maintenance, coverage of the target area, hours of operation and proposed on-air date.²²

²⁰ ITA, Section 4, pp 22 – 25.

²¹ ITA, Section 5, pp 25 – 30.

²² ITA, Section 6, pp 31 – 37.

C THE APPLICATIONS

11. On 14 June 2010, the Authority published a notice in the *Government Gazette* setting out details of the following applications received in response to the ITA:²³

Cape Town

- 11.1 Brimstone Consortium
- 11.2 Cape Town Radio (Pty) Ltd
- 11.3 Chippa Investment Holdings CC
- 11.4 Congrewell (Pty) Ltd
- 11.5 Epinetix (Pty) Ltd
- 11.6 Exclusive Access Trading 740 (Pty) Ltd
- 11.7 Magic FM Consortium
- 11.8 Mainstreet 758 (Pty) Ltd
- 11.9 Market Demand 649 Trading (Pty) Ltd
- 11.10 Megalomedia (Pty) Ltd
- 11.11 Octolog (Pty) Ltd
- 11.12 RadioWize (Pty) Ltd
- 11.13 Yired (Pty) Ltd

Durban

- 11.14 Beat 103 FM (Pty) Ltd
- 11.15 Bonam Media (Pty) Ltd
- 11.16 Capital FM (Pty) Ltd
- 11.17 Congreway (Pty) Ltd
- 11.18 Epicol (Pty) Ltd
- 11.19 KZN Talk (Pty) Ltd
- 11.20 Mainstreet 757 (Pty) Ltd

²³ Published under GN 598 in *Government Gazette* 33299 of 14 June 2010.

- 11.21 Megalomedia (Pty) Ltd
- 11.22 Octolog (Pty) Ltd
- 11.23 One Gospel KNI Radio (Pty) Ltd
- 11.24 Pedal Trading 27 (Pty) Ltd
- 11.25 Proudafrique (Pty) Ltd
- 11.26 RadioWize (Pty) Ltd
- 11.27 Samurai Sun Investment (Pty) Ltd
- 11.28 Sunshine FM (Pty) Ltd

Gauteng

- 11.29 Inspire Consortium
- 11.30 Impact Radio Commercial (Pty) Ltd
- 11.31 Kgosi Media Consortium
- 11.32 Life College Consortium
- 11.33 Mainstreet 756 (Pty) Ltd
- 11.34 Market Demand Trading 649 (Pty) Ltd
- 11.35 Megalomedia (Pty) Ltd
- 11.36 RadioWize (Pty) Ltd
- 11.37 Richtrau No. 284 (Pty) Ltd
- 11.38 Sangrrex trading as Mitupo Radio Consortium
- 11.39 Simascape (Pty) Ltd
- 11.40 Tupelolite (Pty) Ltd
- 11.41 Vexiserve (Pty) Ltd

12. In this notice, the Authority invited interested persons to submit written representations in respect of the applications by 26 July 2010. The closing date for the submission of representations was ultimately extended to 10 August 2010.²⁴

13. In response to the notice and invitation, the Authority received various written representations in respect of the licence applications.

²⁴ Published under GN 726 in *Government Gazette* 33408 of 23 July 2010.

14. The Authority invited the applicants to respond to the written representations received in relation to their respective applications. The closing date for the submission of each applicant's response to the representations was extended to 21 September 2010 (having previously been 7 September 2010).²⁵ Many applicants provided their responses to the representations that they received on their applications directly to the parties who had made representations and did not also submit copies of the responses to the Authority. In its analysis of the applications the Authority has referred, where relevant, to the representations that were made on certain applications and to the relevant applicants' responses although the Authority was obviously not in a position to do so where it did not receive particular representations or responses.

²⁵ Published under GN 850 in *Government Gazette* 33527 of 3 September 2010.

D THE HEARINGS

15. The Authority gave notice of its intention to conduct hearings in respect of the applications submitted in response to the ITA.²⁶ The hearings were held at the Authority's offices in Johannesburg from 10 - 12 November 2010 for Western Cape applicants, 15 -18 November 2010 for KwaZulu-Natal applicants, and 24 - 26 November 2010 for Gauteng applicants.²⁷
16. The Authority exercised its power to conduct the hearings in terms of section 9(2)(e) of the Act. For that purpose, and acting in terms of section 17(1) of the Independent Communications Authority of South Africa Act 13 of 2000 ("the ICASA Act"), the Authority's Council established a committee of Council to consider the applications received and conduct the hearings. The committee comprised Councillors Fungai Sibanda and Nomvuyiso Batyi and the following members of staff: Victor Grootboom, Ndondo Dube, Fikile Hlongwane, Bethuel Makola, Piliswa Ngcwabe, Johannes Kgampe, Monde Mbanga, Ndawo Khanyile, Thabo Ndhlovu, Ngoako Malatji, Lefa Mokoena, and Sibusiso Mazibuko. Nomvula Zinto took care of the logistics. The Authority's Council resolved that the the Committee was to consider all relevant information and representations, make appropriate findings of fact and make recommendations to the Council regarding the granting of licences.
17. Further, the Authority appointed Mmapro IT Solutions in terms of section 14A of the ICASA Act to assist the Authority in the analysis of the financial information, the business plans and market research submitted by the applicants in respect of their respective applications.²⁸ Mmapro IT Solutions was represented at the hearings by Tendani Mawela and Kopano Raophala.

²⁶ Published in under GN 1001 in *Government Gazette* 33664 of 21 October 2010.

²⁷ Published under GN 1022 in *Government Gazette* 33733 of 5 November 2010.

²⁸ Mmapro IT Solutions was appointed on 12 July 2010 following a competitive bidding process conducted under tender number ICASA 53/2009.

18. During the course of the hearings, applicants were given an opportunity to make oral representations in support of their respective applications. The Authority also questioned the applicants on various aspects of their applications. Persons who had made written representations in respect of particular applications were afforded an opportunity to make oral submissions on the applications concerned. In such instances, the relevant applicants were allowed to respond to such submissions. Subsequent to the hearings, the Authority requested certain applicants to furnish further information to assist in clarifying certain aspects of their respective applications.
19. In some cases, the information that was contained in certain of the applicants' applications changed subsequent to their submission to the Authority. As set out above, in terms of regulation 6 of the Processes and Procedures Regulations, applicants whose applications had changed subsequent to submission but prior to a decision being taken were required to apply to the Authority to amend their applications within a period of 14 days after the change. The Authority must consider the application for amendment and may grant the request to amend the application where this will not unfairly prejudice other interested parties, impede the expeditious and proper consideration of the application or materially change the application. The Authority may also give notice of the amended application and invite interested parties to submit representations on the new information. This procedure takes account of the fact that applicants' information may change subsequent to the submission of their applications for individual licences and is intended to ensure that interested parties have a proper opportunity to comment on applications and that amendments to applications are made in an ordered way that does not impede the Authority's ability properly to consider an application.
20. The Processes and Procedures Regulations do not specify the consequences where the Authority refuses to grant an application for the amendment of an application for an individual licence. Similarly, the Processes and Procedures Regulations do not specify what the consequences will be where an applicant

does not follow the amendment procedures. This is an omission which the Authority intends to deal with through an amendment to the Processes and Procedures Regulations.

21. In the context of the present licensing process, most applicants whose information changed after the original submission date did not follow the amendment procedure in the Processes and Procedures Regulations. In some instances, applicants submitted different or totally new information, which materially changed the original application, only during the public hearings. In such cases the Authority had to consider how to address the new information having regard to the fact that, in most cases, interested parties had not had an opportunity to consider the new information and, in many instances, the Authority itself had not had an opportunity before the hearings to consider the information. At the same time, where applicants' information had changed, if the Authority did not take the new information into account, the Authority would be considering the application on the basis of outdated information that was no longer applicable. The Authority considered each of these applications on a case-by-case basis.

E RELEVANT CRITERIA AND CONSIDERATIONS

22. The performance of the Authority's licensing functions must be viewed in the context of section 192 of the Constitution of the Republic of South Africa, 1996, which contemplates that the Authority's mandate is to regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society.
23. The Authority's licensing and regulatory functions must be performed so as to give effect to the objectives specified in section 2 of the Act. The Authority regards the following objects and principles set out in section 2 of the Act as particularly important in considering applications for commercial sound broadcasting licences:
 - 23.1 promoting an environment of open, fair and non-discriminatory access to broadcasting services;
 - 23.2 promoting the empowerment of HDPs, including Black people, with particular attention to the needs of women, opportunities for youth and challenges for people with disabilities;
 - 23.3 ensuring that broadcasting services, viewed collectively, are provided by persons or groups of persons from a diverse range of communities in South Africa;
 - 23.4 promoting the development of commercial broadcasting services which are responsive to the needs of the public;
 - 23.5 ensuring that broadcasting services, viewed collectively -
 - 23.5.1 promote the provision and development of a diverse range of sound and television broadcasting services on a national,

regional and local level, that cater for all language and cultural groups and provide entertainment, education and information;

23.5.2 provide for regular news services, actuality programmes on matters of public interest, programmes on political issues of public interest and programmes on matters of international, national, regional and local significance; and

23.5.3 cater for a broad range of services and specifically for the programming needs of children, women, the youth and the disabled;

23.6 ensuring that commercial and community broadcasting licences, viewed collectively, are controlled by persons or groups of persons from a diverse range of communities in South Africa; and

23.7 ensuring that broadcasting services are effectively controlled by South Africans.

24. Another object of the Act is to promote and facilitate the achievement of the objects of the “related legislation”, which includes the Broadcasting Act. The objects of the latter Act include the following:

24.1 to encourage ownership and control of broadcasting services through participation by persons from historically disadvantaged groups;²⁹

24.2 to ensure plurality of news, views and information and provide a wide range of entertainment and education programmes;³⁰

24.3 to ensure that commercial and community broadcasting licences, viewed collectively, are controlled by persons or groups of persons

²⁹ Section 2(c) of the Broadcasting Act.

³⁰ Sections 2(d) and 3(5) of the Broadcasting Act.

from a diverse range of communities in South Africa;³¹ and

24.4 to ensure that the broadcasting system is controlled by persons or groups of persons from a diverse range of communities in South Africa and within each element promotes ownership, control and management of broadcasting services by persons from historically disadvantaged groups.³²

25. In terms of the Act, when granting a licence, the Authority is required to –

25.1 ensure that broadcasting services, viewed collectively, are provided by persons or groups of persons from a diverse range of communities in South Africa;³³ and

25.2 promote the empowerment of HDPs including women, the youth and people with disabilities in accordance with the requirements of the ICT Charter.³⁴

26. The ICT Charter to be published in terms of the Broad-based Black Economic Empowerment Act 53 of 2003 (“BBBEE Act”) has not yet been finalised. During the Authority’s deliberations on the applications for I-BS licences, a draft version of the ICT Charter, to be published as a sector code in terms of the BBBEE Act, was published for comment by the Minister of Trade & Industry.³⁵ As discussed below, the Authority has had regard to certain relevant principles in the generic Codes of Good Practice published under the BBBEE Act and in the draft ICT Charter, in its evaluation of the applications received in the current licensing process.

³¹ Section 2(m) of the Broadcasting Act.

³² Section 3(1)(c) of the Broadcasting Act.

³³ Section 5(9)(a) of the Act.

³⁴ Section 5(9)(b) of the Act.

³⁵ Published under GN 341 in *Government Gazette* 34359 of 10 June 2011.

27. Against this background, section 51 of the Act relates specifically to commercial broadcasting services and provides that, in considering the grant of a new commercial broadcasting licence, the Authority must, with due regard to the objects and principles enunciated in section 2 of the Act (referred to above), amongst other things, take into account the following factors:
- 27.1 the demand for the proposed broadcasting service within the proposed licence area;
 - 27.2 the need for the proposed broadcasting service within such licence area, having regard to the broadcasting services already existing in that area;
 - 27.3 the expected technical quality of the proposed broadcasting service, having regard to developments in broadcasting technology;
 - 27.4 the capability, expertise and experience of the applicant;
 - 27.5 the financial means and business record of the applicant;
 - 27.6 the business record of persons in a position to control the operations of the licensee, either in an individual capacity or directly or indirectly in relation to management or corporate structure;
 - 27.7 the applicant's record and the record of persons in a position to control the operations of the licensee in relation to situations requiring trust and candour;
 - 27.8 whether the applicant is precluded in terms of section 64 of the Act (referred to below) from holding a broadcasting licence; and
 - 27.9 whether the applicant or any person in a position to control the applicant has been convicted of an offence in terms of the Act or the

related legislation.

28. In addition to these considerations, the Authority also has to consider whether an applicant complies with the other requirements of the Act and related legislation. In this regard:

28.1 A minimum percentage of equity in an applicant for an individual licence must be held by HDPs. The minimum level is set either in the relevant ITA or as prescribed by the Authority. In the context of the present licensing process, the ITA stipulated that the minimum percentage of equity which had to be held by HDPs in applicants for the commercial broadcasting services licences that were the subject of the ITA was 30%.³⁶

28.2 Section 5(8) of the Act provides that every applicant for a licence in terms of the Act must demonstrate that the applicant or other person to whom a licence is to be awarded, in the case of -

28.2.1 a natural person, is a citizen of the Republic of South Africa; or

28.2.2 a juristic person, is, or will be, registered under the laws of South Africa and has or will have its principal place of business located in South Africa.

28.3 Section 52 of the Act provides that broadcasting service licences may not be awarded to any party, movement, organisation, body or alliance which is of a party-political nature.

28.4 Section 64 of the Act deals with limitations on foreign control of broadcasting services, and provides as follows:

“(1) A foreigner may not, whether directly or indirectly—

³⁶ ITA, para 6.1, p10.

(a) exercise *control* over a commercial broadcasting licensee; or
(b) have a *financial interest* or an *interest either in voting shares or paid-up capital* in a commercial broadcasting licensee, exceeding twenty (20) percent.
(2) Not more than twenty (20) percent of the directors of a commercial broadcasting licensee may be foreigners” (italicised emphasis added).

28.5 “Control” as used in section 64(1)(a) of the Act is not defined for the purposes of that section or, more generally, in section 1 of the Act.

28.6 “Financial interest” is defined for the purposes of the Act as –

“an interest that may or may not have voting rights attached to it but which gives the person or entity an equity or debt interest directly through shares or other securities or indirectly through an agreement giving it –

(a) the power to control the licensee; or
(b) an effective say over the affairs of the licensee”.

28.7 Sections 65 and 66 of the Act impose limitations on control of multiple commercial broadcasting services and on cross-media control of commercial broadcasting services, respectively.

28.8 Section 65(2) of the Act provides that no person may -

28.8.1 be in a position to “exercise control” over more than two FM commercial broadcasting service licences;

28.8.2 be a director of a company which is, or of two or more companies which between them are, in a position to “exercise control” over more than two FM commercial broadcasting service licences;

28.8.3 be in a position to “exercise control” over two FM commercial broadcasting service licences and be a director of any company which is in a position to exercise control over any other FM commercial broadcasting service licence.

- 28.9 In terms of section 65(3) of the Act, a “person referred to in [section 65(2)] must not be in a position to control two commercial broadcasting service licences in the FM sound broadcasting service, which either have the same licence areas or substantially overlapping licence areas”.
- 28.10 A “licence area” is defined in the Act as “the geographical area specified in a licence”. A licence area is determined with reference to the geographic area that may be reached by the transmission of a broadcast signal on the relevant frequency at the applicable power level.
- 28.11 Section 65(4) of the Act provides that no person may -
- 28.11.1 be in a position to exercise control over more than two AM commercial broadcasting service licences;
- 28.11.2 be a director of a company which is, or of two or more companies which between them are, in a position to exercise control over more than two AM commercial broadcasting service licences;
- 28.11.3 be in a position to exercise control over two AM commercial broadcasting service licences and be a director of any company which is in a position to exercise control over any other AM commercial broadcasting service licence.
- 28.12 In terms of section 65(5) of the Act, a “person referred to in [section 65(4)] must not be in a position to control two commercial broadcasting service licences in the AM sound broadcasting service, which either have the same licence areas or substantially overlapping licence

areas”.

- 28.13 “Control” is not defined for the purposes of section 65 of the Act.
- 28.14 In terms of section 65(6) of the Act, the Authority may, on application by any person, on good cause shown and without departing from the objects and principles enunciated in section 2 of the Act, exempt that person from the restrictions on controlling more than two AM or FM commercial broadcasting service licences imposed by section 65.
- 28.15 Section 66 of the Act deals with “cross-media” control and provides, amongst other things, that:
- 28.15.1 no person who controls a newspaper may acquire or retain “financial control” of both a commercial television broadcasting service licence and a commercial sound broadcasting service;
- 28.15.2 no person who is in a position to control a newspaper may be in a position to control either a commercial television broadcasting service licence or a commercial sound broadcasting service licence, in an area where the newspaper has an average ABC circulation of 20% of the total newspaper readership in the area, if the licence area of the commercial broadcasting service licence overlaps substantially with the circulation area of the newspaper concerned.
- 28.16 Section 66(4) of the Act provides that “substantial overlap” means an overlap by 50% or more.
- 28.17 Section 66(5) of the Act provides that a 20% shareholding in a commercial broadcasting service “is considered as constituting control”.
- 28.18 In terms of section 66(6) of the Act, the Authority may on good cause

shown and without departing from the objects and principles enunciated in section 2 of the Act, exempt affected persons from any of the limitations imposed by section 66.

29. The Private Sound Broadcasting Position Paper sets out the policy considerations which the Authority will generally take into account in evaluating applications for commercial sound broadcasting licences in terms of the criteria set out in section 51 of the Act and in light of the regulatory objectives in section 2 of the Act.

29.1 Paragraph 3.1 of the Private Sound Broadcasting Position Paper states that the Authority will require all licensees to provide news for a total of 30 minutes of an 18-hour day on a regular basis during the day. The origin and diversity of news sources are factors the Authority will take into consideration in choosing the successful applicant.

29.2 Paragraph 3.2 states that the Authority will take format and language into account in the context of promoting diversity in the range of sound broadcasting services and that maintaining diversity in commercial sound broadcasting services is an important consideration. It is stated, further, that the format proposed by an applicant will become a condition of its licence, if granted. The approach that has been adopted by the Authority is that, if an applicant wishes to change more than 15% of its format during the South African performance period (the 18-hour broadcast period from 05h00 to 23h00), it is required to apply for an amendment to its licence. Such an application must now be made in terms of section 10 of the Act.

29.3 Paragraph 3.3 states that the Authority will not normally specify the broadcast language of a commercial sound broadcasting service but seeks to encourage broadcasting in all South African languages.

29.4 Paragraph 3.4 states that the Authority will take the requirements of regulations addressing South African music content into account. The

applicable regulations in this regard are the South African Music Content Regulations³⁷ (“the Content Regulations”).

- 29.5 Paragraph 5.1 states that the Authority will require applicants to submit detailed information about their financial resources, business plans and relevant cash flow projections showing a realistic calculation of the expected levels of costs and revenues, in accordance with the requirements set out in the relevant application form. It is indicated that the Authority needs to satisfy itself that an applicant has secured access to initial funding to establish and maintain the proposed broadcasting service as set out in the financial plans submitted to the Authority. However, the selection of successful applicants will not necessarily be based on highest potential profitability. The assessment of applications for a broadcasting licence will be based upon the proposals presented in the completed application form.
- 29.6 Paragraph 5.2 states, in relation to business plans, that, in determining the financial feasibility and general quality of the proposals in the applications, the Authority will be guided by:
- 29.6.1 the applicant's capacity to explain its broadcasting plans and vision for the proposed service and its ability to run a distinctive and profitable radio station;
- 29.6.2 the reliability of the financial and business plans submitted and any assumptions made, together with the general financial soundness of the proposal;
- 29.6.3 the diversity of the proposed ownership and management structures;

³⁷ Published under GN 153 in *Government Gazette* 28453 of 31 January 2006.

- 29.6.4 the social value of the proposed radio station and of the role which it will play in the wider context of development in South Africa;
- 29.6.5 the applicant's ability to provide all the necessary resources, including adequate staffing levels, to run the proposed service successfully.
- 29.7 In relation to the market studies that applicants are required to submit, paragraph 5.3 of the Private Sound Broadcasting Position Paper states that the applicant must present sufficient information to satisfy the Authority that its proposal satisfactorily assesses its market potential and should address the key areas of what, where, why, when, how and who the broadcasting service will target. Applicants should also submit a survey which indicates demand for the proposed service. (This is also a requirement of the ITA, which required primary research to be submitted in support of an application.) In preparing their market studies applicants were to:
- 29.7.1 take into account the contribution that the proposed service would make to the achievement of the objectives of the IBA Act,³⁸ particularly the development of local content programming;
- 29.7.2 take into account the development and distribution of the proposed broadcasting service taking into account any potential new technologies for distribution;
- 29.7.3 analyse the market and potential advertising revenues, taking into account the results of surveys which substantiate the financial projections;

³⁸ The IBA Act was repealed by the Act. In this regard, reference should be made to the objects of the Act.

- 29.7.4 demonstrate financial feasibility consistent with the requirements indicated by the applicant's financial projections;
- 29.7.5 indicate the anticipated audience reach of the new service;
- 29.7.6 provide a demographic profile of the potential listenership and a demonstration of how the proposed service is envisaged to obtain a viable share of the market bearing in mind the activities of potential or existing competitive services and media;
- 29.7.7 indicate the likely impact of the proposed sound broadcasting service on the radio segment of the electronic media market and the advertising market with specific reference to the advertising revenue source in the short to medium term;
- 29.7.8 indicate the attitudes and views of advertisers and media buyers towards the proposed service;
- 29.7.9 provide comment and analysis on general market trends;
- 29.7.10 indicate the target audience for the commercial service;
- 29.7.11 identify potential or existing competitors, their likely audience rating, advertising, revenue and market share, and other key competitive issues;
- 29.7.12 indicate programme trends; and
- 29.7.13 address sales and marketing related issues such as sales methods and representation, discount and credit terms, promotion and advertising of the proposed station.
- 29.8 In line with the requirement in the Act that the Authority must

promote the empowerment of HDPs, paragraph 7 of the Private Sound Broadcasting Position Paper states that the Authority will take into account:

- 29.8.1 the extent to which financial interests in the applicant reflect the inclusion of HDPs;
 - 29.8.2 the nature and extent of decision-making by HDPs in the business venture;
 - 29.8.3 the extent to which historically disadvantaged staff are empowered through training and development programmes as well as the extent to which such staff are included in senior managerial, administrative and editorial decision-making positions; and
 - 29.8.4 whether an applicant has an effective policy and implementation strategy.
30. As set out above, in evaluating applications, the Authority also takes account of the requirements of the Content Regulations. The Content Regulations provide that commercial sound broadcasting licensees which devote 15% or more of their broadcasting time during the performance period to the broadcasting of music, must ensure that, within 18 months of the Content Regulations coming into effect, a minimum of 25% of the musical works broadcast in the performance period consist of South African music and that such South African music is spread reasonably evenly throughout this period.³⁹ As such, new licensees must comply with the Content Regulations from the outset of their operations.

³⁹ Regulation 3.2 of the Content Regulations.

F GENERAL FINDINGS

31. The Authority has made the following general findings in relation to the licensing process for I-BS licences in the primary markets. These findings do not apply to all applicants:

31.1 A significant number of applicants prioritized the need to serve, involve and benefit people and communities from the licence coverage area, which is laudable.

31.2 Some of the applicants did not familiarise themselves adequately with the requirements for commercial sound broadcasting services, as set out in the applicable provisions of the Act, the relevant regulations and the ITA. This militated against the Authority considering their applications favourably. In particular, in some instances there appeared to be limited awareness of the requirements regarding the usefulness and importance of market and audience research and linking such findings with programming content. In many instances, insufficient regard was had to the requirements set out in the ITA and the regulations promulgated in terms of the Act.

31.3 Certain applicants failed to procure all relevant documentation prior to submitting their applications.

31.4 Certain applicants appear not to have familiarised themselves with the procedural requirements that are applicable to licensing processes. As discussed above, a number of applicants effected changes to their applications and, particularly, their shareholding structures subsequent to lodging their applications. As stated above, the Processes and Procedures Regulations provide that where information included in an application changes after submission thereof but before the Authority makes a decision, the applicant must notify the Authority within 14 days

of such a change. A number of applicants changed their shareholding structures during the licensing process but failed to notify the Authority in accordance with the Processes and Procedures Regulations.

32. Many applicants requested that certain information be treated confidentially. In this regard, section 4D of the ICASA Act provides that, when a person submits information to the Authority, that person may request that the information be treated as confidential information. The request for confidentiality should be accompanied by a written statement explaining why the specific information should be treated as confidential. The Authority is then required to make a determination as to whether or not confidentiality will be granted within 14 days of receiving the information and provide reasons to the person concerned in relation to its determination. Where the Authority determines that a request for confidentiality cannot be acceded to, the person who submitted the information must be given an opportunity to withdraw it. Certain information must be treated as confidential information, where the person submitting the information requests it. This is information that is: trade secrets; financial, commercial, scientific or technical information other than trade secrets, the disclosure of which is likely to cause harm to the commercial or financial interests of such person; information, the disclosure of which could reasonably be expected to put the person at a disadvantage in contractual or other negotiations, or to prejudice the person in commercial competition; the names of prospective employees; and business plans of a licensee. The Authority considered all requests for confidentiality that were made during the current licensing process in line with these requirements and notified each applicant who had made such a request of its decision.
33. Several applicants applied for commercial broadcasting service licences in more than one of the primary markets and, in a few instances, the same applicants or corporate vehicles established by the same or most of the same shareholders applied for licences in all three primary markets. The Authority received a number of submissions in relation to such applicants from interested parties who submitted that, if all three FM commercial broadcasting service licences were to be granted to a single applicant or applicants owned

by the same shareholders, this would amount to a contravention of section 65(2) of the Act, which restricts the number of FM commercial radio broadcasting service licences which may be controlled by a single person and the number of companies holding FM commercial radio broadcasting service licences of which a single person may be a director. (Section 65(2) is addressed in further detail in Section H (Interpretation of Key Provisions of the Act) below.) In most cases, the applicants who submitted more than one application or whose shareholders submitted more than one application, indicated that they would apply for an exemption from the restrictions imposed by section 65(2), if they were to be granted all three licences. In the event, the restrictions imposed by section 65(2) of the Act were not relevant in this context given that none of the applicants in question were awarded all three licences.

34. In view of the large number of applications involved in this licensing process, the rulings and reasons set out in this Reasons Document are, of necessity, not formulated in very detailed terms. In particular, the reasons for the Authority's decisions as given in this document are intended to provide an overview of the grounds on which the Authority decided to grant licences to specific applicants and to turn down other applications, mainly taking into account whether (and, if so, to what extent) each applicant complied with the applicable requirements set out in the ITA, the Act and the Private Sound Position Paper. Ultimately, the Authority had to make an assessment, in the context of these statutory and policy factors, as to which of the applicants in each of the primary markets best satisfied the applicable requirements.

G TECHNICAL ANALYSIS

Cape Town

35. The only frequency published by the Authority in the ITA for purposes of providing a commercial sound broadcasting service in the metropolitan area of and around Cape Town was 90.4 MHz at 10 kW ERP.
36. This frequency has been pre co-ordinated from the Constantiaberg Sentech site for maximum coverage of the Cape Peninsula which includes the Cape Metropolitan municipal area.
37. All applicants for the Cape Town frequency indicated that Sentech would provide their signal distribution and that Sentech would provide the signal distribution equipment as well as maintenance.
38. The initial concerns about radio frequency interference in the Sea Point area raised by the SABC and Sentech have been addressed. In order to reduce the probability of interference, the SABC agreed to migrate 5FM's low power gap filler site frequency at the Sea Point site from the current CH 29 (90.4 MHz) to CH2 (87.7 MHz).

Gauteng

39. The only frequency published by the Authority in the ITA for purposes of providing a commercial sound broadcasting service in Gauteng was 89.9 MHz at 11 kW ERP
40. This frequency has been pre co-ordinated from the Pretoria Sentech site for maximum coverage of the Pretoria area and some parts of Johannesburg.

41. The initial concerns about radio frequency interference in the Menlo Park area raised by the SABC and Sentech have been addressed. In order to reduce the probability of interference, the SABC agreed to migrate Radio 2000's low power gap filler site frequency at the Menlo Park site from the current CH 111 (98.6 MHz) to CH 201 (107.6 MHz) or CH 120.(99.5 MHz)
- 42.
43. Although the 89.9 MHz frequency has been licensed to and used by Unisa FM for the previous three years without interference problems, the Authority saw it vital that an agreement be reached regarding a second option to eliminate all probability of interference occurrence, while maintaining the same coverage. Any intended variations in the frequency will maintain the same coverage area as advertised in the ITA.

Durban

44. The frequency that is available in Durban is 103 FM at 25 kW ERP.
45. Mainstreet and Capital FM submitted that the 103 MHz FM frequency designated for the Durban licence is already being used by Radio Al-Ansaar.⁴⁰ The frequency is allocated in the Broadcast Frequency Plan for the provision of a commercial broadcasting service.

⁴⁰ Capital FM submission on Beat 103 FM, 10 August 2010: pp 1 – 2.

H INTERPRETATION OF KEY PROVISIONS OF THE ACT

Introduction

46. In assessing the various applications that were submitted in response to the ITA, it was necessary for the Authority to evaluate whether granting a licence to a particular applicant would violate any of the restrictions imposed by any of sections 64, 65 or 66 of the Act. As discussed above in Section E (Relevant Criteria and Considerations), section 64 of the Act imposes restrictions on foreign control of broadcasting services, section 65 imposes limitations on the number of broadcasting licences that may be held by a particular person and section 66 imposes cross-media restrictions on persons who have interests in print media as well as broadcasting services.

Background to the inclusion of sections 64, 65 and 66 in the Act

47. Section 64 of the Act is formulated in terms very similar to those of section 48 of the IBA Act, which was, as discussed above, repealed by the Act in 2006. Section 48 provided, in this regard, that one or more foreign persons could not exercise “control” over a commercial broadcasting service licensee and could not “have [a] financial interest or interest either in voting shares or paid-up capital in a private broadcasting licensee exceeding twenty per cent.” As is now the case with the Act, the IBA Act defined “financial interest”. The definition in the IBA Act was in very similar terms to the definition that is now contained in the Act and provided that a “financial interest” for the purposes of the IBA Act was an “interest that may not have voting rights attached to it but which gives the person or entity a financial interest directly via shares or indirectly via an agreement giving it the power to have control of the licensee or effective say over the affairs of the licensee”.
48. In turn, sections 65(2), (3), (4), (5) and (6) of the Act are very similar to sections 49(2), (3), (4), (5) and (6)(a) of the IBA Act and sections 66(2), (3),

(4), (5) and (6) of the Act are drafted in very similar terms to sections 50(2)(a) to (d) and (3) of the IBA Act. In particular, section 50(2)(d) of the IBA Act provided that “A 20% shareholding in a radio or television licence shall be deemed to constitute control”. This is similar to section 66(5) of the current Act (which provides that: “A twenty (20) percent shareholding in a commercial broadcasting service licence, in either the television broadcasting service or sound broadcasting service, is considered as constituting control”). Unlike the Act, the IBA Act also specified, in Schedule 2, details in relation to what constituted “control” for the purposes of that Act.⁴¹ In addition, Schedule 2 to the IBA Act provided details in relation to what constituted deemed control of a company. In this regard, Item 3 of Schedule 2 provided that –

“Without derogating from the provisions of any law or from the common law, and *in the absence of proof to the contrary, a person shall be regarded as being in control of, or being in a position to exercise control over, a company if he or she has equity shareholding in the company exceeding twenty-five*

⁴¹ Item 1 of Schedule 2 to the IBA Act provided that –

(1) For the purposes of [the IBA Act], a person shall control or be in a position to exercise control over any existing or prospective private broadcasting licensee if, *inter alia*—

- (a) such person, either alone or together with an associate, is in a position to exercise control over such broadcasting licensee;
- (b) such person, either alone or together with an associate, is in a position to exercise direct or indirect control over the selection or provision of a significant proportion of the programmes broadcast or proposed to be broadcast by such broadcasting licensee;
- (c) such person, either alone or together with an associate, is in a position to exercise direct or indirect control over a significant proportion of the operations of such a broadcasting licensee in providing a broadcasting service under the broadcasting licence;
- (d) such person, either alone or together with an associate, is in a position—
 - (i) where the licensee or prospective licensee is a company, to veto any action taken by the board of directors of such licensee or to appoint or secure or veto the appointment of at least half of the board of directors of such licensee; or
 - (ii) to give or exercise in any other manner, whether directly or indirectly, direction or restraint over any substantial issue affecting the management or affairs of the broadcasting licensee; or
- (e) the existing or prospective broadcasting licensee or, where such a licensee is a company, more than fifty percent of the directors of such company—
 - (i) acts or is accustomed to act; or
 - (ii) under a contract, arrangement or understanding (whether formal or informal) is destined, required or expected to act,

in accordance with the directions, instructions or wishes of, or in concert with, such person or such person and his or her associate acting together or, if such person is a company, the directors of the latter company.

(2) ...

(3) ...

(4) More than one person may be in a position to exercise control over a licensee.

percent or has other financial interests therein equal to at least twenty-five percent of its nett assets”.

49. The effect of these provisions was that, although a shareholder was considered to have control of a company when it held 25% of the shares in that company, in terms of section 50(1)(d) of the IBA Act, the IBA Act also provided that a 20% shareholding was sufficient for control of a broadcasting service licensee to exist.
50. The IBA Act provided, in sections 49(7) and 50(1) respectively, similarly to what is now provided for in sections 65(7) and (8) and section 66(1) of the Act, that the Authority could make recommendations to the Minister of Communications (“the Minister”) in relation to the applicable limitations to be imposed in terms of the IBA on the control of television and radio licences and cross-media interests. In the case of proposed amendments to section 49 (regarding the number of commercial sound broadcasting service licences that could be controlled by a particular person), the Authority was first required to conduct an inquiry before making recommendations in relation to the amendment of the IBA Act and its recommendations had to be tabled by the Minister in the National Assembly within 14 days of receipt thereof.
51. The Position Paper was prepared following an inquiry which was conducted by the Authority pursuant to section 28 of the IBA Act. The Authority issued a Discussion Paper on the Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences (“the Discussion Paper”) on 27 September 2002, to which interested parties were invited to respond. One of the issues raised in the Discussion Paper was the definition of “financial interest” in the IBA Act. The Authority then held public hearings in relation to the issues raised and parties’ responses, following which the Position Paper was published.
52. In the Position Paper, the Authority made various general recommendations in relation to potential amendments to sections 48, 49 and 50, as well as Schedule 2, of the IBA Act:

- 52.1 The Authority recommended that the 20% limitation on foreign ownership should be raised, but that foreigners should not necessarily be allowed to control commercial broadcasting services.⁴² The Authority also recommended that it be empowered to exempt a particular person from the limits on foreign ownership.⁴³ Amendments to the wording of section 48 of the IBA Act, which would have removed the reference to “financial interest”, were also proposed for comment.⁴⁴
- 52.2 It was recommended that the applicable legislation should not distinguish between AM and FM broadcasters and that there should not be a numerical limit on the number of commercial broadcasting service licences that could be controlled by a particular person but, instead, that a person should not be permitted to control more than 35% of the total number of commercial broadcasting services that were licensed to broadcast.⁴⁵
- 52.3 Another recommendation was that section 50(2)(b) of the IBA Act be amended to provide that no person who controlled a newspaper would be allowed to control a commercial broadcasting licence in an area where the newspaper had an average ABC circulation of 25% (rather than 20%) of the total newspaper circulation in that area.⁴⁶ This percentage had no bearing on the meaning of “control”, and was only concerned with the extent of a newspaper’s circulation.
- 52.4 A further recommendation related to item 3 of Schedule 2. The Authority proposed amending this item to retain a 25% shareholding threshold as the level at which a person would be deemed to have control of a company. In other words, the Authority expressed a

⁴² Position Paper, pp 39; 44 – 45.

⁴³ Position Paper, p 46.

⁴⁴ Position Paper, p 50.

⁴⁵ Position Paper, p 45.

⁴⁶ Position Paper, p 46.

preference for a 25% threshold, as opposed to the 20% threshold that was ultimately specified in section 66(5) of the Act.

53. The Authority then made various specific recommendations in relation to how sections 48, 49 and 50 should be amended. These were published in the Position Paper for public comment. The Authority indicated that, once it had received and taken into account any further written representations on the proposed amendments, the proposed amendments would be submitted to the Minister for tabling in Parliament.⁴⁷ The Authority presented two options for the amendment of the relevant sections: Option One, in terms of which sections 48, 49 and 50 of the IBA Act would be repealed and replaced by provisions empowering the Authority to set limits for foreign control and interests, restrictions on control of broadcasting service licences and cross-media limitations by regulation; and Option Two, in terms of which specific amendments were suggested to the then-current wording of sections 48, 49 and 50.
54. The Authority received various submissions from interested persons in response to the Position Paper and the proposed amendments to the wording of sections 48, 49 and 50 of the IBA Act. At around the same time, it became clear that the intention on the part of relevant policy-makers was to repeal the IBA Act, which regulated broadcasting services, and the Telecommunications Act 103 of 1996, which regulated telecommunications services, and to replace these statutes with a new statute, which regulated both sectors and which took account of the convergence of communications technologies. The Authority made recommendations to the Minister with regard to proposed amendments to the IBA Act but, given the intention to repeal and replace that Act, these amendments were ultimately not tabled in Parliament,
55. In the event, the requirements that were previously imposed by sections 48, 49 and 50 of the IBA Act were essentially re-enacted in sections 64, 65 and 66 of the Act with some relatively minor changes. The one material difference

⁴⁷ Position Paper, p 44.

is that, unlike the IBA Act, the Act does not include a list of instances of control and does not indicate what would be deemed generally to be control of a company.

56. The Authority commenced a further inquiry in relation to ownership and control issues in the telecommunications and broadcasting sectors in November 2009 with the publication of the Discussion Document on Ownership and Control (“the Ownership and Control Discussion Document”). In this Ownership and Control Discussion Document, interested parties were requested to provide input in relation to, amongst other things, the levels at which foreigners should be entitled to participate in commercial broadcasting services and what constitutes control for the purposes of the Act. The Authority conducted public hearings in relation to the issues raised in the Discussion Document in May 2010.
57. The Authority published the Findings Document on the Review of Ownership and Control of Commercial Services and Limitations on Broadcasting, Electronic Communications Services and Electronic Communications Network Services (“the Ownership and Control Findings Document”) in September 2011. In the Ownership and Control Findings Document, the Authority indicated its intention to make recommendations to the Minister in relation to the amendment of the Act. The Authority also indicated that, as a matter of policy, for the purposes of broadcasting services “control should comprise 25% shareholding”. In addition, the Authority indicated that a person should be regarded as being in control of a licensed entity where it is in *de facto* control of that entity.⁴⁸ Control rights can, accordingly, result from something other than an ownership interest (such as shareholding alone).
58. While the Authority intends to recommend to the Minister that certain changes be effected to the Act to, amongst other things, clarify issues regarding the control of a broadcasting service licensee, at the present time and in the

⁴⁸ Ownership and Control Findings Document: p 13.

context of the current primary markets licensing process, the Authority has to apply the Act in its current form. This meant that the Authority had to consider what the correct interpretation is of certain provisions of the Act.

Interpretation issues to be decided

59. As part of its evaluation of the applications submitted in response to the ITA, it became necessary for the Authority to make a decision in relation to the following issues:
- 59.1 What constitutes a “financial interest” for the purposes of section 64(1)(b) of the Act?
 - 59.2 To whom does the prohibition on foreign control in section 64 of the Act extend?
 - 59.3 What constitutes “control” for the purposes of section 64(1)(a) of the Act?
 - 59.4 What constitutes “control” for the purposes of section 65 of the Act?
 - 59.5 How should “shareholding” (as referred to in section 66(5) of the Act) and “equity ownership” (as referred to in section 9(2)(b) of the Act) be calculated and assessed?
60. To date, these issues have not been addressed by any court, although they did receive some attention in the context of the complaint brought by Caxton and CTP Publishers Limited against MultiChoice Africa (Pty) Ltd (“the Caxton complaint”), which was adjudicated by the Authority’s Complaints and Compliance Committee (“CCC”).⁴⁹ Many of these issues have also arisen for consideration in the context of the Authority’s inquiry into ownership and

⁴⁹ *Caxton and CTP Publishers Limited v MultiChoice Africa (Pty) Ltd*, case number 37/2010, decision dated 11 October 2010.

control issues. Certain of the recommendations that will be made to the Minister in relation to the amendment of the Act relate to issues that have arisen in the context of the present commercial sound broadcasting service licensing process. At the present time, however, the Authority must interpret the Act as it is presently drafted and seek to ascertain the legislative intention from the Act as it stands, even where the Authority may, in due course, recommend to the Minister that certain relevant provisions of the Act are amended.

61. In interpreting the requirements imposed by sections 64 and 65 of the Act, the Authority has had regard to the general principles of statutory interpretation:

61.1 The basic rule of statutory interpretation is that the ordinary meaning of the words used in the statutory provision concerned must be adhered to unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid the absurdity and inconsistency, but no farther.⁵⁰

61.2 In interpreting a statute, the courts may also have regard to the policy, object or purpose underlying the relevant statute in an attempt to determine and give effect to the “real” intention of the legislature.⁵¹ However, the courts have generally held that the purposive approach is only appropriate once it has been determined that the language employed in the relevant provision admits of doubt. As such, it is recognised that, although the primary aim of statutory interpretation is to arrive at the intention of the legislature, the purpose of a statutory provision can provide a reliable pointer to such intention where there is ambiguity.⁵²

⁵⁰ *Fish Hoek Primary School v GW* [2010] 2 All SA 124 (SCA) para 6.

⁵¹ *Farrar’s Estate v Commissioner for Inland Revenue* 1926 TPD 501 at 508; *Stopforth v Minister of Justice, Veenendal v Minister of Justice* 2000 (1) SA 113 (SCA) para 21.

⁵² *Standard Bank Investment Corporation Ltd v The Competition Commission; Liberty Life Association of Africa Ltd v Competition Commission* 2000 (2) SA 797 (SCA) paras 16 and 21.

- 61.3 The meaning of a statutory provision is often said to be determinable by reading its words in context or reading the language in context or reading the provision itself in context. Context does not only include the language of the rest of the statute, but also its subject matter, its apparent purpose and scope and, within limits, its background.⁵³

Financial interest

62. As set out above, section 64(1)(b) of the Act provides that a foreigner may not, whether directly or indirectly, have a “financial interest” or an interest either in voting shares or paid-up capital in a commercial broadcasting licensee, exceeding 20%. A “financial interest” is defined in section 1 of the Act and, accordingly, for the purposes of section 64(1)(b), as –

“an interest that may or may not have voting rights attached to it but which gives the person or entity an equity or debt interest directly through shares or other securities or indirectly through an agreement giving it –

- (a) the power to control the licensee; or
- (b) an effective say over the affairs of the licensee”.

63. The Act does not contain a definition of either “equity interest” or “debt interest”.

64. In the Authority’s assessment, the definition of “financial interest” could be read to mean, on the one hand:

- 64.1 an interest (that may or may not have voting rights attached to it) which gives the holder an equity or debt interest directly through shares or other securities; or

⁵³ *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1925 AD 245 at 261; *Secretary for Inland Revenue v Brey* 1980 (1) SA 472 (A) 478A–B; *S v Makwanyane* 1995 (3) SA 391 (CC) para 10; *Fundtrust (Pty) Ltd (in liquidation) v Van Deventer* 1997 (1) SA 710 (A) 726 in *finJaga v Dönges*; *Bhana v Dönges* 1950 (4) SA 653 (A) 662D–667H. In *Hoban v ABSA Bank Ltd t/a United Bank* 1999 (2) SA 1036 (SCA) para 20, the Court held that “context does no more than reflect legislative meaning which in turn is capable of being expressed only through words in context”.

- 64.2 an interest (that may or may not have voting rights attached to it) which gives the holder an equity or debt interest indirectly through an agreement giving it the power to control the licensee or an effective say over the affairs of the licensee.
65. On the other hand, the definition can also be read to mean either:
- 65.1 an interest (that may or may not have voting rights attached to it) which gives the holder an equity or debt interest directly through shares or other securities giving it the power to control the licensee or an effective say over the affairs of the licensee; or
- 65.2 an interest (that may or may not have voting rights attached to it) which gives the holder an equity or debt interest indirectly through an agreement giving it the power to control the licensee or an effective say over the affairs of the licensee.
66. The central question, accordingly, is whether an interest must afford the holder a measure of control over the company or other entity that holds a broadcasting service licence, before it will be regarded as a “financial interest” for the purposes of the Act, or not. Another question for assessment is whether or not the person in question holds an “equity or debt interest” in the first place.
67. In the context of the Caxton complaint, the CCC indicated that a “financial interest, however large, without the effect in [paragraph] (a) or (b) [of the definition of “financial interest”] is of no significance as far as control in company law or under section 64 [of the Act] is concerned”. As such, the CCC was of the view that, in order to fall within the definition of “financial interest”, an interest in a licensee must also afford the holder control over the licensee or an effective say over its affairs.

68. The Authority received submissions on this issue from Congrewell (Pty) Ltd (Cape Magic FM), Congreway (Pty) Ltd (KZN Magic FM) and Vexiserve (Pty) Ltd (Pretoria Magic FM) and Main Street 756 (Pty) Ltd, Main Street 757 (Pty) Ltd and Main Street 758 (Pty) Ltd (collectively “Main Street”) which applied for commercial broadcasting service licences in the Cape Town, Durban and Gauteng markets. Congreway, Congrewell and Vexiserve submitted that, on the basis that their foreign shareholder, which also provided a large part of its funding on shareholder loan account, did not control the applicant (given that its equity interest was less than 20% and the foreign shareholder did not have other control rights) the foreign shareholder did not have a “financial interest” in the applicant for the purposes of section 64(1)(b) of the Act.⁵⁴
69. Congrewell, Congreway and Vexiserve also submitted an opinion from counsel in this regard.⁵⁵ Counsel’s views may be summarised as follows –
- 69.1 The fact that a foreigner holds a large “interest” as a creditor in a licence applicant through a shareholder loan does not mean that the foreigner holds a “financial interest” as defined in the Act.
- 69.2 This is on the basis that a large interest which does not also give the foreigner in question the power to control the relevant licensee or an effective say over the licensee’s affairs is not a financial interest for the purposes of the Act.⁵⁶
70. In other words, in Counsel’s view, the second possible interpretation discussed above is the correct interpretation of the definition of “financial interest”.
71. Main Street submitted that, even though its foreign shareholder would provide a greater proportion of the applicants’ funding by virtue of the fact that it had

⁵⁴ Cape Magic FM additional submission, 24 November 2010, pp 3 – 5.

⁵⁵ Opinion prepared by A Rafik Bhana SC and Anthony Gotz, 8 December 2010.

⁵⁶ Opinion prepared by A Rafik Bhana SC and Anthony Gotz: p 16.

agreed to loan funds to another shareholder, this did not constitute a “financial interest” as defined in the Act. This was on the basis that the loan agreement between the applicant’s foreign shareholder and the other shareholder did not give the foreign shareholder the right to control the other shareholder or an effective say over its affairs.⁵⁷

72. The Authority agrees with the view that a “financial interest” as defined, requires that the holder of the relevant interest has the power to control the licensee or has an effective say over the affairs of the licensee. This is on the basis that the way in which the definition is formatted suggests that paragraphs (a) and (b) of the definition apply to both constituent parts of the sentence. The Authority accepts that this means that a “financial interest” is, for all intents and purposes, the same as control. The basis for its inclusion is, accordingly, somewhat unclear. However, despite this, the Authority is constrained to interpret the words of the Act as they are drafted.

“Control” for the purposes of section 64(1)(a) and section 65 of the Act

73. As set out above, in terms of section 64(1)(a) of the Act, a foreigner may not “control” a commercial broadcasting service. In terms of sections 65(2) and (4) of the Act, no person may directly or indirectly exercise control over more than two AM or FM commercial sound broadcasting service licences. In addition, in terms of sections 65(3) and (5), respectively, no person may control two AM or FM commercial sound broadcasting service licences which either have the same or substantially overlapping licence areas. Thus, the concept of “control” is central to an understanding and application of the limitations imposed by section 64(1)(a) and section 65. However, neither section 64 or 65 nor section 1 (the general definition section) of the Act provides a definition of “control”.⁵⁸ By contrast, section 66(5) of the Act provides that a 20% shareholding in a commercial broadcasting service

⁵⁷ Main Street 756 additional information, 9 December 2010: item 2; Main Street 757 additional information, 30 November 2010: item 2; Main Street 758 additional information, 25 November 2010: item 2.

⁵⁸ See *Primedia Ltd / The Competition Commission* [2007] 1 CPLR 113 (CT) para 13.

licence “is considered as constituting control”. (As discussed above, section 66 of the Act imposes restrictions on the ability of shareholders in commercial broadcasting licences to have cross-media interests.)

74. The words “is considered as” in section 66(5) are the approximate equivalent of “will be deemed as”.⁵⁹ In *S v Rosenthal*⁶⁰ the court stated the following in this regard:

“The words ‘shall be deemed’ ... are a familiar and useful expression often used in legislation in order to predicate that a certain subject-matter, eg a person, thing, situation, or matter, shall be regarded or accepted for the purposes of the statute in question as being of a particular, specified kind whether or not the subject-matter is ordinarily of that kind. The expression has no technical or uniform connotation. ... Some of the usual meanings and effect it can have are the following. That which is deemed shall be regarded or accepted (i) as being exhaustive of the subject-matter in question and thus excluding what would or might otherwise have been included therein but for the deeming, or (ii) in contradistinction thereto, as being merely supplementary, ie, extending and not curtailing what the subject-matter includes, or (iii) as being conclusive or irrebuttable, or (iv) contrarily thereto, as being merely *prima facie* or rebuttable.”

75. Thus, the effect of section 66(5) is to provide that, even though a 20% shareholding might not ordinarily constitute “control”, such a shareholding must be regarded, for the purposes of section 66, as constituting control. In the Authority’s assessment, this deeming provision falls in category (ii) mentioned in the above quotation, in the sense that it adds to the situations that would ordinarily be regarded as constituting “control”, in accordance with the usual meaning of this term.⁶¹ It is not an exhaustive statement of the circumstances that are regarded, for the purposes of section 66, as amounting to “control”. If it were, it would have the effect of excluding all other instances of control such as where a person has *de facto* management control over a company by virtue of the contractual arrangements that it has entered into even where it does not have 20% of the shares in that company.

⁵⁹ See *S v Van Rensburg* 1967 (2) SA 291 (C) 295G-H; *Ex parte Strydom* 1988 (1) SA 616 (D) 620I-J.

⁶⁰ 1980 (1) SA 65 (A) 75G-76A. Also see *South African Pharmacy Board v Norwitz* 1982 (2) SA 674 (A) 690H-691A.

⁶¹ See *S v Ostilly* 1977 (2) SA 104 (D) 108 in fin.

This could not have been the intention of the legislature, having regard to the stated objects of the Act. In other words, for the purposes of section 66, a 20% shareholding would only be one form of control.

76. The question arises whether the “deemed control” provision set out in section 66(5) applies only in the context of section 66, or whether it may or should also be applied in the interpretation and application of section 64(1)(a) and section 65. If the deeming provision set out in section 66(5) is not applicable in the context of section 64(1)(a) and section 65, then the question arises as to how the term “control”, as used in those sections, is to be understood.
77. There are arguments both in favour of, and against, an interpretation of the Act that would apply the “deeming provision” set out in section 66(5) in the interpretation of sections 64(1)(a) and 65.
78. On the one hand, the fact that the deeming provision that appears in section 66(5) is not replicated in sections 64 and 65 suggests that it might perhaps have been intended that the 20% shareholding rule embodied in section 66(5) was intended to apply only in the context of section 66. Likewise, the fact that no definition of control appears in section 64 or 65 (or, indeed, in section 1) suggests that it might perhaps have been intended that the word “control”, as used in sections 64(1)(a) and 65, should be construed in accordance with its ordinary meaning⁶² (which is considered below), and not in accordance with the deeming provision set out in section 66(5).
79. On the other hand, precepts of statutory interpretation suggest that, in the absence of a clear legislative intention to the contrary, a particular word should have the same meaning wherever it occurs in the statute, since there is a reasonable supposition, if not a presumption, that “the same words in the same statute bear the same meaning” throughout the statute.⁶³ The courts

⁶² See *S v W* 1975 (3) SA 841 (T) 843D-E.

⁶³ *The Master v IL Back & Co Ltd* 1983 (1) SA 986 (A) 1001D; *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC) para 70; *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC) para 52.

will deviate from this presumption of consistent use of language with great hesitation and only if driven to do so, for example, because to do otherwise would lead to manifest absurdity, or would clearly frustrate the manifest intention of the lawgiver.”⁶⁴ On this approach, a word repeatedly used in a statute must generally carry the same meaning throughout the statute unless it is clear from its language that such word is used in different contexts, warranting that different meanings be attached to it. In the latter event, a different meaning which is consistent with the context would be given to the word. However, before such meaning can be attributed to it, it must be clear from the language that the legislature intended a different meaning.⁶⁵

80. The proximate recurrence of the same term within a statute strengthens the presumption of consistency of meaning. In *Commissioner for Customs & Excise v Kemtek Imaging Systems*,⁶⁶ the court was concerned with the meaning of the word “film”, which appeared in successive parts of schedule 1 to the Customs and Excise Act 91 of 1964. The court held that the presumption “would apply with even greater force where the word is used in two tariff headings the one following upon the other”.

81. Various applicants and interested parties made submissions to the Authority on this issue:

81.1 Both Brimstone Consortium and Life College Consortium submitted opinions prepared by Werksmans Attorneys in relation to the meaning of “control” for the purposes of section 65 of the Act. The view expressed by Werksmans in these opinions is that, in the absence of a definition of “control” for the purposes of section 65 of the Act, it is necessary to have regard to the ordinary meaning of the word.⁶⁷ Werksmans referred in this regard to four broad categories of

⁶⁴ *S v Dlamini* 1999 (4) SA 623 (CC) para 47.

⁶⁵ *Chagi v Singisi Forest Products (Pty) Ltd* 2007 (5) SA 513 (SCA) para 13.

⁶⁶ 1999 (4) SA 906 (SCA) para 15.

⁶⁷ Brimstone Consortium additional submission, 26 November 2010, p 2; Life College Consortium additional submission, Annexure A, p 2.

control:⁶⁸

- 81.1.1 complete control, which entitles the holder thereof to exercise all the voting rights at company meetings;
 - 81.1.2 majority control, which entitles a person to exercise more than 50% of the voting rights;
 - 81.1.3 minority control, which means that the controller exercises sufficient voting rights, though less than the majority, to place him or her in *de facto* control of the company;
 - 81.1.4 management control or control of the proxy voting machinery, which is usually coupled to minority control, enabling the controller to control the company by soliciting proxy votes, particularly where the shares of the company are widely held.
- 81.2 In short, Werksmans submitted that, on the basis of shareholding alone, a person would only have “control” for the purposes of section 65 of the Act if that person was able to exercise more than 50% of the voting rights in a particular entity.
- 81.3 The view submitted by Werksmans (for Brimstone Consortium and Life College Consortium) and KZN Talk Radio (Pty) Ltd was that the Authority cannot have regard to section 66(5) of the Act in interpreting section 65 on the basis that the deeming provision in section 66(5) is confined to section 66, which deals specifically with limitations on the cross-media control of commercial broadcasting services⁶⁹ and that, if the legislature had intended this deeming provision to be relied on outside of the context of section 66, it would have specifically stated as

⁶⁸ See Cilliers & Benade *Corporate Law* (2000) 460, cited in the CCC’s decision in the context of the Caxton complaint.

⁶⁹ KZN Talk Radio additional submission, 30 November 2010, p 1.

much.⁷⁰ Main Street made a similar submission.⁷¹

81.4 Main Street submitted, firstly, that “control” for the purposes of section 65 of the Act is 25% in line with Schedule 2 of the IBA Act. This was on the basis that, at the time that the Authority converted existing licences that had been issued in terms of the IBA Act (that was repealed and replaced by the Act) to new licences in terms of the Act, the Authority published a General Notice on Converted Licences⁷² indicating that –

“Until the new regulatory dispensation is promulgated [following a review of the ownership and control regulations published in terms of the Telecommunications Act] the ownership and control provisions of any *regulation* issued in terms of the [IBA Act], the Broadcasting Act and the Telecommunications Act shall remain applicable and where ownership and control terms were included in a *licence* issued in terms of the [IBA Act], the Broadcasting Act and Telecommunications Act such terms shall be held to remain applicable until reviewed” (emphasis added).⁷³

81.5 As such, Main Street submitted that “the definition of control as contained in Schedule 2 of the [IBA Act] remains applicable to the [Act]”.⁷⁴

81.6 Following the public hearings on the primary markets licensing process, Main Street submitted further that “past practice has established a convention that a person was deemed to be in ‘control’ or deemed to be in a position to exercise ‘control’ over a company, if he or

⁷⁰ Brimstone Consortium additional submission, 26 November 2010, p 3; Life College Consortium additional submission, Annexure A, p 3 – 4; Transcript of the hearing in relation to the Brimstone Consortium application, 12 November 2010, pp 34 - 36.

⁷¹ Main Street 756 additional information, 9 December 2010: items 2 & 3; Main Street 757 additional information, 30 November 2010: items 2 & 3; Main Street 758 additional information, 25 November 2010: items 2 & 3.

⁷² Published under GN 28 in *Government Gazette* 31803 of 16 January 2009.

⁷³ Paragraph D.15 of Schedule 1 to the General Notice on Converted Licences.

⁷⁴ Main Street submissions on the application of Congrewell (Pty) Ltd (amongst others), 10 August 2010 (“Main Street submission”), pp 3 – 4.

she had a shareholding exceeding 25% or had other financial interests therein, equal to at least 25% of its net assets". Main Street submitted further that if the Authority wished to "amend" the control restrictions in the Act or to use a different control "convention" to that used in the past, the Authority first had to allow the public to comment.⁷⁵

81.7 Main Street pointed out that, if 20% is regarded as control for the purposes of the Act as a whole, this would mean that "foreigners would be entitled to have 20% voting shares in a commercial broadcasting licensee in terms of section 64(1)(b), but would be prohibited from having a 20% shareholding in a commercial broadcasting licensee in terms of section [64(1)(a)]" of the Act.⁷⁶

81.8 KZN Talk Radio also submitted that "control" for the purposes of section 65 of the Act must be understood as a 25% shareholding in line with Schedule 2 to the IBA Act on the basis that the Authority and the IBA, have always defined control in this way.⁷⁷ Werksmans, on behalf of the Brimstone Consortium and Life College Consortium, disagreed with this contention on the basis that the IBA Act, including Schedule 2 to that Act, was repealed in its entirety by the Act and that, accordingly, it was not possible to rely on it.⁷⁸ KZN Talk Radio submitted that a change in the Authority's approach would have to be preceded by a clear policy document detailing the proposed changes.⁷⁹

⁷⁵ Main Street 756 additional information, 9 December 2010: item 3; Main Street 757 additional information, 30 November 2010: item 3; Main Street 758 additional information, 25 November 2010: item 3.

⁷⁶ Main Street 756 additional information, 9 December 2010: item 2; Main Street 757 additional information, 30 November 2010: item 2; Main Street 758 additional information, 25 November 2010: item 2.

⁷⁷ KZN Talk Radio additional submission, 30 November 2010, p 1 – 2; Transcript for KZN Talk, 16 November 2011: pp 42 - 46.

⁷⁸ Brimstone Consortium additional submission, 26 November 2010, p 3; Life College Consortium additional submission, Annexure A, p 3; Transcript of hearing in relation to the Brimstone Consortium application, 12 November 2010: pp 30 – 31..

⁷⁹ KZN Talk Radio additional submission, 30 November 2010, p 2 - 3.

- 81.9 In addition, KZN Talk Radio indicated that, in their view, the Authority's recommendations in the Position Paper regarding the proposed amendment of the ownership and control provisions of the IBA Act remain in effect and the Minister should, accordingly, table them before the National Assembly, failing which the Minister is in breach of sections 65(8) and 66(8) of the Act.⁸⁰ KZN Talk Radio relied on section 92(7) of the Act in this regard in terms of which any pending processes, recommendations and regulations before the Authority or the Minister at the time when the Act came into effect were to be considered as having been submitted in terms of the relevant provisions of the Act.
- 81.10 KZN Talk Radio also submitted that section 66(5) cannot have been intended to be of general application because it would mean that a foreigner who is allowed to hold 20% of the shares in a broadcasting licensee in terms of section 64(1)(b) of the Act would be restricted from doing so in terms of section 64(1)(a) of the Act if a 20% shareholding was deemed to be "control".
- 81.11 KZN Talk Radio submitted that the Authority had by implication decided the question as to what constitutes control for the purposes of section 65 of the Act, when it converted the various licences in which Kagiso Media Limited holds interests above 20% to new licences in terms of the Act.⁸¹
82. The question as to how "control" should be interpreted for the purposes of sections 64(1)(a) and 65 of the Act, gives rise to a number of difficulties and problems. Many of these issues are a result of the way in which the relevant provisions in Chapter 9 of the Act have been drafted. As the Authority recognised at the time that the Position Paper was prepared, lack of clarity in

⁸⁰ KZN Talk Radio additional submission, 30 November 2010, p 3.

⁸¹ KZN Talk Radio additional submission, 30 November 2010, p 4.

the drafting of the relevant provisions gives rise to numerous inconsistencies which need to be addressed and resolved by the legislature.

83. In the Authority's assessment, considerations of consistency (in accordance with the statutory interpretation principles described above), provide a strong argument in favour of interpreting section 65 of the Act in such a manner that a 20% shareholding in a licensee would constitute "control", as contemplated in section 66(5). It is not clear from the language of the Act that the legislature had a contrary intention, nor is it apparent why the two provisions (which deal with similar subject-matter) should be approached differently in this regard. Accordingly, the Authority's interpretation is that each of sections 64(1)(a), 65 and 66 should be applied in such a manner that a 20% shareholding in a licensee would be construed as constituting "control". This conclusion derives indirect support from the fact that section 64(1)(b) of the Act also seems to contemplate that a 20% shareholding in a licensee is the level beyond which a foreigner's interest in a licensee should not rise. Having regard to sections 64(1)(b) and 66(5), the legislature apparently contemplated that a 20% shareholding in a licensee would suffice to confer on the shareholder an effective ability to exercise significant influence over the affairs of the licensee. Having regard to the stated objects of the Act, this conclusion also derives a measure of support from the principle that the intention of a deeming provision, in laying down an hypothesis, is that the hypothesis shall be carried as far as necessary to achieve the legislative purpose (although no further).⁸²
84. In the Authority's assessment, there is no basis for a finding that a 25% shareholding amounts to "control" for the purposes of the Act on the basis of Schedule 2 of the IBA Act. Although sections 64, 65 and 66 of the Act are similar to corresponding provisions of the IBA Act, the relevant provisions of the IBA Act ceased to have legal force when the IBA Act was repealed by the Act with effect from 19 July 2006.

⁸² *Mouton v Boland Bank Ltd* 2001 (3) SA 877 (SCA) para 13.

85. The change in the shareholding threshold at which a person will be deemed to have “control” of a licensed entity is a result of the repeal of the IBA Act and the enactment of the Act, which contains different provisions from those which were contained in the IBA Act. The 25% threshold that previously applied was not an established “practice” or “convention” but was a matter of law on the basis of the provisions of the IBA Act. The change in the applicable threshold for “control” is not, as some applicants suggested, the result of a policy change by the Authority or a change in practice but is as a result of a change in the law.
86. The General Notice on Converted Licences which was published by the Authority when licences issued in terms of the IBA Act and the Telecommunications Act were converted to new licences in terms of the Act also cannot serve to extend the application of the IBA Act beyond its repeal. The statement made by the Authority in the General Notice on Converted Licences in relation to the continued application of ownership and control requirements simply indicated that requirements in relation to ownership and control that were contained in existing regulations published under the IBA Act and Telecommunications Act would continue to apply. This was already the case by virtue of section 95(2) of the Act, which provides that the *regulations* published under the IBA Act and Telecommunications Act, amongst other statutes, remain in force until amended or repealed. The empowering statutes themselves, however, (including Schedule 2 to the IBA Act), cannot continue to bind the persons who were previously regulated under them after they have been repealed and the General Notice on Converted Licences did not purport to extend the application of either of these empowering statutes or any part of them. In addition, the statement in the General Notice on Converted Licences that licence conditions in relation to ownership and control that were contained in previous licences that were converted to new licences only had application to licensees who were *already* licensed in terms of either the IBA Act or the Telecommunications Act. It has no application to the prospective licensees who participated in the current licensing process. In any event, it is not clear that the Authority had the power to extend the application of licence conditions contained in old licences issued in terms of

the IBA Act and the Telecommunications Act following their conversion to new licences in terms of the Act and the legal effect of the Authority's statement in this regard in the General Notice on Converted Licences has been debated. In light of the fact that the statement does not apply to applicants for new broadcasting licences and that the General Notice on Converted Licences does not purport to extend the application of any part of the IBA Act, including Schedule 2 to that Act, it is not necessary for the Authority to address this issue in any further detail in the context of the current process.

87. Of course, the fact that IBA Act has been repealed, does not mean that its provisions can have no relevance to the interpretation of the Act. In the interpretation of a statutory provision, regard may be had to repealed statutes in relation to the same subject matter if the language of the provision to be interpreted is not clear.⁸³ Where the uncertainty of the legislature's intention relates to a recent amendment of an enactment which has been on the statute book for many years and which has been amended on a number of previous occasions, the historical perspective can be of assistance in resolving problems of interpretation.⁸⁴ However, once the meaning of a statutory provision is found to be clear and unambiguous it is the function of a court to give effect to it. It is not then permissible to have recourse to pre-existing legislation for the purpose of construing the statutory provision.⁸⁵ It is proper to refer to earlier Acts in relation to the same subject matter only where there is ambiguity. It is the duty of the court first of all to ascertain the meaning of the existing provision and, if the meaning is plain, not to confuse the issue by looking at the previous provision.⁸⁶ In the Authority's assessment, the meaning of "control" for the purposes of the Act can be resolved without regard to the previous provisions of the IBA Act

⁸³ *Cornelissen v Universal Caravan Sales (Pty) Ltd* 1971 (3) 158 (A) 175H.

⁸⁴ *Santam Insurance Ltd v Taylor* 1985 (1) SA 514 (A) 527B-C.

⁸⁵ *Ebrahim v Minister of the Interior* 1977 (1) SA 665 (A) 680B; *Padongelukkefonds (voorheen Multilaterale Motorvoertuigongelukkefonds) v Prinsloo* 1999 (3) SA 569 (SCA) 575J-576A.

⁸⁶ *R v Von Zell* (2) 1953 (4) SA 552 (A) 558F-H.

88. Similarly, the recommendations that were made by the Authority in the Position Paper have no bearing on how sections 64, 65 and 66 of the Act are interpreted. As discussed above, these recommendations were not tabled before Parliament; even if the recommendations had been tabled before Parliament, they would have remained recommendations until such time as they were enacted by Parliament. Although the Position Paper survived the repeal of the IBA Act, a policy document such as the Position Paper cannot be used as an aid to interpret provisions in an Act of Parliament, in the same way that (and even more so than) regulations made in terms of legislation cannot be used as an aid to interpret that legislation.⁸⁷ Policies (such as those set out in the Position Paper) cannot override or be in conflict with laws.⁸⁸ Such policies must be compatible with the relevant empowering legislation.⁸⁹ In the present instance, relying on the Position Paper as a basis for adopting a 25% shareholding threshold would be incompatible with section 66(5), which, for the reasons set out above, must also be applied in the context of section 64(1)(a) and section 65.
89. The Authority appreciates the potential difficulty that is created by an interpretation that a 20% shareholding is deemed to be “control” for the purposes of the Act in the context of sections 64(1)(a) and (b) of the Act. This is on the basis that, while section 64(1)(a) of the Act provides that a foreigner cannot have “control” of a licensee, in terms of section 64(1)(b), a foreigner cannot have “voting shares or paid up capital ... *exceeding* twenty percent” (20%). In other words, a foreigner who holds 20% of the shares in a commercial broadcasting licensee would, strictly speaking, be in breach of section 64(1)(a) of the Act, even though it is permitted to hold 20% of the voting shares and paid-up capital in the licensee in terms of section 64(1)(b). This is one of the instances where there is a clear problem with the drafting of the Act. In the Authority’s assessment, as set out above, the way in which the

⁸⁷ *Islamic Unity Convention v Minister of Telecommunications* 2008 (3) SA 383 (CC) para 57.

⁸⁸ *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 (SCA) para 7; *Minister of Education v Harris* 2001 (11) BCLR 1157 (CC) paras 10 and 13.

⁸⁹ *South African Post Office Ltd v Chairman, Western Cape Provincial Tender Board* 2001 (2) SA 675 (C) para 20.

Act has been drafted points to a legislative intention that a 20% shareholding is significant. Accordingly, the Authority is of the view that a shareholding *in excess of 20%* by a foreigner is impermissible in terms of section 64(1)(a) of the Act. In the context of the limitations on control, the Authority's view is that, for the purposes of section 65(2), a person may not (without an appropriate exemption) hold 20% or more of the shares in more than two commercial broadcasting service licences. The difference in the Authority's approach to section 64(1)(a) and section 65(2) is that section 64(1)(a) has to be read in the context of section 64(1)(b). No provision comparable to section 64(1)(b) is included in section 65.

90. The Authority also appreciates that the shareholders in certain existing commercial broadcasting service licensees that were licensed in terms of the IBA Act presently hold in excess of 20% of the shares in more than two companies that control FM and AM commercial sound broadcasting service licensees. Certain of these commercial broadcasting service licensees were granted exemptions in terms of the IBA Act where they held more than 25% of the shares in more than two broadcasting service licensees in the same category. Other licensees did not apply for such an exemption and did not need to do so in terms of the IBA Act because they did not hold 25% or more of the shares in more than two commercial broadcasting service licensees in the same category and, accordingly, were not considered to control those licensees.. The shareholding structures of these licensees were set up in line with the restrictions imposed under section 49 of the IBA Act read with Schedule 2 to that Act that, without an appropriate exemption, a shareholder could not directly or indirectly hold 25% or more of the shares in more than two FM or two AM commercial sound broadcasting service licensees. Given that these licensees were licensed in terms of the IBA Act, the Authority was required to convert their licences to comparable broadcasting service licences in terms of the transitional provisions of the Act “on no less favourable terms”.⁹⁰ Accordingly, the Authority converted *these licences* on the basis of the shareholding structures that were previously permissible in terms of the

⁹⁰ Section 93(1) of the Act.

IBA Act. The fact that the Authority converted existing commercial broadcasting service licences in this manner does not mean, however, that the Authority is now precluded from adopting an interpretation of the Act that a 20% shareholding in a licensee (whether direct or indirect) amounts to control of that licensee for the purposes of sections 64, 65 and 66 of the Act. Indeed, the Authority must adopt such an interpretation if, in its assessment, this is the correct interpretation. The Authority recognises that, on its interpretation, certain existing commercial broadcasting service licensees are in breach of section 65 of the Act. The Authority will engage with the affected licensees and their shareholders regarding possible ways to deal with this.

The various manifestations of control

91. A significant shareholding is only one manifestation of control of a company. Control of a company may also be acquired or exercised through various mechanisms or arrangements other than shareholding. The fact that an entity holds less than 20% of the shares in the issued share capital of a licensee does not necessarily mean that it cannot or does not control the licensee. The enquiry into whether or not a person or entity controls a licensee should extend beyond mere shareholding. This applies equally to the interpretation of section 64, section 65 and section 66 of the Act: in each instance, the question must be asked whether the relevant person has control in *any* manner or form (including, but not limited to, whether such control is exercised through shareholding) of the licensee concerned. The enquiry does not begin and end with shareholding percentages. As such, in the interpretation and application of each of sections 64, 65 and 66, the point of departure is to determine whether the relevant person has the ability, through whatever means (including, but not limited to, shareholding) to exercise control over the affairs of the licensee concerned. Shareholding is only one of the *indicia* of the presence or absence of “control”. “Control” is a broad concept, and may be exercised in a variety of ways. In other words, wherever the term “control” appears in section 64, 65 or 66, it should be construed in accordance with its ordinary, general meaning, of which shareholding is only

one element. In this regard, the Authority will have regard to factors such as those outlined in Item 1 of Schedule 2 to the IBA Act.

The calculation and assessment of “shareholding” and “equity ownership”

92. Given that, as provided for in section 66(5), in the Authority’s assessment a 20% shareholding in a licensee is considered as constituting control for the purposes of sections 64(1)(a), 65 and 66 of the Act, the Authority had to decide how shareholding was to be assessed. This enquiry was also relevant for the purposes of section 9(2)(b) of the Act, read with item 6.1 of the ITA, in terms of which applicants had to have at least 30% “equity ownership” by HDPs.
93. When assessing shareholding levels and equity ownership by HDPs, the Authority looked at effective shareholding levels calculated on the basis of a “flow-through” approach. As such, the percentage of shareholding or equity ownership that is held in a particular entity is determined by multiplying the percentage of ownership rights held by a particular person in any intermediary entity by the percentage of ownership rights which that intermediary holds in the applicant.
94. Many applicants also referred to their scores and ratings and those of their shareholders or consortium members in terms of the Codes of Good Practice. Although the enquiry in terms of the Act in relation to equity ownership by HDPs is different from that under the BBBEE Act, the Authority adopted a pragmatic approach and took relevant information in this regard into account in the evaluation of the applications.

**INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH
AFRICA**

**LICENSING PROCESS FOR INDIVIDUAL COMMERCIAL FREE-TO-AIR SOUND
BROADCASTING SERVICE LICENCES FOR THE PROVISION OF
BROADCASTING SERVICES**

REASONS FOR DECISION

PART IV: GAUTENG

May 2012

K FINDINGS, DECISIONS AND REASONS: GAUTENG

1. The Authority's decisions in relation to each of the applicants who applied for a commercial sound broadcasting licence to broadcast on the 98.9 FM frequency in Gauteng are set out below, together with the reasons for those decisions. The Authority has not canvassed each and every aspect of each application in this Reasons Document and has instead highlighted particular aspects of applications that had a bearing on the Authority's decisions. Many of the applicants who submitted applications for commercial broadcasting service licences complied with the various criteria set by the Act and in the Private Sound Position Paper. Accordingly, the Authority has awarded the Gauteng commercial sound broadcasting service licence to the applicant which, in its assessment, best meets the requirements for commercial broadcasting service licensees and contributes to the achievement of the regulatory objectives which the Authority is required to promote.
2. The licence area to be reached by a broadcast signal transmitted on 98.9 MHz at 11 kW ERP from a transmitter located in Pretoria is primarily the geographic area of the northern region of the province of Gauteng and includes the municipal areas of Moretele and Madibeng in the North West Province. In its consideration of the various applicants' submissions regarding the demand and need for their respective proposed broadcasting services, the Authority had regard to the results of the most recent census carried out in 2001 ("2001 Census")¹ in relation to the demographic profile of the relevant area and various surveys conducted by Statistics South Africa. In this regard

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- 2.1 The total population of the coverage area² is 6,078,292.³ Based on

¹ Statistics South Africa *Census 2001: Stages in the life cycle of South Africans* (2005) Pretoria.

² The coverage area consists of the following municipal areas: City of Johannesburg, Tshwane, Mohale City and Nokeng tsa Taemane in the Gauteng Province and Moretele and Madibeng in the Bojanala District Municipality of the North West Province.

the estimates in the 2007 Community Surveys, the population in 2007 was 7,156,729. The 2007 Community Surveys state that 78% of households in this area have a radio. ⁴

2.2 Figures pertaining to race, language and religion are only available in relation to Gauteng as a whole and not in relation to each of the district and local municipalities (or parts thereof) in the coverage area. As the populations of the municipal areas of the City of Johannesburg and Tshwane together comprise the majority (58.8%) of the population of the Gauteng Province, the figures set out below, which relate to the Gauteng Province as a whole and not specifically to the coverage area, are still of some value.

2.2.1 In 2001, Africans constituted 73.8% of the population, Coloureds 3.8%, Indians 2.5% and Whites 19.9%. ⁵

2.2.2 The language most frequently spoken across the Gauteng Province was isiZulu (21.5%), followed by Afrikaans (14.4%), Sesotho (13.1%) and English (12.5%). ⁶

2.2.3 The predominant religion in the Province is Christianity (75.9%). Persons who do not subscribe to any religion constitute 18.4% of the population, followed by Islam at 1.7%. ⁷

3. The Authority also had regard to the public, commercial and community sound broadcasting services that are presently available in the coverage area and to

³ Statistics South Africa *Community Survey, 2007 Basic Results: Gauteng* Report-03-01-27, table GP3 and Statistics South Africa *Community Survey, 2007 Basic Results: North West* Report-03-01-28, table NW3.

⁴ Statistics South Africa *Community Survey, 2007 Basic Results: Gauteng*, table GP13 and Statistics South Africa *Community Survey, 2007 Basic Results: North West* Report-03-01-28, table NW13.

⁵ *Census 2001*, Table 1.1 in *Provincial Profile 2004 Gauteng*, at 6.

⁶ *Census 2001*, Table 1.4 in *Provincial Profile 2004 Gauteng* at 13.

⁷ *Census 2001*, Table 1.6 in *Provincial Profile 2004 Gauteng* at 14.

recent AMPS and RAMS figures.

Station / Licensee	Area of broadcast	Language of Broadcast	Listenership: RAMS June 2011 ⁹ [in thousands]		Type service of
			Commercial	Community	
5fm	National	English	2,307 (6.8%)	-	Public
Lotus FM	National	English	341 (1.0%)		Public
Metro FM	National	English	6,172 (18.1%)		Public
Radio 2000	National (except for the Northern Cape)	English	912 (2.7%)		Public
Radio Sonder Grense (RSG)	National	Afrikaans	1,802 (5.3%)		Public
SAfm	National	English	460 (1.4%)		Public
Umhlobo Wenene	National	isiXhosa	4,100 (21.1%)		Public
Classic 102.7 FM	Gauteng	English	197 (0.5%)		
Jacaranda	Gauteng	English	2,246 (6.6%)		
Kaya FM	Gauteng		1,476 (4.3%)		
Talk Radio 702	Gauteng	English	646 (1.9%)		
Alex FM	Alexandra			29 (0.1%)	
Jozi FM	Johannesbur g			444 (1.3%)	
Radio 1584	Pretoria				
Radio Islam	East and West Rand, Greater Johannesbur g and Vaal region	English		44 (0.1%)	
Radio Pretoria	Pretoria	Afrikaans		84 (0.2%)	
Radio Rippel 90.5 FM	Pretoria	Afrikaans		40 (0.1%)	
Rainbow FM	Johannesbur g			40 (0.1%)	
Shoshanguve Community Radio	Pretoria, Soshanguve, Rosslyn, Ga- Rankuwa, Mamelodie, Winterveld, Atteridgeville, Hammanstra	English, Tswana, isiZulu, Ndebele, Tsonga, N/Sotho & Venda		137 (0.4%)	

	al				
Thetha FM	Gauteng, North West and Free State	isiZulu and Sotho		250 (0.7%)	
Tuks FM	University of Pretoria and surrounds	English and Afrikaans		55 (0.2%)	
TUT FM	Tshwane University of Technology and surrounds	English		110 (0.3%)	
Tshwane FM	Tshwane University of Technology and surrounds	English		37 (0.1%)	
UJ FM	University of Johannesburg and surrounds	English		14 (0.0%)	
Voice of Tembisa	Midrand, Sandton, Randburg, Roodepoort, Johannesburg Fourways, Edenvale, Kempton Park, Pretoria and Benoni	English and isiZulu		73 (0.2%)	
Voice of Wits	Wits University and surrounds	English		0 (0.0%)	

4. IMPACT RADIO COMMERCIAL (PTY) LTD

4.1 Introduction

4.1.1 The Authority received an application from Impact Radio Commercial (Pty) Ltd for the commercial sound broadcasting service licence in the Gauteng market.

4.1.2 The applicant's proposed station name is "Impact FM".

4.1.3 The Authority received written submissions on Impact Radio Commercial's application from Main Street and Power 98.9 FM.

4.2 Corporate status

4.2.1 The applicant is a private company incorporated in South Africa. The applicant submitted various founding documents, confirming that it is a juristic person. In this regard, the applicant submitted its certificate of incorporation and memorandum and articles of association, as required by item 6.1 of the ITA.⁸

4.2.2 The applicant did not provide a resolution authorising its signatory to sign the application, but instead submitted a letter which was signed by one director. After the public hearing the applicant provided the Authority with a copy of the minutes of the meeting at which the signatory was authorised.

4.2.3 The applicant's authorised share capital is R1000 divided into 1000 ordinary par value shares of R1 each.⁹ The applicant provided copies of share certificates indicating that eight shareholders each hold 100 shares in the company. As such,

⁸ Impact Radio Commercial application: p 6.

⁹ Impact Radio Commercial application: p 9.

each of the following shareholders holds 12.5% of the shares in the applicant company: Andrew Wayne Roebert, Abraham Thamsanqa Sibiya, Mmabatho Goitsimang Baghana, Lourens Petrus Van der Merwe, Masungini Jack Baloyi, Titus Sithole, Thapelo Samuel Seopa, Mphikeleli George Mahlobo, and Reinhard Knauer Schiel.¹⁰

4.2.4 The applicant indicated that its members had not concluded a shareholders' agreement.

4.3 On the basis of the information provided by the applicant, none of its shareholders is in a position to, or is deemed to, control the applicant.

4.4 Main Street contended that the applicant already operates a community radio station, Impact Radio, under a community broadcasting service licence and that it was not clear how the applicant would be able to fulfil the mandate of both a community and a commercial radio service.¹¹ The applicant indicated that, legally, the applicant and Impact Radio are two separate legal entities. The applicant indicated further that, while it intends to share resources with the community radio broadcaster in the first few years of broadcasting, it would operate as a commercial broadcaster and appreciates the different bases for the two types of broadcasting services.¹²

4.5 Empowerment of HDPs

4.5.1 The applicant stated that 75% of its equity ownership is held by HDPs, in that six of its eight shareholders are black

¹⁰ Impact Radio Commercial application: pp 24 – 25; 37 – 44; Transcript for Impact Radio Commercial, 24 November 2011: p 28.

¹¹ Transcript for Impact Radio Commercial, 24 November 2011: pp 5 – 6.

¹² Transcript for Impact Radio Commercial, 24 November 2011: pp 28 – 32.

individuals.¹³

4.5.2 In this regard, the Authority is satisfied that the applicant complies with the 30% minimum HDP shareholding requirement for which the ITA provides.

4.6 Section 64 of the Act

4.6.1 The applicant indicated that neither it nor its shareholders have any foreign shareholders.¹⁴ It also appears on the basis of the identity numbers provided for the eight shareholders that all the shareholders are South Africans.

4.6.2 The information given by the applicant indicates that none of the applicant's directors will be foreigners.¹⁵

4.7 Section 65(2) of the Act

4.7.1 A number of the applicant's shareholders are involved as directors and board members in Impact Radio, which holds a community radio broadcasting service licence.¹⁶

4.7.2 Mr Mahlobo is also a board member of Radio Pulpit, which also holds a community radio broadcasting service licence.

4.7.3 These interests are not relevant for the purposes of section 65(2) of the Act, which only restricts the number of commercial

¹³ Impact Radio Commercial application: p 5; Transcript for Impact Radio Commercial, 24 November 2011: p 28; Impact Radio Commercial additional submission, 3 December 2010: p 2.

¹⁴ Impact Radio Commercial application: p 94.

¹⁵ Impact Radio Commercial application: p 73 - 74; Impact Radio Commercial additional submission, 3 December 2010: p 2.

¹⁶ Impact Radio Commercial application: p 96.

radio broadcasting service licences in the FM sound broadcasting service which may be held by a single person and the number of companies holding commercial FM radio broadcasting service licences of which a person may a director.

4.8 Section 66

The applicant indicated that it does not have any ownership or control interest in any newspapers in South Africa.¹⁷ Based on the profiles provided by the applicant, it does not appear that any of the applicant's shareholders currently have interests in any newspaper published in South Africa.

4.9 Management, control and human resources

4.9.1 The applicant indicated that its board of directors will consist of seven men and one woman. Most of the applicant's directors are also shareholders in the applicant. The applicant provided the Authority with the number of years' experience each individual has in the broadcasting sector but did not detail the previous experience of each individual.¹⁸ At the public hearing the applicant indicated that it had not allocated individuals to specific management posts.¹⁹

4.9.2 The applicant indicated that the names of people who will be involved in the operational management of the applicant would be submitted to the Authority in due course and that it anticipated that its senior management would be made up of the

¹⁷ Impact Radio Commercial application: p 95.

¹⁸ Impact Radio Commercial application: pp 73 - 75.

¹⁹ Transcript for Impact Radio Commercial, 24 November 2010: pp 32 – 33.

members of its board of directors.²⁰

4.9.3 The applicant submitted an organogram of the station's staff and proposed to have a staff complement of 22 full-time and eleven part-time employees.²¹

4.9.4 Although the applicant indicated that assistance would be received from Impact Radio and that members of the applicant's board of directors have previous experience in the broadcasting sector through their involvement in Impact Radio,²² the applicant did not provide any details in relation to the nature of the previous experience and expertise of these individuals. Given that the applicant also did not provide details of the persons who would comprise its senior management, it was difficult for the Authority to ascertain whether the applicant the required relevant media experience and complies with the requirements of section 51(d) of the Act.

4.10 Programming

4.10.1 The applicant submitted a detailed programme schedule covering typical weekdays, Saturdays and Sundays.²³ The applicant proposes to broadcast 24 hours per day, seven days a week and envisages going on air within four calendar months after the licence has been awarded.²⁴

4.10.2 The applicant indicated that its programme service "is designed

²⁰ Impact Radio Commercial application: p 83; Transcript for Impact Radio Commercial, 24 November 2011: p 35.

²¹ Impact Radio Commercial application: p 83.

²² Impact Radio Commercial application: p 75; Impact Radio Commercial additional submission, 3 December 2010: p 2.

²³ Impact Radio Commercial application: pp 103 – 108.

²⁴ Impact Radio Commercial application: p 115.

to appeal to the religious sections within the population of persons subscribing to the Christian faith and living in the broadcast area".²⁵

4.11 Format

4.11.1 The applicant proposes to provide a Christian music-led format. It proposes to be an inspirational radio station that spreads the message of reconciliation. The applicant's further objectives are to promote peace, harmony, unity and to support development in the province.²⁶

4.11.2 The applicant will broadcast in English with a programming format of 75% music and 25% talk.²⁷

4.12 News

4.12.1 The applicant will broadcast news bulletins, including half-hour news headlines, from 06h00 to 19h00 on weekdays. News bulletins will be four minutes in duration and news headlines will be two minutes in duration, totalling 64 minutes of news each day. On Saturdays the radio station will broadcast six news bulletins of four minutes duration, from 08h00 to 18h00, totalling of 24 minutes per day. On Sundays four news bulletins of four minutes will be broadcast, from 08h00 to 18h00, totalling 16 minutes per day.²⁸ This news output accords with the Authority's policy preference in relation to news as stipulated in the Private Sound Position Paper.

²⁵ Impact Radio Commercial application: p 120.

²⁶ Impact Radio Commercial application: p 101 & appendix 25.

²⁷ Impact Radio Commercial application: p 102.

²⁸ Impact Radio Commercial application: p 111.

4.12.2 All news will be broadcast in English. Sources of news will be local newspapers, Newsflash (agency), the internet, the applicant's own journalists and press releases.²⁹

4.13 Current affairs

The applicant indicated that it will incorporate its current affairs programmes in between its programme schedule. In total, current affairs programming will be broadcast for 55 minutes per day and 275 minutes per week. Current affairs programmes will be broadcast in English.³⁰ The applicant indicated further that between 60 – 80% of its current affairs material will be sourced from the Gauteng region.³¹

4.14 South African music

4.14.1 The applicant committed to broadcasting 25% of South African music. To achieve this, the applicant indicated that it will (1) have specific programmes that focus on local music and new releases by local artists, (2) cover live events featuring local artists and (3) interview new and existing artists.³²

4.14.2 The applicant indicated that the South African music on its service will include South African gospel music. Details of illustrative tracks and artists along with the minimum and maximum percentages of South African music were provided.³³

²⁹ Impact Radio Commercial application: p 112.

³⁰ Impact Radio Commercial application: p 114.

³¹ Impact Radio Commercial application: pp 113 – 114.

³² Impact Radio Commercial application: p110.

³³ Impact Radio Commercial application: p 110.

4.15 Languages

The applicant proposes to broadcast in English. The applicant indicated that 9 067 449 people (which the applicant indicated represents 86.81% of the total population) living in the broadcast area are able to understand English.³⁴

4.16 Demand need and support

4.16.1 The applicant defined its target audience as individuals living in Gauteng who subscribe to the Christian faith. The applicant indicated that it is targeting individuals between the ages of 25 and 50 and that it anticipates a reach of 500 000 listeners per week, which is 5% of the population of Gauteng (10 531 300).³⁵ As raised by the Authority at the public hearings, however, the coverage area that will be reached by the new service is not the whole of the Gauteng province but is, instead, restricted primarily to the Pretoria area. The applicant responded that Impact Radio does not presently reach many parts of Pretoria.³⁶

4.16.2 The applicant indicated that it had conducted a survey in 2009 to determine the tastes and interests of the people living in the proposed area. The survey was conducted through SMS, email, the internet and physical form questionnaires that were handed out to members of the public at certain public places. The applicant indicated that 31 439 people were invited to take part in the survey and that there were 14 185 respondents. The applicant stated that over 90% of the respondents responded positively when questioned as to whether there is a need for a contemporary Christian radio station and 99.2% of respondents

³⁴ Impact Radio Commercial application: p 118; Impact Radio Commercial additional submission, 3 December 2010: p 3.

³⁵ Impact Radio Commercial application: pp 123 - 124.

³⁶ Transcript for Impact Radio Commercial, 24 November 2010: p 44.

indicated that they would listen to a regional Christian radio station covering Gauteng. The survey conducted by the applicant was the only evidence of need and demand that was submitted with its application. The applicant indicated that the survey “endeavoured to reach as many people as possible in Gauteng, making use of some form of technology as the majority of the population has access to a form of technology” and that this allowed for maximum participation. The applicant indicated that participation in its survey was voluntary. The applicant did not provide any details as to whether the survey was representative of the demographic characteristics of the licence area or its target audience. It appears that the applicant also did not provide any details to respondents in relation to the specific nature of its proposed service and instead requested respondents to indicate whether they were interested in and would listen to a generic regional Christian radio station in Gauteng.³⁷

4.16.3

The applicant indicated that there is no other radio station that offers a format similar to that proposed by the applicant, covering the entire Gauteng area. The applicant indicated that Radio Pulpit, Impact Radio and Radio Rippel, all of which are Christian stations, are available in the coverage area but that these stations either broadcast to a larger area or are broadcast on “a limited local community level only”.³⁸ The applicant indicated that the primary difference between community radio and commercial radio is “the high transmission power available to a commercial broadcaster” with the implication that this enables commercial broadcasters to operate on a commercial

³⁷ Impact Radio Commercial application: pp 121 - 122.

³⁸ Impact Radio Commercial application: p 126.

basis.³⁹ The applicant indicated that Impact Radio's programming is primarily focussed on the community and the particular interests that it serves whereas the applicant's programming "is focussed on the commercial nature of its business and its regional position as a provincial station".⁴⁰

4.16.4 Power 98.9 FM disputed the applicant's claim that there is a demand for its service as the existing two Christian radio stations, being Impact Radio and Radio Pulpit, operating in the coverage area do not at present have large audiences. Power 98.9 FM also commented that the applicant did not indicate how its service would differ from the existing stations. At the public hearings Power 98.9 FM contended that, as Impact FM and Impact Radio would target the same audience, there was no demand for Impact FM.⁴¹

4.17 Financial means, business record and commercial viability

4.17.1 The applicant expects to be profitable in its second year of operation. The applicant indicated that it has entered into a loan agreement with Impact Radio in terms of which Impact Radio will advance to the applicant an amount not exceeding R2,000,000 to enable the applicant to establish its commercial radio station.⁴²

4.17.2 The applicant indicated that revenues will be generated through

³⁹ Transcript for Impact Radio Commercial, 24 November 2010: pp 23 – 26; Impact Radio Commercial. further representations, 24 November 2010: p 4; Impact Radio Commercial response to Power 98.9 FM, 3 December 2010: pp 5 - 6.

⁴⁰ Impact Radio Commercial response to Power 98.9 FM, 21 September 2010: p 2.

⁴¹ Transcript for Impact Radio Commercial, 24 November 2010: pp 13 – 14.

⁴² Impact Radio Commercial application: pp 137 - 142.

advertising, sponsorship, sales and donations.⁴³

4.18 Decision and reasons

The Authority has decided not to grant the applicant the commercial sound broadcasting licence in the Gauteng primary market for each of the following reasons considered separately, each of which is regarded as constituting adequate reason for turning down the application:

4.18.1 The primary research that was presented by the applicant was inadequate for the Authority to assess demand for the applicant's proposed radio station either within the applicant's own target audience or more generally. The applicant indicated only that it had conducted a survey and that it had attempted to obtain wide participation in that survey. On the information presented to the Authority, however, it does not appear that the applicant conducted any rigorous, systematic and controlled market research in support of its application. Instead, the applicant's research appears to have been conducted on a relatively *ad hoc* basis. In addition, the survey that was conducted appeared to focus on whether the respondents would be inclined to listen to a contemporary Christian regional station and did not specifically focus on the particular service and programming that the applicant itself proposes to offer.

4.18.2 The applicant did not provide sufficient information in relation to the previous experience of its board members to enable the Authority to assess the applicant's expertise in the commercial broadcasting sector.

⁴³ Impact Radio Commercial application: p132.

4.18.3

In the Authority's assessment, the applicant did not sufficiently distinguish its proposed service from the community broadcasting service that is presently provided by Impact Radio. On the basis of the information presented by the applicant in relation to its governance structures, funding arrangements, format and proposed programming, it appeared that the proposed station is intended to replicate the service that is presently provided by Impact Radio save for the fact that the service would be available in a wider geographic area. In the Authority's assessment, the applicant did not adequately appreciate the differences between community and commercial services: although the applicant indicated that the two services would be operated separately and that it was cognisant of the differences between the two categories, this was not supported by the information presented by the applicant. Indeed, the applicant identified the fundamental difference between community and commercial radio stations as the power level at which commercial stations are permitted to broadcast and the associated geographic reach of their services.

4.18.4

The applicant did not adequately identify the ways in which its proposed service would be different from the other Christian radio services that are available in the coverage area, save for the fact that the service would be available in a wider geographic area. This was not sufficient to show that audiences who are interested in Christian radio programming (which is the target audience identified by the applicant) are not presently having their needs met by the existing services that are available.

5. INSPIRE CONSORTIUM (PTY) LTD

5.1 Introduction

5.1.1 The Authority received an application from Inspire Consortium for the commercial sound broadcasting service licence in the Gauteng primary market.

5.1.2 The applicant's proposed station name is "Inspire FM".

5.1.3 The Authority received representations from Power 98.9 FM on this application.

5.2 Corporate status

5.2.1 The applicant is a consortium. The applicant indicated that, if the commercial broadcasting service licence were to be granted to it, the consortium members would establish a new private company ("NewCo") which would hold the broadcasting service licence.⁴⁴

5.2.2 The applicant submitted a Consortium Agreement which indicates that Rhema Ministries Subsidiary Service Limited ("Rhema Ministries"), the Women's Development Foundation and Sabido Investments (Pty) Ltd ("Sabido") are members of the consortium and that the members' interests are structured as follows:⁴⁵

5.2.2.1	Rhema Ministries	35.1%
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5.2.2.2	Woman's Development Foundation	40%
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⁴⁴ Inspire Consortium application: p 48.

⁴⁵ Inspire Consortium application: p 50.

5.2.2.3 Sabido 24.9%

5.2.3 Based on the principles outlined in Section H (Interpretation of Key Provisions of the Act) in Part I of this Reasons Document each of the applicant's shareholders is deemed to control the applicant.

5.2.4 The applicant submitted the certificate of incorporation and memorandum of association and only the first page of the articles of association for Sabido Investments and the certificate of incorporation and memorandum of association for Rhema Ministries, as required by item 6.1 of the ITA.⁴⁶ No founding documents were provided in relation to the Woman's Development Foundation. It appears from the Consortium Agreement that the Foundations is a registered not-for-profit organisation that appears to include the Mmabatho Foundation for Women's Development ("MFWD") and Khomelela Investments (Pty) Ltd.⁴⁷

5.2.5 Sabido Investments, which is involved, through various intermediary companies, in the applications submitted by Yired (Pty) Ltd and Proudafrique (Pty) Ltd for the commercial broadcasting service licences in the Western Cape and Durban markets respectively, is controlled by Hosken Consolidated Investments Ltd ("HCI"), a company listed on the JSE Securities Exchange. As an investment company, Sabido Investments holds interests in e.tv (Pty) Ltd ("e.tv"), Sabido Props, Viamedia (Pty) Ltd ("Viamedia"), Yired, Three Blind Mice Communications, Dreamworld1 and e.sat TV (Pty) Ltd ("e.sat").⁴⁸ On the basis of

⁴⁶ Inspire Consortium application: pp 60 – 95.

⁴⁷ Inspire Consortium application: pp 47; 49 – 50; 70 - 74.

⁴⁸ Inspire Consortium application: p 15.

information contained, The following details relating to the shareholding structure of Sabido were provided in the application by Yired for the commercial broadcasting service licence in the Western Cape: ⁴⁹

5.2.5.1 Hosken Consolidated Investments Limited (“HCI”) 63.86%;

5.2.5.2 Venfin Media Beleggings (Pty) Limited (now Remgro Media Beleggings (“Remgro Media”)), ⁵⁰ a wholly owned subsidiary of Venfin Limited, which was acquired by Remgro Limited (“Remgro”) 31.53%

5.2.5.3 Sabido Employees and Sabido Share Trust 4.61%.

5.2.6 Rhema Ministries is a non-profit company described in the Consortium Agreement as “a special purpose vehicle within the fold of the Rhema Church Bible Group”. ⁵¹

5.2.7 The applicant provided a profile description of MFWD and provided a certificate of incorporation and the memorandum and articles of association of Khomelela Investments. ⁵² The applicant did not, however, provide much information in relation to the relationship between these entities and their respective roles in the Women’s Development Foundation that has an interest in the consortium. The NPO number provided in the Consortium Agreement in relation to the Women’s Development Foundation is the same number that was provided for MFWD.

⁴⁹ Yired application: Volume 1, p 12.

⁵⁰ Transcript for Inspire Consortium, 26 November 2010: p 11.

⁵¹ Inspire Consortium application: p 47.

⁵² Inspire Consortium application.

5.2.8 The documents pertaining to Khomelela Investments indicate that it is a private investment company with three shareholders: Anna M. M. Badimo, Lindiwe Mthimunya and Brenda M. Madumise.⁵³ Ms Madumise is the CEO of Khomelela Investments and has a background in broadcasting through her involvement as a non-executive director in iGagasi FM in Durban and Heart FM in Cape Town.⁵⁴

5.3 Empowerment of HDPs

The applicant stated that “the percentage of ownership by [HDPs] significantly exceeds 30%”.⁵⁵ No details were provided by the applicant in relation to the effective shareholding by HDPs. The Authority was therefore unable to verify this assertion although it appears, on the basis of the information that was submitted regarding Sabido in the context of the Yired and Proudafrique applications, that the effective shareholding by HDPs in Sabido is at least 34.7%. In addition, the three shareholders of Khomelela Investments are all women and, accordingly, HDPs.

5.4 Sections 65(2) and (3) of the Act

5.4.1 Sabido Investments, as an investment holding company, is the sole shareholder in the following broadcasting services: e.tv and e.sat TV, Yired and e.tv mobile. Sabido Investments’ interest in Yired means that it already controls a commercial broadcasting service licence in the FM sound broadcasting service in Gauteng, YFM (JHB).⁵⁶ The applicant submitted that, while

⁵³ Inspire Consortium application: p 66.

⁵⁴ Transcript for Inspire Consortium, 26 November 2010: p7.

⁵⁵ Inspire Consortium application: p 5

⁵⁶ Yired application: pp 34 - 35; Transcript for Yired, 11 November 2010, pp 12; 13;23.

Sabido Investments holds a 24.9% interest in the applicant, should the Authority conclude that the general threshold for control is 20%, the applicant would adjust the percentage interests of the applicant's members accordingly.⁵⁷ Given, however, that, if the applicant were granted the Gauteng licence, Sabido would be deemed to control only two FM sound broadcasting licences and that the coverage areas of the new licence and YFM in Gauteng do not substantially overlap, neither section 65(2) nor section 65(3) of the Act are engaged and Sabido's 24.9% interest in the applicant is not problematic.

5.4.2 Sabido's interest in commercial television broadcasting service licences are not relevant for the purposes of section 65(2) of the Act, which imposes restrictions on the number of broadcasting service licences that may be held in the FM sound broadcasting service licence category.

5.5 Section 66(2) and (3) of the Act

The applicant indicated that neither it nor its shareholders has any interest in newspapers.⁵⁸

5.6 Section 64 of the Act

5.6.1 The applicant did not provide any information in relation to any direct or indirect foreign shareholding in the applicant. In considering Sabido Investments, the Authority referred to HCI's 2010 annual report which indicates that no shares in HCI are held by foreign persons. Information on Remgro's website indicates that approximately 13% of the shares in Remgro are

⁵⁷ Transcript for Inspire Consortium, 26 November 2010: p 30; Inspire Consortium additional submission, 6 December 2010: p 2.

⁵⁸ Inspire Consortium application: p 8.

held by foreigners. This would, however, only amount to an indirect shareholding of approximately 1.02% by foreigners in the applicant and would not be relevant for the purposes of section 64(1) of the Act.

5.6.2 The applicant did not indicate whether any of the eight directors listed in the Consortium Agreement are foreigners.⁵⁹

5.7 Management, control and human resources

5.7.1 The Consortium Agreement indicates that the applicant has appointed eight directors.⁶⁰ The Consortium Agreement indicates that the initial directors of the company will be: Joshua McCauley, Giet Khosa, Makano Mosidi, Mapula Ncanywa, Alison Whittal, Anita Maraney, Kanthan Pillay, Khalik Sherrif and Stephan Potgieter as company secretary. The profiles of these individuals were not provided. At the hearing the applicant indicated that there would be seven directors on its board; three each from Rhema Ministries and the Woman's Development Foundation and one director from Sabido Investments.⁶¹

5.7.2 The applicant provided details and profiles for the seven members of its senior management team.⁶² It appears that six members of the management team will be sourced from Yired.⁶³ The applicant indicated that it seeks to use the experience and infrastructure of Yired as part of its resources.⁶⁴ The

⁵⁹ Inspire Consortium application: p 52.

⁶⁰ Inspire Consortium application: p 52.

⁶¹ Transcript for Inspire Consortium, 26 November 2010: p 52; Inspire Consortium additional submission, 6 December 2010: p 2.

⁶² Inspire Consortium application: p 6.

⁶³ Inspire Consortium application: pp 39 – 43.

⁶⁴ Inspire Consortium application: p 8; Transcript for Inspire Consortium, 26 November 2010 : pp 44 – 49.

applicant identified the following positions in senior management that would be shared with Yired: sales, strategy and development, human resources managers and the finance and technical departments.⁶⁵ The applicant does not intend contracting out any activities to other agencies or consultants.

5.7.3 At the public hearing the Authority was informed that Yired Studios would provide technical backup and support, administrative staff and technical departments and provide equipped studios ready to go live in the event that the applicant's application is successful.⁶⁶ The Authority requested that the applicant clarify the nature of its arrangement with Yired. The applicant indicated that, while no consultancy agreement is in place between Yired and the applicant, an infrastructure agreement is in place between the parties.⁶⁷ The Authority was not provided with a copy of the infrastructure agreement.

5.7.4 The applicant indicated that Mike Penny and Meryn Sigamoney would be responsible for studio and technical maintenance and their curricula vitae were included in the application. Travis Bussiahn was indicated to be the station manager. He indicated that he has worked at East Coast Radio, Jacaranda FM, Heart FM, Algoa and OFM and has consulted to stations outside South Africa.⁶⁸

5.7.5 The applicant submitted an organogram and table of the station's staff and proposed to have a full-time staff complement of 17 employees.⁶⁹ The applicant did not identify any particular employees for the various roles.

⁶⁵ Inspire Consortium application: p 11.

⁶⁶ Transcript for Inspire Consortium, 26 November 2010: p 19.

⁶⁷ Transcript for Inspire Consortium, 26 November 2010: pp 47 – 48.

⁶⁸ Inspire Consortium application: p 11 ; Transcript for Inspire Consortium, 26 November 2010: p 9.

⁶⁹ Inspire Consortium application: pp 9 – 10; 44.

5.7.6 On the basis of its relationship with Yired, the Authority is satisfied that the applicant would be able to operate the proposed radio station. However, the applicant itself does not appear to have any expertise of its own in this regard. The Authority was concerned that the applicant would not develop any capacity to manage its operations independently of Yired.

5.8 Programming

5.8.1 The applicant submitted a detailed programme schedule covering typical weekdays, Saturdays and Sundays.⁷⁰ It proposes to broadcast 24 hours a day, seven days a week and did not state when it envisages going on air.⁷¹

5.8.2 The applicant's target market is listeners in the LSM 6 – 10 range, from 20 to 35 years of age. The applicant's objective is to establish the station as the favourite station for young people living in Gauteng.⁷²

5.9 Format

The applicant aims to deliver programmes that inspire and entertain its audience, while also offering programming that is educational or motivational in nature.⁷³ The applicant proposes to provide a programming service that will be 75% entertainment, including music, and 25% education.⁷⁴ It will offer an Adult Contemporary Hit Radio (ACHR) format that reflects the target market. On a typical

⁷⁰ Inspire Consortium application: appendix 13, pp 15 - 23.

⁷¹ Inspire Consortium application: appendix 17, p 27.

⁷² Inspire Consortium application: p 16.

⁷³ Inspire Consortium application: p 17.

⁷⁴ Inspire Consortium application: pp 17; 24.

weekday the applicant indicated that it would have a minimum of 25% and a maximum of 60% of speech output and a minimum of 20% and a maximum of 30% speech output on weekends.⁷⁵

5.10 News

5.10.1 The applicant indicated that it will broadcast a total of 40 minutes of news per weekday. The applicant stated that 50% of news will be made up of local stories, 30% will be national and 20% will be international news. News will be broadcast in English. Each newscast will be a minimum of three minutes.⁷⁶

5.10.2 The applicant's news will be locally sourced from its journalists, Internet sites, listeners and other media.⁷⁷

5.11 Current affairs

The applicant intends to broadcast current affairs programme once a week for at least ten minutes. A minimum of 25% of current affairs content will be generated from the coverage area.⁷⁸

5.12 South African music

The applicant committed to broadcasting 40% South African music and an additional 5% music from other African countries.⁷⁹ The applicant provided a description of the proposed types of South African music to broadcast with illustrative tracks and artists.⁸⁰ The types of music that will be played will be Gospel, R&B, Rock, Hip

⁷⁵ Inspire Consortium application: p 25.

⁷⁶ Inspire Consortium application: pp 26-27.

⁷⁷ Inspire Consortium application: p 27.

⁷⁸ Inspire Consortium application: p 27.

⁷⁹ Inspire Consortium application: p 25.

⁸⁰ Inspire Consortium application: p 154.

Hop / Kwaito / House, Adult Contemporary, Pop and Golden Classics.

5.13 Language

The applicant will broadcast mainly in English and other languages spoken in the area of broadcast.⁸¹ The number of people who understand the language of broadcast in the coverage area was not provided.

5.14 Demand, need and support

5.14.1 The applicant distinguished its proposed service as the “first exclusively young adult focused radio offering in the province” on account of its language and music policy, its commitment to playing at least 40% South African music on a daily basis and the fact that it places specific focus on youth related issues. The applicant indicated that the proposed service will be differentiated from existing stations in the coverage area on the basis that, amongst other things, the “proposed mixture of languages on the station is unprecedented in the License area and in South Africa in general.”⁸² The applicant stated that there would be a strong focus on lifestyle-orientated content,⁸³ that the ethos of the station was inspirational and that no other competitor holds inspiration intrinsically at its core. The aim was not, however, to be a religious station or to play solely gospel music but rather to be non-denominational in its output.⁸⁴

5.14.2 The application provided a copy of a report prepared by RLA Brand Consulting following primary research commissioned by

⁸¹ Inspire Consortium application: p 28.

⁸² Inspire Consortium application: p 29 ; Transcript for Inspire Consortium, 26 November 2010: p 11.

⁸³ Transcript for Inspire Consortium, 26 November 2010: p 13.

⁸⁴ Transcript for Inspire Consortium, 26 November 2010: p 33.

YFM to support the company's application to launch a gospel music/spiritual uplifting type station in the Pretoria area.⁸⁵ The research objective was to measure reactions to, and interest in, a gospel station. A sample of 250 males and 250 females was surveyed, of which 305 resided in Johannesburg, 434 identified themselves as religious and 76 as not religious.

5.14.3

Based on the RAMS the applicant indicated that the potential listener base was 1.84 million listeners in the coverage area in the target market of LSM 6 to 10.⁸⁶ On the basis of its research the applicant stated that it anticipates a 10% market penetration within the available audience within its first year of operation.⁸⁷ At the hearings the applicant adjusted this figure and indicated that its estimated target audience is 400 000 listeners based on a 20% market share projection for year one.⁸⁸ The applicant presented various broadly-framed findings on the basis of its market research and comments made by individual respondents and more generally. The focus of the research that the applicant conducted appears to have been on the "likelihood" that the interviewees would tune into the proposed service and whether the interviewees themselves felt that there was a "need" for the proposed service.⁸⁹

5.14.4

While the research appeared to indicate that a new gospel music station would be supported among the target market, the applicant did not address the fact that, while it intends to broadcast in English, the research indicates that the target market speaks primarily Sepedi, Setswana and Afrikaans. In addition, the research indicated that the link with YFM, which is

⁸⁵ Inspire Consortium application: pp 97 – 134.

⁸⁶ Transcript for Inspire Consortium, 26 November 2010: p 20.

⁸⁷ Inspire Consortium application: p 30.

⁸⁸ Transcript for Inspire Consortium, 26 November 2010: p 21.

⁸⁹ Inspire Consortium application: pp 97 – 134.

“seen” as a black radio station, may affect the new station’s acceptability among white audiences. The research report was also subject to a number of qualifications, including that, if YFM were to be awarded the licence, it should conduct “further sensitive research ... to guide the positioning and identity of the new station”.⁹⁰

5.14.5 Power 98.9 FM commented in relation to the research sample selected, that the focus on individuals aged 20 – 30 years and the exclusion of other age groups failed to test the market as a whole and did not place the applicant in a position to evaluate need and demand across the market. Power 98.9 FM also questioned the research methodology employed by the applicant.⁹¹

5.15 Financial means, business record and commercial viability

5.15.1 The applicant did not present a business plan. Pro-forma financial statements with a five-year projected cash flow, income statement and operating expenses were included in the application.⁹² The applicant indicated that a R6.5 million loan would be required over the five-year period to meet the operational budget and that this would be sourced through a bank loan. Rhema Ministries and MFWD were identified as investors.⁹³

5.15.2 The applicant did not provide detailed assumptions supporting the projections presented or commentary in relation to its underlying financial forecasts, which made evaluating the

⁹⁰ Inspire Consortium application: pp 130 – 131.

⁹¹ Transcript for Inspire Consortium, 26 November 2010: p 27.

⁹² Inspire Consortium application: p 32.

⁹³ Inspire Consortium application: p 34.

financial data submitted by the applicant significantly more difficult.

5.16 Decision and reasons

The Authority has decided not to grant the applicant the commercial sound broadcasting licence in the Gauteng primary market for each one of the following reasons considered separately, each of which is regarded as constituting an adequate reason for turning down the application:

5.16.1 The applicant's research was not as comprehensive as that submitted by other applicants including the successful applicant. Power 98.9 FM. While the applicant emphasised that there is no station in the relevant market that has the same focus that it proposes to have, the applicant did not clearly show that there is a market for the proposed service on the basis of audience numbers and the likelihood that listeners would churn to the new service from other stations or that new listeners would be attracted. The applicant's own research report indicated that further research was required to guide the positioning and identity of the station. Accordingly, the Authority was not convinced that it was able to rely on the assertions made by the applicant or that the proposed service would, in fact, be commercially viable.

5.16.2 Beyond stating that it is different from the existing stations in the Gauteng market, the applicant did not present clear details as to how its service either fills a gap by providing particular radio programming to an audience that does not presently receive such programming from any of the existing services or, to the extent that its service is similar to the services of existing

stations in the market, how it intends clearly to differentiate itself in order to attract listeners and advertisers. The applicant's proposed format appears to the Authority to be similar to the music-oriented formats provided by a number of existing stations and the audience targeted by the applicant to be similar to the audiences targeted by stations such as 5FM. The applicant did not indicate with sufficient clarity why this is not the case. The assertions made by the applicant in relation to the factors that differentiate it from other stations also did not bear scrutiny. For example, the applicant indicated that its language policy and proposed mixture of language is a key distinguishing factor because it is unprecedented in the licence area and the country. However, the applicant indicated that it intends to broadcast in English with DJs being able to converse with listeners in other languages. In this respect the applicant is not greatly different from other stations.

- 5.16.3 The applicant does not appear to have any expertise of its own with regard to technical and administration staff. The Authority was concerned that the applicant would not develop any capacity to manage its operations independently of Yired.

6. KGOSI MEDIA CONSORTIUM

6.1 Introduction

- 6.1.1 The Authority received an application from Kgosi Media Consortium for the commercial sound broadcasting service licence in the Gauteng primary market.
- 6.1.2 The applicant's proposed station name is "98.9 Tshwane FM".
- 6.1.3 Power 98.9 FM and Main Street made written submissions on

this application. The applicant submitted a written reply dated 26 November 2010 to these representations.

6.2 Corporate structure

6.2.1 The applicant indicated that it is a consortium and that it would form a private company upon the successful award of the licence.⁹⁴ The applicant provided a copy of the shareholders' agreement signed on 30 November 2009 between the company to be known as Kgosi Media Investment and the various then-current shareholders.⁹⁵ As indicated above, this shareholders' agreement was submitted on a confidential basis.

6.2.2 The shareholders' agreement indicated that the company had a particular shareholding structure as at the signature date,⁹⁶ which was to be altered as soon as possible, as follows:⁹⁷

6.2.2.1	Firefly investments 185 (Pty) Ltd (to be known as Koni Group (Pty) Ltd)	25%
6.2.2.2	Groove 69 Entertainment (Pty) Ltd	15%
6.2.2.3	Bomvana Trust	10%
6.2.2.4	ESOP (Management & Staff Trust)	10%
6.2.2.5	BEE Trust to be formed for the benefit of historically disadvantaged women	5%

⁹⁴ Kgosi Media application: p 8.

⁹⁵ Kgosi Media application: shareholders' agreement.

⁹⁶ Kgosi Media application: p 19.

⁹⁷ Kgosi Media application: p 19; shareholders' agreement clause 12.2.

6.2.2.6 Funder (unidentified) 30%

6.2.2.7 Ntshengedzeni Anthony Tshivhase 5%

6.2.3 At the time of the public hearings, which were conducted during November 2010, the applicant indicated that it had not yet altered its shareholding structure as contemplated in the shareholders' agreement. The applicant indicated that the Funder would receive 25%, and not 30% of the shares in the company as reflected in the shareholders' agreement with the additional 5% to be allocated to the Broad-Based Trust.⁹⁸ This is consistent with what was stated in the application itself.⁹⁹ The applicant's written response to the written representations made by Power 98.9 FM and Main Street stated that documentation to effect the name change of the company had been lodged with the Registrar of Companies and the share certificates in Kgosi Media Investments had been issued to the shareholders named in the application, save for certain of the shares held by Firefly Investments which were "warehoused" for the benefit of the BEE Trust, the ESOP and a third party financier to be introduced.¹⁰⁰ In its written response, the applicant provided copies of the company's memorandum and articles of association, various documents evidencing the appointment of directors and share certificates. The applicant also provided copies of share certificates in respect of Firefly Investments indicating that shares in the company are held as follows –

6.2.3.1 Simon Maruping Lebala – 20 shares

⁹⁸ Transcript for Kgosi Media, 26 November 2010: pp 34 – 36.

⁹⁹ Kgosi Media application: p 19.

¹⁰⁰ Kgosi Media written response, 26 November 2010: p 1.

6.2.3.2 Kinesh Schidanandian Pather – 40 shares

6.2.3.3 Joseph Groovin Nchableng – 40 shares

6.2.4 Each of the three shareholders of Firefly Investments is also a director of the company. The organogram provided in the application indicated that “Koni Media Holdings” and not Koni Group was to become a shareholder in Kgosi Media Investments (the applicant). The applicant later clarified this by indicating that while Messrs Pather and Nchabeleng are shareholders in both companies, Koni Media Holdings was not a party to its application or the proposed transactions set out in the shareholders’ agreement.¹⁰¹ The application indicates, however, that Koni Media Holdings holds 51% and an entity known as Publicis BV, a Dutch company, holds 49%.¹⁰² It is not clear which entity has this shareholding structure given that the applicant stated in its written response that Publicis is not a party to “the proposed transaction” and “no reliance is placed on them in the operations or start-up of Kgosi Media Investments”.¹⁰³

6.2.5 Information provided by the applicant indicates that Groove 69 Entertainment is a private company with a single shareholder, Mr Aldrin S. Mogotsi.¹⁰⁴ Groove 69 Entertainment is a subsidiary of May’buye Investment Holdings (Pty) Ltd, trading as Housemaster Entertainment. The applicant stated that Mr Mogotsi (who was also a shareholder in May’buye) has extensive experience in the broadcasting and music

¹⁰¹ Kgosi Media written response, 26 November 2010: p 1.

¹⁰² Kgosi Media application: p 21.

¹⁰³ Kgosi Media written response, 26 November 2010: p 2.

¹⁰⁴ Kgosi Media written response, 26 November 2010: (unnumbered pages).

industries.¹⁰⁵

6.2.6 The applicant provided a copy of the trust deed for the Bomvana Trust.¹⁰⁶ The applicant stated that the Bomvana Trust is a family trust that will hold the interests of Mr Michael J. Vincent in Kgosi Media Investments. The application states that Mr Vincent is a director at Deloitte Consulting (Pty) Ltd with a solid background in the broadcasting and media industry.¹⁰⁷ The trust deed lists both Mr Vincent and Susan A. Vincent as trustees of the Bomvana Trust.

6.2.7 Main Street questioned the fact that the applicant's funder had not been identified and that the funding structure and relationship was not disclosed. At the hearing Main Street submitted that it was not clear whether a single funder or a number of funders were contemplated and that this was important information as it would affect the question of control of the applicant.¹⁰⁸

6.2.8 On the basis of the principles outlined in Section H (Interpretation of Key Provisions of the Act) in Part I of this Reasons Document, through their respective equity interests in the applicant consortium, Firefly Investments and the third party funder to be introduced (provided that a single funder is to be introduced) will be deemed to control the applicant.

6.3 Empowerment of HDPs

6.3.1 The applicant stated that it is largely made up of HDP

¹⁰⁵ Kgosi Media application: p 22.

¹⁰⁶ Kgosi Media written response, 26 November 2010: appendix A2.

¹⁰⁷ Kgosi Media application: p 21.

¹⁰⁸ Main Street submission on Kgosi Media's application, 10 August 2010: p 5; Transcript for Kgosi Media, 26 November 2010: pp 16 – 17.

shareholders, with only 10% of the shareholding (presumably that held by the Bomvana Trust) not held by HDPs.¹⁰⁹ However, as indicated above, the applicant also indicated that a third party funder would take up certain shares. The applicant did not specifically identify this shareholder although information provided by the applicant in relation to its financial position suggested that this funder could be a foreign company. This is addressed in further detail below.

6.3.2 On the basis of the information provided by the applicant, the Authority is satisfied that the applicant complies with the empowerment requirements set out in the ITA.

6.4 Section 65(2) of the Act

6.5 The applicant indicated that it does not have any ownership interests in the broadcasting sector. While the applicant has listed other interests that its members hold in the advertising industry, these interests are not relevant for the purposes of section 65(2) of the Act.¹¹⁰

6.6 Section 66(2) and (3) of the Act

The applicant indicated that neither it nor any of its shareholders which will hold more than 20% of its shares has an interest in any newspaper.¹¹¹

6.7 Section 64 of the Act

The applicant indicated that, save for Mr Nchabaleng and Dr Pather,

¹⁰⁹ Kgosi Media written response, 26 November 2010: p 1.

¹¹⁰ Kgosi Media application: p 61.

¹¹¹ Kgosi Media application: p 63.

none of its directors has any foreign interests.¹¹² The applicant did not specify the nature of the foreign interests held by Mr Nchabaleng and Dr Pather. The applicant did not provide specific details in relation to the foreign interests of its shareholders (as requested by the ITA) and did not specify whether any of the natural persons who ultimately hold shares in the applicant through the various corporate vehicles which hold shares are foreigners. Based on the identity numbers provided for the shareholders of Firefly Investments, Groove 69 Entertainment and the beneficiary and trustees of the Bomvana Trust, the Authority accepts that the applicant has no indirect foreign shareholding. The Authority also accepts that none of the applicant's initial directors are foreigners. The concerns that potentially arise from the fact that the funders identified by the financial advisory firm appointed by the applicant are foreign are addressed below.

6.8 Management, control and human resources

6.9 In terms of the shareholders' agreement, Kgosi Media Investments will have no more than ten directors, to be nominated by the shareholders in proportion to their respective shareholdings, once the warehoused shares have been transferred to the new shareholders.¹¹³

6.10 The six initial directors are as follows:¹¹⁴

6.10.1.1 Mr Nchabeleng, appointed by Firefly Investments;

6.10.1.2 Dr Pather, appointed by Firefly Investments;

6.10.1.3 Mr Ben Dikobe, appointed by the ESOP;

¹¹² Kgosi Media application: p 62.

¹¹³ Kgosi Media application: shareholders' agreement, clause 9.1.

¹¹⁴ Kgosi Media application: shareholders' agreement, clause 9.4.

6.10.1.4 Mr Mogotsi, appointed by Groove 69 Entertainment;

6.10.1.5 Mr Vincent, appointed by the Bomvana Trust; and

6.10.1.6 Mr Tshivhase.

6.11 It appears that all the initial directors are male.

6.12 All the initial directors, save for Mr Tshivhase are also members of the applicant's senior management, together with Mr Kevin Goodwin.¹¹⁵ Details of the personal background and relevant previous experience of each of the members of the senior management team was provided in the application.¹¹⁶ Four of the members of the applicant's senior management have previous experience that is relevant to the operation of a commercial radio station.

6.12.1 The applicant submitted an organogram of the station's staff and proposed to have a staff complement of 44 full-time employees.¹¹⁷ The applicant indicated that a technical manager is yet to be appointed.¹¹⁸

6.12.2 The Authority is satisfied that the applicant has the required relevant media experience and complies with the requirements of section 51(d) of the Act.

6.13 Programming

6.13.1 The applicant submitted a detailed programme schedule

¹¹⁵ Kgosi Media application: shareholders' agreement, clauses 9.1 & 9.4.

¹¹⁶ Kgosi Media application: pp 27 – 29.

¹¹⁷ Kgosi Media application: pp 36; 40.

¹¹⁸ Kgosi Media application: p 43.

covering typical weekdays, Saturdays and Sundays.¹¹⁹ The applicant proposes to broadcast 24 hours per day, seven days a week and envisages going on air at least three months after the licence has been issued.¹²⁰

6.13.2 The applicant indicated that its primary target audience is males and females in the 24 to 49 age bracket in the LSM 7-10 range, with special emphasis on women.¹²¹

6.14 Format

6.14.1 The applicant proposes to be an Urban Contemporary music radio station with a mixture of dance and Top 40 and lifestyle programming. The applicant indicated that it will also include R&B music with a soulful flavour.¹²²

6.14.2 The applicant states that its programming will be very community orientated and will broadcast issues pertaining to Tshwane. The applicant indicated that it would have a minimum of 25% and maximum of 35% speech programming per day during peak and non-peak periods respectively.¹²³

6.14.3 On Sunday and Monday mornings the applicant intends to utilise automated local output between 24h00 – 06h00. The applicant indicated that an effort would be made to develop and train emerging DJs and new talent during this period.¹²⁴

¹¹⁹ Kgosi Media application: pp 69 – 76.

¹²⁰ Kgosi Media application: p 81.

¹²¹ Kgosi Media application: p 68.

¹²² Kgosi Media application: p 68.

¹²³ Kgosi Media application: p 77.

¹²⁴ Kgosi Media application: p 83.

6.15 News

6.15.1 The applicant will broadcast news in English. News will be broadcast every half hour from 05h00 – 19h00 from Monday to Friday as well as every hour on the hour on Saturdays and Sundays. During the morning drive, at 06h30, 07h30 and 08h30 headline news will be supplemented by two-minute sport news. The news bulletins will be four minutes in duration. Local, national and international news will be broadcast but emphasis will be placed on local news.¹²⁵

6.15.2 The applicant intends to establish a News Cadet Academy for young, aspiring news reporters and will work closely with universities to identify and terrain on reporters. It is intended that four cadets will be employed at any one time.¹²⁶

6.16 Current affairs

The applicant indicated that a current affairs programme would not be provided on the station but that its current affairs coverage will form part of the DJ's commentary on society every weekday between 19h40 - 20h00.¹²⁷ The applicant did not provide the percentage of current affairs programming that will originate from the coverage area.

6.17 South African music

The applicant committed to broadcasting at least 25% South African music, which it submitted would not be a difficult target to meet. It will broadcast South African Urban Contemporary music, "hot currents to gold currents". The applicant provided details of illustrative artists.¹²⁸

¹²⁵ Kgosi Media application: p 79.

¹²⁶ Kgosi Media application: p 79.

¹²⁷ Kgosi Media application: p 80.

¹²⁸ Kgosi Media application: p 78.

6.18 Languages

The applicant will broadcast predominantly in English. The applicant indicated that 95% of the people living in the coverage area understand English.¹²⁹ The applicant submitted that English is the *lingua franca* in most urbanised areas of South Africa and this, together with its primary research, motivated the applicant to provide its service in English.¹³⁰

6.19 Demand, need and support

6.19.1 The applicant's need and demand analysis comprised a review of advertising spend, market share and the listener profiles of certain of the existing commercial radio services that are available in the coverage area, together with a primary research study.

6.19.2 The applicant's market analysis utilised the OMD 2008 and AMPS 2008 data. The applicant identified a number of radio stations in the coverage area, which are most popular amongst male listeners between the ages of 25 and 34. Power 98.9 FM questioned the statistical information that was provided by the applicant in relation to the radio stations operating in the Pretoria area as the information in the application conflicted with the figures sourced from Radio Diary '09 June – October and contended that the figures in the application were flawed and that the research lacked validity.¹³¹

6.19.3 The conclusion drawn by the applicant from its secondary research was that female audiences are not adequately catered

¹²⁹ Kgosi Media application: p 84.

¹³⁰ Transcript for Kgosi Media, 26 November 2010: p 31.

¹³¹ Transcript for Kgosi Media, 26 November 2010: pp 21 – 22.

for and that this presents a significant opportunity for a new service.¹³² In the Authority's assessment, however, the applicant's analysis does not adequately demonstrate why the fact that the existing stations referred to (Jacaranda FM, Metro FM, Highveld 94.7, Talk Radio 702, YFM and Classic FM), which are not the only commercial stations available in the coverage area, are most popular amongst male listeners, means that there is a gap in the market for a station aimed at women. The applicant suggested that the fact that regional, commercial radio stations are gaining market share and that certain greenfields stations (but not others) have attracted significant advertising revenue within a relatively short period supports its application.¹³³ However, the applicant did not provide comprehensive information as to why *its* proposed service would attract audiences, and specifically the female audiences that the applicant asserted are presently under-served, and, on this basis, be commercially viable.

6.19.4

The applicant's primary research was conducted using a quantitative method, whereby a structured questionnaire was distributed randomly in the Tshwane area.¹³⁴ The research was aimed at identifying the features of a radio service that listeners regard as important and identifying the "current trends and needs of radio listeners", to form the basis for the new radio station. Of the 180 respondents who took part in the research, 60% were between the ages of 16 and 24, 33% were between the ages of 25 and 49. As such, most of the respondents did not fall into the age range that the applicant seeks to target. The research report also noted that the respondent sample was not broadly representative of the potential audience in the coverage

¹³² Kgosi Media application: pp 85; 96 – 102.

¹³³ Kgosi Media application: pp 88 – 96.

¹³⁴ Kgosi Media application: p 106.

area and that this “could be considered as a limitation” of the study. The applicant’s research findings were that the majority of the respondents emphasised the importance of music and their choice of music genre but the research report emphasised that these findings may have been influenced by the fact that the majority of the respondents fell into the 16 to 24 age bracket. The research apparently showed that respondents’ most preferred existing radio stations were Metro FM, followed by Jacaranda FM and 5FM. (As indicated above, the applicant did not examine the listener profile of 5FM as part of its secondary research.) The research report recommended that more focused research be conducted in order to fully establish the relevant programme format and target group.¹³⁵

6.20 Financial means, business record and commercial viability

- 6.20.1 The applicant submitted a business plan including a financial plan with high level balance sheets, income statements and cash flow statements.¹³⁶
- 6.20.2 The applicant projected average revenue growth of 65%, which is comparatively high. Operating expenditure is expected to grow at 17% per annum. The applicant’s current ratio is calculated at 3, and its leverage ratio is calculated at 11%. The applicant expects positive net profitability in its third year of operations.
- 6.20.3 The applicant indicated that a total of R20 million initial funding is required, which the applicant indicated would be sourced through both equity and debt funding. It is intended that R5 million (20% of the required funding) will be sourced from the

¹³⁵ Kgosi Media application: p 110.

¹³⁶ Kgosi Media application: Vol 2, pp 51 – 55.

shareholders and R15 million (75% of the required funding) will be sourced by Wrightway Environmental.¹³⁷ The applicant provided a letter from Wrightway Environmental, which appears to be a United States company, in this regard indicating that it had been in discussions with various parties in the Peoples Republic of China and had “confirmed funding from both the Guangdong Provincial Equity Fund and for the newly formed Guangdong China Paradise Investment Surety Company Ltd” and, if the applicant’s application was successful, would “enter into agreements with [the] consortium to offer a combination of debt and equity funding”. If these foreign funders were to hold 25% equity in the applicant as well (being the equity stake which the applicant indicated had been warehoused for the funders), the foreign funders would then, on the basis of the principles discussed in Section H (Interpretation of Key Provisions of the Act) above, be deemed both to control the applicant and to have a “financial interest” in excess of 20% in the applicant (on the basis that the foreign funders would contribute 75% of the total funding requirement and would, on the basis of their 25% equity stake in the company, have control rights). This may give rise to concerns in light of the restrictions imposed on foreign involvement in broadcasting service licensees in terms of section 64 of the Act.

6.21 Decision and reasons

The Authority has decided not to grant the applicant the commercial sound broadcasting licence in the Gauteng primary market for each one of the following reasons considered separately, each of which is regarded as constituting adequate reason for turning down the application:

¹³⁷ Kgosi Media application: p 132.

6.21.1

The applicant's need and demand analysis was not sufficiently comprehensive and failed adequately to demonstrate that there is, in fact, a gap in the market for its proposed service or that its service would attract listeners in its target market. The applicant's own primary research identified the shortcomings in the research methods that had been adopted. In addition, the applicant's secondary research based on industry statistics did not clearly support the applicant's findings as to a gap in the market for a female-focussed radio service or that the applicant would be in a position to attract advertising revenues in accordance with its projections. The applicant's review of existing services also did not consider services such as 5FM which, on the basis of the applicant's own primary research, was one of the preferred stations amongst respondents. As a result, the Authority was unable to rely on the applicant's research with much confidence. In the Authority's assessment, the need and demand analysis presented by the successful applicant, Power 98.9 FM, was better able to demonstrate both that the service it proposes to provide is not currently offered in the market and that there is a market for its proposed service.

6.21.2

The applicant indicated that 75% of the applicant's total funding requirement was to be provided by a foreign company and also indicated that unidentified funders were to take up 25% of the equity in the applicant. It appeared that the foreign company identified by the applicant may take up the 25% equity stake. The Authority was, accordingly, concerned that this would breach sections 64(1)(a) and (b) of the Act because the foreign company would have both an equity stake in excess of 20% and would have a financial interest in excess of 20%.

7. LIFE COLLEGE CONSORTIUM

7.1 Introduction

7.1.1 The Authority received an application from Life College Consortium for the individual commercial sound broadcasting service licence in the Gauteng primary market.

7.1.2 The applicant's proposed station name is "98.9 Diski FM".¹³⁸

7.1.3 The Authority received representations from Main Street, Power 98.9 FM and Simascape on Life College Consortium's application.

7.1.4 The applicant requested that its application be treated as confidential information. The Authority granted the applicant's request to treat certain information, namely, its contact person, details on its corporate status and legal form and status, financial information and stakeholders' interests in advertising agencies. The Authority refused the applicant's request for confidentiality in respect of all other aspects of its application on the basis that this information is central to the application and interested parties' ability to comment on the application. The information also does not fall within any of the categories of information contemplated in section 4D(4) of the ICASA Act, which must be treated as confidential information. Certain of the information that the applicant had requested be kept confidential was included in its presentation at the public hearings in relation to its application. Where applicable, certain of that information is referred to in this Reasons Document.

¹³⁸ Life College Consortium application: Vol 1, p 2.

7.1.5 One of the applicant's shareholders, Kagiso Media Investments (Proprietary) Limited ("Kagiso Media"), also has interests in other corporate vehicles, namely Brimstone Consortium, which has applied for the commercial sound broadcasting licence in the primary market of the Western Cape.

7.2 Corporate status

7.2.1 The applicant indicated that it is a consortium. The applicant indicated that, if the commercial broadcasting service licence were to be granted to it, the consortium members would establish a new private company ("NewCo").¹³⁹ The licensed entity would, accordingly, be a juristic person as provided for in section 5(8)(b) of the Act.

7.2.2 At the time that its application was submitted, the respective interests of the consortium members were as follows:¹⁴⁰

7.2.2.1	Life College Investments (Proprietary) Limited ("Life College")	51%
7.2.2.2	Kagiso Media Investments (Proprietary) Ltd	39%
7.2.2.3	Tshepo Urban Trading (Proprietary) Limited ("Tshepo Urban Trading")	10%

7.2.3 The applicant submitted the certificate of incorporation and memorandum and articles of association for each of the consortium members, as required by item 6.1 of the ITA.¹⁴¹

¹³⁹ Life College Consortium application: Vol 1, p 7.

¹⁴⁰ Life College Consortium application: Vol 1, pp 8 - 10.

¹⁴¹ Life College Consortium application: Vol 1, pp 15 - 91.

7.2.4 The applicant indicated that 91.1% of the equity in NewCo would be held by HDPs. In this regard:

7.2.4.1 Kagiso Media Limited (as opposed to Kagiso Media Investments, which is a member of the applicant consortium) is listed on the JSE. Its major shareholder is Kagiso Trust Investments (“KTI”), which holds 51.17% of its shares. It appears from the annual report of Kagiso Media Limited dated 9 November 2010 that Kagiso Media Investments is a wholly-owned subsidiary of Kagiso Media Limited. Accordingly, KTI’s effective interest in the applicant is 12.74%. The shareholders in KTI are: the Kagiso Trust (51%), the Kagiso staff trust (11.34%) and Remgro (37.66%). The applicant indicated that, of the 48.83% of the shares in Kagiso Media Limited that are listed, 65.76% are held by Mandated Investments, as defined in Annexure 100A of Code 100 of the Codes of Good Practice.¹⁴²

7.2.4.2 The applicant indicated that Life College has 100% broad-based black beneficiaries. The main object of Life College is “investments, fund-raising and ancillary activities for South African Life College”.¹⁴³ At the public hearings, the applicant indicated that Life College is wholly owned by the Life College Trust.¹⁴⁴

7.2.4.3 Tshepo Urban Trading, which holds 10% of the shares in the applicant, is wholly owned by the Tshwane

¹⁴² Life College Consortium application: Vol 1, p 9.

¹⁴³ Life College Consortium application: Vol 1, p 19.

¹⁴⁴ Transcript for Life College Consortium, 25 November 2010: p 5.

Leadership Foundation.¹⁴⁵ The applicant indicated that the Tshwane Leadership Foundation is a charity that has 100% broad-based black beneficiaries.¹⁴⁶ At the public hearings, the applicant submitted that Tshepo Urban Trading was established as a trading arm of the Tshwane Leadership Foundation so as to generate income for reinvestment in community and social purposes of the Tshwane Leadership Foundation.¹⁴⁷

7.2.5 The applicant submitted a copy of a consortium agreement between Life College, Kagiso Media and Tshepo Urban Trading in respect of the new company to be established by the consortium members for the purposes of the application.¹⁴⁸ The consortium agreement was submitted on a confidential basis.

7.2.6 On the basis of the principles discussed in Section H (Interpretation of Key Provisions of the Act) in Part I of this Reasons Document, both Life College and Kagiso Media Investments are deemed to control the applicant on the basis of their respective interests in the applicant consortium and the percentage shareholding that they would have in NewCo. In addition, Life College would have *de facto* control of NewCo on the basis that it would hold an actual majority of the issued shares in the company and, in terms of the consortium agreement, will have other control rights in certain instances. On the basis of the “flow-through principle”, none of the shareholders in KTI has an effective shareholding interest in the applicant consortium in excess of 20%.

¹⁴⁵ Life College Consortium application: Vol 1, p 91.

¹⁴⁶ Life College Consortium application: Vol 1, p 8.

¹⁴⁷ Transcript for Life College Consortium, 25 November 2010: p 9.

¹⁴⁸ Life College Consortium application: Vol 1, pp 99 – 144.

7.3 Empowerment of HDPs

7.3.1 The applicant indicated that, on the basis of the ownership calculations conducted by Bravura Consulting, 91.1% of its equity ownership is held by HDPs.^{149 150}

7.3.2 The applicant provided supporting information in its application indicating that Kagiso Media Limited has an effective 30.5% shareholding by black people (on the assumption that the proportion of shares that are listed on the JSE have 0% black shareholding). The applicant also indicated that the Tshwane Leadership Foundation and Life College are charities for the exclusive benefit of black people. As such, the applicant submitted that the shareholding by black people in the applicant is 12.5% through the Tshwane Leadership Foundation, 63.8% through Life College, and 14.9% through Kagiso Media.¹⁵¹ On this basis, the effective shareholding by black people in the applicant is 91.1%. The applicant's calculations in relation to Kagiso Media Investments, as reflected in its original application, excluded Mandated Investments in Remgro and Kagiso Media, as permitted by the Codes of Good Practice. As such, shareholding by black people was calculated on the basis of a denominator of 79.99%. On this basis, the Authority calculates that the effective shareholding by black people in the applicant is 91.1%. (This is calculated by adding the effective ownership by black people in the consortium through Life College and the Tshwane Leadership Foundation (for example, $51\% \times 100\% / 79.99\% = 63.8\%$ and $39\% \times 100\% / 79.99\% = 14.9\%$) and the effective ownership by black people in the consortium through Kagiso Media ($39\% \times 30.5\% / 79.99\% = 14.9\%$).

¹⁴⁹ Transcript for Life College Consortium, 25 November 2010: p 12.

¹⁵⁰ Life College Consortium application: Vol 1, p 7.

¹⁵¹ Life College Consortium application: Vol 1, pp 9 – 11.

7.3.3 The Authority is satisfied that the applicant complies with and significantly exceeds the empowerment requirements in the ITA read with section 9(2)(b) of the Act.

7.4 Section 65(2) of the Act

7.4.1 The applicant indicated that Kagiso Media Investments, with a 39% shareholding in the applicant, controls 100% of East Coast Radio (Pty) Ltd (which is an FM commercial sound broadcasting service licensee in KwaZulu-Natal and 80% of Jacaranda FM (Pty) Ltd (which is an FM commercial sound broadcasting service licensee in Gauteng). It also has a “direct interest” of 24.9% in OFM (Pty) Ltd (which is an FM commercial sound broadcasting service licensee in the Free State), and an “indirect interest” of 24.7% in Radio Heart 104.9 (Pty) Ltd (which is an FM commercial sound broadcasting service licensee in Cape Town) and 24.7% in iGagasi 99.5 FM (Pty) Ltd (which is an FM commercial sound broadcasting service licensee in KwaZulu-Natal). (It appears that Kagiso Media Limited’s interest in these stations is through an intermediary company, Makana Radio Communications (Pty) Ltd.

7.4.2 The applicant also indicated that it “provides funding to Kaya FM (which is an FM commercial sound broadcasting service licensee in Johannesburg), but has no direct interest in Kaya FM, is not represented on its Board and has no involvement in the management of that radio station”.¹⁵² The 2010 annual report of Kagiso Media Limited indicates, however, that Kagiso Media Limited holds 25.1% of the shares in Kaya FM (through Thebe Convergent Technologies (Pty) Ltd) although elsewhere in the report it is indicated that the applicant only has an

¹⁵² Life College Consortium application: Vol 1, p 187.

“economic interest” in Kaya FM.¹⁵³

7.4.3 Written submissions were made by other applicants in relation to the involvement of Kagiso Media Investments in the applicant on the basis that Kagiso Media Investments already has significant broadcasting interests. For example, Main Street submitted that Kagiso Media is “already in control of two commercial broadcasting service licenses in the FM sound broadcasting service”, namely East Coast Radio and Jacaranda.¹⁵⁴ Main Street submitted that, if the licence is granted to Kagiso Media, Kagiso Media will not be in compliance with section 65(2) of the Act. Main Street also submitted that the Authority should have due regard to the principles of diversity of ownership and control and content in its consideration of the applicant’s application.¹⁵⁵

7.4.4 Power 98.9 FM submitted that the applicant is in breach of section 65(2) of the Act for the following reasons, amongst others: the applicant proposes to base its station at the premises of Jacaranda FM which is wholly owned by Kagiso Media, and Kagiso Media will have negative control in respect of key decisions.¹⁵⁶ As a result, Power 98.9 FM submitted that Kagiso Media will exercise *de facto* positive control of the applicant. Power FM submitted further that awarding the licence to the applicant will not promote diversity given that Kagiso Media is already one of the dominant media groups in South Africa.¹⁵⁷

7.4.5 The applicant submitted that Kagiso Media Investments controls only two radio stations, namely Jacaranda FM and East Coast

¹⁵³ Kagiso Media Limited 2010 annual report: pp 8, 10.

¹⁵⁴ Main Street written submission, 10 August 2010: pp 5 - 7, para 8.

¹⁵⁵ Main Street written submission, 10 August 2010: pp 7 - 9.

¹⁵⁶ Power FM Notes for oral representations: pp 2 & 3.

¹⁵⁷ Power FM Notes for oral representations: p 3.

Radio FM, and does not control any other radio stations.¹⁵⁸ The applicant submitted further that Kagiso Media does not control the applicant because it is not the majority shareholder, has only the standard rights that are accorded to minority shareholders and does not have management control of the applicant.¹⁵⁹ As such, the applicant submitted that Kagiso Media will not be in a position to exercise control over the NewCo.¹⁶⁰ As discussed in Section H (Interpretation of Key Provisions of the Act) in Part I of this Reasons Document, the applicant also obtained an opinion from its legal representatives which submitted that, although Kagiso Media will hold 39% of the shares in NewCo, it will have neither complete nor majority control in respect of voting rights in NewCo.¹⁶¹ The opinion obtained by the applicant was that, with one possible exception, none of the subjects in relation to which a unanimous resolution of the applicant's shareholders or directors, as the case may be, is required would enable Kagiso Media to exercise *de facto* negative control of NewCo (in that Kagiso Media would be in a position to exercise a veto). The opinion advised that, if the list of subjects in respect of which unanimous resolutions are required were to be amended, Kagiso Media would not have control of the applicant. As such, the applicant submitted a signed amendment to the consortium agreement on 9 December 2010.

7.4.6 In response to a question from the Authority, the applicant stated that Life College, which will for all purposes have legal control of NewCo on the basis that it will control more than 50% of the shares in the company, is a new entrant to the broadcasting sector.¹⁶²

¹⁵⁸ Transcript for Life College Consortium, 25 November 2010: p 38.

¹⁵⁹ Transcript for Life College Consortium, 25 November 2010: pp 38 - 39.

¹⁶⁰ Life College Consortium additional information, 9 December 2010: p 1, paras 3 - 5.

¹⁶¹ Life College Consortium additional information, 9 December 2010: p 2, paras 5 & 6.

¹⁶² Transcript for Life College Consortium, 25 November 2010: p 55.

7.4.7 The applicant indicated further that programming and resources will not be syndicated or shared between the proposed station and the other radio stations in which Kagiso Media has an interest.¹⁶³

7.5 Section 66(2) and (3) of the Act

The applicant indicated that its shareholders do not have any ownership or control interests in any newspapers.¹⁶⁴

7.6 Section 64 of the Act

The applicant indicated that it has no foreign shareholders.¹⁶⁵

7.7 Management, control and human resources

7.7.1 The board will comprise not less than five and not more than seven directors.¹⁶⁶ In terms of the consortium agreement, each of the shareholders has the right to appoint directors essentially in proportion to their respective shareholdings.¹⁶⁷

7.7.2 The applicant indicated that its senior management will consist of four members, of which three are women.¹⁶⁸

7.7.3 The applicant provided brief details in relation to the backgrounds and qualifications of the members of its senior management. It appears from the information provided that two

¹⁶³ Transcript for Life College Consortium, 25 November 2010: p 49.

¹⁶⁴ Life College Consortium application: Vol 1, p 185.

¹⁶⁵ Life College Consortium application: Vol 1, p 183.

¹⁶⁶ Life College Consortium application: Vol 1, p 115 (clause 21.1 of consortium agreement).

¹⁶⁷ Life College Consortium application: Vol 1, p 95.

¹⁶⁸ Life College Consortium application: Vol 1, p 146.

of the four identified members of senior management have relevant broadcasting experience.¹⁶⁹

7.7.4 The applicant submitted an organogram of the station's staff and proposes to have a staff complement of 19 full-time and five part-time employees.¹⁷⁰ The applicant also indicated that technical services will be outsourced to Jacaranda FM.¹⁷¹ The Authority is satisfied that the applicant would have the requisite technical capabilities if it were to be awarded the licence.

7.8 Programming

7.8.1 As required, the applicant submitted a detailed programme schedule covering typical weekdays, Saturdays and Sundays.¹⁷² It proposes to broadcast 24 hours per day, seven days a week and proposes to commence broadcasting within six months of the licence being issued.¹⁷³

7.8.2 The applicant indicated that its target market is working and middle class South Africans within the coverage area, and particularly soccer lovers.¹⁷⁴

7.9 Format

7.9.1 The applicant proposes to be a sport talk radio station mixed with music. As such, the applicant indicated that it would provide a programming service that will be talk-based, with most of the soccer-based talk taking place during peak times and the

¹⁶⁹ Life College Consortium application: Vol 1, p 146.

¹⁷⁰ Life College Consortium application: Vol 1, p 168.

¹⁷¹ Life College Consortium application: Vol 1, pp 170 - 174.

¹⁷² Life College Consortium application: Vol 2, pp 198 - 207.

¹⁷³ Life College Consortium application: Vol 2, pp 216 - 217.

¹⁷⁴ Life College Consortium application: Vol 2, p 196.

evenings.¹⁷⁵ The applicant indicated that the proposed radio station will not provide live commentary, but will be a forum for fans to talk about sport and specific matches.

7.9.2 The applicant provided the minimum and the maximum percentages of programming airtime for talk output, in each of the periods as required by the ITA. The applicant indicated that it would provide a maximum of 70% speech output during peak-time (5am – 7pm) on weekdays and 60% during peak-time on weekends.¹⁷⁶ The applicant indicated that non-local originating content (in the form of sound bytes, interviews and other information sourced from other media sources) is unlikely to exceed 10% of its speech content.¹⁷⁷ The applicant will not broadcast any automated output.¹⁷⁸

7.10 News

7.10.1 The applicant indicated that it will broadcast a total of eight minutes of local news, 26 minutes of national news and eight minutes of international news per day on weekdays, and that it will broadcast seven minutes of local news, 22 minutes of national news and seven minutes of international news on weekends.¹⁷⁹ As such, the applicant indicated that the news will consist, on average, of 20% local, 60% national and 20% international news.

7.10.2 The applicant indicated that news will be broadcast in English (33.3%), Sepedi (33.3%) and Setswana (33.3%).¹⁸⁰ The

¹⁷⁵ Life College Consortium application: Vol 2, p 196.

¹⁷⁶ Life College Consortium application: Vol 2, p 209.

¹⁷⁷ Life College Consortium application: Vol 2, p 196.

¹⁷⁸ Life College Consortium application: Vol 2, p 221.

¹⁷⁹ Life College Consortium application: Vol 2, p 213.

¹⁸⁰ Life College Consortium application: Vol 2, p 213.

sources of the applicant's news will be SAPA, other news agencies and local freelancers.

7.11 Current affairs

The applicant indicated that it does not intend to broadcast current affairs programmes unless they are sports related.¹⁸¹

7.12 South African music

The applicant stated that every third song played on the station will be a South African song.¹⁸² This would comply with the music quota requirements set by the Content Regulations. The applicant provided illustrative tracks and artists and the music type as a percentage of the total music.¹⁸³ The applicant indicated that it will play Hip Hop, Kwaito, House/ Dance, R&B, and other local genres.

7.13 Language

The applicant indicated that it will broadcast in English (50%), Setswana (16%), Sepedi (16%) and the "Local Vernacular", indicated to be "lingo" and an "informal language in which most people in Northern Gauteng communicate" (18%). The applicant also stated that, based on figures sourced from RAMS 2009/3, 1 365 000 people in the proposed coverage area understand English, 614 000 people understand Setswana and 732 000 people understand Sepedi.¹⁸⁴

7.14 Demand, need and support

7.14.1 The applicant stated that there is currently no radio station in the

¹⁸¹ Life College Consortium application: Vol 2, pp 214 - 215.

¹⁸² Life College Consortium application: Vol 2, p 211.

¹⁸³ Life College Consortium application: Vol 2, p 211.

¹⁸⁴ Life College Consortium application: Vol 2, p 223.

relevant coverage area or in the country that is dedicated to serving sports information needs. The applicant indicated that it commissioned a “format gap analysis study”, being research aimed at identifying radio format needs that were still unmet in the coverage area given the particular demographics in that area.¹⁸⁵ The research was outsourced to two specialist research companies, Ask Africa (Pty) Ltd and ARI Research, and consisted of telephonic interviews in August 2009 with 400 respondents in the coverage area. During these interviews the applicant played excerpts from examples of the various radio format types.¹⁸⁶ The applicant indicated that a recording of one of these interviews was available on request.

7.14.2

The applicant indicated that it researched eight possible formats, five of which showed comparatively little support among radio listeners aged 16 to 29 years. Two of the remaining three formats, namely R&B and CHR Urban, have strong appeal but other stations are perceived to fill these niches. As such, the remaining format – a sports format – is a format that has support among radio listeners aged 16 to 49 and was “thought of as not existing by a large number of Gauteng radio listeners”. In the applicant’s assessment, this makes sports the strongest candidate for satisfying unmet listener needs and has the best prospects of success as a business given the lack of direct competition. The applicant indicated that “[o]ver 97% of those interviewed said a station like this would be a positive addition to the community.”¹⁸⁷ The applicant provided excerpts of the results of the research that had been conducted but did not provide a copy of the research report which apparently supported its contentions in relation to the appeal of sports and

¹⁸⁵ Life College Consortium application: Vol 2, p 226; Transcript for Life College Consortium, 25 November 2010: p 14.

¹⁸⁶ Transcript for Life College Consortium, 25 November 2010: p 15.

¹⁸⁷ Life College Consortium application: Vol 2, pp 226 - 227.

the proposed sports format. Accordingly, the Authority had relatively limited information in relation to the research methodology that was employed by the applicant, including the selection of participants and the profile of the survey sample that was used.

7.14.3 The applicant also relied on secondary research which it conducted in 2007 in Gauteng and the Western Cape to determine, amongst other things, what the opportunity is for a station specialising in sports programming. The applicant provided some details in relation to the results and data that was generated from its research but again did not provide a copy of the research report.¹⁸⁸ The applicant's research appeared to show that there was relatively extensive demand for a sports radio service, particularly amongst male listeners. It seems, however, that these results were generated from the whole sample of 700 interviewees (in Gauteng and the Western Cape) rather than just the interviewees based in Gauteng.

7.14.4 In relation to the need for its proposed service, the applicant indicated that none of the broadcasting services that are available in the coverage area specialise in providing sports information and that television is currently the primary source of sports information that radio station listeners go to for such information. The applicant indicated that, as existing stations dedicate very little of their programming to sports since they are full broadcasters or music stations, the applicant's proposed sports focused station will fill a need for sports information.¹⁸⁹

7.14.5 The applicant indicated that it expects a listenership of 200 000 people (or 13% of the adult population in the area) in its first

¹⁸⁸ Life College Consortium application: Vol 2, pp 228 - 229.

¹⁸⁹ Life College Consortium application: Vol 2, pp 231 - 232.

year of operation and that this was based on both the AMPS and RAMS and the research conducted for the applicant by ARI Research.¹⁹⁰ The applicant indicated that for commercial sales and marketing purposes, its primary market is defined as males of all races in the LSM 5 – 10 group. The applicant indicated, on the basis of the RAMS, that the total available audience in the primary target market is 760 000 males.¹⁹¹

7.15 Financial means, business record and commercial viability

7.15.1 The applicant submitted a relatively detailed business plan including the risks and opportunities for new commercial broadcasters in the relevant coverage area given the overall radio and business environment and the existing services in that area. The applicant's business plan was premised on the applicant's assessment, based on its research that an opportunity exists for a radio service of the type that the applicant proposes to provide.¹⁹²

7.15.2 The applicant projected an average revenue growth of 37%,. Operating expenditure is expected to grow at 9% on average. The applicant's current ratio is calculated at 4.89 and its leverage ratio is calculated at 27.2%.

7.15.3 The applicant indicated that it will be profitable in its sixth year of operations. The applicant indicated that a total of¹⁹³ will be required to fund its operations during the first five years of operation. Funding will be provided by members of the

¹⁹⁰ Life College Consortium application: Vol 2, p 234; Transcript for Life College Consortium, 25 November 2010: p 16.

¹⁹¹ Life College Consortium application: Vol 2, p 264.

¹⁹² Life College Consortium application: Vol 2, pp 252 - 261.

¹⁹³ Confidential

consortium.¹⁹⁴

7.16 Decision and reasons

The Authority has decided not to grant Life College Consortium the individual commercial sound broadcasting licence in the Gauteng primary market for each one of the following reasons considered separately, each of which is regarded as constituting adequate reason for turning down the application:

- 7.16.1 As set out in Section H (Interpretation of Key Provisions of the Act) in Part I of this Reasons Document, in the Authority's assessment, a 20% shareholding in a company is regarded as control of that company for the purposes of the Act, including section 65(2) of the Act. On this basis, Kagiso Media Limited (which is the sole shareholder in Kagiso Media Investments, which has a 24.9% interest in the applicant and will hold 24.9% of the shares in NewCo), presently controls more than two commercial broadcasting service licences in the FM sound broadcasting service. The licences held by each of the commercial broadcasting service licensees which Kagiso Media Limited presently controls were issued in terms of the IBA Act which allowed a company such as Kagiso Media Limited to hold more than 25% of the shares in up to two commercial broadcasting service licensees and, accordingly, allowed such a company to hold less than 25% of the shares in any number of FM commercial sound broadcasting licensees. The Authority converted the licences held by each of the radio services which Kagiso Media controlled in 2009 on the basis that those licences had to be converted on no less favourable terms than those of their previous licences.

¹⁹⁴ Life College Consortium application: Vol 2, p 326.

7.16.2 The Authority cannot grant an FM commercial broadcasting service licence to the applicant given the extent of Kagiso Media Limited's indirect stake in the applicant on the basis that the applicant would be in breach of the restrictions imposed by sections 65(2)(a) and (3) of the Act. The applicant did not advance reasons as to why it should be exempted from these restrictions but instead advanced its views and various legal arguments as to why a 20% shareholding did not amount to control for the purposes of section 65 of the Act.

7.16.3 The applicant provided excerpts of the results of the research that had been conducted but did not provide a copy of the research report which apparently supported its contentions in relation to the appeal of sports and the proposed sports format. Accordingly, the Authority had relatively limited information in relation to the research methodology that was employed by the applicant, including the selection of participants and the profile of the survey sample that was used. The applicant's research was not as comprehensive as that submitted by other applicants including the successful applicant, Power 98.9 FM.

8. MAIN STREET 756 (PTY) LTD

8.1 Introduction

8.1.1 The Authority received an application from Main Street 756 (Pty) Ltd for the individual commercial sound broadcasting service licence in the primary market in Gauteng.

8.1.2 The applicant's proposed station name is "Tshwane 98.9 FM".
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8.1.3 The Authority received a written representation in respect of this application from Power 98.9 FM.

8.1.4 The applicant requested that certain information in its application be treated as confidential information. The Authority granted the applicant's request for confidentiality in respect of its shareholders' agreement, finances, business plan and details of senior management. The Authority refused the applicant's request for confidentiality in respect of any other information on the basis that this information is central to the application and interested parties' ability to comment on the application. The information also does not fall within any of the categories of information contemplated in section 4D(4) of the ICASA Act, which must be treated as confidential information.

8.1.5 Certain of the applicant's shareholders are also involved in the applications of Main Street 757 (Pty) Ltd and Main Street 758 (Pty) Ltd, which submitted applications for commercial broadcasting service licences in the Durban and Cape Town markets respectively

¹⁹⁵ Main Street application: Vol 1, p 4.

8.2 Corporate status

8.2.1 As part of its application, the applicant submitted copies of its founding documents (including its memorandum and articles of association) as required by the ITA.¹⁹⁶ The Authority is satisfied that the applicant is a private company registered in South Africa with its principal place of business in South Africa, as required by section 5(8)(b) of the Act.

8.2.2 The applicant's original shareholding structure was as follows:
¹⁹⁷

8.2.2.1	Avusa Media Ltd ("Avusa")	24.9%
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8.2.2.2	Lagardere Active Radio International ("LARI")	20%
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8.2.2.3	Direng Investment Holding (Pty) Ltd ("Direng")	20%
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8.2.2.4	Vaximax Investment (Pty) Ltd ("Vaximax")	4.9%.
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8.2.2.5	SADTU Investment Holdings (Pty) Ltd ("Sihold")	10%
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8.2.2.6	Kurisani Youth Development Trust ("Kurisani")	10%
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8.2.2.7	Albavect (Pty) Ltd ("Albavect")	10.2%
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8.2.3 The applicant indicated as follows:

8.2.3.1 The shareholders of Direng, which is 90% black-owned

¹⁹⁶ Main Street application: Vol 2.

¹⁹⁷ Main Street application: Vol 1, p 1; Vol 3, appendix 6.5.

and controlled, are: Mr Kenny Setzin, Ms Felicia Roman, Ms Hazel Relefeta, Mr Victor Sekese, Mr Raymond Kevan and Mr Mike Tissong.¹⁹⁸

8.2.3.2 Avusa is a public company listed on the JSE. Following the public hearings, the applicant submitted a list of Avusa's top beneficial shareholders.¹⁹⁹

8.2.3.3 LARI is a French, publicly quoted company.

8.2.3.4 Sihold is a 100% BEE company and is 100% owned and controlled by the South African Democratic Teachers Union.

8.2.3.5 Mr Talib Sadik is the sole director of Vaximax. The applicant provided a copy of the trust deed for a trust known as Sediba Trust of which Mr Sadik is one of the trustees. The applicant did not explain the role of the Sediba Trust but the Authority presumes that it has some interest in Vaximax.²⁰⁰

8.2.3.6 The trustees of Kurisani are David Harrison, Grenville Harrison, Michael Sinclair, Nthatho Motlana, and Raymond Dalais. The beneficiary of Kurisani is the new LoveLife Trust. The applicant provided copies of the trust deeds for both trusts.²⁰¹ The object of the LoveLife Trust is broadly to have fiduciary responsibility for the affairs of LoveLife in meeting its strategic objectives of HIV prevention among young people in Southern Africa.

¹⁹⁸ Main Street application: Vol 1, pp 8 - 9.

¹⁹⁹ Main Street additional information, 9 December 2010: item 7.

²⁰⁰ Main Street application: Vol 3,

²⁰¹ Main Street application: Vol 2; Vol 3..

- 8.2.3.7 Albavect is a black empowerment consortium of HDPs in the community of Tshwane in various professions. The applicant provided the shareholders' agreement between the shareholders of Albavect.²⁰²
- 8.2.4 The applicant indicated that no one shareholder is in a position (and no shareholder of the applicant holds a sufficient percentage of the shares) to appoint or to veto the appointment of any of the directors, or in any other way to direct or restrain the applicant on substantive management or other issues.²⁰³ The Authority had regard to the shareholders' rights to appoint directors, directors' voting rights in respect of ordinary and material decisions and the shareholders' rights to call and vote at shareholders' meetings as provided for in the shareholders' agreement that was submitted by the applicant on a confidential basis²⁰⁴ and confirmed that no one director in fact has the right on its own to direct the applicant's affairs through the board or shareholder structures.
- 8.2.5 The applicant submitted a copy of the consultancy agreement concluded between the applicant, LARI, Avusa and Direng on 27 November 2009.²⁰⁵ This agreement records that: LARI has extensive experience in the radio broadcasting industry and in the development and operation of commercial radio stations; Avusa has expertise relating to marketing and public relations and has access through its newspaper network to a wide spectrum of the public; and Direng has expertise in the local radio broadcasting industry. For the purposes of developing and operating the proposed radio station, the applicant requested

²⁰² Main Street application: Vol 1, p 9; Vol 3.

²⁰³ Main Street application: Vol 1, p 11 & appendix 6.4.

²⁰⁴ Main Street application: Vol 3 (Confidential), shareholders' agreement, clauses 10 – 13.

²⁰⁵ Main Street application: Vol 3, appendix 8.4.

the consultants to provide the services to the applicant as independent contractors as recorded in the agreement.²⁰⁶

8.2.5.1 In terms of the agreement, Avusa will provide the following services, amongst others: providing assistance in the recruitment of personnel such as the station manager, financial manager and programme manager; ensuring the implementation of key HR and corporate governance policies and training; providing supportive operational oversight; and reviewing and assisting in developing the research to refine the positioning and programme content prior to launch.

8.2.5.2 Direng will provide the following services, amongst others: the recruitment of key personnel such as the station manager, financial manager and programme manager; providing operational oversight; providing and making recommendations and reports to station management on annual budgets; guiding and assisting station management in negotiating advertising sales contracts and key commercial and consultancy agreements.

8.2.5.3 LARI will provide the following services, amongst others: reviewing and assisting in identifying the research necessary to refine the positioning and programming content prior to launch; ensuring that programme content matches the chosen positioning; supervising and helping design the music research systems and focus groups; assisting and making recommendations in the selection of “on air talent” and administrative staff; working with management in recommending staffing structures and

²⁰⁶ Main Street application: Vol 3, appendix 8.4, p 5.

levels; and assisting in the transfer of skills and setting up appropriate training programmes.

8.2.6 The consultancy agreement endures for an initial period of five years. As consideration for the services to be rendered by the consultants to the applicant, the applicant is required to pay an annual service fee equal to the greater of 5% of the applicant's gross turnover or R1 million. The service fee shall be apportioned amongst the consultants as follows: LARI – 60%; Avusa – 20%; and Direng – 20%.

8.3 Empowerment of HDPs

8.3.1 The applicant indicated in its application that 58.6% of its equity ownership is held by HDPs.²⁰⁷ However, at the public hearings, the applicant indicated approximately 65.89% of the applicant is owned and controlled by HDPs²⁰⁸ on the basis that that Direng is 90% black-owned; Albavect is 100% black-owned; Talib Sadik is an HDP; and Avusa is a Level 3 BBBEE contributor and is a 51.3% black-owned listed entity.²⁰⁹ (The BBBEE Certificate which was included in the application in respect of Avusa Limited, which covers Avusa Media Limited as well, indicates that Avusa has 56.2% ownership by black people.)²¹⁰

8.3.2 On the basis of the information and supporting documents presented by the applicant in relation to the shareholding and ownership structures of its various shareholders, the Authority is satisfied that the applicant complies with the HDP

²⁰⁷ Main Street application: Vol 1, pp 2; 7-10.

²⁰⁸ Transcript for Main Street, 25 November 2010: p 3.

²⁰⁹ Main Street presentation, 25 November 2010: shareholding structure. Transcript for Main Street, 25 November 2010: p 3.

²¹⁰ Main Street application: Vol 2.

empowerment requirements set out in the ITA read with section 9(2)(b) of the Act.

8.4 Section 65(2) of the Act

8.4.1 The applicant indicated that its shareholders have the following broadcasting interests:

8.4.1.1 Direng Investment Holding (Pty) Ltd has a 26% shareholding in North West FM (Pty) Ltd, which is a licensed commercial sound broadcasting service in the North West province, and a 27.1% shareholding in M-Power Radio (Pty) Ltd, which is a licensed commercial sound broadcasting service in the Mpumalanga province.²¹¹ Direng also holds 20% of the shares in the applicant, and is a consultant to the applicant, in terms of the consultancy agreement. If the licence were to be awarded to the applicant, there would be no contravention of section 65(3) of the Act on the basis that North West FM, M-Power Radio and the proposed service to be broadcast on 98.9 FM in the Gauteng metropolitan area do not have the same or substantially overlapping licence areas. However, Direng controls North West FM and M-Power Radio and, as a 20% shareholder in the applicant, Direng would also, on the basis of the Authority's interpretation of section 65(2) of the Act (as discussed in Section H (Interpretation of Key Provisions of the Act) above), be deemed to control the applicant. As such, if the applicant were to be awarded an FM commercial sound broadcasting service licence, it would be in contravention of section 65(2)(a) of the Act given that Direng would then be in a position to exercise

²¹¹ Main Street application: Vol 1, p 24.

control over three commercial broadcasting service licences in the FM sound broadcasting service.

8.4.1.2 LARI holds 20% of the shares in Jacaranda FM, and 20% of the applicant's total share capital.²¹² The applicant would not, on the basis of LARI's shareholding, be in contravention of either section 65(2)(a) or (3) of the Act.

8.4.1.3 Sihold holds 24% of the shares in North West FM, and holds 12.6% of the shares in the applicant.²¹³ The applicant would not, on this basis, be in contravention of either section 65(2)(a) or (3) of the Act given that Sihold's shareholding in the applicant does not amount to deemed control.

8.5 As indicated above, Mr Andrew Manderstam is one of the directors of the applicant. Mr Manderstam is also a director of Jacaranda FM.²¹⁴

8.6 Sections 66(2) and (3) of the Act

8.6.1 Avusa, which holds 24.9% of the shares in the applicant, publishes various newspapers which are circulated in the coverage area, as discussed below. On the basis of the principles discussed in Section H (Interpretation of Key Provisions of the Act) above, Avusa is, on the basis of its shareholding interests, also deemed to control the applicant. Accordingly, it is necessary to evaluate the applicant's and Avusa's compliance with section 66(3) of the Act.

8.6.2 The applicant indicated that in Tshwane, ABC circulation for

²¹² Main Street application: Vol 1, p 23.

²¹³ Main Street application: Vol 1, p 24.

²¹⁴ See Jacaranda FM submission, 26 July 2010.

Business Day is 0.87%; *Daily Dispatch* is 0% (as it is subscription-based), *The Herald* is 0%; *Saturday Dispatch* is 0%, *Sowetan* is 1.91%; *Sunday Times* is 4.9%; *Sunday World* is 2.91%; *The Times* is 1.52% and the *Weekend Post* is 0% of the total circulation.²¹⁵ Based on total circulation of all publications in the Tshwane, the applicant indicated that Avusa's paid circulation is 81 389 of a total of 672 352, which amounts to 12.11%.²¹⁶ As such, the applicant indicated that Avusa has an average ABC circulation of 12.11% in Tshwane.²¹⁷ A document submitted by the applicant subsequent to the hearing in relation to Avusa's circulation figures indicated that Avusa's ABC circulation in relation to total newspaper readership in Tshwane is 10.7%.²¹⁸ On this basis, even though Avusa is deemed to control the applicant, the applicant would not be in breach of section 66(3) of the Act because its average circulation in the relevant area is less than 20%.

8.6.3 Power 98.9 FM submitted that the readership of Avusa newspaper titles in the coverage area means that the applicant "holds a dominant position with respect to newspaper readership in the Gauteng area" and is in breach of section 66(3) of the Act. Power 98.9 FM submitted that, based on the latest AMPS data it had calculated the gross and net reach achieved by Avusa titles within Gauteng and concluded that Avusa titles reach 38.75% of duplicated readers of daily and weekly newspapers and 61% of unduplicated readers and, with respect to Sunday newspaper readers, Avusa reaches 48.29% of duplicated readers but 72% of unduplicated readers. Power 98.9 FM used the AMPS data

²¹⁵ Main Street presentation, 25 November 2010: Avusa circulation slide; Main Street additional information, 9 December 2010: item 7.

²¹⁶ Main Street presentation, 25 November 2010: Avusa circulation slide.

²¹⁷ Main Street presentation, 25 November 2010: Avusa circulation slide; Transcript for Main Street, 25 November 2010: pp 6 & 7.

²¹⁸ Main Street additional information, 9 December 2010: items 7 & 8.

on the basis that ABC no longer publishes disaggregated circulation figures per province and only makes nationally aggregated figures available. Power 98.9 FM also submitted that only paid-for newspapers are relevant to these calculations on the basis that these are the newspapers covered by ABC.²¹⁹ In response to Power 98.9 FM's submissions, the applicant submitted a document comparing the circulation numbers of Avusa for Gauteng that were supplied to ABC against the AMPS data on total readership in both Gauteng generally and Tshwane, more specifically, and indicated that, in both cases, Avusa was below the 20% threshold.²²⁰ The applicant indicated that these calculations had been verified and submitted copies of reports prepared by Deloitte & Touche in this regard dated 28 July 2010 in relation to *The Times*, *Sowetan*, *Sunday Times*, and *Sunday World*, reports prepared by Marais & Smith Chartered Accountants dated 30 July 2010 in respect of *Saturday Dispatch* and *Daily Dispatch*, and a representation made by BDFM Publishing (Pty) Ltd in respect of *Business Day*.²²¹ The applicant submitted that the information prepared and submitted by Power 98.9 FM was not relevant for the purposes of section 66(3) of the Act because it only showed a comparison between readership of Avusa titles in the Gauteng province and total readership in the Gauteng province based on the relevant AMPS data and did not compare the ABC data in respect of readership of Avusa titles and total readership in the Gauteng province on the basis of the AMPS data. The applicant submitted that a comparison between ABC data and AMPS data is what is required by the Act.²²²

²¹⁹ Power 98.9 FM Notes for oral representations: p 4; Transcript for Main Street, 25 November 2010: pp 14 - 16.

²²⁰ Main Street additional information, 9 December 2010: items 4 & 5.

²²¹ Main Street additional information, 9 December 2010: item 8.

²²² Main Street additional information, 9 December 2010: item 5

8.6.4 Power 98.9 FM submitted that print media in South Africa is dominated by only a few companies, including Avusa (in this regard Power 98.9 FM included a copy of a 2009 report prepared for the MDDA titled *Trends of Ownership and Control of Media in South Africa* with its representations)²²³, and that awarding the radio licence to Main Street would not promote diversity.²²⁴ In response, the applicant submitted that the MDDA report does not support Power 98.9 FM's contentions and does not show that Avusa is dominant. The applicant also submitted only one of its shareholders (LARI) has significant exposure to the broadcasting industry and its other shareholders are either wholly new entrants or have limited prior exposure to the sector. On this basis the applicant contended that its application is in line with the regulatory objective of promoting competition and diversity of ownership in the broadcasting industry. The applicant also submitted that it would ensure diversity of content across the various media interests of its Avusa and the proposed radio station by developing its own policies in respect of news and editorial matters.²²⁵

8.6.5 The Authority requested circulation figures from the Audit Bureau of Circulation and was advised that figures are no longer available at a regional disaggregated level but only at a national aggregated level. In light of this, the Authority could not take the matter any further and had to rely on the reports of Deloitte and Touche and Marais Smith Chattered accountants to confirm that the applicant is not in breach of section 66 of the Act.

²²³ Power 98.9 FM, Notes for oral representations: annexure E.

²²⁴ Transcript for Main Street, 25 November 2010: pp 16 - 19.

²²⁵ Main Street additional information, 9 December 2010: item 6.

8.7 Section 64 of the Act

8.7.1 LARI, a subsidiary of the French company, Lagadere Group, has a 20% shareholding in the applicant.²²⁶ The applicant submitted that its application and LARI's shareholding in particular does not contravene section 64 of the Act.

8.7.2 LARI is a party to the aforementioned consultancy agreement. It will provide technical, creative and administrative services, and will fulfill a management function, which will involve *inter alia* regular visits to the premises, selecting staff and determining content.²²⁷ The applicant indicated that the consultancy agreement that was provided to the Authority was concluded between LARI, Avusa, Direng and the applicant based on the value that the applicant believes each shareholder will bring. As such, the applicant contended at the public hearings that the consultancy arrangement is an arms-length transaction which ensures that LARI does not have a financial interest in the applicant exceeding 20%. The applicant also indicated that the consultancy agreement does not give rise to any additional voting rights that operate in LARI's favour, nor does it give LARI the power to control the applicant or have an effective say over the applicant's affairs.²²⁸

8.7.3 The applicant provided a copy of a loan agreement between LARI and Vaximax and Mohammed Sadik to the Authority and indicated that this loan agreement does not give rise to any voting rights that operate in LARI's favour, nor does the loan agreement give LARI the power to control Vaximax or have an effective say over the affairs of Vaximax.²²⁹

²²⁶ Main Street application: Vol 1, pp 8 – 9; 23,

²²⁷ Main Street application: Vol 3, Appendix 8.4, clause 8 and annexure C.

²²⁸ Main Street additional information, 9 December 2010: item 2, p 5.

²²⁹ Main Street additional information, 9 December 2010: items 16.

- 8.7.4 The applicant submitted, on this basis, that LARI does not have a “financial interest” in the applicant, as defined in the Act. For the reasons given in Section H (Interpretation of Key Provisions of the Act) in Part I above, the Authority is satisfied on the basis of the information and documents provided by the applicant that LARI does not have a financial interest in the applicant. Accordingly, from this perspective, section 64(1)(b) of the Act is not breached.
- 8.7.5 It appears from the information submitted by the applicant in relation to its shareholders and their respective ownership structures that none of the shareholders other than LARI have any foreign ownership interests. Avusa is a listed company and could, accordingly, have foreign shareholders. This may mean that the applicant is in breach of the restrictions on foreign ownership. The Authority has, however, reviewed Avusa’s most recent annual report and has not seen any information which suggests that Avusa has a significant foreign shareholder base.
- 8.7.6 At the public hearings, the applicant indicated that its board of directors is currently made up of three directors, and that Mr Andrew Manderstam, a foreign citizen, is one of these three directors.²³⁰ In the Authority’s assessment, the applicant is thus in contravention of section 64(2) of the Act given that more than 20% of the directors of the applicant are foreigners.
- 8.7.7 At the public hearings, the applicant indicated that clause 10.1 of the shareholders’ agreement provides that each shareholder is entitled to appoint a director, and that there will be no more than seven directors, and each of those directors will vote proportionate to the equity that he or she represents on the

²³⁰ Main Street application: Vol 3, appendix 7.1; Transcript for Main Street, 25 November 2010: p 22.

board. The applicant also indicated that, while it may currently be in contravention of section 64(2) of the Act, if it were to be awarded the licence, its directorship would be “regularised” and the applicant would no longer be in breach of section 64(2).²³¹

8.8 Management, control and human resources

8.8.1 As discussed above, the applicant indicated that the board of directors is currently made up of three directors.²³²

8.8.2 However, according to the shareholders’ agreement each shareholder is entitled to appoint one representative as a director on the board. Accordingly, on the basis of the current shareholding structure, there will be no more than seven directors. In terms of the shareholders’ agreement and as indicated by the applicant at the public hearings each of those directors will vote in proportion to the equity that he or she represents on the board.²³³

8.8.3 Details of the applicant’s senior management were submitted on a confidential basis.²³⁴

8.8.4 The applicant submitted an organogram of the station’s staff and indicated that it would employ 31 full-time employees.²³⁵

8.8.5 In the Authority’s assessment. The applicant possesses the required relevant media experience, particularly having regard to LARI’s involvement on a consultancy basis, and complies

²³¹ Transcript for Main Street, 25 November 2010: p 23.

²³² Main Street application: Vol 3, appendix 7.1; Transcript for Main Street, 25 November 2010: p 22.

²³³ Main Street application: Vol 3 (Confidential), appendix 6.5, shareholders’ agreement, clauses 10.1 and 11.7; Transcript for Main Street, 25 November 2010: p 23.

²³⁴ Main Street application: Vol 1, p 12; Vol 3 (Confidential), appendix 7.1.

²³⁵ Main Street application: Vol 1, p 14.

with the requirements of section 51(d) of the Act.

8.9 Programming

8.9.1 As required, the applicant submitted a detailed programme schedule covering typical weekdays, Saturdays and Sundays.

²³⁶ The applicant proposes to broadcast 24 hours per day, seven days a week and proposes to commence broadcasting six months after the issue of the licence. ²³⁷

8.9.2 The applicant's target market is the broad category of people between the ages of 25 and 50 within the LSM 6 – 9 segments.²³⁸ The applicant indicated that the proposed station will also appeal to younger listeners between 16 and 24 years.

²³⁹

8.10 Format

8.10.1 The applicant indicated that it would provide an Urban Adult Contemporary ("UAC") music format radio station with news, information, entertainment and sport. ²⁴⁰

8.10.2 The applicant will broadcast 75% music and 25% talk. ²⁴¹ In particular, the applicant indicated that it would have a minimum of 20% and a maximum of 25% speech output during peak-times on weekdays and Saturdays, compared with a minimum of 10% and a maximum of 25% speech output during peak-times on Sundays and during non-peak times on weekdays and

²³⁶ Main Street application: Vol 3, appendix 13.1.

²³⁷ Main Street application: Vol 1, p 32.

²³⁸ Main Street application: executive summary, p 2; Vol 1, p 25.

²³⁹ Main Street application: Vol 1, p 26.

²⁴⁰ Main Street application: Vol 1, p 25; Vol 3, appendix 13.2.

²⁴¹ Main Street application: Vol 1, p 28; Transcript for Main Street, 25 November 2010: p 9.

weekends.²⁴²

8.10.3 In terms of non-local origination, the applicant indicated that it would provide local news and information and would not be sourcing any programming from a wider regional or network service originating from a studio outside the licence area.²⁴³

8.10.4 The applicant also indicated that the proposed radio station will have automated music output through the night (between 00h00 and 06h00) by using tracking on the RCS system which will be remotely available to the applicant's technical staff.²⁴⁴

8.11 News

8.11.1 The applicant indicated that it will broadcast 30 minutes of news per day in the primary broadcasting language of the station, which is English. There will be an emphasis on local news (70% of the news will be locally generated), which will extend to efforts to broadcast even national and international news items from a local perspective.²⁴⁵

8.11.2 The applicant indicated that its website will be fully compatible with the latest 3G and 4G technology and news operations will be fully interactive.²⁴⁶

8.12 Current affairs

The applicant indicated that its current affairs programming will not be conventional, but will instead be interspersed within the normal

²⁴² Main Street application: Vol 1, p 29.

²⁴³ Main Street application: Vol 1, p 33.

²⁴⁴ Main Street application: Vol 1, p 34; Vol 3, appendix 13.1.

²⁴⁵ Main Street application: Vol 1, pp 3; 31 - 33.

²⁴⁶ Main Street application: Vol 1, pp 30 - 32.

programming.²⁴⁷ The applicant also indicated that approximately 70% of its current affairs will be local in nature.²⁴⁸

8.13 South African music

The applicant indicated that it will use music scheduling software to ensure compliance with the 25% South African music quota imposed in terms of the Content Regulations. The applicant also indicated that it intends to conduct regular interviews with local artists, and aims to increase its local content output to broadcast 30% South African music by its third year of operation. The applicant submitted that the type of South African music that will be played on the proposed radio station will be a mix of contemporary music including pop/rock, pop, hip-hop, R&B and dance/house. The applicant also indicated that it will rely on interactive technology to allow listeners a unique opportunity to influence the station's playlist.²⁴⁹

8.14 Language

The applicant submitted that its research reflects that 82% of people living in the licence area understand English, and 11% of these people claim that English is their home language.²⁵⁰ Accordingly, the applicant indicated that its proposed language of broadcast is English, and that programming will be in English only. However, the applicant did indicate that it will employ DJs who are proficient in other languages, such as Sotho and Afrikaans, in order to better facilitate audience interaction.²⁵¹

²⁴⁷ Transcript for Main Street, 25 November 2010: pp 9 & 10.

²⁴⁸ Main Street application: Vol 1, p 3.

²⁴⁹ Main Street application: Vol 1, pp 28 – 30; Vol 3, appendices 13.1 & 13.2.

²⁵⁰ Main Street application: Vol 1, pp 34 - 35.

²⁵¹ Main Street application: Vol 1, p 34.

8.15 Demand, need and support

- 8.15.1 The applicant engaged two market research consultants, Freshly Ground Insights and Concept Evaluations CC, to conduct quantitative and qualitative primary research through focus groups and face-to-face interviews.²⁵² The research report submitted by the applicant regarding the focus groups concluded that the proposed station would be well received particularly if it was “more sport focused” and that respondents believe “that there is no current radio station that is sport focused unless it is a dedicated sports radio” (sic). The research report setting out the results of the interviews that were conducted to establish need and demand showed that a high percentage of respondents wanted the proposed station in the coverage area after having heard a description. The primary reasons advanced for wanting the new station were “freedom of choice” and “more radio stations to choose from”.
- 8.15.2 The applicant also provided an assessment of the Pretoria market based on recent AMPS data, including in relation to the characteristics of existing stations in the area and advertising spend. From its research, the applicant concluded that Jacaranda FM is the leading station in the area followed closely by Metro FM and that all stations are highly duplicated except RSG. The applicant’s assessment was that there is an option to target demographics that do not currently segment the market in any significant way, such as gender.²⁵³
- 8.15.3 At the public hearings, the applicant submitted that its research indicates that audiences are in search of a radio station that addresses the cross-cultural needs of the target audience in the

²⁵² Main Street application: Vol 3 (Confidential), appendix 22.

²⁵³ Main Street application: Vol 3 (Confidential), appendix 22.

area, and that the coverage area does not presently have a station that adequately covers the music and information needs of a broad adult audience.²⁵⁴ Power 98.9 FM submitted that the applicant had not provided a basis for its assertion that current stations do not cater to market demand or for its assertion that its proposed format would receive market support and outweigh support for other format solutions.²⁵⁵ In response, the applicant submitted that its research showed that English should be used as the broadcast language so as not to alienate any significant part of the market and that the response to its concept was “incredibly positive”. The applicant also indicated that its proposed music programming (being music that is “mature in approach”) would be its key differentiator.²⁵⁶

8.15.4 The applicant indicated that the proposed station will offer sport content on a regular basis.²⁵⁷ The applicant also indicated that the choice of UAC as a core music format is based “solely on independent market research indicating that UAC is by far the most widely accepted music genre in the broadcast area amongst the preferred target group”.²⁵⁸

8.15.5 The applicant indicated that the proposed station is designed to appeal to both the Black and White race groups in the broadcast area, with a focus towards the black audience.²⁵⁹ The applicant also indicated that it would appeal to its target audience between the ages of 25 and 50 years, no matter whether they are English, Afrikaans or vernacular. Power 98.9 FM questioned whether the applicant’s proposed target market is

²⁵⁴ Main Street application: Vol 1, p 36.

²⁵⁵ Transcript for Main Street, 25 November 2010: p 21.

²⁵⁷ Main Street application: Vol 1, p 36.

²⁵⁷ Main Street application: Vol 1, p 36.

²⁵⁸ Main Street application: Vol 1, p 3.

²⁵⁹ Main Street application: Vol 1, p 37.

too broad.²⁶⁰

8.15.6 The applicant indicated that in its secondary focus group research, it “further tested reasons for the need” and the main finding “was that there was a need for a radio station to provide an identity for the listeners”.²⁶¹

8.15.7 The applicant indicated that it expects an average cumulative listenership of 250 000 in its first year, 320 000 listeners in its second year and 380 000 in its third year of operation. The applicant indicated that its estimated weekly reach is approximately 29% of the adult population in the broadcast area.²⁶²

8.16 Financial means, business record and commercial viability

8.16.1 The applicant projected an average revenue growth of 29%. Operating expenditure is expected to grow at 6% on average. The applicant’s current ratio is calculated at 18 and its leverage ratio is calculated at 121% which is considered as too risky.

8.16.2 The applicant indicated that it expects to be profitable from its third year of operation. The applicant also indicated that its shareholders would provide the requisite funding for the establishment and operation of the proposed radio station. The shareholders’ agreement indicates that shareholders shall be obliged to fund the company in proportion to their respective percentage shareholding in the company.²⁶³ The applicant

²⁶⁰ Power 98.9 FM Notes for oral representations: p 6; Transcript for Main Street, 25 November 2010: p 21.

²⁶¹ Transcript for Main Street, 25 November 2010: p 12.

²⁶² Main Street application: Vol 1, p 41; Vol 3 (Confidential), appendix 23.

²⁶³ Main Street application: Vol 3, appendix 6.5.

indicated that it requires funding to the amount of²⁶⁴ to be provided by cash or debt basis in terms of the shareholders' agreement.²⁶⁵

8.17 Decision and reasons

The Authority has decided not to grant Main Street 756 the individual commercial sound broadcasting licence in the Gauteng primary market for each one of the following reasons considered separately, each of which is regarded as constituting adequate reason for turning down the application:

Direng, one of the shareholders in the applicant has a 26% shareholding in North West FM and a 27.1% shareholding in M-Power Radio.

8.17.1 In the Authority's assessment, it is problematic from the perspective of section 64(2) of the Act that Mr Manderstam, who is a foreign national, was one of only three directors appointed to the applicant's board at the time of the application. The applicant also did not point to any other individuals who would be appointed as directors, although each of the seven shareholders of the applicant has the right in terms of the shareholders' agreement, to appoint a director.

8.17.2 The applicant indicated that in its secondary focus group research, it "further tested reasons for the need" and the main finding "was that there was a need for a radio station to provide an identity for the listeners. The applicant's research was not as comprehensive as that submitted by other applicants including the successful applicant, Power 98.9 FM.

²⁶⁴ Confidential

²⁶⁵ Main Street application: p 72, appendix 32.2.

9. MARKET DEMAND TRADING 649 (PTY) LTD

9.1 Introduction

9.1.1 The Authority received an application from Market Demand Trading 649 (Pty) Ltd for the individual commercial sound broadcasting service licence in the Gauteng primary market.

9.1.2 The applicant's proposed station name is "ONE FM".²⁶⁶

9.1.3 Main Street and Power 98.9 FM made representations on Market Demand Trading's application for the Gauteng commercial broadcasting service licence.

9.1.4 In addition to its application for the Gauteng commercial broadcasting service licence the applicant submitted an application for the commercial broadcasting service licence in the Western Cape primary market. At the public hearings, Main Street submitted that the format, programming and proposed station name in respect of the applicant's Western Cape application and the Gauteng application are identical and that there is a possibility of syndication.²⁶⁷ The applicant's response was that it will not be syndicating any content.²⁶⁸

9.2 Corporate status

9.2.1 The applicant is a private company incorporated in South Africa as a special purpose vehicle for the purposes of the present application. In this regard, the applicant submitted its certificate

²⁶⁶ Market Demand Trading application: section 1, p 1.

²⁶⁷ Transcript for Market Demand Trading, 26 November 2010: p 14.

²⁶⁸ Transcript for Market Demand Trading, 26 November 2010: p 29.

of incorporation as required by item 6.1 of the ITA.²⁶⁹ The applicant also submitted a shareholders' agreement signed by three of the applicant's shareholders and copies of share certificates in respect of the shares held by its four shareholders.²⁷⁰

9.2.2 The applicant indicated that its shareholding structure is as follows:²⁷¹

9.2.2.1 Sterndale Advisory Services Limited ("Sterndale") 36%

9.2.2.2 Mr Mohammed Murad 17.5%

9.2.2.3 The Reference Consortium 26.5%

9.2.2.4 Divine Inspiration Trading 611 (Pty) Ltd ("DIT") 20%

9.2.3 The applicant indicated that Sterndale is a company incorporated in Gibraltar that is wholly-owned by Mr Chan Kan Kai, a South African citizen, who is resident in Gibraltar. The applicant did not provide any documents evidencing Mr Kai's shareholding in Sterndale but indicated that it was in a position to do so if required. At the public hearings, the applicant indicated that there is no shareholders' agreement for Sterndale as there is only one shareholder.²⁷²

²⁶⁹ Market Demand Trading application: section 2, p 2.

²⁷⁰ Market Demand Trading application: appendix 6.5; Market Demand Trading additional submission, 8 December 2010.

²⁷¹ Market Demand Trading application: section 2, p 1; appendix 6.5, p 1.

²⁷² Transcript for Market Demand Trading, 26 November 2010: p 23.

- 9.2.4 The applicant indicated further that Mr Murad is a citizen of the United Arab Emirates.²⁷³
- 9.2.5 The applicant provided a certificate of incorporation for DIT together with a shareholders' agreement in respect of that company.²⁷⁴ In terms of this shareholders' agreement and as indicated in the application, the three shareholders in DIT are: Sterndale (which holds 35% of the issued shares), Mr Mark Leven-Marcon (who holds 35% of the issued shares) and Mr Kevin Kai (who holds 30% of the issued shares). Accordingly, Sterndale effectively holds 43% in total of the issued shares in the applicant through direct and indirect means. For the reasons given in Section H (Interpretation of Key Provisions of the Act) in Part I of this Reasons Document, both Sterndale and its sole shareholder Mr Chan Kai are deemed to have control of the applicant. Following the public hearings, the applicant indicated that Mr Kai would transfer his direct shareholding in the applicant and his shareholding in DIT to himself or to an entity incorporated in South Africa.²⁷⁵
- 9.2.6 The applicant indicated that The Reference Consortium is presently not an incorporated entity. A draft shareholders' agreement was provided for this consortium, which the applicant indicated is along the lines of the agreement that would govern the consortium if Market Demand Trading's application were to be granted.²⁷⁶ This draft shareholders' agreement indicates that Lumko Mtimde Consulting (which the applicant indicated is Mr Mtimde's business's trading name) would have a 45%

²⁷³ Market Demand Trading application: appendix 7.2; Transcript for Market Demand Trading, 26 November 2010: p 26.

²⁷⁴ Market Demand Trading application: appendix 6.2.

²⁷⁵ Market Demand Trading additional submission, 8 December 2010: p 2.

²⁷⁶ Market Demand Trading application: appendix 6.5. Transcript for Market Demand Trading, 26 November 2010: pp 26 - 27.

interest in the consortium, Reference Capital would have a 45% interest and Zozuko Trust would have a 10% interest. The applicant indicated that the beneficiary of the Zozuko Trust is the Ekhayalethu Orphanage.²⁷⁷ The applicant further indicated that the three shareholders of Reference Capital are Mpho Mosimane, Mabothokgong Mathole and Makgotdso Letsisi who hold shares in the company in equal proportions.²⁷⁸

9.2.7 The applicant's shareholders' agreement provides only that resolutions of the company will be passed by majority vote and does not deal with the manner in which directors would be appointed.²⁷⁹ In this regard, the applicant did not provide a copy of its articles of association. The applicant's shareholders' agreement provides further that Sterndale will provide "loan capital" in the sum of R2 million.²⁸⁰

9.2.8 At the hearing in relation to the applicant's application, Main Street objected to Mr Mtimde being a shareholder in the applicant as well as CEO of the MDDA, which is a statutory body to which all broadcasting service licensees are obliged to pay an annual contribution.²⁸¹ In the Authority's assessment there is no legal impediment to Mr Mtimde being involved in a broadcasting service licensee. If the applicant were to be granted a broadcasting service licence, it would remain subject to the obligation to pay an annual levy in terms of the MDDA Act and Mr Mtimde would be obliged to handle any conflicts of interest that arose in accordance with that Act and the Public Service Act, 1994.

²⁷⁷ Transcript for Market Demand Trading, 26 November 2010: p 22.

²⁷⁸ Market Demand Trading additional information, 8 December 2010: structure of shareholding.

²⁷⁹ Market Demand Trading application: appendix 6.5; Market Demand Trading additional submission, 8 December 2010: structure of shareholding..

²⁸⁰ Market Demand Trading application: appendix 6.5, clause 4.2.

²⁸¹ Transcript for Market Demand Trading, 26 November 2010: pp 24 - 25.

9.3 Empowerment of HDPs

The applicant indicated that 75.5% of its equity ownership is held by HDPs.²⁸² Although the applicant did not provide information pertinently addressing the natural persons who are the ultimate shareholders in the applicant, if one takes all the information presented by the applicant into account, the application indicates that Mr Chan Kan Kai (who is indicated to be the sole shareholder in Sterndale), Mr Kevin Kai (who is a shareholder in DIT) and Mr Mtimde are all HDPs.

²⁸³ While no further information was made available to allow the Authority to verify that Reference Capital and the Zuzuko Trust, who are indirect shareholders in the applicant through The Reference Consortium, are HDPs, the applicant complies with the 30% HDP equity ownership requirement in that, collectively, Mr Chan Kai, Mr Kevin Kai and Mr Mtimde effectively hold 60.925% of the shares in the applicant.

9.4 Section 65(2) of the Act

9.4.1 It appears that the applicant's shareholders and Sterndale and Mr Chan Kan Kai, in particular, do not have any ownership or control interests in any other FM commercial broadcasting service licensee in South Africa.²⁸⁴

9.4.2 Although Mr Mtimde was, subsequent to the submission of Market Demand Trading's application, appointed to the board of the SABC, this is not relevant for the purposes of section 65(2) of the Act, which deals only with commercial broadcasting service licensees, as defined in the Act. The restrictions in section 65(2) accordingly do not apply to SABC radio licensees.

²⁸² Market Demand Trading application: section 2, p 1; Transcript for Market Demand Trading, 26 November 2010: pp 4 - 5.

²⁸³ Market Demand Trading application: section 2; appendix 7.2.

²⁸⁴ Market Demand Trading application: appendix 11.4.

9.5 Section 66(2) and (3) of the Act

The applicant indicated that neither it nor its shareholders or directors has an interest in any newspaper.²⁸⁵

9.6 Section 64 of the Act

9.6.1 As set out above, section 64(1)(a) of the Act prohibits a foreigner from directly or indirectly exercising control over a commercial broadcasting licensee, while section 64(1)(b) prohibits a foreigner directly or indirectly having a “financial interest or an interest either in voting shares or paid-up capital in a commercial broadcasting licensee, exceeding twenty (20) percent.” Sterndale, which is an entity not incorporated in South Africa, effectively holds 43% of the shares in the applicant. The applicant indicated that Sterndale is wholly owned by Mr Chan Kai, a South African national, and, accordingly, the applicant submitted that the shares controlled by Sterndale are not controlled by a foreigner. The applicant indicated that Mr Chan Kai resides in Gibraltar.²⁸⁶

9.6.2 The applicant indicated that Mr Chan Kai and Mr Murad, who is a citizen of the United Arab Emirates, would both be members of the applicant’s board of directors.²⁸⁷

9.6.3 The fact that one of the applicant’s five directors, Mr Murad, is foreign does not amount to a breach of section 64(2) of the Act on the basis that not more than 20% of the applicant’s directors are foreign. In addition, the shareholders’ agreement does not

²⁸⁵ Market Demand Trading application: appendix 11.3.

²⁸⁶ Market Demand Trading application: appendix 7.2.

²⁸⁷ Market Demand Trading application: appendices 7.1-7.2, 8.1; Transcript for Market Demand Trading, 26 November 2010: p 26.

confer on Mr Murad the right to appoint any more than 20% of the applicant's directors.

9.7 Management, control and human resources

9.7.1 In terms of the shareholders' agreement, directors will be appointed if the application for the broadcast radio licence is successful.²⁸⁸ However, in its application, the applicant provided the details of its board of directors, which consists of five males, being Mr Mtimde, Mr Chan Kai, Mr Kevin Kai, Mr Murad and Mr Leven-Marcon. From the information presented by the applicant, it appears that Mr Murad has experience in the operation of commercial radio stations in the Middle East. Mr Mtimde has experience in relation to the regulatory environment in which radio broadcasting services operate and in the context of his employment at the MDDA.²⁸⁹

9.7.2 The applicant indicates that it will have a staff complement of 19 full-time and six part-time employees.²⁹⁰

9.8 Programming

9.8.1 As required, the applicant submitted a detailed programme schedule covering typical weekdays, Saturdays and Sundays.²⁹¹ The applicant proposes to broadcast 24 hours per day, seven days a week, and proposes to commence broadcasting three months after the licence is granted.²⁹²

²⁸⁸ Market Demand Trading application: appendix 6.5, clause 6.1.

²⁸⁹ Market Demand Trading application: appendices 7.1, 7.2, 8.1.

²⁹⁰ Market Demand Trading application: appendix 8.1.

²⁹¹ Market Demand Trading application: appendix 13.

²⁹² Market Demand Trading application: appendix 17.2.

9.8.2 The applicant indicated that its primary target audience will be people of diverse backgrounds but will focus on an “older more mature radio listener”, namely: people between 25 and 55 years of age bracket with an income level of above R8000 per month, in the LSM 7-10 segments.²⁹³

9.9 Format

9.9.1 The applicant proposes that “[t]he format of ONE FM will be Hot Adult Contemporary” but that it will strive to play a range of music with wide appeal.²⁹⁴ The applicant indicated that its music will be a mix of modern and classic adult hits and soulful sounds and it will dedicate some of its weekday playlist to promote and highlight South African music and artists.

9.9.2 The applicant’s proposed maximum speech output is 15% on weekdays, with 85% music, except during the “Business Breakfast” slot, during which the format will be 30% music and 70% talk, and 35% talk on weekends.²⁹⁵

9.10 News

The applicant intends to broadcast a total of 21 minutes of news on weekdays and 19 minutes of news on weekends. In total, 15 minutes of business and sport news will be broadcast on weekdays and 12 minutes will be broadcast on weekends. Traffic news will be 12 minutes in total on weekdays and six minutes on weekends. 70% of news will be local, 20% will be national and 10% will be international. The applicant indicated that news content would be sourced from

²⁹³ Market Demand Trading application: section 3, p 1; appendices 12.2, 21.2.

²⁹⁴ Market Demand Trading application: appendix 12.2.

²⁹⁵ Market Demand Trading application: appendices 14, 16.2.

NRS/Local authorities and Reuters.²⁹⁶

9.11 Current affairs

The applicant indicated that it will provide “elements of current affairs”, focusing largely on financial matters, for a three hour period on weekend mornings.²⁹⁷

9.12 South African music

The applicant stated that it intends to comply with the 25% South African music quota by playing more local requested songs, running a feature on a local artist twice hourly and having a three hour local music show on weekends.²⁹⁸ The applicant provided illustrative tracks and artists as requested in item 15.2 of the ITA.²⁹⁹

9.13 Languages

9.13.1 The applicant indicated that its language of broadcast will be English, which the applicant indicated is spoken by a significant majority of the target market (95% of the total population in the licence area). The applicant indicated that 10% of its programming will be broadcast in other languages as the DJs will be bilingual and will converse with callers in their own languages. In this regard, the applicant stated that four million people living in “Cape Town” are mostly bilingual. It thus appears as though these figures may have been intended in respect of the Cape Town coverage area, as opposed to the Gauteng coverage area. In any event, the additional languages in which the applicant intends to broadcast were not specified.

²⁹⁶ Market Demand Trading application: appendix 16.1.

²⁹⁷ Market Demand Trading application: appendix 16.2.

²⁹⁸ Market Demand Trading application: appendix 14.

²⁹⁹ Market Demand Trading application: appendix 15.2.

9.13.2 There is uncertainty as to the language or languages in which the applicant will broadcast given the applicant's assertion firstly, that the station will be broadcast in English, and then, that "production elements will also be produced in multiple languages to reflect the language spoken by ONE FM's audience."³⁰¹

9.14 Demand, need and support

9.14.1 The applicant indicated that although many existing stations in the relevant broadcast area have an adult contemporary format, the applicant's view is that these stations are targeting a progressively younger audience. Accordingly, the applicant indicated that "a dedicated hot adult contemporary station would cater to the tastes and interests of the older mature radio listener in the target areas".³⁰² At the public hearings, the applicant indicated that the "hot adult contemporary" market is currently under-served, and that the proposed radio station will be a cross-over radio station which "will appeal to the majority of the population groups and cultures" within the coverage area.³⁰³

9.14.2 The applicant provided details of the breakdown by age of the population although the statistics given appear to be for the whole country rather than the target area. In particular, the applicant indicated that there are 18 million men between the ages of 15 and 64 and 14.74 million women in the same age bracket. The applicant did not provide the source of these statistics. The applicant indicated that this demographic data

³⁰⁰ Market Demand Trading application: appendix 20.

³⁰¹ Market Demand Trading application: appendices 20, 22.

³⁰² Market Demand Trading application: section 4, appendices 21.1, 21.3.

³⁰³ Transcript for Market Demand Trading, 26 November 2010: p 8.

“shows that the population that makes up the largest numbers in terms of age proves that more stations need to cater to that age group”.³⁰⁴

9.14.3 The applicant indicated that it conducted primary research, by commissioning Periodical Press Services, in relation to: which radio stations are currently preferred by respondents, the amount of time that is spent listening to those stations, how respondents rated the content of the news, talk and music components of those stations, whether respondents would listen to a new station given the opportunity and respondents’ likes and dislikes in respect of existing radio services. The applicant indicated that its survey covered adults aged 16 and older who live in both Gauteng and the Western Cape. No further breakdown of the sample group was provided.

9.14.4 The applicant indicated that “data obtained from the preference section of the questionnaire is unique and therefore cannot be included in statistical analysis”. The applicant’s research apparently showed that, given the choice, a high proportion of respondents would “listen to a new station broadcast in english (*sic*) or their own language”. The applicant also indicated that it intends to conduct further research to “fine-tune its style and music to cater to an older more mature audience”.³⁰⁵

9.14.5 Power 98.9 FM submitted that “[f]eeling that one is too old for the music played on present stations, and asking people what they listen to... does not rise to the level required in order to establish market need and demand”.³⁰⁶

³⁰⁴ Market Demand Trading application: appendix 22.

³⁰⁵ Market Demand Trading application: appendix 22.

³⁰⁶ Power 98.9 FM Notes for oral representations: p 4, para 1.10; Transcript for Market Demand Trading, 26 November 2010: pp 18 - 19.

9.14.6 The applicant did not provide audience projections in its application in relation to the actual number of people within its target audience and in the target area that it expects would listen to its proposed service. At the public hearings, the applicant indicated that statistics from Statistics SA indicate that the population of the Tshwane Metropolitan Municipality is 2.2 million of which 1.35 million are within the coverage area. The applicant thus stated that it intended to reach a 14% share of this target audience in its first year of operation, together with additional listeners falling within the coverage area but outside of the Tshwane Metropolitan Municipality.³⁰⁷ In other words, the applicant expects to reach approximately 272,600 people per week in its first year of operation.³⁰⁸

9.14.7 The Authority is of the view that the applicant did not properly comply with the requirements of the ITA in relation to analysis of need and demand for the proposed service. It appears that the applicant conducted very limited primary research (and it is not clear who constituted the sample group for the research that was conducted). In other words, in the Authority's assessment, the research methodology and findings do not sufficiently prove, nor do they even indicate, a demand or a need for the proposed service, as contemplated in terms of sections 51(a) and (b) of the Act.

9.15 Financial means, business record and commercial viability

9.15.1 The applicant did not indicate its projected start-up costs. The applicant indicated that it will receive R2 million initial funding from Sterndale in the form of a shareholder's loan.³⁰⁹ The

³⁰⁷ Transcript for Market Demand Trading, 26 November 2010: pp 8 & 9.

³⁰⁸ Market Demand Trading additional submission, 8 December 2010: p 2.

³⁰⁹ Market Demand Trading application: appendix 6.5, financial model.

applicant submitted that the fact that Sterndale would provide funding not give rise to a contraventions of the Exchange Control Regulations because the requisite permission would be obtained on respect of the loan.³¹⁰

9.15.2 The applicant provided proof of funding is in the form of a letter from Credit Suisse confirming that Sterndale has assets of around R2 million deposited with the bank.³¹¹

9.15.3 The applicant projected an average revenue growth of 21%. Average operating expenditure growth is projected at 15%. The applicant's current ratio is calculated at 17.7 which is viewed as high and the leverage ratio was not calculated as there were insufficient details given. The applicant indicated that it expects to be profitable from its first year of operations.³¹²

9.15.4 The applicant indicated that it would generate advertising revenue of approximately R33 631 200 in its first year of its operation increasing to R68 309 050.

9.16 Decision and reasons

The Authority has decided not to grant Market Demand Trading 649 the individual commercial sound broadcasting licence in the Gauteng primary market for each of the following reasons considered separately, each of which is regarded as constituting adequate reason for turning down the application:

³¹⁰ Market Demand Trading additional submission, 8 December 2010.

³¹¹ Market Demand Trading application: appendix 33.

³¹² Market Demand Trading application: appendix 27.

9.16.1

In the Authority's assessment, the applicant's market research was not sufficiently rigorous to persuade the Authority that there is either a demand or a need for the applicant's proposed broadcasting service, as contemplated in section 51(a) and (b) of the Act, read with item 22 of the ITA. The research that was presented to the Authority reflects only the current radio preferences of the respondents who formed part of the applicant's survey and their level of satisfaction with those stations and that the respondents would listen to another station in English or "their own language" if given an opportunity to do so. The applicant did not, however, present any evidence that the target audience would be inclined to listen to the particular service that the applicant proposed to provide, having regard to format and programming.

9.16.2

The applicant did not provide any evidence or research in support of its assertions that existing radio stations are more focused on younger audiences and do not adequately cater for more mature audiences and did not indicate, beyond proposing to have an adult contemporary format, how its service would address any shortcomings in this regard. As indicated above, the demographic statistics presented by the applicant in support of a service focused on a "more mature" market were not aligned to the applicant's proposed target market, being persons between the ages of 25 and 55 in the Gauteng area. It appears that the applicant conducted very limited primary research (and it is not clear who constituted the sample group for the research that was conducted). In the Authority's assessment, the research methodology and findings do not sufficiently prove, nor do they even indicate, a demand or a need for the proposed service, as contemplated in terms of sections 51(a) and (b) of the Act.

10. MEGALOMEDIA (PTY) LTD

10.1 Introduction

10.1.1 The Authority received an application from Megalomedia (Pty) Ltd for the individual commercial sound broadcasting service licence in the Gauteng primary market.

10.1.2 The applicant's proposed station name is "Easy FM".³¹³

10.1.3 The Authority received two written representations in respect of this application from Power 98.9 FM and Main Street.

10.1.4 The applicant requested that the Authority treat several parts of its application as confidential information. The Authority granted the applicant's request for confidentiality in respect of the details provided in relation to [its / certain] shareholders and shareholders' agreements, finances, business plan and advertising revenue and radio sales and marketing information. The Authority refused the applicant's request for other information to be treated as confidential on this information is central to the application and interested parties' ability to comment on the application. The information also does not fall within any of the categories of information contemplated in section 4D(4) of the ICASA Act, which must be treated as confidential information.

10.1.5 The applicant applied for all three radio licences in the context of the current licensing process. In this regard, the applicant submitted that although granting three radio licences at any one time is unusual, it was of "the view that, as is the case with the

³¹³ Megalomedia application: section 1.

larger incumbent players, ... Megalomedia should be given an equivalent opportunity, vested with equivalent rights, to roll out its operation unfettered by what could constitute a set of stifled rights and a consequent ability to provide service only in a limited market. Any approach adopted by the Authority, contrary to [Megalomedia's] views as expressed [in its application] would in turn impact adversely upon the issue of sustainability". ³¹⁴

10.1.6 At the public hearings, the Authority questioned the applicant as to the similarities between its application for the Gauteng licence and its applications in respect of the Cape Town and Durban primary markets. The applicant indicated that while there was similarity in the socio-economic status or income capability of the relevant markets and the age spectrum, its proposed format was different depending on the relevant primary market. ³¹⁵

10.1.7 On 20 and 21 September 2010, the applicant served and filed a document entitled "Written response pursuant to paragraph 6 of Government Gazette No. 33299 of 14 June 2010, 21 September 2010 (the "Response Document") on the Authority and each of the other applicants, regarding a change in its shareholding. ³¹⁶ In this document, the applicant (1) addressed the written representations that had been made by Power 98.9 FM and Main Street on its application and (2) indicated that its shareholding structure had changed. The applicant also indicated that a new shareholders' agreement had been concluded with the new shareholders. In the Response Document the applicant did not provide updated information in relation to the new shareholder e.g. whether the new shareholder has any interests in other broadcasting service

³¹⁴ Megalomedia application, pp 66 – 67.

³¹⁵ Transcript for Megalomedia, 25 November 2010: pp 48 - 49.

³¹⁶ Megalomedia Response Document, 21 September 2010, pp 11 - 12; Megalomedia clarification, 3 December 2010: p 7, para 13.

licensees or any newspapers or whether the new shareholder itself has any foreign shareholding.

10.1.8 Power 98.9 FM submitted that the amendments to Megalomeia's application should not be allowed for two main reasons:

10.1.8.1 the applicant adjusted its consortium and introduced a shareholders' agreement and other documents after having seen the other applications, which unfairly prejudices other applicants; and

10.1.8.2 the applicant introduced amendments of a substantial nature which materially changed its application.³¹⁷

10.1.9 At the public hearings, the applicant indicated that it remained the same, even if its shareholding had changed and that it thus did not have to comply with any further processes or procedures to amend its application.³¹⁸ In its "Clarification" document submitted after the hearings, the applicant indicated that "the essence of the requirement is compliance by bid parties [with] the criteria set out in the [Act] and not the identity as to bid party". In this regard, the applicant referred to the fact that, since sections 10 and 13 of the Act (regulating licence amendments and licence transfers respectively) contemplate that changes may be made to a licensed entity, the identity of the bid party is not a key issue. This was particularly given that the shareholder who substituted an earlier shareholder was "equivalent" to the previous shareholder.³¹⁹

³¹⁷ Power 98.9 FM submission, 10 August 2010, pp 1-2; Transcript for Megalomeia, 25 November 2010: pp 25 & 26.

³¹⁸ Transcript for Megalomeia, 25 November 2010: pp 42-44.

³¹⁹ Megalomeia clarification; 3 December 2010: pp 12 – 13.

10.1.10

As discussed in Part I of this Reasons Document, in terms of regulation 6(1) of the Processes and Procedures Regulations, where information included in an application changes at any time after submission but before the Authority makes a decision on the application, the applicant must notify the Authority and, in writing, request to amend the application within 14 days of such change. The applicant notified the Authority of the changes to its proposed shareholding in its Response Document submitted on 21 September 2010. The applicant did not request that an amendment to its application be permitted but instead presented the change to its shareholding structure and, accordingly, its application as a *fait accompli*. As discussed above in this regard, the Authority appreciates that it is necessary to amend the Process and Procedures Regulations to clarify what the consequences are when an applicant changes its application and how changes to an application must be effected.

10.1.11

In terms of the Process and Procedures Regulations as they stand, the Authority may grant a request to amend an application where this will not (1) unfairly prejudice other interested parties; (2) impede the expeditious and proper consideration of the application; or (3) materially change the application. As indicated above, during the public hearings, it was suggested that, by amending its shareholding, the applicant had submitted a new application and that it had benefitted from viewing other applications before amending its application.³²⁰ The applicant submitted that the amendments to its application did not prejudice any other applicant, delay the expeditious and proper consideration of the application or materially change its application.³²¹

³²⁰ Megalomeia clarification, 3 December 2010: p 10, paras 27 & 28.

³²¹ Megalomeia clarification, 3 December 2010: pp 13 - 16.

10.1.12 The Authority's position in relation to shareholding changes is that the identity of the persons who make up a bidder i.e. its shareholders, members or consortium members, is not an insignificant consideration. The Authority does not agree with the applicant's assertion that the only real issue is whether the applicant itself remains the same. The identity of the persons who make up an applicant is important for the purposes of assessing, amongst other things, whether there are any breaches of section 64, 65 or 66 of the Act and whether the applicant meets HDP shareholding thresholds. For this reason, it is not open to an applicant simply to change its application by substituting one shareholder for another. The fact that amendments to and transfers of licences are permissible in terms of the Act also does not mean that it is open to any licensee simply to change its shareholders or the licensee itself. In such cases, a licensee is obliged to obtain the Authority's prior approval.

10.2 Corporate status

10.2.1 The applicant indicated that the bid consortium's articles and memorandum of association were those contained in Schedule I to the previous Companies Act.³²² A copy was included in the Response Document. Initially, the only founding documentation that was submitted were copies of share certificates for Peotona Media (Pty) Ltd ("Peotona")³²³ and an unsigned resolution authorising Mr Andre le Roux and/or Mr Stanley Katz ("Mr Katz") and/or Mr Duncan Okes to sign the application.³²⁴

³²² Megalomedia application: p 33.

³²³ Megalomedia application: pp 76 - 77.

³²⁴ Megalomedia application: pp 31 - 33.

10.2.2 The applicant's initial shareholding structure was indicated to be as follows: ³²⁵

10.2.2.1 Peotona 31%

10.2.2.2 Nevala Investment Holdings (Pty) Ltd ("Nevala") 15%

10.2.2.3 Street Spirit Trading (Pty) Ltd ("Street Spirit") 26%

10.2.2.4 The National Empowerment Fund ("the NEF") 20%

10.2.2.5 Mr Gordon Muller ("Muller") 2%

10.2.2.6 Undisclosed A (an appropriate sales specialist) 2%

10.2.2.7 Undisclosed B (an appropriate programming specialist) 2.5%

10.2.2.8 New entrants to the management team 5%

10.2.3 The applicant indicated that a shareholders' agreement would only be concluded between the initial bid parties upon the granting of one or more broadcasting service licences to the applicant. ³²⁶ With regard to the warehousing of shares, in addition to funding Peotona, the applicant indicated that 20% of the share capital of the applicant being "set aside for employees" was to be warehoused by the NEF. ³²⁷ Of the shares held by Street Spirit, the applicant indicated that 11% would be warehoused by Mr le Roux for the purposes of giving effect to HDI staff obligations, and would be invested in an

³²⁵ Megalomeia application: pp 9 - 10.

³²⁶ Megalomeia clarification, 3 December 2010: p 2, para 5.1.

³²⁷ Megalomeia clarification, 3 December 2010: p 3, para 5.3.1.

ESOP, and that a further 2% was also warehoused for new entrants to the management team.³²⁸

10.2.4 On or about 25 August 2010, Megalomedia received a letter from Peotona advising that it wished to withdraw from the Megalomedia consortium due to its principals' increased "roles in various state owned entities and state advisory structures..." and that they were therefore concerned that there would be a conflict of interest.³²⁹ As a result, the applicant indicated that it needed to change the parties to its bid consortium, but that it would not otherwise change the subject matter or content of its application.³³⁰

10.2.5 On 7 September 2010, the remaining initial bid parties concluded a shareholders' agreement with Rainbow Pepper Trading 103 (Pty) Ltd, a special purpose vehicle set up for this purpose by, and wholly owned by Women Investment Portfolio Holdings Limited ("Wiphold").³³¹ In terms of this shareholders' agreement, Wiphold would subscribe for 49% of the shares in the applicant. The agreement also indicates that the NEF was also no longer a shareholder in the applicant.³³²

10.2.6 With regard to the undisclosed shareholders earmarked to fill the sales and programming functions, these positions were filled by an individual who was a sales specialist who acquired a right to 2% of the shares in the company, and a programming specialist who also acquired a right to 2% of the shares.³³³ The applicant indicated further that Mr Katz had elected to hold his

³²⁸ Megalomedia clarification, 3 December 2010: pp 3 - 4.

³²⁹ Megalomedia clarification, 3 December 2010: p 4, para 6.

³³⁰ Megalomedia clarification, 3 December 2010: p 4, para 7.

³³¹ Megalomedia clarification, 3 December 2010: p 4, para 8.

³³² Megalomedia Response Document, annexure M3, schedule 1.

³³³ Megalomedia clarification, 3 December 2010: p 5, para 9.

share allocation in his own name rather than through Nevala, as before.³³⁴

10.2.7 With regard to the establishment of the ESOP, the new shareholders' agreement provides that the board of the applicant shall, within 90 days of the licence being granted, identify management shareholders to subscribe for the additional 14 management shares at par value (i.e. 4% of the total share capital).³³⁵ The applicant further indicated that, in terms of the shareholders' agreement, Street Spirit agreed that its shareholding was to be diluted by 11% for the purposes of creating the ESOP.³³⁶

10.2.8 The applicant thus indicated that its amended shareholding is as follows:³³⁷

10.2.8.1	Wiphold	49%
10.2.8.2	Street Spirit	15%
10.2.8.3	Mr Katz	15%
10.2.8.4	Mr Muller	2%
10.2.8.5	Undisclosed A	2%
10.2.8.6	Undisclosed B	2%
10.2.8.7	ESOP	15%

³³⁴ Megalomeia clarification, 3 December 2010: p 5, para 10.

³³⁵ Megalomeia clarification, 3 December 2010: p 6, para 11.2.

³³⁶ Megalomeia clarification, 3 December 2010: p 6, para 11.3.

³³⁷ Megalomeia clarification, 3 December 2010: pp 6 & 7.

10.2.9 On the basis of this shareholding structure only Wiphold is deemed to control the applicant on the basis of its shareholding. Neither Wiphold nor any of the other shareholders has any additional control rights in terms of the shareholders' agreement.

10.3 Empowerment of HDPs

10.3.1 In its initial application the applicant indicated that, through Peotona and the NEF, it exceeded the 30% HDP equity requirement.³³⁸

10.3.2 The applicant provided information to the Authority regarding the new shareholder (Wiphold) at the time that it notified the Authority of the changes to its application.³³⁹ Although Wiphold's involvement suggests that the applicant complies with the empowerment requirements set out in the ITA read with section 9(2)(b) of the Act, there was insufficient information given for the Authority to establish the effective percentage of shareholding by HDPs in the applicant.

10.4 Section 65 (2) of the Act

10.4.1 The applicant indicated in its initial application that none of its members or directors has any other media interests or interests in other broadcasting licensees.³⁴⁰ The information presented by the application in relation to Wiphold indicates that Wiphold has some telecommunications interests and has identified the media sector as an area for strategic investment. It did not appear, however, that Wiphold has any interests in other broadcasting service licensees, although this issue was not

³³⁸ Megalomeia application: pp 10 – 12; 70 - 71.

³³⁹ Megalomeia Response Document, annexure M5

³⁴⁰ Megalomeia application: pp 42; 59.

directly addressed. It also appears that Wiphold's chief financial officer previously "served as a non-executive director for Kaya FM and YFM" but did not hold these positions at the time the new information was provided.³⁴¹

10.4.2 There was, accordingly, no basis for the Authority to conclude that the applicant was not in compliance with section 65(2) of the Act.

10.4.3 As indicated above, the applicant applied for all three licences that were anticipated to be granted pursuant to the current licensing process. The applicant indicated in this regard that "there is no bar to the Authority granting Megalomeia one or more licences". The Authority was requested to grant all three licences to the applicant or, alternatively, to grant it "sufficient rights, in one or more areas which enables us to achieve sustainability". Clearly, however, section 65(2) does in fact impose a restriction on the number of FM radio licences that may be controlled by a single entity.

10.5 Section 66(2) and (3) of the Act

The applicant indicated that it does not have an interest in any newspapers (including holdings in a group having substantial control over one or more newspapers), as required in the ITA.³⁴² From the information provided in relation to Wiphold, it also does not appear that Wiphold has any such interests.³⁴³

10.6 Section 64 of the Act

³⁴¹ Megalomeia Response Document, annexures M5 & M6.

³⁴² Megalomeia application: p 58.

³⁴³ Megalomeia Response Document, annexure M5.

The applicant indicated that none of its members has any foreign shareholding.³⁴⁴ Although the applicant did not provide clear details of the natural persons who ultimately hold shares in the applicant through the various corporate vehicles which hold shares and the Authority was not in a position to confirm that the applicant has no indirect foreign shareholding none of the information that was presented suggested that the applicant has any indirect foreign shareholding.

10.7 Management, control and human resources

10.7.1 One director is appointed by each shareholder who beneficially owns at least 15% of the authorized and issued share capital in the applicant, with certain provisos. The board of directors also includes the chief executive officer and the chief financial officer.³⁴⁵

10.7.2 Details of the applicant's senior management were provided.³⁴⁶ In this regard, Mr Katz is the CEO, Mr Muller is the general manager: marketing and strategy; Mr Mamdou is the general manager: corporate services; Mr Shane Huntley is the general manager: programming; and Ms Louise Lewis is the general manager: sales. The curricula vitae which were submitted in relation to the applicant's senior management indicate that the applicant possesses the required relevant media experience. In particular, Mr Katz, the applicant's chief executive officer, was previously the chief executive officer of Radio 780.³⁴⁷ Ms Leetcher, the applicant's finance and administration manager, spent 16 years with M-Net and eight years with YFM, Mr Huntley was head of operations and programming at YFM, and Ms

³⁴⁴ Megalomeia application: pp 58; 70.

³⁴⁵ Megalomeia Response Document, annexure M3, pp 17 - 18.

³⁴⁶ Megalomeia application: pp 91 - 94; 104 - 105.

³⁴⁷ Transcript for Megalomeia, 25 November 2010: p 7.

Lewis was a sales manager at 94.7 and the SABC.³⁴⁸ The Authority is satisfied that the applicant's senior management has relevant media experience.

10.7.3 The applicant submitted an organogram of the station's staff and proposes to have a total staff complement of 171 employees, across all three proposed radio stations (i.e. in Gauteng, Durban and Cape Town together).³⁴⁹

10.8 Programming

10.8.1 As required by the ITA, the applicant submitted a proposed programme schedule covering typical weekdays, Saturdays and Sundays.³⁵⁰ The applicant proposes to broadcast 24 hours per day, seven days a week and proposes to commence broadcasting 120 days after being awarded a licence to broadcast.³⁵¹

10.8.2 The applicant indicated that its primary target audience is persons between the ages of 35 and 55 years within the LSM 7-10 segments.³⁵²

10.9 Format

10.9.1 The applicant proposes to be a "mature Adult"³⁵³ radio station which will provide a full spectrum service providing light, relaxed and easy classics from the past 40 years.³⁵⁴

³⁴⁸ Transcript for Megalomeia, 25 November 2010: pp 5 - 6.

³⁴⁹ Megalomeia application: pp 44 - 47.

³⁵⁰ Megalomeia application: p 158, appendix 13.

³⁵¹ Megalomeia application: p 164, appendix 17.

³⁵² Megalomeia application: p 157.

³⁵³ Megalomeia application: p 156, appendix 12.

³⁵⁴ Megalomeia application: p 155, appendix 12.

10.9.2 The applicant indicated that it will be a music-driven station with a minimum of 15% and maximum of 35% speech output during peak times on weekdays, and a minimum of 10% and maximum of 25% speech output during peak times on weekends. The applicant indicated further that it will have a minimum of 5% and a maximum of 15% speech output during off-peak times on weekends.³⁵⁵ These estimates exclude all advertising content. In short, the applicant proposed a format of 75% music and 25% talk.

10.10 News

10.10.1 The applicant indicated that it will broadcast 70 minutes of news and information packages on weekdays, not including information, sports and traffic updates. On weekends, the applicant will broadcast 43 minutes of news and information packages per day. The applicant indicated that news will be broadcast in English and will be sourced from government and municipalities, community, religious and political leaders and organisations, and news wire services such as SAPA and Reuters and internet resources.³⁵⁶

10.10.2 At the public hearings, the applicant clarified that it will broadcast 50% local news, 30% national news and 20% international news.³⁵⁷

10.11 Current affairs

The applicant indicated that 65% of current affairs topics will

³⁵⁵ Megalomedia application: p 160.

³⁵⁶ Megalomedia application: p 162.

³⁵⁷ Transcript for Megalomedia, 25 November 2010: p 49.

originate from the coverage area. The applicant indicated that current affairs content will be broadcast in English, and will be included and aligned with news broadcasts.³⁵⁸

10.12 South African music

10.12.1 The applicant indicated that the proposed radio station would aim to broadcast a minimum of 25% South African music comprising of relaxed and easy classic songs, such as Afro-pop, South African R&B and South African Pop, from the past 40 years, so as to ensure compliance with the Content Regulations. The radio station will also highlight music from other African countries that complement the relaxed and easy format of the station.

10.12.2 Details of illustrative tracks and artists were provided. However, the tracks submitted are not reflective of easy classic music from the past 40 years, and indicate much more recent music.³⁵⁹

10.13 Languages

According to the applicant's research, over 60% of respondents stated that "English is the preferred language of broadcast by a station in the style of [the proposed radio station]". As such, the applicant indicated that it will broadcast in English.³⁶⁰ The applicant indicated, in response to a question from Power 98.9 FM that 83.9% of the total population in the broadcast area understands its chosen broadcast language.³⁶¹

³⁵⁸ Megalomeia application: p 163.

³⁵⁹ Megalomeia application: p 161.

³⁶⁰ Megalomeia application: p 167.

³⁶¹ Megalomeia Response Document, annexure M2.

10.14 Demand, need and support

10.14.1 The applicant conducted primary and secondary research and gathered data from AMPS 2008/2009. Based on this research, the applicant ascertained that there was a gap in the market in respect of a target audience consisting of upper LSM listeners of all races between the ages of 35 and 55 years.³⁶²

10.14.2 In September 2009, the applicant commissioned Q & A Research to conduct primary research in the target market to establish demand, need and support for a radio station that caters for a mature adult audience. The applicant conducted face-to-face interviews, based on a questionnaire, with a sample size of 300 white, black (African) and coloured people, split evenly between the following age groups: 30 - 39 years of age, 40 -49 years of age, and 50 - 55 years of age, being the applicant's main target market.³⁶³ The applicant indicated that the research methodology involved testing 19 different genres by playing 57 songs.³⁶⁴ The following areas were covered in the questionnaire: radio stations listened to, preferred station including preferred station for music and news, and where, when, and for how long a person listens to radio. The appeal of such a radio station was measured by asking the following questions: need for a new radio station in area that is aimed at target market of respondents, favourite music era, music era collection, most appealing sounds for radio station, what percentage of music to talk to news for new radio station, and percentage of preferred language, genre preferred and preference of talk topics.³⁶⁵ As a result of this research, the applicant found that 79% of respondents in the Gauteng area

³⁶² Transcript for Megalomedia, 25 November 2010: p 9.

³⁶³ Megalomedia application: pp 185 - 190.

³⁶⁴ Transcript for Megalomedia, 25 November 2010: p 9.

³⁶⁵ Megalomedia application: pp 192 - 212.

indicated a need for a new radio station, and 91% of those individuals indicated that they would definitely or probably listen to a station with the proposed music format.³⁶⁶

10.14.3 The applicant indicated that its primary research supports the “reliability” of AMPS data.³⁶⁷

10.14.4 On the basis of its research, the applicant indicated that 48% of targeted listeners list Highveld as their preferred station, and 42% list Jacaranda as their preferred station. The applicant indicated that this was mainly due to a lack of choice.³⁶⁸ The applicant also concluded that the overwhelming majority of the respondents participating in the questionnaire preferred a “relaxed easy listening” music format (40%) or secondly, “relaxed and easy classic songs of 70s/80s/90s” (23%). The applicant also indicated that its research demonstrated that the focus of news coverage should be on “safety and crime” (55%) and “happenings in the community” (49%). The applicant has indicated that its proposed balance between easy listening and localised news coverage will differentiate the proposed service from competitors.³⁶⁹

10.14.5 The applicant indicated that it expected 221 000 targeted listeners in the first year, which would reach approximately 16% of the total adult population of the licence area.³⁷⁰

10.14.6 Power 98.9 FM submitted that the applicant’s target market is presently over-represented amongst various stations in the market, which means that the applicant’s proposed service is

³⁶⁶ Megalomedia application: pp 203; 207.

³⁶⁷ Megalomedia application: 168.

³⁶⁸ Megalomedia application: p 168.

³⁶⁹ Megalomedia application: p 168.

³⁷⁰ Megalomedia application: p 273.

targeting an audience with a surplus of options.³⁷¹ Power 98.9 FM submitted further that the applicant agrees that easy listening “golden oldies” is already being broadcasted by Talk Radio 702 during weekends, but Gauteng RAMS 2009 seems to indicate that Talk Radio 702’s Saturday reach is only 2.69% of the total duplicated Saturday reach in Gauteng (amongst all adults over the age of 15 years) and only 4.87% of duplicated Saturday reach amongst members of the applicant’s core target audience (LSM 7-10, between the ages of 35 and 55). As such, Power 98.9 FM submitted that this would seem to indicate that market demand for this music format is significantly below that which is estimated by the applicant.³⁷² The applicant responded that it was utilising a different format to that used by Talk Radio 702. In other words, its proposed service offering would consist of easy listening music, as opposed to “golden oldies”, and the figures thus are not comparable.³⁷³

10.14.7 In the Authority’s assessment, the applicant submitted all the requested information in response to this section of the ITA and provided detailed research methodology and findings.

10.15 Financial means, business record and commercial viability

10.15.1 The applicant indicated that its advertising revenues will be sold through three sales teams, namely agency sales, government sales and direct sales.³⁷⁴

10.15.2 The applicant projected an average revenue growth of 20%. Operating expenditure is projected to growth at 7% on average.

³⁷¹ Power 98.9 FM written submission, 10 August 2010: pp 3 & 4.

³⁷² Power 98.9 FM written submission, 10 August 2010: p 4; Transcript for Megalomeia, 25 November 2010: pp 26 - 27.

³⁷³ Transcript for Megalomeia, 25 November 2010: pp 39 - 41.

³⁷⁴ Megalomeia application: p 282.

The applicant has a current ratio of 8 for the projected period and a leverage ratio of 21% which is viewed as conservative.

10.16 Decision and reasons

The Authority has decided not to grant the applicant the individual commercial sound broadcasting licence in the Gauteng primary market for each one of the following reasons considered separately, each of which is regarded as constituting adequate reason for turning down the application:

- 10.16.1 The applicant submitted all the requested information related to the demand and need for the proposed service, as specified in the ITA, and provided detailed research methodology and findings that supported the assertions that it made regarding demand and need for its proposed service. However, the target market which the applicant intends to serve and the music format which it proposes to adopt is presently targeted by other radio stations, which have had a great deal of success in targeting the relevant market. In the Authority's assessment, listeners are unlikely to tune into a radio station simply because it is on air: it is for this reason that applicants must clearly demonstrate a strategy to attract listeners that is closely aligned to their market research and their proposed format. In this regard, the Authority is not satisfied that the applicant articulated how it will attract listeners from other radio stations beyond indicating that its proposed service has a broader appeal than existing competitive services and that listeners in the applicant's target market presently listen to their current radio stations due to a lack of choice. In the Authority's assessment, the successful applicant, Power 98.9 FM, was better able to demonstrate both that its target market is not presently served

by a radio service such as the service that it proposes to provide and that such a service will be commercially viable.

- 10.16.2 The applicant has estimated that its revenue will grow by 25% in its first two years of operation and by 20% thereafter. Given that the applicant's research illustrates that 48% of targeted listeners list Highveld as their preferred station, and 42% list Jacaranda as their preferred station, and, in the Authority's assessment, did not adequately describe how it intends to attract listeners to its proposed radio station beyond suggesting that its proposed music format might offer a broader appeal, the applicant's estimated revenue growth is exaggerated and, as such, may affect the financial viability of the proposed radio station.

11. RADIOWIZE (PTY) LTD

11.1 Introduction

- 11.1.1 The Authority received an application from RadioWize (Pty) Ltd for the individual commercial sound broadcasting service licence in the Gauteng primary market.
- 11.1.2 The applicant's proposed station name is "Good 'n Gold 98.9".
375
- 11.1.3 Power 98.9 FM and Main Street submitted written representations in relation to RadioWize's application. The applicant did not submit written responses to these representations and instead indicated that it would address the

³⁷⁵ RadioWize application: Vol 1, p 3.

queries raised by these parties at the public hearing.³⁷⁶

11.1.4 The applicant also submitted applications in response to the ITA for the Western Cape and KwaZulu-Natal commercial broadcasting service licences.

11.1.5 The applicant requested that certain parts of its application be treated as confidential information. The Authority granted the applicant's request for confidentiality in respect of its financial information. The Authority refused the applicant's request for confidentiality in relation to all other parts of the application on the basis that this information is central to the application and interested parties' ability to comment on the application. The information also does not fall within any of the categories of information contemplated in section 4D(4) of the ICASA Act, which must be treated as confidential information.

11.2 Corporate status

11.2.1 The applicant is a private company, duly registered and incorporated in South Africa. The applicant submitted various company documents,³⁷⁷ from which it appears that it is a juristic person registered in South Africa, as required by section 5(8)(b) of the Act, and has its principal place of in South Africa, although the applicant did not submit a certificate of incorporation and its memorandum and articles of association.

11.2.2 The applicant indicated that its shareholding structure is as follows:³⁷⁸

³⁷⁶ Transcript for RadioWize, 24 November 2010: p 12.

³⁷⁷ RadioWize application: Vol 1, pp 9 – 14; Transcript, p 4.

³⁷⁸ RadioWize application: Vol 1, p 16.

- 11.2.2.1 Maru Media (Pty) Ltd (“Maru Media”) 33.3%
- 11.2.2.2 New African Media Enterprise (Pty) Ltd (“NAME”) 66.7%
- 11.2.3 For the reasons set out in Section H (Interpretation of Key Provisions of the Act) in Part I of this Reasons Document, both Maru Media and NAME are deemed to control the applicant on the basis of their respective shareholdings in the company.
- 11.2.4 The applicant provided various company documents in respect of its shareholders but did not provide any further information on their respective shareholding structures, as was submitted by both Main Street and Power 98.9 FM in their written submissions on RadioWize’s application.³⁷⁹
- 11.2.5 The applicant submitted the shareholders’ agreement that has been concluded by its shareholders and the company.³⁸⁰ This agreement provides that the applicant is incorporated with an authorised share capital of 1000 par value shares of R1.00 each, and an issued share capital of 100 par value shares of R1.00 each.³⁸¹ The shareholders’ agreement provides further that each of Maru Media and NAME has the right to appoint two directors and to remove any directors so appointed.³⁸² Each director has one vote, and the maximum number of directors is five. For as long as they are shareholders, both Maru Media and NAME must approve any shareholders’ resolutions.³⁸³ The

³⁷⁹ RadioWize application: Vol 1, pp 16 – 30; Power 98.9 FM Notes for oral representations: pp 1 - 2; Main Street written submission, 10 August 2010: p 5, para 5.2; Transcript for RadioWize, 24 November 2010: p 4.

³⁸⁰ RadioWize application: Vol 1, pp 34 - 59.

³⁸¹ RadioWize application: Vol 1, p 38, clause 2.4.

³⁸² RadioWize application: Vol 1, pp 39 - 40, clause 6.

³⁸³ RadioWize application: Vol 1, pp 39 – 42.

quorum for meetings of directors is four directors.³⁸⁴

11.3 Empowerment of HDPs

11.3.1 The applicant did not provide any information in its application in relation to the percentage of its equity ownership that is held by HDPs.³⁸⁵ At the hearings in relation to its application for the Western Cape licence, the applicant indicated that effective representation by HDPs is 72%.

11.3.2 In particular, the applicant did not provide any information in relation to the shareholding in Maru Media and NAME that allowed the Authority to assess its HDP shareholding. Although the applicant provided a copy of a share certificate indicating that 100 ordinary shares in NAME (which appears previously to have been called Adjupac (Pty) Ltd) are held by Mr Mahomed Dawjee,³⁸⁶ no information was provided to indicate NAME's total issued share capital to enable the Authority to determine the extent of Mr Dawjee's effective shareholding in the applicant.

11.4 Section 65(2) of the Act

11.4.1 The applicant indicated that neither of its shareholders have assets in the broadcasting sector.³⁸⁷ The Authority is satisfied that the applicant and its shareholders comply with the requirements of section 65(2) of the Act.³⁸⁸

11.4.2 As raised by Main Street in its submission on RadioWize's application, if the Authority were to award a commercial

³⁸⁴ RadioWize application: Vol 1, p 41, clause 7.

³⁸⁵ RadioWize Application: Vol 1, p 9.

³⁸⁶ RadioWize application: Vol 1, p 30.

³⁸⁷ RadioWize application: Volume 1, p 104.

³⁸⁸ RadioWize application: Vol 1, p 111.

broadcasting service licence to the various corporate vehicles established by the applicant's shareholders in each of the three primary markets in which commercial sound broadcasting licences are to be awarded pursuant to the current licensing process, this would result in a contravention of section 65(2) of the Act in respect of the shares held by Maru Media and NAME in each applicant.³⁸⁹ This is on the basis that Maru Media and NAME hold 20% or more of the shares in each applicant and, accordingly, for the reasons given in Section H (Interpretation of Key Provisions of the Act) in Part I of this Reasons Document, are deemed to be in "control" of each applicant. The applicant did not advance reasons as to why it or either of the other two applicants for commercial FM sound broadcasting service licences in the Western Cape and KwaZulu-Natal should be exempted from the requirements of section 65(2) in this regard, as provided for in section 65(6) of the Act on the basis that it did not expect all three applications to be successful. It was not necessary for the Authority to consider this issue in further detail in the context of RadioWize's application on the basis that RadioWize's application was refused for other reasons.

11.5 Section 66(2) and (3) of the Act

The applicant indicated that it does not have any ownership or control interest in any newspapers.³⁹⁰

11.6 Section 64 of the Act

11.6.1 The applicant indicated that NAME was engaged in a transaction with a British citizen pursuant to which the individual

³⁸⁹ Main Street written submission, 10 August 2010: p 5, para 6; Transcript for RadioWize, 24 November 2010: p 5.

³⁹⁰ RadioWize application: Vol 1, p 109.

in question would effectively hold more than 20% of the shares in RadioWize. The individual in question was also indicated to have committed to subscribe for further new shares in the applicant.³⁹¹ The Authority noted, however, that, if the transaction was concluded, a British citizen would, on the basis of the principles outlined in Section H (Interpretation of Key Provisions of the Act) in Part I of this Reasons Document, be deemed to control the applicant. This would be a breach of section 64 of the Act.

11.6.2 The applicant provided information in relation to its senior management, indicating that:

11.6.2.1 Mr Thabo Komane would be the managing director;

11.6.2.2 Mr Michael Bukht would be the applicant's programming director;

11.6.2.3 Ms Refilwe Marumo would be the marketing director;

11.6.2.4 Mr Faizel Dawjee would be the head of news; and

11.6.2.5 Mr Ahmed Hassan would be the financial director.

11.6.3 The applicant indicated that Mr Hassan and Mr Bukht are British citizens.³⁹² At the hearings, the applicant stated that Mr Hassan is at an advanced stage of applying for South African citizenship.³⁹³

11.6.4 The applicant indicated at the hearing that Mr Bukht was no

³⁹¹ RadioWize application: Vol 2, pp 59; 68.

³⁹² RadioWize application: Vol 1, p 62.

³⁹³ Transcript for RadioWize, 24 November 2010: p 15.

longer involved in its application.³⁹⁴ The applicant did not apply for any formal amendment to its application in this regard.

11.6.5 The applicant did not indicate who the members of its board of directors are although there seems to have been some confusion on the applicant's part between the people who comprise its senior management and the individuals who are members of its board of directors.³⁹⁵ As described above, the restriction imposed by section 64(2) of the Act is in relation to foreign directors (i.e. members of the board of directors). It is possible, of course, that, where an applicant's senior management is heavily influenced by foreign individuals, there may be a breach of section 64(1)(a) of the Act. Given, however, that Mr Hassan is one of four members of the applicant's senior management it does not seem that Mr Hassan would have such an influence. Public records show that the applicant's directors are: Ms Marumo, Mr Komane and Mr Dawjee. Each of these individuals is indicated to be a South African citizen.

11.7 Management, control and human resources

11.7.1 As set out above, each of the applicant's shareholders, namely Maru Media and NAME, has the right to appoint two directors to the applicant's board. The shareholders' agreement provides further that the applicant's board of directors may consist of no more than five directors.³⁹⁶ As indicated above, the applicant did not indicate who the members of its board of directors are. Public records show that the applicant's directors are: Ms Marumo, Mr Komane and Mr Dawjee. Each of these individuals is indicated to be a South African citizen.

³⁹⁴ Transcript for RadioWize, 24 November 2010: p 15.

³⁹⁵ Transcript for RadioWize, 24 November 2010: pp 14 – 15.

³⁹⁶ RadioWize application: Vol 1, p 40, clause 6.2.

- 11.7.2 The applicant indicated that its senior management will consist of four men and one woman.³⁹⁷ The applicant provided details and profiles of its senior management which includes the following individuals:
- 11.7.2.1 Mr Komane as the managing director;
- 11.7.2.2 Mr Bukht as the programming director (although the applicant indicated at the public hearings that Mr Bukht was no longer with the applicant);
- 11.7.2.3 Ms Marumo as the marketing director;
- 11.7.2.4 Mr Dawjee as the head of news; and
- 11.7.2.5 Mr Ahmed Hassan as the financial director.³⁹⁸
- 11.7.3 The Authority is satisfied that the applicant's senior managers have relevant media experience: Mr Komane has operated as a manager for the Southern African Film Market and has been a broadcasting and telecommunications regulation consultant in Malawi and has worked as a manager at Sentech, while Mr Dawjee is a communications and media specialist.³⁹⁹
- 11.7.4 The applicant submitted an organogram of the station's staff and proposed a staff complement of 47 full-time employees.⁴⁰⁰ The applicant indicated that the radio sales and market research functions, amongst other things, would be outsourced to

³⁹⁷ RadioWize application: Vol 1, pp 62 - 79.

³⁹⁸ RadioWize application: Vol 1, p 62.

³⁹⁹ RadioWize application: Vol 1, pp 63 - 79.

⁴⁰⁰ RadioWize application: Vol 1, p 92.

Afstereo.⁴⁰¹ Technical matters would also be outsourced.⁴⁰² It appears that Mr Vaughan Taylor (who was also indicated by other applicants to be responsible for their technical matters) has the necessary technical expertise and experience in relation to the technical operation of radio stations generally.

11.8 Programming

11.8.1 As required, the applicant submitted a detailed programme schedule covering typical weekdays, Saturdays and Sundays.

⁴⁰³ The applicant proposes to broadcast 24 hours per day, seven days a week and intends to commence broadcasting six months from the date on which it is granted a licence.⁴⁰⁴

11.8.2 The applicant's target market in Gauteng is adults between the ages of 35 and 60 years in the LSM 7-10 segments.⁴⁰⁵ The applicant indicated that its core market is between the ages of 40 and 55 years.⁴⁰⁶

11.8.3 Main Street requested the Authority to pay due regard to the possibility of the applicant syndicating its programming and content.⁴⁰⁷ The applicant indicated that all its programming will originate locally except to the extent that it is awarded more than one licence in the various primary markets. The applicant indicated that syndication on this basis with its other stations would allow for some economies of scale.⁴⁰⁸

⁴⁰¹ RadioWize application: pp 90 – 93; 105.

⁴⁰² RadioWize application: pp 96 – 100.

⁴⁰³ RadioWize application: Vol 1, p 160.

⁴⁰⁴ RadioWize application: Vol 1, p 117.

⁴⁰⁵ RadioWize application: Vol 1, p 116.

⁴⁰⁶ RadioWize application: Vol 1, p 172.

⁴⁰⁷ Main Street written submission, 10 August 2010: p 7, para 8.

⁴⁰⁸ RadioWize application: Vol 1, p 161.

11.9 Format

11.9.1 The applicant proposes to have a “Golden Oldies” format, playing music from the 1940s to the 1980s.⁴⁰⁹

11.9.2 The applicant intends to play not only foreign music in this format but older music that was recorded and produced in South Africa and that is not presently played on any other station.⁴¹⁰

11.9.3 The applicant indicated that it would provide a full spectrum service that will be listener-oriented and music-led, with a mixture of news, information, entertainment and relaxation. All content will be locally originated with the exception of international news. The applicant’s speech / music output varies though the day between 50% talk and music and 25% talk and 75% music. It appears that, on average, the applicant’s programming format will be 60% music and 40% news/current affairs.⁴¹¹ The applicant’s objectives are to “develop a radio station that will promote and reflect the region’s diverse culture and character”.⁴¹²

11.10 News

11.10.1 The applicant indicated that it will broadcast news 24 hours a day, on the hour and half hour, during both peak times and off-peak times. News will be broadcast in English. The applicant indicated that, in total, 153 minutes of news will be broadcast per weekday (i.e. 765 minutes from Monday to Friday) during both peak and off-peak times and that, on weekends, 87

⁴⁰⁹ RadioWize application: Vol 1, p 133.

⁴¹⁰ RadioWize application: Volume 1, pp 103; 117.

⁴¹¹ RadioWize application: Vol 1, pp 115; 119.

⁴¹² RadioWize application: Vol 1, pp 115; 117 – 119; 128 – 129; 169.

minutes of news will be broadcast each day.⁴¹³ This complies with the Authority's indicative requirements as stipulated in the Private Sound Position Paper.

11.10.2 The applicant indicated that it would provide a continuous local news service but did not provide a percentage breakdown for local, national and international news output.

11.10.3 The applicant indicated that its principal sources of news will be the station's own team of journalists and secondary sources will be SAPA and the African Press Association (APF) for national news and Al Jazeera and Thomson Reuters for international news.⁴¹⁴ The applicant indicated that there is a demand for high quality news from its target audience and indicated that existing services in the coverage area do not provide serious, in depth reporting.⁴¹⁵

11.11 Current affairs

The applicant indicated that it will broadcast three extended news and current affairs programmes per day on weekdays. The applicant indicated that, in total, it will broadcast approximately 1135 minutes of current affairs programming Monday to Friday. On weekends, current affairs programming will amount to a total of 196 minutes, 98 minutes for Saturday and Sunday respectively each day.⁴¹⁶ The applicant appeared to indicate that news programming, financial news, sport, traffic, and features constitute current affairs programming. As discussed above in the context of the Private Sound Broadcasting Position Paper, the Authority regards news and current affairs programming as distinct.

⁴¹³ RadioWize application: Vol 1, pp 138 – 143; 157.

⁴¹⁴ RadioWize application: Vol 1, pp 143 – 155.

⁴¹⁵ RadioWize application: Vol 1, pp 104, 143 – 150, 169.

⁴¹⁶ RadioWize application: Vol 1, pp 153 – 157.

11.12 South African music

11.12.1 The applicant committed to comply with the 25% South African music requirement in terms of the Local Content Regulations and indicated that its proposed format will mean that, on average, at least 30% locally produced, South African music will be broadcast.⁴¹⁷ The music that the applicant proposes to broadcast will include Golden Oldies such as Scathamiya, Marabi, Afro-Jazz, Mbaqanga, Pop Alternative, and Afrikaans. Details of illustrative tracks and artists along with the minimum and maximum percentages of South African music were provided.⁴¹⁸ The applicant indicated that each weekday evening the station will programme specialist music featuring mostly local genres such as a capella, choral or Mbube.

11.12.2 One of the applicant's principal objectives is to preserve South African music heritage. For this purpose the applicant proposes to establish a foundation with this aim.⁴¹⁹

11.13 Languages

The applicant's only language of broadcast will be English although the applicant indicated that certain of its music programming would be in other South African languages. The applicant estimated that there are 8.1 million people living in the coverage area of which 4.9 million understand English.⁴²⁰

⁴¹⁷ RadioWize application: Vol 1, pp 133-134.

⁴¹⁸ RadioWize application: Vol 1, pp 132 – 136.

⁴¹⁹ RadioWize application: Vol 1, p 58.

⁴²⁰ RadioWize application: Vol 1, p 164.

11.14 Demand, need and support

- 11.14.1 The applicant indicated that its research shows that there is an opportunity for businesses that cater to the older market, which is more financially secure and has high radio consumption.⁴²¹ The applicant indicated that its proposed service will be the first with its proposed format (Golden Oldies) in South Africa and that there is a demand from its target audience for news programming of the type proposed by the applicant.⁴²²
- 11.14.2 The applicant indicated that it had appointed Freshly Ground Insights to conduct primary research to establish need and demand for the proposed station. The applicant indicated that quantitative and qualitative research was conducted including field research, focus groups and telephone interviews. The applicant indicated that the quantitative research was conducted in Gauteng using a sample of 500 male and female respondents between 35 - 55 in the LSM 7 – 10 range and representing all races. Face-to-face interviews were conducted between 13 and 24 July 2009. Three focus groups were conducted in Gauteng consisting of 6 – 7 respondents each. The applicant indicated that its proposed format was formulated to match the research findings to provide programming that is not currently available.⁴²³
- 11.14.3 The applicant provided a summary of its research findings but did not provide a copy of the research report produced by its market research service provider. The applicant indicated that its research showed: that radio consumption increases with age and that 59.7% of respondents in the 35 – 44 group, 79.3% of

⁴²¹ RadioWize application: Vol 1, p 173 – 175.

⁴²² RadioWize application: Vol 1, p 178.

⁴²³ RadioWize application: Vol 1, p 180.

respondents in the 45 - 54 group and 53.8% in the 55+ group indicated that there is room for variety. However, in this regard, the applicant also indicated that only 23.1% of the 55+ group, 5.2% of the 45 – 54 group and 8.5% of the 35 – 44 group interviewed indicated that they would like something new to cater to their needs.⁴²⁴ The applicant indicated that 62% of respondents believe a good balance between music and talk shows, news and weather makes a good radio station; diverse views were expressed on the types of music that respondents enjoyed the most; 55% of the respondents indicate that there is an appetite for a station that plays a Golden Oldies format; 74% of respondents listen to radio every day of the week and change between radio stations for programme-specific listening and playlists are a key in their choices in this regard; and most of the target audience listen to Kaya FM (54%), Metro FM (47%) and Highveld 94.7 (37%). The applicant's findings in relation to music preference were that 27% of respondents like Soul music, 19% like any music with a good beat and 19% of respondents like Golden Oldies. The applicant submitted that these findings indicated a window of opportunity for its proposed station.⁴²⁵ Following the public hearings, the applicant submitted further information on its market research indicating the questions that were posed to respondents and the responses that were received.⁴²⁶

11.14.4 Power 98.9 FM questioned the applicant regarding its proposals to generate listener-oriented radio and requested clarification on how this approach is different from the approaches used by existing stations. Power 98.9 FM also submitted that the listener figures for Talk Radio 702's Golden Oldies format, which is

⁴²⁴ RadioWize application: Vol 1, p 181.

⁴²⁵ RadioWize application: Vol 1, pp 181 – 189.

⁴²⁶ RadioWize additional submission, 25 November 2010: pp 1 – 2.

broadcast on weekends, are relatively low. It was submitted, accordingly, that demand for such services is lower than asserted by the applicant. The applicant's response was that demand and need was assessed on the basis of responses to its "detailed and lengthy" questionnaire and that its results were "reliable". The applicant questioned how Talk Radio 702 is permitted to broadcast music at all given that it is a talk format service and indicated that the applicant's format is significantly different from Talk Radio 702's format, primarily because of the percentage of South African music that would be played.⁴²⁷

11.14.5 The applicant expects 1 050 000 listeners on a weekly basis.⁴²⁸ In this regard, the applicant indicated that the total possible audience for Gauteng is 7 million people and that it estimates that 15% of that population will listen to its proposed service. This appeared to be based on the fact that 74% of respondents interviewed during the course of the applicant's primary research "would definitely listen to the station".⁴²⁹ However, the findings presented by the applicant in its application did not reflect this statistic. The applicant's assessment in relation to its audience size did not appear to take into account the proportion of the population that falls into its target market and appeared to be based on a percentage of the population more generally. Power 98.9 FM submitted that an estimated audience of the size estimated by the applicant is highly unlikely.⁴³⁰ At the public hearings, the Authority also questioned whether the applicant's estimated audience size is not unrealistic. The applicant indicated that its estimated audience size reflected the possibilities of what the station could have.⁴³¹

⁴²⁷ Transcript for RadioWize, 24 November 2010: pp 11; 16 - 18.

⁴²⁸ RadioWize application: Vol 1, p 192.

⁴²⁹ RadioWize application: Vol 1, pp 192 – 193; 196.

⁴³⁰ Power 98.9 FM written submission, 10 August 2010: p 4, para 1.15.

⁴³¹ Transcript for RadioWize, 24 November 2010: pp 23 - 24.

11.14.6 Power 98.9 FM submitted that the applicant's research lacks demonstrable validity "to the extent that it must be discounted as the basis for a valid estimate of market demand".⁴³²

11.15 Financial means, business record and commercial viability

11.15.1 The applicant indicated that it intended to launch a new sales platform for advertising.⁴³³

11.15.2 The applicant projected an average revenue growth of 62%, which is viewed as extreme. Operating expenditure growth is 7%, which is viewed as conservative. The applicant's current ratio was calculated at 0.02 and its leverage ratio was calculated at 6.80% for the 2011/12 financial year. The applicant expects to be profitable from its second year of operation.⁴³⁴

11.15.3 The applicant indicated that its required funding would be raised by way of an equity contribution from various individual shareholders who intend to subscribe for new shares in the company comprising 39.97% of the applicant's total issued share capital.⁴³⁵ The applicant indicated that the identified shareholders had committed to fund a total amount in excess of the applicant's funding requirements. The applicant provided letters of commitment in this regard.⁴³⁶ The applicant detailed its required capital expenditure. On the basis of the information provided by the applicant, equity and sales receipts would cover the applicant's staff costs, purchases and capital expenditure in

⁴³² Power 98.9 FM written submission, 10 August 2010: p 3, para 1.11.

⁴³³ RadioWize application: Vol 1, pp 106, 108; Vol 2, pp 7 - 8.

⁴³⁴ RadioWize application: Vol 2, p 18 - 20.

⁴³⁵ RadioWize application: Vol 2, p 22.

⁴³⁶ RadioWize application: Vol 2, pp 58 – 68; RadioWize additional submission, 23 November 2010.

its first year of operation.

11.16 Decision and reasons

The Authority has decided not to grant RadioWize the individual commercial sound broadcasting licence in the Gauteng primary market for each of the following reasons considered separately, each of which is regarded as constituting adequate reason for rejecting the application:

11.16.1 The Authority is satisfied that the applicant's senior managers have relevant media experience, as required in terms of section 51(d) of the Act.

11.16.2 In the Authority's assessment, the applicant did not clearly indicate the manner in which its expected audience of 1 050 000 people per week, was derived. In this regard, the applicant anticipated that its audience share would be 15% of the total possible audience in Gauteng, which is 7 million people. However, this did not appear to take into account the fact that only a part of the total population of Gauteng falls into the applicant's target market, being the market in relation to which the applicant assessed need and demand. Accordingly, the applicant's projection that it would have a listenership of 1,050,000 does not appear to have any objective basis. The applicant also appears to have over-estimated its anticipated audience size and does not provide clear guidelines on how it expects to attract and retain an audience of this size. This assessment appears to be based on the fact that 74% of respondents interviewed indicated that they would definitely listen to the proposed radio station, but the findings presented by the applicant did not reflect this statistic. This in turn impacts on the viability of the applicant's financial projections, which are based on this anticipated audience size.

- 11.16.3 The applicant's own research, as presented to the Authority, indicated that while a high percentage of its survey indicated that there is room for "variety" in radio services, only very small percentages indicated that they would like something new to cater to their needs. While 55% of the respondents interviewed showed that there is an appetite for a station that plays a Golden Oldies format, on the basis of the applicant's research, as presented to the Authority, only 19% of the surveyed respondents indicated a preference for Golden Oldies music, which is the basis of the applicant's format (27% of respondents like soul music and 19% of respondents like anything with a good beat). This suggests that there is not sufficient demand for the format that the applicant has proposed. The applicant also submitted that its research indicated that most of its proposed target audience listen to Kaya FM (54%), Metro FM (47%) and Highveld 94.7 (37%), which suggests that there is also no need for the proposed service offering presented by the applicant.

12. RICHTRAU NO 284 (PTY) LTD trading as POWER 98.9

12.1 Introduction

- 12.1.1 The Authority received an application from Richtrau No. 284 (Pty) Ltd trading as Power 98.9 FM for the commercial sound broadcasting service licence in the Gauteng market.
- 12.1.2 The applicant's proposed station name is "Power 98.9 FM".
- 12.1.3 The Authority received written representations in respect of the applicant's application from Main Street and Jacaranda FM.

12.1.4 Two of the applicant's largest shareholders, MSG Afrika Investment Holdings (Pty) Ltd and Zungu Investment Company (Pty) Ltd ("Zico") are also shareholders in KZN Talk (Pty) Ltd, which made application for the commercial sound broadcasting service licence in the KwaZulu-Natal primary market.

12.2 Corporate status

12.2.1 The applicant is a private company incorporated in South Africa. The applicant submitted founding documents, confirming that it is a juristic person registered in South Africa, as required by section 5(8)(b) of the Act.⁴³⁷ The applicant indicated that, in the event that its application is successful, the company name will be changed to Power 98.9 FM (Pty) Ltd.⁴³⁸

12.2.2 The shareholding structure of the applicant was indicated to be as follows:⁴³⁹

12.2.2.1	MSG Afrika Media (Pty) Ltd	35%
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12.2.2.2	Zungu Investment Company (Pty) Ltd ("Zico")	20%
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12.2.2.3	AIH Media (Pty) Ltd	11%
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12.2.2.4	Friedshelf 1121 ("MIB Radio & Media Investments")	7%
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12.2.2.5	Friedshelf 1136 (Pty) Ltd ("Ndalo Radio Broadcasting")	9%
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12.2.2.6	Friedshelf 1125 (Pty) Ltd ("Kgalagadi Media")	10%
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⁴³⁷ Power 98.9 FM application: Part 1, p 29.

⁴³⁸ Power 98.9 FM application: Part 1, p 28.

⁴³⁹ Power 98.9 FM application: Part 1, p 73; Part 3, pp 930 - 931.

12.2.2.7 Friedshelf 1134 (Pty) Ltd (“Thonga Media”) 2%

12.2.2.8 Friedshelf 1135 (Pty) Ltd (“TT Media & Stuff”) 4%

12.2.2.9 Friedshelf 1122 (Pty) Ltd (“Jacobs the 4th”) 2%

12.2.3 The applicant indicated that the names of the six Friedshelf companies will be changed should the applicant’s application be successful to reflect the names indicated in brackets.⁴⁴⁰

12.2.4 On the basis of the principles discussed in Section H (Interpretation of Key Provisions of the Act) in Part I of this Reasons Document, both MSG Afrika and Zico are deemed to control the applicant on the basis of their respective shareholding interests.

12.2.5 Details of the shareholding structures of each of the nine companies holding shares in the applicant were provided in the application together with the founding documents including, memoranda and articles of association, for each of these entities, as well as change of name certificates in respect of certain of the shareholders.⁴⁴¹ The applicant indicated that:

12.2.5.1 MSG Afrika Media is a 100% black owned, private South African company and a wholly owned subsidiary of MSG Investment Holdings. The applicant stated that the shares in MSG Investment Holdings are held by the following individuals or entities:⁴⁴²

⁴⁴⁰ Power 98.9 FM application: Part 1, p 73.

⁴⁴¹ Power 98.9 FM application: Part 2, appendix 6.2 ; Power 98.9 FM response to Main Street, 20 September 2010.

⁴⁴² Power 98.9 FM application: Part 1, p 74.

12.2.5.1.1	Given Mkari	34.95%
12.2.5.1.2	Siyabonga Simphiwe Mdlalose	34.95%
12.2.5.1.3	Investec Bank Ltd	25.1%
12.2.5.1.4	Andile Khumalo	5.0%

12.2.5.2 The applicant indicated that Zico is a 100% Black owned company. (It appears that this statement does not take account of the shareholding by Sanlam, discussed below, and is presumably based on the principle in the Codes of Practice that certain Mandated Investments may be excluded in the calculation of black ownership.) The following individuals were indicated to hold shares in the company: Sandile Zungu, Tsepiso Mofokeng, Darryl Castle, Bonga Zungu, Nosipho Molope, Yedyedwa Zungu, Itumeleng Dlamini, JB Magwaza and E Mabyana.⁴⁴³ In addition, Sanlam has a 20.73% interest in the company. There are four trusts with interests in the company as follows:⁴⁴⁴

12.2.5.2.1	The Mfundo Nenjabulo Trust	40.77%
12.2.5.2.2	Sindi Mabaso-Konyana (through the Bentungwa Family Trust)	2.05%
12.2.5.2.3	Geoffrey Nzau (via the Nzau Family Trust)	2.57%

⁴⁴³ Power 98.9 FM application: Part 1, p 74. The interests held by these individuals have been described in the application. Save for Mr Zungu who holds 27.63% of the shares in Zico, the remaining individuals each hold less than 1.88% of the shares.

⁴⁴⁴ The beneficiaries of each of the trusts are listed in the application.

12.2.5.2.4	Zico Group Charitable Trusts	1.22%
12.2.5.3	<p>AIH Media is a private company wholly owned by African Women Chartered Accountants (“AWCA”) Investment Holdings (“AIH”), a section 21 company. The applicant indicated that up to 10% of the interest flowing to AIH will benefit AWCA, The shareholders of AIH are all Black women. There are currently 60 shareholders in AIH, none of whom hold more than 3.7% equity in the company.⁴⁴⁵</p>	
12.2.5.4	<p>MIB Radio and Media Investments is a wholly-owned subsidiary of Spacegrow Investment Holdings Ltd, a company registered in South Africa. There are eight shareholders in Spacegrow Investment Holdings, five of whom each hold 14.286% of the shares in the company and three that hold 0.07% each. All the shareholders are individuals save for the Space Trust, of whom the beneficiaries are Johan Petrus Prins and Morne Ebersohn (both of whom are also shareholders in their own names).⁴⁴⁶</p>	
12.2.5.5	<p>Ndalo Radio Broadcasting is a private company whose sole shareholder is Khanyisile Nokuthulo Dhlomo. The company is 100% Black owned and 100% female owned. The applicant indicated that Ndalo Radio Broadcasting intends establishing a staff trust for the benefit of the employees of Ndalo Media (Pty) Ltd. 44% of the shares will be transferred from Ms Dhlomo to the staff trust.⁴⁴⁷</p> <p>The relationship between Ndalo Radio Broadcasting and</p>	

⁴⁴⁵ Power 98.9 FM application: Part 1, pp 75 – 77.

⁴⁴⁶ Power 98.9 FM application: Part 1, p 77.

⁴⁴⁷ Power 98.9 FM application: Part 1, p 78.

Ndalo Media was not explained in the application.

- 12.2.5.6 Kgalagadi Media is a private company with two shareholders; Ferdinand Mabalane and Timothy Molefe Modise, each of whom hold 50% equity in the company. The company is 100% Black owned.⁴⁴⁸
- 12.2.5.7 Thonga Media is a private company with a single shareholder, Shonisani Aubrey Muleya. The company is 100% Black owned.⁴⁴⁹
- 12.2.5.8 TT Media & Stuff is a private company with two shareholders, Thabiso Tema and Thomas Mlambo, each of whom hold 50% equity in the company. The company is 100% Black owned.⁴⁵⁰
- 12.2.5.9 Jacobs the 4th is a private company with a single shareholder, Zeona Anastasia Jacobs. The company is 100% Black owned and 100% women owned.⁴⁵¹
- 12.2.6 None of the legal entities or individuals who indirectly hold shares in the applicant through the various shareholders identified above is deemed, on the basis of their respective effective interests in the applicant company, to control the company.
- 12.2.7 The shareholders' agreement entered into between Power 98.9 FM and its shareholders is included in the application.⁴⁵² On the basis of this agreement, each share carries one vote. A

⁴⁴⁸ Power 98.9 FM application: Part 1, p 79.

⁴⁴⁹ Power 98.9 FM application: Part 1, p 79.

⁴⁵⁰ Power 98.9 FM application: Part 1, p 80.

⁴⁵¹ Power 98.9 FM application: Part 1, p 80.

⁴⁵² Power 98.9 FM application: Part 3, appendix 6.5.

quorum at meetings of the shareholders is three shareholders, including at least the “required shareholders”, MSG and Zico.⁴⁵³

12.2.8 The applicant provided an original company resolution authorising the application for a commercial broadcast service licence in the name of the applicant.⁴⁵⁴

12.2.9 The applicant requested that certain parts of its application be treated as confidential information. The Authority granted the applicant’s request for confidentiality in respect of its financial information, radio market analysis, and business case summary.

12.3 Empowerment of HDPs

The applicant stated that 93% of its equity ownership is held by HDPs.⁴⁵⁵ This statement is supported by the detailed information that was submitted by the applicant in relation to its indirect shareholders. The Authority is, accordingly, satisfied that the applicant complies with and significantly exceeds the requirement set in the ITA in relation to equity ownership by HDPs.

12.4 Sections 51 and 52 of the Act

The applicant confirmed that it complies with section 51(i), in terms of which the applicant and none of the persons in a position to control the applicant must have been convicted of an offence in terms of the Act and the related legislation, and section 52 of the Act, which provides that a broadcasting service licence may not be granted to any party,

⁴⁵³ Power 98.9 FM application: Part 3, p 941.

⁴⁵⁴ Power 98.9 FM application: Part 3 pp 913 – 914.

⁴⁵⁵ Power 98.9 FM application: Part 1, p 28.

movement, organization, body or alliance which is of a party-political nature.⁴⁵⁶

12.5 Sections 65(2) and (3) of the Act

12.5.1 The applicant disclosed details of its and its shareholders and directors' involvement in various advertising agencies, media companies and media strategy and buying agencies.⁴⁵⁷ These interests in the media sector are not relevant for the purposes of section 65 of the Act, although they are a relevant factor in considering the diversity of ownership of the media sector more broadly.

12.5.2 MSG Afrika holds a 38.5% interest in Capricorn FM (Pty) Ltd (a licensed commercial sound broadcasting service in the Limpopo province) and a 5% interest in Telkom Media (now Super 5 Media).⁴⁵⁸ For the reasons given in Section H (Interpretation of Key Provisions of the Act) in Part I of this Reasons Document, MSG Afrika, through its shareholding in the company, is deemed to control Capricorn FM. As a 35% shareholder in the applicant, MSG Afrika would also control the applicant. If the licence were to be awarded to the applicant, there would be no contravention of section 65(2)(a) or (3) of the Act on the basis that MSG Afrika would not control *more than two* commercial FM sound broadcasting service licences and Capricorn FM and the proposed service to be broadcast on 98.9 FM in the Gauteng area do not have the same or substantially overlapping licence areas.

⁴⁵⁶ Power 98.9 FM additional submission, 2 December 2010.

⁴⁵⁷ Power 98.9 FM application: Part 1, p 126.

⁴⁵⁸ Power 98.9 FM application: Part 1, p 127.

- 12.5.3 The applicant indicated that Mr Given Mkhari and Mr Siyabonga Mdlalose, who are intended to be amongst the initial directors of the applicant, are also directors of Capricorn FM and Mr Mkhari is a director of Super 5 Media.⁴⁵⁹ These directorships are not problematic in terms of sections 65(2)(b) or (3) given that neither Mr Mkhari nor Mr Mdlalose are directors of more than two radio stations or applicants for FM radio broadcasting service licences and Capricorn FM and the new station to be broadcast in Gauteng do not have the same or substantially overlapping licence areas.
- 12.5.4 The applicant indicated that Shonisani Muleya, the sole shareholder in Thonga Media, holds a 10% interest in Capricorn FM.⁴⁶⁰ For the reasons given in Section H (Interpretation of Key Provisions of the Act) in Part I of this Reasons Document, Thonga Media is not, on the basis of its shareholding in the company, regarded as having a controlling interest in Capricorn FM. In addition, Mr Muleya, through his shareholding in Thonga Media, holds only 2% of the shares in the applicant. On this basis, Mr Muleya is not, by virtue of his shareholding, deemed to control the applicant. Accordingly, his shareholding in Capricorn FM is not relevant for the purposes of section 65(2) of the Act.
- 12.5.5 Main Street noted that two of the applicant's shareholders, MSG Investment Holdings (through MSG Afrika) and Zico, are shareholders in another applicant (KZN Talk) which has made application for a commercial broadcast service licence in the KZN region. A further concern regarding diversity of ownership was raised, in that MSG Afrika and Mr Muleya hold shares in Capricorn FM.⁴⁶¹ Given that the licence in the KwaZulu-Natal

⁴⁵⁹ Power 98.9 FM application: Part 1, pp 94 - 97.

⁴⁶⁰ Power 98.9 FM application: Part 1, p 127.

⁴⁶¹ Main Street written representations 10 August 201, pp 5 – 6.

primary market was ultimately awarded to another applicant, the shareholding interests of MSG Investment Holdings and Zico in KZN Talk were not problematic.

12.6 Sections 66(2) and (3) of the Act

The applicant stated that Zico has an indirect interest in *UmAfrika* through its 33% shareholding in Izimpondo Communications (Pty) Ltd, a publishing company which publishes certain KwaZulu-Natal newspapers.⁴⁶² Given that the newspapers in which Zico has an interest are published in KwaZulu-Natal, it appears unlikely that the coverage area of the applicant's proposed service (in Gauteng) overlaps with the circulation area of the newspapers. Accordingly, if the applicant were to be awarded the commercial broadcasting service licence for Gauteng, section 66(3) of the Act would not be breached.

12.7 Section 64 of the Act

The applicant indicated that it does not have any foreign shareholding.⁴⁶³ None of the initial directors of the applicant are indicated to be foreign.⁴⁶⁴

12.8 Management, control and human resources

12.8.1 The shareholders' agreement indicates that there is to be a minimum of five and a maximum of twelve directors on the board of directors. In terms of the shareholders' agreement each shareholder will be entitled to appoint one director for each

⁴⁶² Power 98.9 FM application: Part 1, p 126.

⁴⁶³ Power 98.9 FM application: Part 1, p 126.

⁴⁶⁴ Power 98.9 FM application: Part 1, pp 86 - 89.

complete 10% of shares it holds.⁴⁶⁵ On this basis, MSG Afrika will be entitled to nominate three directors, Zico will be entitled to nominate two directors and AIH Media and Kgalagadi Media will be entitled to nominate one director each.⁴⁶⁶ In addition, up to four non-executive directors may be appointed from time-to-time by the holders of votes equal to at least 66% of the total votes exercisable by shareholders.⁴⁶⁷ It appears from the shareholders' agreement that, at present, none of the shareholders has the right to appoint more than half the applicant's directors.

12.8.2

The applicant states that none of its shareholders will be in a position to control the operations of the applicant, but MSG Afrika and Zico are influential shareholders in the applicant.⁴⁶⁸ At directors' meetings, each director has the same number of votes as are exercisable by the shareholder who appointed that director, divided by the number of directors appointed by that shareholder. Fractions of votes are to be ignored. On the basis of the applicant's current shareholding, the directors appointed by MSG Africa will have 35 votes in total, the directors appointed by Zico will have 20 votes in total, and the directors appointed by AIH Media and Kgalagadi Media will have 11 votes and 10 votes respectively. A total of 76 votes will be exercisable at directors' meetings. This means that no one shareholder has the power to control the ordinary decisions of the board. Decisions in relation to reserved matters are required to be adopted by way of a supermajority vote of 66% of the votes exercisable by directors at a board meeting. Similarly, while no one shareholder has an actual majority and, accordingly, the ability to control the adoption of ordinary resolutions at a

⁴⁶⁵ Power 98.9 FM application: Part 3, p 938, clauses 11.1 & 11.2.

⁴⁶⁶ Power 98.9 FM application: Part 1, p 85.

⁴⁶⁷ Power 98.9 FM application: Part 3, p 939, clause 11.8.

⁴⁶⁸ Power 98.9 FM application: Part 1, p 112.

meeting of the applicant's shareholders, shareholders' resolutions in relation to reserved matters must be adopted by way of a supermajority vote of 66% of the votes exercisable by shareholders.⁴⁶⁹ On this basis, it appears that MSG Afrika (which holds 35% of the shares in the applicant) has negative control rights in respect of certain of the applicant's affairs. As discussed above, however, in the context of sections 65(2) and (3) of the Act, the fact that MSG Afrika is both deemed to control the applicant on the basis of its shareholding and may, in fact, control the applicant in relation to reserved matters is not in itself a contravention of the Act.

12.8.3 The shareholders' agreement identifies the first six directors of the applicant as:⁴⁷⁰

12.8.3.1 Given Mkari , appointed by MSG Afrika

12.8.3.2 Siyabonga Simphiwe Mdlalose, appointed by MSG Afrika

12.8.3.3 Sandile Donald Muziwenkosi Zungu, appointed by Zico

12.8.3.4 Tsepiso Mofokeng, appointed by Zico

12.8.3.5 Karabo Gwendolin Nondumo, appointed by AIH Media

12.8.3.6 Ferdinand Mabalane, appointed by Kgalagadi Media.

12.8.4 The first directors of the applicant are all HDPs. The applicant indicated that three further individuals are also to be appointed as directors, being Khanyisile Nokuthula Dhlomo, Johan Pretrus

⁴⁶⁹ Power 98.9 FM application: Part 3, pp 927, 938 – 943, clauses 1.2.3.47, 11 – 14.

⁴⁷⁰ Power 98.9 FM application: Part 3, p 938, clauses 11.3 – 11.6.

Prins and Zeona Anastasia Jacobs.⁴⁷¹ The board of directors will be then comprise nine individuals, of whom three are women and eight are HDPs.⁴⁷² The applicant provided a background profile for each of these individuals, indicating that a number of the directors have relevant media experience. These include: Mr Mdlalose who is indicated to have worked in, amongst other things, community radio and who is employed by Capricorn FM, Mr Mkhari who has worked internationally for various radio stations, has held various positions at Kaya FM and Metro FM, and, as discussed above, is a director of Capricorn FM and Super 5 Media FM, and Mr Mabalane who was involved in the establishment of Kaya FM.⁴⁷³

12.8.5 The applicant's senior management will consist of ten men and six women.⁴⁷⁴ The following directors will also form part of the senior management team: Mr Mdlalose (CEO), Mr Mabalane (programme manager) and Mr Prins (sales and marketing manager). Members of the senior management staff have significant experience in the media and broadcasting industry. Staff with relevant experience include Mr Dirk Hartford (operations manager) who was involved in the establishment of YFM and in the strategic planning unit of the SABC, Ms Mahlatse Gallens (head of news and information) who has been a reporter, producer and correspondent of news and current affairs for various radio shows, and Mr Thabiso Tema (sports editor) who has worked as a sports journalist and producer for various SABC and international radio and television services.⁴⁷⁵

12.8.6 The applicant submitted an organogram of the station's staff and

⁴⁷¹ Power 98.9 FM application: Part 1, pp 86 – 89 and 110 – 111.

⁴⁷² Power 98.9 FM application: Part 1, pp 94 – 111.

⁴⁷³ Power 98.9 FM application: Part 1, pp 94 – 103.

⁴⁷⁴ Power 98.9 FM application: Part 1, p 86.

⁴⁷⁵ Power 98.9 FM application: Part 1, pp 103 – 107.

proposed to have a staff complement of 25 full-time and 35 part-time employees.⁴⁷⁶

12.8.7 The Authority is satisfied that the applicant possesses the requisite relevant media experience and complies with the requirements of section 51(d) of the Act.

12.9 Programming

12.9.1 The applicant has submitted a detailed programme schedule covering typical weekdays, Saturdays and Sundays.⁴⁷⁷ It proposes to broadcast 24 hours per day, seven days a week and envisages going on air in a minimum of six months and maximum of twelve months after the licence is issued.⁴⁷⁸

12.9.2 The applicant's proposed target market is "accomplished and aspirational black adults" aged 25 – 49 years old in the Gauteng region, in the LSM 6 and upwards range. The primary aim of the proposed station is to be a catalyst for dialogue about key issues and concerns to the target audience.⁴⁷⁹

12.10 Format

12.10.1 The applicant proposes that Power 98.9 FM will be a "24-hour full service adult contemporary talk radio station". The proposed service will be a full spectrum service adult, contemporary talk-radio station, with up to 70% of programming airtime devoted to talk during peak broadcasting periods.⁴⁸⁰

⁴⁷⁶ Power 98.9 FM application: Part 1, p 121.

⁴⁷⁷ Power 98.9 FM application: Part 1, pp 133 – 136.

⁴⁷⁸ Power 98.9 FM application: Part 1, p 143.

⁴⁷⁹ Power 98.9 FM application: Part 1, pp 128; 131.

⁴⁸⁰ Power 98.9 FM application: Part 1, pp 131; 137.

- 12.10.2 Although the applicant intends that the majority of its programming will be talk based, it has created spaces in the programme schedule that will focus on music, including soul, South African classics, R&B and pan-African genres. Speciality music shows are scheduled for evening and late night broadcast and, on weekends, up-tempo hits from recent decades will be broadcast in the evenings.⁴⁸¹
- 12.10.3 The applicant intends to make use of automated local output from 23h00 to 04h00 every day.
- 12.11 News
- 12.11.1 The applicant proposes to broadcast 13 news bulletins and twelve news headlines per day. It appears that news headlines (indicating main news coming up in the next bulletin) will be broadcast for one minute each and news bulletins will be broadcast for three minutes each.⁴⁸² On this basis, the applicant proposes to broadcast approximately 49 minutes of scheduled news per weekday. This is consistent with the Authority's policy on news programming.
- 12.11.2 The applicant indicated that breaking news will likely take over a broadcast programme instead of being contained solely within the news bulletin.
- 12.11.3 News will be broadcast in English. News will be sourced from SAPA, Reuters and the applicant's own journalists. The applicant intends to work closely with its listener base to use listeners' proximity to news events and their ability to report on them.

⁴⁸¹ Power 98.9 FM application: Part 1, p 139.

⁴⁸² Power 98.9 FM application: Part 1, p 142.

12.12 Current affairs

12.12.1 The applicant proposes to broadcast current affairs programmes from Monday to Thursday between 06h00 and 09h00 and between 12h00 and 15h00.⁴⁸³ On Sunday mornings the applicant intends to broadcast reports from correspondent reporters in various African countries on current events in their regions.⁴⁸⁴

12.12.2 At the public hearings the applicant was requested to provide clarity regarding its proposed current affairs programmes. It stated that there would be a morning show, a midday show and an afternoon show, primarily dedicated to current affairs programme.⁴⁸⁵

12.13 South African music

The applicant committed to broadcast at least 25% South African music. The applicant provided the types of South African music, together with illustrative tracks and artists, that it intends to broadcast.⁴⁸⁶

12.14 Language

12.14.1 The applicant's language of broadcast will be English. It indicated that it will also allow the use of languages commonly spoken in Gauteng and, wherever possible, presenters will aim to respond to callers in their language of choice.⁴⁸⁷

⁴⁸³ Power 98.9 FM application: Part 1, pp 133 – 136.

⁴⁸⁴ Power 98.9 FM application: Part 1, pp 140 – 141.

⁴⁸⁵ Transcript for Power 98.9 FM, 24 November 2010: pp 21 – 22.

⁴⁸⁶ Power 98.9 FM application: pp 138 – 139.

⁴⁸⁷ Power 98.9 FM application: p 145.

12.14.2 The applicant did not provide details of the number of people who understand the language of broadcast in the proposed broadcast area, as required by the ITA. The applicant set out the difficulties with providing these statistics on account of the fact that: (i) the reach of the transmission signal being different to that of the provincial boundary and accurate figures, it submitted, are therefore not available, and (ii) the existing statistical information such as StatsSA and the AMPS data also do not provide this information.⁴⁸⁸ The applicant elected to use available information on home language, language read and understood in the various LSM categories as well as languages read and understood within the various population groups. On this basis the applicant indicated that approximately 85% of the population read and understand English.⁴⁸⁹ The applicant also indicated that the most prevalent home language amongst members of its target audience (black people in the LSM 6 – 10 range) is isiZulu (32.1%), while approximately 89.2% of its target audience read and understand English.⁴⁹⁰

12.14.3 At the hearing the applicant was requested to clarify its submissions on language as set out in its application. The applicant stated that, by broadcasting content primarily in English, which is understood by more than 85% of the Gauteng population, it is able to ensure that it has access to the widest possible audience.⁴⁹¹ As a consequence of focusing on talk radio, local colloquialisms in various languages spoken in the region are expected to become part of all programming.⁴⁹²

⁴⁸⁸ Power 98.9 FM application: Part 1 pp 145 – 146.

⁴⁸⁹ Power 98.9 FM application: Part 1 pp 147 ; 150.

⁴⁹⁰ Power 98.9 FM application: Part 1, p 148.

⁴⁹¹ Transcript for Power 98.9 FM , 24 November 2010: p 19.

⁴⁹² Transcript for Power 98.9 FM , 24 November 2010: p 20.

12.15 Demand, need and support

12.15.1 The applicant submitted that while many of the broadcasting objectives set out in the Act can only properly be met by informed talk radio, there is only one talk radio station in Gauteng (Talk Radio 702) and it caters to a largely suburban audience.⁴⁹³ The applicant indicated that the research it conducted considered the need and support for its intended programme format, having regard to the gap in the market that the applicant had informally identified.⁴⁹⁴ The applicant also indicated that its research showed that there is a “market in the gap”, in other words, that there would be sufficient demand for its proposed service, which would have some differences compared to other services available in the market, to be viable and sustainable.

12.15.2 The applicant used various sources of data to develop its need and demand analysis including information sourced from Statistics South Africa, SAARF demographic, media and product consumption data, primary research data, the Nielsen AdDynamix Media Expenditure Data, and IBIS Media Inflation Data. Primary research was conducted on the applicant’s behalf by ASK Africa. The research sought to (i) test the applicant’s proposed format and (ii) establish the market potential and uptake of the format. The research indicated significant audience preference and support for the proposed service.⁴⁹⁵ The research methodologies included qualitative research (four focus groups comprised of eight people each), quantitative research (573 face-to-face interviews) and Target Group Index secondary data parallel analysis. The questions posed during

⁴⁹³ Power 98.9 FM application: Part 1, p 154.

⁴⁹⁴ Power 98.9 FM application: Part 1, p 164.

⁴⁹⁵ Power 98.9 FM application: p 154.

the research sought to elicit information in relation to, amongst other things, format preferences, target market and tastes.⁴⁹⁶

12.15.3 The data presented by the applicant indicate that 45% of the envisaged core listeners of Power 98.9 FM strongly agree that their ideal radio station would provide them with comprehensive news updates and 46% specified that they would like content aligned to their unique value system.⁴⁹⁷ 78% of respondents agreed or completely agreed that there is a need for a radio station that broadcasts a cultural, intellectual, progressive and agenda-setting platform for black adults in Gauteng.⁴⁹⁸

12.15.4 The applicant included detailed submissions in its application regarding the manner in which the potential audience had been estimated, given that the broadcast coverage area is not contiguous with the area covered by the Gauteng province or specific municipal areas. The applicant indicated that, although there are differences between the Broadcast Maximum Area and Broadcast Weighted Area population estimates, the profile of the population is not significantly different regardless of which profile is used. Accordingly, the applicant utilised media and product consumption information for Gauteng to understand the actual population in the coverage area.⁴⁹⁹ The applicant indicated that the potential market size for its proposed service is in excess of 1 million listeners and that it expects 500,000 listeners over the course of one week during the first year of operation. (These figures were indicated to be more conservative than the figures projected by the applicant's market research consultant.⁵⁰⁰) The estimated listenership with regard

⁴⁹⁶ Power 98.9 FM application: pp 155; 241 - 242.

⁴⁹⁷ Power 98.9 FM application: Part 1, p 151.

⁴⁹⁸ Power 98.9 FM application: Part 1, p 152.

⁴⁹⁹ Power 98.9 FM application: Part 1, pp 243 – 336.

⁵⁰⁰ Power 98.9 FM application: Part 1, pp 173; 391 – 392.

to the target audience is 817,930. (This figure excludes possible listeners that do not fall within the proposed service's target market). The applicant projected that it would be able to attract 39% of the estimated target audience in Gauteng of 2.1 million people.⁵⁰¹

12.15.5 The applicant's research indicated that there is a gap for a music/talk station aimed at Black people.⁵⁰² The applicant identified Talk Radio 702 as the only station broadcasting in the applicable coverage area which provides a predominantly talk-based service. However, the applicant indicated that its service will be aimed at a different target market from Talk Radio 702 FM. The applicant also indicated that, in its assessment and according to its research the Gauteng market is already well-served by African language radio stations, general public service stations and commercial music radio formats broadcasting primarily in English. The applicant submitted that, of the existing radio services that are available in the broadcast area, listeners from Metro FM, YFM, Ukhozi and Talk Radio 702, and to a lesser extent Kaya FM, would be the most likely to churn to the new service.⁵⁰³

12.15.6 Main Street and Jacaranda FM commented that there is no need for another talk radio station broadcasting in English in Gauteng as Talk Radio 702 already operates in the licence area.⁵⁰⁴ The applicant's response was that its research "clearly proves the need and demand for the proposed services" and that Main Street had "only singled out one service that it perceives to be similar to [the applicant's] proposed format, in a market that has a substantial number of music formats". The

⁵⁰¹ Power 98.9 FM application: Part 1, pp 157 - 158.

⁵⁰² Power 98.9 FM application: p 156.

⁵⁰³ Power 98.9 FM application: Part 1, pp 128 – 132; 152; 164 - 165.

⁵⁰⁴ Main Street, written representations 10 August 2010, p 7.

applicant submitted that its proposed format is substantially different from Talk Radio 702.⁵⁰⁵

12.16 Financial means, business record and commercial viability

12.16.1 The applicant's shareholders' agreement indicates that, pursuant to a decision by the board of directors in relation to the amount of funding required to conduct, promote and expand the applicant's business, the company may borrow any required funds from outside sources on terms that are commercially acceptable to the board or, if the terms offered are not acceptable, funds may be provided by the shareholders in proportion to their respective interests in the company. Any shareholders' loans will be provided interest free.⁵⁰⁶

12.16.2 The applicant indicated that it intends to raise capital through an "appropriate mix of debt and equity, as determined by the market conditions at the time". The model included in the application assumed that all funding is through debt finance at a premium over prime interest rates. The applicant indicated that initial discussions have been held with a number of prospective funding partners. The applicant included in its application an indicative letter of interest from Nedbank in this regard in relation to the provision of debt funding.⁵⁰⁷

12.16.3 The applicant provided detailed research on projected revenues, which suggest that the proposed station will be viable.⁵⁰⁸ The applicant projected average revenue growth of 39%. Operating expenditure is expected to grow at 7% on average. The applicant's current ratio is calculated at 1.82 and its leverage

⁵⁰⁵ Power 98.9 FM response to Main Street, 20 September 2010, para 5.

⁵⁰⁶ Power 98.9 FM application: Part 3, pp 935 – 936.

⁵⁰⁷ Power 98.9 FM application: Part 1, pp 154; 202 – 203; 208.

⁵⁰⁸ Power 98.9 FM application: Part 1, pp 181 – 183; 414 – 418.

ratio is calculated at 168%. The applicant expects to be profitable in its fifth year of operation.

- 12.16.4 The applicant's financial model projects a cumulative funding amount of⁵⁰⁹ A contingency budget of R500 000 was assumed for the first year increasing by 5% on an annual basis.⁵¹⁰

12.17 Decision and reasons

The Authority has decided to grant the Richtrau (Pty) Ltd the commercial sound broadcasting licence in the Gauteng primary market. The reasons for the Authority's decision are as follows -

- 12.17.1 The applicant has a very high degree of participation by HDPs. The Authority was of the view that the applicant's diverse ownership structure would contribute to the regulatory objectives which the Authority is required to promote, including promoting the empowerment of HDPs and ensuring that, collectively, electronic communications and broadcasting services are provided by a diverse range of communities in the Republic of South Africa.
- 12.17.2 The Authority was satisfied, on the basis of the information presented by the applicant, that there is sufficient relevant experience and expertise between the applicant's directors and members of senior management, to successfully establish and operate a new commercial radio station.
- 12.17.3 Despite the fact that the applicant's language of broadcast is English, the Authority was satisfied that other languages

⁵⁰⁹ Power 98.9 FM application: Part 1, p 184. (Confidential)

⁵¹⁰ Power 98.9 FM application: Part 1, p 196.

commonly spoken in Gauteng will be used and, wherever possible, presenters will aim to respond to callers in their language of choice. This is in line with the applicant's language policy premised on its desire to reach as many listeners in its target audience as possible.

12.17.4

The Authority was satisfied that the applicant demonstrated both that there is a gap in the market for its proposed service format and programming, in that a similar service targeted at the relevant segment of the population (Black people aged 25 to 49 in the LSM 6 – 10 range) is not currently available and that there is sufficient demand on the part of the relevant segment for the proposed station to be viable. As stated elsewhere in this Reasons Document, it is not sufficient for applicants simply to show that a similar service to the service that they propose to provide is not currently available in the relevant broadcast area. What must also be shown is, as the applicant describes it, that there is a “market in the gap” or, in other words, that there is, in fact, a demand and need for the proposed service. In the Authority's assessment, the applicant was able to show better than many other applicants that there is both a need and demand for its proposed service. Although, as pointed out by Main Street, there is currently a talk radio station that is broadcast in the coverage area (Talk Radio 702), the Authority was satisfied on the basis of the evidence submitted by the applicant in relation to the type of programming that will be provided and the proposed station's marketing focus, that the new service will be distinct from the Talk Radio 702 service and will offer listeners in the relevant market segment a valuable choice as to their preferred station. The fact that a talk radio station is presently available in the coverage area does not necessarily mean that there is no need or demand for a further talk radio station with a distinct focus. This is borne out by the fact that there are, in the Gauteng market, a number of music

stations which focus on different formats and/or are aimed at different segments of the radio audience. Although certain of the other applicants were also able to show that a need and demand exists for their proposed services, the detailed consideration that the applicant had given to these issues, together with the other favourable aspects of the applicant's application, influenced the Authority's decision to award the Gauteng licence to the applicant.

- 12.17.5 The Authority took into account the fact that the applicant's funding model is premised on an appropriate mix of equity and debt. The detailed projections that were provided by the applicant based on, amongst other things, the applicant's comprehensive analysis of potential revenues derived from the projected audience, gave the Authority some assurance that the proposed station will be viable and that the applicant has taken account of the funding requirements of its proposed station.

13. SANGRIEX (PTY) LTD trading as MITUPO RADIO CONSORTIUM

13.1 Introduction

- 13.1.1 The Authority received an application from Sangriex (Pty) Ltd trading as Mitupo Radio Consortium for a commercial sound broadcasting service licence in the Gauteng primary market.
- 13.1.2 The proposed station name is "Radio Freedom".
- 13.1.3 The Authority received written submissions from Main Street and Power 98.9 FM on this application.

13.1.4 The applicant requested that its application be treated as confidential information. The Authority granted the applicant's request to treat certain information as confidential, namely, its specialist contact persons, details on its corporate status and legal form and status of its shareholders, and the details of its management. Certain of the information that the applicant had requested be kept confidential was included in its presentation at the public hearings in relation to its application. Where applicable, certain of that information is referred to in this Reasons Document.

13.2 Corporate status

13.2.1 The applicant indicated that it is a consortium and had purchased a shelf company for the purposes of its application.⁵¹¹ The applicant indicated that the name of the shelf company was being changed to Mitupo Radio Consortium. Item 6.2 of the ITA requires the legal status of each consortium member to be specified and certified copies of all relevant founding documentation to be provided. The applicant submitted the required information and documentation in this regard.⁵¹²

13.2.2 The applicant submitted founding documents, from which it appears that it is a juristic person registered in South Africa, as required by section 5(8)(b) of the Act.⁵¹³ The Authority is also satisfied that the applicant's principal place of business is located in South Africa.

⁵¹¹ Mitupo Radio Consortium application: p 12.

⁵¹² Mitupo Radio Consortium application: Appendix 6.2, pp 140 - 223.

⁵¹³ Mitupo Radio Consortium application: Appendix 6.1, pp 72 - 101.

- 13.2.3 The shareholding structure of the applicant is as follows: ⁵¹⁴
- 13.2.3.1 Mitupo Investments Holdings (Pty) Ltd (“Mitupo”) 46%
- 13.2.3.2 Bokamoso Barona Investments Trust (“Bokamoso”) 22%
- 13.2.3.3 Financier 10%
- 13.2.3.4 Radio Freedom Veterans Trust 7%
- 13.2.3.5 Radio Freedom Foundation 5%
- 13.2.3.6 Mecuritech (Pty) Ltd 5%
- 13.2.3.7 Employees Trust 3%
- 13.2.3.8 Kgomotso Moeketsi 5%
- 13.2.3.9 Lennox Mzoxolo Klaas 3%
- 13.2.3.10 Golden Neswiswi 3%
- 13.2.3.11 Johannes Thamagane Makhafula 3%
- 13.2.4 The applicant submitted a copy of the shareholders’ agreement dated 27 November 2009 between the company and its shareholders. ⁵¹⁵
- 13.2.5 In relation to its shareholders, the applicant indicated that -

⁵¹⁴ Mitupo Radio Consortium application: p 12.

⁵¹⁵ Mitupo Radio Consortium application: pp 102 – 139.

13.2.5.1 Mitupo Mitupo”) is a private company incorporated in 2004 with three shareholders.⁵¹⁶

13.2.5.2 Bokamoso is established for the benefit of three beneficiary organizations being the South African Students’ Congress (“SASCO”), the Congress of South African Students (“COSAS”) and the South African Press Union (“SAPU”).⁵¹⁷ The primary goal of the trust is to generate income from investments and other sources to provide financial assistance to the beneficiaries for their activities.⁵¹⁸ On the BBI Trust letterhead the trustees are indicated as Tshilidzi Ratshitanga, Zandile Nzalo, Mlunigisi Johnson, Dorothy Mahlangu, Mothupi Modiba, Khumbudzo Ntshavheni and Andrew Dipela.⁵¹⁹

13.2.5.3 The beneficiaries of the Radio Freedom Veterans Trust are defined as the Radio Freedom Veterans community,⁵²⁰ being individuals who were previously in the employ of the original Radio Freedom.⁵²¹ Power 98.9 FM commented that Radio Freedom was the radio arm of the African National Congress (“ANC”) and requested clarification on the applicant’s relationship with the party.⁵²² The applicant responded that the name “Radio Freedom” has not been trademarked by the ANC, which has also not authorized the use of the brand by the applicant in light of restrictions on the involvement of political parties in broadcasting. The applicant indicated,

⁵¹⁶ Mitupo Radio Consortium application: pp 13; 165 – 167.

⁵¹⁷ Mitupo Radio Consortium application: pp13; 173.

⁵¹⁸ Mitupo Radio Consortium application: p 175.

⁵¹⁹ Mitupo Radio Consortium application: p 292.

⁵²⁰ Mitupo Radio Consortium application: p 192.

⁵²¹ Mitupo Radio Consortium application: p 13.

⁵²² Transcript for Mitupo Radio Consortium, 25 November 2010: pp 8 – 9.

accordingly, that it has no special relationship with the ANC and on this basis, presumably, that there was no breach of broadcasting laws regarding the involvement of political parties.⁵²³

13.2.5.4 Mecuritech is a private company incorporated in 2008.

13.2.6 The applicant indicated that the three companies that are part of the consortium are 100% black and youth owned.⁵²⁴

13.2.7 On the basis of the principles discussed in Section H (Interpretation of Key Provisions of the Act) in Part I of this Reasons Document, both Mitupo and Bokamoso are, on the basis of their respective ownership interests in the applicant, deemed to control the applicant.

13.3 Empowerment of HDPs

The applicant indicated that 100% of its equity ownership is held by HDPs.⁵²⁵ Although the Authority was not able to verify this claim, the supporting information provided by the applicant indicated that, indirectly, more than 30% of the shares in the applicant, through Mitupo are held by HDPs and it seems likely that, through the trust structures of Bokamoso and the Radio Freedom Veterans Trust, the applicant has significant effective ownership by HDPs and black people in particular. The Authority is satisfied that the applicant complies with, and exceeds, the empowerment requirements set out the ITA read with section 9(2)(b) of the Act.

⁵²³ Transcript for Mitupo Radio Consortium, 25 November 2010: pp 8 – 9; 14 - 17.

⁵²⁴ Mitupo Radio Consortium application: p 19.

⁵²⁵ Mitupo Radio Consortium application: p 12.

13.4 Section 65 (2) of the Act

The applicant indicated that it does not have any ownership or control interests in the broadcasting sector.⁵²⁶

13.5 Section 66 (2) and (3) of the Act

The applicant indicated it does not have any ownership or control interests in any newspapers.⁵²⁷

13.6 Section 64 of the Act

The applicant indicated it does not have any foreign shareholders.⁵²⁸ This is supported by the information provided by the applicant in relation to its shareholders and their respective ownership structures.

13.7 Management, control and human resources

13.7.1 The applicant indicated that it has deployed two executives from within its shareholding ranks to head up and build a new management team for the radio station. The proposed individuals have previous experience in broadcasting. The applicant's other proposed directors also have media experience, including in public commercial radio and commercial radio broadcasting.⁵²⁹ The Authority is satisfied that the applicant's management has relevant media experience and complies with the requirements of section 51(d) of the Act.

⁵²⁶ Mitupo Radio Consortium application: p 20.

⁵²⁷ Mitupo Radio Consortium application: p 20.

⁵²⁸ Mitupo Radio Consortium application: p 20.

⁵²⁹ Mitupo Radio Consortium application: pp 14 - 15.

13.7.2 The applicant submitted an organogram of the station's staff and proposed to have a staff complement of 26 full-time employees and 22 part-time employees.⁵³⁰

13.7.3 The applicant indicated that it would outsource a number of its activities. National sales would be contracted out to Radmark; Studio maintenance and support to RCS and SoundFusion; transmission support to Sentech; and the applicant's local and international news would be sourced from SAPA and Reuters. The applicant indicated that it would also outsource its IT support to a local BEE company with a large youth ownership component.⁵³¹

13.8 Programming

13.8.1 The applicant submitted a detailed programme schedule covering typical weekdays, Saturdays and Sundays.⁵³² The applicant proposes to broadcast 24 hours per day, seven days a week and envisages going on air four to six months after the licence has been issued.⁵³³

13.8.2 The applicant's proposed primary target audience are persons in the 25 to 49 age bracket in LSM 5 - 10.⁵³⁴

13.9 Format

The applicant proposes to provide an adult contemporary format radio service offering a full spectrum service with 65% music and 35% talk

⁵³⁰ Mitupo Radio Consortium application: p 18.

⁵³¹ Mitupo Radio Consortium application: p 18.

⁵³² Mitupo Radio Consortium application: pp 26 - 28.

⁵³³ Mitupo Radio Consortium application: p 33.

⁵³⁴ Mitupo Radio Consortium application: p 22.

with specialised items focused on talk, finance matters talk, BEE breakdown and community driven elements.⁵³⁵

13.10 News

13.10.1 The applicant will broadcast news in English but will cater for other languages to be translated into English. On a week day the applicant proposed a total of 45.5 minutes for news, and on a Saturday or Sunday a total of 17.5 minutes of news.⁵³⁶ At the public hearings the applicant indicated that it may have miscalculated the number of minutes for which it intends to broadcast news.⁵³⁷

13.10.2 The applicant indicated that news will be sourced from community spokespersons, political spokesperson, civic associations, police, traffic and fire departments, educational institutes, political and religious leaders, analysts, economists as well as cultural and social hubs outside of the ordinary wire services. Local, national, international and news from Africa will be self-generated whilst other news will sourced from SAPA, Reuters and the Internet, amongst other sources.⁵³⁸

13.11 Current affairs

13.11.1 The applicant indicated that it will broadcast current affairs in English but will not bar mother tongue contributions from commentators and listeners. Current affairs issues will be broadcast on Mondays to Thursdays between 19h00 and 21h00, and where appropriate, the show will be interspersed with local music offerings. The applicant stated that no international music

⁵³⁵ Mitupo Radio Consortium application: p 23.

⁵³⁶ Mitupo Radio Consortium application: p 31.

⁵³⁷ Transcript for Mitupo Radio Consortium, 25 November 2010: pp 26 – 28.

⁵³⁸ Mitupo Radio Consortium application: p 31.

will be played during current affairs shows. The show will be part of the news bulletins or talk mixed with music where appropriate. The current affairs show will be one and half hours in duration.⁵³⁹

13.11.2 The applicant indicated that “there naturally will be a skew of Gauteng issues in terms of coverage of issues, followed by South Africa then the globe”.⁵⁴⁰

13.12 South African music

The applicant indicated that it will broadcast 32% South African music initially and increase this to 40% by its third year of operation. The applicant will broadcast South African adult contemporary music comprising of Soul, Afro-jazz, Afro-pop, Afro R&B, R&B, Classic Soul, Neo-Soul and Contemporary R&B. The applicant submitted details of the types of music to be broadcast, illustrative tracks and artists.⁵⁴¹ Power 98.9 FM requested the applicant to clarify how this diverse music format including many different genres constitutes a coherent and distinct offering. The applicant responded that its music offering actually “blends seamlessly together” and that its proposed music programming was driven by its research findings.⁵⁴²

13.13 Languages

The applicant indicated that will broadcast in English.⁵⁴³ However, it will allow the use of indigenous languages by DJs or listeners to accommodate the multicultural diversity that is definitive of the Gauteng province. The applicant indicated that of the more than six

⁵³⁹ Mitupo Radio Consortium application: p 32.

⁵⁴⁰ Mitupo Radio Consortium application: p 32.

⁵⁴¹ Mitupo Radio Consortium application: p 30.

⁵⁴² Transcript for Mitupo Radio Consortium, 25 November 2010: pp 9; 17 - 18.

⁵⁴³ Mitupo Radio Consortium application: pp 35 - 36.

million people living in the coverage area, more than 70% understand English and that it had elected to broadcast in English to reach the greatest possible number of listeners in its target audience.⁵⁴⁴

13.14 Demand, need and support

13.14.1 The applicant conducted desk top research relying on available literature and statistical SAARF data which appeared to be an assessment of the market in the coverage area. The applicant indicated that having the City of Tshwane as the radio station's base of operations would be advantageous given that it would be the only radio station in the city providing an adult contemporary service with black listeners as its core target audience. The applicant appeared to indicate that its proposed service and programming is aligned with trends in the coverage area. The applicant made a series of broad statements in this regard in relation to the anticipated growth of its service and the need for additional competition in the commercial broadcasting sector.⁵⁴⁵

13.14.2 The applicant indicated that it had conducted primary research with a sample of 700 respondents using "the non-probability method". The applicant indicated that it had conducted music research by playing various songs to the test groups and research in relation to respondents' content preferences by answering a questionnaire. The applicant's research appeared to focus on the types of music and other programming that respondents preferred and examined the extent to which existing radio stations meet listeners' needs in relation to the

⁵⁴⁴ Mitupo Radio Consortium application: p 36.

⁵⁴⁵ Mitupo Radio Consortium application: pp 40 - 41.

delivery of credible news and weather reports.⁵⁴⁶

- 13.14.3 The applicant is aiming for an audience of 500,000 in the adult market, with a modest increase in line with anticipated population growth in the target area which equates to more demand for radio content.⁵⁴⁷ Power 98.9 FM requested clarification from the applicant regarding the statistical basis for this audience projection and its expected audience size and composition after its first year of operation.⁵⁴⁸
- 13.14.4 The applicant stated that a monopoly exists when it comes to “an African focused adult contemporary market with an age focus of 25 - 49”, in the current pool of licensed stations and that there are no two formats that compete effectively which means that listeners are not given enough choice.⁵⁴⁹ The applicant indicated that, although the music that it would play would be similar in some respects to music played on other radio services, its proposed service would be packaged differently.⁵⁵⁰ The applicant also indicated that its proposed service is based, in part, on offering listeners and advertisers a choice of services offering a particular format, to the extent that its offering overlaps with what is currently provided by existing services.⁵⁵¹
- 13.14.5 The research conducted by the applicant was significantly less comprehensive than that produced by other applicants. It was not clear from the information presented by the applicant exactly what its research findings were or quite how the research findings informed its proposed service and supported the

⁵⁴⁶ Mitupo Radio Consortium application: p 43.

⁵⁴⁷ Mitupo Radio Consortium application: p 52.

⁵⁴⁸ Transcript for Mitupo Radio Consortium, 25 November 2010: p 10.

⁵⁴⁹ Mitupo Radio Consortium application: pp 53; 55.

⁵⁵⁰ Transcript for Mitupo Radio Consortium, 25 November 2010: p 19.

⁵⁵¹ Transcript for Mitupo Radio Consortium, 25 November 2010: pp 23 - 24.

introduction of such a service. In the Authority's assessment, the applicant did not demonstrate that there is, in fact, a gap in the market for its proposed service either in that the applicant's service is different from existing services or, to the extent that it is similar to existing services (such as Kaya FM ⁵⁵²), would be supported by the market. While it is clear that new radio services may be similar in some respects to existing services, it is not sufficient to introduce competition for competition's sake, which appeared to be what the applicant was suggesting. Where a service is intended to be substantially similar to an existing service it is necessary for the applicant to demonstrate a clear business case for its proposed service and to provide details, supported by evidence, as to why the existing services are insufficient to meet the needs of the market, being both listeners and advertisers. In other words, it is necessary for an applicant clearly to demonstrate what it is that it would add.

13.14.6 In the Authority's assessment, the applicant did not sufficiently demonstrate how it would compete in the Gauteng primary market.

13.15 Financial means, business record and commercial viability

13.15.1 The applicant projected an average revenue growth of 20%. Operating expenses are projected to grow at 6%.

13.15.2 The applicant indicated that it will require⁵⁵³ funding which will be sourced from Bokamoso.⁵⁵⁴ By funding the applicant's working capital, Bokamoso will extend its equity in the consortium by an additional 10% which was reserved for the

⁵⁵² Mitupo Radio Consortium application: pp 52 – 53.

⁵⁵³ Confidential

⁵⁵⁴ Mitupo Radio Consortium application: p 59.

financier.

13.16 Decision and reasons

The Authority has decided not to grant Mitupo Radio Consortium the individual commercial sound broadcasting licence in the Gauteng primary market for each of the following reasons considered separately, each of which is regarded as constituting adequate reason for turning down the application:

13.16.1 The research conducted was significantly less comprehensive than that produced by other applicants. It was not clear from the information presented by the applicant exactly what its research findings were or quite how the research findings informed its proposed service and supported the introduction of such a service. In the Authority's assessment, the applicant did not demonstrate that there is, in fact, a gap in the market for its proposed service either in that the applicant's service is different from existing services. While it is clear that new radio services may be similar in some respects to existing services, it is not sufficient to introduce competition for competition's sake, which appeared to be what the applicant was suggesting. Where a service is intended to be substantially similar to an existing service it is necessary for the applicant to demonstrate a clear business case for its proposed service and to provide details, supported by evidence, as to why the existing services are insufficient to meet the needs of the market, being both listeners and advertisers.

13.16.2 While the Authority's assessment was that the applicant would, if the licence were to be awarded to it, contribute to diversity of ownership in the broadcasting sector through the high level of

HDP involvement, the Authority was not persuaded by the applicant's research findings or that the research, in fact, supported the conclusions that the applicant had sought to draw. In the circumstances, in the Authority's assessment, the application submitted by the successful applicant, Power 98.9 FM, more clearly showed an objective basis for the proposed radio station and was preferred on this basis.

14. SIMASCAPE (PTY) LTD

14.1 Introduction

14.1.1 The Authority received an application from Simascape (Pty) Ltd for the individual commercial sound broadcasting service licence in the Gauteng primary market.

14.1.2 The applicant's proposed station name is "World Sport Radio" ("WSR").⁵⁵⁵

14.1.3 The Authority received representations from Main Street and Power 98.9 FM on Simascape's application.

14.1.4 Certain of the applicant's shareholders are also involved in the applications of Epinetix (Pty) Ltd and Epicol (Pty) Ltd, which submitted applications for commercial broadcasting service licences in the Western Cape and KwaZulu-Natal primary markets respectively. The applicant indicated that its "ultimate aim is to operate more than one radio station which would allow regional equity with a national synergistic association, achieving a broad national footprint".⁵⁵⁶

⁵⁵⁵ Simascape application: p 2.

⁵⁵⁶ Simascape application: p 15.

14.1.5 At the public hearings, the applicant acknowledged that the application that was submitted to the Authority contained numerous errors.⁵⁵⁷

14.2 Corporate Status

14.2.1 The applicant indicated that it is a private company that has been incorporated as a special purpose vehicle for the purposes of the licence application. The Authority has verified that a company by the name Simascape (Pty) Ltd under registration number 2009/013815/07 has been registered and, on this basis, the Authority is prepared to accept, for the purposes of this application that the applicant is a company registered in accordance with the company laws of South Africa, as required by section 5(8)(b) of the Act, although the applicant did not comply with item 6.1 of the ITA.

14.2.2 The applicant submitted an unsigned copy of the shareholders' agreement to be concluded between the company and its members.⁵⁵⁸

14.2.3 The applicant indicated that Ms Pat Dambe presently holds all the issued shares in the applicant "in trust" and that she will transfer the shares to the intended shareholders in due course. Ms Dambe will retain 5% of the shares in the applicant in her personal capacity.⁵⁵⁹

14.2.4 The applicant's shareholding structure was described as follows:
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⁵⁵⁷ Transcript for Simascape, 26 November 2010: pp 24 & 25.

⁵⁵⁸ Simascape application: appendix 6.5, clause 2.21.

⁵⁵⁹ Simascape application: p 4.

⁵⁶⁰ Simascape application: p 2; appendix 6.5; Transcript for Simascape, 26 November 2010: p 26.

14.2.4.1	Mr Ernest Pillay	1.2%
14.2.4.2	Mr Bruce Fordyce	1.2%
14.2.4.3	Azramat (Pty) Ltd	1.2%
14.2.4.4	Mr Barry Lambert	1.4%
14.2.4.5	South African Sports Confederation and Olympic Committee ("SASCOC")	2.5%
14.2.4.6	Special Olympics	2.5%
14.2.4.7	Sports Science Institute of South African ("SSISA")	2.5%
14.2.4.8	Ms Dambe	5%
14.2.4.9	Mr David Selvan ("Mr Selvan")	5%
14.2.4.10	Mokone Broadcasting (Pty) Ltd ("Mokone Broadcasting")	10%
14.2.4.11	Industrial Development Corporation ("IDC")	15%
14.2.4.12	MFL	15%
14.2.4.13	14 Mile (Pty) Ltd ("14 Mile")	37.5%
14.2.5	The applicant indicated that the shareholders of MFL, which is not a registered company and is still to be formed, will be Dr Mathews Phosa (85%) and Mr Lucas Radebe (15%). ⁵⁶¹ The	

⁵⁶¹ Document entitled "WSR Gauteng Shareholding Structure".

applicant provided some details in relation to the structures of the various corporate entities with interests in the applicant but did not clearly stipulate the shareholding structures of each of these entities.⁵⁶²

- 14.2.6 The only shareholder which holds more than 20% of the shares in the applicant and which, accordingly, is deemed to control the applicant, is 14 Mile. The applicant did not provide detailed information in respect of 14 Mile, although the applicant indicated at the public hearings that Ms Monana Nhlanhla is the chairperson. The applicant also indicated that the shareholders of 14 Mile are Ms Nhlanhla (27%), Dr Phosa (19%), Mr France Lekgema (27%) and Ms Jessica Thwala (27%).⁵⁶³
- 14.2.7 At the public hearings, the applicant indicated that Dual Point is a shareholder in Mokone Broadcasting.⁵⁶⁴
- 14.2.8 The applicant submitted various resolutions from members of the shareholding “consortium” authorising Ms Dambe and/or Mr Selvan to submit its application.⁵⁶⁵
- 14.2.9 In terms of the shareholders’ agreement that was provided, management control of the applicant will vest in the applicant’s board of directors. Resolutions of the board will be passed by majority vote. There will be a minimum of eight directors. Each shareholder which holds at least 10% of the shares in the applicant is entitled to appoint one person as a director and to remove any such person as a director and all the shareholders who hold less than 5% of the shares in the applicant shall “by a

⁵⁶² Transcript for Simascape, 26 November 2010: p 25.

⁵⁶³ Transcript for Simascape, 26 November 2010: p 4; Document entitled “WSR Gauteng Shareholding Structure”.

⁵⁶⁴ Transcript for Simascape, 26 November 2010: p 26.

⁵⁶⁵ Simascape application: appendix 6.3.

majority vote of all of them, be entitled to appoint one person as a director of WSR".⁵⁶⁶ On this basis, MFL, Mokone Broadcasting, the IDC and 14 Mile would each have the right to appoint one director. At the public hearings, however, the applicant indicated that it has seven directors.⁵⁶⁷ The chief executive officer and head of business affairs will be members of the board of directors on an *ex officio* basis.⁵⁶⁸ The shareholders' agreement also provides that an Executive Committee will be established, as a sub-committee of the board of directors, to oversee matters such as the direction and management of the applicant, appointment of key staff members, marketing and promotional plans, public statements and the applicant's day-to-day business. The applicant indicated that this committee will initially comprise Ms Dambe and Mr Selvan.⁵⁶⁹

14.2.10 In terms of the shareholders' agreement, shareholders' resolutions, other than special resolutions, are passed by majority vote. A quorum at meetings of the shareholders is constituted by at least two shareholders, each holding not less than 10% of the shares in the company.⁵⁷⁰

14.2.11 The shareholders' agreement provides that the IDC and MFL will acquire shares in the applicant and "lend the radio station the finance that it requires to operate (operating finance)". 70% of this operating finance will be repaid as senior debt and 30% will constitute a shareholders' loan to be repaid as subordinated, interest-free debt. The applicant may also negotiate with other funders, if the terms offered by the IDC and MFL are

⁵⁶⁶ Simascape application: appendix 6.5, clause 5.

⁵⁶⁷ Transcript for Simascape, 26 November 2010: p 29.

⁵⁶⁸ Simascape application: appendix 6.5, clause 5.

⁵⁶⁹ Simascape application: appendix 6.5, clause 9.1.

⁵⁷⁰ Simascape application: appendix 6.5, clause 7.

unacceptable. The shareholders' agreement does not provide that these funding shareholders will have any additional voting or other rights which would give them a greater influence over the affairs of the applicant than they already have by virtue of their respective shareholdings.⁵⁷¹ Shareholders are not permitted to pledge their shares or allow them to become subject to any encumbrances, other than those existing at the signature date and those in favour of financial institutions or shareholders who have advanced monies to fellow shareholders.⁵⁷² The applicant did not provide copies of any agreements with these funding shareholders nor any other funding agreements.

14.2.12 Power 98.9 FM commented that it is unusual for the IDC or any development finance institution to align itself with any licence applications before a decision is ultimately made. According to Power 98.9 FM, the applicant's response to it was that the IDC is fully aware of the application.⁵⁷³ The Authority has not, however, seen any confirmation that the IDC is or intends to become a shareholder in the applicant. In addition, while resolutions authorising Ms Dambe and/or Mr Selvan to submit the application were submitted on behalf of most of the applicant's shareholders, no such resolution was submitted on behalf of the IDC.⁵⁷⁴

14.2.13 The applicant's shareholders' agreement restricts shareholders from selling, alienating or disposing of their shares if the sale, alienation or disposal would result in the applicant breaching its licence.⁵⁷⁵

⁵⁷¹ Simascape application: appendix 6.5, clause 4.

⁵⁷² Simascape application: appendix 6.5, clause 8.4.

⁵⁷³ Power 98.9 FM Notes for oral representations, p 3.

⁵⁷⁴ Simascape application: appendix 6.5.

⁵⁷⁵ Simascape application: appendix 6.5, clause 16.2.

14.3 Empowerment of HDPs

- 14.3.1 The applicant indicated that 70.5% of its equity ownership is held by HDPs, which rises to 90.3%, when the various institutional shareholders (indicated as SSISA, SASCO, Special Olympics and the IDC) are excluded.⁵⁷⁶ This is a relatively high percentage that exceeds the requirements set by the ITA. The information provided by the applicant suggests that Ms Dambe, Mokone Broadcasting, MFL and 14 Mile are black persons or entities.
- 14.3.2 The applicant also indicated that the shareholders of 14 Mile are Ms Nhlanhla (27%), Dr Phosa (19%), Mr Lekgema (27%) and Ms Thwala (27%), who are all black persons, and that the shareholders of MFL, namely Dr Phosa (85%) and Mr Radebe (15%), are also black persons.
- 14.3.3 The applicant did not, however, provide details of all of the natural persons who ultimately hold shares in the various corporate entities which hold shares in the applicant with the result that the Authority is unable to verify the applicant's submissions in relation to HDP shareholding. In addition, Ms Dambe, who is indicated to hold 5% of the shares in the applicant, is indicated to be a Zimbabwean national.⁵⁷⁷ No further details in this regard were provided. Accordingly, it is not possible for the Authority to determine whether Ms Dambe is an HDP or not.
- 14.3.4 Nevertheless, on the basis of the information that was presented by the applicant, the Authority is satisfied that the applicant

⁵⁷⁶ Simascope application: p 4.

⁵⁷⁷ Simascope application: appendix 7.1.

complies with and exceeds the 30% HDP shareholding requirement set in the ITA.

14.4 Section 65(2) of the Act

14.4.1 The applicant indicated that none of its members or directors has any other media interests or interests in other broadcasting licensees.⁵⁷⁸ Although Mr Ndwandwe and Ms Sakina Khumalo, who appear to have interests in Mokone Broadcasting (which will hold 10% of the shares in the applicant), are presenters on Metro FM,⁵⁷⁹ this is not relevant for the purposes of section 65(2) of the Act given that Mr Ndwandwe and Ms Khumalo are not in a position to control the applicant and do not appear to be in a position to control Metro FM.

14.4.2 Although the applicant did not directly address the issue in its application, it does not appear, from the information that was presented, that any of the applicant's shareholders, and 14 Mile in particular, which is the only shareholder which is deemed to have control of the applicant by virtue of its shareholding on the basis of the principles outlined in Section H (Interpretation of Key Provisions of the Act) in Part I of this Reasons Document, presently have an ownership or other interest in any other commercial FM radio broadcasting service licensees.

14.4.3 There was, accordingly, no basis for the Authority to conclude that the applicant was not in compliance with section 65(2) of the Act.

⁵⁷⁸ Simascape application: pp 12; 14.

⁵⁷⁹ Simascape application: p 16.

14.5 Section 66(2) and (3) of the Act

14.5.1 The applicant indicated that none of its directors has an interest in any other media interests.⁵⁸⁰

14.5.2 The applicant indicated that Mr Chris Matshaba, who is indicated to be a shareholder in Mokone Broadcasting,⁵⁸¹ manages and owns “Sebata Media”, which published community newspapers.⁵⁸² No further details regarding these publications have been provided. Given that Mokone Broadcasting only holds 10% of the shares in the applicant and, accordingly, on the basis of the applicant’s shareholders’ agreement, controls 10% of the voting rights in matters decided by shareholders’ resolution and has a maximum 12.5% vote in meetings of the applicant’s board of directors (given that it has the right to appoint only one out of a minimum of eight directors), Mr Matshaba’s interests in community newspapers are not relevant for the purposes of section 66 of the Act.

14.5.3 The applicant also indicated that Mr Jovial Rantao (spelled Rantau in the application), who was indicated to be the editor of *The Star* newspaper (it seems that Mr Rantao is presently the deputy-editor of *The Star* and is the editor of *The Sunday Independent*), is the controlling member of Azramart. Given that Azramart’s shareholding in the applicant is 1.2% on the basis of the draft shareholders’ agreement that was included with the application, Azramart only has 1.2% of the vote where shareholders’ resolutions are adopted, Azramart does not have the ability itself to appoint or remove a director from the board and Azramart has no additional rights to control the applicant’s

⁵⁸⁰ Simascape application: p 12.

⁵⁸¹ Simascape application: p 11.

⁵⁸² Simascape application: p 16.

affairs, Mr Rantao's role at Independent Newspapers (Pty) Ltd is not relevant in the context of section 66 of the Act.

14.6 Section 64 of the Act

14.6.1 The applicant indicated that none of its members has any foreign shareholding.⁵⁸³

14.6.2 Ms Dambe and Mr Fordyce, who collectively hold 6.2% of the shares in the applicant, are indicated in the applicant's application to be Zimbabwean and British nationals, respectively, although both were indicated as having South African identity numbers and being residents in South Africa.⁵⁸⁴ Assuming that Ms Dambe and Mr Fordyce are foreign nationals, the applicant would not be in breach of section 64(1)(a) on the basis of their shareholding given that they are not deemed to control the applicant for the purposes of that section. Even though Ms Dambe would occupy the office of chief executive officer of the applicant, this is not, in the Authority's assessment, sufficient to amount to control of the applicant. This is particularly on the basis that, as provided in the shareholders' agreement, the applicant's day-to-day affairs would be managed by the Executive Committee, of which Ms Dambe is only one member.

14.7 Section 52 of the Act

14.7.1 In light of the prohibition, in section 52 of the Act, on granting a broadcasting service licence "to any party, movement, organisation, body or alliance of a party-political nature", applicants were asked to declare any political interests. The

⁵⁸³ Simascope application: p 16.

⁵⁸⁴ Simascope application: appendix 7.1.

applicant indicated in this regard that Mr Panyaza Lesufi, the Executive Chairman of Mokone Broadcasting (which will hold 10% of the shares in the applicant and which will be entitled to appoint a director to the applicant's board), is an advisor to the Minister of Basic Education and a member of the Provincial Executive Committee for the African National Congress ("ANC") in Gauteng.⁵⁸⁵

14.7.2 In addition, Mr Phosa, who was indicated to have an interest in the applicant through the Special Olympics organization and through both MFL and 14 Mile which will accumulatively hold 55% of the shares in the applicant, is the Treasurer-General of the ANC.⁵⁸⁶

14.7.3 As indicated above, section 52 of the Act prohibits a political party or organisation of a party-political nature from holding a broadcasting licence. As such, a registered political party such as the ANC or the Democratic Alliance is clearly prohibited from holding a broadcasting licence. Although certain of the individuals associated with the applicant have party-political interests, this does not mean that the applicant itself is a party, movement, organisation, body or alliance of a party-political nature. As such, in the Authority's assessment, the applicant does not contravene section 52 of the Act.

14.8 Management, control and human resources

14.8.1 At the public hearings, the applicant provided information indicating that its board of directors would be comprised of the following seven individuals –

⁵⁸⁵ Simascope application: p 16.

⁵⁸⁶ Simascope application: appendix 7.1.

- 14.8.1.1 Mr Gideon Sam, as the representative of SASCOC;
- 14.8.1.2 Ms Dambe;
- 14.8.1.3 Mr Selvan;
- 14.8.1.4 Ms Manana Nhlanhla as the representative of 14 Mile;
- 14.8.1.5 Ms Doris Mbele;
- 14.8.1.6 Mr Ezra Ndandwe, as the representative of Mokone Broadcasting; and
- 14.8.1.7 Mr Radebe, as the representative of MFL.⁵⁸⁷
- 14.8.2 It appears that *ex officio* Ms Dambe, in her capacity as chief executive officer and Mr Selvan, in his capacity as head of business affairs, would also be members of the board of directors. At the public hearings, the applicant stressed that Dr Phosa is not a director of the applicant.⁵⁸⁸
- 14.8.3 The applicant did not provide profiles for each of the identified members of the board. Of the identified members of the board for whom profiles were provided, Ms Dambe and Mr Selvan have previous experience in the operation of radio stations, including Kaya FM and Worldspace.⁵⁸⁹
- 14.8.4 The applicant indicated that its senior management was as follows –

⁵⁸⁷ Document entitled “WSR Gauteng Shareholding Structure”.

⁵⁸⁸ Transcript for Simascape, 26 November 2010: p 31.

⁵⁸⁹ Simascape application: appendix 6.2.

- 14.8.4.1 Ms Dambe, who is indicated to be the managing director;
- 14.8.4.2 Mr Selvan, who is indicated to be the business advisor;
- 14.8.4.3 Mr Vaughan Laurence Taylor, who is indicated to be the technical manager;
- 14.8.4.4 Mr Ernest Pillay, who is indicated to be the programme manager;
- 14.8.4.5 Mr Tjipo Mothobi, who is indicated to be the marketing and promotions manager;
- 14.8.4.6 Mr Johnny Hansen, who is indicated to be the financial manager; and
- 14.8.4.7 Mr David Mabusela, who is indicated to be the sales manager.⁵⁹⁰
- 14.8.5 The applicant provided profiles for each of these individuals. Each of these individuals has some experience relevant to his or her intended position. Mr Mabusela, in particular, has prior experience in relation to radio advertising sales with Kaya FM and as a consultant to United Stations and YFM, and Mr Taylor is indicated to have experience in the broadcast industry working for Sentech and as a consultant for the design and implementation of all-digital radio air-chains, amongst other things.⁵⁹¹
- 14.8.6 The applicant submitted an organogram of the station's staff and proposes to have a staff complement of 36 full-time and six

⁵⁹⁰ Simascape application: pp 8 - 12.

⁵⁹¹ Simascape application: appendices 6.2 and 7.2.

part-time employees. The applicant indicated that it will engage United Stations, the radio advertising sales house, to assist with radio sales. It appears from the staffing organogram that the applicant also intends to have a dedicated sales team of six people.⁵⁹²

14.9 Programming

14.9.1 The applicant submitted a programme schedule covering typical weekdays, Saturdays and Sundays.⁵⁹³ The applicant proposes to broadcast 24 hours a day, seven days a week and proposed to commence broadcasting on 1 June 2010.⁵⁹⁴

14.9.2 The applicant indicated that its target market is persons from the ages of 16 to 50, of all races and both genders in the LSM 7-10 segment. The applicant submitted that there are 3,350,000 people in its target market in the Gauteng metropolitan municipal area and that, of these, 2,863,000 are interested in sport.⁵⁹⁵ The applicant submitted details (which appeared to be based on the AMPS) of the age, gender, racial, language, income, life stage, LSM, education, interest in sport, media consumption profile of the target market.⁵⁹⁶

14.9.3 At the public hearings, the applicant responded to the questions relating to syndication by stating that it will not cut down on diversity.⁵⁹⁷ The applicant indicated that 70% of its programming would be “national” and 30% would be “local”.⁵⁹⁸

⁵⁹² Simascape application: pp 12 - 13, 33; appendix 8.1.

⁵⁹³ Simascape application: pp 18 - 22.

⁵⁹⁴ Simascape application: p 22.

⁵⁹⁵ Simascape application: pp 25 – 26; appendix 23.4.

⁵⁹⁶ Simascape application: appendix 23.4.

⁵⁹⁷ Transcript for Simascape, 26 November 2010: p 27.

⁵⁹⁸ Simascape application: pp 17- 18.

14.10 Format

14.11 The applicant proposes a “sports broadcast format radio station” that is predominantly talk-based. It intends using a lifestyle/magazine talk radio format to probe and debate sports-related issues. The applicant indicated that its objective is to provide listeners with a unique opportunity to keep up-to-date with the latest results, reports, actuality, issues, commentary and interviews from the world of sport.⁵⁹⁹

14.12 The applicant’s proposed format is purely talk radio. The applicant indicated that music will be used only as jingles to differentiate programmes and will be composed in-house.⁶⁰⁰

14.13 News

14.13.1 The applicant indicated that it will broadcast international and national general news and sports news for four minutes every hour, and will broadcast local sports news for three minutes on the half hour. This is a total of 168 minutes per 24-hour day and a total of 126 minutes per 18-hour broadcast day.⁶⁰¹ This exceeds the 30 minutes of news per day that is the Authority’s general policy preference. News will be broadcast in English although interviews will be in the interviewee’s home language and where required, translated for listeners via an interpreter.⁶⁰² Sources of news will be the applicant’s own correspondents, wire service, SASCOC affiliates and the internet.⁶⁰³

⁵⁹⁹ Simascape application: .p 17

⁶⁰⁰ Simascape application: p 22.

⁶⁰¹ Simascape application: pp 19; 22.

⁶⁰² Simascape application: p 21.

⁶⁰³ Simascape application: p 22.

14.14 Current affairs

The applicant indicated that its current affairs will be restricted purely to issues related to sporting events, players and relevant matters of interest to regional listeners. Current affairs in the form of “magazine” programming, which will be broadcast in English, is expected to take up 60% of broadcast time.⁶⁰⁴

14.15 South African music

The applicant, as a talk radio station, intends devoting less than 15% of its broadcasting time to music, and, accordingly, is not required to comply with the 25% South African music quota contained in the Content Regulations.⁶⁰⁵

14.16 Language

The applicant indicated that its proposed language of broadcast is English. The applicant stated that 95% of the total population living in the coverage area are able to understand English.⁶⁰⁶ The applicant did not supply any references to any supporting data in relation to these assertions.

14.17 Demand, need and support

14.17.1 The applicant’s market research was mainly commissioned to measure the appeal of a sport focused lifestyle/magazine talk radio format to a mainly metropolitan audience. The applicant commissioned two research reports from Kuper Research and Forge Media and Marketing in relation to the tastes and interests of persons in the target market and predictions regarding

⁶⁰⁴ Simascape application: p 22.

⁶⁰⁵ Simascape application: p 21.

⁶⁰⁶ Simascape application: p 23.

advertising and revenue, respectively.⁶⁰⁷

- 14.17.2 The applicant's findings included that there is a "massive interest in sport, particularly among the core market of WSR".⁶⁰⁸ Amongst the applicant's core market, the sports in which there was the most significant interest were soccer (41%), cricket (26%), rugby (22%), walking/hiking (18%), and dancing and swimming (both 15%). The research also indicated that the applicant's core target market "is involved in a broad activity spectrum". The applicant's research focused on the current media habits of the core target market, which apparently reflected significant reading of sports articles and viewing of sports programming on television and listening to radio stations which have "limited sports programming in constrained time segments".⁶⁰⁹
- 14.17.3 The applicant submitted further that there is minimal sports' programming on radio for persons in the applicant's target market (LSM 7 – 10) whereas the LSM 5 – 6 market is better catered for by "the vernacular stations with live commentary and talk". The applicant provided details of the sports programming that is currently available on South African radio stations, including some stations that are available in the relevant coverage area (Gauteng metropolitan area) and, on the basis of RAMS, the respective reach of each of these services.⁶¹⁰
- 14.17.4 Power 98.9 FM submitted that the applicant committed the error of aggregating support for particular sporting codes into generalised support for sport as a whole and that the applicant seemed to argue that, if 30% of the market likes soccer and

⁶⁰⁷ Simascape application: pp 24-27; appendix 23.4.

⁶⁰⁸ Simascape application: appendix 23.4.

⁶⁰⁹ Simascape application: appendix 23.4.

⁶¹⁰ Simascape application: p 29.

20% of the market likes rugby, it follows that 50% of the market would support a station covering soccer and rugby.⁶¹¹ As such, Power 98.9 FM submitted that the applicant failed to make a reasonable case for market need and demand. At the public hearings, the applicant responded by noting that, based on its research, 32% of people are interested in five or more sports, which led the applicant to believe that there is a “sports fan mentality”.⁶¹²

14.17.5 At the public hearings, the Authority questioned, with regards to the applicant’s research, how an interest in sports equates to a demand for the service and whether the applicant conducted any research on sports as opposed to any other format.⁶¹³ The Authority also questioned how it could assess the sustainability of the applicant’s proposed format without the applicant actually having tested it or the concept.⁶¹⁴ The applicant responded by indicating that there is a market which is interested in sports.⁶¹⁵

14.17.6 The market research conducted by Kuper Research was mainly secondary research based on the following databases in industry: AMPS (with a sample size of 21,000), RAMS (with a sample size of 20,000), Future Fact (with sample size of 2,500) and TAMS (with a sample size of 4,600).⁶¹⁶ The applicant indicated that the specific objectives of the research were to: obtain listenership data to establish current patterns of radio audiences, establish interest levels in different sports among key sectors, and identify lifestyle issues and activities that could

⁶¹¹ Power 98.9 FM Notes for oral representations, pp 3 - 4; Transcript for Simascape, 26 November 2010: p 23.

⁶¹² Transcript for Simascape, 26 November 2010: p 32.

⁶¹³ Transcript for Simascape, 26 November 2010: p 38.

⁶¹⁴ Transcript for Simascape, 26 November 2010: p 41.

⁶¹⁵ Transcript for Simascape, 26 November 2010: pp 44 & 45.

⁶¹⁶ Simascape application: appendix 23.4.

point to programme direction. As such, the applicant did not conduct its own primary research as required by the ITA. In this regard, the applicant indicated that it had aired a “pilot” during the Soccer World Cup on a number of radio stations across the country which had been very successful.⁶¹⁷ However, other than the anecdotal evidence it submitted, the applicant did not put forward any documented results evidencing the success of its pilot programme in a way that demonstrated its appeal to the target market and, by extension, the appeal of a purely sports and lifestyle focussed radio station outside the context of a major event such as the World Cup.

14.17.7 The applicant indicated further that it expects a minimum potential audience of 278,000 people and a maximum potential audience of 2.8 million people.⁶¹⁸

14.17.8 In the Authority’s assessment, the applicant’s use of only secondary data serves to indicate an interest for a sports radio station but does not prove need or demand for the applicant’s service in the proposed coverage area. In the Authority’s assessment, it is therefore not clear how the proposed service will cater for the tastes and interests of people living in the area as is required in Item 22 of the ITA.

14.18 Financial means, business record and commercial viability

14.18.1 The applicant indicated that while there are at least four revenue streams for a radio station (including new media opportunities, as detailed in its advertising and revenue research report), its financial calculations were based on advertising revenue

⁶¹⁷ Transcript for Simascape, 26 November 2010: p 40.

⁶¹⁸ Simascape application: pp 26 - 27.

alone.⁶¹⁹

14.18.2 The applicant's projected average revenue growth is 107%, which is viewed as extreme. Operating expenditure is expected to grow at 23% on average.

14.18.3 The applicant indicated that it requires a total of R19 million to go on air, and expects to be profitable from its third year of operation.⁶²⁰ The applicant indicated that the radio station would be financed on the basis of loan finance. The applicant indicated that it had entered into discussions with the IDC.⁶²¹

14.19 Decision and reasons

The Authority has decided not to grant Simascope the individual commercial sound broadcasting licence in the primary market of Gauteng for each one of the following reasons considered separately, each of which is regarded as constituting adequate reason for turning down the application:

14.19.1 The Authority was satisfied that the key individuals who would be appointed to manage the applicant's affairs during the initial stages of its operation, Ms Dambe and Mr Selvan, have the necessary capability and expertise to operate a commercial radio station. The Authority was also satisfied that the applicant's proposals in relation to staffing levels are adequate to operate a successful radio station. The applicant's intention to provide a significant proportion of news, sourced from a range of news sources, including its own reporters, was also a

⁶¹⁹ Simascope application: p 32.

⁶²⁰ Simascope application: p 42.

⁶²¹ Simascope application: pp 44 - 45.

favourable consideration.

14.19.2

In the Authority's assessment, the applicant's ownership structures as described in its application would contribute to the diversity of ownership of broadcasting services in South Africa given that none of the applicant's shareholders presently has an interest in any other broadcasting licensee. However, the information presented by the applicant in relation to its ownership structures was not comprehensive and was presented in its application in an unclear manner, often confused with information that was relevant to the applicant's shareholders' other applications for licences in the KwaZulu-Natal and Western Cape markets. Nevertheless, on the basis of the information that was presented by the applicant, the Authority is satisfied that the applicant complies with the 30% HDP shareholding requirement set in the ITA. However, the Authority is concerned that there was very little evidence in the application of the intention of either the IDC or MFL, which together would hold 30% of the applicant's issued share capital, to be involved in the proposed radio station as shareholders or otherwise.

14.19.3

Although the applicant's proposed service is different from existing services and would contribute to the diversity of radio programming that is presently available in the coverage area given that no radio station is presently providing a comparable sports-focused service, in the Authority's assessment, the applicant has not shown sufficient evidence to demonstrate that there is a demand for the proposed service. In particular, while there is no equivalent service that is presently available and although the applicant's secondary research shows that a significant proportion of the applicant's target audience have an interest in sports, these findings cannot necessarily be extrapolated to reach a conclusion that a proportion of the

targeted listeners will be interested in a sports radio station. In other words, the fact that a particular service is not presently available and that a proportion of the target audience has an interest in the proposed subject matter is not sufficient to determine with any degree of certainty that a proportion of the target market will tune-in to such a service if it was made available.

14.19.4

In the Authority's assessment, the applicant did not clearly demonstrate that there is a need for the proposed service, as provided for in section 51(b) of the Act. Although the applicant provided evidence that there is relatively limited programming dealing with sports on radio at present and that a proportion of the applicant's target market have an interest in sports, the applicant did not provide sufficient evidence that the absence of such programming points to a need for it, particularly having regard to the alternative sources of news and information on sports such as newspapers, magazines and television. The applicant did not demonstrate with sufficient particularity the reasons that, in the context of the radio service it proposes to offer in the Gauteng area, the proportion of the target market that the applicant indicated as its minimum expected audience (278,000 people), the audience requires or would be interested in additional sports and lifestyle programming on radio.

15. TUPELOLITE (PTY) LTD

15.1 Introduction

15.1.1 The Authority received an application from Tupelolite (Pty) Ltd for the commercial broadcasting service licence in the Gauteng primary market.

15.1.2 The applicant's proposed station name is "Sport FM".

15.1.3 Power 98.9 FM submitted written representations in relation to this application. The applicant stated at the public hearing that it did not receive these representations. The Authority noted that Power 98.9 FM had attached a fax transmission report proving it had sent the written representations to the applicant.⁶²²

15.2 Corporate status

15.2.1 The applicant indicated that it is a consortium. Item 6.2 of the ITA requires the legal status of each consortium member to be specified and certified copies of all relevant founding documentation to be provided. No founding documents in relation to either the applicant or any of its consortium members were initially included in Tupelolite's application.⁶²³

15.2.2 In its application, the applicant indicated that its shareholding structure was as follows⁶²⁴:

15.2.2.1	Happy Ntshingila	15%
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⁶²² Transcript for Tupelolite, 24 November 2010: pp 32 – 33.

⁶²³ Tupelolite application: appendix 6.3.

⁶²⁴ Tupelolite application: p 5.

15.2.2.2	Sandra Gordon	4%
15.2.2.3	Nozipho Jafta	4%
15.2.2.4	Blitech-MKVA Consortium	25%
15.2.2.5	Dash Media	28%
15.2.2.6	Hugh Farrell	8%
15.2.2.7	Dave East	8%
15.2.2.8	Keith Lindsay	8%

15.2.3 The applicant attached to its application a letter dated 30 November 2009 from its attorneys indicating that the attorneys were still in the process of "reformatting" the applicant's company.⁶²⁵ According to the letter, the company's shareholding structure was to be as follows:

15.2.3.1	Happy Ntshingila	15%
15.2.3.2	Sandra Gordon	5%
15.2.3.3	Nozipho Jafta	5%
15.2.3.4	Dash Media	51%
15.2.3.5	Hugh Farrell	8%
15.2.3.6	Dave East	8%

⁶²⁵ Tupelolite application: appendix 6.1.

15.2.3.7	Keith Lindsay	8%
15.2.4	The letter indicated that Dash Media is owned by Mncedisi Mayekiso, Kwami Mokoena, Ndala Vusi, Time Shete, Lunga Kepe, and Lwazi Koyana. The shareholding structure detailed in the letter is different from the shareholding structure detailed by the applicant in its application.	
15.2.5	At the public hearing the applicant indicated that its corporate structure had changed as two shareholders, Happy Ntshingila and Lunga Kepe, who was a member of Dash Media, had resigned and that the MK Veterans Association was no longer involved as a shareholder. ⁶²⁶ In its response to Power 98.9 FM's submissions on its application, however, the applicant indicated that "Blitec and MKVA were linked as a grouping – it has since been decided that Blitec would hold its own shareholding and MKVA would also hold its own shareholding". ⁶²⁷	
15.2.6	The applicant submitted various additional documents to the Authority after the public hearing including further information in relation to its shareholding structure and further changes which had been made in this regard. ⁶²⁸ The applicant indicated that its shareholding would be as follows: ⁶²⁹	
15.2.6.1	Edosol Investment CC (trading as Dash Enterprise) 25%	
15.2.6.2	Blitec (Pty) Ltd	20%

⁶²⁶ Transcript for Tupelolite, 24 November 2010: pp 35 - 30.

⁶²⁷ Tupelolite additional submission: Part 2, p 5.

⁶²⁸ The applicant submitted a copy of its CM29 form (change of directors' details), CM31 form (change of auditors) and CM22 form (change of registered address); Tupelolite additional submission: Part 1, p 3 and appendix 1.

⁶²⁹ Tupelolite additional submission: Part 1, appendix 1.

15.2.6.3	Leslie Warren Maasdorp	10%
15.2.6.4	David Leslie East	8%
15.2.6.5	Keith James Lindsay	8%
15.2.6.6	Nozipho Ada Jafta	6%
15.2.6.7	Timothy Kgaka Shete	5%
15.2.6.8	Sandra Jane Gordon	4%
15.2.6.9	Annie Malan	5%
15.2.6.10	Hugh Kevin Farrell	4%
15.2.6.11	Robin Drummond Twaddle	5%

15.2.7 The applicant indicated that Edosol Investment CC is a close corporation which was in the process of being formed as at 6 December 2010. The members of this entity were indicated to be Lwazi Mandisi Koyana, Mncedisi Mayekiso and Mzimasi Liphuma Mgebisa and the applicant indicated that the close corporation had been registered as the vehicle through which these individuals would hold their shares in the applicant.⁶³⁰

15.2.8 The additional documents provided included share certificates in respect of the shares held by the above eleven shareholders. The applicant also provided some company notices that had been submitted to the Companies Office. The applicant provided various company documents for Blitec (whose full

⁶³⁰ Tupelolite additional submission: Part 1, appendix 1.

name was indicated to be Black Information Technology Empowerment Consortium (Pty) Ltd), including its certificate of incorporation, memorandum and articles of association and a shareholders' agreement.⁶³¹ A company profile for Blitec was also provided.

15.2.9 The applicant also indicated that 5% of the shares in the applicant were "held in trust" for staff. The shares in question are presumably the shares that were indicated to be held by Mr Twaddle.⁶³²

15.2.10 In line with the principles discussed in Section H (Interpretation of Key Provisions of the Act) in Part I of this Reasons Document and on the basis of the most recent information that was provided to the Authority by the applicant, Edosol Investment and Blitec are, on the basis of their respective shareholdings, deemed to control the applicant.

15.2.11 The changes to the applicant's shareholding structure were first notified to the Authority at the public hearing in relation to Tupelolite's application. The applicant did not, however, follow the procedure stipulated in the Process and Procedures Regulations in relation to the amendment of applications. The extensive changes that occurred to the applicant's ownership structure made it difficult for the Authority to evaluate the application and gave rise to concerns that the applicant had amended its application in a manner which prejudiced other applicants who had not made similar amendments to their applications.

⁶³¹ Tupelolite additional submission: Part 1, appendix 2.

⁶³² Tupelolite additional submission: Part 1, appendix 3.

15.3 Empowerment of HDPs

The applicant did not initially indicate the extent to which the applicant is owned by HDPs. After the public hearing the applicant indicated that 66% of its shares are held by HDPs.⁶³³ The applicant did not provide a breakdown as to which of its shareholders are HDPs although other information in the application suggests that all the shares in Blitec are held by black persons.⁶³⁴

15.4 Section 65(2) of the Act

The applicant indicated that its shareholders do not have any other interests in the broadcasting sector.⁶³⁵

15.5 Sections 66(2) and (3) of the Act

The applicant indicated that its shareholders do not have an interest in any newspapers. The applicant indicated that Ms Gordon, who holds 4% of the shares in the applicant, is the founder and managing director of Wag the Dog Publishers, which is a publisher of media marketing magazines and online publications.⁶³⁶ Such publishing interests are, however, not relevant for the purposes of section 66 of the Act, which refers only to interests held in newspapers. Ms Gordon also does not control the applicant.

15.6 Section 64 of the Act

The applicant indicated that it has no foreign shareholding.⁶³⁷

⁶³³ Tupelolite additional submission: Part 1: appendix 3.

⁶³⁴ Tupelolite additional submission: Part 1, appendix 2.

⁶³⁵ Tupelolite application: appendix 11.1, p 53.

⁶³⁶ Tupelolite application: appendix 11.1, p 53.

⁶³⁷ Tupelolite application: appendix 11.1, p 53.

15.7 Management, control and human resources

15.7.1 It was not clear from Tupelolite’s application how its board of directors would be structured. The applicant indicated that persons to be appointed to its board are : ⁶³⁸

15.7.1.1 Happy Ntshingila Chairman

15.7.1.2 Sandra Gordon Non-executive director

15.7.1.3 Nozipho Jafta Non-executive director

15.7.2 The applicant provided information indicating that two of these individuals are black and two are female. ⁶³⁹ As indicated above, the applicant informed the Authority at the hearing that Mr Ntshingila had resigned.

15.7.3 The letter from Mr Twaddle that was included in the original application indicated that the directors of the company would be: Mr Ntshingila, Ms Gordon, Ms Jafta, Mr Mncedisi Mayekiso, Mr Tim Shete and Mr Keith Lindsay. ⁶⁴⁰

15.7.4 Appendix 6.4 to the original application indicated further that: “Any person may become a director of the consortium who meets the criteria for members” and that the board would have at least seven members. ⁶⁴¹

15.7.5 The applicant stated that its “shareholding management team”

⁶³⁸ Tupelolite application: p 6.

⁶³⁹ Tupelolite application: pp 28 – 37.

⁶⁴⁰ Tupelolite application: appendix 6.1.

⁶⁴¹ Tupelolite application: appendix 6.1, pp 23 – 26.

and their portfolios would be as follows:⁶⁴²

:

15.7.5.1	Happy Ntshingila	Chairman
15.7.5.2	Sandra Gordon / Media	Non-executive director
15.7.5.3	Nozipho Jafta	Non-executive director
15.7.5.4	Vusi Ndala	Sales
15.7.5.5	Hugh Farrell	Sponsorships
15.7.5.6	Dave East	Marketing
15.7.5.7	Keith Lindsay	Programming
15.7.6	At the public hearing the applicant indicated that it had identified an individual who had been approached to become the applicant's CEO but could not disclose his name as the individual is current employment by another company. ⁶⁴³ The applicant further indicated that Ms Gordon and Ms Jafta would head up the sales and marketing operations of the management team. ⁶⁴⁴	
15.7.7	According to the additional documents provided by the applicant after the hearing, the applicant's directors are: ⁶⁴⁵ David Leslie East, Sandra Jane Gordon, Nozipho Ada Jafta, Lwazi Mandisi Koyana, Ruben Shadrack Nkosinathi Mebtha, and Leslie	

⁶⁴² Tupelolite application: p 6.

⁶⁴³ Transcript for Tupelolite, 24 November 2010: pp 42 - 43; Tupelolite additional submission: Part 1, p 6.

⁶⁴⁴ Transcript for Tupelolite, 24 November 2010: p 4.

⁶⁴⁵ Tupelolite additional submission: Part 1, appendix 1.

Warren Massdorp.

15.7.8 The applicant submitted an organogram of the station's staff and proposes to have a staff complement of 36 full-time employees and 22 freelance employees.⁶⁴⁶ The applicant indicated that it would employ only one person to perform sports research.

15.7.9 The applicant indicated that a number of its activities would be contracted out. The applicant indicated that it would outsource its advertising to an advertising agency. Importantly, the applicant's sports content would be sourced from Supersport. The applicant's technical maintenance installation would be provided by Morai Media. The applicant further indicated that its auditors, public relations, news and event management would be contracted out but did not provide details of the intended contractors.⁶⁴⁷

15.8 Programming

15.8.1 The applicant submitted a programme schedule covering typical weekdays, Saturdays and Sundays.⁶⁴⁸ The applicant proposes to broadcast 24 hours per day, seven days a week.⁶⁴⁹

15.8.2 The applicant indicated at the public hearing that between midnight and the morning slot it will repeat some content.⁶⁵⁰

⁶⁴⁶ Tupelolite application: appendices 8.2 & .8.2.

⁶⁴⁷ Tupelolite application: p 7.

⁶⁴⁸ Tupelolite application: appendix 13, p 57.

⁶⁴⁹ Tupelolite application: appendices 13 & 17.

⁶⁵⁰ Transcript for Tupelolite, 24 November 2010: p 47.

15.8.3 The applicant indicated that, on the basis that it will be covering sporting events, it will have some outside broadcasts and that “associations/affiliations with international broadcasters will become an everyday event as we cross over for the latest in sporting updates” and that “these will all be extracts from purchased material and/or from telephonic updates provided live from correspondents”.⁶⁵¹ The applicant did not provide any further information in relation to any contractual or other arrangements that regulate these content arrangements. The applicant subsequently indicated that university sport and school sport as well as “Developmental, Minority and Cinderella sporting codes” would be covered “because they do not seek or solicit rights fees”. In relation to the major sports codes, the applicant appeared to indicate that its sports programming would be focused on discussing sports events as opposed to providing live coverage.⁶⁵²

15.8.4 The applicant’s proposed primary target audience are persons in the 16 to 50 age bracket⁶⁵³ within the 5 - 9 LSM segments.

15.9 Format

15.9.1 The Applicant proposes to provide a sports, talk and music service “that will be filled with updates and information on the field, off the field and centred around the love of sport”. The applicant indicated that it will provide programming that is sport-driven relating to both well-known and less well-known sporting bodies. Programming will be focused on getting to know sporting celebrities’ tastes in music, lifestyles and sporting events and is intended to supplement sports programming on television. Peak-time broadcasts will be centred on sport,

⁶⁵¹ Tupelolite application: p 60.

⁶⁵² Tupelolite additional submission: Part 2: pp 15 – 16.

⁶⁵³ Tupelolite application: appendix 21, p 92.

particularly week-end sport activities.⁶⁵⁴

15.9.2 The applicant proposes to broadcast primarily talk programming in relation to sports, with some music programming.⁶⁵⁵

15.10 News

The applicant intends to broadcast news in English every hour on the hour with variable half hour updates.⁶⁵⁶ The applicant will broadcast 60% international news and 40% local news. The applicant did not indicate the proposed sources for its newscasts.⁶⁵⁷

15.11 Current affairs

The applicant indicated that it will broadcast 60 minutes of current affairs programming from Monday to Sunday between 7pm and 10pm. Current affairs will be broadcast in English and will comprise 10% regional news (this is subject to increase, based on listener request), 30% local news and 60% international news and financial updates.⁶⁵⁸

15.12 South African music

The applicant committed to broadcast between 25% - 30% South African music. The applicant indicated that it will broadcast adult contemporary music. The applicant indicated that “Music is as important to our channel as Sport and Talk issues”.⁶⁵⁹ The applicant subsequently indicated, in response to comments made by Power 98.9

⁶⁵⁴ Tupelolite application: appendix 12, pp 55 – 56; Tupelolite additional submission: Part 2, pp 13 - 14.

⁶⁵⁵ Tupelolite application: appendix 13, p 57.

⁶⁵⁶ Tupelolite application: appendix 16.1, p 59.

⁶⁵⁷ Tupelolite application: p 59.

⁶⁵⁸ Tupelolite application: Appendix 16.2, p 60.

⁶⁵⁹ Tupelolite application: Appendix 15.

FM, that “[c]urrent percentages are just an estimate. Our programme mix will be defined more accurately following our planned in-depth qualitative research survey when SPORT FM starts”.⁶⁶⁰

15.13 Languages

15.13.1 The applicant indicated that its language of broadcast will be English but that allowance will be made for any local South African sports celebrity or official to be interviewed in their own language. This will be either carried as is or with a voice-over in English.⁶⁶¹

15.13.2 The applicant did not indicate the percentage of the total population of the licence area that are able to understand the language of broadcast as required by section 20 of the ITA.

15.14 Demand, need and support

15.14.1 The applicant provided a copy of a research report prepared by Freshly Ground Insights to assess radio listeners’ appetite for a radio station focused on sport and exploring the need for a service that is currently not on offer by existing radio stations. The report indicates that 115 face-to-face interviews were conducted in the greater Pretoria region. The survey consisted of 80% male and 20% female respondents aged 18 and above, with the demographics of the sample group matching the licence area.⁶⁶²

15.14.2 The research findings were that 84% of the respondents agreed that there is a need for a radio station that will focus on sports. However, other respondents apparently indicated that they did

⁶⁶⁰ Tupelolite additional submission: Part 2, p 19.

⁶⁶¹ Tupelolite application: appendix 20, p 61.

⁶⁶² Tupelolite application: appendix 21.

not feel there was scope for a new radio station. The research report also addressed the respondents' preferences in relation to particular programming elements including the types of sports that listeners would like to hear more of and the features of entertaining and educational sports programming. The research found that, while there is an appetite for a radio station that focuses on sport, music also plays a role amongst the listeners in question.

15.14.3

Power 98.9 FM contended that the applicant's research was not a clear reflection of demand, as the survey was skewed towards males and there was consequently a bias towards positive answers and the report was commissioned to poll support for a format that had already been decided on without any exploration of the appetite for other possible formats.⁶⁶³ The applicant's response was that the bias towards males arose as a result of the market research consultant's use of AMPS and that it had not tested demand for other formats on the basis that there are already a number of the stations serving the area in question.⁶⁶⁴ Power 98.9 FM further contended that it was doubtful that there was a demand for the applicant's proposed service as its morning drive-time shows devoted 60% of broadcast time to music, which would mean that its commercial feasibility depends on there being an existing market for another "adult contemporary hits" morning show.⁶⁶⁵ The applicant's response was that the difference between its proposed service and other existing radio formats is that its "music is based on sporting celebrity, on sporting events and fan-based preference – a delicately balanced sporting jukebox".⁶⁶⁶ Power 98.9 FM

⁶⁶³ Power 98.9 FM Notes for Oral Representations: p 4.

⁶⁶⁴ Tupelolite additional submission: Part 2, p 24.

⁶⁶⁵ Power 98.9 FM Notes for Oral Representations: p 5.

⁶⁶⁶ Tupelolite additional submission: Part 2, pp 17; 20.

also commented that the applicant's assertion that "[m]usic is as important to our channel as sport and talk issues" implies that its unique offering depends on all three of music, talk and sports programming whereas the applicant's argument in relation to the need for its service is based on the fact that there is, at present, insufficient coverage of sports. As indicated above, the applicant's response was that the programming description merely estimated the percentage of broadcast time that would be spent on particular programming. The applicant also indicated that it had not tested the proportion of broadcast time that would be spent on the various components of its proposed service (music, sport, entertainment and talk).⁶⁶⁷

15.14.4 The applicant indicated that its own surveys of commercial radio channels and "in depth understanding of what various consumers want" had encouraged it "that there is a need for something different".⁶⁶⁸ The applicant also referred to various international radio stations with a similar sports-focused radio format to that proposed by the applicant and the fact that these have been relatively popular.⁶⁶⁹

15.14.5 The applicant indicated that none of the radio stations that would be its competitors, including Jacaranda FM, Metro FM, Highveld Stereo, Metsweding FM and others "run a major portion of their programming around sport". The applicant indicated in this regard that, by way of example, 5FM broadcasts 10% current affairs and sports programming, Kaya FM broadcasts 15% current affairs and sports programming, the SABC stations focus on coverage of special football games and Radio 2000 covers "perceived national interest sports events" but does not cover

⁶⁶⁷ Tupelolite additional submission: Part 2, pp 19; 24 - 25.

⁶⁶⁸ Tupelolite application: p 90.

⁶⁶⁹ Tupelolite application: p 92; Tupelolite additional submission: Part 2, p 11.

other sports. The applicant indicated that it would provide a differentiated service on the basis that its programme offering is driven “behind the power of SPORT”.⁶⁷⁰

15.14.6 The applicant projected an audience of one million listeners in its second year of operation based on its “conservative” survey and AMPS regarding listener numbers for competitor stations.⁶⁷¹ In response to comments from Power 98.9 FM, the applicant indicated that it had used Sentech coverage information to derive these audience numbers.⁶⁷²

15.15 Financial means, business record and commercial viability

15.15.1 The applicant projected an average revenue growth of 20%. Operating expenditure is expected to grow at 10% on average. The applicant’s current ratio is calculated at 10.5 and the leverage ratio is calculated at 41.6%. The applicant expects positive net profitability in year three of operations.

15.15.2 In its application, the applicant stated that it would require funding of over R26 million but did not indicate the source/s of this funding.⁶⁷³ At the public hearing the applicant indicated that it had approached the IDC, the National Empowerment Fund and Nedbank for funding.⁶⁷⁴

15.15.3 The applicant submitted amended financial information following the public hearings.⁶⁷⁵ The funding structure changed from being almost 100% dependent on debt funding to a 60:40 split in

⁶⁷⁰ Tupelolite additional submission: Part 2, pp 11 – 13.

⁶⁷¹ Tupelolite application: appendix 23.1, p 94; Tupelolite additional submission: Part 2, p 25.

⁶⁷² Tupelolite additional submission: Part 2, p 22.

⁶⁷³ Tupelolite application: appendix 29.

⁶⁷⁴ Transcript for Tupelolite, 24 November 2010: p 19.

⁶⁷⁵ Tupelolite additional submission: Part 1, appendix 5.

favour of debt to accommodate equity funding from Blitec. The 60% debt financing will be sourced from both secured and unsecured debt. The applicant indicated that the 40% equity will be funded by shareholders with the major portion emanating from Blitec. The applicant did not indicate what the breakdown of the 40% amongst the shareholders would be or whether the contribution would be proportional to their respective shareholdings.

15.16 Decision and reasons

The Authority has decided not to grant the applicant the commercial sound broadcasting licence in the Gauteng primary market for each of the following reasons considered separately, each of which is regarded as constituting adequate reason for turning down the application:

15.16.1 The information that was provided by the applicant in relation to its corporate structure was not coherent and was incomplete. While the Authority appreciates that corporate and shareholding structures may change during the course of an application process, it is incumbent on applicants to inform the Authority timeously of such changes. The Authority is bound, for reasons of fairness, to ensure that applicants do not simply amend their applications at any stage during the application process prior to a decision being taken on their applications as this has the potential to prejudice other applicants who submitted their information on time and whose applications are judged on the basis of the information contained in those applications, even where this may affect those applicants negatively.

15.16.2 The applicant did not provide sufficient details of the previous experience of its senior management and/or members of its board of directors. Accordingly, the Authority was not in a

position properly to evaluate the applicant's expertise in relation to the operation of a commercial broadcasting service.

- 15.16.3 The applicant indicated that it would obtain sports content from Supersport on an out-sourced basis and that it would employ one person to conduct sports research. Given that the applicant indicated that it was a sports-focused radio station and that this formed the basis for its need and demand analysis, this did not seem to be adequate. The applicant also indicated that it intends to broadcast international sports content but did not provide any details as to how this would be done bar making general statements that this was its intention. Accordingly, in the Authority's assessment, the applicant did not demonstrate that it had a clear strategy as to exactly how its programming service would be provided. Any information that was provided by the applicant in this regard was submitted in a haphazard and unclear manner.
- 15.16.4 The applicant indicated that its audience projection was one million listeners. The basis for this projection was not clear and did not seem to be linked to any objective statistics other than the listenership figures of other radio stations in the coverage area. The applicant did not demonstrate why its listenership would be in line with the audiences that are achieved by other commercial stations. The fact that the applicant did not, in the Authority's view, submit a solid audience projection that was objectively justifiable in turn impacts on the validity of the applicant's financial projections. As such, the Authority was not persuaded that the applicant would be commercially viable.
- 15.16.5 The applicant did not, in the Authority's assessment, adequately test its proposed service in the market. The applicant's conclusions based on its research were very general and did not

focus on the specific type of service that the applicant proposed to provide. In fact, the applicant did not appear to have a clear idea of the exact nature of the service that it proposed to provide e.g. the proportions of broadcast time that would be spent on sports or music programming and indicated that the proposed service needed further refinement following additional qualitative research. The Authority considers that the successful applicant, Power 98.9 FM, had a clearer definition of its proposed service, which was supported by comprehensive market research. In this regard, Power 98.9 FM's application was preferred.

16. VEXISERVE (PTY) LTD

16.1 Introduction

16.1.1 The Authority received an application from Vexiserve (Pty) Ltd for the individual commercial sound broadcasting service licence in the Gauteng primary market.

16.1.2 The applicant's proposed station name is "Pretoria Magic FM".
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16.1.3 The Authority received representations from Main Street and Power FM on Vexiserve's application.

16.1.4 Certain of the applicant's shareholders (Media Frequency (Pty) Ltd ("MF"), 21st Venture Capital (Pty) Ltd, CIDA Empowerment Fund (Pty) Ltd ("CIDA") and Salamax 844 (Pty) Ltd ("Salamax")) also have interests in various other corporate vehicles, namely Congreway (Pty) Ltd and Congrewell (Pty) Ltd, through which application has been made in response to the ITA for

⁶⁷⁶ Vexiserve application: p 7.

commercial sound broadcasting licences in the primary markets of KwaZulu-Natal and the Western Cape.⁶⁷⁷

16.1.5 The applicant requested that certain information submitted in its application be treated as confidential information. The Authority granted the applicant's request for confidentiality in respect of its shareholders' agreements and financial information. The Authority refused the applicant's request for confidentiality in respect to research report on the basis that this information is central to the application and interested parties' ability to comment on the application. The information also does not fall within any of the categories of information contemplated in section 4D(4) of the ICASA Act, which must be treated as confidential information.

16.2 Corporate status

16.2.1 The applicant is a consortium which has incorporated a private company for the purposes of its application in response to the ITA. The applicant submitted the founding documents of this company (including its memorandum and articles of association and certificate of its change of name) as required by the ITA.⁶⁷⁸ The Authority is satisfied that the applicant's principal place of business is located in South Africa as required by section 5(8)(b) of the Act.

16.2.2 The applicant provided various details of its shareholding structure and subsequently clarified that the structure is as follows:⁶⁷⁹

16.2.2.1 MF (previously Mshingila Investments (Pty) Ltd) 30%

⁶⁷⁷ Main Street submission: pp 5 – 6; Transcript for Vexiserve, 24 November 2010: pp 10 - 11.

⁶⁷⁸ Vexiserve application: appendix 6.1, p A1 - A18.

⁶⁷⁹ Vexiserve application: appendix 6.5.

16.2.2.2	21 st Venture Capital (Pty) Ltd	20%
16.2.2.3	CIDA	15%
16.2.2.4	Quandocept Investment (Pty) Ltd (“QI”)	15%
16.2.2.5	Salamax	10%
16.2.2.6	Rural Women’s Organisation	5%
16.2.2.7	Children’s Foundation	5%

16.2.3 The applicant submitted the founding documents (including memoranda and articles of association and some certificates of changes of name,) for each of MF, CIDA, QI and Salamax, being the applicant’s existing shareholders, as required by the ITA. As noted by Main Street, the applicant also submitted the founding documents of a company called Catwalk Investments 571 (Pty) Ltd with registration number 2000/023566/07 with no change of name certificate.⁶⁸⁰ The applicant later clarified that this entity is 21st Venture Capital.⁶⁸¹ Although the applicant indicated that Mshingila Investments is now known as Media Frequency, the applicant did not provide any documentation evidencing this change of name.

16.2.4 The applicant indicated that –⁶⁸²

16.2.4.1 100% of the shares in MF are held by Ms Pearl Sokhulu;

⁶⁸⁰ Main Street written submission, 10 August 2010: p 6, para 7.

⁶⁸¹ Vexiserve response to Main Street, 21 September 2010, p 2; Transcript for Vexiserve, 24 November 2010: p 33.

⁶⁸² Vexiserve application: pp 10 – 12.

- 16.2.4.2 100% of the shares in 21st Venture Capital are held by 21st Venture A.S., an investment company registered in Norway, in which the majority of the shares are held by Gezina A.S., also registered in Norway;
- 16.2.4.3 100% of the shares in CIDA are held by the CIDA Empowerment Trust;
- 16.2.4.4 the shares in QI are held by the following shareholders, namely Kelepile Kebokoe, Selina Kgathle, Mamphoks Josita Leremi, Prof Queen Mokhuane, Ceceil Allan Mulaudzi, Muditambi Elizabeth Ravele, Kelebogile Sechearo, Dorothy Sefanyatso, Numvuyo Yvonne Seriti, Olivia Seriti, and Pontsho Lerato Seriti-Mokoena;⁶⁸³
- 16.2.4.5 100% of the shares in Salamax are held by Khethani Trust. Khethani Trust is indicated to be a family trust of which the Nassel-Henderson family are beneficiaries;
- 16.2.5 At the public hearings, the applicant made a presentation indicating that the shareholding structure of the applicant is as follows: 21st Venture (20%); MF (30%); CIDA (15%); QI (15%); Salamax (15%) and Bosele Social Development Network (“Bosele”) as a 10% shareholder in the applicant (as opposed to the Rural Women’s Organisation and Children’s Foundation described in the application).⁶⁸⁴ At the public hearings, the applicant indicated that the Rural Women’s Organisation and Children’s Foundation became one organisation, namely Bosele, which took up the full 10% shareholding in the applicant. The applicant also indicated that Bosele, which is a rural

⁶⁸³ Vexiserve application: p 11.

⁶⁸⁴ Vexiserve presentation: p 9; Transcript for Vexiserve, 24 November 2010: p 33.

woman's and children's organisation,⁶⁸⁵ is a registered non-profit organisation which seeks to develop communities by establishing support networks for functional, home-based, children's and old age care. The applicant also indicated that Bosele is a "100% BBBEE organisation".⁶⁸⁶ The applicant indicated that further information in connection with Bosele was provided in its response to Main Street's submissions on its application, and that failing to identify Bosele did not materially affect the strategic direction, funding principles or operations of the applicant.⁶⁸⁷

16.2.6 The applicant indicated further that a Staff Share Incentive Trust would be established for the benefit of the employees, and that the shareholders have agreed in principle to make at least 5% of the shareholding in the applicant available for the establishment of such a trust.⁶⁸⁸

16.3 Empowerment of HDPs

16.3.1 The applicant states that 70% of its equity ownership is held by HDPs.⁶⁸⁹ In this regard, the applicant indicated that –

16.3.1.1 All the shares in MF, which holds 30% of the shares in the applicant, are held by Ms Pearl Sokhulu, who is an HDP.

16.3.1.2 CIDA, which holds 15% of the shares in the applicant, is a broad-based BEE trust. In this regard, the applicant

⁶⁸⁵ Vexiserve additional information, 8 December 2010: p 2, para 4.2.

⁶⁸⁶ Vexiserve additional information, 8 December 2010: pp 6 & 7.

⁶⁸⁷ Vexiserve response to Main Street, 21 September 2010, p 2; Vexiserve additional information, 8 December 2010: p 3.

⁶⁸⁸ Vexiserve additional information, 8 December 2010: p 7.

⁶⁸⁹ Vexiserve application: p 5; Transcript for Vexiserve, 24 November 2010: p 14.

submitted a BEE ratings certificate prepared by the National Empowerment Ratings Agency indicating that CIDA is a Level One contributor to BEE.⁶⁹⁰

16.3.1.3 QI, which holds 15% of the shares in the applicant, is wholly-owned by eleven HDP shareholders.⁶⁹¹

16.3.1.4 Both the Rural Women's Organisation and the Children's Foundation (collectively, Bosele) are broad-based BEE organisations.

16.3.2 On the basis of the information presented by the applicant, the Authority is satisfied that the applicant complies with and exceeds the 30% HDP shareholding requirement set in the ITA.

16.4 Sections 65(2) and (3) of the Act

16.4.1 The applicant indicated that 21st Venture Capital holds 20% of the shares in North West FM (Pty) Ltd, which is a licensed commercial sound broadcasting service in the North West province.⁶⁹² For the reasons given in Section H (Interpretation of Key Provisions of the Act) in Part I of this Reasons Document, 21st Venture Capital is deemed to control North West FM. As a 20% shareholder in the applicant, 21st Venture Capital would also control the applicant. If the licence were to be awarded to the applicant, there would be no contravention of section 65(2)(a) or (3) of the Act on the basis that (1) 21st Venture Capital would not control more than two commercial FM sound broadcasting service licences and (2) North West FM and the new Gauteng licence do not have the same or substantially

⁶⁹⁰ Vexiserve application: p B33.

⁶⁹¹ Vexiserve application: pp 11; C3.

⁶⁹² Vexiserve application: p 12.

overlapping licence areas. Similarly, Mr Larsen, Mr Henderson and Ms Sokhulu who are all directors of North West FM, would not be in contravention of section 65(2)(b) of the Act on the same basis.

16.4.2 The applicant indicated that Salamax, which presently holds 10% of the shares in the applicant, is presently undertaking a restructuring exercise in terms of which 10% of the shares in North West FM which are presently held by the Khethani Trust will be transferred to it. This is subject to the Authority's approval.⁶⁹³ Main Street urged the Authority to have regard to the funding and commercial arrangements between these parties.⁶⁹⁴ In the Authority's assessment, Salamax does not control the applicant simply by virtue of its 10% shareholding and the acquisition is merely proposed at this stage and has not yet been effected. Accordingly, Salamax's potential acquisition of 10% of the shares in North West FM is not presently relevant for the purposes of section 65 of the Act.

16.4.3 As raised in by Main Street,⁶⁹⁵ if the Authority were to award a commercial broadcasting service licence to the various corporate vehicles established by the applicant's shareholders in each of the three primary markets, this would result in a contravention of section 65(2) of the Act in respect of the shares held by MF and 21st Venture Capital in each applicant. This is on the basis that MF and 21st Venture Capital hold 20% or more of the shares in each applicant and, accordingly, for the reasons given in Section H (Interpretation of Key Provisions of the Act) in Part I of this Reasons Document, are deemed to be in "control" of each applicant. The applicant did not advance reasons as to

⁶⁹³ Vexiserve application: p 23.

⁶⁹⁴ Main Street submission: p 6, para 8.3; Transcript for Vexiserve, 24 November 2010: p 35.

⁶⁹⁵ Main Street submission, 10 August 2010: pp 7 – 8.

why it or either of the other two applicants for commercial FM sound broadcasting service licences in KwaZulu-Natal and the Western Cape should be exempted from the requirements of section 65(2) in this regard, as provided for in section 65(6) of the Act, on the basis that it did not expect all three applications to be successful.⁶⁹⁶ In any event, it became unnecessary for the Authority to consider this issue in further detail in the context of Vexiserve's application on the basis that Vexiserve's application was refused for other reasons.

16.5 Section 66(2) and (3) of the Act

The applicant indicated that neither it nor any of its shareholders with more than 20% of the shares in the applicant has an ownership or control interest in any newspaper.⁶⁹⁷

16.6 Section 64 of the Act

16.6.1 At the public hearings in relation to its application, the applicant was requested to furnish the Authority with its views on the proper interpretation of section 64 of the Act and, in particular, on the level of shareholding which may be held by foreigners.⁶⁹⁸ As discussed in Section H (Interpretation of Key Provisions of the Act) in Part I of this Reasons Document, the applicant made further submissions to the Authority on this issue. The Authority's general findings in this regard are discussed in Section H.

16.6.2 21st Venture Capital, which holds 20% of the shares in the applicant, is wholly-owned by 21st Venture AS, a foreign

⁶⁹⁶ Vexiserve response to Main Street, 21 September 2010, pp 3 – 4.

⁶⁹⁷ Vexiserve application: p 22.

⁶⁹⁸ Transcript for Vexiserve, 24 November 2010: pp 42 – 45.

Norwegian private investment company in which Gezina AS, a Norwegian company, is the largest shareholder. The applicant indicated that a further 5% of the shares in the applicant would be transferred to 21st Venture Capital by Salamax, which presently holds 10% of the shares in the applicant, once the Act is amended to allow foreign shareholders to have more than 20% of the voting shares and paid-up capital in a commercial broadcasting service licence.⁶⁹⁹ There is nothing in the shareholders' agreement or other documents submitted by the applicant to suggest that 21st Venture Capital presently controls more than 20% of the voting shares or paid-up capital in the applicant. Accordingly, the intention for 21st Venture Capital to acquire a further 5% of the shares in the applicant is irrelevant for present purposes given that, in the Authority's assessment, the Act currently imposes a 20% restriction on foreign shareholding and, regardless of the parties' intention, no transaction has been entered into between Salamax and 21st Venture Capital. Given that (1) each ordinary share in the applicant carries one vote, (2) in terms of the shareholders' agreement, 21st Venture Capital does not have any additional control rights in the applicant and (3) the applicant confirmed that 21st Venture Capital has no additional rights in respect of the shares presently held by Salamax,⁷⁰⁰ the applicant is not in breach of section 64(1)(a) or the restriction in section 64(1)(b) on foreigners having an interest exceeding 20% in "voting shares or paid-up capital in a commercial broadcasting licensee".

16.6.3

As discussed in Section H in Part I of this Reasons Document, an issue which arose for consideration is whether the applicant would be in breach of the restriction on a foreigner having a

⁶⁹⁹ Vexiserve application: pp 23; E11 - 12.

⁷⁰⁰ Transcript for Vexiserve, 24 November 2010: p 29.

“financial interest” in excess of 20% in a licensee on the basis that 21st Venture Capital, which is wholly owned by a foreign-registered company, will provide R6.5 million of the applicant’s required R8 million funding.⁷⁰¹ In this regard –

16.6.3.1 The applicant indicated that R1 million of the required R8 million funding would be funded through the equity contributions of the shareholders in proportion to their shareholdings and R7 million would be raised through shareholder loans.⁷⁰²

16.6.3.2 The shareholders’ agreement provides that 21st Venture Capital, MF and Salamax would fund the equity contributions of CIDA, QI, the Rural Women’s Organisation and the Children’s Foundation (i.e. Bosele), who collectively hold or will hold 35% of the shares in the applicant.⁷⁰³ The application indicated that 21st Venture Capital would provide funding to these BEE entities and intended to facilitate a loan from the Norwegian Foreign Aid Agency (NORAD). A letter of commitment from 21st Venture Capital’s indirect majority shareholder, Gezina A.S. was included in the application indicating that Gezina A.S. would contribute the to the funding of the proposed station in line with what is indicated in the application.⁷⁰⁴

16.6.3.3 The applicant indicated that 21st Venture Capital would provide 81% of the total required funding, MF would

⁷⁰¹ Vexiserve application: p 45; Transcript for Vexiserve, 24 November 2010: pp 38 - 45; Main Street written submission, 10 August 2010: pp 8 - 9.

⁷⁰² Vexiserve application: p 45.

⁷⁰³ Vexiserve application: p E11 & E12; Transcript for Vexiserve, 24 November 2010: pp 13 - 14.

⁷⁰⁴ Vexiserve application: pp G1 – 2.

provide 4%, Salamax would provide 10% and Mr Robinson would provide 5%. The applicant indicated that this finance would be provided on shareholder loan account. In this regard, the shareholders' agreement provides that shareholders' loans should generally be in proportion to their shareholdings but that shareholders may make a loan to the company out of proportion to their respective shareholdings provided that, inter alia, any such loan will be repayable before other shareholders' loans until such time as the loan is in proportion to the relevant shareholding and all shareholders' loans bear the same rate of interest.⁷⁰⁵

16.6.3.4 The applicant indicated that 21st Venture A.S. does not indirectly acquire any further voting or control rights in the applicant by virtue of the fact that it, through 21st Venture Capital, will provide a greater proportion of the applicant's required funding through a shareholder loan.⁷⁰⁶

16.6.3.5 In the Authority's assessment, the applicant's shareholders' agreement, which regulates shareholder loans, does not confer on 21st Venture Capital any additional control rights as 21st Venture Capital's voting rights are in proportion to its shareholding and its appointed director will have no additional rights to dictate the applicant's affairs regardless of the extent of the shareholder loan that it makes to the applicant.

16.6.4 Main Street submitted that the applicant's funding arrangements would breach the restriction on foreigners holding a financial interest in a commercial broadcasting licence in excess of

⁷⁰⁵ Vexiserve application: pp E23 – 24.

⁷⁰⁶ Transcript for Vexiserve, 24 November 2010: pp 42 - 45.

20%.⁷⁰⁷

16.6.5 For the reasons given in Section H (Interpretation of Key Provisions of the Act) in Part I, in the Authority's assessment, the fact that 21st Venture A.S. does not have any additional rights which would allow it to control the applicant means that it does not have a "financial interest" in the applicant for the purposes of section 64(1)(b) of the Act.

16.6.6 One of the applicant's four directors, Mr Larsen, is foreign. The applicant is thus in breach of section 64(2) of the Act on the basis that more than 20% of its directors are foreign.

16.7 Management, control and human resources

16.7.1 In its application, the applicant indicated that its board of directors will be made up of four individuals of whom two are woman and two are men.⁷⁰⁸ The applicant indicated that the board will initially comprise Ms Sokhulu, Mr Larsen, Ms Nomvuyo Seriti and Mr John Nassel-Henderson. Most of these individuals have some previous experience in commercial radio broadcasting either in management or presenting. In particular, Ms Sokhulu was previously the managing director of iGagasi FM, a commercial radio broadcaster and Mr Larsen is a director of North West FM and a Botswanan commercial radio station.⁷⁰⁹

16.7.2 In terms of the applicant's shareholders' agreement between the applicant's shareholders, each shareholder which holds 10% of the shares in the applicant may appoint or remove a director and

⁷⁰⁷ Main Street written submission, 10 August 2010: pp 8 - 9.

⁷⁰⁸ Vexiserve application: pp13 - 14.

⁷⁰⁹ Vexiserve application: pp 14 – 15.

75% of the shareholders together may appoint further directors.⁷¹⁰ Accordingly, on the basis of the applicant's current shareholding structure, MF, 21st Venture Capital, CIDA, QI, Salamax and Bosele would each be in a position to appoint or remove a director. As such, there would be six directors on the applicant's board as opposed to four. At present, however, it appears that there are only four directors

16.7.3 The applicant did not submit specific details of the individuals who would make up its senior management and indicated that details will be submitted in due course as such individuals are identified and/or indicate their willingness to publicly provide their details.⁷¹¹ The applicant indicated that 100% of the applicant's management would be made up of black people from the initial stages of its operation.⁷¹² The applicant's shareholders' agreement indicated that responsibility for the day-to-day management of the applicant would vest in the board.⁷¹³

16.7.4 The applicant submitted an organogram of the station's staff and proposed to have a staff complement of 16 full-time and 19 part-time employees.⁷¹⁴

16.8 Programming

16.8.1 As required by the ITA, the applicant submitted a detailed programme schedule covering typical weekdays, Saturdays and Sundays.⁷¹⁵ The applicant proposes to broadcast 24 hours

⁷¹⁰ Vexiserve application: pp E12 – 13.

⁷¹¹ Vexiserve application: p 13 - 15.

⁷¹² Vexiserve application: p 67.

⁷¹³ Vexiserve application: p E25.

⁷¹⁴ Vexiserve application: pp 17 & 18.

⁷¹⁵ Vexiserve application: pp 28 - 29.

per day, seven days a week and proposes commencing broadcasting within six months of being granted the licence.⁷¹⁶

16.8.2 The applicant indicated that its target audience is Black Setswana and Sepedi speaking people between 25 and 49, who understand and use English.⁷¹⁷ The size of the applicant's expected audience over one week is 300 000 with a weekly reach of 13% of the adult population in the broadcasting area after the applicant's first year of operation.⁷¹⁸

16.8.3 There is some confusion in the applicant's application as to whether any non-local programming or syndicated programming will be broadcast.⁷¹⁹

16.8.4 The applicant's proposed programme schedule is similar to the schedules which were submitted by each of Congreway and Congrewell in their applications for commercial licences in the KwaZulu-Natal and Western Cape primary markets. This issue was also raised in Main Street's written submission on the application.⁷²⁰ The applicant commented in this regard that the difference will be in the language of broadcast and the local issues that will be addressed⁷²¹ and that in this respect the proposed service is tailored to the identified target market in the Gauteng area.

⁷¹⁶ Vexiserve application: pp 34 - 35.

⁷¹⁷ Vexiserve application: p 38; Vexiserve presentation: p 2; Transcript for Vexiserve, 24 November 2010: p 4.

⁷¹⁸ Vexiserve application: p 38.

⁷¹⁹ Vexiserve application: pp 28; 35.

⁷²⁰ Main Street written submission, 10 August 2010: pp 9 - 10.

⁷²¹ Transcript for Vexiserve, 24 November 2010: pp 30 - 31.

16.9 Format

16.9.1 The applicant indicated that the proposed radio station will be a Setswana, Sepedi and English music radio station. The music to be broadcast will consist of Soft R&B/AC/Afropop (including classical soul and inspirational/gospel), and talk in primetime slots.⁷²²

16.9.2 The applicant intends to deliver a mix of music, entertainment, news, culture, debate and current affairs. The overall focus will be on providing full service programming with a strong local, provincial and regional focus.⁷²³

16.9.3 The applicant indicated that speech will be limited to 25% of programme airtime during peak time and 30% of programme airtime during non-peak time.⁷²⁴

16.10 News

The applicant indicated that it will broadcast, in English, 50 minutes of news daily, which will comprise 20 minutes of local news, 20 minutes of national news and 10 minutes of international news. News will be sourced from various sources, including SAPA, Newsflash, websites, newspapers and freelance news reporters based in and around the broadcast coverage area.⁷²⁵ The applicant indicated that approximately 35% of the news and current affairs content will be of a local nature.⁷²⁶

⁷²² Vexiserve application: pp 6; 24 - 25.

⁷²³ Vexiserve application: pp 24 - 25.

⁷²⁴ Vexiserve application: p 31.

⁷²⁵ Vexiserve application: pp 32 - 34.

⁷²⁶ Vexiserve application: pp 6.

16.11 Current affairs

The applicant indicated that it will broadcast 210 minutes of current affairs programming per weekday. The applicant anticipates that approximately 55% of current affairs will be generated from the coverage area.⁷²⁷

16.12 South African music

The applicant indicated that it will commence broadcasting to meet the minimum local content requirements of the Authority, but expects to exceed these minimum requirements within a period of time. This was on the basis that the nature of the applicant's programming is unique, and will automatically give it access to a higher percentage of local content.⁷²⁸ The applicant provided some illustrative tracks as examples of the South African music that it intends to broadcast.⁷²⁹

16.13 Languages

The applicant's proposed language of broadcast is English (30%), Setswana (35%) and Sepedi (35%).⁷³⁰ The applicant indicated that there are 612,000 people who understand Setswana, 438,000 people who understand Sepedi and 1,480,000 people who understand English in the coverage area.⁷³¹ The applicant did not supply any references to any supporting data in relation to these assertions.

16.14 Demand, need and support

16.14.1 The applicant conducted secondary research through analysis

⁷²⁷ Vexiserve application: p 34.

⁷²⁸ Vexiserve application: p 31.

⁷²⁹ Vexiserve application: p 32.

⁷³⁰ Vexiserve application: p 36.

⁷³¹ Vexiserve application: p 36.

of music preferences from “existing sources”, including AMPS and RAMS, to determine its proposed programming format and the demographics and profile of the population in the target area.⁷³² The applicant indicated that it identified gaps in the market on the basis of this research. In particular, the applicant’s research indicated that the applicant’s target market likes the following music: gospel (68%); love songs or ballads (43%); jazz or fusion or blues (41%); rhythm and blues or soul (38%); and house music (31%).⁷³³

16.14.2 The applicant indicated that it also conducted a “dipstick study” in the second phase of its market research in which a sample of 100 radio listeners were surveyed to substantiate and qualify the information that had been obtained through the AMPS and RAMS information.⁷³⁴

16.14.3 This sample was comprised of 100 Black people, both male and female, between the ages of 25 and 50. The questionnaire for the survey, which was conducted by Echo Research, consisted of only two questions:

16.14.3.1 “If a radio station was playing your favourite music, what language would you prefer the presenters to speak?”

16.14.3.2 “The new radio station is thinking of playing soft songs by artists like Judith Sephuima, Simphive Dana and Ringo as well as international hits by artists like Luther Vandross, Brian McKnight and Celin Dion. The stations will be different from other stations in that its selection of songs

⁷³² Vexiserve application: p 25; Vexiserve presentation: p 3; Transcript for Vexiserve, 24 November 2010: pp 32 - 33.

⁷³³ Vexiserve application: p F2.

⁷³⁴ Vexiserve presentation: p 3; Transcript for Vexiserve, 24 November 2010: pp 33 – 34.

will be more smooth and laid back. Would this kind of music appeal to you?" (sic)⁷³⁵

16.14.4 The results of the format feasibility study indicated that the applicant's target audience's preferred broadcast language in Gauteng was English – 50%.⁷³⁶ The applicant indicated that, based on its market research, 91% of respondents accepted the applicant's proposed format.⁷³⁷

16.14.5 Despite 50% of respondents indicating that their preferred broadcast language in Gauteng was English, the applicant indicated that the proposed radio station will cater to listeners in the area in their home language.⁷³⁸ This appears to have been based on the applicant's secondary research which indicated that 63% of the target group consider Sepedi and Setswana to be their home language, and 86% of these people say that they prefer to be spoken to and addressed in their own language.⁷³⁹ This question was never directed at the applicant's sample group during its primary research. Specific details in relation to the composition of the applicant's sample group were also not provided. The applicant also indicated that it will provide soft R&B/AC/Afro pop (including classical soul and inspirational/gospel) targeted at Setswana and Sepedi speaking people between the ages of 25 and 49. In the Authority's assessment, this proposed format only partly addresses the results obtained from the applicant's secondary research which indicated that the applicant's target market likes the following music: gospel (68%); love songs or ballads (43%); jazz or fusion or blues (41%); R&B or soul (38%); and house music (31%).

⁷³⁵ Vexiserve application: p F4.

⁷³⁶ Vexiserve application: p F5.

⁷³⁷ Vexiserve application: p F5.

⁷³⁸ Vexiserve Application: p 38.

⁷³⁹ Transcript for Vexiserve, 24 November 2010: p 7.

16.14.6 The applicant indicated that it expects an audience of 300.000 listeners over the course of one week, after one year of operation, and a reach of 13% of the population.⁷⁴⁰

16.15 Financial means, business record and commercial viability

16.15.1 The applicant presented information in relation to, amongst other things, its required funding, anticipated revenue and revenue growth, operating expenditure and capital expenditure. The applicant indicated that its required capital expenditure and working capital is estimated to be⁷⁴¹

16.15.2 The applicant projected an average revenue growth of 30%. Operating expenses are projected to grow at 12% on average. The applicant has a current ratio of 3.4 for the period and a leverage ratio of 86%. The applicant indicated that it expects to be profitable from its third year of operation.⁷⁴² The applicant indicated that it will be funded through equity and shareholder loans.⁷⁴³ The applicant presented information in relation to, amongst other things, its required funding, anticipated revenue and revenue growth, operating expenditure and capital expenditure.

16.15.3 The applicant indicated that the shareholders will raise the necessary funds independently through their respective financial structures as soon as possible after the granting of the licence. In this regard, the applicant also indicated that 21st Venture Capital would fund its own 20% shareholding and would provide

⁷⁴⁰ Vexiserve application: pp 6; 38.

⁷⁴¹ Vexiserve application: p 43. (Confidential)

⁷⁴² Vexiserve application: p 43.

⁷⁴³ Vexiserve application: p 47.

all of the funding for the other BEE shareholders.⁷⁴⁴ The applicant indicated that 21st Venture would provide in excess of 80% of the required funding; MF will provide 4% of the total required funding; and Salamax will provide 10% of the total funding.⁷⁴⁵ The applicant indicated further that it also intends to approach the National Empowerment Fund and/or the Development Bank of South Africa to apply for some funding in the event that the licence is granted to the applicant.⁷⁴⁶

16.15.4 The applicant indicated that 21st Venture A.S. does not indirectly acquire any further voting or control rights in the applicant by virtue of the fact that it, through 21st Venture Capital, will provide a greater proportion of the applicant's required funding. In the Authority's assessment, the applicant's shareholders' agreement, which regulates shareholder loans, does not confer on 21st Venture Capital any additional control rights as 21st Venture Capital's voting rights are in proportion to its shareholding and its appointed director will have no additional rights to dictate the applicant's affairs regardless of the extent of the shareholder loan that it makes to the applicant.

16.15.5 For the reasons given in Section H (Interpretation of Key Provisions of the Act) in Part I of this Reasons Document, the Authority's position is that, in the absence of any additional control rights, 21st Venture Capital does not have a "financial interest" in the applicant for the purposes of the Act. As such, the fact that 21st Venture Capital would provide the largest proportion of the applicant's required funding was not, in the Authority's assessment, problematic in terms of section 64(1)(b) of the Act.

⁷⁴⁴ Vexiserve application: p 50.

⁷⁴⁵ Vexiserve application: p 49.

⁷⁴⁶ Vexiserve application: p 51.

16.15.6 One of the applicant's five directors, Mr Larsen, is foreign. The applicant is not in breach of section 64(2) of the Act on the basis that not more than 20% of its directors are foreign. In addition, the applicant's shareholders' agreement does not confer on 21st Venture Capital the right to appoint any more than 20% of the applicant's directors.

16.16 Decision and reasons

The Authority has decided not to grant the applicant the individual commercial sound broadcasting licence in the metropolitan area of and around Gauteng primary market for each one of the following reasons considered separately, each of which is regarded as constituting adequate reason for turning down the application:

16.16.1 The relatively high percentage of HDP shareholding in the applicant was a favourable consideration in the Authority's evaluation of the applicant's application on the basis that, if a broadcasting licence were to be awarded to the applicant, this would contribute to the empowerment of HDPs, which the Authority is required to promote in terms of section 5(9)(b) of the Act.

16.16.2 The Authority was satisfied that the identified members of the applicant's board of directors have the necessary capability and expertise to operate a commercial radio station, having regard to their respective profiles and business records.

16.16.3 The applicant did not conduct substantial primary research in relation to its proposed offering – only 100 people were interviewed and these respondents were asked only two questions, neither of which really tested the demand or need for the proposed format. In the Authority's assessment, the

applicant thus only really performed analysis of existing research sources, primarily those available from the SAARF, in order to assess market demand. In this regard, the applicant's approach appeared to be to analyse AMPS and RAMS surveys in relation to music preferences and the demographics of the relevant licence areas and to structure its proposed offering on the basis of perceived gaps. Based on the applicant's secondary research, the applicant determined that there was both demand and need for a mellow and soft R&B/AC/Afropop (including soul and gospel) music station but, in the Authority's assessment, this proposed format only partly addresses the results obtained from the applicant's secondary research. In the Authority's assessment, the applicant did not clearly demonstrate that there is a need for the proposed service, as provided for in section 51(b) of the Act.

16.16.4

Based on the primary market research performed by the applicant, the Authority can also not reach the conclusion that a proportion of the targeted listeners will be interested in listening to a radio station, let alone a radio station focusing on mellow and soft R&B/AC/Afropop (including soul and gospel) music. In other words, the interviews conducted with the sample group were not sufficiently detailed to enable any sort of assessment as to the target audience's actual needs and demands and in no way demonstrated with any degree of certainty, that the applicant's proposed target audience would, in fact, tune-in to such a service if it was made available in the proposed coverage area. In the Authority's assessment, the applicant did not clearly demonstrate that there is a demand for the proposed service, as provided for in section 51(a) of the Act.

16.16.5

The applicant did not provide any objective references or indication as to the basis for its assertion that its expected

audience after its first year of operation is 300,000 persons over the course of one week or why its weekly reach is anticipated to be 13% of the adult population in the coverage area. Accordingly, in the Authority's assessment, these assertions are without any objectively verifiable basis.