



# **Wave Bermuda Ltd. trading as Horizon Communications, Change of Control**

## **Modification of ICOL**

### **Decision and Order**

Matter: 20210323

Date: 23 March 2021

## **Introduction**

1. The RA hereby issues this decision and order modifying the Integrated Communications Operating Licence (“ICOL”) held by Wave Bermuda Limited, trading as “Horizon Communications” (“Horizon”), issued on 1 September 2020 (#ICOL202023Rev1-772) in the manner set out below.

## **Legal Context**

2. Section 51(1) and (2) of the Regulatory Authority Act 2011 (“RAA”) empowers the RA to modify any licence, permit or authorization, where (1) the RA is authorized to do so by sectoral legislation, and (2) it concludes that such modification is in the public interest:

*“51 (1) The Authority, when authorized by sectoral legislation, on its own motion or at the request of an authorization holder, may modify or vary any term or condition of a licence, permit or other authorization if the Authority concludes that such modification or variation is necessary in the public interest.*

*(2) Before taking any action pursuant to subsection (1), the Authority shall give the authorization holder reasonable notice and an opportunity to comment, and shall take into account any representations made by or on behalf of the authorization holder.*

3. The relevant sectoral legislation is the Electronic Communications Act 2011 (“ECA”), specifically, section 9(2)(c)(i), which permits the RA to make administrative determinations for, *inter alia*, the modification of licences for the provision of electronic communication services:

*9(2) The functions of the Authority shall include—*

*[...]*

*(c) the making of administrative determinations to provide for the control and conduct of public electronic communications, including—*

*(i) the award, renewal, modification, termination or revocation of licences for the provision of electronic communications;*

4. Horizon’s Integrated Communications Licence (“ICOL”) also provides at condition 16:

### **16 MODIFICATION OF THE LICENCE**

*The licence may be modified:*

*(a) with the mutual consent of the Licensee and the Authority;*

*(b) by the Authority pursuant to the provisions of Section 51 of the RAA and Section 9(2)(c)(i) of the ECA; and*

*(c) by the Authority following an enforcement proceeding, pursuant to the provisions of Section 93 of the RAA.*

5. The Regulatory Authority (Master Communications Operating Licence Application Process) General Determination 2019 ("2019 GD") establishes the criteria, conditions, requirements and procedures for the grant of new COLs and the terms and conditions of such COLs. Annex 4 of the 2019 GD inserts into new licences (including the ICOL) the following transitional condition:

**A6 TRANSFER OR ASSIGNMENT OF ICOL; TRANSFER OF OWNERSHIP OR CONTROL**

*Notwithstanding the provisions of Conditions 19 and 20, the Licensee may not, for a period of three years following the date of this Licence, directly or indirectly:*

- a) sub-license, assign or grant any right, interest or entitlement in the License nor transfer the Licence to any other Person, including an Affiliate of the Licensee; or*
- b) transfer ownership or control of the Licensee.*

*For purposes of this Transitional Condition A1, "control" shall have the meaning assigned to it by section 18(7) of the ECA, except that the reference to "25 per cent" shall be replaced by "10 per cent."*

6. The ICOL was issued without this condition included. Notwithstanding this omission, the ICOL is deemed by operation of the 2019 GD to include new condition A6.
7. The RA notes that the subject matter of new condition A6, namely a prohibition on any change in control of a new ICOL for three years, was not embedded as a direct obligation in the 2019 GD. Rather, it creates a new condition of the ICOL (whether deemed or otherwise), which must be read the context of the ICOL as a whole, and indeed, the entire legislative framework to which the ICOL is subject.
8. The effect of this is that the ICOL, as amended by the 2019 GD, can be modified in accordance with the RA's ordinary processes. This is not to say that 2019 GD is being amended by this decision and order; this legal result can only be achieved by a different General Determination, in accordance with section 62(2)(d) of the RAA. Rather, this decision and order is simply modifying the ICOL as it applies to Horizon.
9. In any event, the RA notes that the 2019 GD is nonetheless subject to the provisions contained within primary legislation setting out its powers and functions. It is an axiomatic principle that subsidiary legislation, such as a General Determination, cannot purport to narrow the scope of authority directly granted to a public authority by its parent legislation. Ordinary rules of

statutory interpretation require that subsidiary legislation should be construed to avoid such a result.

### **Factual findings and reasons for decision**

10. The RA noted in the Final Report, *Grant of New Integrated Communications Operating Licences and Other Types of Communications Operating Licences*, the benefits that increased competition will bring to Bermuda over the longer term. The RA further noted:

*The proposed ICOL grants are a necessary, but not sufficient, condition for the two new entrants to compete effectively in the provision of fixed and mobile networks in Bermuda. Granting the ICOLs at this time will at least commence the process of opening the sector to new entry and introducing increased competition over the longer term.*

11. In the context of a discussion on the COVID-19 pandemic:

*[T]he ability of the new entrants to gain traction in the market will be an even greater challenge than would otherwise be the case and could prolong their respective start-up periods. The RA therefore sees no reason to delay the grant of the pending licence applications. In fact, it would be contrary to the public interest to delay this first step in the road toward increased competition, which, if allowed to develop over time, is expected to benefit the overall economy of Bermuda in the years to come.*

12. In the context of a discussion on the then pending Market Review consultation:

*The award of communications operating licenses in this proceeding does not automatically create effective or sustainable competition. Other necessary conditions for the development of effective, sustainable competition include the availability and award of spectrum to one or both of the ICOL applicants to support fixed wireless and/or mobile networks and services, as well as the ability of the new entrants to negotiate reasonable interconnect and wholesale access arrangements with existing ICOL holders, including OneComm and Digicel.*

13. The RA continues to adopt these positions which are relevant to its assessment as to whether the public interest is met in modifying Horizon's ICOL. It is an fundamental statutory principle that Bermuda consumers will, in general, benefit from increased competition. The duty to promote and preserve competition was entrenched as on the principal functions of the RA, while the Electronic Communications Act 2011 includes, *inter alia*, as a purpose to—

*“...encourage sustainable competition and create an invigorated electronic communications sector that will lay the groundwork for the further development of communications-reliant industries...”*

14. The granting of new communications licences, as noted above, is a necessary but not sufficient condition for Horizon, as one of the new entrants in the electronic communications market, to compete effectively. Further required is for new entrants to have the opportunity to give effect to the business plans which were submitted to the RA as part of the Master ICOL process. Horizon’s business plan calls for a significant amount of outside investment to launch its services and to compete effectively.

15. Horizon has arranged with Fortress Bermuda H Investor LLC to secure financing in exchange for granting control of the company. As noted in Horizon’s *Communications Operating Licence: Master Application Form*, of which a redacted version is publicly available:

*The funding required for this project is significant, it recognizes that fulfillment of the services of the ICOL will take time in addition to investment and Fortress is prepared to support that delivery over a five-year + timescale to ensure that Horizon provides a first-class service for the people of Bermuda.*

*It is important to note that Horizon will not deliver a return in the first year and will still be building out the company and capabilities of the network. Also, to ensure the future longevity of the company, Horizon has allocated a significant amount of yearly capital back into the company for equipment upgrades and network improvements in order to continually improve the service.*

16. Furthermore, Horizon’s application form attached the term sheet with Fortress showing that Fortress would close an investment once the ICOL was granted, moving into a controlling shareholder position.

17. New condition A6 serves as an impediment to the sort of outside financing which might be critical to a nascent business venture. To prevent a change of control at this stage would render the objectives of the lifting of the ICOL moratorium and of the issue of new licences nugatory. More fundamentally, not modifying the ICOL to remove condition A6 would entirely frustrate Horizon’s ability to deliver on the business plan it presented to the RA in the runup to being issued its ICOL, thereby preventing the possibility of new competition arising. The business cannot be funded by debt and is entirely dependent upon a significant equity investment funding.

18. Accordingly, the RA believes that it is necessary in the public interest to agree to a modification of Horizon’s ICOL removing new condition A6, and issues the order annexed hereto.

### **DECISION AND ORDER**

1. The RA determines that it is necessary in the public interest to modify the Integrated Communications Operating Licence ("ICOL") held by Wave Bermuda Limited, trading as "Horizon Communications" ("Horizon"), issued on 1 September 2020 (#ICOL202023Rev1-772).
2. Having secured the consent of Horizon, the RA hereby modifies the ICOL by removing condition A6.

So ordered this 23<sup>rd</sup> day of March 2021.

A handwritten signature in black ink, appearing to read 'Mark Fields', is written over a horizontal line.

Mark Fields, Chairman