BELCO

Our Ref: B-R322

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31 August 2022

Regulatory Authority
1st Floor, Craig Appin House
8 Wesley Street
Hamilton HM 11

Attention: Richard Ambrosio, Director of Legal Affairs & Enforcement

Dear Mr. Ambrosio,

Comments on Electronic Communications Sectoral Review – Consultation Document

Bermuda Electric Light Company Limited ("BELCO") responds to the Regulatory Authority's (the "RA") consultation document entitled, "Electronic Communications Sectoral Review Public Consultation" bearing matter number 20220727 (the "Consultation Document"). The Consultation Document represents the first publication in the consultation for the electronic communications sector review required to be commenced by August 2022 (the "Consultation"). BELCO declares that its interest in this Consultation arises in its capacity as a spectrum user. It also welcomes the opportunity to participate given that many of the recommendations in the Consultation Document relate to one of BELCO's governing acts, namely the Regulatory Authority Act 2011 (the "RAA"). To the extent that the RA intends that the proposed amendments discussed below that appear to be recommended for all sectors will, in fact, strictly apply to the electronic communications sector, BELCO would be grateful for clarification.

At paragraph 89 of the Consultation Document, the RA invites comment on the proposed recommendations contained therein or any other related matter. As such, the remainder of this submission sets out BELCO's comments but reserves all rights and remedies available to it, now and in the future, including, but not limited to, the right to provide additional submissions in relation to the subject matter contained herein and/or otherwise to modify and amend its position as set out herein.

<u>Amendments to the RAA - Enforcements</u>

In the Consultation Document, at paragraph 56, the RA recommends amendment of the RAA to replace the adjudication and enforcement process with a warning and decision notice procedure

based on that of the Bermuda Monetary Authority (the "BMA"). Among the concerns raised in support of such recommendation, the RA suggests that recent enforcement and adjudication processes were "expensive, cumbersome, and time-consuming processes not too dissimilar to a fully contested court proceeding."

As an overarching statement, BELCO notes that it welcomes a right-sized procedure that provides certainty for all stakeholders, including customers, and believes that any procedures that result in arbitrary outcomes in which sectoral providers are not afforded the opportunity to be heard ought to be avoided. The following are some specific observations that BELCO wishes to raise at this time:

- BELCO questions whether the BMA is the appropriate comparator when considering other regulatory regimes that may provide insight for new policies or procedures for adoption by the RA. The utility industry is not akin to the financial services industry such that the BMA does not appear to represent the most appropriate comparator for the RA in these circumstances. Specifically in relation to electric utility regulation, there may be other regimes that would be more appropriate to consider. This is particularly so given that many of the electricity sector principles relevant in Bermuda electricity regulation are akin to those in North America.

  Although it would remain to be determined whether the court-like approach employed in many of the North American jurisdictions in which BELCO's affiliates operate would be appropriate for Bermuda, the benefit of such would be increased certainty and the appearance of the principles of natural justice being upheld. BELCO suggests that the RA fully cavasses sectoral participants on possible replacements for existing procedures before concluding that any one replacement option should be adopted.

- BELCO does not necessarily disagree with the abolition of the independent presiding officer, but BELCO disagrees that any such abolition should remove the need for adjudication altogether. BELCO therefore does not support the replacement of the adjudication process and its replacement with a warning and decision process at this time.

  BELCO wonders whether the RA has given any thought to a process in which the adjudicators would, rather than being IPOs, be some or all of the commissioners themselves. BELCO's affiliates are accustomed to similar processes in which commissioners hear all matters brought before the authoritative body no matter how mundane. Adjudicative processes lend themselves well to upholding the rules of fairness and natural justice that the RA suggests it would like to uphold.

- Except that the legal obligations must be limited to those within the RA's remit, BELCO agrees that it should first try to resolve matters informally when it believes that a sectoral participant or provider is in breach of a legal obligation.

- The RA states that an undertaking in lieu of enforcement proceedings should be permissible at any stage of enforcement. BELCO is supportive of any efforts to avoid unnecessary time and expense where it is possible to reach a resolution of any matter. That said, BELCO is of the view that an undertaking cannot be requested until the provisions in 93(2) of the RAA are taken, namely that the sectoral participant must have had the facts; alleged contravention of statutory, administrative or authorization provisions; and time frame and procedures for responding put to it. Otherwise, circumstances could ensue in which sectoral participants are asked to give undertakings for arbitrary and unfounded reasons.

Amendments to the RAA - Public Consultations

The RA has recommended that the public consultation process be streamlined in two ways: 1) to create a two-stage process for public consultations in lieu of a three stage-process; and 2) to remove the need for a public consultation for a general determination save for in matters of public importance. BELCO does not support either of these changes for the reasons set out here:

1) **Two-stage Process.** It is unclear which aspect of the existing three-stage process the RA is proposing to remove, and the RA is asked to clarify. Either way, it is understood that the impetus behind the proposed streamlined approach is to enable the RA to be nimble. If that is correct, the RA is reminded that it has available to it the emergency general determination mechanism under section 66 of the RAA. Such mechanism enables the RA to respond to market and technological developments quickly and effectively.

   Another benefit to maintaining the three-stage process is that it provides stakeholders with multiple opportunities to raise technical, practical or other concerns that would not otherwise be taken into account. There have been consultation processes where the RA has modified or reversed its position after the first or second round of consultation.

   Given the value in allowing stakeholders multiple opportunities to comment upon an issue, and given that there is already a mechanism that affords the RA the opportunity to move swiftly, BELCO does not support a two-stage process at this time.

2) **Limited Consultations for General Determinations.** The making of general determinations is one of the few instances in which stakeholders have the opportunity to comment on draft legislation.

BELCO

Given the importance of general determinations, being statutory instruments, BELCO Is not supportive of the removal of an opportunity for stakeholders to participate in a legislative process.

Radio Spectrum

At Paragraph 85 of the Consultation Document, the RA notes that a revised version of the Regulatory Authority (Grant of Spectrum Licences, Permits, and Exempted Frequencies) General Determination 2020 will be published in the current fiscal year. BELCO looks forward to participating in the consultation process.

Amendments to RAA - Removal of Complaints Provisions

In summary, the RA appears to believe that sections 57 and 58 of the RAA ought to be removed because they are redundant. The RA suggests that such provisions are unnecessary because they limit the RA's involvement in disputes between sectoral providers or between sectoral providers and consumers to circumstances in which there is an event of an alleged act or omission that contravenes matters within the RA's remit. The RA suggests that the provisions are redundant because the RA can get involved in alleged acts or omissions in any event.

BELCO generally agrees that redundancy within the regulatory framework is unnecessary and, potentially, confusing. In this case, however, express inclusion of both sections 57 and 58 of the RAA represents a signal for sectoral providers and consumers as to the sorts of matters in which the RA should be involved. As such, frivolous claims that will otherwise consume resources and ultimately increase costs for customers are reduced. The provisions also provide certainty for all parties. BELCO therefore suggests that the sections ought to be retained.

BELCO looks forward to participating in the next round of the Consultation.

Yours faithfully,

Wayne Caines
President

August 31, 2022

Matter: 20220727

Richard Ambrosio
Regulatory Authority of Bermuda
1st Floor, Craig Appin House
8 Wesley Street
Hamilton, Bermuda

Re: Comments on Electronic Communications Sectoral Review – Consultation Document

1. LinkBermuda ("Link") hereby provides our response to the Regulatory Authority's ("RA") consultation document dated 27 July 2022 regarding the Electronic Communications Sectoral Review Consultation Document (the "Consultation"). The RA published the Consultation to initiate a comprehensive review of the Electronic Communications Sector ("EC Sector") as required by section 17 of the *Regulatory Authority Act 2011* (RAA). The RA has invited interested parties to provide general comments on the Consultation.

2. Link appreciates the opportunity to provide comments on this matter. Link recognizes the RA's function to forward the goals of ensuring the people of Bermuda are provided with reliable and affordable access to quality electronic communications services, encourage the orderly development of the EC Sector, encourage sustainable competition in the sector, and promote investment and innovation. These are important goals which can be achieved through careful and practical implementation of regulation in the EC Sector and the RA's continued support of electronic communications service providers in Bermuda.

3. Link submits that in order to support the regulatory objectives outlined above, regulatory intervention should only occur when necessary and to the minimum extent required in order to provide operators the flexibility they need to successfully operate and promote sustainable competition in the market. It is imperative that regulation be directed at a

clear and demonstrated need, and not add additional unnecessary cost and burden on operators which then limits their ability to provide affordable services.

4. Link will not address all issues raised in the Consultation Document. Link's failure to comment on any specific issues should not be interpreted in a manner which would be contrary to our interests. Should the RA have any questions or wish to discuss our views further we would we pleased to arrange to do so.

Service Continuity

5. The RA is adopting various recommendations to address risks impacting service continuity, including risks related to ICOL insolvency. They note that obligations to notify the RA of any fact or event likely to materially affect the ability to comply with a Permit, or to notify of a potential insolvency-related fact or event, may apply to all COL holders. Further, the RA proposes to make robust use of existing legislative authority to request financial reports and information, and proposes expanding upon the legislative authority to require production of profit and loss statements, balance sheets, cash flow statements, management accounts and certificates of good standing. The RA recommends that sectoral providers should be required to notify the RA of any substantial change in their financial position that is liable to affect their viability as an ongoing provider, as well as to notify the RA before discontinuing any service to wholesale customers due to non-payment or insolvency. Finally, the RA recommends amending the RAA to allow it to order management or operations audits, which the RA expects would be ordered in extreme cases.

<u>Notification of Insolvency and Events Impacting Compliance</u>

6. Link submits that it is unnecessary to impose obligations to notify the RA regarding substantial changes in financial position or insolvency-related facts or events. Link is unaware of any recent insolvency events impacting the EC Sector. Further, given the available competitive alternatives in the market for end-users and the fact that an operator facing insolvency would likely find a purchaser to continue serving customers, Link is of the view that the risks around service continuity in this case is low.

<u>Increased Financial Reporting</u>

7. Link submits that there is no demonstrated need for increased obligations around the scope or frequency of financial reporting. ICOL holders already provide regular financial reporting to the RA. Link submits that the existing reporting processes should be sufficient to address the RA's concerns. If there are additional concerns with a particular operator the RA can inquire directly with that operator. Increased reporting requirements create additional unnecessary burden on operators which takes time and resources away from other operations.

Disconnection of Wholesale Customers

8. Link submits that an obligation for ICOL holders to notify the RA prior to disconnecting from wholesale customers due to non-payment or insolvency is unnecessary. These relationships are governed by commercial contractual arrangements which should be sufficient to address such scenarios. Link submits that there is nothing to suggest additional regulatory intervention into these arrangements is needed.

Audit Powers

9. Link has concerns with the management and operational audit powers described in the Consultation Document. The RA already has broad investigative powers including the powers to request production of information. However, the audits contemplated by the RA in the Consultation Document propose investigations into the financial, technical, or operational capacity of an operator to comply with legislation and regulation, as well as "an evaluation of the efficiency of the company's management, performance or operations in any respect".

10. Link respectfully submits that the audits described in the Consultation Document go beyond the mandate of the RA and the appropriate level of intervention from a regulator. Section 16 of the RAA notes the RA shall, in carrying out its duties, rely on market forces where practicable, act only in cases in which action is needed, and rely on self-regulation where practicable. Further, both the RA and the *Electronic Communications Act 2011* ("ECA") highlight the importance of sustainable competition. Beyond complying with applicable laws and regulations, private companies must be free to operate in the manner they assess to be best to support their business. This is key to long term sustainable competition. Allowing a regulator to evaluate the management, performance,

and operations of a company and make recommendations based on that evaluation is a severe interference with market forces and does nothing to further the long term goal of sustainable competition. Link is unclear what goals the RA aims to achieve with this recommendation.

Government Authorization Fees

11. The RA is adopting the recommendation to develop a tier-based Government Authorization Fee ("GAF") structure as opposed to the existing percentage of revenue GAF structure. This recommendation is based on the rationale that fees may create a barrier to entry or expansion in the market for smaller providers as they may take time to generate a profit due to higher up-front investment costs.

12. Consistent with our comments on this matter when it was recommended in the previous sectoral review, Link submits that barriers to entry in the market are more likely to be as a result of the high cost of network investments rather than fees. Despite being a smaller provider, Link submits that the percentage based fee calculation is more appropriate than a tiered system as it results in the equitable treatment of all operators. Link disagrees with the RAs assessment that the tiered structure is effectively non-discriminatory, as it results in different rates for different operators.

Amendments to the RAA – Enforcements

13. The RA is adopting the recommendation to make amendments to the RAA to replace the adjudication and enforcement process with a warning-and-decision-notice procedure. This is based on the RA's experience with the existing processes which they explain have proven to be expensive, cumbersome, time-consuming, and inefficient at reaching any sense of finality. Further, they noted under the current process the RA may play a role as both a party to an adjudication as well as the ultimate decision-maker.

14. Link does not have significant experience with the existing enforcement process. However, Link is generally supportive of initiatives to improve the efficiency of such processes. We wish to emphasize that any new enforcement processes should be transparent, proportionate, and fair.

15. Regarding civil penalties, Link submits the existing penalties should be sufficient and does not need to be adjusted to the higher of the current allowed penalty (up to 10% of annual turnover) or $500,000. There is no evidence to suggest the current penalties are not sufficient.

Amendments to the RAA – Surplus funds

16. The RA is recommending amending the RAA so that net surplus funds can be utilized for any deferred projects, or projects that carry over from the previous fiscal years, as well as for start-up funding for any new sectors assigned to the RA. This is based on the fact that there is a surplus most years and under the current legislation any surplus is divided between the Consolidated Fund, paid-up capital, and the RA's Reserve Fund. The RA explains that the current framework limits the RA's ability to operate efficiently.

17. Link is supportive of initiatives that may reduce our regulatory fees and may increase the overall efficiency of the RA's operations. With that said, it is important to ensure that any discretion around the ability to reallocate surplus funds does not result in insufficient funds available when needed for operational purposes. It is important that those contributing fees have fee certainty to plan for future years. In that context, we generally agree with providing the RA some flexibility to use surplus funds in one year for the following years' expenditures, with the caveat that this should not inadvertently result in even higher fees in subsequent years.

Amendments to the RAA – Public Consultations

18. The RA recommends amending the provisions of the RAA governing the consultation process to create a two-stage, rather than three-stage, process while maintaining discretion for the RA to prepare additional documents as appropriate. Further, the RA recommends requiring consultations for the making of General Determinations only in cases of "public significance" allowing the RA to bypass consultations for routine administrative tasks. They define "public significance" as something that relates to a sectoral provider and is "likely to lead to (a) a major change in the activities carried on by the Office under this or any other Law; (b) a significant impact on a sectoral provider; or (c) a significant impact on members of the public."

19. While Link generally supports measures that are intended to increase efficiency and reduce unnecessary steps for both the RA and operators, Link has some concerns with the recommendation to only require public consultation on matters of "public significance" and matters that could only have a "significant impact" on providers or the public. It is a well-established principle of regulatory best practice that input from impacted parties and stakeholders should be sought to inform the development of regulatory policies.[1] This should not be limited to cases where the RA has assessed there may be a "significant impact" on impacted parties. Carrying out public consultations prior to making a General Determination ensures there are no unintended consequences from the regulation, improves the quality and efficiency of the regulation, and promotes public and industry confidence in the overall regulatory framework. Link submits that these principles are essential to an effective regulatory framework for the electronic communications sector in Bermuda. While the recommendation would still require consultations in matters of "public significance", it is unclear exactly how the assessment of what constitutes "public significance" would take place and there is a very real risk that matters that may seem innocuous to the RA could have an impact on sectoral providers. These unknowns and unintended consequences are exactly what consultations are intended to reveal. If the RA decides to adopt this recommendation, Link submits that the exception to public consultations must be applied very narrowly to avoid any unintended impacts on the sector.

Conclusion

20. Link appreciates the opportunity to comment on these matters and appreciates the RA's consideration of our submission.

Yours sincerely,

Tim Repose
Director of Operations

[1] For example, OECD (2012), Recommendation of the Council on Regulatory Policy and Governance, OECD Regulatory Policy Committee. https://www.oecd.org/gov/regulatory-policy/49990817.pdf .

31 August 2022

Mr. Richard Ambrosio
Regulatory Authority
1st Floor, Craig Appin House
8 Wesley Street, Hamilton HM11
Bermuda

Dear Mr. Ambrosio,

Re: Comments on Electronic Communications Sectoral Review (the "Consultation") – Consultation Document dated 27 July 2022 (the "CD")

On behalf of One Communications Ltd. and its affiliates Bermuda Digital Communications Ltd. ("BDC") and Logic Communications Ltd. ("Logic") (collectively trading as, and referenced herein as, "One Communications", "One Comm" or the "Company"), we are writing to respond to the Consultation.

Below, we provide both general and specific comments to the matters raised in the Consultation. For the avoidance of doubt, any lack of response to the RA on any particular point in the CD should not be interpreted as acceptance or agreement by One Communications.

General Comments to the Consultation

Statutory Requirements for the CD include Consultation re "Market Conditions"

We note paragraph 5 of the CD, where the RA states:[1]

> 5. For the avoidance of doubt, the Sectoral Review is separate from the process relating to the market review of the EC Sector (**Market Review**) required under part 4 of the Electronic Communication Act 2011 (**ECA**). This Final Report does not directly deal with the specific issues raised as part of the Market Review. The last Market Review was completed on 1 September 2020,[2] culminating in the Regulatory Authority (Market Review of the Electronic Communications Sector) General Determination 2020.

[1] There appears to be a mistaken reference to a "Final Report" in the second sentence. Given the context, we can only assume the RA intended reference to the current CD rather than the Final Report of the 2018 Sectoral Review.

While we agree that the statutory process for sectoral review is separate and distinct from the market review process, consultation regarding current market conditions is a required component of the CD. Section 17(2) of the Regulatory Authority Act 2011 (the "RAA") states:

> (2) The Authority shall initiate the review process by publishing a consultation document, pursuant to section 70, inviting comment regarding—
>
> (a) market conditions in the sector;
>
> (b) regulations and administrative determinations applicable to the sector that should be made, modified or revoked; and
>
> (c) any other issues found to be relevant by the Authority.

The CD must invite comment regarding market conditions in the sector. The RA's statement that the CD "does not directly deal with the specific issues raised as part of the Market Review" appears contrary to that requirement. Moreover, the CD contains no explicit invitation to comment on market conditions in the sector, thereby raising a concern that the CD is statutorily deficient.

Repeating Recommendations from the Final Report of the Electronic Communications Sectoral Review dated 30 November 2018 (the "2018 Report") is Insufficient

In large part, the RA's CD repeats recommendations made in the 2018 Report without providing any additional detail or evidence as to the policy need underlying the reiterated recommendation. If the 2018 recommendation did not result in the legislative action recommended by the RA, the RA's implicit conclusion should be that their case for change was insufficient, or perhaps inconsistent with current legislative intent. The RA's "ask again" approach essentially ignores the Minister's and Parliament's past decision to not proceed with the RA's 2018 recommendation. If the basis of the original 2018 recommendation has persisted or exacerbated, the RA should provide details of such matters as part of the relevant factual and legal background required for the CD.

Section 70 of the RAA states:

> **Consultation document**
>
> 70 (1) The Authority shall commence a public consultation by publishing a consultation document on its official website.
>
> (2) The consultation document shall include—
>
> (a) the relevant factual and legal background;
>
> (b) the issues on which public comment is sought;
>
> (c) any tentative conclusions that the Authority has reached including, where appropriate, proposed language for any regulations that the Authority proposes to recommend to a Minister or any administrative determination that the Authority proposes to adopt;
>
> (d) any questions that the Authority may request interested parties to address;
>
> (e) the date by which responses must be filed;
>
> (f) the deadline for completion of the consultation process and the issuance of a final report, recommendation or decision and order; and
>
> (g) the name and contact information for the staff member who will serve as the principal point of contact for interested persons during the public consultation.

To properly fulfill the legal requirements for the CD, the RA needs to ensure the CD, *inter alia*, complies with all aspects of sections 17 and 70. For any repeated recommendation, the relevant factual and legal background should recognize legislative inaction on the point since the prior review, and the additional factual basis (beyond what was provided in 2018) for why this recommendation merits reiteration and reconsideration by the Minister and Parliament.

Sectoral Review Should Not Be Focused on Adding Regulation or Facilitating Regulatory Action

Given the varying kind and scale of the recommendations in the CD, it appears that legislative change is sought to facilitate all efforts by the RA to accomplish what it believes are worthy, but difficult to obtain, goals and objectives. In essence, the underlying theme in the CD is to make it easier for the RA to intervene or act in some way in pursuit of its objectives.

The breadth of sectoral review needs to include the possibility that regulation and past regulatory action may no longer be needed or fit for purpose, and that replacement regulation is not always required. Recommending less intrusive regulatory measures or, in appropriate cases, deregulation, should also be considered as options in the Consultation.

Section 16 of the RAA states:

> **Regulatory principles**
>
> 16 In performing its duties under this Act, the Authority shall—
>
> (a) act in a timely manner;
>
> (b) rely on market forces, where practicable;
>
> (c) rely on self-regulation and co-regulation, where practicable;
>
> (d) act in a reasonable, proportionate and consistent manner;
>
> (e) act only in cases in which action is needed;
>
> (f) operate transparently, to the full extent practicable;
>
> (g) engage in reasoned decision-making, based on the administrative record;
>
> (h) act without favouritism to any sectoral participant, including any sectoral participant in which the Government has a direct or indirect financial interest;
>
> (i) not act in an unreasonably discriminatory manner; and
>
> (j) act free from political interference.

Subsections (b), (c), and (e) make clear that the RA should rely on market forces, where practicable; rely on self-regulation and co-regulation, where practicable; and act only in cases in which action is needed. These principles apply within the context of sectoral review, but do not appear to have been actively considered throughout the CD.

Email mobility (also referred to as "email forwarding") provides an illustrative example of the point. The first email mobility consultation was commenced by the RA in August 2013. A preliminary report dated

December 2015 recommended regulatory action be taken to mandate email mobility. After receiving numerous submissions regarding the preliminary decision and order, the RA failed to finalize a final decision and order. Instead, the issue of email mobility was raised again as part of the 2018 Sectoral Review where the RA recommended to the Minister that the ECA be amended to mandate email mobility. In the ensuing absence of legislative amendment, the RA held a Principles of Consumer Protection Consultation over the course of 2019 and 2020 where the issue was not considered. It is therefore surprising that the RA feels the need to again recommend to the Minister the mandating of email mobility/forwarding as part of this Consultation for sectoral review.

The RA's efforts on email mobility/forwarding began in 2013 and in the ensuing 9-year period, across 2 regular consultations and now 2 different sectoral review consultations, no legislative amendment or final regulatory measures have resulted. Moreover, in the current CD, the RA has provided no new or continuing evidence that current market conditions warrant regulatory intervention on this issue. Given the lack of action over the 9-year period, and the apparent absence of a current problem, it is appropriate to turn back to sections 16 (b), (c), and (e) of the RAA and consider whether any regulatory action is required in this instance.

Specific Comments to the Consultation

In the 2018 sectoral review process, One Comm provided submissions in respect of most of the matters listed in the CD. Perhaps not so surprisingly, our position in respect of the various matters remains the same. Accordingly, we incorporate by reference our 24 May 2018 Response to Preliminary Report: Comments on Electronic Communications Sectoral Review (the "2018 Response") and attach it as an Appendix to this submission.

New comments and any updates in respect of specific issues are provided below under headings or proposals set out in the CD. For ease of reference, we will include excerpted portions of our 2018 Response, as appropriate.

A. Service Continuity – Integrated Communications Operating Licence (ICOL)

"The RA recommends the inclusion of express language in appropriate legislation and/or an amendment to [ICOLs] which imposes an obligation on sectoral providers to establish a specific service restoration plan, which the RA can order to be amended if it is considered inadequate"

As stated in our 2018 Response, it is a prudent and standard business practice for a provider to have in place arrangements for redundant (restoration) capacity in case of outages on their primary subsea capacity ("Secondary Capacity"). One Communications has put in place sufficient Secondary Capacity to back up our primary subsea capacity needs and ensure service continuity in the case of major service interruption.

There is no need for regulation to require what is already industry standard and sound business planning. Consumers, and the market in general, require that a provider have a proper restoration plan

in case of outages. The extent to which a provider avails itself of such Secondary Capacity results will determine the long-term reliability of its services. A prudent provider will properly manage the balance of having sufficient redundancy and the additional costs of Secondary Capacity. How each provider manages this balance is a competitive feature in the market, as Secondary Capacity is a significant component of the cost base and pricing for home and business connectivity in Bermuda. Introducing regulation to mandate such practices is unnecessary and may reduce competitive dynamics rather than promote competition.

> **"The RA recommends the inclusion of express language in appropriate legislation and/or an amendment to [ICOLs] which imposes an obligation on sectoral providers to submit periodic financial reports… to allow the RA to effectively assess their financial stability, and to notify the RA of any risks to their future financial stability (i.e. legal proceedings) or significant changes in their financial position (i.e. risk of insolvency)"**

One Communications and all other ICOL holders file frequent financial reporting with the RA under existing regulation including section 53 of the RAA and section 4.6 of the Filing Fee Instructions. Requiring ICOL holders to file additional financial information beyond those requirements is duplicative and wasteful of resources. Service provider resources are better directed to operating more efficiently and competing more aggressively in the market.

With respect to insolvency risk, as stated in our 2018 Comments, individuals and business customers have choices in the market. In 2022, this is truer than ever before with the advent of stronger resellers and new entrants. Continuity of service is important, and customers can in the first instance choose providers who are well-financed and have a long history of operating stability. If their provider becomes insolvent, they can switch providers within a reasonable timeframe. Customers are sufficiently empowered to deal with the possible insolvency of an ICOL holder. There is no need for the RA to layer in additional reporting and accounting obligations to manage the risk for consumers.

> **"The RA recommends the inclusion of express language in appropriate legislation and/or an amendment to [ICOLs] which imposes an obligation on sectoral providers to notify the RA before discontinuing any service to wholesale customers due to non-payment or insolvency"**

As per our 2018 Comments, section 3.12 of the FibreWire Model Access and Interconnection Agreement (an agreement reviewed and approved by the RA) which states:

> Without prior notice to the CP, OneComm may, after notifying the RA, immediately suspend the supply of the Service, in whole or in part, if… the CP is determined by a competent authority to be Insolvent, and the RA has given its prior written approval and shall take reasonable endeavors to advise the CP's relevant Contact prior to the suspension in respect to subclause (a) and attempt prompt resolution and otherwise at or around the time of the suspension and shall give the CP written confirmation of any such suspension under this clause as soon as is reasonably possible (and no later than the Working Day following the suspension), including reasons for such suspension.

Given this provision, there is no need for additional legislation or ICOL conditions to be implemented.

In respect of discontinuing services to consumers (both business and individual) of electronic communication services, we refer the RA to section 18 of every ICOL:

> **18 DISCONTINUATION OF SERVICE; SURRENDER OF LICENCE**
>
> **18.1** Subject to any Ex Ante Remedies imposed on the Licensee pursuant to Sections 23 and 24 of the ECA, the Licensee shall not discontinue the general provision of any Electronic Communications Service unless the Licensee first provides the Authority and affected Subscribers and Other Licensees with no less than 60 days advance notice, or such other greater or lesser notice as the Authority may determine, of the discontinuation of service. The Licensee shall make such reasonable efforts as the Authority may require to transition affected Subscribers and Other Licensees from the discontinued Electronic Communications Service to a reasonable alternative service provided by either the Licensee or an Other Licensee.

This provision clearly requires notice to customers and the RA prior to discontinuing services. There is no need for further regulation of this point.

> **"RA further recommends that the RAA be amended to allow it to order management or operations audits into the any sectoral provider which it oversees."**

We refer the RA to section 15 of every ICOL:

> **15 INFORMATION, AUDITS AND INSPECTION**
>
> **15.1** In addition to the information required by Section 53 of the RAA, the Licensee shall promptly provide the Authority with any documents, accounts, reports, returns, estimates or other information required by the Authority to carry out its responsibilities under the RAA and ECA, including information regarding (a) the services or equipment provided to Users, Other Licensees and Persons with Class Licences, (b) the rates and charges for such services and equipment, (c) copies of contracts with Other Licensees, (d) statistics regarding usage of the Licensee's Electronic Communications Networks and Electronic Communications Services, (e) relevant activities, operations, or shareholdings of any Related Persons, and (f) any arrangements or relationships between the Licensee and any Related Persons that the Authority determines to be relevant to competition in the sector. For purposes of Condition 15.1, "Related Person" shall mean any entity that directly or indirectly owns, is directly or indirectly owned by, or is under common ownership with, the Licensee, as evidenced by the ownership of five per cent or more of the shares, stock or other securities or voting rights of the owned entity, including through an arrangement of any type.
>
> **15.2** The Licensee shall permit the Authority or Persons designated by the Authority to examine, investigate or audit, or procure such assistance as the Authority may require to conduct an examination, investigation or audit of, any aspect of the Licensee's business.
>
> **15.3** Subject to the provisions of Section 92 of the RAA, the Licensee shall permit the Authority or Persons designated by the Authority to enter the Licensee's premises, and shall facilitate access by them to premises used by the Licensee, to conduct an inspection, examination, investigation or audit of the Licensee.

Given these provisions, there is no reason to seek amendment of the RAA. If the RA finds such powers to be inadequate, it needs to clearly explain its position in this Consultation.

B. "The RA recommends to the Minister the adoption of a tiered Government Authorization Fee (GAF) structure to replace the current GAF structure" and "the RA further recommends to the Minister that the lowest band of the proposed GAF tiered structure be exempt from taxation."

In response to the RA's proposed adoption of a tiered government fee structure, we draw the RA's attention to our 2018 Comments at section C where we state:

> With respect, the proposed tiered fee structure is neither objective nor reasonable. While we do not agree with the level or degree of current taxation, the percentage mechanism for taxation works properly to apportion tax by revenue dollar. A small firm that makes $100,000 of taxable revenue will pay $5,250 of government and RA authorization fees. A large firm that makes $100 million of taxable revenue will pay $5.25 million in taxes and fees. The proportionality issue is properly addressed by the differences in revenue and the application of a percentage tax, rather than a flat nominal amount. All firms should bear the costs of regulation in proportion, and it is our position that they currently do. A flat percentage is not regressive in the manner implied by the Report.
>
> If small firms pay less than the 5.25%, larger firms will essentially be subsidizing the cost of regulation and government policy for small firms. All other firms would have to pick up the rest of the RA fees as the RA's budget recommendations determine the percentage of tax charged, and the RA is not proposing to reduce its budget to cover the shortfall caused by lower rates for small firms. Every budgetary dollar not charged to a small firm must be raised from the larger firms. This approach is discriminatory. It institutionalizes a regulatory bias to supporting certain firms at the cost of others and, as a consequence, fosters smaller, financially weak competition. The statutory framework of the RA was not enacted to systematically favour some firms (that are arbitrarily designated as small) at the expense of all other firms. The regulatory goal should be effective competition on a level playing field, not regulated cross-subsidization between firms.
>
> The high fixed costs of the industry are a natural barrier to entry in this market, but they are a reality of the business. All firms face that competitive reality equally and should have to invest capital and pay the fees necessary to compete in the sector. Moreover, we note that regulation has already been used to try and remediate the issue of high fixed costs. Most of the smaller firms who might benefit from the tiered fee approach have already avoided the largest fixed costs of the sector by availing themselves of wholesale options historically mandated by the RA. The very high costs of market entry (i.e. building a network) are not part of their chosen business model. Accordingly, those same costs should not now be used to justify discriminatory taxation, if in fact discriminatory taxation can be justified at all.

The RA links this recommendation to the promotion of competition. Again, with respect, favouring small players at the expense of larger firms promotes certain competitors, not competition overall. Moreover, we refer the RA to section 16 of the RAA as set out above. In particular, subsection (h) explicitly states the RA shall, in performing its duties, act without favouritism to any sectoral participant. We also note the market entry of Wave Bermuda Ltd. (also known as "Horizon Communications") occurred without the benefit of a lower tiered GAF or an initial GAF exemption. Clearly, the equal GAF percentage did not prevent or inhibit entry in that instance, and to now implement the proposed tiered structure would ironically require Horizon Communications to subsidize smaller firms who enter thereafter.

C. "The RA recommends that amendments be made to the RAA replacing the cumbersome adjudication and enforcement process with a simpler warning-and-decision-notice procedure based on that used in the sectoral legislation of the Bermuda Monetary Authority."

As in 2018, the RA again recommends drastic changes to the legislation in relation to enforcement actions and adjudication because the existing processes are "somewhat counterproductive and cumbersome" and are "time-consuming processes not too dissimilar to a fully contested court proceeding". No factual evidence is provided in support of these comments.

With respect, we disagree with this recommendation. As stated in our 2018 Comments, our main concern is with the apparent elimination of any element of independent investigation and judgement. The RA proposes that enforcement matters should not be vested in an independent presiding officer, but instead should be directly vested in the RA. This removes any element of objectivity or independence in the process. The powers of the BMA are customized to the industry they regulate, which is very different from the electronic communications sector. We also refer the RA to the BMA Enforcement Guide which describes the distinct roles played by the Chief Enforcement Officer, the supervisor and the Enforcement Committee.

We also note the RA's related proposals to expand civil penalties and add public censure, while still maintaining its current remedial powers regarding restitution, directions, and suspension, revocation or modification of licences. In summary, it appears the RA is asking to be given the enforcement and adjudication powers of the BMA in addition to its existing statutory powers. The CD provides no explanation as to how its existing powers are insufficient. Simply labelling such powers as costly, cumbersome and time-consuming to implement does not provide the factual and legal background needed to justify such a dramatic expansion of the RA's powers.

In proposing a warning-and-decision notice procedure based on the sectoral legislation of the BMA, the RA proposes that the legislation would only provide a framework and that the RA will be able to "flesh out the processes" through documentation available on their website. We do not agree with the substance of the proposals, and we do not agree with the notion that such important details can be detailed at some later date. And, at the very least, the legislative changes, "fleshed out" policy documents and enforcement principles should be subject to further public consultation so that any concerns of sectoral providers can be properly voiced.

D. "The RA recommends to the Minister the amendment of sections of the RAA to provide the ability to carry forward Surplus Funds from one financial year to the next in order to remove unnecessary budgeting difficulties and to afford the RA the ability to account for workstreams that are conducted across multiple fiscal years."

As per our 2018 Comments, we are supportive of any effort that will reduce the tax burden on our sector. The RA's proposal to use surplus funds from prior years to fund current and future years is welcome provided this results in an actual decrease in the tax burden for all sectoral participants. We would not support surplus funds being used to benefit some but not all participants, nor would we welcome the use of surplus funds for discretionary or overspending by the RA beyond its approved budget.

In paragraph 58 of the CD, the RA states (as it did in 2018) that it tends to err on the side of caution by over-budgeting which often results in surplus. This practice takes funds from the sector unnecessarily. Those funds could have been used to build networks, provide services or improve pricing. If statutory

change to allow funds to be used in future years will eliminate the basis for the tendency to over-budget, we are supportive of the change.

E. The RA recommends amending the "statutory requirement to conduct an initial public consultation as part of General Determination process to account for exceptional circumstances where an initial public consultation may not be required (i.e. due to technological and market developments, timing and sensitivity of the matter, inherent simplicity of the matter)."

The RA is seeking to amend the RAA to provide it discretionary power to skip the initial stage of the current public consultation process where the RA deems it unnecessary. In support of this proposal, the RA highlights the need to respond quickly and effectively to market and technological developments, and it implies that respondents have delayed past consultations by seeking extensions for deadlines to submit responses. The RA cites the example of the Price Check Website decommissioning taking over two years even in the absence of controversy or comments from sectoral providers. Further, the RA references the Cayman Islands regulatory approach as a preferable model as it only requires public consultation for matters of 'public significance'.

One Comm disagrees with this proposal. Public consultation is a key component of the RA's general mandate. Any shortening of the consultative process may speed up the effort but only at the expense of public input. The RA's exercise of its statutory powers was intended to be tempered and influenced through the public consultation process. Both the RAA and the ECA are structured to ensure the RA's powers are used for the public benefit. Reducing opportunities for public consultation is inconsistent with that statutory approach.

With regard to respondents delaying past consultations by seeking extensions, we believe the RA's point is only part of the reason for delayed consultations. Yes, respondents seek extensions. One Comm has sought additional submission time in some circumstances to ensure it can properly participate in a consultation. We note, however, that the RA has in many cases taken months (and in some cases, years) to develop its consultation documents, preliminary orders and related materials. The RA retains off-island professional consultants to draft this material. When the documents are finally issued to the public (often on a Friday or the day before a holiday weekend)[2], they usually have a deadline of one month for submissions. Most sectoral participants and members of the public who participate in the consultations do not have dedicated regulatory resources; nor do they have the benefit of external professional economists and lawyers in preparing their responses.

With respect to the example used by the RA in decommissioning the Price Check Website, the timeline of greater than 2 years was not because of deadline extensions for respondents. The initial consultation document response period commenced on 29 March 2019 and concluded on 12 April 2019. There was only one response. More than a year later, on 30 April 2021, the RA issued its Preliminary Report, Decision and Draft General Determination in the matter. The response period commenced on the 30 April 2021 and concluded on the 14 May 2021. The RA received no responses to the Preliminary Report. The Final Report and Final Decision and Order in this matter was issued 27 May 2021, more than 2 years

[2] This Sectoral Review CD was issued 27 July 2022, the day before Cup Match, with a response deadline of 31 August 2022.

after the initial consultation document was issued. Of that period, only one month was spent waiting for public responses.

With regard to the RA's suggestion that the Cayman 'public significance' model be used, we suggest further research be done to determine whether such a model is more efficient and whether it results in better outcomes for the market and the public. One Comm has many years of experience operating in the Cayman market, and we would ask the RA to provide more detail in this consultation as to why the Cayman model might be the better choice.

F. The RA recommends to the Minister the following: "Remove the references to the adjudication process in sections 41 and 50 of the ECA and replace with a reference to consultation."

One Comm disagrees with this proposal. The RA provides none of the required factual or legal background necessary to evaluate this recommendation. We can only assume the change from adjudication to consultation was intended to streamline the process and make it easier for the RA to make final decisions regarding Type Approvals (s. 50) and the efficient use of spectrum (s.41).

This proposal must also be considered in conjunction with the RA's other proposals to shorten or reduce the public consultation process, and to simplify the adjudication process. When viewed in totality, there is a concerning theme of providing unfettered powers to the RA. While we understand the RA intends to exercise these streamlined powers for the public benefit, we do not believe these proposals recognize the public benefit of independent presiding officers in adjudication, and the constructive influence of public input in the consultation process. Parliament saw fit to design these processes with checks and balances. The RA has provided no compelling reason in support of its proposal.

G. "The RA recommends to the Minister the imposition of consumer compensation provisions for consumers in the event of service failures, through a consumer protection general determination and the inclusion of supporting ICOL terms and conditions through an ICOL general determination."

It is unclear why these issues are being addressed under the sectoral review. The RA has failed to provide the required factual and legal background on this issue.

As the RA's recommendation is that general determinations be used to implement such measures, the RA has the power to commence public consultations that could ultimately result in its proposed general determinations. Pursuant to statute, there is no direct involvement of the Minister in such processes.

With respect to the imposition of consumer compensation provisions, we will reserve further comments until the appropriate consultation is commenced. In the interim, we refer the RA to our past comments in its Principles of Consumer Protection Consultation in 2020.

H. "The RA recommends to the Minister the imposition of email forwarding provisions for consumers that switch internet service providers, through a consumer protection general determination and the inclusion of supporting ICOL terms and conditions through an ICOL general determination."

See our related comments on this issue above under the heading: "Sectoral Review Should Not Be Focused on Adding Regulation or Facilitating Regulatory Action".

It is unclear why these issues are being addressed under the sectoral review. The RA has failed to provide the required factual and legal background on this issue. As per the previous section, the method of implementation proposed by the RA is through a general determination. Accordingly, it remains within the powers of the RA to commence a public consultation that might ultimately lead to a general determination on the point. We will reserve further comment on the issue of email mobility/forwarding until the appropriate consultation is commenced. In the interim, we refer the RA to our past comments in the relevant consultations in 2013, 2015 and 2018.

I. "The RA recommends to the Minister the adoption of additional Consumer Protection measures which will be considered as part of a consumer protection general determination."

It is unclear why these measures are being addressed under the sectoral review. The RA has failed to provide the required factual and legal background on this issue. As per the previous sections, the method of implementation proposed by the RA is through a general determination. Accordingly, it remains within the powers of the RA to commence a public consultation that might ultimately lead to a general determination on the point. We will reserve further comment on the issue of additional consumer protection measures until the appropriate consultation is commenced. In the interim, we refer the RA to our past comments in the consumer protection consultation concluded in 2020.

J. Radio Spectrum

It is unclear what the RA is proposing in this section of the CD. There are references to future consultations and a possible update to the Minister's 2014 Spectrum Policy. When these public processes are commenced, One Comm will participate as appropriate.

If you have any questions regarding the matters set out above, please feel free to contact me directly.

Regards,

Michelle Ashton
General Counsel
One Communications

Appendix

24 May 2018

Ms. Monique Lister
Regulatory Authority
1st Floor Craig Appin House
3 Wesley Street, Hamilton HM11
Bermuda

Dear Ms. Lister,

Re: Response to Preliminary Report: Comments on Electronic Communications Sectoral Review dated 17 April 2018 (the "Report")

On behalf of One Communications Ltd. and its affiliates Bermuda Digital Communications Ltd. ("BDC") and Logic Communications Ltd. ("Logic") (collectively trading as, and referenced herein as, "One Communications" or the "Company"), we are writing to respond to the preliminary Report.

By way of general comment on the Report, we note the lack of clarity regarding what the Regulatory Authority (the "RA") considers to be within the remit of the market review (which we understand is ongoing) as opposed to the sectoral review discussed in the Report. As many of the issues in the Report depend to some degree on a study of the current market state in combination with an assessment of sectoral problems, the diverging timelines are difficult to reconcile. At paragraph 17, the RA makes it clear that the sectoral review was delayed for 2 years in January 2016 "due to the value of the expected results of the... market review." This seems contrary to the later statement regarding a "divergence of the issues" at paragraph 23. Based on the Consultation Document issued 17 October 2017, we assumed the original belief was that the 2 reviews were inter-dependent to some degree and overlapped significantly, now it appears the RA is treating them as separate and distinct. While not explicitly stated, this change of approach seems to be driven simply by the 17 July 2018 deadline referenced in the Report rather than any substantive reasons.

When examining sectoral matters, it is clear that the relevant market economics need to be understood before sectoral change or status quo can be recommended. Without a proper and current market review completed, the sectoral review suffers from a theoretical bias towards protection and regulation based on outdated market analyses and the mere perception of risk. As a result, the Report appears to be a compilation of disparate theoretical concerns with little attention paid to the facts of the market and the statutory principles of the RA, including in particular the duty to rely on market forces, where practicable. The Report suggests that theoretical concerns may be used to justify the implementation of invasive regulation where no market problems have been evident. That regulatory approach runs the high risk of causing inefficiency in a currently functioning market, or in the worst case, causing ICOL holders to stop investing and/or exit a line of business.

We further note that the Report touches upon a wide variety of matters, some which appear "sectoral" in nature, and some that are clearly not of that kind and scale. In the latter grouping, we believe that certain issues raised, and the corresponding recommendations made, are properly handled in their own

specific consultation given their microeconomic market impact, rather than a "sectoral" review that we believe is statutorily intended to address the macro issues affecting the industry.

Our final general comment relates to the procedural requirements referenced in paragraph 20 of the Report. In particular, we highlight the requirement under section 72 of the RAA that a preliminary report shall "provide a reasoned explanation of the basis on which the Authority made any significant factual finding, policy determination and legal conclusion" and "state the Authority's preliminary conclusions". The Report does not satisfy these requirements on the majority of issues. Issues or concerns are raised without a reasoned explanation of the factual, policy, or legal basis for them. Describing a concern and proposing possible regulatory solutions to address it does not provide the reasoned basis for that particular concern. Similarly, the RA does not provide its preliminary conclusions as required by statute. Instead, the Report "invites comments"[1] on the need for regulations of various kinds, but stops short of actually articulating a preliminary conclusion or a preliminary recommendation. From a process and substantive perspective, it is both important and required that the RA clearly state its preliminary conclusions and recommendations, and any factual finding, policy determination and legal conclusions that form the reasoned basis for them.

Below, we provide further comments specific to the matters raised in the Report.

A. Service Continuity – Submarine Cable Infrastructure

Submarine cable infrastructure is a complicated business built with long term capital investment and multi-party planning and construction. Initial investments are made based on financial and operating assumptions that span multiple decades. Intervention in this business runs the very high risk of unbalancing the commercial arrangements negotiated at the outset, and will likely dampen future investment.

All providers of connectivity in Bermuda need to have subsea capacity in place to take traffic off-island. A prudent provider will also have arrangements for diverse redundant (or restoration) capacity in case of outages on their primary subsea capacity. Although subsea outages are quite rare, they do occur, and a provider's redundant or restoration capacity arrangement ("Secondary Capacity") acts as a kind of insurance against primary subsea faults. Based on our own commercial planning, and not on regulation, One Communications has put in place sufficient Secondary Capacity to backstop our primary subsea capacity needs. There is no need to regulate what is already being done as a part of proper business planning. Secondary Capacity is costly but necessary for us to ensure proper operations for our customers. That cost is a significant component of the cost base and pricing for home and business connectivity in Bermuda.

At paragraph 3, the RA states concerns regarding damage to subsea infrastructure, "including simultaneous damage to more than one cable." The question raised is whether regulation should be

[1] See paragraph 49 where the RA "invites comments on the need for". Similar invitations to comment on proposals or "provide views on the recommendations" can be found in paragraphs 56, 75, 79 and 81. We note at paragraph 83 there is a reference to the "preliminary recommendations... as set out in section 5" of the Report, but that section of the Report is not consistent with that word choice.

used to mitigate the effects. It should be noted that requiring additional layers of redundancy for subsea capacity will not guarantee 100% uptime for internet to customer homes or businesses. Regulation will not mitigate the effects and is more likely to discourage future investment in this segment. Subsea cables run at greater than 99% reliability. The occurrence of multiple simultaneous cable faults is a highly improbable outcome. For more than one cable to suffer a fault at the same time, a very serious force majeure event (e.g. hurricane, tsunami or other similar catastrophe) would have had to have occurred. The RA should consider that a catastrophic event of that magnitude will also have likely damaged all on-island telecom networks and the power grid that supports them. Additional subsea connections will not likely matter in those improbable scenarios, and forcing carriers to make such arrangements will add significant cost and drive regular prices higher for every customer.

These are very technical issues that are not well understood except by subject matter experts. We suggest this matter be properly handled in a specific industry consultation where the proper details of this market segment can be addressed, and expert advice can be obtained. Existing industry dynamics and the true costs of potential regulation need to be better understood.

B. Service Continuity – Insolvency of an ICOL Holder

Insolvency is unfortunately a natural commercial event that triggers a legal process for financially weak competitors to exit a market or reorganize with their creditors' involvement, often through receivership. A normal outcome would be that other commercial interests would buy out the assets (e.g. the customer accounts) or the business as a whole with the price being commensurate with the future viability of those assets.

Unless they willingly contract otherwise, customers are free to switch to other providers on relatively short notice, and competing providers should be free to make proactive offers to those customers. While switching may cause some disruption[2] to a customer's service, that is a normal free market outcome in most countries around the world. Moreover, when choosing a service provider, a customer can and should consider the financial strength and operating performance of a particular provider before making a simple decision based on short term promotions and pricing. Customers are proactive decision makers regarding their telecom services, rather than simple observers and possible victims of an insolvent ICOL holder. The RA should consider customers' freedom to choose before trying to implement market-distorting protections.

Further Monitoring or Notice Requirements

One Communications is a public company required to give public disclosure of its financials on an annual basis (audited), and on a 6-month basis (unaudited). This disclosure is made available to all

[2] For fixed services, One Communications can usually provision services to a customer within 3-4 days (sometimes less) provided the infrastructure to the home or business is in reasonably good shape, and the field resources are available. For wireless, mobile services can be changed over as quickly as obtaining a new sim. Assuming the porting process is working properly, customers can port their number in 1-2 days depending on the time of request. The porting process has already been regulated by the RA so additional 'in case of insolvency' requirements are not necessary.

shareholders proactively under the BSX rules, and is made publicly available at http://bsx.com/company_details.php?CompanyID=126. As a consequence, our financial statements and operating performance are readily knowable by the RA, our customers and other stakeholders. We, like all other ICOL holders, also file frequent financial reporting with the RA (revenues and cost of goods sold). Requiring us to file additional financial information with the RA is duplicative and wasteful of resources. We note that our competitors are not publicly traded and have no public disclosure requirements. We make no comment in respect of additional obligations being placed on them.

As a final comment on this particular proposal, we note the RA's suggestion that it might use financial information to warn consumers that "their service is at risk" when the RA believes the ICOL holder may become insolvent. This kind of regulatory action may cause ICOL holders who are close to insolvency to actually become insolvent, as their customers will be encouraged (by the regulator) to proactively switch to another provider to ensure continuity of service.

Disconnection Authorisation

In the current market, there is no evidence of a need to further regulate "disconnection" more than it is currently. We refer the RA to the following:

Section 3.12 of the FibreWire Model Access and Interconnection Agreement (an agreement reviewed and approved by the RA) states:

> Without prior notice to the CP, OneComm may, after notifying the RA, immediately suspend the supply of the Service, in whole or in part, if... the CP is determined by a competent authority to be Insolvent, and the RA has given its prior written approval and shall take reasonable endeavors to advise the CP's relevant Contact prior to the suspension in respect to subclause (a) and attempt prompt resolution and otherwise at or around the time of the suspension and shall give the CP written confirmation of any such suspension under this clause as soon as is reasonably possible (and no later than the Working Day following the suspension), including reasons for such suspension.

Section A2.1 of Annex A of every ICOL states:

> **A2.1** The Licensee shall comply with the provisions of Sections 21 and 23A of the Telecommunications Act 1986, which are reproduced in Annex B, until the later of the following events:
>
> (a) the Authority determines that the Licensee does not possess Significant Market Power in one or more relevant markets, or
>
> (b) if the Authority determines that the Licensee possesses Significant Market Power, the Authority determines that the Licensee has complied with any Ex Ante Remedies imposed on the Licensee by the Authority.
>
> For purposes of this Transitional Condition, references in Annex B to "Carrier" shall mean the Licensee and references to "the Commission," "the Department" and "the Minister" shall mean the Authority.

Section 21 of Annex B of every ICOL states:

(8) No Carrier may disconnect another Carrier without the consent in writing of that Carrier or the Minister.

(9) A Carrier may only seek the permission of the Minister to disconnect another Carrier if—

(a) that Carrier fails to settle its accounts due within a period of thirty days after receipt of a written warning notice and within a further period of thirty days after receipt of a written notice of intention to seek permission for disconnection;

(b) that Carrier fails to comply with any term of the contract or agreement for the provision of the service;

(c) that Carrier fails to conform to the agreed technical specification for the provision and operation of the service; or

(d) there is other just and reasonable cause for disconnection.

(10) A Carrier which seeks the Minister's permission to disconnect another Carrier shall give notice to the Minister in writing not less than thirty days before the date of the proposed disconnection, informing the Minister of the reasons for the proposed disconnection, and the Minister shall forthwith refer the matter to the Commission for enquiry and report.

The suggestion that mechanisms dating back to the original Telecommunications Act of 1986 should be re-regulated suggests a degree of uncertainty regarding the operating validity of the provisions set out above. On a straight legal reading of A2.1 of Annex A and Section 21 of Annex B, the provisions set out above addressing the issue of disconnection appear to be still in force. Paragraph 47 of the Report seems to imply that these provisions are no longer operable. As a part of this Sectoral Review, we ask that the RA clarify its interpretation of the law.

Service Provider of Last Resort

As stated above, customers can proactively choose to switch service providers before insolvency, or afterward, in a relatively short timeframe. There is no need to create additional rules to designate a service provider of last resort. Customers should be able to choose their next service provider rather than the RA regulating an outcome that the customer may not want.

Finally, in terms of this section of the Report, we are supportive of the views expressed in paragraphs 42 and 43 of the Report. Although some disruption of service might occur, individual customers and business customers are sufficiently empowered to deal with the possible insolvency of an ICOL holder. There is no evidence to the contrary and therefore, a market outcome is preferred to a regulated outcome. We caution the RA before implementing regulation that protects customers where no protection is needed. This kind of over-regulation has unintended consequences and leads to an inefficient market that will not serve customers well in the longer run. By over-regulating, the RA may change the competitive dynamic to favour certain firms over others, rather than allowing the market place to properly work itself out.

C. Tiered Fee Structure

The proposal to implement a tiered fee structure appears to be based on the commentary in paragraph 55 of the Report where it states:

> By implementing a tiered fee structure, sectoral providers with lower revenues could be assessed on a smaller percentage of revenue than those with higher revenues. This differentiation between ICOL holders on the basis of turnover would be justifiable because of the disproportionate impact that the Regulatory Authority fees at their current level may have on smaller operators. This is so because of the high level of fixed costs relative to turnover involved in operating an electronic communications service in Bermuda.

With respect, the proposed tiered fee structure is neither objective nor reasonable. While we do not agree with the level or degree of current taxation, the percentage mechanism for taxation works properly to apportion tax by revenue dollar. A small firm that makes $100,000 of taxable revenue will pay $5,250 of government and RA authorization fees. A large firm that makes $100 million of taxable revenue will pay $5.25 million in taxes and fees. The proportionality issue is properly addressed by the differences in revenue and the application of a percentage tax, rather than a flat nominal amount. All firms should bear the costs of regulation in proportion, and it is our position that they currently do. A flat percentage is not regressive in the manner implied by the Report.

If small firms pay less than the 5.25%, larger firms will essentially be subsidizing the cost of regulation and government policy for small firms. All other firms would have to pick up the rest of the RA fees as the RA's budget recommendations determine the percentage of tax charged, and the RA is not proposing to reduce its budget to cover the shortfall caused by lower rates for small firms. Every budgetary dollar not charged to a small firm must be raised from the larger firms. This approach is discriminatory. It institutionalizes a regulatory bias to supporting certain firms at the cost of others and, as a consequence, fosters smaller, financially weak competition. The statutory framework of the RA was not enacted to systematically favour some firms (that are arbitrarily designated as small) at the expense of all other firms. The regulatory goal should be effective competition on a level playing field, not regulated cross-subsidization between firms.

The high fixed costs of the industry are a natural barrier to entry in this market, but they are a reality of the business. All firms face that competitive reality equally and should have to invest capital and pay the fees necessary to compete in the sector. Moreover, we note that regulation has already been used to try and remediate the issue of high fixed costs. Most of the smaller firms who might benefit from the tiered fee approach have already avoided the largest fixed costs of the sector by availing themselves of wholesale options historically mandated by the RA. The very high costs of market entry (i.e. building a network) are not part of their chosen business model. Accordingly, those same costs should not now be used to justify discriminatory taxation, if in fact discriminatory taxation can be justified at all.

D. Review of Governing Legislation – Enforcement Process

The RA wishes to change the legislation to correct difficulties in enforcement actions because they are "very lengthy and complex" and "difficult to implement". The RA also points to conceptual problems where it brings a case for enforcement and then also must "consider and determine any (effective)

appeal against the adjudication." We agree that this conflicted role is conceptually and practically problematic, but for different reasons than those referenced by the RA. We do not support the notion that eliminating the role of the independent adjudicator is the answer to the problem. That solution will simply lead to other, more severe enforcement problems with sectoral implications.

It is increasingly clear that perceived difficulties in the enforcement process have caused the RA to take an overly expansive view of its power to issue administrative orders under Part 6 of the RAA. Section 63 orders were explicitly intended to address administrative matters only, and not matters that may only be taken by the adoption of a general determination or an adjudicative decision and order. If incorrectly applied to enforcement related actions, this use of the administrative power avoids the due process of Part 8 of the RAA governing investigation and enforcement.

In particular, the use of section 63 administrative orders as an enforcement tool avoids the obligation to appoint an independent presiding officer to conduct an adjudication. Setting aside the legal impropriety of this approach, the key procedural problem is that the only real independent oversight or avenue of appeal from these quasi-enforcement "administrative" actions appears to be judicial review or appeal under Part 9 of the RAA. As all sectoral participants are aware, the judicial process is a very costly and time-consuming process for both the appellant/applicant and the RA. In practical terms, that process only really offers relief when the implications of an incorrect RA action are far-reaching or very damaging. In the majority of instances, where the negative implications of a problematic RA action are of lesser scale, appeals under Part 9 and judicial review are economically unjustifiable. The unfortunate result is that small to medium scale regulatory errors go unchallenged, creating bad precedents that are later built on in future actions, administrative or otherwise.

Given the above, we cannot be supportive of efforts to remove the only check and balance on the RA's enforcement powers, short of judicial review or appeal. The role of an independent presiding officer was intended to bring objectivity and independence to the process of enforcement. Eliminating that role would mean that targets of an enforcement process will be left with the same problem that is unfolding in the context of administrative orders. In all but the most severe cases, the RA would be unchecked as a combined policing, prosecuting and adjudicating body. As noted above, judicial review and appeal would not provide practical relief in small to medium scale issues where errors are made or the RA's powers are misused.

If any change is to be recommended in this area, we would suggest that an independent presiding officer be used as an arbitration-like option for actions taken by the RA through its administrative powers. By allowing an appeal to an arbitrator-like presiding officer, firms would have a cost-efficient avenue for ensuring the correctness of the RA's administrative/quasi-enforcement activities. This would ultimately enhance regulatory decision-making and efficiently address any errors that are made.

E. Review of Governing Legislation – Use of Surplus Funds

We are supportive of any effort that will reduce the growing tax burden placed on our sector. The RA's proposal to use surplus funds from prior years to fund current and future years is welcome provided this results in an actual decrease in the tax burden for all sectoral participants. We would not support

surplus funds being used to benefit some but not all participants, nor would we welcome the use of surplus funds for discretionary or over spending by the RA beyond its approved budget.

We would like to note, however, a number of continuing problems with the process and implementation of the RA's budgetary and audit process, beyond simply the use of surplus funds. While we cannot cover all of the issues in this response, we do want to highlight the lack of public accountability in the RA's financial process. Budgets are put forth for consultation on an annual basis without review of actuals from the prior period. Delays in the audit process are blamed for the lack of timely public disclosure, but no attempts to remediate the situation seem evident.

As well, budgetary items like consultations are regularly carried over from year to year as they are not completed in the period. The same activities are used to justify funds each year, while no public answer is given as to why those same matters were paid for but not completed in the prior period. Market review provides the best example of a consultation that has been budgeted for in multiple years without being completed. Based on the brief public references made over the years regarding foreign consultant contracts for market review, it is our belief that budgetary funds have been used to pay for multiple market review attempts without a final report ever being issued.

Returning to the point of surplus funds, the RA continues to not disclose the financial details of its Reserve Fund, and the retained surpluses that have funded it. Audit issues aside, the unaudited numbers could have been used to properly inform the budgetary process each year. Paragraph 64 of the Report is the first public admission from the RA that "it is not unusual for a surplus to be generated" because the RA is "inclined to err on the side of generating a surplus." This inclination towards surplus is not a good outcome for the sector, especially given the continuing rise in tax rates on ICOL holders, and the RA's attempt to expand the tax base by eliminating historical deductions and exemptions.

Paragraph 65 of the Report seems to suggest that the RA is not permitted to use a surplus in one year to fund the following year. We note that this is only partially true as 25% of a budgetary surplus in any year is contributed to the Reserve Fund. The RA may recoup losses in any year from the Reserve Fund under section 40(4). Accordingly, it is possible to set a budget with a planned loss that is intended to be covered by the Reserve Fund, as was done in the final Work Plan for 2017-2018.

In terms of the remaining 75% of any budgetary surplus, we support statutory change to allow these funds to be used in future years to alleviate costs for the sector. The RA's practice of erring on the side of generating a budget surplus is unnecessarily draining funds from the sector. Those same funds could have been used to build networks, provide services or improve pricing. The current statutory mechanisms implicitly encourage overbudgeting and are particularly concerning in the absence of stringent audit practices and timely public disclosure.

F. Moratorium Review

As a regulated entity in the sector, we welcome competition from current ICOL holders and new entrants. We firmly believe that competition improves our own services and offerings, and those of any other player in the sector. If a firm is willing to invest in a network and compete in the market based on the same rules, there is no reason why they should not be allowed to enter the market. It is

contradictory to put regulations in place that are supposed to foster competition, and yet in the same framework prevent new entrants from obtaining an ICOL.

G. Consumer Protection

Section 5.5 of the Report is a disparate compilation of regulatory initiatives that were at one time or another the subject of a consultation or a planned (but not completed) consultation in one of the RA's Work Plans. Rather than now addressing these issues under the umbrella of a sectoral review, they should follow their own proper consultation process.

Mandated Service Credits for Outages

As the RA is aware, residential broadband is a best efforts type service. Service providers use their best efforts to serve the residential customer but there is no guaranteed service level. Service level agreements (known as SLAs) and outage credits are provided as part of business services but not residential services. A key difference between business and residential services is price. Business service pricing is significantly higher than more affordable residential services. If the RA wants to mandate SLAs and outage credit schemes for residential services, it will result in higher costs and by extension, higher prices.

We have many small and medium sized business customers who would prefer to buy residential services (without the SLA and outage credit scheme) because of the lower pricing. Similarly, residential customers are free to buy business services for their home if they are willing to pay business prices. We believe this is a decision that each and every customer can make for themselves. The RA should let customers decide what level of service and pricing they want, rather than forcing a regulated outcome.

Protections for Low Incomes

This kind of "protection" is really a social policy issue that is properly addressed by the Government rather than the telecommunications regulator. If the Government wants to help low income households obtain telecom services, there are a myriad of governmental programs that could be implemented to accomplish that social policy. The RA is not an elected body with a social policy mandate, and should avoid efforts that go beyond the economic boundaries of telecommunications regulation.

Providing Specific Services to Assist Consumers with Disabilities

Similar to the above point, the Government's social service organizations are the appropriate body to determine if public resources should be used to fund or enable special services for consumers with disabilities.

Mandated Email Forwarding

In late 2015, the RA held an Email Mobility Consultation and issued a preliminary decision that was never finalized and implemented. We refer the RA to our comments in that consultation available on

the RA's website at http://rab.bm/index.php/consultation-responses-2/ra-email-mobility-consultation/email-mobility-responses.

We also note the helpful submission of Mr. Iain Grant of the SeaBoard Group found at http://rab.bm/index.php/consultation-responses-2/ra-email-mobility-consultation/email-mobility-responses/1367-bermuda-email-consulation-v3/file.

At paragraph 18 of his submission, he states:

> Changing from one address to another, from one provider to another, the focus of the proposed Determination, is not a major hurdle. While some Bermudian consumers may have considered it a problem as recently as 2013, the world (and Bermuda) has moved on. It may be a minor inconvenience, but it is difficult to grasp how that should trigger regulatory intervention and statutory action. An email sent to one's list of friends and recipients will suffice to enable consumers to "move on" from their ex-IASP to their new IASP. There is no set-up cost: There is no transaction cost. It is not hard to do!

Mr Grant's comments were compelling in 2015 when they were submitted, and they are even more convincing today. Moreover, the lack of action on this matter since 2015 underscores the conclusion that regulatory intervention is not truly warranted.

H. Licence Management

As per our comments above in F. regarding the moratorium, we believe that competition is enhanced by new facilities-based entry into the sector. If, however, the Government decides to maintain or remove the moratorium, we do not believe the RA should use other means (e.g. reissuance and forfeiture) to circumvent or bypass the moratorium.

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If you have any questions regarding the matters set out above, please feel free to contact me directly.

Regards,

Michael Tanglao
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One Communications