COMMUNICATIONS
AUTHORITY OF KENYA

DETERMINATION NO. 2 OF 2016 ON TERRESTRIAL BROADCAST SIGNAL DISTRIBUTION (BSD) PRICING AND ACCCESS FRAMEWORK

1. INTRODUCTION

This Determination is made under the Kenya Information and Communications Act of 1998 as amended in 2013 (herein referred to as the Act) and the Kenya Information and Communications Regulations, 2010 (herein referred to as Regulations).

This Determination shall be known as the Determination No. 2 of 2016 on Long Run Average Incremental Cost Plus mark up (LRAIC+) based BSD tariff regime. The Determination is effective on the **1st day of December 2016** and is binding to all terrestrial broadcast signal distributors in the Republic of Kenya. The Determination will also provide a framework for infrastructure sharing and a standard Reference Access Offer (RAO), and it also supersedes the previous Determination on Broadcasting signal Distribution services, made by the Communications Authority of Kenya.

On 16th December 2013, the Authority issued the Determination No.1 on Cost-Based Terrestrial Digital Broadcasting Signal Distribution Tariffs, to ensure that the tariff structure would give the Signal Distributors a reasonable return on their investment without levying unjustifiably high charges on content service providers that could result in constrained access to the digital platform to the detriment of the consumer. Since then, the broadcasting market has seen developments that include, among others, the switch off of analogue television transmission and the development of a programming code.

Following these developments, the Authority decided to undertake a detailed review of the current rates that were set in its 2013 determination, as well as to develop a standard

RAO that will enable the Content Service Providers to access the signal distribution platform in an affordable, transparent and non-discriminatory manner.

2. OBJECTIVES

The primary objective of the signal distribution cost modeling exercise was to review the current BSD framework in Kenya, taking into account the latest market developments and providing a comparative analysis of the current situation with international best practice. More specifically, the study aimed to develop a BSD cost model and attendant tariffs thus defining an appropriate pricing framework that will foster, in particular, the development of access and competition in the broadcasting sector in Kenya.

3. CONFORMITY WITH THE LAW

This Determination is guided by the results of the Digital Terrestrial Network Cost Study conducted by the Communications Authority of Kenya through M/S Analysis Mason, a UK based independent consultancy firm, during the 2015/2016 Financial Year. The Determination is made pursuant to section 46A (a), (d) and (g) of the Kenya Information and Communications Act, Regulation 16 (2) (c) of the Kenya Information and Communications (Broadcasting) Regulations, 2009 (Broadcasting Regulations) and Regulation 3 of the Kenya Information and Communication (Tariff) Regulations, 2010 (hereinafter referred to as the Regulations).

The import of the quoted provisions of the law is that the Authority may require a person granted a license for the provision of terrestrial digital broadcasting signal distribution services to provide the said services on such terms and conditions as to access tariffs and quality of service as the Authority may prescribe. The same requirement has been provided for under the digital terrestrial signal distribution license.

4. BASIS FOR SETTING BINDING RULES

In the year 2015, Kenya fully migrated from analogue television broadcasting to digital television broadcasting. Since then, the Authority has licensed a host of Content Service Providers (Commercial TV Broadcasters), thereby affording consumers a variety of TV channels to view. The apparent uptake of the services not withstanding, there is room for growth in the Commercial TV sub-market. For this continuous growth to be realized, it is important to ensure that the access prices to the platform are cost-based and not prohibitive and that there is equitable access to the broadcasting wholesale network.

By its nature, the BSD market is un-competitive, thus it is important to ensure that the costs of providing the service are in line with the principles of economic efficiency, to avoid imposition of arbitrarily high carriage prices on the Content Service Providers. Consequently, Regulatory intervention is backed by microeconomic theory on the regulation of markets that exhibit non-competitive tendencies such as monopoly, oligopoly or monopsony, which are prevalent in network service industries.

5. REVIEW PROCESS

The study adopted a highly transparent and consultative process, which included interviews with industry stakeholders, site visits, receipt of written and oral submissions by operators, review and consideration of comments made and provision of appropriate responses to those comments.

I. Oral and Written Submissions

Industry stakeholders were given adequate opportunity to make both oral and written submissions in the course of the study with respect to the methodology, study assumptions, data collection and the proposed interventions. The key issues raised by the stakeholders revolved around the following:

i. The issuing of self-provisioning licenses has taken away the most profitable customers of the BDS's and that the remaining FTA stations are small and have limited funds, resulting in high rates of non-payment.

ii. The benefits of site sharing were overestimated because (a) most towers are owned by third parties who will essentially charge the same rent as to all tenants, and (b) active sharing is not feasible.

iii. The cost of local insertion is underestimated.

iv. The cost for satellite uplink has been underestimated, because the use of C-band distribution is more expensive than the use of Ku-band capacity.

v. The effects of inflation have been underestimated in the model, because the income is in Kenya Shillings whilst a large proportion of the costs are in US dollars.

vi. Some of the low charges proposed under the new framework are unrealistically low.

II. Consideration of comments by Stakeholders

The above comments were addressed as follows:

i. We do not believe that self-provisioning by AND has had a negative impact on the BSD's since the four channels are accepted to be must carry channels, and were not therefore paying charges. The self-provision by Lancia has not had a material impact either as we do not believe that Bamba's unique channels would pay for distribution in Kenya if Bamba were not carrying them. However, we accept that self-provision by GOtv could have a larger impact on the BSD licensees, and this was considered during the cost modeling.

ii. Costs of rented sites were considered in the model, and in the case of new sites we believe that the efficient approach would be for the two BSD's to share the tower and the associated capex and opex.

iii. The cost of the card for local insertion that was used in the model is an efficient cost for such equipment.

iv. Published information on the price of satellite capacity shows that the premium for C-band distribution capacity over Ku-band distribution capacity is small. Thus the cost of satellite uplink has not been underestimated.

v. The cost projections took account of both forecast inflation in Kenya and forecast changes in exchange rates, as provided by the Economist Intelligence Unit. Thus the effects of inflation and currencies are fully accounted for in the model.

6 CONSIDERATION OF THE FINDINGS OF THE BSD TARIFF REVIEW

Following a thorough and exhaustive analysis of the findings of the BSD tariff review study, the Authority noted the issues below arising from the study:

I. **Mandate**: That the review of the signal distribution tariffs and the development of a standard Reference Access Offer was undertaken by the Authority as stipulated in the Act and Regulations:

II. **Stakeholder involvement**: That the review was undertaken in a transparent and consultative manner and all stakeholders were, to the extent possible and practicable, sufficiently involved in the process;

III. **Responses to comments raised by Stakeholders:** That all the comments raised by stakeholders in the course of the study were considered and addressed during the review exercise;

IV. **Costing Methodology**: That the LRAIC+ methodology is the most efficient method for setting signal distribution tariffs, since it sets tariffs as close to the marginal cost of providing signal distribution services to third parties;

V. **Stakeholder Impacts of the Review**: That the lower signal distribution rates associated with the LRAIC+ model pose no significant financial risks to the

Broadcast Signal Distributors, whereas commercial TV broadcasters stand to benefit through the facilitation of more affordable access to the digital platform.

VI. **Wholesale Intervention**: That the duopoly power enjoyed by the two licensed Broadcast Signal Distributors, coupled with the scarcity of the requisite spectrum resource for the development of signal distribution infrastructure; and the fact that the two distributors are wholly owned subsidiaries of commercial TV broadcast houses, provide an incentive for the firms to not only price their services significantly above the relevant costs, but also to discriminate against other commercial TV broadcasters. In light of the foregoing, maintaining wholesale regulatory intervention through imposition of price caps on the signal distribution rates is justified.

VII. **Standard Reference Access Offer (RAO)**: That the signal distributors shall be obliged to use the RAO whilst entering into negotiations with any third parties to ensure that the principles of non-discrimination are upheld. This RAO describes the services to be provided to broadcasters by the two national BSD operators in terms of; required service standards, non-discrimination, colocation principles, rollout and coverage and preparation of separated accounts for vertically integrated BSDs. All BSDs will be required to publish a RAO in order to ensure that there is access, transparency and non-discrimination on the terrestrial signal distribution platforms.

7 THE DETERMINATION

Following due consideration of all the above factors reviewed during the study and taking due regard of the Authority's mandate to, *inter alia*, promote development of a vibrant broadcasting market in the communications sector in Kenya, the Authority hereby determines:

I. That all the operators licensed to provide digital terrestrial broadcast signal distribution services in Kenya shall implement the signal distribution rates capped as stipulated in Table 1.

Table 1: LRAIC+ cost-based prices

KES per site per Mbit/s per month		2016	2017	2018
BSD	Nairobi	89,545	91,753	93,411
	Other cities/towns	37,311	38,306	39,074
	Rural	32,961	33,759	34,352
Satellite up linking, National	National	234,015	234,319	234,594
Satellite reception	Nairobi	668	697	723
	Other cities/towns	835	872	904
	Rural	835	872	904
Local insertion (per channel not per Mbit/s)		1,563	1,593	1, 597

II. The above charges in Table 1 have been determined to be:

a) just and reasonable;
b) objective;
c) independently verifiable; and
d) fair, having regard to the underlying and actual costs of the Designated Licensees.

III. That all signal distributors are at liberty to negotiate lower tariffs subject to the capped rates outlined in Table 1 above;

IV. That considering the prevailing higher signal distribution tariffs of KES 125,993.50 per Mbit for Nairobi and KES 93,202.75 per Mbit for other sites in Kenya, the BSD's shall be obliged to renegotiate their Service Level Agreements, no more than the LRAIC+ rates stipulated in table 1 above;

V. That all channels must pay all the listed charges for the services purchase from a BSD operator using the RAO, as provided in Annex I;

VI. That vertically integrated players apply transfer charges in regulatory accounting statements and hence will be required to prepare separate accounts for the respective business lines; and

VII. The maximum charges shall be per Mbit/s rather than per channel, to allow parties to choose the bit stream quality, offer HDTV, etc. and a minimum bit stream quality shall be 1.5 Mbit/s per channel to ensure an acceptable level of quality.

Dated this **9th** day of **November** 2016

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Francis W. Wangusi, MBS

DIRECTOR GENERAL

COMMUNICATIONS AUTHORITY OF KENYA