



Ref: L/T-TOP/20/038

Mr. Balkrishna Kaunhye
Managing Director
TOP FM Ltd
7th Floor, The Peninsula,
2A, Falcon Street,
Caudan
Port-Louis

03 April 2020

Dear Sir,

Re: BREACHES IN THE NEWS BROADCAST BY TOP FM LTD ON 06 AUGUST 2019

SUSPENSION OF LICENCE TOP FM LTD

1. TOP FM Ltd. is the holder of a **PRIVATE COMMERCIAL FREE TO AIR FM RADIO BROADCASTING LICENCE** (the "Licence") issued by the Independent Broadcasting Authority, (the "Authority"), pursuant to the provisions of the Independent Broadcasting Authority Act.
2. The Licence was renewed by the Authority for the period 13 December 2018 to 12 December 2021.
3. Clause 9 of the Licence provides for suspension of the Licence and reads as follows:

"9. SUSPENSION

9.1 Notwithstanding Clause 8 above, where the Authority is satisfied that –

- a. *the Licensee has failed to start its operation within 6 months of the issue of this Licence or within such additional period as may be allowed by the Authority;*
- b. *the Licensee has ceased its operation under this Licence;*

- c. *the Licensee has given the Authority information which is false or misleading in a material particular;*
 - d. *the Licensee has failed to comply with the Code of Conduct specified in the Second Schedule to the Act (ANNEX A);*
 - e. *it is in the public interest to do so,*
- it may suspend the Licence.”*

4. TOP FM Ltd., as any other licensee, is also bound by the terms of its licence and by section 21(6) of the Independent Broadcasting Authority Act which makes it **mandatory** for it to comply with the terms and conditions of its licence. This has statutory underpinning as section 21(6) of the Independent Broadcasting Authority Act provides that:

“A licensee shall comply with the terms and conditions of a licence.”

5. It is clear that the Code of Conduct for Broadcasting Services (see clause 9.1(d) of TOP FM Ltd.'s licence) has, as a matter of law, to be complied with. A breach of the Code of Conduct for Broadcasting Services, is also a breach of clause 9.1(d) of TOP FM Ltd.'s licence. TOP FM Ltd.'s licence, in clause 9.1(d), clearly specifies that such a breach may lead to a suspension of the licence.
6. On 06 August 2019, TOP FM Ltd broadcast the following extract in its news bulletin of 17:00 hours:

"Neshen Pillay:

Octroi de deux nouvelles licences radio, le Board de l'IBA était illégalement constitué. C'est ce qui ressort de la réponse donnée par Yogida Sawmynaden à la Private Notice Question du leader de l'opposition ce matin. Ce dernier voulait savoir si le Board de l'Independent Broadcasting Authority était composé d'au moins 3 membres indépendants comme l'exige la section 6 (f) de l'IBA Act. À plusieurs reprises, lors de ses questions supplémentaires, Xavier-Luc Duval a révélé des éléments troublants concernant l'exercice d'octroi de permis. Naren Jassodanand, Stacy Irlanda.



Stacy Irlanda :

À la première question supplémentaire de Xavier Duval, le ministre des TICs a affirmé que tous les membres de l'IBA sont indépendants mais le leader de l'Opposition n'est pas d'accord.

Xavier-Luc Duval:

Madam Speaker, may I ask the honourable minister whether section 6 of the IBA Act does not clearly specify that the board should have a minimum of three independent members that the time of allocating the licence and to date, these three independent members are non-existent at the board and it is completely filled by government employees and nominees. (Interruptions) I am surprised it is a small ministry, your ministry (interruptions)

Stacy Irlanda:

A une autre question de Xavier-Luc Duval..."

7. The Authority, at its meeting of 11 September 2019, considered the above item and was of the considered view that the news item broadcast by TOP FM Ltd at 17h00 on 06 August 2019 was in breach of:
 - (a) paragraphs 2.1 and 2.2 of the Code of Ethics;
 - (b) paragraphs 3(1), 3(2), 3(3) and 3(4) of the Code of Conduct for Broadcasting Services; and
 - (c) paragraph 25.1 of the Licence of TOP FM Ltd.
8. By way of letter dated 18 September 2019 (Ref: L/T-TOP/19/072), TOP FM Ltd was requested to show cause, by 26 September 2019 at noon, as to why it should not be sanctioned for breaches of paragraphs 2.1 and 2.2 of the Code of Ethics, paragraphs 3(1), 3(2), 3(3) and 3(4) of the Code of Conduct for Broadcasting Services and paragraph 25.1 of the licence of TOP FM Ltd.
9. Me Ashok B. Radhakisson, whose services were retained by TOP FM Ltd, requested for an extension of time to respond to the said letter. That request was, in fairness to TOP FM Ltd, favourably considered by the Authority.



10. By way of letter dated 06 October 2019 Me Ashok B. Radhakissoo thanked the Authority for having acceded to his request for an extension of time. He also, in the same letter, requested for particulars which of the potential breaches referred to in the letter issued by the Authority to TOP FM Ltd on 18 September 2019 (Ref: L/T-TOP/19/072).
11. The request for particulars in relation to the alleged breaches by TOP FM Ltd was debated during the Authority's meeting of 10 October 2019.
12. By way of e-Board Resolution No 21 of 2019, circulated on 29 October 2019, the Authority approved the particulars to be provided to TOP FM Ltd.
13. By way of letter dated 03 November 2019 (Ref: L/T-TOP/19/086), the Authority provided the particulars requested by Me Ashok B. Radhakissoo and explained in detail how, in its view, the extract set out in paragraph 6 of this letter constituted the breaches which are set out in paragraph 7 of this letter.
14. By way of letter dated 26 November 2019, TOP FM Ltd replied to the Authority's letter dated 18 September 2019 which requested it to show cause why TOP FM Ltd should not be sanctioned for the potential breaches in its news item broadcast on 6 August 2019 at 1700.
15. The reply of TOP FM Ltd as well as the breaches referred to in paragraph 7 above were debated at length during the Authority's meetings of 15 January 2020, 27 February 2020 and 16 March 2020.
16. On 16 March 2020, the Authority decided to consider only the breaches of the Code of Conduct for Broadcasting Services referred to a paragraph 7 above. The Authority decided, in fairness to TOP FM Ltd., that no further action be taken in relation to the other breaches set out at paragraph 7 above.
17. The Authority's discussions on the breaches by TOP FM Ltd. were finally concluded by e-Board Resolution No.4 of 2020 circulated on 31 March 2020.
18. After having considered the explanations of TOP FM Ltd, the Authority is not satisfied with the explanations of TOP FM Ltd and is of the considered opinion that TOP FM Ltd



has breached paragraphs 3(1), 3(2), 3(3) and 3(4) of the Code of Conduct for Broadcasting Services set out in the Second Schedule to the Independent Broadcasting Authority Act.

19. The Authority highlights that a breach of the Code of Conduct for Broadcasting Services is a matter which is to be taken seriously as section 21(7) of the Independent Broadcasting Authority Act provides that licensees ***“shall carry out its activities in compliance with the code of conduct specified in the Second Schedule.”*** [underlining is ours]. The Authority further highlights that the word “shall” is to be read as being imperative (vide section 5(4)(a) of the Interpretation and General Clauses Act, as judicially considered and applied in the case of **Ng Kwet Leong v Medical Council of Mauritius 2019 SCJ 1.**
20. The news broadcast by TOP FM Ltd on 06 August 2019 at 17:00 hours is considered by the Authority as breaching the Code of Conduct for Broadcasting Services as follows:
- (a) not reporting news truthfully (i.e it was reported that the Board of the Authority was illegally constituted); (paragraph 3(1) of the Code of Conduct for Broadcasting Services);
 - (b) it was misrepresented that the Board of the Authority was illegally constituted; (paragraph 3(2) of the Code of Conduct for Broadcasting Services);
 - (c) it was misrepresented that the Board of the Authority was illegally constituted when, in fact, the fact that the Board was illegally constituted was merely the view of the Leader of the Opposition; (paragraph 3(3) of the Code of Conduct for Broadcasting Services);
 - (d) the allegation that the Board of the Authority was illegally constituted was not verified by TOP FM Ltd. before its news presenter stated that the Board of the IBA was illegally constituted. (paragraph 3(4) of the Code of Conduct for Broadcasting Services);
 - (e) in addition, the Authority highlighted in its letter of 3 November 2019 to TOP FM Ltd, that at no point did the Honourable Minister Sawmynaden state that he agreed with the Leader of the Opposition that the Board of the Authority was illegally constituted; and
 - (f) the Authority also pointed out in that letter that the extract taken as a whole breached paragraphs 3(1), 3(2), 3(3) and 3(4) of the Code of Conduct for Broadcasting Services.



21. The Authority is not satisfied with the explanations of TOP FM Ltd and considers that the suspension of the Licence of TOP FM Ltd is well warranted given the breaches of the Code of Conduct for Broadcasting Service set out in this letter and explained, in detail, in the Authority's correspondences to TOP FM Ltd.

22. The Authority took note that the maximum period for the suspension of a licence is 21 days (vide section 25(2)(b) of the Independent Broadcasting Authority Act). The Authority has considered this matter very anxiously. In deciding the length of suspension to be given to TOP FM Ltd., the Authority, as an independent regulator, is fully alive to the fact that the suspension of a licence is a not a matter which may be treated lightly. A suspension of a licence prevents the broadcaster from broadcasting and it reduces the number of voices being heard and the range of programmes available to the audience. The Authority considers that the threshold to suspend a broadcaster's licence is, therefore, high.

23. The Authority has considered:

- (a) the nature of the breaches;
- (b) the explanations of TOP FM Ltd.;
- (c) the applicable law; and
- (d) TOP FM Ltd.'s licence,

before coming to a conclusion on this matter.

24. The Authority has further applied the test of proportionality to decide on the length of suspension to be meted out to TOP FM Ltd. The Authority is of the considered view that that the breaches committed by TOP FM Ltd justify the suspension of TOP FM Ltd.'s licence for 2 days out of a maximum number of 21 days suspension which could have been given to TOP FM Ltd by the Authority (vide section 25(2)(b) of the Independent Broadcasting Authority Act).

25. The particulars of the suspension period decided by the Authority in respect of TOP FM Ltd are as follows:

Date suspension starts	:	04th April 2020
Time suspension starts	:	06:00 a.m.
Date suspension ends	:	06th April 2020
Time suspension ends	:	06:00 a.m.



26. The effect of the suspension is that during the suspension period TOP FM Ltd should not broadcast any material.

27. TOP FM Ltd. is further directed by the Authority to give public notice of this suspension prior to it taking effect.

28. TOP FM Ltd is further reminded that paragraph 35.1 of its licence provides as follows:

"35. BASHING

35.1 The Licensee shall refrain from using its air to criticise decisions or directions/directives issued to it by the Authority with a view to discredit the latter."

SIGNED FOR AND ON BEHALF OF THE INDEPENDENT BROADCASTING AUTHORITY.



**K. Ramphul
Acting Director**