



# Memorandum

on the

## Kenya Communications (Broadcasting) Regulations, 2009

November 2009

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## **About the ARTICLE 19 Law Programme**

The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme operates the Media Law Analysis Unit which publishes a number of legal analyses each year, commenting on legislative proposals as well as existing laws that affect the right to freedom of expression. The Unit was established in 1998 as a means of supporting positive law reform efforts worldwide, and our legal analyses frequently lead to substantial improvements in proposed or existing domestic legislation. All of our analyses are available online at <http://www.article19.org/publications/law/legal-analyses.html>.

If you would like to discuss this Memorandum further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at [law@article19.org](mailto:law@article19.org).

## OVERVIEW OF RECOMMENDATIONS

### **Recommendations on the licensing procedure:**

- The Communications Commission should be tasked with the development of a frequency plan which sets out how the frequencies available for broadcasting in Kenya will be shared equitably and in the public interest among the various tiers of broadcasting (public, commercial and community), the two types of broadcasters (radio and television) and broadcasters of different geographic reach (national, regional and local).
- Opportunities to apply for a broadcasting licence should be properly publicised. Frequencies in which multiple operators may be interested should be put up for tender, while applications for broadcasting in underserved areas should be accepted on a rolling basis.
- When announcing the availability of a frequency, the Commission should be required to publish, at the same time, which documentation must be included in an application. The Commission should not enjoy blanket discretion to require any documentation it sees fit - any documentation required should be directly relevant to the criteria for awarding the licence.
- The Broadcasting Regulations should provide for public participation in the development of the frequency plan and public comment on individual licensing decisions.
- Clear time limits should be prescribed within which the Commission must take its decision. The decision should be in writing, accompanied by reasons, and subject to judicial review.
- A clear distinction should be made between the criteria according to which licence applications are assessed and the conditions subject to which licences are granted.
- Trade unions should not be subject to a blanket ban on applying for a licence.
- Section 4(3)(b), requiring all broadcasters to carry news and information, and allowing the Commission to prescribe the broadcasting of “discussions on matters of national importance”, should be deleted.
- The Broadcasting Regulations should set out clear time limits on the duration of different types of licences, and require the Commission to adopt a clear schedule of fees in advance.
- Licence holders should benefit from a presumption of renewal at the end of the licence term.

### **Recommendations on specific rules for the public service broadcaster and community broadcasting:**

- Discussion of the public service broadcaster in the proposed Broadcasting Regulations should be limited to reserving an equitable number of frequencies in the frequency plan. ARTICLE 19 would greatly support transformation of the Kenya Broadcasting Corporation (KBC) into a true modern public service broadcaster, but this requires an overhaul of the KBC Act.
- Further thought should be given to whether the benefits of making KBC eligible for licences for commercial broadcasting outweigh the risks.

- An equitable number of frequencies should be reserved for community broadcasting through the frequency plan.
- Community broadcasting licences should be made available for free or at very low cost.
- The application requirements set out in Section 3 should be relaxed in respect of community broadcasters. In particular, they should not be required to demonstrate the ability to broadcast for at least eight continuous hours per day, and the requirements to provide a business plan and demonstrate experience and expertise should be interpreted leniently, in line with what may reasonably be expected from a local non-profit group.

#### **Recommendations on concentration of ownership and regularisation of existing broadcasters:**

- The rule barring a licensee from holding multiple licences in the same coverage area should be amended to make it explicit that no person may control, whether directly or indirectly, more than one licence.
- Consideration should be given to imposing additional limits on the total audience level one licensee may reach.
- Limits should be placed on the level of permissible cross-ownership between newspapers and broadcast outlets.
- Licensees should not be required to at all times comply with the Government's "Communications Sector Policy".
- Only changes of ownership which affect control over a broadcaster should require the prior written consent of the Commission.
- The Commission should be tasked with developing a clear strategy, including steps to be achieved year-to-year, to transition from the current situation to the scenario set out in the frequency plan within five years. This should include a fair and orderly process for reclaiming and reissuing frequencies from broadcasters who currently hold more than they are entitled to.
- The licences issued to existing broadcasters should be valid only for the transitional period. Upon their expiry, the broadcasters should reapply according to the ordinary licensing procedure.

#### **Recommendations on content issues:**

- Part IV of the proposed Broadcasting Regulations, on content issues, should be deleted, with the exception of Section 31. In line with the Communications Act, the regulation of content should be left to the Programme Code to be developed by the Commission, or self-regulatory codes developed by broadcasters and accepted by the Commission.
- Section 39, requiring broadcasters to carry public notices of emergency issued by the government, is unnecessary and should be deleted.
- Section 31(1) should require the Commission to publish a schedule detailing the level of local content which each category of broadcaster must provide. In determining these levels, the Commission should have regard to the costs of developing quality local content and the resources available to the category of broadcaster.
- Consideration should be given to exempting foreign broadcasters from the duty to carry local content.

#### **Recommendations on complaints procedures:**

- The Commission should be entitled to reject a broadcaster's proposed complaints procedure only if it fails to meet a requirement set out in Section 35(2).
- The standard by which complaints are judged should be identified. Presumably, complaints may allege a violation of the Act, the Regulations, the Programme Code or, alternatively, a broadcaster's self-regulatory code.
- Section 40 should be replaced with a provision requiring the Commission to respond to any breaches of a broadcaster's obligations with proportionate sanctions, applied in a graduated manner, having regard to the seriousness of the breach and the broadcaster's overall compliance record.
- Decisions to apply a sanction against a broadcaster should be presented writing, accompanied by the reasons, and should be subject to judicial review.
- The Commission, which is not equipped to conduct criminal trials, should not be in a position to impose prison sentences on any individual.

## 1. INTRODUCTION

This Memorandum provides ARTICLE 19's analysis of the proposed Kenya Communications (Broadcasting) Regulations (hereinafter 'the Broadcasting Regulations') against international standards on freedom of expression. ARTICLE 19 is an international, non-governmental human rights organisation which works with partner organisations around the world to protect and promote the right to freedom of expression. We have previously provided legal analyses in the area of broadcasting law to government and civil society organisations in over 30 countries.<sup>1</sup> Article 19 has been working in Kenya since 2007 and has a regional office in Nairobi supporting 9 countries in the region. Our legal work in Kenya has included the production of analyses of various existing and proposed pieces of legislation, including the Media Council Bill,<sup>2</sup> Freedom of Information Bill,<sup>3</sup> and the Kenyan Constitution's provisions on freedom of expression.<sup>4</sup>

The Broadcasting Regulations are part of a series of proposals drawn up by the Ministry of Information and Communications in consultation with the Communications Commission of Kenya ('the Commission'), in order to implement the Kenya Communications Act, 1998, as amended in 2009 ('the Communications Act'). The Broadcasting Regulations are intended principally to govern the exercise of the Commission's licensing powers, to set out rules for broadcast content and to establish a mechanism to enforce those rules.

The proposal has a number of positive aspects. Commendable is that some steps are envisaged to tackle the current situation in which frequencies have been handed out in a fairly haphazard manner and an undue degree of media concentration has come about. On the other hand, the timeframe for reallocating these frequencies is quite long and there is still no provision for the development of a frequency plan, to set out a long-term vision for a pluralistic broadcasting sector and put licensing decisions on a more structured footing. The proposed content rules are highly problematic, not only because many of them are overbroad, vague and unjustified, but because they pre-empt the development of a Programme Code by the Commission and self-regulation by broadcasters, as foreseen in the Communications Act. By contrast, the proposal sensibly relies on self-regulation as the primary mechanism of enforcement for content rules, with a role for the Commission only where disputes cannot be settled between broadcasters and their audience directly.

This analysis examines whether and the extent to which the proposed Broadcasting Regulations actually enhance the right of freedom of expression in Kenya. Our comments are based on general international standards regarding freedom of expression and broadcast regulation, as found in international human rights instruments and elaborated by the UN Human Rights Committee and other human rights courts, mechanisms and constitutional tribunals worldwide. These standards are encapsulated in a separate ARTICLE 19 publication, *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation* (the ARTICLE 19 Principles).<sup>5</sup>

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<sup>1</sup> An overview of these analyses can be found on the ARTICLE 19 website, at <http://www.article19.org/publications/law/legal-analyses.html>.

<sup>2</sup> See <http://www.article19.org/pdfs/analysis/kenya-media-council-bill.pdf>.

<sup>3</sup> See <http://www.article19.org/pdfs/analysis/kenya-foi.pdf>.

<sup>4</sup> See <http://www.article19.org/pdfs/analysis/note-on-the-existing-kenyan-constitutional-provisions-on-freedom-of-expression.pdf>.

<sup>5</sup> London, April 2002, available at <http://www.article19.org/pdfs/standards/accessairwaves.pdf>.

## **2. ANALYSIS OF THE BROADCASTING REGULATIONS**

The Broadcasting Regulations are divided into seven parts. These can be grouped as follows. Part I deals with preliminary issues such as definitions. Part II sets out the general licensing procedure. Part III prescribes additional rules for specific categories of broadcasters, such as the public service broadcaster and community broadcasters. Parts IV and V deal with content issues, while Part VI defines the right of the public to complain about content. Part VII sets out a number of transitional provisions.

The analysis of the Broadcasting Regulations in this Memorandum follows the same order.

### **2.1. The Licensing Procedure**

#### Overview of proposal

The licensing procedure commences with an application for the grant of a licence. Section 3 requires the applicant to furnish the Commission with a range of documentation, including a viable business plan, evidence of the necessary technical and personnel resources to carry out broadcasting services for at least eight continuous hours a day, and “such other information or requirement as the Commission may from time to time prescribe”.

Trade unions and proscribed groups are ineligible to apply for a licence, according to Section 3(4). This supplements Section 46(d)(1) of the Communications Act, which already disqualifies political parties, bankrupt persons and those of unsound mind.

Section 4(1) states that the Commission shall ensure that broadcasting services “reflect the culture, needs and aspirations” of their audience, and provide “efficient delivery of programming using the most effective technologies available”. Section 4(3) adds that the Commission shall ensure that free-to-air broadcasting services (unencrypted broadcasts available without subscription) provide an appropriate amount of local content, as well as news, information and discussion on matters of national importance. It is not very clear whether these provisions are intended as a general statement on the policy to be followed by the Commission, or as specific criteria which must be taken into consideration when considering a licence application, over and above the criteria laid down in Section 46(d)(2) of the Communications Act.

Once licensed, every broadcaster is subject to a range of obligations. Section 4(2) states that broadcasters must annually file their station identity with the Commission, and ensure it is unique to avoid confusion. (The term ‘station identity’ is not defined - we assume it refers to the name / logo under which the broadcaster operates.) Broadcasters must also keep such records as the Commission may prescribe. Section 5 requires licensees to announce the commencement of broadcasting services at least 14 days beforehand, along with their contact details, which can be used to complain of any interference caused by the new service. Part III of the proposed Broadcast Regulations provide further specific obligations for different types of broadcasters. These are further discussed in Section 2.2 of this Memorandum below.



## Analysis of proposal

The licensing rules contain a number of useful provisions and positive language on the objectives of the licensing process. However, we believe this part of the proposal will require substantial further work if it is to contribute to the development of a pluralistic broadcasting landscape.

### *2.1.1. Need for frequency planning*

In order to secure an orderly transition from the current situation, it would seem three basic steps must be taken by the Commission: (1) drawing up a blueprint of what the broadcasting landscape in Kenya should look like in the future; (2) establishing a procedure to allocate broadcasting frequencies in accordance with that blueprint; and (3) establishing a proper process to revoke or drawn down permits for frequencies which are currently being used in a way contrary to the blueprint, and subsequently re-issuing them according to it.

Our first concern is that the idea of a blueprint is largely absent from the proposed Broadcasting Regulations. Although the Communications Act provides a range of sensible criteria to evaluate each individual licence application, there is no provision for the development of a broader long-term plan to ensure overall diversity of services. In many democracies, the broadcast regulator is explicitly tasked with drawing up such a “frequency plan” to promote the optimal use of the available broadcasting frequencies. In addition to assisting the regulator with structured decision-making, such a plan also makes the regulator more accountable – the public can criticise licensing decisions which appear to deviate from the pre-agreed plan. Accordingly, we recommend that the Commission be given the task to develop a frequency plan through the Broadcasting Regulations. Moreover, in the Kenyan situation, it would be a good idea to mandate the development of a series of intermediate, annual plans, illustrating how the transformation from the current situation to the planned future situation will be achieved over a number of years.

The final frequency plan should be drawn up in an open and participatory way, seeking input from the public. It should reserve equitable numbers of frequencies for each type of broadcaster, as explained in paragraph 9.3 of ARTICLE 19’s *Access to the Airwaves*:<sup>6</sup>

The frequency plan should ensure that the broadcasting frequencies are shared equitably and in the public interest among the three tiers of broadcasting (public, commercial and community), the two types of broadcasters (radio and television) and broadcasters of different geographic reach (national, regional and local).

Returning to the licensing procedure as proposed in the Broadcasting Regulations, we believe it is important to ensure that the following are present: (1) clear rules on when and how to apply; (2) a clear and transparent procedure; (3) a set of well-defined criteria for deciding whether or not to grant the licence; (4) clear rules on the terms on which a licence will be awarded. In our view, improvement is possible on all four points.

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<sup>6</sup> See note 5.

### 2.1.2. Applications for licences

With regard to applications for broadcasting licences, it is not specified at which time they may be made. It makes sense to adopt two approaches: frequencies in which multiple operators are likely to be interested (such as local frequencies in densely populated areas, or frequencies for national TV) should be awarded through a tender procedure, so that the Commission has a range of proposals to compare and chose from. On the other hand, *ad hoc* applications should be accepted for frequencies in underserved areas. The Commission should publish an overview of available frequencies on its website, so that interested parties know they are in a position to apply. When a tender is organised, this should be publicised broadly through a call for applications in relevant media.

We are somewhat troubled by the fact that, in addition to the business plan, evidence of capacity and other documentation which an applicant must provide, the Commission is granted the right to prescribe further requirements “from time to time”. We understand that the documentation required for an application for a community broadcasting licence may differ, for example, from a national commercial broadcasting licence; but this is a rather open-ended provision which could be abused to impose onerous and unjustified requirements on less favoured applicants. We would recommend instead rewriting Section 3 to the effect that whenever the Commission announces the availability of a frequency, it shall publish at the same time an overview of the documentation any applicant must supply. This shall include the items listed in Section 3(a)-(d), as well as any further documentation which is directly relevant to assessing whether the applicant meets the criteria established in the Communications Act, Broadcasting Regulations and Frequency Plan for grant of the licence in question.

In order to make the licensing procedure more transparent and participatory, we further recommend that the Commission should be required to make an announcement whenever it has received and is considering an application, and the public should be given an adequate opportunity to comment on it. This would be in line with Principle V of the *Declaration on Principles of Freedom of Expression in Africa*, which states that “licensing processes shall be fair and transparent.”<sup>7</sup> Clear timelines are also needed. A deadline should be prescribed within which the Commission will decide on an application and issue the licence, if the applicant is successful. The Commission should provide its decisions in writing, stating the reasons, so that unsuccessful applicants have an opportunity to contest the decision in court. (We note that a consultation is also currently ongoing on the proposed “Kenya Communications (Licensing and Quality of Service) Regulations”, which could also be an appropriate place to include such procedural rules).

### 2.1.3. Criteria for the awarding of a licence

We find the proposed Broadcasting Regulations fail to draw a clear distinction between criteria by which applications for a licence will be judged, and conditions to be included in different types of licences. These are certainly two different things. For example, if there are two radio stations operating in a district, both of them devoted to news and debates, and there are five applicants for the licence to operate the third, an important criterion for deciding will be: which of those applicants will be able to contribute most to diversity by offering

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<sup>7</sup> Declaration of Principles on Freedom of Expression in Africa, adopted by the African Commission on Human and Peoples’ Rights at its 32nd Ordinary Session, Banjul, The Gambia, 23 October 2002.

something completely different? However, “contribute to diversity” would not be a suitable licence condition as it is rather unspecific. A concrete licence condition in this case could be to carry at least a certain number of hours of cultural, sports and music programmes every week, and no more than a certain number of hours of news programmes.

Section 4 illustrates the problem. The remark in the first paragraph, that broadcasting shall reflect the culture, needs and aspirations of viewers, sounds like a selection criterion (but it could be an overly vague licence term); the second paragraph, which amongst others requires broadcasters to file their station identity with the Commission annually, is clearly a licence condition.

We recommend to reorganise the relevant parts of sections 1-14 into the following scheme:

1. General selection criteria which are applicable to all applications for a broadcasting licence
2. Additional criteria for each type of service (commercial broadcasting, public service broadcasting, community broadcasting, subscription broadcasting, etc.)
3. General conditions to be included in all broadcasting licences
4. Additional conditions to be included in licences for different types of service.

In respect of the general criteria for licence grants, Section 46(d) of the Communications Act provides very useful guidance. We are not convinced that there is sufficient justification to add to these criteria a ban on licences for trade unions. While general criteria of diversity and balance may often play against an application for a licence by a trade union, we do not think that the possibility of a trade union meeting these requirements should be ruled out in principle.

#### ***2.1.4. Licence conditions***

The licence conditions found in the proposal – insofar as they can be clearly distinguished – are for the most part uncontroversial.

This is not true, however, of Section 4(3)(b), which requires broadcasters to include news and information, as well as discussion of matters of national importance as prescribed by the Commission, in their programming. The obligation to carry news and information programmes may be a suitable licence condition for national stations, but it should not be an obligation for each and every broadcaster. The idea of the Commission dictating the coverage of “matters of national importance” is particularly problematic, and raises the spectre of unjustified political interference. This provision should be deleted. Broadcasters will almost certainly cover such matters on their own initiative, and insofar as they fail to, it is the task of the public service broadcaster to remedy this.

Conspicuous by their absence from the proposal are certain conditions which one would expect to be included in any broadcasting licence.

In the first place, nothing is said about the duration for which licences will be issued. This need not, of course, be the same for every category of licence; the key consideration is that the term should be long enough to encourage the licensee to make investments into delivering a good service, yet short enough to enable reassignment of the frequency within a reasonable

time frame, if the broadcaster is not serving the public interest. As a rule, therefore, smaller operations (such as community broadcasters) should be given a licence with a shorter duration. We also recommend that a licensee should benefit from a presumption of licence renewal, unless the licensee has substantially failed to comply with the licence conditions or renewal is clearly against the public interest. This encourages long-term investment by the licensee, as well as an independent stance. Any refusal to renew the licence should be accompanied by written reasons and subject to appeal in court.

Second, the proposal does not mention any fee payable by licensees (except that Section 42 does allow the Commission to charge existing permit holders for the issuance of a licence). Section 46C of the Communications Act permits the Commission to prescribe the payment of a licence fee. We assume this will be done and in fact recommend making this mandatory: the Commission should publish and at fixed intervals update a uniform schedule of fees, setting the price for each type of licence. This will prevent *ad hoc* and arbitrary decision-making. The level of fees should obviously depend on the level of revenue that the licensee can expect, and should not be set so high as to hamper investment in quality programming.

## Recommendations:

- The Commission should be tasked with the development of a frequency plan which sets out how the frequencies available for broadcasting in Kenya will be shared equitably and in the public interest among the various tiers of broadcasting (public, commercial and community), the two types of broadcasters (radio and television) and broadcasters of different geographic reach (national, regional and local).
- Opportunities to apply for a broadcasting licence should be properly publicised. Frequencies in which multiple operators may be interested should be put up for tender, while applications for broadcasting in underserved areas should be accepted on a rolling basis.
- When announcing the availability of a frequency, the Commission should be required to publish, at the same time, which documentation must be included in an application. The Commission should not enjoy blanket discretion to require any documentation it sees fit - any documentation required should be directly relevant to the criteria for awarding the licence.
- The Broadcasting Regulations should provide for public participation in the development of the frequency plan and public comment on individual licensing decisions.
- Clear time limits should be prescribed within which the Commission must take its decision. The decision should be in writing, accompanied by reasons, and subject to judicial review.
- A clear distinction should be made between the criteria according to which licence applications are assessed and the conditions subject to which licences are granted.
- Trade unions should not be subject to a blanket ban on applying for a licence.
- Section 4(3)(b), requiring all broadcasters to carry news and information, and allowing the Commission to prescribe the broadcasting of “discussions on matters of national importance”, should be deleted.
- The Broadcasting Regulations should set out clear time limits on the duration of different types of licences, and require the Commission to adopt a clear schedule

of fees in advance.

- Licence holders should benefit from a presumption of renewal at the end of the licence term.

## 2.2. Rules applicable to specific types of broadcasters

### Overview of proposal

Part III of the proposed Broadcasting Regulations, entitled “Broadcasting Services”, sets out a number of distinct rules for each type of broadcasting service. We limit our consideration here to public service broadcasting and community broadcasting.

Section 7 provides, briefly put, that the public broadcaster must provide information, education and entertainment programming in an impartial and independent manner, in a way which serves the different communities in Kenya, especially those not generally catered for by other broadcasting services. The public broadcaster may not let its frequencies out to other operators; however, it is eligible to apply for commercial broadcasting licences, as long as it maintains separate accounts for its public service and commercial operations.

Community broadcasting is covered by Section 9. Community broadcasters must serve the needs of people within the relevant community, and particularly deal with issues of community interest that are not adequately catered to by other broadcasters. Their programmes must be informational, educational and entertaining in nature, and must highlight grassroots community issues.

### Analysis of proposal

#### *2.2.1. The public service broadcaster*

Section 7 describes, in very brief summary, what the mandate of a public service broadcaster should be in a modern democracy. While we agree with this statement, we wonder what the purpose is of including this nutshell definition of the objectives for the Kenya Broadcasting Corporation in the proposed Broadcasting Regulations. Giving true effect to these objectives requires a detailed law, with provisions on the appointment of an independent board, funding mechanisms which insulate the broadcaster against political or commercial pressure, rules on accountability to the public, and so on. ARTICLE 19 has published an extensive *Model Public Service Broadcasting Law*, which covers all these subjects in some detail.<sup>8</sup> We would greatly welcome a decision to review the Kenya Broadcasting Corporation Act to bring it into line with international standards.

We believe the provisions in the proposed Broadcasting Regulations should be limited to ensuring that an appropriate number of frequencies is reserved for the public service broadcaster in the frequency plan.

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<sup>8</sup> London, June 2005. Available online at <http://www.article19.org/pdfs/standards/modelpsblaw.pdf>.

The idea of granting the public service broadcaster additional frequencies for commercial broadcasting is not without risk. If not handled properly, this could lead to unfair competition with the private sector and a board which loses sight of its public service mandate. The private sector may also be better at delivering commercial broadcasting services than a public body. On the other hand, commercial operations could provide an independent source of funding for the Kenya Broadcasting Corporation, reinforcing its independence from government. This could also be achieved by allocating part of the licence fees paid by private broadcasters to KBC, rather than KBC running its own commercial venture.

### ***2.2.2. Community broadcasting***

The Communications Act, in Section 2, provides a progressive definition of “community broadcasting service”. Section 46F, moreover, sets out a series of criteria to be taken into account when deciding whether to grant a community broadcaster a licence, and a number of conditions which may be included in the licence.

Section 9 of the proposed Broadcasting Regulations is again open to the criticism that it is not clear whether this is intended as a set of additional selection criteria, or additional licence conditions. In our view, these provisions are too vague to be suitable as concrete requirements under a licence, but as selection criteria they are certainly appropriate.

A number of factors will be crucial to the successful development of community broadcasting in Kenya. First, an equitable portion of the available broadcast frequencies must be reserved for community broadcasting through the frequency plan discussed above. Second, community broadcasters (who are required under the Communications Act to operate as not-for-profits) should receive their licence for free or at a very low cost. This should be guaranteed through the schedule of fees. Third, the procedure for licensing community broadcasters should not be too burdensome. We recommend exempting community broadcasters from the requirement to demonstrate the ability to broadcast for 8 continuous hours daily, and instead set a reasonable total number of hours per week. We also strongly recommend adding a paragraph to Section 3, to the effect that in the case of an application for a community broadcasting licence, the requirements to demonstrate a viable business plan, technical capability, relevant experience and expertise shall be interpreted leniently, in line with what may be reasonable expected from a non-profit entity run by a local community.

#### **Recommendations:**

- Discussion of the public service broadcaster in the proposed Broadcasting Regulations should be limited to reserving an equitable number of frequencies in the frequency plan. ARTICLE 19 would greatly support transformation of the Kenya Broadcasting Corporation (KBC) into a true modern public service broadcaster, but this requires an overhaul of the KBC Act.
- Further thought should be given to whether the benefits of making KBC eligible for licences for commercial broadcasting outweigh the risks.
- An equitable number of frequencies should be reserved for community broadcasting through the frequency plan.

- Community broadcasting licences should be made available for free or at very low cost.
- The application requirements set out in Section 3 should be relaxed in respect of community broadcasters. In particular, they should not be required to demonstrate the ability to broadcast for at least eight continuous hours per day, and the requirements to provide a business plan and demonstrate experience and expertise should be interpreted leniently, in line with what may reasonably be expected from a local non-profit group.

### **2.3. Concentration of ownership and regularisation of existing broadcasters**

#### Overview of proposal

Section 6, entitled “ownership and control”, prescribes limits to the number of licences that can be held concurrently by one licensee, as well as setting out rules on the shareholding of a licensee.

Pursuant to paragraph 1, no licensee (with the exception of the public service broadcaster) may be assigned more than one broadcast frequency for radio or television in the same coverage area. Paragraph 2 states that shareholding of a licensee shall at all times comply with the Government’s “Communications Sector Policy”. The following paragraphs state that licensees must notify the Commission of any proposed change in their ownership, with prior written consent by the Commission required if the change exceeds 15% of the issued share capital, or an existing shareholder is acquiring at least 5% additional share. In taking its decision, the Commission must take a number of criteria set out in paragraph 5 into consideration, such as the capacity of the acquiring entity, the impact on pluralism and competition, the compliance record of acquiring and acquired entities, and so on.

The situation of existing broadcasters is dealt with through a number of provisions. Section 5(1) states that the Commission shall prescribe a timeframe for existing stations to bring themselves into compliance with the rule barring licensees from holding multiple licences in the same coverage area. Section 42(3) in fact prescribes such a timeframe, stating that additional broadcasting licences must be surrendered within a period not exceeding five years.

More immediately, existing broadcasters must apply for a licence (Section 42(1)(a)), although no deadline is mentioned. If they fail to do so, they will “cease to be a broadcaster” (Section 42(1)(d), which presumably means that any further broadcasting activity will be treated as an unauthorised broadcast and subject to the penalties prescribed in the Communications Act. Will this is not stated expressly, it appears that existing broadcasters are entitled to receive a licence, provided they pay such fees as are prescribed by the Commission (Section 41(1)(b)) and their past compliance record is deemed satisfactory (Section 41(2)).

### Analysis of proposal

These parts of the proposal appear to signal a willingness on the part of the Government to tackle the thorny problem of concentration in the Kenyan media sector. This is commendable. If too many broadcasting licences are held in too few hands, there is little hope for pluralism. Principle XIV of the *Declaration of Principles on Freedom of Expression in Africa* requires measures against excessive concentration:

States should adopt effective measures to avoid undue concentration of media ownership, although such measures shall not be so stringent that they inhibit the development of the media sector as a whole.<sup>9</sup>

We believe several changes are necessary, however, if the proposal is to have a chance of genuinely de-concentrating Kenyan broadcasting.

In the first place, the rule prohibiting *one licensee* from holding multiple licences in one coverage area as currently defined could prove ineffective, inasmuch as one person could establish multiple corporations, each holding no more than one licence. It would be wiser to state that no *person* (natural or legal) may control, *directly or indirectly*, more than one licence in a coverage area.

The ‘one licence rule’ is useful but could still put an undue amount of power in the hands of one operator. Consideration should be given to capping the total aggregate audience level a licence holder may reach, for example in such a way that a person who holds a national licence may not obtain control over further local licences, and there are limits on the number of local licences one person may control simultaneously.<sup>10</sup>

Another clear shortfall in the proposal is that it fails to address cross-ownership of newspapers and broadcasting outlets. In order to safeguard pluralism, a person who already controls a large share of the newspaper market in a coverage area should not be able to hold a broadcasting licence at the same time. One way to achieve this is the adoption of a formula limiting the combined level of control over TV, radio and newspapers one person may achieve. France (population: about 65 million), for example, enforces the following rules:

An owner may not be involved in more than two of the following at the national level:

- TV audience area of 4 million people
- Radio audience area of 30 million people
- Cable audience area of 6 million people
- Share exceeding 20% of the national circulation of daily newspapers<sup>11</sup>

There are further rules for concentration at the local level.

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<sup>9</sup> See note 7.

<sup>10</sup> A number of democracies impose such rules, which often rely on a complicated formula for calculating an operator’s level of control over public opinion. The Canadian Radio-television and Telecommunications Commission published a comparative study in 2007 which describes the situation in a number of countries. The study can be accessed at <http://www.crtc.gc.ca/eng/publications/reports/mcewen07.htm>.

<sup>11</sup> Information taken from the survey mentioned in note 10.



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We are concerned at the rule that licensees must at all times comply with the Government's "Communications Sector Policy". Although this policy could conceivably be a factor to take into account at the time of licensing, the fact that an existing licence holder must at all times comply with it provides the government with a hazardous level of control, since the policy could be varied with the intention to inconvenience critical broadcasters.

We also believe the rules on approval of a change in ownership are slightly arbitrary. The acquisition of 5% additional shares by an existing shareholder is not particularly significant if that shareholder first had 1% of the shares. On the other hand, in some situations the acquisition of less than 5% additional shares can provide a person with a controlling stake (e.g. a shareholder buys an extra 2% and thereby reaches 51%). Perhaps a better solution is to stipulate that any change in ownership which affects control over the broadcaster requires the consent of the Commission.

The rules for the normalisation of existing broadcasters are a pivotal aspect of the proposed Broadcasting Regulations. ARTICLE 19 applauds the fact that broadcasters will be required to bring themselves into line with the 'one licence rule'. The grace period of up to five years is rather long, but can be justified provided a clear plan is presented on how to fully complete the transition to the scenario envisaged by the frequency plan (see section 2.1.1 above) by the end of that term. It is also essential that existing broadcasters will not be given an opportunity to simply cherry-pick which of their frequencies to hold onto, and more or less automatically obtain a long-term licence for it, without any consideration whether the service fits into the frequency plan or meets the requirements that new entrants are subject to. We believe that these broadcasters should be given a transitional licence of limited duration (preferably less than five years), upon whose expiry they may apply for a new licence according to the ordinary procedure.

#### **Recommendations:**

- The rule barring a licensee from holding multiple licences in the same coverage area should be amended to make it explicit that no *person* may control, whether directly or indirectly, more than one licence.
- Consideration should be given to imposing additional limits on the total audience level one licensee may reach.
- Limits should be placed on the level of permissible cross-ownership between newspapers and broadcast outlets.
- Licensees should not be required to at all times comply with the Government's "Communications Sector Policy".
- Only changes of ownership which affect control over a broadcaster should require the prior written consent of the Commission.
- The Commission should be tasked with developing a clear strategy, including steps to be achieved year-to-year, to transition from the current situation to the scenario set out in the frequency plan within five years. This should include a fair and orderly process for reclaiming and reissuing frequencies from broadcasters who currently hold more than they are entitled to.
- The licences issued to existing broadcasters should be valid only for the transitional period. Upon their expiry, the broadcasters should reapply according to the ordinary licensing procedure.

## 2.4. Content issues

### Overview of proposal

Part IV of the proposed Broadcasting Regulations sets out an extensive list of content requirements which licensed broadcasters must comply with. These include requirements of good taste and tolerance (Section 15); rules designed to protect minors (Sections 16 and 30); rules relating to balance, fairness, accuracy, transparency and acceptable newsgathering techniques (Sections 17-20, 23 and 28); rules for election coverage (Section 21); requirements related to the protection of privacy and dignity (Sections 22, 24 and 25); sponsorship and advertising rules (Sections 26, 27 and 29); and a requirement to provide content to the physically challenged (Section 32). In cases of emergencies or public disasters, Section 39 (in Part VII) requires broadcasters to transmit notices made by persons authorised by the Government.

Separate note should be made of Section 31. The first paragraph of this provision entitles the Commission to impose a local content requirement as one of the licence conditions, or to prescribe a similar requirement by notice in the gazette. The second paragraph adds that the Commission shall prescribe, “from time to time”, local content quota for foreign stations.

Part V makes it clear that broadcasters will be subject to further content regulation. Section 33 mandates the Commission to prescribe a Programme Code, to set standards for the time and manner of programmes to be broadcast by licensees. Alternatively, Section 34 permits broadcasters to draw up their own, self-regulatory Programme Code, which must however deal with a series of topics set out in Section 34(2), as well as any other topics as the Commission may prescribe from time to time in the gazette. To become effective, a self-regulatory code must be approved by the Commission. It must also be revised biannually (Section 34(3)).

### Analysis of proposal

The rules on content are the most problematical element of the proposal and fall well short of what may be expected in a democracy.

#### *2.4.1. Evisceration of the role of the Programme Code and of self-regulation*

The content of broadcasts should be subject, first and foremost, to the same rules which apply to any other form of expression, such as defamation law or obscenity law. However, because of their great impact and intrusiveness – they are beamed straight into the living room – it is generally accepted that the broadcast media may be subjected to more extensive regulation, usually through the adoption of a code of conduct or similar instrument. The purpose of such a code is not to constrain broadcasters’ editorial freedom through a body of criminal law over and above the criminal code; rather, the aim is to guide broadcasters on how to navigate necessarily difficult and changing issues such as the appropriate level of violence on television or what children are comfortable viewing. Consistently with this idea, the code is usually drawn up by, or through extensive consultation with, the broadcasters themselves, and revised periodically. It is enforced through a system of graduated sanctions – relying where possible on moral pressure such as a simple warning, and resorting to progressively heavier

sanctions, such as a fine or licence suspension, or even licence withdrawal, only in cases of severe or repeated violations of the code.

We believe the Communications Act envisaged a comparable model of regulation. Section 46H(1) of the Communications Act vests the Commission with the power to “set standards for the time and manner of programmes to be broadcast by licensees”. Paragraph 2 of the same section mandates the Commission to prescribe content rules, through the adoption of a programming code and a watershed period. The programming code is not applicable, however, to broadcasters who develop, adhere to and enforce a self-regulatory code which is accepted by the Commission. Broadcasters thus have a choice between effectively regulating themselves or being regulated by the Commission – an innovative and suitable approach.

The proposed Broadcasting Regulations would undermine the approach envisaged by the Communications Act by putting in place extensive content rules which largely pre-empt the Programme Code to be developed by the Commission. This would also render self-regulation by broadcasters more or less pointless, since they will already be subject to wide-ranging content rules under the Broadcasting Regulations. What is more, many of the content requirements fail basic requirements for a restriction on freedom of expression under international human rights law, being vague, overbroad, or unnecessary in a democratic society. Finally, far from being enforced through a system of graduated sanctions, Section 40 exposes broadcasters who contravene any provision of the proposed Regulations – including those on content - to a hefty fine, or even three years in prison.

We question whether the Ministry of Information and Communications is in principle entitled under the Communications Act to propose content rules for broadcasters, since this power appears reserved to the Commission alone. In any event, we strongly urge that Part IV of the proposed Regulations be deleted and the subject of content regulation be left to the Programme Code, developed by the Commission in consultation with broadcasters.

#### *2.4.2. The ‘must carry’ requirement for public emergencies*

The ‘must-carry’ rule in relation to public notices of emergency or disasters is inappropriate and unnecessary. This kind of provision exists in many countries, but often proves to be nothing more than a liability, since professional broadcasters anyway provide appropriate coverage of emergencies, and such a provision can easily become a vehicle for government intrusion into editorial independence at the first sign of unrest or trouble.

#### *2.4.3. Local content requirements*

Local content requirements are imposed on broadcasters in many countries in order to stimulate the development of a national media industry, and ensure that radio and television offer programmes which are relevant to local audiences, rather than just purveying recycled material from abroad.

Section 2 of the proposed Broadcasting Regulations sets out a reasonable definition of “local content”, under which a programme is considered local if it meets at least four out of a series of five criteria, which include being produced in Kenya, having a majority of Kenyan actors, and being produced by a company owned for at least 20% by Kenyans. Section 31(1) does not

set any particular level for local content, but states that the Commission may publish rules in this regard or impose obligations to carry local content through broadcasting licences. Since producing quality local content requires investment, it will be important to ensure that the required level is set in a manner which takes the financial position of different types of broadcasters into account. To avoid a situation in which local content requirements are imposed in an arbitrary fashion, we also recommend amending Section 31(1) to the effect that the Commission shall publish a schedule specifying the requirements incumbent on each category of broadcaster (including waivers for any broadcasters in a special position, *e.g.* a station devoted to foreign music styles). Broadcast regulators in some countries impose a progressive requirement for newly licensed broadcasters, *e.g.* 10% in the first year, 20% in the second year and 30% in the third year, enabling them to “gather steam”.

The wisdom of Section 31(2) may be questioned. A local content requirement may simply deter foreign broadcasters from offering their stations in Kenya, with the result that Kenyans are deprived of valuable outside perspectives, which can also contribute to pluralism and the development of a well-informed citizenry.

#### **Recommendations:**

- Part IV of the proposed Broadcasting Regulations, on content issues, should be deleted, with the exception of Section 31. In line with the Communications Act, the regulation of content should be left to the Programme Code to be developed by the Commission, or self-regulatory codes developed by broadcasters and accepted by the Commission.
- Section 39, requiring broadcasters to carry public notices of emergency issued by the government, is unnecessary and should be deleted.
- Section 31(1) should require the Commission to publish a schedule detailing the level of local content which each category of broadcaster must provide. In determining these levels, the Commission should have regard to the costs of developing quality local content and the resources available to the category of broadcaster.
- Consideration should be given to exempting foreign broadcasters from the duty to carry local content.

## **2.5. Complaints handling procedures**

### Overview of proposal

Section 46L of the Communications Act requires each licensed broadcaster to put in place a procedure by which persons who believe the broadcaster has violated the Act, or who are otherwise aggrieved by a programme, can complain within 30 days to that broadcaster. A complainant who has exhausted the broadcaster’s procedure and remains unsatisfied can escalate the case to the Commission, and ultimately to the Tribunal.

A broadcaster’s complaints procedure must be approved by the Commission. Part VI of the proposed Broadcasting Regulations sets out a series of requirements which every procedure will have to meet in order to be considered for approval (Section 35(2)). These range from the

designation of a contact person to receive and handle complaints, to the setting of timeframes within which the complaint must be processed, to the provision of facilities assisting handicapped and illiterate persons to file a complaint. Section 37 grants the Commission a wide degree of discretion to approve a proposed complaints mechanism or demand changes to it.

Section 36 imposes an obligation on licensees to document complaints handling procedures, alert their viewers or listeners at least once a day to the existence of the complaints procedure, keep copies of broadcasts which are subject to a complaint until the complaint is resolved, and submit an annual report on the functioning of the complaints mechanism to the Commission.

Finally, Section 38 makes it clear that the Commission may also investigate matters on its own motion, without the need for a complaint and the exhaustion of the broadcaster's internal procedure.

### Analysis of proposal

The provisions on complaints mechanism are a very positive aspect of the proposal. ARTICLE 19 commends the fact that precedence is given to self-regulation by broadcasters over enforcement by the Commission, an innovative approach which will help to safeguard their independence. We also believe that the basic requirements which any complaints procedure must meet according to Section 35(2) are relevant and appropriate.

One concern is the fact that the Commission enjoys apparently unfettered discretion to reject broadcasters' proposed complaints procedures or impose additional requirements not foreseen by the Act or the Regulations. We recommend stipulating that the Commission may reject a procedure only if it fails to respond to the requirements of Section 35(2).

A more fundamental issue is that it is not stated anywhere by which standard broadcasters or the Commission should judge whether a complaint is founded or not. We would assume that the question to be answered is whether the broadcaster has violated the Act, the Regulations, the Programme Code or, alternatively, its self-regulatory code. This should be made explicit.

Another important issue, touched upon previously above, is the absence of graduated regime of sanctions. Section 40 simply states that any contravention of the Broadcasting Regulations may lead to the imposition of a fine of up to one million shillings or to a prison sentence of up to three years, or both. The Act itself vests the Commission with the power to revoke licences in case of a breach of the Act or a licence condition.

We strongly urge replacing Section 40 with a provision which states that in any case where the Commission determines a broadcaster has violated the Act, the Regulations, the Programme Code or its licence terms, the Commission shall impose a proportionate sanction, having regard to the broadcaster's overall record of compliance. Minor breaches of the rules should give rise to a warning or, in more serious cases, the imposition of a requirement to carry a statement by the regulator identifying the breach. Only where these sanctions fail to remedy the problem should more serious sanctions, such as a fine, come into play. Licence suspension or revocation, the most serious sanction possible, should be applied only in cases of gross and repeated breach of the rules, which other sanctions have failed to redress. Imprisonment is in any case never an appropriate sanction to be applied by the Commission.

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The Commission is not a criminal court and its procedure does not offer the same safeguards (such as the presumption of innocence, the right to remain silent, the right to cross-examine witnesses, and so on) as a criminal trial. Moreover, neither the Act nor the proposed Regulations offer any criteria for when an individual should be considered responsible for a particular broadcast.

Any time the Commission opens an investigation against a broadcaster, whether in response to a complaint or on its own initiative, it should give the broadcaster an opportunity to put forward its views. A decision to apply a sanction should be presented in writing and state the reasons. The broadcaster should then have an opportunity to challenge the decision in court.

#### **Recommendations:**

- The Commission should be entitled to reject a broadcaster's proposed complaints procedure only if it fails to meet a requirement set out in Section 35(2).
- The standard by which complaints are judged should be identified. Presumably, complaints may allege a violation of the Act, the Regulations, the Programme Code or, alternatively, a broadcaster's self-regulatory code.
- Section 40 should be replaced with a provision requiring the Commission to respond to any breaches of a broadcaster's obligations with proportionate sanctions, applied in a graduated manner, having regard to the seriousness of the breach and the broadcaster's overall compliance record.
- Decisions to apply a sanction against a broadcaster should be presented writing, accompanied by the reasons, and should be subject to judicial review.
- The Commission, which is not equipped to conduct criminal trials, should not be in a position to impose prison sentences on any individual.

***APPENDIX: THE KENYA COMMUNICATIONS (BROADCASTING)  
REGULATIONS, 2009***

**ARRANGEMENT OF REGULATIONS**

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**PART 1 PRELIMINARY**

**Short title** 1. These Regulations shall be cited as the Kenya Communications (Broadcasting) Regulations, 2009.

**Interpretation** 2. In these Regulations, unless the context otherwise requires:-

**“Act”** means the Kenya Communications (Amendment) Act, No. 1 of 2009;

**“advertising”** means the broadcasting of any item in return for payment or other valuable consideration to a broadcaster with the intention of-

- (a) selling to a viewer or listener, any product or service;
- (b) convincing a viewer or listener of a belief or course of action; or
- (c) promoting a product, service, belief, course of action, person or organisation;

**“broadcaster”** means any legal or natural person who composes or packages or distributes television or radio programme services for reception by the public or sections of the public or subscribers to such a service, irrespective of technology used;

**“Broadcasting licence”** means a license issued by the Commission for provision of broadcasting services. A broadcasting service license does not include the infrastructure license.

**“Broadcast market”** means the area within which a licensee is licensed to operate as specified in the broadcasting licence by the Commission;

**“Child”** means child as defined in the “Children Act, No. 8 of 2001”

**“Commission”** means the Communications Commission of Kenya established under the Kenya Communications Act,

**“disaster”** means a serious disruption of the functioning of the society causing widespread human, material or environmental damage and losses which exceed the ability of the affected community to cope using their own resources, including any event or circumstance arising out of accidents, natural phenomena, fires, floods, explosions, or incidents involving exposure or potential exposure to radioactive or toxic materials;

**“election period”** means the period between the initiation of an election under the provisions of the relevant law pertaining to the election and the eve of the polling day.

**“infomercial”** means any advertising broadcast in visual or audio form, lasting for more than two minutes, which may contain demonstrations of the use of the product or service advertised, entailing direct offers to the public in return for payment, and which results in the broadcaster receiving payment in monetary terms or otherwise;

**“local content”** means the total of all television or radio programmes which fulfil any four of the following conditions:

- the production is made in either Kenya’s native languages or official languages of Kenya;
- production was done in Kenya
- the content deals with issues that are unique and relevant to Kenyan audiences.



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- at least 20% of the share of the production company are owned by Kenyans;
- a majority of the artistes are Kenyans. for avoidance of doubt, local content does not include news and commentaries.

”**Minister**” means the Minister for the time being responsible for matters regarding broadcasting in Kenya.

”**Multiplex Operator**” means any person who provides network facility operator services for digital terrestrial transmission and radio broadcasting as well as mobile television based on broadcasting technologies;

”**national emergency organizations**” include the police force, security forces, fire brigade, ambulance services, medical services, veterinarian services and environmental disaster agencies, whether or not such organisations are owned and managed on a private or public basis;

”**political party**” means a party registered by the Registrar of Political Parties as a political party in Kenya under the Political Parties Act 2007;

”**programme**”, in relation to a **broadcasting** service, means sound, vision or a combination of both, intended to inform, educate or entertain, but does not include text or data;

”**programme segment**” is a programme which in audio-visual sense presents one whole unit clearly separated from other segments and content with its beginning and end;

”**Public Broadcaster**” means a public broadcaster as defined in Section 46E of the Act,

”**public emergency service**” means broadcasting services offered in the event of a disaster emergency on request by a person authorized by the government;

”**satellite broadcasting service**” means a **broadcasting** service which is broadcast by transmitters situated on a satellite;

”**rebroadcasting**” means simultaneous or subsequent broadcasting by one or more broadcasting authorities of the broadcast of another broadcasting authority;

”**sponsored programme**” means a programme that has all or part of its costs paid by a sponsor, with a view to promoting that sponsor's, or another sponsor's name, product or service;

”**station programming format**” means an arrangement of programmes which are presented on a **broadcasting** station;

”**Subscription broadcasting services**” shall include such other services as cable broadcasting multi-channel satellite distribution services from foreign territories usually offered by subscription.

”**subscriber**” means a person who has entered into an agreement with a provider of subscription radio or television services in relation to subscription television and or radio broadcasts;

”**licensee means** ‘holder of a broadcasting services license’

”**terrestrial broadcasts**” means the services that are broadcast from a transmitter situated upon the earth's surface within the country;

”**territory**” means the geographical coverage of Kenya .

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**“watershed”**; it is used to describe time in television schedules after which material more adult in nature can be broadcast.

**“Watershed Period”** means the time between 6.00 am and 10.00 pm, or such other time as may be prescribed by the Commission by Notice in the Gazette, within which content intended for an adult audience is not to be aired

## PART II LICENSING

### Application for a broadcasting services license

3. (1) An applicant for the grant of a licence for a broadcasting service or services shall furnish the Commission with-
- (a) a viable business plan;
  - (b) evidence of technical capability in terms of personnel and equipment to carry out broadcasting services;
  - (c) evidence of relevant experience and expertise to carry out broadcasting services; and
  - (d) evidence of the capability to offer broadcasting services for at least eight continuous hours per day;
  - (e) such other information or requirement as the Commission may from time to time prescribe.
- (2) Unless otherwise prescribed by the Commission, an applicant for the grant of a licence to provide subscription television and or radio service shall, in addition to complying with the provisions of paragraph (1), satisfy the Commission that it has the capacity to offer a minimum of ten channels to each subscriber.
- (3) In considering an application for the grant of such licence, the Commission shall have regard to the provisions of the Act provided that the Commission may limit the number of licensees broadcasting nationally
- (4) A trade union or a proscribed group shall not be eligible for the grant of a broadcasting licence.

### *General requirements for broadcasting services*

4. (1) The Commission shall ensure that broadcasting services-
- (a) Reflect the culture, needs and aspirations of the audience and or viewers
  - (b) Provide efficient delivery of programming using the most effective technologies available
- (2) All broadcasters shall-
- (a) file with the Commission their station identity annually and any changes thereto;
  - (b) ensure that their station identity is unique such as not to cause confusion
  - (c) Keep such records as the Commission may from time to prescribe.
- (3) In the case of free-to-air broadcasting services the Commission shall ensure that such services:
- (a) Provide appropriate amount of local content as specified in the programme code ;
  - (b) Include news and information in their programming, as well as discussions on matters of national importance as may be prescribed by the Commission from time to time;

### *Commencement of broadcasting service*

5. (1) A licensee shall publish a notice in a newspaper, published and circulated in the licensee's coverage area, not later than fourteen (14) days before commencement of broadcasting services.
- (2) A notice under paragraph (1) shall contain:

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- (a) a statement on the licensee's intention to transmit a broadcasting service from a station in the licensee's coverage area;
- (b) the commencement date and time of transmissions;
- (c) the assigned frequency that the station will use;
- (d) the station programming format;
- (e) a statement that members of the public should contact the licensee if any transmission by the licensee causes interference with the services provided by other licensees; and the address and telephone number of the licensee

#### *Ownership and control*

6. (1) All Licensees, except the public broadcaster shall-not be assigned more than one broadcast frequency for radio or television broadcasting in the same coverage area;

Provided the Commission shall prescribe a timeframe for existing stations to comply with this requirement;

(2) The shareholding of a licensee shall at all times comply with the Government's Communications Sector Policy, as may be published from time to time;

(3) A licensee shall notify the Commission of any proposed change in ownership, control or proportion of shares held in it at least ninety (90) days prior to effecting such change.

Provided that:

- (a) any change in shareholding exceeding 15 % of the issued share capital; or
- (b) the acquisition by an existing shareholder of at least 5% additional shares;

Shall require the prior written consent of the Commission provided that the Commission shall notify the applicant of its acceptance or refusal with the reasons thereon, within thirty (30) days of receipt of the said notification.

(4) A notification of change in ownership, control or proportion of shares held in a licensee shall state:

- (a) The date on which ownership or part thereof is intended to be transferred;
- (b) the name and address of the acquirer;
- (c) Any change in the name or address of the business; the names, nationality and addresses of persons who are in control of the business;

(5) In considering an application for transfer of ownership or change of person in control or change in shareholding of a broadcasting licensee the Commission shall have regard to -

- (a) The capacity/capability of the acquiring entity to roll out the broadcasting services
- (b) The nature of broadcasting services and programming that the acquiring entity envisages to roll out
- (c) The extend to which the allocated frequency resource (s) of the entity to be acquired have been utilized
- (d) The possible impact on promotion of pluralism and diversity that the transaction may have
- (e) The effect /impact of the transaction on competition /promotion of competition in the sector
- (f) Whether the transaction is in conformity with the stipulations of the sector policy
- (g) The past and current compliance record, of the acquiring and acquired entities, with respect to the conditions of their current licences
- (h) Any other matter as the Commission may consider relevant.

## PART III BROADCASTING SERVICES

### Public Broadcasting Service

7. 1) The Public Broadcaster shall:

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- (a) Provide independent and impartial broadcasting services of information, education and entertainment, in English and Kiswahili and such other languages as the broadcaster may decide;
- (b) Conduct the broadcasting services with impartiality attention to the interests and susceptibilities of the different communities in Kenya;

(2) The public broadcaster may, provide and receive from other persons material to be broadcast;

Provided that in acquiring such material, the public broadcaster shall have regard to the need to maintain the distinctive character of the public broadcasting service and to cater for the expectations of audiences who are not generally catered for by other broadcasting services

(3) Broadcast frequencies assigned to the public broadcaster for use in public broadcasting shall not be let or transferred to a third party;

(4) The Commission may on application by the public broadcaster grant a Private (Commercial) broadcasting licence on such conditions as the Commission may prescribe from time to time;

(5) A license granted to the Public Broadcaster may require the broadcaster to maintain and keep separate accounts in respect of its Public broadcasting services and Private (Commercial) broadcasting services;

#### *Private (Commercial) Broadcasting Service*

**8.** A private (commercial) free-to-air broadcaster shall-

(1) Shall hold a broadcasting service License and separate frequency licences for each broadcast station that utilizes a frequency resource.

(2) provide a diverse range of programming that reflects the culture, needs and aspirations of people in their broadcasting area;

(3) commence broadcasts within twelve (12) months after being licensed

(4) not acquire exclusive rights for the broadcast of national events identified to be of public interest as may be determined by the Commission from time to time Community

#### *Broadcasting services*

**9.** Community broadcasting services shall:

- (a) reflect the needs of the people in the community including cultural, religious, language and demographic needs;
- (b) deal specifically with community issues which are not normally dealt with by other broadcasting services covering the same area;
- (c) Be informational, educational and entertaining in nature;
- (d) Provide a distinct broadcasting service that highlights grassroots community issues;

#### *Subscription broadcasting services*

**10. (1)** The Commission may upon application in a prescribed manner grant a licence for Subscription broadcasting services.

(2) A licence granted under paragraph (1) may require the licensee;

- (a) distribute broadcasting services, whether through cable, satellite or telecommunication facilities within the borders of the Kenya or from the Kenya to other territories;

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- (b) provide a minimum number of Kenyan Broadcasting channels;
- (c) provide diversity in programming
- (d) Ensure protection of consumers of such broadcast services
- (e) respect copyright and neighboring rights in respect of any work or material.

#### *Obligations of Subscription broadcasting services licensees*

**11.** A person licensed to provide subscription broadcasting service shall provide a subscriber with the following information in writing:

- (a) The products and services offered;
- (b) The cost of subscription including installation and maintenance;
- (c) The options of programming service available;
- (d) The conditions under which the service is supplied;
- (e) The instructions as to usage of the service in the official languages;
- (f) The number and allocation of channels carried on the system and the programming available on each channel;
- (g) The billing and complaints procedures;
- (h) The address and telephone number of the licensee's business office.
- (i) Fourteen (14) days prior notice to any changes in the programming service or channel allocation in writing.

#### *Multiplex Operator*

**12. (1)** The Commission may upon application in a prescribed manner grant a license to a Multiplex Operator for the distribution of digital television broadcasting services:

- (2) a license granted under paragraph (1) may require a licensee to
  - (a) Distribute on its digital platform free to air and subscription broadcasting services and related data on behalf of licensed broadcasters
  - (b) Enter into contractual arrangements, on terms and conditions prescribed by the Commission, with licensed broadcasters for the distribution of broadcasting services prescribed under its license
  - (c) A license granted under paragraph (1) may require a licensee to provide its services on such terms and conditions as to access, tariffs and quality of service as the Commission may prescribe.

(3) a multiplex operator shall only enter into contractual relationships with broadcasters assigned frequencies by the Commission;

(4) within 14 days of notification by the Commission of the termination, expiry or non renewal of a broadcaster's license, a Multiplex operator shall discontinue any arrangements entered into in relation to distribution of broadcasting services for such a broadcaster

- (5) a Multiplex operator may impose charges;
  - (a) in respect of any contractual arrangements entered into under paragraph (2);
  - (b) In respect of reception of broadcastings services requiring conditional access;
  - (c) In respect of provision by it of any apparatus or device enabling the reception of broadcasting services (including free-to-air broadcasting services) in a digital form

#### *Electronic programme guides*

**13. (1)** A multiplex operator shall in consultation with broadcasters shall prepare an Electronic programme guide to be used by viewers and listeners to to access information in relation to the

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schedules of programme material the subject of each broadcasting service provided by all the broadcasters.

(2) An electronic programme guide prepared in Paragraph (1) shall be easy to use and navigate through the programme material which is the subject of a broadcasting service.

#### *Other Broadcasting services*

14. The Commission may issue such other broadcasting service licences.

## PART IV CONTENT

### General requirements

15. (1) A licensee shall broadcast its station identity at intervals as may be prescribed by the Commission from time to time by Notice in the Gazette.

(2) A licensee shall not broadcast any matter which:

- (a) contains the use of offensive language, including profanity and blasphemy;
- (b) presents sexual matters in an explicit and offensive manner;
- (c) glorifies violence or depicts violence in an offensive manner;
- (d) is likely to incite or perpetuate hatred or vilify any person or section of the community on account of the race, ethnicity, nationality, gender, sexual preference, age, disability, religion or culture of that person or section of the community or
- (e) Has no program rating indicated prior to the commencement of such programs Protection of Children.

16. A licensee shall:

- (1) ensure that due care is exercised in order to avoid content which may disturb or be harmful to children; such content is content with offensive language, explicit sexual or violent material, music with sexually explicit lyrics or lyrics which depict violence;
- (2) Shall not broadcast such programmes as referred to in (a) above during the watershed period;
- (3) request for permission to conduct the interview from the minor's parents or guardian before conducting an interview with a minor.

#### *News Reporting*

17. A licensee shall

- (1) ensure that news and information are broadcast and presented in a balanced manner, without prejudice or negligent departure from facts through distortion, exaggeration, misrepresentation and material omissions
- (2) give fair reporting regardless of its context and importance.

#### *Unconfirmed Reporting*

18. A licensee shall not

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(2) broadcast any report that is not based on fact or that is founded on an opinion, rumour, supposition, or allegation unless the broadcast is carried out in a manner that indicates these circumstances clearly.

(3) broadcast any report where there exists sufficient reason to doubt its accuracy thereof and it is not possible to verify accuracy of the report before it is broadcast.

#### *Correction of Errors in Reports*

**19.** A licensee shall broadcast the correction of any factual error:

(1) without reservation, as soon as it is reasonably possible after it has been established that there was an error and

(2) With such degree of prominence and timing and shall be broadcast during a similar time-slot as the original error as soon as is reasonably possible and where appropriate shall include an apology.

#### *Reporting on controversial issues*

**20.** A licensee shall endeavour to ensure that when broadcasting controversial issues of public interest during live broadcasts,

(1) a wide range of views and opinions are represented.

(2) a person or organisation whose views on any controversial issues of public interest have been criticised during a broadcast, and who replies to such criticism within a reasonable time, shall be offered an opportunity by the licensee to reply to such criticism.

(3) a reply to criticism under paragraph (2) shall be given a similar degree of prominence and shall be broadcast on a similar time-slot, as soon as is reasonably possible.

#### *Election period*

**21.** During an election period:

(1) A licensee shall provide equal coverage and opportunities to political parties and candidates.

(2) A licensee shall ensure that the name of the political party or sponsor, if any, on whose behalf a broadcast is made, is announced, immediately before the commencement and immediately after such broadcast;

(3) A licensee shall not permit any broadcast sponsored by or made on behalf of a political party other than an advertisement thereof to be dramatized;

#### *Conduct of interviews*

**22.** (1) A licensee shall ensure that any person to be interviewed shall be:-

(a) advised of the subject of the interview; and

(b) Informed, before the interview takes place, to determine whether the interview is to be recorded or broadcast live.

(2) A licensee shall exercise sensitivity in conducting interviews with bereaved persons, survivors of traumatic incidents or witnesses thereof.

#### *Commentaries*

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23. Any commentaries that are broadcast by a licensee, whether the comments are made by the licensee or by any person invited by a licensee, shall be presented in a manner that clearly indicates that they are based on facts which are clearly stated.

#### *Sexual Offences*

24. A licensee shall:

- (a) not disclose, in a broadcast, the identity of a victim of a sexual offence unless such victim consents in writing to the disclosure of his or her identity.
- (b) avoid the use of unnecessary or repetitive detail when broadcasting the circumstances of a sexual offence.

#### *Consent to broadcast*

25. A licensee shall not broadcast any information acquired from a person without that person's consent, unless the information so acquired is essential to establish the credibility and authority of a source, or where the information is clearly in the public interest.

#### *Programme Sponsorship*

26. A licensee

- (1) Shall not accept sponsorship of news broadcasts;
- (2) May accept sponsorship of weather broadcasts, financial broadcasts or traffic reports; Provided that the licensee shall retain ultimate editorial control of the sponsored programme;
- (3) Shall ensure that sponsorship of an informative programme does not compromise the accuracy and impartiality of the programme's contents;
- (4) Shall not unreasonably discriminate against favour a particular sponsor;
- (5) Shall not broadcast any programme which has been sponsored by a political party save for an advertisement by a political party in which case the advert must be distinctly identified so as not to be confused with normal programming;
- (6) Shall acknowledge the sponsorship of a programme immediately before and after the programme is broadcasted, and any connection between the programme's subject-matter and the sponsor's commercial activities shall be identified.

#### *Infomercials*

27. (1) An infomercial shall not be broadcast-

- (a) for a period exceeding three and half hours of the performance period in any day;
- (b) during prime-time; or
- (c) during any break in the transmission of a children's programme.

(2) A licensee shall ensure, either by visual or audio form that the broadcast of any infomercial is distinguishable from any programme material broadcast.

(3) A licensee shall ensure that all infomercials that are broadcast are:-

- (a) lawful;
- (b) honest;
- (c) decent; and
- (d) in conformity with the principles of fair competition.

(4) The provisions of paragraphs (1) and (2) shall not apply to stations which exclusively broadcast infomercials.

#### *Payment of criminals*



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**28.** A licensee shall not pay:

- (1) Any person involved in a crime; or
- (2) Any person who has been convicted of a criminal offence, in order to obtain information, unless there is a compelling reason in the public interest to do so.

#### *Advertisements*

**29.** (1) A licensee shall ensure that any advertisements that are broadcast by it are:

- (a) lawful;
- (b) honest;
- (c) decent;
- (d) in conformity with the principles of fair competition.
- (e) do not contain any descriptions, claims or other material which may, directly or by implication, mislead members of the public in relation to the product or service advertised, or about its suitability for the purpose recommended; and
- (f) do not unfairly attack or discredit, directly or by implication, any other advertisers, products or advertisements.

(2) A licensee shall, before broadcasting an advertisement, ensure that any descriptions or claims in the advertisement have been adequately substantiated by the advertiser thereof

(3) A licensee shall not unreasonably discriminate against or favour any advertiser.

(4) A licensee shall exercise responsible judgment when scheduling advertisements which may be unsuitable for children during periods when large numbers of children may be expected to be watching or listening to programmes.

(5) A licensee shall ensure that any advertising breaks are clearly distinguishable from broadcast programmes.

(6) A licensee shall ensure that its presenters, when reading advertisements, make a clear distinction between programming material and the advertisements they deliver.

#### *Watershed Period*

**30.** (1) Content which depicts or contains scenes that are rated by the Kenya Film Censorship Board as adult, or are of the language intended for adult audiences shall not be aired during the watershed period;

(2) all programmes broadcast during the watershed period must be suitable for family audiences. The transition from family oriented to a more adult programming after the watershed period shall be gradually;

(3) consumer advice such as warnings, labeling, classification details and other announcements shall be given prior to the telecast of a programme or its trailers;

(4) all trailers and promotional material shown before the watershed time must comply with (b) and (c) above.

(5) broadcaster's shall exercise responsibility in scheduling of programmes to reduce the risk of causing offence;

#### *Local Content*

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**31.** (1) A licensee may be required to commit a minimum amount of time to the broadcast of local content as may be prescribed in the licence, or as may be prescribed from time to time by the Commission by notice in the gazette, Provided that where a broadcaster is, unable to comply with the foregoing, the Commission shall require such broadcaster to pay such an amount of money, as may be prescribed by the Commission into the Fund.

(2) The Commission shall from time to time prescribe a minimum local content quota for foreign broadcasting stations.

#### *Content for the physically challenged*

**32.** (1) the Commission shall require broadcasters to take specific steps to promote the understanding and enjoyment of programmes transmitted on any broadcasting service persons who are physically challenged and in particular by

- (a) persons who are deaf or hard of hearing
- (b) persons who are blind or partially sighted

(2) the Commission shall prescribe by notice in the gazette the manner, time and percentage of programmes targeting persons referred to above shall be broadcast.

## **PART V PROGRAMME CODE**

### Setting Standards for Programmes

**33.** The Commission shall prescribe a Programme Code that sets the standards for the time and manner of programmes to be broadcast by licensees.

#### *Approving of a Programme Code*

**34.** (1) Pursuant to Section of 46H the Act, any body of broadcasters wishing to operate under its own Programme Code shall submit such a code to the Commission for approval;

(2) In considering a Code submitted for its approval, the Commission shall have regard to specified standards to be complied with and rules and practices to be observed, in respect of the following areas:

- (a) the taste and decency of programme material, the subject of a broadcasting service or sound broadcasting service, and, in particular, in respect of the portrayal of violence and sexual conduct in such material;
- (b) advertising, infomercials, sponsorship and other forms of commercial promotion employed in any broadcasting service or sound broadcasting service (other than advertising and other activities as aforesaid falling within paragraph (c);
- (c) advertising, infomercials, sponsorship and other forms of commercial promotion employed in any broadcasting service or sound broadcasting service, being advertising and other activities as aforesaid which relate to matters likely to be of direct or indirect interest to children;
- (d) news, public affairs, analysis and commentaries;
- (e) childrens programmes, coverage and welfare;
- (f) election period and political parties;
- (g) liquor, dangerous drugs and cigarettes;
- (h) individual rights, privacy, discrimination and personal attacks;
- (i) religious programmes, occultism and superstition
- (j) identity of broadcasters subscribing to the code, procedure of being enjoined to the code;
- (k) action to be meted against violators;
- (l) family viewing policy and programme guide/labeling;
- (m) programming likely to incite, promote hatred or vilify any person or community on the basis of ethnicity/race/gender/religion/culture/age/disability;
- (n) such other matters as the Commission may prescribe from time to time by notice in the gazette

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(3) In the event of disapproval, either in part or in whole, of the submitted Programme Code by the Commission:

- (a) the Commission shall indicate the remedial measures the broadcasting body is to undertake in order to satisfy the Commission's requirements;
- (b) the body of broadcasters shall within thirty (30) days from the date of notification resubmit the revised Programme Code for reconsideration by the Commission.

(4) Upon approval, the body of broadcasters shall:

- (a) publish its Programme Code and avail it to any person who reasonably requests;
- (b) enforce the Programme Code on its members and avail information as may be required and in the form prescribed by the Commission from time to time and in regarding enforcement;
- (c) inform the Commission within five (5) days if any of its members unsubscribing to the body of broadcasters Programme Code
- (d) cause to be published in at least one newspaper circulating in Kenya a notice of the fact that the code is available for inspection by any member of the public

(3) The Commission shall review or cause the revision of the programming code to be carried out by the relevant broadcasting body at least once every two years, from the date of the coming into force of broadcaster's code.

## PART VI COMPLAINTS HANDLING PROCEDURE

### Complaints handling procedure

**35.** (1) Every broadcaster shall develop a procedure, for handling complaints from persons who may be aggrieved by its broadcasts.

(2) The complaints handling procedure, shall, among other things cover the following:

- (a) full name of the broadcaster as it appears in the licence as well as the broadcast station identity specific to different broadcast services offered;
- (b) the physical postal and email addresses where complaints can be sent;
- (c) the contact person authorized to receive and handle customer complaints;
- (d) the manner in which the complaint may be lodged including the applicable languages;
- (e) details which need to be submitted when lodging a complaint;
- (f) the need for the complainant to retain a copy of every correspondence exchanged between complainant and broadcaster;
- (g) the manner in which the complaint will be investigated (process of investigating);
- (h) Information to listeners or viewers that the first opportunity to resolve a complaint should be given to the broadcaster to resolve the complaint.
- (i) the timeframes for responding to the complainant, and resolving the complaint;
- (j) provision of how complaints form physically challenged and illiterate consumers who are not capable of providing complaints in writing, will be accommodated;
- (k) methods of recording and tracking of complaints, together with the associated responses;
- (l) duration of storage of records of complaints received and actions taken;
- (m) retention and production of recordings of any programme which is the subject matter of a complaint;
- (n) categories of complaints which the broadcaster is under no obligation to respond to (complaints considered frivolous, vexatious or an abuse of the complaint process or from complainants who choose to remain anonymous);
- (o) any other matter as the Commission may from time to time by notice in the gazette prescribe.

### Obligations of licensees

**36.** (1) All licensees shall:

- (a) ensure that their complaints handling procedure are documented;
- (b) inform their listeners or viewers at least once a day of the existence of the complaints handling procedure and how they can lodge a complaint regarding the broadcast station;

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(c) not dispose off broadcast transcripts/recordings related to a complaint so long as it has not been summarily resolved either by the broadcaster, the Commission, the Tribunal or the High Court. In this case, the clause in the licence stipulating the minimum duration to retain a copy of recordings of broadcasts shall not apply;

(d) on 1st July of every year, submit to the Commission a written report of all complaints received during the period and the manner in which they were addressed.

#### Approval of Complaints Handling Procedure

37. (1) Every broadcaster shall, prior to the commencement of broadcasting services submit to the Commission for approval a Complaints Handling Procedure.

(2) In the event of disapproval, either in part or in whole, of the submitted Complaints Handling Procedure by the Commission:

(a) the Commission shall indicate the remedial measures the broadcaster is to take in order to satisfy the Commission's requirements;

(b) the broadcaster shall within thirty (30) days from notification in resubmit the revised Complaints

Handling Procedure for reconsideration by the Commission.

(c) provided that in the interim, the Commission may require the broadcaster to handle any complaints

submitted during that period in accordance with the procedure determined by the Commission.

(3) After approval, the broadcaster shall publish its Complaints Handling Procedure and avail it to any person who reasonably requests.

#### Escalating Complaints to the Commission

38. (1) Where any person alleges that he has exhausted the broadcasters' complaints procedure and is not satisfied with the remedy offered or action taken, he may appeal to the Commission and such appeal shall be dealt with in accordance with the Dispute Resolution Regulations or such procedures as may be prescribed by the Commission from time to time.

Provided that the Commission may, on its own motion, investigate a matter where in its view a broadcaster has breached the provisions of the Act, Regulations or the Programme Code.

(2) a broadcaster or the Commission shall not entertain a complaint or dispute lodged pursuant to a broadcast after ninety (90) days from the date upon which the material complained of was broadcast;

## PART VII GENERAL PROVISIONS

### Public Emergencies

39. (1) All broadcasting service providers shall provide a public notice of an emergency or a public disaster announcement made by a person authorized by the Government.

(2) The Commission shall prescribe, by Notice in the Gazette the manner in which broadcasters provide information during public emergencies or national disasters.

### Breach of regulations

40. Any person who contravenes any provision of these Regulations commits an offence and on conviction shall be liable to a fine not exceeding One Million Shillings or to imprisonment for a term not exceeding three years, or both.

## PART VII TRANSITIONAL PROVISIONS

### Transition from analogue to digital television broadcasting

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- 41.** (1) a multiplex operator licence shall specify such conditions as;
- (a) the percentage of the multiplex capacity that shall be used for relaying broadcast content and other related data
  - (b) the technical specifications of the multiplex and associated digital transmitters
  - (c) the requirement for the signal distributor to file such tariffs it proposes to impose on broadcaster for approval by the Commission
  - (d) universal service obligations

(2) Nothing in these Regulations shall be construed as preventing the Commission from requiring television broadcasters broadcasting on digital platform before the enactment of the Kenya Communications Amendment Act 2009 to comply with the Act and this Regulations Transition of permits to licenses

**42.** (1) Pursuant to Sections 46R of the Act, all persons issued with broadcast permits prior to the commencement of the Act shall:-

- (a) be required to apply for broadcast licence(s) forming such as a manner as prescribed by the Commission;
- (b) pay such fees prescribed by the Commission for issuance of the licence(s) to replace the permits;  
as well as payment of frequency licence and usage fees
- (c) retain such radio frequency resources already assigned under the same terms and conditions of issuance, provided they comply with such new terms and conditions that may be imposed by the Commission
- (d) cease to be a broadcaster in the event of failing to apply or qualify for the licence(s) under this Act

(2) in addition to the requirements under Section 46D (2) in considering an application for a licence in place of a permit, the Commission shall where applicable take into consideration:

- (a) the past compliance record of the applicant with regard to adherence to the conditions of the broadcasting frequency licence
- (b) the status of frequency fee payments

(3) All holders of broadcasting permits who have been assigned more than one broadcast frequency for either radio or television broadcasting services in the same broadcast coverage area shall be required within a period not exceeding five [5] years, to surrender all additional broadcasting frequencies to the Commission.

Made at Nairobi this day of 2009

Hon. Samuel Poghisio  
Minister for Information and Communication