



Memorandum

on the

Kenya Communications (Radio Communications and Frequency) 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.

OVERVIEW OF RECOMMENDATIONS

Recommendations on the objectives of the Radio Communications and Frequency (RCF) Regulations:

- Section 3 should define the promotion of freedom of expression as a key objective of frequency management.
- Promotion of the Kenyan Government policy objectives should not be an objective of the RCF Regulations.

Recommendations on frequency assignments:

- Broadcasters who apply for a radio or television licence should be guaranteed a frequency in case they are successful. It should not be necessary to go through a second licensing process to this end.
- Section 8(2), granting the Communication Commission broad discretion to migrate broadcasters to new frequencies or frequency bands, should be deleted.
- Section 9(2) should be amended to make it clear that the Communication Commission has the power to make frequency sharing a licence condition – rather than the power to impose a sharing requirement at any time.

Recommendations spectrum fees and pricing:

- Broadcasters should not be charged a separate fee for use of a frequency. These costs should be factored into their broadcast licence fee.
- In adopting the pricing formula for spectrum use, the Communication Commission should have regard to the public interest generally and not only to the generation of revenue. To this end, the promotion of quality broadcasting and the promotion of affordable wireless services for consumers should be added to the list of factors in Section 11(2).
- Appropriate portions of the spectrum should be reserved for free, unlicensed uses, such as WiFi and future technologies.

1. INTRODUCTION

This Memorandum provides ARTICLE 19's analysis of the proposed Kenya Communications (Radio Communications and Frequency) Regulations (hereinafter 'the RCF 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.¹ 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,² Freedom of Information Bill,³ and the Kenyan Constitution's provisions on freedom of expression.⁴

The RCF 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 RCF Regulations set out how the Commission will administer the frequency spectrum through the issuance of radio communication licences and the enforcement of rules designed to prevent harmful interference.

Together with the Kenya Communications (Broadcasting) Regulations ('the Broadcasting Regulations'), which are part of the same package of proposals, the RCF Regulations will play a key part in shaping the future of radio and television in Kenya. The Broadcasting Regulations are the subject of a separate analysis, which ARTICLE 19 is publishing concurrently with the present one. In this Memorandum, we consider whether the proposed frequency management scheme is consistent with Kenya's obligation to promote broadcasting freedom and diversity, which follows from the guarantee of freedom of expression under international human rights law and Section 79 of the Constitution of Kenya.⁵

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

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

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

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

⁵ For an overview of international standards in this area, see the ARTICLE 19 publication *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*, London, April 2002, available at <http://www.article19.org/pdfs/standards/accessairwaves.pdf>.

2. ANALYSIS OF THE BROADCASTING REGULATIONS

The RCF Regulations are divided into seven parts. Part I deals with preliminary issues such as definitions, and establishes the objectives of the Regulations. Parts II and III set out the procedure for obtaining a frequency assignment, and impose certain obligations on licensees. Part IV is concerned with fees for the use of the spectrum. The remaining parts V-VII cover issues of enforcement and penalties.

2.1. Objectives of the RCF Regulations

Overview of proposal

Section 3 puts forward four objectives for the RCF regulations. These can be summarised as: (a) promoting the orderly development and efficient operation of broadcasting to meet socio-economic, security and cultural needs; (b) ensuring proper management of the available frequencies in accordance with the Act, Government of Kenya policy objectives, and international agreements; (c) ensuring the adoption of the latest technical advances and the most efficient spectrum allocation; (d) ensuring equitable allocation of spectrum so as to benefit the maximum number of users.

Analysis of proposal

Given the dominance of broadcast media (radio, television, and increasingly mobile telephony and internet) over print media in modern societies, the way the frequency spectrum is managed has a tremendous bearing on how free a society is. This is perhaps illustrated best by the fact that *coups d'état* often start with taking over control of key broadcasting outlets, even before government buildings are seized. For dictatorships, the key objective of regulating broadcasting is to secure control. For democracies, the key objective is to prevent it, by ensuring that broadcasting gives a voice to all opinions and sectors of society.

Section 3(d) mentions benefiting the maximum number of users as one objective of the RCF regulations, but we urge the explicit inclusion of promoting freedom of expression as a key objective. This could, for example, be worded as follows:

“to promote freedom of expression by reserving sufficient frequencies for a diverse range of radio and TV broadcasters at the local, regional and national level, as well as frequencies for new media which facilitate the free exchange of ideas and information.”

In the same spirit, promoting the government’s policy objectives is not an appropriate goal for an independent regulator. This element should be deleted.

Recommendations:

- Section 3 should define the promotion of freedom of expression as a key objective of frequency management.
- Promotion of the Kenyan Government policy objectives should not be an

objective of the RCF Regulations.

2.2. Frequency assignments

Overview of proposal

According to Section 5(2), a person licensed to operate and provide radio communication systems and services must apply to the Communication Commission for the assignment of the necessary frequencies. This would presumably apply, for example, to broadcasters who have been granted a licence for a radio or TV service.

In considering the request, the Communication Commission must take a number of criteria into account, which are set out in Section 4. These include spectrum availability, avoidance of harmful interference with distress systems, compliance with environmental, safety and aesthetic requirements, and so on. Section 5(1) adds avoidance of interference with existing licensed operators in general as a further criterion. If the requested frequency is not available, the Commission may consider assigning an alternative frequency (Section 5(2)).

Licensees do not become the owners of the assigned frequency (Section 9), and are not permitted to assign or lease it to a third person without the Communication Commission's permission (Section 6(2)). A fee must be paid for use of the frequency, which must moreover be put into use within the timeframe specified by the Communication Commission (Section 8(1)(b) and (d)). Licensees must cooperate with the Communication Commission to prevent and eliminate harmful interference and optimise utilisation of the frequency spectrum (Section 8(c) and (e)).

The Communication Commission may, where it considers this necessary, require a licensee to migrate to a new frequency or frequency band (Section 8(2)). It may also require licensees to share a frequency (Section 9(2)).

Analysis of proposal

Although they may make sense for some forms of radio communication, a number of the provisions of Part II and III are problematic when applied to radio and TV broadcasters.

Section 5(2) suggests that prospective broadcasters will be expected to go through the onerous licensing process set out in the proposed Broadcasting Regulations without knowing in advance what kind of frequency, if any, will be on offer at the end of the day. This is not efficient, and not very reasonable either. ARTICLE 19's analysis of the Broadcasting Regulations recommends the adoption, at the outset, of a frequency plan which sets aside sufficient radio and TV frequencies at the local, regional and national levels for public, commercial and community broadcasters. These frequencies can then be put out to tender, and awarded to the operator whose proposed service will make the greatest contribution in terms of quality and diversity. Harmful interference can be prevented by including specific technical parameters amongst the licence conditions imposed on the broadcaster.

The Communication Commission's power to migrate broadcasters to new frequencies or frequency bands more or less arbitrarily is also very problematic in the context of radio and television (and in other contexts too). Such a move could have disastrous consequences for a broadcaster's audience levels, and thus viability. Moreover, the very existence of this kind of provision, even if it is not abused in practice, may create uncertainty and discourage broadcasters from making long-term investments. Accordingly, we strongly recommend deleting Section 8(2).

The exact purpose of the Communication Commission's power to require licensees to share a frequency is not clear to us. This could be a legitimate provision, for example if it is intended to enable the Commission to licence one community broadcaster for the morning, and another one for the evening, both on the same frequency. However, such a sharing requirement should be written into the licence at the time it is issued, and not imposed unilaterally at the Commission's whim.

Recommendations:

- Broadcasters who apply for a radio or television licence should be guaranteed a frequency in case they are successful. It should not be necessary to go through a second licensing process to this end.
- Section 8(2), granting the Communication Commission broad discretion to migrate broadcasters to new frequencies or frequency bands, should be deleted.
- Section 9(2) should be amended to make it clear that the Communication Commission has the power to make frequency sharing a licence condition – rather than the power to impose a sharing requirement at any time

2.3. Spectrum fees and pricing

Overview of proposal

Holders of a frequency spectrum licence will be required to pay a fee, and observe "other terms and conditions as may be determined by the Communication Commission" (Section 10(2)). Section 10(1) states that frequency pricing "shall be determined by such methods as may be prescribed by the Communication Commission from time to time", but Section 11 in fact requires the charging methodology to be reviewed and published at least once every three years, and also lays down criteria for the pricing formula. The fee structure must "reflect the economic value of frequency spectrum in order to encourage the efficient usage of frequency spectrum and stimulate growth". Other factors to be taken into account include the size of the spectrum assigned, market demand and power output.

Analysis of proposal

The recommendation above to guarantee a frequency to any broadcaster who successfully applies for a licence also means that no separate charges should, in our opinion, be levied for the broadcasting licence and the spectrum use. In our analysis of the Broadcasting Regulations, we recommend the publication of a schedule setting out the fees applicable to

different types of broadcast licences. In this way, broadcasters who apply for a licence will know in advance both which frequency they will receive, and what fee will be payable, in case their bid is successful.

More generally, we find Part IV takes a too exclusively economic approach to the issue of spectrum pricing. Generating revenues is certainly one legitimate objective (and may support the Commission's independence by providing it with its own income), but the public interest is not well served if too much of the available spectrum is auctioned off to the highest bidder. Providers of wireless services to the public will simply pass the expense on. Broadcasters will be unable to invest the money they spend on spectrum fees in quality programmes.

We recommend including a number of additional criteria in Section 11(2), such as the promotion of quality broadcasting and ensuring wireless services are available to consumers at affordable rates. Furthermore, we recommend reserving appropriate portions of the spectrum for free, unlicensed uses such as WiFi, and such other wireless consumer technologies as may lie around the corner.

Recommendations:

- Broadcasters should not be charged a separate fee for use of a frequency. These costs should be factored into their broadcast licence fee.
- In adopting the pricing formula for spectrum use, the Communication Commission should have regard to the public interest generally and not only to the generation of revenue. To this end, the promotion of quality broadcasting and the promotion of affordable wireless services for consumers should be added to the list of factors in Section 11(2).
- Appropriate portions of the spectrum should be reserved for free, unlicensed uses, such as WiFi and future technologies.

***APPENDIX: THE KENYA COMMUNICATIONS
(RADIO COMMUNICATIONS AND FREQUENCY SPECTRUM)
REGULATIONS, 2009***

ARRANGEMENT OF REGULATIONS

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**THE KENYA COMMUNICATIONS ACT
(No. 2 of 1998)**

IN EXERCISE of the powers conferred by sections 38 of the Kenya Communications Act, the Minister for Information and Communication in consultation with the Commission makes the following Regulations –

**THE KENYA COMMUNICATIONS (RADIO COMMUNICATIONS AND FREQUENCY
SPECTRUM) REGULATIONS, 2009**

PART I - PRELIMINARY

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Citation

1. These Regulations may be cited as the Kenya Communications (Radio Communications and Frequency Spectrum) Regulations, 2009.

Interpretation

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

“Act” means the Kenya Communications Act No. 2 of 1998

“Amendment Act” means the Kenya Communications (Amendment) Act Number 1 of 2009

“authorised frequency” means the frequency assigned to a station by the Commission;

“Commission” means the Communications Commission of Kenya

“harmful interference” means any radiation or induction which endangers the functioning of a radio-navigation service or of a safety service or obstructs or repeatedly interrupts an authorised radio or telecommunication service;

“licensee” means a person or an entity licensed by the Commission to provide any communication services;

“network” means two or more stations operated by a person and used or intended to be used in communication with one another;

“radio emission” means any emission of electromagnetic energy of frequencies currently less than 300 Gigahertz without continuous artificial guide or such other frequencies as the Commission may from time to time publish;

“Spectrum Assignment” means the authorization by the Commission to any Licensee for use of specific frequencies or frequency pairs within a given allocation, usually at stated geographic location(s).

“station” means a transmitter, receiver, a combination of transmitters and receivers or any accessory thereto which is used or intended to be used for radio-communication;

“transmitter” means anything, irrespective of its use or function or the purpose of its design, that is capable of radio emission;

“user” means any person or body of persons who uses or operates radio communication services.

Purpose and Object

3. The purpose and objective of these Regulations is to-

- (a) promote the orderly development and efficient operation radio communication systems and services to meet the country socio-economic, security and cultural needs;
- (b) ensure proper planning, utilization and management of the spectrum resource in accordance with the Act, Government of Kenya Policy objectives and international agreements.
- (c) ensure efficient and optimum use of frequency spectrum resource through the adoption of latest technical advances and most efficient spectrum allocation and management technology based on operational requirements and technical viability;
- (d) ensure equitable and fair allocation and assignment of spectrum so as to benefit the maximum number of users;

PART II – FREQUENCY ASSIGNMENTS

Application criteria for approval

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4. (1) In considering applications for frequency assignment, the Commission shall take into consideration -
- (a) spectrum availability for the type of service and proposed location;
 - (b) whether the proposed service can be satisfied by any other means of communications;
 - (c) the distress and safety radio communication services which require protection from harmful interference.
 - (d) compliance with environmental, safety and aesthetic requirements; and
 - (e) the latest technical advances that ensures the most efficient spectrum use.

(2) The Commission may assign the use of a frequency or frequencies to the applicant, and shall for that purpose take into account all technical data of the equipment and associated accessories proposed to be used by the applicant.

Assignment of frequencies

5. (1) The Commission may assign frequencies when it is satisfied that such assignment will not cause harmful interference to any station or licensee operating in accordance with the Kenya table of frequency allocations;

(2) A person licensed to operate and provide radio communication systems and services shall apply to the Commission for assignment of the necessary frequencies.

Provided that in the event of non-availability of the frequencies applied for, the Commission may consider assigning frequencies in an alternative frequency band.

(3) An application for a licence shall be in the form prescribed by the Commission from time to time

(4) When the Commission is satisfied with an application, the applicant may be assigned a frequency or frequencies, which shall be used in accordance with the prescribed technical and operating parameters.

(5) The Commission may impose such conditions as it may deem necessary on the use of the assigned frequencies.

PART III – RADIO COMMUNICATION LICENSES

General licensing conditions

6. (1) No person shall possess, establish, install or use any radio communication station which requires licensing under these Regulations in any place within Kenya, unless he has a valid licence granted by the Commission

(2) The licensee shall not assign or lease part of frequency or transfer the licence without the prior written consent of the Commission provided that such consent shall not be unreasonably withheld by the Commission.

Provided that the Commission may from time to time publish in the Kenya Gazette the criteria for Assignment of Leasing of Frequency

(3) A licensee shall comply with the provisions of the International Telecommunications Convention and any Regulations annexed thereto which the Government of Kenya has ratified.

(4) The Commission may at its discretion grant temporary authorisation for the utilisation of the frequency spectrum. In cases where the authorisation is for a period of less than one month, the minimum applicable fee will be for a period of one month

Eligibility for licenses

7. The Commission shall publish guidelines outlining persons eligible and the eligibility criteria for grant of spectrum licences from time to time.

Obligations of licensees

8. (1) Licensees assigned the use of frequencies or frequency bands shall –
- (a) maintain and at the Commission's request provide an inventory of frequencies assigned;
 - (b) keep the licence in force by regular payment of annual fees as may be prescribed from time to time by the Commission;
 - (c) guard against and eliminate unauthorized emission, harmful interference or illegal use of the spectrum;
 - (d) put into use the assigned frequencies within the period specified by the Commission.
 - (e) Use all measures as may be prescribed by the Commission from time to time to: eliminate unauthorised emission and harmful interference
 - (f) optimize utilization of frequency spectrum resource as may be prescribed by the Commission from time to time.
- (2) The Commission may where it considers necessary, require a licensee to migrate to a new frequency or frequency band.
- (3) No material change may be made to a licensed station, including station parameters as specified in the licence without written authorisation of the Commission
- (4) A licensee shall require the prior written consent of the Commission where the licensee seeks to:
- a) increase the height of a structure supporting the radiating portion of the antenna
 - b) relocate an antenna where such relocation would involves a change in the geographic co-ordinates of latitude or longitude by as much as one second or change in street address;
 - c) change in antenna parameters such as; height, number of antenna elements, radiation pattern or polarization.
- (6) Licensees shall, unless exempted by the terms of the licence, transmit assigned call sign at the end of each complete transmission.

Provided that the transmission of the call sign at the end of each transmission shall not be required in cases of projects requiring continuous, frequent or extended use of the transmitting apparatus, if, during such periods and in connection with such use, the call sign is transmitted at least once every thirty minutes.

Ownership of frequencies

9. (1) A radio communication licence shall not confer any ownership rights of the frequency to the licensee.
- (2) The Commission may require licensees to share a frequency.

PART IV - SPECTRUM FEES AND PRICING

Frequency spectrum pricing

10. (1) Frequency spectrum pricing shall be determined by such methods as may be prescribed by the Commission from time to time.
- (2) Frequency spectrum licences shall be available subject to payment of fees and other terms and conditions as may be determined by the Commission

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- (3) All frequency assignments not utilized within the period specified may be recalled by the Commission;
- (4) Where a Radio communications License has been granted, the same may be revoked for non utilization of frequency assignment
- (5). Any fee paid in Sub –regulation (3) and (4) of this Regulation 11 shall not be refunded.

Pricing parameters

11 (1) The Commission shall adopt a pricing formula that reflects the economic value of frequency spectrum in order to encourage the efficient usage of frequency spectrum and stimulate growth.

- (2) such formula shall take into consideration such factors as;
- (a) size of Spectrum assigned;
 - (b) Frequency Band and level of congestion within the Band;
 - (c) market demand;
 - (d) power output and;
 - (e) geographical usage; and
 - (f) such other factors as the Commission may from time to time determine

The Commission shall review and publish charging methodology of frequency spectrum at least once every three years.

PART V – COMPLIANCE AND ENFORCEMENT

Type approval and inspection

- 12.** (1) No spectrum shall be brought into use unless radio equipment in respect of which an assignment is sought has been duly type approved or type accepted by the Commission.
- (2) Upon installation of a radio communication system, the licensee shall ensure that the system is inspected and certified by the Commission as installed in accordance with conditions as specified in the Kenya Communications (Importation, Type Approval And Distribution Of Communications Equipment) Regulations, 2009

Monitoring and inspection

- 13.** (1) The Commission may at any time monitor all emissions from licensed stations for the purpose of ensuring efficient utilisation and compliance with licensed parameters.
- (2) A licensee shall provide unlimited access to the Commission's authorised officers to its installations for purposes of inspection and verification of operational parameters.
- (3) The owners or management agents of buildings shall:
- (a) require proof of licences and authorization from the Commission before authorizing any installation of radio communication systems in their premises.
 - (b) keep records of all equipment installations on or within such buildings
 - (c) provide unlimited access to the Commission's authorised officers to the licensees' installations for purposes of inspection and verification of operational parameters;
- (4) Where required to do so, all licensees or persons operating licences shall make available to the Commission's authorised officers all records regarding their station's operations.
- (5) Any interference experienced by the licensee shall be reported to the Commission in writing.
- (6) Where the Commission, pursuant to a report made to it or on its own accord, is of the view that certain actions need to be undertaken to avoid or mitigate against any interference, the Commission

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may in writing require a licensee or a class of licensees to take that action and a licensee or such licensees shall comply with such requirement Inspection, sitting and maintenance of illuminated towers and control equipment.

14. (1) A licensee of any radio station which has an antenna structure shall paint and illuminate the tower in accordance with any written law , perform routine inspections and maintenance to the tower to ensure its properly marked and illuminated and on any other associated control equipment required thereto.

(2) All licensees shall comply with directions given by the Commission in consultation with the government agency responsible for civil aviation, in regard to antenna towers.

(3) All licensees shall ensure that the sitting of antennas and towers is in compliance with all applicable laws to which they are subject including but not limited to local authority requirements, environmental requirements, safety requirements and any other relevant Government Authority

(4) All licensees shall ensure that the sitting and installation of transmitters, antennas and towers is in full compliance with the guidelines on radiation limits that may be in force from time to time.

Radio spectrum management and monitoring facilities

15. The Commission may restrict the installation or operation of radio communications apparatus or erection of structures within a prescribed area from the Commission's radio monitoring facilities if it is of the opinion that such apparatus or structure will cause harmful interference to its operations.

Disposal of uncollected goods

16. (1) The Commission may disable or confiscate any radio communication apparatus or stations operated in contravention of the condition of licence or in contravention of the Act and these Regulations

(2) The confiscated equipment or apparatus may be disposed of in accordance with the Public Procurement and Disposal Act 2005

PART VI- OFFENCES

Misuse of frequencies

17. (1) Any licensee who uses any radio communication station for or in furtherance of unlawful conduct, is guilty of an offence.

2) Any person who, fails to disclose such material information, within a reasonable time, as sought by the Commission shall be guilty of an offence and upon conviction, be liable to a fine not exceeding One Million Kenya Shillings or to an imprisonment term not exceeding five years or both.

PART VII – MISCELLANEOUS PROVISIONS

General Offences

18. A Licensee who uses numbers or addresses contrary to these Regulations, commits an offence and shall on conviction be, liable to a fine not exceeding One Million shillings.

Amount of frequencies

19. The Commission may prescribe the minimum or maximum number or amount of radio communication channels or frequencies which any user or licensee may be granted

Revocation of Part VI of L.N 68 of 2001

20. Part VI of the Kenya Communications Regulations 2001 is revoked.

Made on the, 2009.

SAMUEL POGHISIO, Minister for Information and Communication.