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## GENERAL NOTICE

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### NOTICE 1039 OF 2010



**Independent Communications Authority of South Africa**

Pinmill Farm, 164 Katherine Street, Sandton

Private Bag X10002, Sandton, 2146

### INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

The Independent Communications Authority of South Africa hereby publishes reasons for its decision with regard to the application by KFM (Proprietary) limited, for the amendment of their individual commercial sound broadcasting service licence.

A handwritten signature in black ink, appearing to be 'SS Mncube', written over a horizontal line.

**Dr SS MNCUBE**

**CHAIRPERSON**

**ICASA**

**Dr SS Mncube (Chairperson), NA Batyi, WH Currie, JM Lebooa, TLV Makhakhe, N Ndhlovu, FK Sibanda,  
Dr MM Socikwa, WF Stucke (Councillors), TTC Dlamini (CEO)**

**APPLICATION FOR AMENDMENT OF BROADCASTING LICENCE CONDITIONS**

**KFM (PROPRIETARY) LIMITED**

**REASONS FOR DECISION**

**OCTOBER 2010**

**A INTRODUCTION**

1. KFM (Pty) Ltd ("licensee"), trading as KFM, holds an individual licence to provide commercial sound broadcasting services ("the licence"). On 30 July 2009 the licensee submitted an application ("the Application") to the Independent Communications Authority of South Africa ("the Authority") for the amendment of the licence. The licence amendment is intended to enable the licensee to conclude a sale of shares and transfer of the licence to Primedia (Pty) Ltd ("Primedia"). The sale of shares would result in the deletion of clauses 9.1 and 9.2 of the licence which stipulates:

*"9.1 The licensee shall maintain a minimum of 30% ownership and control of the station within the broadcast geographic coverage area.*

*9.2. The licensee shall operate a staff share incentive scheme holding 5% of the shares in the licensee and benefiting all staff."*

2. The Licensee submitted the application in terms of section 10 of the Electronic Communications Act 36 of 2005 ("the Act") read with regulation 9<sup>1</sup> of the **Regulations regarding the processes and procedures for applications for an individual licence to provide electronic communications network services, electronic communications services and broadcasting services, and for temporary special authorisations and matters pertaining thereto**; published in Government Gazette No. 30916 of 31 March 2008 ("the regulations"). Section 10 of the Act sets out the basis on which the Authority may amend an individual licence:

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

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<sup>1</sup> An application to amend a licence must be in the format as set out in Form C and must be accompanied by the applicable fee.

- (a) *To make the terms and conditions of the individual licence consistent with the terms and conditions being imposed generally in respect of all individual licences of the same type;*
- (b) *For the purpose of ensuring fair competition between licencees;*
- (c) *To the extent requested by the licensee provided it will not militate against orderly frequency management and will not prejudice the interests of other licensees;*
- (d) *To the extent necessitated by technological change or in the interest of orderly frequency management;*
- (e) *In accordance with a decision made by the Authority in terms of section 17E of the ICASA Act following a finding and recommendation by the Complaints and Compliance Committee;*
- (f) *Where the Authority is satisfied that the amendment is necessary to ensure the achievement of the objectives of this Act;*
- (g) *If the amendment relates to universal access or universal service and is necessary, in the opinion of the Authority, as a result of –*
  - (i) *Changed circumstances in the market; or*
  - (ii) *lack of electronic communications network services, broadcasting services, or electronic communications services in specifically identified areas of the Republic.*
- (h) *If the amendment is in pursuance of and in accordance with the regulations made under chapter 10.*

3. The licensee submitted the application in terms of Section 10 (1) (c) of the Act.
4. On 18 August 2009, the Authority published the application in General Notice 1160 published in Government Gazette No. 32508 and interested parties were given until 15 September 2009 to lodge representations. No representations were received by the Authority in respect of the application.
5. On 12 March 2010, the Authority held public hearings in respect of the application. The hearing notice appeared in General Notice 195 published in Government Gazette No. 32995 dated 2 March 2010.

**B THE APPLICATION**

6. The shareholding of KFM (Pty) Ltd before the application was submitted to the Authority is as follows:<sup>2</sup>

New Africa Media Holdings (Pty) Ltd ("NAM")	66.5%
Broadcape Investments ("Broadcape")	28.5%
Employee Share Trust ("Employee Trust")	5%

7. The reasons advanced by licensee for the proposed amendment to the licence are the following:

7.1 Primedia, through NAM, has entered into a sale of shares and Claims Agreement in terms of which NAM is to acquire the shares and claims of Broadcape in the licensee,

7.2 Primedia, through NAM, has made an offer to all of the beneficiaries of the Employee Trust to purchase the 5% stake in the licensee; and

7.3 To effect a transfer of KFM(Pty) Ltd's licence to Primedia, after the sale of shares, in order to regularise the holding of its broadcasting assets.<sup>3</sup>

8. In 2000, NAM and Broadcape made an undertaking to the Authority to set aside a portion of each of their shareholdings so as to set up a staff share trust. This undertaking was provided for in clause 9.2 of the licence conditions.<sup>4</sup>

9. Primedia holds 100% shares in NAM, which holds 66,5% of the shares in the licensee and thus makes Primedia the controlling shareholder in KFM (Pty) Ltd.

10. In the event that the sale of shares agreements between Broadcape, Employee Trust and the NAM is approved by the Authority, Primedia will become the sole

<sup>2</sup> KFM Amendment Hearing Transcript: p 11, para 10.

<sup>3</sup> KFM Amendment Application: Appendix 3.2, pp 1-2.

<sup>4</sup> KFM Amendment Hearing Transcript: p 10, para 10.

shareholder in the licensee and this will lead to the cancellation of clauses 9.1 and 9.2 of the licence.<sup>5</sup>

11. The licensee submitted that the two clauses were introduced in the licence conditions in order to ensure that broadcasting as a whole was not owned and controlled only by persons from Gauteng and to encourage broad-based black economic empowerment ("BBBEE").<sup>6</sup>
12. The Mineworkers Investment Company ("MIC") holds 69,5% of the shares in Primedia. MIC is a 100% BBBEE Company. Through the Mineworkers Investment Trust ("MIT"), MIC has approximately 1.2 million beneficiaries made up of mining, energy and construction workers and their dependants.<sup>7</sup> Of these, about 10,500 are in the Western Cape alone and approximately 8000 in the Northern Cape. From a seed capital funding of R3 million in 1995 from the National Union of Mineworkers MIC has, to date, distributed dividends totalling R368 million, with R245 million distributed in 2008 alone. MIC's support of the worker's children has resulted in 594 graduates to date.<sup>8</sup>
13. The intention of the sale of shares and transfer of the licence is to simplify Primedia's shareholding in the licensee as it was the case in the already approved applications of 94, 7 Highveld Stereo, Talk Radio 702 and 567 Cape Talk and; also to make it possible for the relevant shareholders and beneficiaries to realise their investments.<sup>9</sup>

<sup>5</sup> KFM Amendment Hearing Transcript: p 12, para 10.

<sup>6</sup> KFM Amendment Application: Appendix 3.3, p 4.

<sup>7</sup> KFM Amendment Hearing Transcript: p 15 p 20.

<sup>8</sup> KFM Amendment Hearing Transcript: p 16 para 10 – 20.

<sup>9</sup> KFM Amendment Application: Appendix 3.2 p 2, para 2.2.

### C. THE AUTHORITY'S DECISION

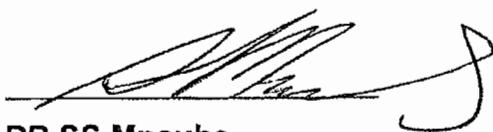
14. The Authority has decided to approve the licensee's application to amend and transfer its licence to Primedia.
15. The reasons for the Authority's decision are set out below:
  - 15.1 The Authority considered the question whether the loss of the local and employee representative value which is ensured by clauses 9.1 and 9.2 of the licence and the resulting 100% shareholding by Primedia can be justified. In so far as the cancellation of clauses 9.1 and 9.2 is concerned, a regional ownership share and a staff share scheme were typical of the times before the Broad-Based Black Economic Empowerment Act ("BBBEE Act") of 2003. The licence ensured that there was a local financial interest in the broadcaster and that staff would be involved financially;
  - 15.2 The licensee submitted that once clauses 9.1 and 2 are deleted by the Authority, a broad-based scheme of benefits will become effective. This will be achieved by the controlling shareholder in Primedia, namely MIC via the Mineworkers Investment Trust ("MIT"). The Authority is thus satisfied that the amendment will result in broad-based black economic empowerment;
  - 15.3 The existing employee share trust had the effect of differentiating between the nine (9) beneficiaries of the trust and the other employees of the licensee. The Authority noted that the amendment and transfer of the licence to Primedia will ensure that all its employees are remunerated and benefited in an equitable manner without differentiation;
  - 15.4 MIC, which is 100% black owned, holds 69, 5%, of the shares in Primedia. The Authority is thus satisfied that equity shareholding by historically disadvantaged groups far exceed the 30% threshold required by section 9 (2) (b) of the Act;
  - 15.5 The Authority also considered and accepted the licensee's stated intention of making it possible for the relevant shareholders of Broadcape and Employee Trust

beneficiaries to realise their investment. The licensee submitted that the approval of the proposed amendments will unlock the value of their shares after almost 14 years.<sup>10</sup> Furthermore, Broadcape, the local company with 37 shareholders, which holds 28,5% shares in KFM, has agreed to sell its shareholding to Primedia;

15.6 The Authority also found that the proposed amendment will not militate against orderly frequency management in terms of section 10(1) (c) of the Act. Furthermore, the amendment will not prejudice the interests of other licensees in terms of section 10(1) (c) of the Act;

15.7 The Authority also considered the fact that the sale of shares held by Broadcape and Employee Trust would result in the transfer of the licence to Primedia. In terms of regulation 12 of the regulations, the Authority can approve an amendment and transfer of a licence if there is no finding of a contravention by CCC and non-compliance with an order of Council; no non-payment of licence fees and where ownership and control of historically disadvantaged persons is not less than 30%. The Authority found that the licensee did not violate any of the three conditions enumerated above; and

16. The application to amend and transfer KFM (Pty) Ltd's licence to Primedia has been granted on the basis of the aforesaid reasons.



**DR SS Mncube**

**Chairperson**

<sup>10</sup> <sup>10</sup> KFM Amendment Hearing Transcript: p 14, para 10.