STAKEHOLDER COMMENTS ON DRAFT ONE (1) OF THE COMMUNICATIONS (FACILITIES) REGULATIONS AND MACRA'S RESPONSES TO THE COMMENTS

Clause No.	Provision	Comments	Proposition	MACRA's response
Comments from TNM				
		Publishing access and facility services information on the website is not ideal taking into account that most Network Architectures are currently IP based and network operators may be subjected to attacks.	TNM propose that publication should be optional and not mandatory, subject to clarification on the type of information required.	The Authority agrees with the comment and the Regulation has been revised to remove the requirement for publication on the website
	4(3)An access provider may refuse an access or facility services request for not being technically or economically feasible in terms of section 68(4) or 71(3) of the Act.	(1) There should be a time frame within which the Authority shall make a determination on the issue		(1) Proposal accepted. The Authority will make a determination on the matter within 30 days from receipt of the access provider's decision.

	4(4)Where the access provider refuses the request for access of facility services under sub regulation(3) it shall inform the Authority and show why the request was not technically or economically feasible. 4(5) Pursuant to the reasons given under sub regulation (4), the Authority shall review the decision of the access provider and make a determination and give an appropriate direction.	(2) The clause should be rephrased to indicate that a report to MACRA should be made where the access seeker does not agree with the reasons for refusal or where the access seeker has made a complaint .		(2) Access to facilities is very crucial for the electronic communications ecosystem and for competition. The onus therefore should be on the access provider to show cause to the Authority the reasons for refusing access to enable the Authority intervene quickly on the matter.
	6(2)An access and facility services agreement shall include the following matters—	Number of racks is a facility type just like a tower and this should not be conspicuous. This is not applicable in general terms.	TNM proposes that this should be included as examples of equipment or facility type.	Comment accepted. Reference to racks has been deleted

	(a)scope and specification of facilities and collocation to be provided or infrastructure to be shared including — (i) specific geographic location of sites, equipment or facility type, type of collocation required and number of racks;			
	9.— (1) Upon declaration of a dispute, the Authority shall require each party to submit within fourteen working days,written representations on the matters on which they cannot agree. (2) Each party shall provide to the other party a copy of the written representations submitted under sub-regulation (1).	The suggested period should be 21 days and not 14 days. TNM notes that there is no right of appeal of the Authority's final decision where either party is unsatisfied with the Authority's	TNM proposes that there should be an additional clause to give right of appeal of the Authority's	Proposal not accepted. Fourteen days is the standard period and no justification has been provided why it be 21 days The right of appeal is already provided for under section 174 of the Communications Act, which allows appeals to

	(3) Upon receipt of the representations, the Authority shall determine the terms of the agreement to apply between the parties.	decision as is the case in *Tanzania, Nigeria*	decision where the operator is not satisfied.	be made to the High Court against orders or determinations of the Authority
	10 (1) An access and facility services agreement shall commence on a date agreed upon by the parties, which date shall be after the date of issue of a compliance notice by the Authority under Regulation 9(3)(a).	The clause is not practical and may delay implementation. Parties may have agreed and be held from implementing because they are waiting for the compliance notice. In addition no timeframe has been indicated as to when the notice will be provided upon submitting the agreement	Commencement date should be the date the parties agreed and should not be made subject to the compliance notice.	Proposal not accepted. Regulation 10 should be read together with Regulation 8 which states that the compliance notice shall be issued within 30 days from date of submission of the Agreement. The rationale behind Regulation 10(1) is to ensure that parties implement only agreements that are in compliance with the Act and the Regulations.

	Licensee's right to reserve capacity for future use	There may be cases where the operator has long term plans for network roll-out or even expansion plans that may require that some of its facilities be put on reserve. In some jurisdictions like *Tanzania & Nigeria,* in such instances the operator is given the right to reserve the capacity within a specified period according to the submitted plans. Where however the operator fails to roll out within the stated period, this right is withdrawn by the Authority.	TNM proposes that the following clause should be included "Notwithstanding the provisions of these Regulations, licensees shall have the right to reserve capacity for future use based on future network roll out plans, within reasonable time frame. (2) The right of a licensee referred to in sub-regulation (1) shall, at all times, be recognized and balanced against the need to promote the network roll-out or expansion plans of new market	Proposal not accepted as it is not applicable to a Facilities Service Licensee whose objective is to provide facilities to Network Service Licensees. The issue of reserving capacity for network expansion therefore does not arise. Additionally, an access provider may refuse to provide access within the grounds stipulated in the Act. Reservation of capacity, where justifiable, may fall within those grounds.

			entrants or other licensees.	
Comments from Wananchi				
		Regulation 4 (3) Obligation to Provide access and facilities	The access provider should be allowed to refuse facility services request where such request may result in the Access provider being unduly prejudiced.	The Communications Act (Section 71) already provide for refusals to provide access where the Access Provider will be unduly prejudiced
		Regulation 6 Terms and conditions of access and facilities services agreement	The facility services agreement should also include Technical specifications & standards, information handling and confidentiality, duration, re-negotiation & review procedures	Regulation 6 provides for the minimum requirements of the Agreement. Parties are at liberty to go beyond the minimum requirements
		Regulation 10 (4) Commencement, suspension, termination of agreements	A party intending to terminate an agreement	Proposal not accepted. The 30 day period is to give the Authority sufficient time to

			should notify the authority but the notice need not be 30 days.	review the matter and intervene where appropriate
		Regulation 3(2) Right to access and facility services	The request for access and facility should be written.	Proposal accepted
Comments From Multi Choice Malawi				
		• s68(1) of the Communications Act, 2016 ("the Act") sets out a precursor to requests for and provision of access to networks. It requires that the Authority to publish in the Gazette an annual list of electronic communications networks of licensees whose access may be shared with other licensees. • The draft Regulations are silent on this. • Given that mandatory obligations to provide access to other licensees' networks may reduce incentives for operators to make certain strategic investments in	Insert a new regulation before Reg. 3 as follows: *"When compiling the list of electronic communications networks licensees whose access may be shared in terms of s68(1) of the Act, the Authority shall take into account the following criteria –* *(a) whether the facility can be reasonably*	Proposal is accepted. The Authority will insert a new regulation setting out the criteria for identifying the networks to be published under section 68. It should however be noted that Section 68(1) applies to Networks only and not to Facilities. Whilst the Authority is required to publish networks that may be shared. Such a requirement is not

		infrastructure if there is no advantage to be gained by them due to free-riding by competitors on those investments, it is important that the draft Regulations set out a criteria which will guide the listing of licensees in terms of s68(1) of the Act. • We propose that the criteria assess whether licensees have the capacity to share access with other licensees, taking into account their present or future needs. In addition, propose an assessment of whether providing access to infrastructure would, in any way, compromise the licensee's ability to serve its customers adequately in the present or future, or would otherwise be impractical or unfeasible. • In this regard, we propose that in order to encourage the effective and efficient use of infrastructure, the draft Regulations ought to focus access obligations on rural	*duplicated or substituted;* *(b) the existence of technical alternatives;* *(c) whether the facility is critical to the supply of service by the licensees;* *(d) whether the facility has available capacity having regard to the current and reasonable future needs of the licensee or person to whom the facility belongs; and whether joint use of the facility encourages the effective and efficient use of broadcasting infrastructure"*	applicable for Facilities (see part VII of the Act).

		infrastructure where cost savings exist and duplication is costly given the sparse population, and, in urban areas, only in respect of topographical high sites to the extent that there is a shortage of high sites. It is also important to consider whether there is a demand for sharing in a particular infrastructure in order to prevent increases in costs and a decline in efficiencies.		
3(1)	licensee may request access and facility services from any other licensee that is authorised to build, operate or maintain an electronic communications network.	Reg. 3(1) suggests that requests be made to any licensee, even if that licensee's network has not been listed in terms of s68(1) of the Communications Act, 2016 ("the Act") as one whose access may be shared with other licensees. In order to bring Reg. 3(1) in line with the Act, we suggest that the request for and the obligation to provide access should be restricted to licensees listed in terms of s68(1) of the Act.	Amend as follows: *"A licensee may request access and facility services from any other licensee whose electronic communications network has been included in the list of electronic communications networks of licensees whose access may be shared with other*	The Clause will be amended to limit access to networks listed under section 68(1). However it would not be proper to state the exemptions in the Regulations. The publication of Networks that may be shared section 68(1) will suffice, meaning that

		In addition, in the spirit of transparency and to further incentivise constructive cooperation by licensees, we propose that the draft Regulations include a criteria or guiding principles that will inform the Authority's decision when determining the list of licensees that will be obligated to provide access. Furthermore, we propose that self-provision network services be excluded from the list of licensees to whom requests for access to networks may be made. Mandatory access to self-provision networks defeats the purpose of issuing a self-provision licence, which is issued to broadcasters who establish and operate networks for the purposes of their own broadcasting service. In this regard, self-providers create their networks with the immediate and long term needs of their own service in mind.	*licensees in terms of s68(1) of the Act, which shall exclude electronic communications networks licensed for use to provide self-provisioning broadcasting signal distribution.* ~~*that is authorised to build, operate or maintain an electronic communications network."*~~	those not on the list may not provide access.

		In addition, the Authority has recognised and distinguished self-provision from other network services, and this distinction ought to reflect in how self-providers are regulated. We therefore propose that self-provision network licences be excluded from the list of licensees' whose access may be shared with other licensees.		
4(1)	An access provider may refuse an access or facility services request for not being technically or economically feasible in terms of section 68(4) or 71 (3) of the Act.	Reg. 4(3) references s71 (3) as a basis for refusing a request for access or facility services. However, s71 (3) provides grounds for refusing a request for co-location and infrastructure sharing. Therefore, this provision conflates "access" and "co-location and infrastructure sharing" which are separate concepts with distinct processes under the Act. s68(4) of the Act is the appropriate section which provides grounds for refusing access.	Amend Reg. 4(3) as follows: *"An access provider may refuse an access* or *facility services request for not being technically* or *economically feasible in terms of section* 68(4) ~~or 71(3) *of the Act*~~*."*	Proposal not accepted. The concept of access encompasses access to networks as well as to facilities (co-location and infrastructure sharing)(see the definition of access in section 3 of the Act). The principles that apply for access to networks and facilities (particularly on refusal are similar) hence the two concepts can be

		We propose that reference to s71 (3) be deleted.		combined in the same regulation.
5(2)	Where a request for access is refused, the access provider shall communicate the refusal to the access seeker within fourteen days from the date of request.	It appears that the time periods for starting the negotiating process for an access and facility services agreement in terms of Reg. 5(1) runs concurrently with duration given for the refusal of a request for access. Therefore, the access seeker is given 14 days to either commence negotiations or to reject the request for access. This is however confusing, as the issue of refusal will arise in the course of the negotiations between the parties. We propose that the draft Regulations make it clear that refusal of requests ought to be communicated as soon as possible during negotiations, but no later than 14 days from the commencement of the negotiations.	Amend Reg. 5(2) as follows: *"Where* a *request for access is refused, the access provider shall communicate the refusal to the access seeker within fourteen days from the date of ~~request~~ commencement of negotiations "*	The Regulations have been revised to provide clarity. Two issues arise here: (1) Refusal to provide access or facility service and (2) negotiations pertaining to an access and facilities agreement. Refusal to provide access has to be premised on the grounds stipulated in the Act. The access provider will make the decision based on the request and information submitted by the Access seeker. At this stage there are little or no negotiations involved and a decision has to be made by the access

				provider within 14 days from the date or request for access and facility services. The second aspect is negotiations for an access and facilities services agreement. Negotiations on the agreement will only be will only be had on the premise the Access Provider is amenable to provide access to the access seeker. To make the Regulations clearer, we have deleted Regulation 5(2) and moved to another part of the Regulations. We have increased the period for commencement of

				negotiations under Regulation 5(1) to allow the access provider to make a decision whether to provide access or not and thereafter start the negotiations for an access agreement.
5(4)	The negotiations shall be in accordance with section 70(3) of the Act	Reg. 5(4) suggests that s70(3) of the Act regulates negotiations for access agreements. However, s70(3) deals with co-location and infrastructure sharing. It requires that infrastructure providers co-locate and share infrastructure on a first come first serve basis and share in accordance with the principle of impartiality and non-discrimination. Therefore, s70(3) does not apply to access agreements. To the extent that the Authority intends for the process prescribed in s70(3) of the Act to be extended to		Comments accepted. The regulation has been revised to apply to both access agreements and facilities sharing agreements

		apply to requests for access, we propose that this be clarified.		
6(1)(a)	An access and facility services agreement shall include the following matters- (a) scope and specification of facilities and collocation to be provided or infrastructure to be shared including - (i) specific geographic location of sites, equipment or facility type, type of collocation required and number of racks	Reg. 6(a) conflates "access" and "co-location and infrastructure sharing" which are separate concepts with distinct processes under the Act. We suggest the deletion of any reference to co-location and infrastructure sharing in Reg. 6(a) in order to ensure that the draft Regulations are coherent and align to the Act. Alternatively, if the Authority's intention is to regulate colocation and infrastructure sharing agreements, we suggest that the Authority create separate provisions in line with ss71 to 73 of the Act		The Regulations apply both to access to Networks under Part VI of the Act and to access to Facilities (Co-location and infrastructure sharing) under Part VII of the Act. The principles of access in both cases are similar. The regulation has been revised to provides specifically for access and facilities services
7(2)		Reg. 7(2) Refers to essential "services" whilst the context of the whole regulation is about essential "facilities"		Comment accepted

Second 7(2)	A licensee that has control of one or more essential facilities must be deemed to be dominant.	While Reg. 7(2) is consistent with s57(3)(b) of the Act, it disregards s57(1)(a) and (b)(ii), which requires the Authority to conduct a market analysis before listing licensees that are deemed to be dominant in their relevant market. s57 does not accommodate or support an interpretation where a licensee is automatically deemed to hold a dominant position by virtue of controlling one or more essential facilities but rather subjects the determination of dominance to a market analysis. We suggest that Reg. 7(2) be amended to align with s57(1) of the Act by requiring the Authority to conduct a market analysis to determine licensees that are deemed as holding a dominant position.	Delete the second 7(2). Alternatively, amend the as follows: "A licensee that has control of one or more essential facilities shall be deemed to be dominant *subject to conducting a market analysis in terms of s57(1) of the Act."*	Proposal accepted. The Regulation has been revised.
Comments from Airtel				
Reg 4		The access and facilities provider should be given a window in which		Proposal not accepted. The Communications

		the requestor can have access to the services. This is inconsideration to the Return on Investiment for every investment the licensee has invested. This means requestor shall be given access after expiry of the ROI period as determined by the licensee.		Act mandates infrastructure sharing in recognition that the electronic communication sector has high barriers of entry in terms of investment cost. Infrastructure sharing promotes competition which benefits the sector
		Access and Facilities information is confidential for business operation purposes and should only be provided at a request within governed environment in which case the information cannot be used to gain competitive advantage The licensee should be given a right to reserve critical information which it is uncomfortable to share with requestor		The provision has been revised to require the provision of relevant information that will enable a feasibility study on the access provider's network or facilities. Further the provision has been revised to remove the requirement of publication of

		Making this information public puts the licensee at risk of losing the business advantage		information on the website.
Reg 6(5)		The Authority should define what constitutes "relevant information"		Proposal not accepted. There is no need to define “relevant information”. Regulation 6 is on conclusion of an access and facilities service agreement and relevant information will be information that is necessary for concluding the agreement.
Reg 7(5)		The timeline for revert on the offer shall be 30 days considering the wider spectrum/range of consultations to be made, discussed and agreed between the parties (which include technical, commercial issues, etc)		Proposal not accepted. The Authority deems fourteen days to be enough for a dominant licensee to amend a reference access offer.
Reg 12(2)	"A person who commits an offence under these regulations	We suggest a rephrase to be as follows	We suggest that this has to be revised and	Proposal not accepted. Regulation 12(2) in its

	for which no punishment has been provided for shall, upon conviction, be liable to a fine of K5,000,000.	A person who commits an offence under these regulations for which no punishment has been provided for shall, upon conviction, be liable to a fine not exceeding K5,000,000"	reworded to include "a maximum of K5,000,000..." We note that not every miss warrants a fine. The Regulations should not instil fear on licensees. We suggest a gradual process of penalties from a lesser one to a big fine The Authority has other regulatory sanctions that it can undertake/impose	current form, means that a court will not impose a fine exceeding K5 million. Regulation 12 should not be conflated with Regulation 11 which provides for regulation sanctions that the Authority may impose. These sanctions include cease and desist orders, compliance orders and administrative penalties. Regulation 12 on the other hand provides for a fine that will become payable upon conviction of the offender by a court of law. The amount of the fine will be in the

				discretion of the court however the fine shall not be exceed K5 million