



# **Electronic Communications Sectoral Review**

## **Final Report**

### **Final Recommendations**

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# 1 Introduction

1. The Regulatory Authority of Bermuda (the **RA**) issues its Final Report and Final Recommendations (Final Report) on the Electronic Communications Sectoral Review (the Consultation Document and Preliminary Report).
2. This Final Report is structured as follows:
  - a. section II sets out the background;
  - b. section III summarises the responses received regarding the Preliminary Report and the RA's Final Responses and Recommendations;
  - c. section IV provides the RA's Summary of Final Recommendations; and
  - d. section V sets forth the RA's Final Recommendations to the Minister.

## 2 Background

3. The RA has a legal obligation under section 17 of the RAA to conduct a comprehensive review of each regulated industry sector every three years, including all policies, legislation, regulations, and administrative determinations applicable to the sector.
4. The Electronic Communications Sectoral Review Consultation Document (the Consultation Document) invited the public, sectoral participants and sectoral providers, as well as other interested parties to submit responses commenting on the Consultation Document.
5. Responses to the Consultation Document were solicited from the public electronically through the RA's website at [www.ra.bm](http://www.ra.bm).
6. The response period commenced on 27 July 2022 and concluded on 31 August 2022.
7. The RA received three responses to the Consultation Document from the following entities:
  - a. One response from Bermuda Electric Light Company Limited (BELCO);
  - b. LinkBermuda Limited (Link); and
  - c. One Communications Ltd and its affiliates, Bermuda Digital Communications Ltd (BDC) and Logic Communications Ltd (Logic) (together OneComm).
8. Under sections 17(2) of the Regulatory Authority Act 2011 (**RAA**) the RA had six months from the date of publishing the Consultation Document to publish the Preliminary Report.
9. The Preliminary Report was published on 27 January 2023 as required by section 17(2) of the RAA and in accordance with sections 72(1) and 72(2) of the RAA.
10. The response period for the Preliminary Report commenced on the 27 January 2023 and concluded on 28 February 2023.
11. The RA received three responses to the Preliminary Report from the following entities:
  - a. Bermuda Electric Light Company Limited (BELCO);
  - b. LinkBermuda Limited (Link); and
  - c. One Communications Ltd and its affiliates, Bermuda Digital Communications Ltd (BDC) and Logic Communications Ltd (Logic) (together OneComm).
12. The RA thanks BELCO, Link and OneComm for the responses submitted. Copies of the full responses received can be found on the RA's website.
13. Section 72(4) of the RAA outlines the required contents of the final report which are set out below. The final report should:

- a. summarise the responses received regarding the preliminary report, recommendation or decision and order;
- b. provide a reasoned explanation of the basis on which the RA revised any significant factual finding, policy determination or legal conclusion contained in the preliminary report, recommendation or decision and order;
- c. in the case of a final report, state the RA's final conclusions;
- d. in the case of a final recommendation, state the policy or regulations that the RA recommends the Minister adopt; and
- e. in the case of a final decision and order, specify –
  - (i) any administrative determinations that the RA has adopted; and
  - (ii) subject to section 67 of the RAA, the date on which such administrative determinations will become effective.

14. On this basis, this document constitutes the RA's Final Report under section 17(4) of the RAA.

### 3 Summary and discussion of responses to the Preliminary Report

15. The RA discusses the responses received by referring to the paragraphs and subjects of the Preliminary Report.

#### *Service continuity – Integrated Communications Operating Licence (ICOL) – Paragraphs 54 to 72 of the Preliminary Report*

*The RA recommended 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;*
- *submit periodic financial reports to the RA to allow the RA to effectively assess their financial stability;*
- *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); and*
- *notify the RA before discontinuing any service to wholesale customers due to non-payment or insolvency;*

#### Restoration Plan

16. The RA received no comments in relation to this issue as the RA withdrew the recommendation to amend specific legislation and/or ICOLs to impose obligations on sectoral providers to establish specific service restoration plan.

#### **RA's Final Recommendation:**

17. **In the Preliminary Report the RA recognized that there was no immediate need to regulate this matter. Accordingly, the RA withdrew its recommendation to amend legislation and/or ICOLs to impose obligations on sectoral providers to establish a specific service restoration plan. The RA reserves the right to look at this issue in the future.**

#### Periodic Financial Reports

18. The RA received no comments in relation to periodical financial reports as the recommendation to amend specific legislation or the ICOL to impose on sectoral providers the obligation to submit periodic financial reports was withdrawn.

## **RA's Final Recommendation**

### **19. The RA confirms that it has withdrawn the recommendation made in the Preliminary Report.**

Notification regarding risks to future financial stability

20. Link has brought to the RA's attention that a recommendation regarding notification of any risks to ICOL holder's future financial stability (ie legal proceedings) or significant changes in their financial position (ie risks of insolvency) was missing in the Preliminary Report.

21. Link stated on page 3 paragraph 10 of their letter:

*10.Link has reviewed the Report. We note that the RA highlights this as one of the initial recommendations in the summary at page 15 of the Report ("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)"), however there does not appear to be a follow- up analysis or recommendation on this proposal in the Report and may have been overlooked. Link looks forward to the RA's attention to this recommendation.*

## **RA's Response and Recommendation**

**22. The RA thanks Link for bringing this oversight to the RA's attention. Upon examination of the recommendation in question, the RA decided to withdraw it as under condition 22 of the ICOL, sectoral providers are required to inform the RA of risks that may affect the sectoral provider's future financial stability or that changes their financial position significantly. Condition 22 does not mention explicitly the requirement of notification in the event of legal proceedings. However, the RA examined this issue and concluded that if the said legal proceedings affect the sectoral provider's ability to operate or its financial position, the provider is required to notify the RA.**

Notification regarding disconnection of wholesale customers

23. The RA recommended updating the ECA to require ICOL holders, particularly those offering services subject to SMP remedies, to notify the RA before discontinuing any services to wholesale customers.

24. OneComm brought to the RA's attention that Paragraph 146 of the Preliminary Report did not reflect the RA's preliminary decision regarding discontinuation of wholesale service. Regarding this, the RA clarifies that as per Paragraphs 64 to 66 of the Preliminary Report, the RA removed the recommendation to amend the ECA to require ICOL holders to notify the RA before discontinuing any services to wholesale customers.

**RA's Final Recommendation:**

25. In this Final Report, as in the Preliminary Report, the RA withdraws the recommendation to update the ECA to require ICOL holders, particularly those offering services subject to SMP remedies, to notify the RA before discontinuing any services to wholesale customers.

Amending the RAA to Order Management or Operations Audits

26. OneComm brought to the RA's attention that Paragraph 145 of the Preliminary Report did not reflect the RA's recommendation regarding amendment of the RAA to order management and operations audits. Regarding this, the RA clarifies that as per Paragraphs 70 to 72 of the Preliminary Report the RA removed the recommendation to amend the RAA to include a provision giving power to the RA to order management or operations audits of any sectoral provider it oversees.

**RA's Final Recommendation:**

27. The RA confirms that the recommendation is withdrawn.

*Government Authorization Fees – Paragraphs 73 to 78 of the Preliminary Report*

*The RA recommended to the Minister the adoption of a tiered Government Authorization Fee (GAF) structure to replace the current GAF structure which has the unintended consequence of disincentivizing prospective smaller sectoral providers from entering into, or participating in, the electronic communications market. The recommendation of a tiered GAF structure will thereby foster competition by encouraging the entry or expansion of prospective and/or existing smaller market participants.*

*The RA further recommended to the Minister that the lowest band of the proposed GAF tiered structure be exempt from taxation.*

28. In the Preliminary Report the RA withdrew the recommendation to the Minister to adopt a tiered Government Authorization structure to replace the current GAF structure.

**RA's Final Recommendation:**

29. The RA confirms that the recommendation is withdrawn.



## *Amendments to the RAA – Enforcements – Paragraphs 79 to 105 of the Preliminary Report*

*The RA recommended to the Minister the amendment of various sections of the RAA identified during the RA’s fully comprehensive review. These suggested amendments included, but were not limited to, the following:*

- Amend the existing adjudication process and enforcement process to ensure that the RA is afforded the ability to quickly and effectively resolve circumstances and impose remedies where there has been a breach, or alleged breach of an ICOL holder’s legal obligations, or there are disputes between two sectoral providers or a sectoral provider and a consumer.*

*[...]*

30. BELCO, Link and OneComm commented on the RA’s recommendation to amend the existing adjudication and enforcement processes.
31. The RA recommended amendments to ensure that it had the ability to resolve circumstances quickly and effectively. The RA also made the recommendations to impose remedies in case of a breach, or alleged breach of an ICOL holder’s legal obligations, or disputes between two sectoral providers or a sectoral provider and a consumer.
32. BELCO stated on pages 1 to 3 of their letter:

### *BMA*

*In the Consultation Document, at paragraph 147, 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”). The responses from sectoral providers who disagreed with this proposal, including BELCO, noted in part the BMA may not be the appropriate comparator. In response, at paragraph 89 of the Consultation Document, the RA has stated that, “the RA is aware of the BMA operating in a different sector. It is the RA’s view that the fact that BMA regulates a different sector does not diminish the value of its enforcement process. This is a local process that has not be considered to overlook the principle of natural justice.*

*There are a number of reasons why BELCO is particularly of the view that BMA processes are inappropriate for electricity regulation:*

- In any jurisdiction, it is not necessarily the case that one regulatory process can be transplanted from one regulatory regime into another simply because both regulatory bodies are in the same jurisdiction. Although the two regulators are in the same jurisdiction, many of the electricity sector principles relevant in Bermuda electricity regulation are akin to those in North America.*

- *Electric sector regulation is unique and highly technical.*
- *The BMA is well-established, having existed for many decades.*
- *Unlike the RA, the BMA does not set the rates chargeable to customers of any of its regulated entities and has no direct impact on the profitability of its regulated entities, The impact that the RA can have on its licensees warrants greater representation.*
- *In the Consultation Document, the RA seems to overlook the fact that the proposed recommendations would affect all sectors it regulates (see paragraphs 89 and 104 of the Consultation Document).*

#### *Adjudication for Other Purposes*

*The RA refers to streamlining the adjudication and enforcement process as if to overlook the fact that the adjudication process is not limited to enforcement proceedings. BELCO therefore suggests that the RA consider that enforcement proceedings are but one instance in which an adjudication could be employed. BELCO suggests that the RA consider other circumstances in which an adjudication could be the appropriate route and consider recommending that any streamlined approach is limited so that the adjudication process may be retained for other potential uses.*

#### *Flexibility*

*At paragraph 91 of the Consultation Document, the RA states that it “wants the ability to flesh out the [enforcement] process internally rather than having it again overly prescribed in legislation. The current adjudicative rules provide no room for the RA to amend the procedure when necessary.” The ability of the regulator to create its own processes in a vacuum may lead to arbitrary processes that are uncertain and do not inspire confidence for stakeholders.*

#### *The IPO*

*BELCO is confused by the RA’s suggestion, at paragraph 87 of the Consultation Document, that replacing the IPO with a member of the RA’s Board is unworkable because the RAA would require amendment. At paragraph 88 the RA also states that the RAA is too prescriptive because “a simple solution suggested by BELCO to change the enforcement procedure cannot be readily implemented due to statutory restrictions.” BELCO notes the following:*

- *BELCO has not suggested a change to the enforcement procedure. BELCO asked whether the RA had considered having commissioners serve as adjudicators. As mentioned above, an adjudication could be employed in scenarios other than enforcement proceedings.*
- *It is unclear why the RA is suggesting that the need for the RAA to be amended justifies the rejection of a potential option about which a sectoral provider is curious about the RA’s thoughts. Is the RA not recommending amendments to the RAA in any event? "*

33. Link responded to the RA’s preliminary recommendation to amend the adjudication and enforcement proceedings on pages 2 and 3, paragraphs 7-8 of their letter. Their response was as follows:

#### *Amendments to the RAA - Enforcements*

*7. In the Consultation the RA proposed recommendations revising the existing enforcement processes. As part of this proposal, the RA proposed changes to the civil penalties to be up to the higher of the current allowed penalty (up to 10% of annual turnover) or \$500,000. Link opposed this change in our Initial Comments noting there is no evidence that the existing penalties are insufficient to promote compliance. In the Report, the RA states that it proposed the penalties to "effectively deter breaches of regulatory requirements", to "appropriately impact the sectoral provider", and to "incentivize management to change conduct of the sectoral provider".*

*8. While Link recognizes the policy goals of incentivizing compliance, we remain of the view that the RA has not presented evidence that the existing penalties are not sufficient to meet the RA's objectives and the recommendation should be removed.*

34. OneComm disagreed with the RA's recommendation and stated under pages 2 to 6 of their letter:

*At page 46 of the PDO, the RA reiterates:*

*147. Regarding amendment of adjudication and enforcement process, 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. The RA also recommends that its disposal options for enforcement be widened as detailed in the Consultation Document and above.*

*In responding to comments received, the RA made a series of summary conclusions with little to no evidence in support. The RA's willingness to pursue an outcome while providing very little evidence in the public consultation is illustrative of the concerns raised. The requirements of the existing adjudication and enforcement process, including in particular the role of the independent presiding officer (the "IPO"), incorporate a level of independence and objectivity that would not exist otherwise. The RA appears to disregard the value of that independence and objectivity, instead focusing only on the time, effort and resource required by the IPO.*

*The only evidence used to support its case is found at paragraph 90, where the RA describes two enforcement proceedings in 2020:*

*90. The RA notes OneComm statement that it did not provide factual evidence that the adjudication proceeding is counterproductive and cumbersome. In response to this the RA advises that in 2020, the RA had two enforcement proceedings relating to fees owed to the RA. The appointment of the IPO was a slow process. Once appointed the IPO had to become familiar with the RA's adjudication rules set out in the Regulatory*

*Authority (Adjudication Rules) General Determination 2014 (Adjudication Rules). The said rules are very prescriptive in that the parties are not able to agree an adjournment and advise the IPO of its agreement. The parties have to submit a request to adjourn, and the IPO will then decide if it agrees to such adjournment. Additionally, if the parties reach a settlement that is satisfactory to them, they still have no discretion to enter the said terms without the IPO's approval. The IPO then must submit its decision to the RA Board of Commissioners. This is because the decision of the IPO needs to be approved by the RA's board. All this interaction cost money to the RA and to the sectoral provider. Although the parties were cooperating with the IPO, the liability not being contested and the enforcement proceedings being resolved on paper the said proceedings extended to 6 and 11 months. It is the RA's view that since liability was not contested the RA should have had the power to issue an Order and enforce it right away. However, due to the statutory requirement under the RAA the IPO had to decide every single procedural step to resolve the said enforcement proceedings. The RA spent significant time, internal resources and costs for this uncontested enforcement procedure. It is anticipated that a warning-and-decision-note procedure will substantially reduce these costs.*

*We are not aware of all of the facts in these matters, but based on the above information, we would argue there were other options for the RA to consider in seeking a remedy to the issues raised – options available in the current legislative framework.*

*First, the Adjudication Rules were determined by the RA in 2014. If they are cumbersome or counterproductive, the RA has the power to commence a consultation with a view to amending the Adjudication Rules. In contrast to that view, the RA's paragraph 91 from the PDO states:*

*91. A proposal to streamline the adjudication and enforcement process is far from a drastic change. It is the RA's view that modernizing inefficient, cumbersome, and costly procedures is part of the RA's statutory obligations. The RA wants the ability to flesh out the process internally rather than having it again overly prescribed in legislation. The current adjudicative rules provide no room for the RA to amend the procedure when necessary.*

*We would ask the RA to review the Adjudication Rules it set in 2014, and consider whether they need to be amended by way of public consultation, rather than seeking significant legislative change.*

*Second, the RA notes that the parties were cooperating with the IPO, that liability was not being contested, and that the enforcement proceedings were resolved on paper. Given these facts, proceeding by way of voluntary mediation, binding arbitration, or undertaking in lieu of enforcement would very likely have been more expeditious and less costly.*

*Section 93 of the Regulatory Authority Act 2011 (the "RAA") states:*

- (2) *The Authority shall initiate the enforcement proceedings by sending a written notice to the sectoral participant that the Authority believes committed the contravention which shall—*
- (a) set out the alleged facts;*
  - (b) state the statutory, administrative or authorization provisions that the person allegedly contravened; and*
  - (c) state the time frame and procedures by which the person must respond.*
- (3) *The Authority shall determine whether a contravention has occurred by conducting an adjudication, whether formal or informal, which shall be conducted by an independent presiding officer appointed in the manner specified in section 76.*
- (4) *In lieu of initiating an adjudication, the Authority, with the consent of the affected sectoral participant may refer the matter to—*
- (a) voluntary mediation; or*
  - (b) binding arbitration.*

*With consent, the RA and the parties involved can avoid an adjudication by referring to voluntary mediation or binding arbitration.*

*Section 95 of the RAA offers the RA an alternative to taking enforcement action where the parties involved are willing to take or not take specific actions.*

#### ***Undertakings in lieu of enforcement***

- 95(1) *In lieu of taking enforcement action pursuant to section 93, the Authority may issue a decision and order accepting, from any persons subject to enforcement action, an undertaking to take or not take specific actions.*
- (2) *In considering whether to accept an undertaking in lieu of taking enforcement action, the Authority shall consider the need to achieve as comprehensive a solution as is reasonable and practicable to the adverse effect caused by the conduct that provided the basis for the enforcement action.*
- (3) *The authority may—*
- (a) allow an undertaking to be varied or superseded by another undertaking made in accordance with subsection (1); or*
  - (b) release a person from an undertaking under this section.*

*Although we are not aware of all of the facts of the RA's 2020 enforcement proceedings, the facts that are disclosed suggest that more timely, less costly processes were available to resolve the fees issues.*

*Accordingly, One Comm continues to believe that the RA's case for significant change to the adjudication and enforcement processes has not been made. The current legislative framework offers many options and it remains unclear as to whether the RA has properly availed itself of the full range of statutory processes.*

**\*\*\*\*\***

*At a more general level, we note the RA has idealized certain aspects of BMA regulation, and that of OfReg, the telecoms regulator in the Cayman Islands. In terms of the latter, as a long-time participant in the Cayman telecoms market, we see no compelling evidence that the Cayman regulator's approach is better than the existing Bermuda approach.*

*With regard to the former, the RA believes "that the fact that [the] BMA regulates a different sector does not diminish the value of its enforcement process." With respect, that misses the point made by BELCO and One Comm. The financial services sector in Bermuda (and elsewhere) is significantly different from the electronic communications (and electricity) sector on a myriad of factors. Regulation that works or is necessary in one sector, may not be appropriate or necessary in the other. Should telecoms companies be subjected to anti-money laundering ("AML") rules, or know-your-client ("KYC") requirements? Should reinsurance companies and banks be subject to wholesale discount obligations to resellers? Clearly, the regulatory risks of concern to the BMA are not the same as the risks regulated by the RA. The kind and scale of regulatory concerns in each sector shape and determine the regulatory mandate codified in statute, including the relevant regulator's enforcement powers. The BMA enforcement provisions are part of a larger statutory framework that governs a very different economic market. Cherry-picking enforcement powers from the BMA framework and inserting them into that of the electronic communications sector is not a panacea for the enforcement concerns of the RA. As discussed above, there exist a variety of enforcement paths available under the RAA that need to be fully considered before legislative change is recommended.*

*Finally, we note that the CD and PDO are part of the "Electronic Communications" sectoral review. By definition, the recommendations made by the RA in this process are in respect of the electronic communications sector. We further note, however, that most of the changes recommended by the RA involve matters covered by the RAA which is a statute that affects all sectors regulated by the RA. Changes to the RAA will affect electricity regulation and could potentially affect fuels and broadcasting regulation in the future. The implications across multiple sectors need to be considered before proceeding with any changes to the RAA.*

#### **RA's Response and Final Recommendation:**

35. BELCO and OneComm stated that the RA failed to consider that the proposal to amend the RAA would affect all sectors it regulates. Contrary to BELCO and OneComm's statements, the RA does take into consideration all sectors when proposing legislative changes, consulting and on its day-to-day operations. This is a statutory requirement which the RA complies with daily.
36. BELCO and OneComm seem to take issue with the RA's recommendation that an enforcement process like the BMA be implemented. They both stated that the BMA regulates a different market. The RA has already demonstrated in its Preliminary Report that the BMA process is like the OfCom

process.<sup>1</sup> OfCom is the UK regulator for communications. In addition, the Canadian Radio-television and Telecommunications Commission also adopts a similar process.<sup>2</sup> The Australian Communications and Media Authority also has similar enforcement process.<sup>3</sup> The Canada Energy Regulator has an enforcement regime that is also like the enforcement process proposed by the RA.<sup>4</sup> The European Commission is also able to directly impose fines and sanctions following an investigation into a breach of its competition rules, with judicial challenges to be filed in the Court of Justice of the European Union.<sup>5</sup> As can be seen, the sort of enforcement regime being proposed by the RA would not be an outlier. The fact that the BMA process is from a different market, as stated by BELCO and OneComm, should not be an impediment to the RA proceedings with these recommendations.

37. BELCO goes further in its reply and states that enforcement proceedings as they relate to the electricity sector should be based on how such proceedings are conducted in North America. The RA does not necessarily agree with this approach. However, as mentioned above the Canada Energy Regulator enforcement process also resembles the BMA process.
38. BELCO stated that they do not agree with the RA having an enforcement process like the BMA because the BMA does not set the rates chargeable to customers of its regulated entities and has no direct impact on the profitability of its regulated entities. BELCO also stated that the impact that the RA can have on its licensees warrants greater representation in the enforcement process.
39. The BMA process does affect the profitability of entities they regulate by canceling the registration of its regulated entities in case of a severe breach. Any sectoral participant affected by a decision made by the RA would have the ability to appeal to the Bermuda Court. If they believe that the decision will negatively affect their profitability, they can seek recourse from the Court to suspend the RA's decision until the Court makes a final decision.
40. BELCO stated that it has not suggested a change of the enforcement procedure. Regarding this, the RA notes that BELCO suggested that the RA's commissioners be appointed as adjudicators. Appointing the RA's commissioners as adjudicators or in place of an IPO would indeed require changes to the RAA. Rather than making such a suggestion, which would still be a prescriptive change, the RA recommended changing the adjudication and enforcement process allowing it to exercise its discretion regarding these processes. If the RA has such discretion, it could for example appoint any staff to act in the adjudication and enforcement process. It should be noted that any internal business process that governs enforcement would provide for the separation of the investigating and enforcement teams, as is currently the case with the BMA.

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<sup>1</sup> Ofcom. *Enforcement guidelines for regulatory investigations*. June 2017.

[https://www.ofcom.org.uk/data/assets/pdf\\_file/0015/102516/Enforcement-guidelines-for-regulatory-investigations.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0015/102516/Enforcement-guidelines-for-regulatory-investigations.pdf)

<sup>2</sup> <https://crtc.gc.ca/eng/ce/actions.htm>

<sup>3</sup> [www.legislation.gov.au/Details/F2021L01123](http://www.legislation.gov.au/Details/F2021L01123) – However, it should be noted that

<sup>4</sup> [CER – The Canada Energy Regulator's Enforcement Policy \(cer-rec.gc.ca\)](http://cer-rec.gc.ca)

<sup>5</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treat

41. Link in its reply continued to raise concern regarding the RA's proposal to raise civil penalties. Link states that the RA has not provided evidence that the current penalty is insufficient to meet the RA's objectives. Therefore, Link proposed removal of the said recommendation.
42. The RA does not agree with Link's assessment of how penalties should be changed. It is the RA's assessment that imposing a penalty of up to 10% of the total annual turnover might not be sufficient to deter the actions of a sectoral provider. The main objective of a financial penalty is that its sum be sufficient to incentivize compliance and that it be adequate for the seriousness of the infraction. For this reason, the RA proposed that the maximum applied fine be either \$500,000 or up to 10% of the total annual turnover to give the RA's proper powers to deter contravention. The penalties will be decided based on the severity of the infraction.
43. OneComm in its reply stated that in the example provided by the RA regarding current enforcement proceedings, the RA had the option to avail itself of sections 93(4) and 95 of the RAA. The RA is aware of its statutory framework. These options were considered by the RA. Circumstances of the case, which the RA cannot divulge, did not allow the RA to conduct the enforcement proceedings according to these sections.
44. Regarding OneComm's proposal that the RA change its Adjudication Rules, the RA confirms that it has considered changing the Adjudication Rules by way of amendment. However, the changes would not address all the issues that the RA is proposing to be resolved by amending the RAA. Given the length of time that has passed since the RA's initial proposal to amend the RAA, and the fact that the said amendment has not been implemented yet, the RA will conduct a public consultation to change the current Adjudication Rules.
45. **Given the above, the RA's final recommendation is 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 by many other regulators as exemplified above. The RA also recommends that its disposal options for enforcement be widened as detailed in the Consultation Document and Preliminary Report. Once the amendments are made the RA will conduct a public consultation to implement the Enforcement Guidance. This public consultation will contain the principles, processes and procedures for the Enforcement Guidance. By way of example, the BMA<sup>6</sup> and OfCom<sup>7</sup> also have such enforcement guidance.**
46. **Regarding financial penalties, the RA recommends that the maximum applied fine be either \$500,000 or up to 10% of the total annual turnover to allow the RA's powers to deter contravention in an effective manner.**

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<sup>6</sup> <https://cdn.bma.bm/documents/2019-03-27-05-40-10-Enforcement-Guide-Statement-of-Principles-and-Guidance-on-the-Exercise-of-Enforcement-Powers.pdf>

<sup>7</sup> [https://www.ofcom.org.uk/data/assets/pdf\\_file/0015/102516/Enforcement-guidelines-for-regulatory-investigations.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0015/102516/Enforcement-guidelines-for-regulatory-investigations.pdf)



47. Additionally, the RA will conduct a public consultation to change its current Adjudication Rules while it waits for legislative amendments replacing its cumbersome adjudication and enforcement process.

*Amendments to the RAA – Surplus funds – Paragraphs 106 to 110 of the Preliminary Report*

*The RA recommended to the Minister the amendment of various sections of the RAA identified during the RA’s fully comprehensive review. These suggested amendments included, but were not limited to, the following:*

*[...]*

- *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.*

*[...]*

48. In the Preliminary Report the RA withdrew the recommendation to the Minister to amend various sections of the RAA to provide the RA the ability to carry forward Surplus Funds from one financial year to the next to remove budgeting difficulties and afford the RA the ability to account for workstreams that are conducted across multiple fiscal years. The recommendation was withdrawn because the Minister of Finance approved under section 38 of the RAA the creation of a project fund for stated work plan projects and projects in progress on 22 March 2019. At that time, the Minister of Finance also approved the creation of a Litigation Reserve Fund to hold up to \$1.5 million.
49. The RA received no further responses regarding the Surplus Funds.

**RA’s Final Recommendation**

50. The RA confirms that the recommendation is withdrawn.

## *Amendments to the RAA – Public Consultations – Paragraphs 111 to 122 of the Preliminary Report*

*The RA recommended to the Minister the amendment of various sections of the RAA identified during the RA’s fully comprehensive review. These suggested amendments included, but were not limited to, the following:*

*[...]*

- *Amend the statutory requirement to conduct an initial public consultation as part of the 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).*

51. The recommendation to amend the Public Consultation Process received responses from BELCO, Link and OneComm.

52. BELCO responded on page 3 of their letter as follows:

### **Amendments to the RAA – Public Consultations**

*BELCO repeats its comments in the First Round Response relating to the RA’s recommendation that the consultation process is streamlined to 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.*

*The RA has indicated that 1) it wishes to consult the public only when there is a valid reason; 2) its time is not well spent on trivial consultations relating to administrative matters; and 3) time is wasted when its consultations are met with no response.*

*In addition to its comments stated in the first round of the Consultation, and in relation to the comment that some consultations receive no responses, the RA is asked to please clarify how many electricity sector consultations have received no responses. On its website, the RA notes that, “[c]onsulting with the public to get their feedback is an important part of the regulatory process.” BELCO agrees and has always sought to exercise its right to participate in consultative processes. Any case in which there has been no response from BELCO on an electricity sector consultation would be exceptional.*

53. Link stated on page 2 paragraphs 4 to 6 of their letter the following:

### **Amendments to the RAA - Public Consultations**

*4. In the Consultation the RA recommended requiring consultations for the making of General Determinations only in cases of "public significance" where there is a "significant impact" on*

stakeholders, allowing the RA to bypass consultations for routine administrative tasks. In our Initial Comments Link expressed concern regarding this proposal. We explained that consultation is a key step in regulatory development which ensures that there are no unintended consequences from regulation. Further, we expressed concern in giving the RA discretion to determine what regulatory measures could have a "significant impact" on stakeholders without input from stakeholders themselves, as it is through consultation that these impacts are uncovered.

5. Despite the concerns expressed by Link, the RA has maintained this recommendation in the Report. The RA explains "The RA wishes to consult only when there is a valid reason to consult." The RA notes the resources required in holding consultations and highlights consultations they have held that received no comment.
6. Respectfully, in Link's view it is insufficient to point to the fact that consultations require resources from the RA and that some consultations have not received input to support only consulting when the RA determines in their own opinion there will be a "significant impact" on stakeholders. Stakeholders must be consulted when there is the possibility of any impact. This is a well-established principle of regulatory best practice. Further, the RA proposes no definition of "significant impact". In our view, the RA cannot reasonably know whether an impact will be significant without consulting with those impacted. Ultimately this proposal leaves the decision to consult completely within the RA's discretion which raises significant concerns of transparency, accountability, and public confidence in the regulatory framework. Link respectfully requests the RA remove this aspect of the recommendation or, in the alternative, revise the recommendation to remove "significant" and require consultation if there is any anticipated impact on stakeholders, a standard which must be applied in favour of consultation.

54. OneComm stated on page 5 of their letter:

*At page 46 of the PDO the RA reiterates*

**148. Regarding amendments to the RAA concerning public consultations, the RA recommends that the legislative provisions regarding the conduct of public consultations be streamlined. The RA recommends a two-stage approach public consultation with the possibility of extending it to a third stage.**

*In respect of this recommendation, One Comm remains of the belief that reducing public opportunity for participation in the consultation process is counter to the intent of the legislation. The RA cites instances where little to no public comment was received. With respect, that is not a compelling reason to reduce the general legal obligation to consult. The examples provided are not truly representative of the full range of issues normally raised in public consultations. To change the general process to accommodate the exception is inappropriate, and potentially dangerous, as the RA's view of matters that may lead to "major change" or "significant impact" will not always be the same as that of the sector or the general public.*

*At a more general level, we note the RA has idealized certain aspects of BMA regulation, and that of OfReg, the telecoms regulator in the Cayman Islands. In terms of the latter, as a long-time participant in the Cayman telecoms market, we see no compelling evidence that the*

*Cayman regulator's approach is better than the existing Bermuda approach.*

*With regard to the former, the RA believes "that the fact that [the] BMA regulates a different sector does not diminish the value of its enforcement process." With respect, that misses the point made by BELCO and One Comm. The financial services sector in Bermuda (and elsewhere) is significantly different from the electronic communications (and electricity) sector on a myriad of factors. Regulation that works or is necessary in one sector, may not be appropriate or necessary in the other. Should telecoms companies be subjected to anti-money laundering ("AML") rules, or know-your-client ("KYC") requirements? Should reinsurance companies and banks be subject to wholesale discount obligations to resellers? Clearly, the regulatory risks of concern to the BMA are not the same as the risks regulated by the RA. The kind and scale of regulatory concerns in each sector shape and determine the regulatory mandate codified in statute, including the relevant regulator's enforcement powers. The BMA enforcement provisions are part of a larger statutory framework that governs a very different economic market. Cherry-picking enforcement powers from the BMA framework and inserting them into that of the electronic communications sector is not a panacea for the enforcement concerns of the RA. As discussed above, there exist a variety of enforcement paths available under the RAA that need to be fully considered before legislative change is recommended.*

*Finally, we note that the CD and PDO are part of the "Electronic Communications" sectoral review. By definition, the recommendations made by the RA in this process are in respect of the electronic communications sector. We further note, however, that most of the changes recommended by the RA involve matters covered by the RAA which is a statute that affects all sectors regulated by the RA. Changes to the RAA will affect electricity regulation and could potentially affect fuels and broadcasting regulation in the future. The implications across multiple sectors need to be considered before proceeding with any changes to the RAA.*

### **RA's Final Recommendation**

55. Regarding BELCO's request for clarification as to occasions on which it failed to participate in electricity consultations, the RA advises that BELCO is correct in stating that those occasions are exceptional.
56. It seems that BELCO, Horizon and OneComm failed to properly consider the RA's recommendation regarding the public consultation process. The RA explained the reason why in the Consultation Document it proposed to consult only on matters of significant impact. In the Preliminary Report, the RA provided reasons again why it proposed in the consultation document to consult only in matters of significant impact. The RA also provided an example of the OfReg process which allowed a two-stage approach but which referred to consulting only in cases of major changes or significant impact. However, given the responses received from the Consultation Document regarding the recommendation to consult only in cases of major changes or significant impact the RA no longer proposed such approach. The recommendation made in the Preliminary Report was to streamline the legislative provisions regarding the conduct of public consultations and have a two-stage approach public consultation with the possibility of extending it to a third stage.
57. Regarding OneComm's response, the RA notes that OneComm does not agree with the RA's proposal to streamline the consultation process by having a two-stage approach that can be

extended to a third-stage. OneComm criticized the RA for wanting to follow the OfReg consultation process. However, other than providing evidence that the said process is not fit for purpose in Bermuda, OneComm only stated that as a long-time participant of the Cayman’s telecommunications market they see no compelling evidence that the Cayman Regulator’s approach is better than Bermuda’s approach.

58. OneComm also stated in its response that the RA should consider the implications across multiple sectors when proposing changes to the RAA.
59. Contrary to OneComm’s belief, the RA does take into consideration all sectors when proposing legislative changes, consulting and on its day-to-day operations. This is a statutory requirement which the RA complies with daily.
60. Additionally, the RA is not proposing to change the consultation process due to exceptions. The proposal to change the consultation process is made due to the inadequacy of the current process which was exemplified in the consultation document and in the preliminary report. The RA is not proposing to put an end to the consultation process or to reduce public participation. The proposal is to have a flexible consultation process fit for purpose.
61. **Given the above, the RA reiterates its recommendation to streamline the legislative provisions regarding the conduct of public consultations. The RA also recommends a two-stage approach public consultation with the possibility of extending it to a third stage.**

### *Amendments to the ECA – Paragraphs 123 to 125 of the Preliminary Report*

*The RA recommends to the Minister the amendment of various identified sections of the ECA in response to the RA’s fully comprehensive review. These suggested amendments include, but are not limited to, the following:*

- *Remove the references to the adjudication process in sections 41 and 50 of the ECA and replace with a reference to consultation. As currently constructed, section 41 of the ECA stipulates that in order to impose remedies for the inefficient use of Spectrum, the RA must have completed a lengthy and cumbersome adjudication process. Similarly, section 50(2)(b) of the ECA stipulates that an adjudication must be completed in order to approve an electronic communications technology, in accordance with section 50(2)(b) of the ECA. The proposed recommendation will ensure that the processes outlined in sections 41 and 50 of the ECA are more efficient.*

62. No further responses were received regarding the RA’s proposal to remove the references to the adjudication process in sections 41 and 50 of the ECA.

### RA's Final Recommendation

63. Section 41 of the ECA requires the RA to complete a lengthy and cumbersome adjudication process to impose remedies due to inefficient use of Spectrum. Section 50(2)(b) of the ECA requires that an adjudication be completed to approve an electronic communications technology. As previously mentioned, the RA does not regard it necessary that an adjudication be conducted to impose remedies for the inefficient use of spectrum or to approve an electronic communications technology. Given this, the RA reiterates the recommendation to the Minister that the references to the adjudication process in sections 41 and 50 of the ECA be replaced with a reference to consultation.

### *Moratorium review – Paragraphs 126 to 127 of the Preliminary Report*

*The RA recommended to the Minister that the current Moratorium restricting the issuance and re-issuance of ICOLs is lifted given the results obtained as part of the Sectoral Review and Market Review (i.e technological, market developments).*

64. As stated in the Consultation Document, the Moratorium was lifted by the Minister on 19 March 2019.

### RA's Final Recommendation

65. As indicated in the Consultation Document and Preliminary Report no further recommendation is made in respect of this matter.

### *Consumer protection – Compensation – Paragraphs 128 o 130 of the Preliminary Report*

*The RA recommended 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.*

66. The RA in its Preliminary Report removed the recommendation to amend the ECA and/or ICOL conditions to require sectoral providers to compensate consumers, based on established levels of compensation, in the event of service failures resulting in service outages such as mobile outages or leased line outages.
67. The RA received no further responses regarding its decision to remove the said recommendation.

### **RA's Final Recommendation**

68. The RA confirms that as noted in section 7.10 (iii) of the RA's 2023-2024 Work Plan and Budget Consultation, it intends to update the Principles of Consumer Protection General Determination 2020. The RA also confirms that one of the items included in the work plan is compensation for outages. Given this inclusion in the work plan and the required consultation for any determinations, the RA confirms that the recommendation is withdrawn.

### *Consumer protection – Email Forwarding – Paragraphs 131 and 132 of the Preliminary Report*

*The RA recommended 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.*

69. In the Preliminary Report the RA removed the recommendation to the Minister to impose email forwarding provisions for consumers that switch internet service providers through a consumer protection general determination and inclusion of supporting ICOL terms and conditions through an ICOL general determination due to the response received from OneComm. However, the RA reserved its rights to re-open the previous email consultation or consider this issue under the next EC Market Review.
70. The RA received no further responses regarding its proposal to withdraw the said recommendation.

### **RA's Final Recommendation**

71. The RA confirms that the recommendation is withdrawn.

### *Consumer protection – Additional Measures – Paragraphs 133 and 134 of the Preliminary Report*

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

72. In the Preliminary Report the RA removed the recommendation to the Minister to adopt additional consumer protection measures as part of a consumer protection general determination. Additionally, the RA confirmed that it was its intent to update the Principles of Consumer Protection in the 2023-2024 fiscal year.

### RA's Final Recommendation

73. **The RA confirms that it intends to update the Principles of Consumer Protection this fiscal year. The RA also confirms that no further recommendation is made regarding this matter.**

### *Radio spectrum – Paragraphs 135 to 139 of the Preliminary Report*

74. In the Consultation Document, the RA reminded the public of the statements made in the 2018 Sectoral Review Final Report and of progress made regarding radio spectrum since that time.
75. In the Preliminary Report the RA clarified that the statement provided in the Consultation Document was of an informational nature only and that no proposal or recommendation was made regarding Radio Spectrum.
76. No further replies were received regarding the RA's statement.

### RA's Final Recommendation

77. **The RA confirms that no proposal or recommendation is made regarding Radio Spectrum.**

### *Legislative Amendment to allow the fulfilment of RA's mandate in the EC Sector – Paragraph 140 and 141 of the Preliminary Report*

78. In the Preliminary Report the RA recommended the amendment of section 21(1)(b)(i) of the RAA to improve the administration and assist with continuity of the RA's Board. The RA recommended that the notice soliciting applications for the position of Commissioners should be published in the Gazette 180 days prior to the date on which a Commissioner's term is set to expire rather than 90 days. The RAA should also be amended to allow for a meaningful means of enforcing the deadline for appointing a Commissioner by the Selection Committee under section 21(4) of the RAA.
79. The RA received no replies to the recommendations made in the Preliminary Report.

### RA's Final Recommendation

80. **The RA reiterates the recommendation that the notice soliciting applications for the position of Commissioners should be published in the Gazette 180 days prior to the date on which a Commissioner's term is set to expire rather than 90 days. The RA also recommends that the RAA be amended to allow for a meaningful means of enforcing the deadline for appointing a Commissioner by the Selection Committee under section 21(4) of the RAA.**



## *Annex 1 – Update to enforcement procedures – Paragraphs 1 to 28 of the Annex*

81. In the Preliminary Report the RA clarified that the provisions of sections 57 and 58 of the RAA would become redundant if the recommendations contained in Annex 1 of the Consultation Document regarding the Enforcement proceedings were in place. Given this, the RA also clarified that any changes in the provisions of sections 57 and 58 of the RAA would have to consider changes of the enforcement proceedings.
82. The RA received no further response regarding the clarification provided in the Preliminary Report.

### **RA's Recommendation**

83. **The RA maintains the view that the provisions of sections 57 and 58 of the RAA will become redundant if the recommendations contained in Annex 1 of the Consultation Document regarding the Enforcement proceedings were in place.**

## 4 Summary of Final Recommendations

84. In section 3 of this Final Report the RA addressed the responses received from the sectoral providers. In section 3 the RA also provided its final recommendations regarding the Sectoral Review. Below is a summary of the recommendations made in section 3 for ease of reference.
85. Regarding amendment of adjudication and enforcement process, the RA's final recommendation is 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 by many other regulators as exemplified above. The RA also recommends that its disposal options for enforcement be widened as detailed in the Consultation Document and Preliminary Report. Once the amendments are made the RA will conduct a public consultation to implement the Enforcement Guidance. This public consultation will contain the principles, processes and procedures for the Enforcement Guidance. By way of example, the BMA<sup>8</sup> and OfCom<sup>9</sup> also have such enforcement guidance.
86. Regarding financial penalties, the RA recommends that the maximum applied fine be either \$500,000 or up to 10% of the total annual turnover to allow the RA's powers to be sufficient to deter contraventions.
87. Additionally, the RA will conduct a public consultation to change its current Adjudication Rules while it waits for legislative amendments replacing its cumbersome adjudication and enforcement process.
88. Regarding amendments to the RAA concerning public consultations, the RA recommends that the legislative provisions regarding the conduct of public consultations be streamlined. The RA recommends a two-stage approach public consultation with the possibility of extending it to a third stage.
89. Regarding amendments to the ECA, the RA recommends that the references to the adjudication process in sections 41 and 50 of the ECA be replaced with a reference to consultation.
90. Regarding fulfillment of the RA's mandate in the EC Sector, the RA recommends the amendment of section 21(1)(b)(i) of the RAA to improve the administration and assist with continuity of the RA's Board. The RA also recommends that the RAA be amended to allow for a meaningful means of enforcing the deadline for appointing a Commissioner by the Selection Committee under section 21(4) of the RAA.

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<sup>8</sup> <https://cdn.bma.bm/documents/2019-03-27-05-40-10-Enforcement-Guide-Statement-of-Principles-and-Guidance-on-the-Exercise-of-Enforcement-Powers.pdf>

<sup>9</sup> [https://www.ofcom.org.uk/data/assets/pdf\\_file/0015/102516/Enforcement-guidelines-for-regulatory-investigations.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0015/102516/Enforcement-guidelines-for-regulatory-investigations.pdf)

91. Regarding sections 57 and 58 of the RAA and update to the RA's enforcement proceedings, the RA maintains the view that the provisions of sections 57 and 58 of the RAA would become redundant if the recommendations contained in Annex 1 of the Consultation Document regarding the Enforcement proceedings were in place.

## 5 Recommendations to the Minister

92. The RA recommends that the Minister requests amendments to the RAA replacing the cumbersome adjudication and enforcement process with a simpler warning-and-decision-notice procedure based on that used by many other regulators as exemplified above. The RA also recommends that its disposal options for enforcement be widened as detailed in the Consultation Document and Preliminary Report. Sections 57 and 58 of the RAA would become redundant due to such changes. Accordingly, they should be repealed/deleted from the RAA.
93. Additionally, regarding financial penalties, the RA recommends that the Minister requests amendments to the RAA to impose a maximum applied fine of either \$500,000 or up to 10% of the total annual turnover to allow the RA to have sufficient deterring powers in case of contraventions.
94. Regarding amendments to the RAA concerning public consultations, the RA recommends that the legislative provisions regarding the conduct of public consultations be streamlined. The RA recommends that the Minister requests legislative changes replacing the RA's current public consultation process with a two-stage approach public consultation with the possibility of extending it to a third stage.
95. Regarding amendments to the ECA, the RA recommends that the Minister requests that references to the adjudication process in sections 41 and 50 of the ECA be replaced with a reference to consultation.
96. Regarding fulfillment of the RA's mandate in the EC Sector, the RA recommends that the Minister requests that section 21(1)(b)(i) of the RAA be amended to improve the administration and assist with continuity of the RA's Board. The RA also recommends that the RAA be amended to allow for a meaningful means of enforcing the deadline for appointing a Commissioner by the Selection Committee under section 21(4) of the RAA.