

Digital switchover: what must we consider as we develop the licensing criteria?

By Henry Maina

Broadcast television has begun the most significant technological change since its birth in the 1920s thanks to the emergence of digital broadcasting and the slow death of the analog designs that underlay “terrestrial” TV-over-the-air broadcasts from transmitter towers.

The switchover has the prospect to greatly expand the multiplicity of voices on the airwaves as digital stations, by making efficient use of the ever more crowded airwaves, can broadcast multiple channels. However, before entrenching the above benefits and the so called “digital dividends”, any country must make three daunting sets of decisions.

The foremost is to select a digital technical standard. Each of the world’s four candidate systems- the American Advanced Television Systems Committee(ATSC); the European-Digital Video Broadcasting (DVB); the Japanese-Integrated Services Digital broadcasting(ISDB); and the Chinese-Digital Terrestrial Multimedia Broadcast(DTMB has divergent characteristics of cost and performance. The Japanese and Chinese systems, born after the American and the European one, began life with some features of greater sophistication than the older ones had, notably the ability to broadcast to mobile telephones. While Kenya has settled on the enhanced DVB-T2 MPEG 4 as from the advice of the task force on migration of terrestrial television from analogue to digital broadcasting in Kenya. The decision was affirmed by its successor the Digital Transition Committee. However, the justifications of the choice of the digital system, it is clear that considerations that ultimately carried the day were less about technical specifications but more about politics and socio-economic ties. This is clearly manifest because Kenya has the highest mobile subscribers in the region with an estimated 30million. Therefore why did we not pick a system that would have immediately had the ability to broadcast on mobile phones?

In parallel with the decision of Kenya on the digital technology standard are the decisions of spectrum design. Due to the uniqueness of broadcasting and the importance of the services it provides, broadcasts have a special obligation to serve the needs and interests of their communities, however this must be done with the understanding that the spectrum is still finite resource. These decisions must seek to answer the following questions; on which specific frequencies will the new digital broadcasts take place? How many licenses will be assigned to Kenya Broadcasting Corporation- state-owned broadcaster and will KBC be transformed to a public media service?, and how many to the private? How many to free TV, how many to pay TV? How many will go to a single licensee to carry a uniform signal all over the country, and how many to broadcasters that serve a single city or county like Kisumu, Mombasa or Kakamega? How many to mobile TV? What will be the frequency spectrum fees chargeable and by whom shall it be fixed? And finally what will happen to the frequencies that the analog stations surrender? The policy issues around managing this spectrum design are that the regulator must resist undue pressure from politicians and commercial actors. They must fairly and objectively consider all options and refuse the favour of one party over another to ensure that through thoughtful changes to the current frequency allocation table, they bring a flowering of new broadcasting and information services to the country’s airwaves.

The third and final decision gigantic decision that governments must make in the transition to digital broadcasting is who will be licensed to broadcast? Given these changes, the broadcast television sector in Kenya is bound to drastically change but this process must have a qualified midwife with clear licensing criteria otherwise the promise of digital switchover will be a stillbirth. Given the draft Independent Communications Commission of Kenya is still just that, a draft after nearly two years since it was published, there is need for more reflection on what may constitute legitimate and legal licensing criteria and in what manner it may be applied. Secondly, we may have to think about the ability of the user to control the content viewed through features on the Set Top Boxes. The regulator has thus to shift from thinking about specific channel regulation to multi-channel operator terms of carriage requirements.

But before discussing the licensing criteria a quick reflection on the process of migration and the team that has engaged in the process since the decision First, let me address the manner in which the licensing criteria may be applied before embarking on what such criteria may encompass. The procedural guidelines on how the process will be managed must provide sufficient guarantees against arbitrariness. It must include the requirement that the decisions and reasoning of the licensing authority whether to grant or deny a broadcasting licensing.

In terms of the licensing criteria, the starting point is that the regulatory authority must be independent and the basic conditions and criteria governing the granting and renewal of broadcasting licenses should be clearly defined in the law. Given that the current regulatory framework in Kenya as provided for by the Kenya Communications (broadcasting) Regulations, 2009 predate the Constitution of Kenya, 2010.

There is an urgent need to ensure that the regulations are reviewed to conform to the Constitution. Similarly, the current composition of the Communication Commission of Kenya may not pass the constitutional muster as provided for in Article 34 (3) which states inter alia that “broadcasting and other electronic media have freedom of establishment, subject only to licensing procedures that –a) are necessary to regulate the airwaves and other forms of signal distribution; and b) are independent of control of government, political interests or commercial interests.

Similarly, the current regulatory body may be considered unconstitutional given that the Constitution of Kenya, Article 34(5) requires that Parliament enacts a legislation that provides for the establishment of a body which shall be independent of control by government, political interests or commercial interests; reflect the interests of all sections of the society; and; set media standards and regulate and monitor compliance with those standards.

Second, the regulations governing the broadcasting licensing procedure should be clear and precise and should be applied in an open, transparent and impartial manner.

Third, the decisions made by the regulatory authority should be subject to adequate publicity.

Fourth, the decisions made by the licensing authority should be open to review by the competent judicial bodies according to national and international law.

Fifth, when awarding the digital broadcasting licenses, the relevant public authority must ensure that the services on offer are many and varied, and encourage the establishment of regional or local services that meet the public's expectations at these levels. So far the CCK has granted two main licenses for digital signal distributors- the Kenya Broadcasting Corporation subsidiary SIGNET and the Pan African Networks group. The Pan African Network group licensed in October 2011 is expected to roll out 12 sites by the end of the first year while its first transmitters were expected to have been on air by end of June 2012.

Examples from a study by the European Platform of regulatory Authorities indicate that varied approaches have been adopted for the allocation of digital capacity (spectrum). For instance, in Germany, UK, Netherlands, Italy, Spain, Austria, Ireland and Lithuania, the capacity was allocated to one or more network/multiplex operators. In other cases, like Sweden and Finland, the capacity is allocated directly to channels. Given the policy decision Kenya has made after advice from the Digital Transition Committee, Kenya will no longer assign frequencies to broadcasters once the signal distributors are in place. The broadcasters will enter into commercial arrangements with signal distributors and the regulator will ensure that the signal distributors provide services to broadcasters promptly on request and without prejudice.