



LEGAL NOTICE NO.

THE KENYA INFORMATION AND COMMUNICATIONS (ACCESS AND INFRASTRUCTURE SHARING) REGULATIONS, 2022

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THE KENYA INFORMATION AND COMMUNICATIONS ACT
(No. 2 of 1998)

IN EXERCISE of the powers conferred by by section 85A (3) of the Kenya Information and Communications Act, 1998, the Cabinet Secretary for Information, Communication, Technology, Innovation and Youth Affairs, in consultation with the Communications Authority of Kenya, makes the following Regulations—

THE KENYA INFORMATION AND COMMUNICATIONS (ACCESS AND INFRASTRUCTURE SHARING) REGULATIONS, 2022

PART I—PRELIMINARY

Citation. **1.** These Regulations may be cited as the Kenya Information and Communications (Access and Infrastructure Sharing) Regulations, 2022.

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

“**Access**” means availing facilities or services, to another service provider under specified conditions, an exclusive or non-exclusive basis, for the purpose of providing telecommunications services;

No 5 of 2018 “**Active infrastructure**” means infrastructure that is electronically involved in the transmission and reception of information which includes access network infrastructure such as; base transceiver stations, base station controllers, radio network controllers, multi-service access gateways, multi-service access networks, wireless local loop and core network infrastructure such as mobile services switching centres, soft switches, internet protocol multimedia sub-systems, serving gateway support node, short message service centre, multimedia gateways, mobile money transfer platforms and network management systems;

“**Active infrastructure sharing**” means the sharing of electronic infrastructure elements including antennas, backbone transmission network, base transceiver station, base station controller, bit stream, databases, radio access network, radio network controller (RNC), feeder cables, microwave radio equipment, mobile switching centre, registers, spectrum, optical fibre and wired access;

“**Agency outlets**” includes Information Communications and Technology service centres, customer care centres, contractors, distributors, mobile money agents and franchises;

“**Calling line identity**” means the information generated by a telecommunications system that identifies the calling number and forwards it through the telecommunications network to a receiving telecommunications system;

“**Critical infrastructure**” is as defined by the Computer Misuse and Cybercrimes Act;

“**co-location**” means accommodation of two or more switches, transmission equipment, antennas or any other electronic communications equipment in, or on a single building tower or any other structure for the purpose of interconnecting telecommunications networks;

“**Facilities acquirer**” means a licensee who provides network services who has leased or shares facilities or has requested to lease or share facilities from a facilities provider;

“**Facilities provider**” means a network facilities licensee who has been requested by a facilities acquirer for lease or to share facilities;

“**infrastructure**” means both tangible and intangible facilities, which enable provision of Information, Communications and Technology

services;

“Infrastructure sharing” means the provision to other licensees of access to—

- (a) tangible network elements used in connection with a public Information Communications and Technology network and includes lines, cables or wires whether fiber optic or other, equipment, power supply, apparatus, towers, masts, tunnels, ducts, risers, holes, pits, poles, landing stations, huts, lands, buildings or facilities; or
- (b) intangible network elements facilitating the utilization of a public Information, Communications and Technology network and includes agreements, arrangements, licences, franchises, rights of way, easements and other such interests;

“Infrastructure seeker” means a licensee who makes a formal request to enter into an agreement with an infrastructure provider for the purposes of accessing or sharing the provider’s infrastructure;

“Infrastructure sharing agreement” means a legal arrangement entered into by an infrastructure provider and infrastructure seeker setting out the terms and conditions for infrastructure sharing.

“Infrastructure provider” means an entity that owns or manages Information, Communications and Technology infrastructure;

“Just and reasonable charges” means charges that enable a licensee maintain its financial integrity, attract capital, operate efficiently and fully compensate investors for risks borne;

“Mobile network operator” means a telecommunications service provider that provides wireless voice and data communication for its

subscribed mobile users;

“Mobile virtual network operator” means a business model whereby a licensee provides mobile electronic communication services using the infrastructure of one or more mobile network operators;

“National roaming” means the ability for a mobile subscriber to automatically access electronic communication services, in areas outside the geographical coverage of their service provider by using available infrastructure of other mobile network operator;

“National roaming agreement” means a legal agreement entered into by an infrastructure provider and infrastructure seeker setting out the terms and conditions for national roaming;

“Network facility” means any element that forms part of an electronic communications network and includes any wire, cable, antenna, mast or other thing which is or may be used for or in connection with communications;

“Non-replicable infrastructure” means a facility that is provided on a monopolistic basis or subject to some degree of monopoly, is required by competitors in order to compete and it cannot be practicably replicated by other competitors for economic, technical or other reasons;

“Passive infrastructure” means infrastructure that is not involved in the electronic transmission and reception of information that includes site sharing (space, tower, power, shelter, security) and transmission (optic fiber cable, copper cable, trenches, manholes, ducts, poles);

“Passive infrastructure sharing” means the sharing of non-electronic infrastructure elements which include, but are not limited to, air conditioning, buildings, distribution frames or points, service ducts, electric power supply and battery backup, physical sites, poles, right of ways, shelters, data centre space, towers or masts, security arrangement,

trenches and way leaves;

“**Private network licensee**” means the licensee of a telecommunications system that provides private telecommunication services for its own use;

“**Public network licensee**” means a provider of a public telecommunications service;

“**Publicly owned infrastructure**” means infrastructure that is owned by the public or is for public use;

“**Reference access offer**” means a document setting out the terms and conditions under which an interconnect licensee undertakes to permit access to its telecommunications network in a non-discriminatory manner; and

“**Service provider**” means any licensee who provides Information, Communications and Technology services to its subscribers or other licensees.

Object and purpose of the Regulations.

3. The object and purpose of these Regulations is to—

- (a) create a framework for better cooperation in infrastructure sharing;
- (b) eliminate unnecessary duplication of Information, Communications and Technology infrastructure;
- (c) maximize the use of the existing and future Information, Communications and Technology infrastructure;
- (d) minimize negative public health, safety and environmental impacts caused by the proliferation of infrastructure installations;
- (e) promote competition in the provision of Information, Communications and Technology networks and services;
- (f) promote orderly and effective town and country planning in terms of Information, Communications and Technology

- service provision; and
- (g) promote investment and innovation in the provision of Information, Communications and Technology services.

PART II— REQUIREMENTS FOR INFRASTRUCTURE SHARING

Guidelines for infrastructure sharing.

- 4.** An infrastructure provider shall when processing a request for infrastructure sharing be guided by the following—
- (a) whether the infrastructure can be reasonably duplicated or substituted;
 - (b) the existence of technical alternatives;
 - (c) whether the infrastructure is critical to the supply of services by the licensees;
 - (d) whether the infrastructure has available capacity;
 - (e) whether joint use of the infrastructure encourages the effective and efficient use of the facility; and
 - (f) the cost, time and inconvenience to the licensees and the public of the alternatives to shared provision and use of the infrastructure.

Conditions for sharing of general infrastructure.

- 5.** (1) A licensee deploying infrastructure for the licensee’s own use shall provide for at least thirty percent additional capacity beyond the projected owner’s needs.
- (2) The additional capacity provided under sub-regulation (1) shall be availed for sharing with other licensees on a non-discriminatory basis.
- (3) Publicly owned infrastructure shall be operated and availed to infrastructure seekers on the principle of open-access and non-discrimination.
- (4) Passive infrastructure may be established at a particular location where there is no feasible option of co-location or infrastructure sharing with an existing infrastructure provider.
- (5) The Authority may impose specific infrastructure sharing obligations relating to an infrastructure provider who has significant market power or is declared dominant in the relevant market segment to ensure effective

occupation.

Conditions for sharing non-replicable infrastructure.

6. An infrastructure provider shall ensure that not more than fifty percent of the infrastructure provider's non-replicable infrastructure is used by a single infrastructure seeker.

Infrastructure sharing agreements.

7. (1) An infrastructure sharing agreement shall—

(a) be in writing;

(b) be submitted to the Authority for approval at least two weeks before the commencement date of the agreement; and

(c) include—

(i) the particular elements to be shared;

(ii) the capacity to be shared;

(iii) the cost;

(iv) the term of the proposed agreement;

(v) service levels;

(vi) handling of outages and modalities of accessing the facility;

(vii) points of sharing of installed facilities on private land;

(viii) such other term as may be agreed to by the parties.

(2) The Authority may give directions on the nature, composition and form of such an agreement.

(3) An infrastructure provider shall provide infrastructure-sharing services on a non-discriminatory “first come, first served” basis.

(4) An infrastructure provider shall, in its provision of facilities, deal with an infrastructure seeker on a basis that is non-discriminatory and no less favourable than the treatment which the infrastructure provider affords to its subsidiaries, its affiliates or other similarly situated facilities acquirers.

(5) The terms and conditions for infrastructure sharing shall be subject to a commercial and technical agreement between the parties concerned and the Authority may intervene to resolve disputes arising from such agreements.

(6) An infrastructure provider shall charge a fee according to filed tariffs which are just and reasonable;

(7) An infrastructure sharing agreement which prohibits the provision of Information, Communications and Technology services by other licensees shall be illegal.

Exemption from the sharing of a particular element of the

- 8.** The Authority may exempt an infrastructure provider from the obligation of sharing a particular element of the infrastructure if—
- (a) infrastructure sharing is prohibited by law;
 - (b) the infrastructure seeker does not have the appropriate license to operate the requested infrastructure;

- infrastructure. (c) the request is rendered impossible as a result of technical specifications or capacity limitations;
- (d) the infrastructure sharing would endanger the environment, life, or safety or result in injury of any person or cause harm to other property; or
- (e) there is a valid and justifiable cause.
- Request for infrastructure sharing. **9.** (1) An infrastructure seeker shall make a formal written request for infrastructure sharing to an infrastructure provider.
- (2) An infrastructure provider shall within 45 days from the receipt of an infrastructure-sharing request respond to the infrastructure seeker with an invitation to commence negotiations.
- Negotiation **10.** (1) A party to a proposed infrastructure sharing agreement shall—
- (a) negotiate in good faith;
- (b) endeavour to arrive at a reasonable infrastructure sharing agreement;
- (c) not obstruct and or delay negotiations;
- (d) not intentionally mislead the other party;
- (e) not coerce the other party into making an agreement that the party would not otherwise have made;
- (f) not refuse to provide information relevant to the negotiations or agreement;
- (g) designate proper representatives to expedite negotiations; and
- (h) collaborate with all relevant agencies to obtain all necessary approvals.
- (2) The parties shall finalize the negotiations within twenty-four days from the date of commencement of negotiations.
- (3) The parties shall file the signed agreement with the Authority within seven days from the date of concluding the negotiations and the Authority

shall respond to the parties within fourteen days.

(4) Where the Authority approves an infrastructure sharing agreement pursuant to sub-regulation (5), the parties shall finalize the infrastructure sharing arrangement within the timelines indicated in the agreement.

(5) Parties must keep a record of all requests received for infrastructure sharing and submit a quarterly report to the Authority indicating the status and progress of each request.

Procedure in cases where there is lapse in the time set for negotiation.

11. (1) Where negotiations are not concluded within the timelines specified under regulation 10(4), the infrastructure provider shall refer the matter to the Authority.

(2) The Authority may, after receiving and reviewing representations from both parties, prescribe an interim infrastructure sharing arrangement.

(3) An interim infrastructure sharing arrangement prescribed by the Authority shall remain in force until the parties reach a consensus.

(4) The parties shall file an infrastructure sharing agreement with a received approval from the Authority.

Procedure in cases where the infrastructure provider is unable to share infrastructure.

12. (1) Where an infrastructure provider is unable to share the requested infrastructure, the infrastructure provider shall respond in writing to the infrastructure seeker within the timeline specified under regulation 9(2) detailing the reasons for not sharing the requested infrastructure.

(2) Where the infrastructure seeker is not satisfied with the reasons provided by the infrastructure provider, the infrastructure seeker may refer the matter to the Authority for determination.

(3) The Authority may, if is not satisfied with the reasons provided by the infrastructure provider on the sharing of its infrastructure, obligate the infrastructure provider to share the particular infrastructure with the infrastructure seeker in which case the parties shall commence infrastructure sharing negotiations.

- Filing. **13.** Any party entering into an infrastructure sharing agreement shall file the executed infrastructure sharing agreement with the Authority, attaching evidence of the requisite documents duly filed pursuant to regulation 10(1) (h).
- Infrastructure sharing to facilitate national roaming. **14.** (1) A request by an infrastructure seeker to facilitate its subscribers for national roaming on an infrastructure provider’s network shall be considered as a request for sharing active infrastructure.
- 2) An infrastructure seeker who has entered into a national roaming agreement shall take all necessary steps to inform its subscribers—
- (a) when they enter a roaming area that they are roaming in another network;
 - (b) the associated costs of such roaming; and
 - (c) where necessary, the possible ways of lowering the roaming costs by disabling some features and services.
- (3) The Authority may require an operator in a geographic area where there is imbalance in network coverage to enter in to national roaming agreement so as to ensure seamless communication across all networks in Kenya.
- Infrastructure sharing to facilitate mobile virtual network provider. **15.** (1) A request by an Infrastructure Seeker to facilitate provision of mobile virtual network operator services shall be considered as a request for sharing active infrastructure.
- (2) A mobile virtual network operator may enter into a national roaming arrangement with other operators other than their host operators either on its own or through its host operator.

- Hosting of service providers. **16.** (1) A request by a service provider to facilitate provision of Information Communication and Telecommunication services to subscribers of an infrastructure provider shall be considered as a request for sharing active infrastructure.
- (2) A service provider may, upon fully disclosing any existing infrastructure sharing agreements at the time of application, request for infrastructure sharing from more than one infrastructure provider.
- Infrastructure sharing reference offer. **17.** An infrastructure provider shall develop and publicly display their infrastructure sharing reference offers on their websites.
- Sharing of installed facilities on private land. **18.** (1) The Authority shall, particularly where other licensees do not have access to viable alternatives, encourage the sharing of facilities and property on private land with other licensees.
- (2) The Authority shall require the infrastructure provider in the circumstances to—
- a) file with the Authority a schedule of fees charged for sharing;
 - b) agree on a meet-point and location with another licensee seeking a similar arrangement;
 - c) provide reasonable, just, and non-discriminatory rates, terms and conditions for physical sharing of equipment necessary for providing access to install facilities at the licensee’s premises.
- Reference Infrastructure Sharing offer **19.** (1) Where the Authority issues an order requiring a dominant telecommunications service licensee to publish a Reference Infrastructure Sharing offer, the licensee shall, unless otherwise determined by the Authority—
- (a) submit a proposed reference Infrastructure Sharing offer to the Authority for review and approval within three months after

- the issuance of the order by the Authority; and
- (b) be subject to the terms and conditions of the approved reference Infrastructure Sharing offer approved by the Authority, subject to any amendments considered appropriate by the Authority, within three months after the issuance of the order by the Authority.
- (2) Prior to approving any reference access offer or any amendments thereto, the Authority may—
- (a) request for additional information or clarification from the dominant telecommunications service licensee with regard to the proposed reference access offer; or
- (b) consult with the industry and public on the proposed reference Infrastructure Sharing offer.
- (3) The reference Infrastructure Sharing offers shall —
- (a) be sufficiently unbundled to ensure that the access seekers do not pay for network elements or facilities which are not necessary; and
- (b) contain a description of the components of the offer, associated terms and conditions, including the structure and level of prices.
- (4) The reference Infrastructure Sharing offers shall, where applicable, include detailed information related to access to—
- (a) network elements and associated facilities, which may involve the connection of equipment, by fixed or non-fixed means;
- (b) physical infrastructure including buildings, ducts and masts;
- (c) relevant software systems including operational support systems, access to number translation or systems offering equivalent functionality;
- (d) fixed and mobile networks, in particular for roaming, access to conditional access systems for digital television services; and
- (e) access to virtual network services.

Network
access
agreement.

- 20.** An access agreement shall be in writing and shall specify—
- (a) the scope and specification of the facilities to be provided;
 - (b) access to all ancillary or supplementary services, or access to and use of premises or land that are required to support the provision of network facilities;
 - (c) service levels and the maintenance of facilities;
 - (d) charges for the facilities;
 - (e) billing and settlement procedures;
 - (f) ordering, forecasting, provisioning and testing procedures;
 - (g) the provision of co-location for facilities and the terms and conditions in accordance with which co-location is to be provided;
 - (h) technical specifications, standards and inter-operability tests;
 - (i) information handling and confidentiality;
 - (j) duration, re-negotiation and review procedures; and
 - (k) dispute resolution procedures.

Network
access and
facilities.

- 21.** (1) A facilities licensee shall facilitate access to network facilities.
- (2) Access to network facilities shall be commercially agreed upon between the facilities acquirer and the facilities provider.
 - (3) Request for access to network facilities shall be reasonable and in writing.
 - (4) A facilities provider and a facilities acquirer shall negotiate access to network facilities at all times in good faith.
 - (5) A facilities licensee shall submit a copy of a concluded access agreement to the Authority within thirty days after conclusion of the negotiations.
 - (6) The Authority may authorize access to essential facilities of dominant

telecommunications service providers.

(7) A facilities provider who has been authorized to provide access to network facilities shall be entitled to levy a charge for such access to enable it recover economic costs and ensure a reasonable rate of return.

(8) A facilities provider shall treat each—

(a) facilities acquirer on a basis that is non-discriminatory in its provision of facilities and no less favourable than the treatment which the facilities provider affords to its subsidiaries, its affiliates, or other similarly situated facilities acquirers;

(b) communication network service of a facilities acquirer on a basis that is non-discriminatory and no less favourable than the treatment which the facilities provider affords to the electronic communication network services of itself, its affiliates, or other similarly situated facilities acquirers; and

(c) customer of a facilities acquirer on a basis that is non-discriminatory and not less favourable than the treatment which the facilities provider affords to its own customers of the customers of its subsidiaries, its affiliates, or other similarly situated facilities acquirers.

Unreasonable access requests. **22.** (1) A facilities licensee may refuse unreasonable requests for access to facilities licensee's network facilities.

23. (2) A request for access to network facilities shall be unreasonable if it—
(a) is not economically or technically feasible; or
(b) may result in the facilities licensee being unduly prejudiced.

(3) A facilities licensee shall not be required to provide access where, in the Authority's view, it is not reasonable to require the facilities provider to provide access including, among others, to circumstances where it is beyond its control or it is not reasonably practicable.

Co-location.

24. (1) The Authority shall encourage a licensee who has the right to install facilities on, over or under private land or take advantage of a procedure for the expropriation or use of property to share such facilities and property with other licensees, in particular, where other licensees do not have access to viable alternatives.

(2) A service provider providing such co-location shall—

- (a) file with the Authority a schedule of fees charged for co-location;
- (b) agree on a meet-point with another licensee seeking interconnection and designating location for interconnecting the network;
- (c) provide reasonable, just, and non-discriminatory rates, terms and conditions for physical collocation of equipment necessary for providing access to the unbundled network elements at the licensee's premises;
- (d) resort to virtual co-location, requiring interconnection at a place outside the licensee's usual premises such as switching, transmission, or main distribution door frame room if it is demonstrated that physical co-location is not practical for technical reasons or for space limitations;
- (e) agree with a licensee seeking interconnection on a facility that is based in the central office of either party to complete the transmission; and
- (f) charge a fee according to filed tariffs.

(3) The terms and conditions for co-location or sharing of facilities shall be subject to a commercial and technical agreement between the parties

concerned and the Authority may intervene to resolve disputes arising from such agreements.

PART III- GENERAL PROVISIONS

Dispute resolution.

25. A dispute arising from the infrastructure sharing arrangement or agreement shall be referred to the Authority in accordance with the regulations relating to dispute resolution.

Penalties.

26. A licensee who contravenes these Regulations shall be liable to a penalty equivalent not exceeding 0.2% of the annual gross revenue turnover based on the last accounts submit by the licensee.

Made on the, 2022.

JOE MUCHERU,
Cabinet Secretary,
Ministry of ICT, Innovation and Youth Affairs.