BELCO

Our Ref: B-R355

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28 February 2023
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 – Preliminary Report

Bermuda Electric Light Company Limited ("BELCO") responds to the Regulatory Authority's (the "RA") consultation document entitled, "Electronic Communications Sectoral Review Preliminary Report" bearing matter number 20220727 (the "Consultation Document"). The Consultation Document represents the second publication in the consultation for the current electronic communications sector review (the "Consultation"). BELCO filed its response in the first round of the Consultation on 31 August 2022 (the "First Round Response"). BELCO 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").

At paragraph 144 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, repeating the headings in the Consultation Document (with subheadings added), 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.

Amendments to the RAA – Enforcements

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 the 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?

<u>Amendments to the RAA – Public Consultations</u>

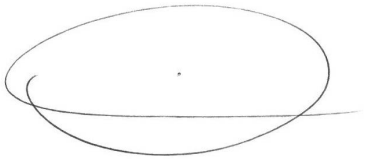
BELCO repeats its comments in the First Round Response relating to the RA's recommendation that the consultation process is streamlined to 1) to create a two-stage process for public consultations in lieu of a three stage-process; and 2) to remove the need for a public consultation for a general determination 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.

BELCO looks forward to the conclusion of the Consultation.

Yours faithfully,



Wayne Caines
President

February 28, 2023 **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 – Preliminary Report

1. LinkBermuda ("Link") hereby provides our response to the Regulatory Authority's ("RA") preliminary report dated 26 January 2023 regarding the Electronic Communications Sectoral Review (the "Report"). The RA published the Report to present the RA's assessment of the responses to the Electronic Communications Sectoral Review Consultation Document (the "Consultation") and to seek public comment on the RA's proposed recommendations that will be set forth in a Final Report.

2. Link appreciates the opportunity to provide comments. We initially provided comments on the Consultation in correspondence dated 31 August 2022 (the "Initial Comments"). Many of Link's concerns outlined in those Initial Comments were recognized by the RA and incorporated into the RA's revised recommendations. We acknowledge and appreciate the RA's careful review and consideration of the comments from stakeholders in formulating the recommendations in the Report.

3. While many of Link's initial concerns have been addressed in the Report, certain recommendations remain on which we feel compelled to provide comment. These comments will be brief and are intended to complement our Initial Comments which we stand by. Link will not address all issues raised in the Report, and our failure to comment on any specific issues should not be interpreted in a manner which would be contrary to our interests.

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 a any anticipated impact on stakeholders, a standard which must be applied in favour of consultation.

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.

Service Continuity

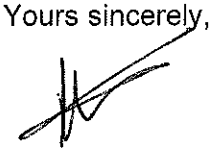
9. In the Consultation the RA recommended notification obligations regarding substantial changes in financial position or insolvency-related facts or events. In our Initial Comments we were of the view that these obligations were unnecessary.

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.

Conclusion

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

Yours sincerely,



Tim Repose
Director of Operations

28 February 2023

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 Preliminary Report – Preliminary Decision and Order dated 26 January 2023 (the "PDO")

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 PDO. For the avoidance of doubt, any lack of response to the Regulatory Authority (the "RA") on any point in the PDO should not be interpreted as acceptance or agreement by One Communications. As in our previous comments, "Consultation Document" or "CD" refers to the RA's Electronic Communications Sectoral Review Consultation Document date 27 July 2022.

In several instances, the RA has decided to remove certain recommendations found in the original Consultation Document and therefore no further comment is required in such matters. In other instances, the RA has elected to proceed by way of public consultation rather than continuing to pursue legislative change. One Comm reserves its rights in such matters and will respond as needed when the public consultation processes are commenced.

For the remaining recommendations set out in the PDO (as summarized in Section 6 on page 46 of the PDO), One Comm's initial comments stand. Additional comments are set out below.

At page 46 of the PDO, the RA reiterates:

> **145. Regarding ICOL holders' future financial stability, the RA recommends that the RAA be amended to include a provision giving power to the RA to order management or operations audits of any sectoral provider it oversees.**

This continuing recommendation conflicts with the RA's comments earlier in the PDO, where it stated:

RA's Response:

70. The RA notes Link and OneComm's position regarding this issue. The RA is aware that there are provisions within ICOL licences that cover this eventuality. However, this inclusion was intended to address potential challenges regarding the ability to order management or operational audits for other licences and in other sectors.

71. RA is aware that there may be some impetus for a multisectoral approach to be embedded in the RAA. If that is the case, it would address this concern.

72. Taking the above comments into account, the RA will remove this recommendation from this EC Sectoral Review.

It can only be assumed that the RA's summary is incorrect and that the RA intended to remove this recommendation as per paragraph 72.

At page 46 of the PDO, the RA reiterates:

146. Regarding discontinuation of wholesale service, the RA recommends 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.

Again, this continuing recommendation conflicts with the RA's comments earlier in the PDO, where it stated:

RA's Response:

64. The RA acknowledges OneComm's submission on this matter. The RA accepts that properly constructed commercially agreed interconnection agreements should provide sufficient protection for wholesale channel partners.

65. The RA intends to review all interconnection agreements between sectoral providers and reserves the right to revisit this issue outside of this sectoral review and/or as part of any other relevant consultation.

66. Based on the above, the RA agrees that this particular item can be removed from this sectoral review.

As before, it can only be assumed that he RA's summary is incorrect and that the RA intended to remove this recommendation as per paragraph 66.

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 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.

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