



FREQUENCY SPECTRUM TRANSFER GUIDELINES

2022

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Definitions

Spectrum Trading

Spectrum trading is the process that allows the transfer of certain rights to use the radio frequency spectrum from one undertaking to another

Spectrum Transfer

A Spectrum Trading transaction in which a Licensee reassigns a portion or a whole of its Licence rights on a Spectrum Licence to another Licensee following a commercial agreement approved by the Authority

Transferor

A licensee desiring to transfer his/her license rights and obligations

Transferee

A licensee desiring to acquire spectrum rights and obligations from another licensee

Licensee

An entity licensed by the Authority to provide communication services

I. Background

1. The Authority is responsible for the management of the country's radio frequency spectrum. Management of this scarce resource entails planning, assignment, licensing and monitoring of spectrum for various radio communication services.
2. In managing this scarce resource, the Authority develops relevant regulatory instruments that would ensure optimum utilization of this scarce resource. The Authority has identified Spectrum transfer guidelines as one of the key instruments that will aid efficient spectrum management in the country.
3. Spectrum transfer is a form of spectrum trading mechanism for the further exchange of spectrum amongst users that has first been made available through primary mechanisms.
4. Spectrum transfer promotes efficiency by exposing spectrum users to the opportunity cost of spectrum, i.e. the value of spectrum to the next best user. In a well-functioning secondary market, users will be incentivised to sell spectrum to other users if the value to them is below the market price or opportunity cost, thus leading to more efficient spectrum use
5. The fundamental concerns regarding spectrum transfers are that the regulatory framework for the transfer of spectrum is unclear, incomplete and inconsistently applied and that a liberal secondary market may lead to an accumulation of spectrum that increases market power. There are already signs that such an accumulation has been occurring e.g. where some operators have accumulated substantial holdings of spectrum through the acquisition of telecom licensees.
6. In the past spectrum, the transfer has primarily taken the form of frequency transfers arising as a result of corporate acquisitions, i.e. the transfer of ownership of one company to another including rights to spectrum.
7. Existing regulations do specify that any transfer of spectrum rights requires the Authority's approval. This implies that transfers are not unlawful in themselves, only they require approval. Although a barrier to the process, this nevertheless suggests that transfers can be envisaged within the existing regulation and that the Authority would only need to develop regulations and rules itself to make it possible.

II. Preamble

8. This may be cited as the Frequency Transfer Guidelines of the Communications Authority of Kenya (CA) hereafter referred to as "The Authority". These Guidelines form a basis for frequency transfers in Kenya, which includes the procedure and considerations of frequency transfer.
9. The objective of these guidelines is to provide clarity and consistency, promote transparency and enhance efficiency in processing transfer of frequencies.
10. Development of the Frequency Transfer Guidelines is informed by provisions in Regulation 5 (3) of the Kenya Information and Communications (Radio Communications and Frequency Spectrum) Regulations, 2010 which states as follows; "*A licensee shall not transfer frequencies assigned and the rights therein without the written consent of the Authority*"

11. It follows therefore that transfer of spectrum resources attached and/or embedded in the license is envisaged and contemplated by the spirit of the above regulation.
12. The above regulation should be read together with Regulation 10 of the Kenya Information and Communications (Licensing and Quality of Service) Regulation, 2010, on limitations for frequency transfer and that in consideration of a transfer request the request, should be considered as if it is an application for a new license.
13. The Authority has the discretion to develop guidelines to operationalize grey areas of regulation and the grey area in question is the eligibility criteria of these new breed/category of licensees who are transferees of licences or assignment of frequencies making Regulation 5(3) instructive as a basis to formulate these guidelines.
14. The National Information, Communications and Technology (ICT) Policy Guidelines 2020 proposes "ensuring that the radio frequency spectrum is managed equitably and transparently with specific and clear conditions". These guidelines, therefore, provide clarity and transparency in the frequency transfer process.
15. These guidelines are published to enhance the deployment of telecommunication services across the country and further liberalize the spectrum management guidelines of the Authority towards:
 - a. transparent and predictable transfer of spectrum to licensees
 - b. Deepening competition in the market
 - c. Promoting innovation by facilitating entrepreneurs to acquire spectrum and offer new services
 - d. Reducing the barriers to market entry by allowing predictable and transparent access to the spectrum.

III. Situational Analysis

16. The Authority's vision of "a digitally transformed nation" is inclined to facilitate the uptake of ICT services. To achieve this the Authority has to take strategic decisions to remove barriers to market entry through regulatory interventions such as spectrum transfer guidelines.
17. Currently, there is no formal procedure for the transfer of frequency licenses; hence Frequency Spectrum Licenses are transferred from one entity to another in an unstructured manner.
18. This is mainly experienced in frequency bands with high demand and low supply such as FM broadcasting bands and in spectrum bands required for use in deploying new technologies.
19. The Authority is often notified after the acquisition or transfer has taken place and the acquiring entity may not be aware of its licence rights or obligations .
20. The development of the Frequency transfer guidelines is therefore aimed at addressing these challenges.

IV. Objectives

21. To promote and enhance transparency and predictability in facilitating frequency transfers and act as an instrument that will aid efficient management of the scarce spectrum resource.
22. To remove regulatory barriers and increase access to the spectrum, which is part of the Authority's secondary market initiatives to ensure efficient use of the spectrum.

V. Scope

23. The scope of these guidelines will include the following aspects of frequency transfer. A licensee may transfer;
 - a. the entire bundle of rights and obligations under a frequency license; or
 - b. partial rights and obligations under a frequency license is limited to:
 - i. part of the range of frequencies under the license;
 - ii. a geographic area being part of the total geographic area in which the transferor is licensed to use the radio frequencies; or
 - iii. both of the foregoing.
24. Licensees may transfer the right to use radio frequencies in all licensable bands of the spectrum.

A. Transitional period

25. The frequency transfer guidelines will be effective upon approval and publication.

B. Eligibility criteria for frequency transfer

26. Frequency transfer will be considered if it does not disrupt the market structure
27. The Authority shall license the transferor and transferee. In the event the transferee is not a licensee, then they will obtain the relevant licenses from the Authority before the frequency transfer request is considered.
28. Government Ministries, Departments and Agencies shall be eligible to transfer spectrum. Since they have public obligations, they will be handled on a case-by-case basis. They will be required to comply with all license conditions.
29. The entity transferring must have held the frequency for a minimum period of two (2) years before they can transfer it and the frequency must be fully or partially in use.

C. Procedure for frequency transfer

30. A licensee shall seek approval from the Authority before initiating any intention for transfer.

- a. A licensee shall submit a completed Application Form. The form is attached as Annex I to the Frequency transfer guidelines.
 - b. Pay the associated frequency transfer administration fee as prescribed by the Authority.
 - c. A licensee shall submit all the requisite transaction documentation relating to the frequency under consideration as listed in the application form.
 - d. The Authority may request any additional information it may deem necessary.
 - e. The Authority will consider the application through the Communications Licensing Committee (CLC) and communicate the decision to the applicant within 30 days from the date the decision is made. This may however be extended for another fifteen days in unusual circumstances.
31. If the application is approved, the Authority shall attach the necessary license conditions and communicate to the applicant for further processing
 32. If the application is not approved, the Authority shall communicate to the applicant indicating the reasons for rejection.

D. Considerations for Frequency Transfer

The Authority will take into consideration, among other factors:

33. Whether the Transferee meets all qualification requirements that applied to the transferor
34. Whether the transferee is capable of fulfilling all conditions attached to the frequency license proposed for transfer and any unfulfilled obligations of the transferor:
35. Whether the transferee is in a position to fulfil the obligations corresponding to the rights to be transferred under the relevant frequency license;
36. Whether the frequency transfer will raise any competition concerns in line with the Kenya Information and Communication Act 1998 (KICA).
37. Whether the transferor and transferee have settled all applicable regulatory and other fees and are in good standing under applicable laws, regulations and licenses;
38. Whether the proposed transfer involves radio frequencies for which there is likely to be significant demand, in that case, the Authority may:
 - i. publish the details of the proposed transfer highlighting the frequency bands and/or geographic area of application for the frequencies proposed for transfers, the duration of the proposed transfer, if any, and the parties involved soliciting comments thereon from interested parties;

- ii. allow the transferor and transferee an opportunity to respond to any comments received within seven (7) days after the lapse of the publication period and consider any such comments received and responses made. That where the Authority authorises a partial transfer as contemplated, it shall specify the allocation of licence rights and obligations between the transferor and the transferee or to both concurrently.

E. Authorisation of frequency transfer

39. In consideration of E., the Authority may:

- a. Authorise the transfer request without conditions;
- b. Authorise the transfer subject to conditions necessary to address concerns arising under subparagraph 34 above; or
- c. Reject the transfer request.

40. The Authority shall, within sixty (60) days, communicate its decision to Authorise or reject an application for a transfer to the transferee and transferor, including the reasons for its decision.

41. The Authority may, for good reason, extend the period referred to in subparagraph 40 by notice to the proposed transferor and transferee.

42. Any transfer of frequency without the Authority's prior written approval shall be considered null and void and may result in revocation of the frequencies.

F. Applicable Fees

43. A transfer application fee of Kshs. 10,000.00 for the transfer. This is in line with the fees charged as application fees for the operating license.

44. An administrative fee of 0.2% of the frequency transfer value is applicable. The Authority will review this administrative fee in line with the frequency fee schedule.

VI. Public register of Frequency Transfers

45. The Authority will maintain a public register of Frequency transfers made according to these Guidelines, specifying:

- i. the particulars of the transferor, transferee and the frequencies under consideration;
- ii. the terms applicable to the transfer including the duration of the transfer; and
- iii. any other relevant information on the nature of the frequency transfer.

VII. Non-Compliance

46. Where a licensee contravenes these Guidelines, the Authority may levy penalty following the license conditions, and relevant regulations including the Kenya Information and Communications (Radio Communications and Frequency Spectrum) Regulations, 2010 and the Act.

VIII. Review of the guidelines

47. This guideline may be reviewed from time to time to ensure that it meets the Authority's statutory obligations as far as its approach to spectrum management is concerned.