



**EVALUATION REPORT
CABLE AND WIRELESS (BVI) LTD**

LICENSE PERFORMANCE FROM MAY 2007 – MAY 2021

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1. EXECUTIVE SUMMARY

- 1.1. Pursuant to the requirement set out in **section 15 of the Telecommunications Act 2006**, on the 25 day of May 2007, the Telecommunications Regulatory Commission (the Commission) granted a Licence to Cable and Wireless (West Indies) Ltd. Assignment of the Licence from Cable and Wireless (West Indies) Ltd. to Cable and Wireless (BVI) Ltd. was approved by the Commission on a later date so that Cable and Wireless (West Indies) Ltd. transferred the Licence to Cable and Wireless (BVI) Ltd. (the Licensee).
- 1.2. The Licence is for fifteen (15) calendar years, effective from 25 May 2007, and gave the Licensee authority to establish, install, operate, maintain, exploit, and use within, into and from the British Virgin Islands and all territorial waters a telecommunications network consisting of transmission, reception, switching and related equipment, including without limitation cable (coaxial, metallic or fiber optic) and microwave, radio and satellite transmission, reception, and related facilities.
- 1.3. The Licensee is authorized to provide telecommunication services comprising basic telephony services including local, national and international telephony services; cellular mobile telecommunications services; trunk capacity resale services, including the provision of leased lines and circuits; satellite telecommunications services; third party private network services; paging services; store and forward messaging services; telex services; telegraph services; value-added services; the sale and maintenance of subscriber premise wiring and terminal apparatus; private telecommunications services; internet services; wireless video programming; cable television service via wireline network; and international connectivity services .
- 1.4. **Article 16 of the Licence** outlined certain obligations that had to be fulfilled on the signing of the Licence for the Licence to be effective namely: -
 - 1.4.1. pursuant to **Article 5.1 of the Licence**, the payment by the Licensee to the Commission of an annual industry levy and of an annual royalty fee in the amount of 3% of the gross revenues for services provided under the Licence collected by the Licensee payable no later than 5 April of each year;
 - 1.4.2. the reception of frequencies and frequency bands as assigned by the Commission;
 - 1.4.3. the delivery to the Commission of an officer's certificate certifying the representations and warranties of the Licensee contained in **Article 17 of the Licence**;
 - 1.4.4. the delivery to the Commission of all corporate documents;
 - 1.4.5. the delivery to the Commission of consortium agreements;
 - 1.4.6. the delivery to the Commission of originals of the Licence agreement;
 - 1.4.7. complying with its obligations under **Article 7 of the Licence**.

- 1.5. Additionally, under the License agreement, there were obligations that had dates of fulfillment attached to the fifth anniversary of the Effective date, which was May 24, 2012. The Commission carried out an evaluation of the Licensee' performance and assessed the level of fulfillment these obligations. It was observed that by the end of the first five years, the Licensee had duly complied with the relevant obligations although the requisite reports were not found on the Commissions files. The Commission has continued to monitor the Licensee's performance.
- 1.6. The Licensee's Licence expires on 24 May 2022 and in accordance with **Article 3.2 of the Licence**, on 24 May 2021, the Licensee submitted its application for the renewal of the Licence for another fifteen (15) years.
- 1.7. The Commission has been monitoring the Licensee's operations throughout the Licence period and has carried out assessments of the Licensee's compliance with its obligations under the Licence and pursuant to the relevant laws, including the Telecommunications Acts and Codes.
- 1.8. The Commission has an obligation pursuant to **Article 3.3(b) of the Licence** to prepare an Evaluation Report stating if and to what extent the Licensee has complied with its obligations under the Licence, and the legislative framework; has abided by directives and orders of the Commission; and has provided the Licensed Services and conduct its business in accordance with the laws of the British Virgin Islands.
- 1.9. The evaluation contained within this Evaluation Report (the Evaluation) is intended to assist the Commission in its determination of the Licensee's application for renewal of the License, and if it is determined that the Licence should be renewed, the requisite terms and conditions to be included in the renewed Licence.
- 1.10. The Evaluation will focus on the extent to which the Licensee has complied with its financial, legal, technical, regulatory, and other obligations.
- 1.11. The Evaluation reveals that while the Licensee has been largely compliant with its obligations, there are certain matters that need to be rectified, in order for the renewal application process to progress.

2. BACKGROUND

- 2.1. On the 25 day of May 2007, the Commission granted to Cable and Wireless (West Indies) Ltd. a Licence to provide telecommunications services in the British Virgin Islands for a period of fifteen (15) calendar years.
- 2.2. On 26 June 2007, Cable and Wireless (BVI) Ltd., the Licensee, was incorporated under the BVI Business Companies Act, 2004 and this entity became the holder of the said Licence which was transferred to it by Cable and Wireless (West Indies) Ltd.
- 2.3. The Licence is scheduled to terminate on 24 May 2022 and in accordance with **Article 3.2 of the Licence**, the Licensee on 24 May 2021 applied for the renewal of its Licence for a further period of fifteen (15) years.
- 2.4. **Article 3.3(a) of the Licence** states that within ten (10) working days from the date on which the application was received, the Commission shall give notice to the public by publication in the Gazette and at least one (1) other domestic newspaper of general circulation which notice shall state: -
 - 2.4.1. that Licensee has applied for renewal of the Licence Term;
 - 2.4.2. the length of the renewal sought;
 - 2.4.3. the time within which comments or objections to the proposed application shall be made in writing by any interested third party, such time not being less than thirty (30) nor more than forty-five (45) Working Days from the date of the publication of the notice;
 - 2.4.4. the fact that the Commission shall send to the Licensee an evaluation report (the "Evaluation Report") within ninety (90) working days from the date of receipt of the application, which report shall be a matter of public record at the Commission; and
 - 2.4.5. the date and the place for a hearing during which the Licensee and any third party with a legitimate interest may make comments or objections, such date being within ten (10) working days of the date of publication of the Evaluation Report.
- 2.5. Additionally, **Article 3.3(b) of the Licence** indicates that the Evaluation Report prepared by the Commission shall state if and to what extent the Licensee has during the preceding Licence period up to the date of the application:
 - 2.5.1. complied with its obligations under this Licence;
 - 2.5.2. complied with the regulations and orders adopted from time to time by the Commission; and
 - 2.5.3. generally provided the Licensed Services and conducted its business in accordance with the laws of the British Virgin Islands.

- 2.6. In compliance with **Article 3.3 of the Licence**, the Commission ensured that the public notice was issued in the *Gazette* and in the Beacon Newspaper on 3 June 2021 (the Notice), thereby complying with its obligation to inform the public of the Licensee's application for renewal. As indicated in the Notice, the deadline for comments or objections to the application was 30 July 2021.
- 2.7. In accordance with **Article 3.3(a) of the Licence**, the Commission must send this Evaluation Report (the Evaluation) to the Licensee within ninety (90) working days from the date of receipt of the application, which will be a matter of public record at the Commission. Accordingly, the Commission must send the Evaluation to the Licensee no later than 30 September 2021.
- 2.8. The Evaluation will be made available at the reception desk of the office of the Commission located at 3rd Floor, LM Business Centre, Fish Lock Road, Road Town, Tortola, British Virgin Islands. Alternatively, a copy of the Evaluation will be available on the Commission's website (www.trc.vg).
- 2.9. On 12 October 2021, a public hearing will be held at Maria's by the Sea during which the Licensee and any third party with a legitimate interest may make comments or objections on the application. Participation in this hearing will be limited to those persons who submitted a relevant comment or objection on the application in response to the Notice.
- 2.10. The person responsible for this matter is Mr. Guy L. Malone, Chief Executive Officer, and he can be contacted at gmalone@trc.vg concerning this Notice. All queries in relation to this matter should be copied to Chantal L. Flax-Ward, Chief Legal Advisor, at cflaxward@trc.vg.
- 2.11. Thus, in fulfillment of its obligations under the Licence and **section 24 of the Telecommunications Act 2006**, the Commission issues this Evaluation relative to Cable and Wireless (BVI) Ltd.

3. EVALUATION PROCESS

3.1 Purpose of the Evaluation Process

- 3.1.1 The Evaluation is meant to guide the Commission, the Licensee, and the public on the fundamental issues that that ought to be and were considered by the Commission in evaluating the Licensee's performance of its obligations under the Licence and forms the basis for the Commission's decision regarding the Licensee's application for renewal of its Licence.
- 3.1.2 The evaluation process helps to determine whether the Licence should be renewed. In order for the Commission to make this decision it has to determine the following: -
 - 3.1.2.1 the extent to which the Licensee has complied with the terms and conditions of the Licence throughout the term of the Licence from May 2007 to present;
 - 3.1.2.2 the extent to which the Licensee has observed the conditions attached to the resources assigned to it in accordance with the relevant legislation and the Licence;
 - 3.1.2.3 the extent to which the Licensee has complied with the Telecommunication Act, the Telecommunication Code, directives, standards, and other orders issued by the Commission over the fourteen-year period since May 2007;
 - 3.1.2.4 the Licensee's Telecommunications Network capability to provide the Licensed Services.

4. METHODOLOGY

4.1. The Commission used the following methodology in evaluating the Licensee's operations: -

- 4.1.1. Reviewing the Licensee's obligations under its Licence;
- 4.1.2. Reviewing the Licensee's obligations under the Telecommunications Acts and Codes;
- 4.1.3. Review of the records on file submitted by the Licensee over the years, including quality of service reports, coverage reports and maps, financial reports and fulfillment of financial obligations, resource authorisations, et cetera;
- 4.1.4. Consideration of the independent evaluation of the Licensee's compliance with its legal and regulatory obligations carried out by Harneys Fiduciary in May 2019;
- 4.1.5. Verifying the provision of emergency communication services and related measures, especially after the passage of Hurricanes Irma and Maria in September 2017;
- 4.1.6. Confirming that customers are provided adequate access to customer care services.

4.2. Assessing the Licensee's performance was guided by the following considerations: -

- 4.2.1. The terms and conditions contained in the Licensee's Licence;
- 4.2.2. The relevant laws and Codes that have been in operation throughout the term of the Licence;
- 4.2.3. The response and/or adherence of the Licensee to the orders and/or directives that were issued by the Commission during the term of the Licence.

4.3. Prior to publishing this Evaluation, the Commission provided the Licensee with the opportunity to review and comment on its findings. On 1 September 2021, a draft version of the Evaluation was sent to the Licensee, who responded on 15 September 2021. The Licensee addressed (a) the issue of service disruption, (b) referred to its letter sent to the Commission dated 16 February 2021 relative to the Harney's Audit, and (c) addressed most of the points detailed under paragraph 8.4.2, which mainly deal with the issue of outstanding documents and unimplemented procedures (and were some of the obligations detailed sections 6 and 7 of the Evaluation).

4.4. However, it is noted that the issues outlined under paragraphs 8.4.2.2.3 (ensuring customers can find the complaints procedure on its website) and 8.4.2.3.9 (filing annual s. 72 compliance reports) were not addressed. Nor did the Licensee comment on other Commission findings in sections 6 or 7 of this Evaluation, except to the extent connected to the points detailed under paragraph 8.4.2. Further, the Licensee indicated that it would submit certain documents by separate correspondence. The promised documents were not received at the time of finalization of this Evaluation.

- 4.5. The Commission notes that this Evaluation takes the Licensee's response of 15 September 2021 into account, where relevant. However, in accordance with **Article 3.3(b) of the Licence**, this Report focuses on the Licencee's performance prior to the date of Unitary Licence renewal application.
- 4.6.

5. STRUCTURE OF THE REPORT

- 5.1. This Evaluation provides a summary of how the Licensee has complied with its legal and licensing obligations over the past fourteen (14) years. To arrive at this summary, the Commission has reviewed and assessed the Licensee's compliance with the following categories of obligations:

5.1.1 Technical performance and obligations

5.1.1.1 This section looks at the Licensee's general obligations under the Telecommunications Act 2006, including, the obligations not to assign its Licence without the prior written approval of the Commission; upon written request made by the Governor to collaborate with the Governor in matters of internal security; to comply with the Act, the Regulations, the Telecommunications Code, the terms and conditions of its Licence and any instructions; not to allow a person owning or holding a significant interest in it to sell, transfer, charge or otherwise dispose of his interest, or any part of his interest unless the prior written approval of the Minister has been obtained; not to cause, permit or acquiesce in any said sale, transfer, charge or other disposition unless the prior written approval of the Minister has been obtained; not to merge or consolidate with another company, unless the prior written approval of the Minister has been obtained; and not to issue or allot any shares or cause, permit or acquiesce in any other reorganization of its share capital that results in a person acquiring a significant interest in it or a person who already owns or holds a significant interest in it, increasing or decreasing the size of his interest, unless the prior written approval of the Minister has been obtained, unless its listed on a recognized stock exchange in which case the obligation may be waived.

5.1.1.2 It also includes obligations under the Licence like the provision of telecommunications services, provision of leased lines and circuit services, interruption of operations, telecommunications during a public emergency, public payphone requirements, service quality requirements, inspection procedures and control requirements, customer and subscriber assistance requirements, assistance to disabled persons, amongst other considerations.

5.1.2 Financial and Reporting Obligations

5.1.2.1 This part gives an overview of the Licensee's compliance relative to its financial obligations under the Licence. These include the obligation to pay the industry levy, royalty fees, payment for resources, including spectrum and numbering range, accounting requirements, record keeping and reporting requirements.

5.1.3 Consumer, competition, and other regulatory obligations

5.1.3.1 This section includes matters such as compliance with the relevant laws and codes, compliance with orders and/or directives issued by the Commission, the establishment of a Master Service Agreement, and the establishment of interconnection agreements with other operators, the appointment of a Compliance Officer.

5.1.4 Audit by Harneys Fiduciary in 2019

5.1.4.1 This section gives an overview of the audit of the Licensee carried out by Harneys Fiduciary Limited (Harneys) in May 2019, the recommendations made by Harneys and the Licensee's response to the audit.

5.2. The Commission has summarized its findings on these obligations in this report.

6. FINDINGS ON FULFILLMENT OF LICENSEE'S OBLIGATIONS

6.1 TECHNICAL PERFORMANCE AND OBLIGATIONS

6.1.1. The Commission has assessed the Licensee's technical performance to evaluate the extent to which the Licensee's technical operations are compliant with its obligations under the technical provisions of its Licence, the Telecommunication Acts, the Telecommunication Code, and industry standards.

6.1.2. This appraisal indicates that the Licensee has throughout the term of the Licence been largely compliant with the various technical requirements, as discussed below: -

6.1.2.1 Obtaining Licence Permits, and Frequency Authorization

6.1.2.1.1 Article 13.1 of the Licence states that the Licensee shall be obligated to obtain all authorisations, permits and licences which are necessary under the Telecommunications Act, 2006, the Commission Regulations and the Laws of the British Virgin Islands for the provision of Telecommunications Services in accordance with the Licence.

6.1.2.1.2 Section 15 of the Telecommunications Act, 2006 requires that any person who wishes to operate a telecommunications network or provide a telecommunications service must apply to and obtain from the Commission a Licence in accordance with the Telecommunication Code.

6.1.2.1.3 Section 19 of the Telecommunications Act, 2006 requires that any person who wishes to use the spectrum, must apply to the Commission in accordance with the Telecommunication Code.

6.1.2.1.4 Section 94(4) of the Telecommunications Act, 2006 states that where any person who is licensed under the Telecommunications Act operates a telecommunications network or provides a telecommunications service, radiocommunications service or broadcasting service and is required to obtain a licence or frequency authorisation under this Act to continue such operation or provision of service, he shall during the period referred to in subsection (3), apply to the Commission for such a licence or frequency authorisation to continue operating such network or providing such service as he operated or provided the day this Act comes into force.

6.1.2.1.5 Section 3.1.7 of Frequency Authorisation Number VRGM/002/2016 and section 3.1.9 of Frequency Authorisation Number VRGM/006/2016 and Frequency Authorisations Numbers VRGFX/0148/2016 to VRGFX/0184/2016 (excluding VRGFX/0165/2016 to VRGFX/0168/2016) indicate that the Licensee/Frequency Authorisation Holder shall obtain all required approvals and rights of access for access to lands and/or for the construction or erection of the facilities or of any equipment or other installation in relation to the use of the assigned frequency band.

6.1.2.2 Evaluation of Licensee's compliance with obtaining Licence, permits and Frequency Authorization

6.1.2.2.1 The Evaluation notes that in compliance with the requirement to obtain a Licence, there is a signed and legally binding Licence in place for the operation of a telecommunications network and the provision of telecommunications services in the British Virgin Islands for the Licensee. The Licence was issued on 25 May 2007 and expires 25 May 2022.

6.1.2.2.2 The Evaluation notes that there were several radio frequency authorisations assigned to the Licensee by the Commission during the Licence term, namely:

6.1.2.2.2.1 Paired frequencies of 838.00 MHz – 846.80 MHz and 883.00 MHz – 891.80 MHz were issued from 25 May 2007;

6.1.2.2.2.2 Authorisation number, FA/001/2012, for frequencies 891.8 MHz – 894 MHz was issued from 30 April 2012 to expire on 29 October 2012;

6.1.2.2.2.3 Thirty-three (33) frequency authorisations were issued from 9 June 2016 to expire on 8 June 2017, that is, VRGFX/0148/2016 to VRGFX/0184/2016 (excluding VRGFX/0165/2016 to VRGFX/0168/2016);

6.1.2.2.2.4 Thirty-three (33) frequency authorisations were issued from 9 June 2017 to expire on 8 June 2018, VRGFX/0148/2016 to VRGFX/0184/2016 (excluding VRGFX/0165/2016 to VRGFX/0168/2016);

6.1.2.2.2.5 Authorisation Number, VRGM/002/2016, frequency authorisations for 838 MHz – 846.8 MHz paired with 883 MHz – 891.8 MHz and 1895 MHz – 1910 MHz paired with 1975 MHz – 1990 MHz were issued from 7 July 2016 to expire on 25 May 2022;

6.1.2.2.2.6 Authorisation Number, VRGM/006/2016, frequency authorisations for 704 MHz – 716 MHz paired with 734 MHz – 746 MHz and 1740 MHz – 1755 MHz paired with 2140 MHz – 2155 MHz were issued from 23 August 2016 to expire on 22 August 2031.

6.1.2.2.3 Instances of non-compliance

6.1.2.2.3.1 The Evaluation notes that on 24 April 2007, the Licensee in its application for the Licence, which was issued on 25 May 2007, applied for certain frequency authorisations. Thereafter it failed to apply for certain additional frequency authorisations relating to microwave fixed links.

6.1.2.2.3.2 The Commission issued a notice of non-compliance to the Licensee on 14 February 2019 in relation to micro-wave link authorisations VRGFX/0148/2016 to VRGFX/0184/2016 (excluding VRGFX/0165/2016 to VRGFX/0168/2016) which were issued from 9 June 2016 to expire on 8 June 2017 and provided the necessary application form to the Licensee. The Licensee was given until 5 March 2019 to be compliant.

6.1.2.2.3.3 On 18 May 2021, the Commission wrote to the Licensee indicating that its authorisations for microwave links had expired on 8 June 2018 and attached the requisite application form to be completed and returned by the Licensee to the Commission by 1 June 2021.

6.1.2.2.3.4 The Licensee's response

6.1.2.2.3.4.1 The Evaluation indicates that in 2015, the Licensee was required by the Commission to enter into undertakings with the Commission, which included amongst other obligations, the obligation to apply for frequency authorisations for point-to-point microwave fixed links required for the support of its mobile telecommunications network. These undertakings were prerequisites which allowed the Licensee to qualify to participate in the Spectrum Award Process.

6.1.2.2.3.4.2 On 5 March 2019, the Licensee responded to the Commission's letter of 14 February 2019, asking that the Commission observe the same protocol for the renewal of the microwave links as it did for the period of 2017, in that in June 2017, the Licensee had appended the expired Authorisations to a letter written to the Commission requesting that the Commission renew the expired Authorisations on the exact terms and conditions as the expired ones; a request that was acceded to in 2017. The Commission's files do not reflect a response by the Commission to this request.

6.1.2.2.3.4.3 The Commission's files reflect that the requisite applications were made by the Licensee for point-to-point microwave fixed link following the issuance of the Commission's letter of 18 May 2021.

6.1.2.3 Collaborate with the Governor on matters of internal security

6.1.2.3.1 Under **section 16(1)(b) and 20(1)(c) of the Telecommunications Act, 2006** the Licensee has an obligation to collaborate with the Governor on matters of internal security.

6.1.2.4 Evaluation of the Licensee's compliance to collaborate with the Governor

6.1.2.4.1 The Evaluation found that in 2017, post Hurricanes Irma and Maria, the Offices of the Governor of the Virgin Islands issued a request to three (3)

telecommunications operators, including the Licensee, for there to be implemented an interim commercial arrangement between said operators. The operators were unable to reach an agreement regarding said arrangement and the Governor's request was not implemented. The Evaluation notes that there was no follow-up from the Governor's Offices regarding his request.

6.1.2.4.2 The Evaluation notes that in a correspondence dated 3 October 2017, the Licensee acknowledged the Governor's letter dated 21 September 2017, explained the state of its network, and indicated to the Governor that to offer the requested service at that time would have added a burden to the Licensee's fragile network that could presage network failure as there was already a challenge to manage congestion on its network from its own customers.

6.1.2.4.3 As noted in said letter by the Licensee, all the operators were meeting with the Commission three times per week – Mondays, Wednesdays, and Fridays – to discuss service restoration progress. In those meetings the issue of charging one of the operators (not the Licensee) for the service ordered by the Governor arose, and this was rejected by said operator. Thereafter, the Governor's request was not carried out by the operators, including the Licensee.

6.1.2.5 Changing significant interest in the Licensee

6.1.2.5.1 Under **Article 11 of the Licence and sections 16 and 20 of the Telecommunications Act, 2006, the Licensee** is obligated not to allow a person owning or holding a significant interest in it to sell, transfer, charge or otherwise dispose of his interest, or any part of his interest unless the prior written approval of the Minister has been obtained; not to cause, permit or acquiesce in any said sale, transfer, charge or other disposition unless the prior written approval of the Minister has been obtained; not to merge or consolidate with another company, unless the prior written approval of the Minister has been obtained; and not to issue or allot any shares or cause, permit or acquiesce in any other reorganization of its share capital that results in a person acquiring a significant interest in it; or a person who already owns or holds a significant interest in it, increasing or decreasing the size of his interest, unless the prior written approval of the Minister has been obtained, unless its listed on a recognized stock exchange in which case the obligation may be waived.

6.1.2.6 Evaluation of Licensee's compliance with duty not to change significant interest without approval

6.1.2.6.1 The Evaluation found evidence of the Licensee submitting notifications to the Commission regarding changes due to internal re-structuring.

6.1.2.6.2 Cable and Wireless (West Indies) Ltd. requested a transfer of the Licence to the Licensee in 2007. Thereafter, the Licence was vested in the Licensee.

- 6.1.2.6.3 The Commission was informed by the Licensee of the merger of Cable & Wireless Communications (CWC) and Columbus International in 2016.
- 6.1.2.6.4 The Commission's approval was sought in connection with the Licensee's beneficial ownership changes in 2016 in which Liberty Global acquired CWC, which is in compliance with the relevant requirements.
- 6.1.2.6.5 In December 2017, and January 2018 the Commission was notified, as a courtesy, of the transfer of an indirect interest in the Licensee from Liberty Global plc to Liberty Latin America Ltd.

6.1.2.7 Strictly adhere to the designated frequency band

- 6.1.2.7.1 Under **section 20(1)(a) of the Telecommunications Act, 2006**, the Licensee is mandated to strictly comply with the designated frequency bands.

6.1.2.8 Evaluation of Licensee's compliance with duty to adhere to frequency band

- 6.1.2.8.1 The Evaluation found no evidence that the Commission took action against the Licensee for not adhering to its designated bands.
- 6.1.2.8.2 However, on the 25 April 2014, the Commission contacted the Licensee relative to the unauthorized use of 850MHz Spectrum in the range 881 MHz – 883 MHz by the Licensee. The Commission sought clarification from the Licensee on the specific nature of the activity and the reasons for using this spectrum. A directive was given that a reply must be provided by Friday 2 May 2014. The Licensee responded via email on 6 May 2014.
- 6.1.2.8.3 On 20 May 2014 the Commission contacted the Licensee about the unauthorized use of 850 MHz spectrum, in the range of 881 – 883 MHz, referencing the Licensee's email of 6 May 2014. The Commission indicated to the Licensee that no formal authorization had been given by the Commission to the Licensee to use said spectrum and informed the Licensee that if an arrangement had been made with the authorisation holder of that frequency, the Commission should have been formally notified in accordance with **section 20(1) of the Telecommunications Act, 2006**. The Commission requested that immediate action be taken by the Licensee to vacate the frequency with a report to be given by the Licensee to the Commission on 23 May 2014. There was no response by the Licensee.
- 6.1.2.8.4 On 18 July 2014, the Commission again wrote to the Licensee as there had been no reply to its letter of 20 May 2014. The Licensee was instructed to vacate frequency ranges 880-883 MHz paired with 835-838 MHz by 8 August 2014. The Licensee was instructed to report to the Commission by 25 July 2014 to confirm the arrangements being made to vacate the spectrum. There is no indication on the Commission's file that this letter was responded to.

- 6.1.2.8.5 On 9 July 2015 the Commission wrote to the Licensee requesting information on its spectrum usage on the 850 and 1900 MHz band based on a complaint that it received from another operator. The information was to be provided by 16 July 2015. In another correspondence to the Licensee dated 22 July 2015, the Commission pointed out that the Licensee had not provided this requested information.
- 6.1.2.8.6 There was a meeting between the Commission and the Licensee on 24 August 2015 relative to issues of compliance that had to be rectified in advance of any application by the Licensee for spectrum in the 2015 Spectrum Award.
- 6.1.2.8.7 On 19 August 2015, the Commission issued an Invitation to Apply for a 700, 1900 and AWS-1 Spectrum Award. The Licensee did not meet the qualification of being in material compliance with the Act, its Licence, the Codes and thus the Licensee gave certain written undertakings to the Commission.

6.1.2.8.8 **The Licensee's response**

6.1.2.8.8.1 On 6 May 2014, the Licensee responded by email to the Commission's letter of 25 April 2014 in which it made reference to the Commission's letter of 12 December 2012 which referred to the 4G Unwired Consultancy Report. In this Report it was recommended by 4G Unwired that the 880 MHz – 883 MHz band be occupied by the Licensee. However, the Commission had clearly indicated to the Licensee in this said letter dated 12 December 2012 that this spectrum was assigned to another operator and thus this recommendation would not be followed.

6.1.2.8.8.2 On 14 September 2015, the Licensee wrote to the Commission indicating that it vacated the two 850 blocks in question on 11 September 2015, amongst other things, in accordance with its undertakings. Thus, the Licensee fulfilled its undertaking to vacate the spectrum.

6.1.2.8.9 The Evaluation did not note any further evidence thereafter that the Licensee did not adhere to its designated band.

6.1.2.9 Spectrum Management (Numbering and Domain Name)

6.1.2.9.1 **Section 38 (1) of the Telecommunications Act, 2006** requires that the Licensee operates its facility, terminal equipment or other equipment in a manner that is not likely to cause harmful interference.

6.1.2.10 Evaluation of the License's spectrum management

6.1.2.10.1 The Evaluation found no indication of intentional harmful interference caused by the Licensee on the Commission's files.

6.1.2.10.2 Nonetheless, on 27 June 2012, the Commission received a complaint from an operator against the Licensee relative to interference on the 900 MHz uplink band. The matter was investigated by the Commission who

thereafter, on 6 November 2012, engaged 4G Unwired (the consultant) to investigate the matter as the Commission's conclusion was contested by the Licensee.

6.1.2.10.3 The consultant found that whilst there was no spectrum overlap between the networks operated on the 850 and 900 MHz bands, the Licensee's usage through 884 MHz and 894 MHz was fully utilized and research showed that an overflow of energy in the upper end of the 850 MHz band is likely to negatively affect the uplink performance of operators on the 900 MHz band. This was proffered as an explanation for the interference being experienced by the complainant.

6.1.2.10.4 In accordance with **section 38(2)(b) of the Telecommunications Act, 2006**, the Licensee was given certain directives by the Commission to reduce the interference and to inform the Commission of the completion of the directives within twenty-four hours of so doing.

6.1.2.10.5 The Licensee's response

6.1.2.10.5.1 The Licensee responded to the Commission's directives by letter dated 28 December 2012, indicating that its directives were time consuming, complex, and costly.

6.1.2.10.5.2 The Licensee indicated that the consultant's suggestion that the Licensee should be permitted to relocate to the 880 MHz to 883 MHz, which was assigned to but not being used by another operator, was the least disruptive and less costly option.

6.1.2.10.5.3 The Licensee asked that the Commission re-think its directive and/or to put it on hold or to extend the date of compliance from 8 January 2013 to 8 February 2013.

6.1.2.10.6 There is nothing in the Commission's file to suggest that thereafter the directives were not eventually adhered to. However, in May and July 2014 the Commission contacted the Licensee about the unauthorized use of spectrum in the range of 880 – 883 MHz, as outlined under paragraph 6.1.2.8 above, thereby suggesting that the directive was not adhered to up to this period.

6.1.2.11 Provision of telecommunications services

6.1.2.11.1 Under **Article 7.1 of the Licence**, the Licensee is obligated to provide the Licensed Services within, into and out of the British Virgin Islands in accordance with the terms of the Licence, the Telecommunications Act, 2006, the Telecommunications Code and the Commission Regulations, and the Laws of the British Virgin Islands.

6.1.2.11.2 According to **Article 2.1(b) of the Licence**, the Licensed Services are basic telephony services including local, national and international telephony services; cellular mobile telecommunications services; trunk capacity resale services, including the provision of leased lines and circuits; satellite telecommunications services; third party private network services; paging services; store and forward messaging services;

telex services; telegraph services; value-added services; the sale and maintenance of subscriber premise wiring and terminal apparatus; private telecommunications services; internet services; wireless video programming; cable television service via wireline network; and International Connectivity Services.

6.1.2.12 Evaluation of compliance with provision of telecommunications services

6.1.2.12.1 The Evaluation reveals that the Licensee provides a range of services comprising basic telephony services including local, national and international telephony services; cellular mobile telecommunications services; Dedicated Internet Access; Internet Exchange Point; Fixed Radio Communication Links; Optical fibre links; Internet Service; submarine cable networks; Wi-Fi networks; International Connectivity Services; value-added services; the sale and maintenance of subscriber premise wiring and terminal apparatus; the sale of cellular mobile telecommunications handset equipment; Pay Television; Wi-Fi network equipment; prepaid calling card services.

6.1.2.12.2 There are a few services that have not been provided although they were part of the services for which the Licensee was licensed, for example, satellite communication services. Additionally, there are a few services that became obsolete in view of the advance in technology, for example, paging services; telex services; telegraph services.

6.1.2.12.3 There is no evidence on the Commission's file that there were any discussions between the Commission and the Licensee regarding Licensed Services that were not provided or were discontinued.

6.1.2.13 Provision of leased lines and circuit services

6.1.1.13.1 In **Article 7.2 of the Licence**, the Licensee was obligated to provide leased and circuit services.

6.1.2.14 Evaluation of compliance with provision of leased lines and circuit services

6.1.2.14.1 The Evaluation reveals that the Licensee initially provided leased lines to businesses subject to availability. However, the provision of same appears to have been discontinued.

6.1.2.14.2 There is no evidence on the Commission's file that there were any discussions between the Commission and the Licensee regarding the discontinuation of the provision of leased lines and the amending of the Licence to reflect this discontinuation.

6.1.2.15 Telecommunications during a public emergency and Force Majeure

6.1.2.15.1 Under **Article 7 of the Licence**, the Licensee is mandated to develop plans for operating networks and providing services during force majeure and where there is serious and substantial interruption in the provision of telecommunications services. This is also reiterated by

section 89(5) of the Telecommunications Act, 2006 which also indicates that the Licensee shall cooperate in the development and implementation of any such plans.

6.1.2.15.2 **Article 7.4(e) of the Licence** mandates that the Licensee provide an emergency alert system on all programmed channels of a cable or wireless cable television system.

6.1.2.15.3 **Article 20 of the Licence** deals with Force Majeure events and what is expected in such situations. This article indicates that if any of the listed force majeure event occurs and causes damage to the telecommunications network operated by the Licensee, the Licensee shall be obligated to repair or rebuild the network pursuant to a timetable and workplan to be established by the Licensee and approved by the Commission, and subject to adequate changes in the provisions of this Licence to be agreed upon between the Parties.

6.1.2.16 Evaluation of Compliance with Public Emergency and Force Majeure Provisions

6.1.2.16.1 The Licensee provided hurricane preparedness and business continuity plans to the Commission in 2016 but despite a request from the Commission on 23 May 2019 to provide updated plans in this regard, the Licensee has not done so.

6.1.2.16.2 Following the hurricanes of September 2017, by correspondence dated 25 October 2017, the Commission requested from the Licensee a detailed report which would include information pertaining to the state of its network after Hurricane Irma, the estimated cost of damage suffered, the baseline detail including assets prior to Hurricane Irma, indicators, specific restoration and/or rebuilding activities and timetable including proposed, start, duration and completion date of each activity, the expected date of completion of entire restoration and/or rebuilding exercise, the estimated development cost, the provision of a description of customer engagement, any plans for refunding costs of services not delivered, and its funding source. The Evaluation found evidence of a document from the Licensee, dated 24 November 2017, outlining the impact of Hurricane Irma and planned restoration works.

6.1.2.16.3 In relation to Hurricane Irma, the Licensee indicated in a letter to the Commission dated 5 March 2019 that in compliance with **Article 20 of the Licence**, the Licensee had sent to the Commission a correspondence dated 23 October 2017 requesting that the Commission suspend its requirement for reports until the parties agreed that normality has been restored to the Licensee's network. The Evaluation did not find a copy of this correspondence of 23 October 2017 on the Commission's files. It is noted that the Licensee indicated that it had not received a reply from the Commission to its 23 October 2017 correspondence.

6.1.2.16.4 The Evaluation notes a correspondence from the Commission to the Licensee dated 14 December 2017 which referred to Quality of Service Reports and requesting that the Licensee provide said reports for

quarters 2, 3 and 4 of 2017 by 31 January 2018. Although this request was complied with, the Commission's files do not reveal when it was complied with.

6.1.2.16.5 Notwithstanding, paragraph 6.1.2.9.1 above, it must be indicated that in its 15 September 2021 response to the Draft Evaluation provided to it by the Commission on 1 September 2021, the Licensee made certain indications relative to its business continuity plan.

6.1.2.17 Public payphone requirements

6.1.2.17.1 **Article 7.6 of the Licence** places an obligation on the Licensee to install and maintain Public Pay Telephones in accordance with a plan submitted to and approved by the Commission.

6.1.2.18 Evaluation of Compliance with installation and maintenance of Public Pay Telephones

6.1.2.18.1 The Evaluation found no documentation on the Commission's files indicating that a plan had been submitted to and approved by the Commission relative to the installation and maintenance of payphones.

6.1.2.18.2 The Evaluation revealed that there were at least seven (7) payphones in the Road Town area, two (2) at the Noel Lloyd Positive Action Movement Park, one (1) at Wickham Cay 1, three (3) along Waterfront Drive and one (1) on Main Street. These payphones stopped being operational prior to 2012, although an exact timeframe could not be determined. The physical structures were later taken down.

6.1.2.18.3 The Evaluation notes a correspondence dated 20 July 2011 from the Commission to a Government Department in which it was indicated that the Commission was participating in a series of meetings with the Licensee in relation to bringing closure to several outstanding issues between the organizations, including telephone booths. However, the Evaluation found nothing on the Commission's files that indicates the outcome of these discussions.

6.1.2.18.4 The Evaluation notes that there was an interview in 2012 with former Country Manager, Sean Auguste where he indicated that the Licensee was trying to decide what to do with the Territory's public phones. There was an indication that the public payphones may be obsolete due to the availability of mobile technology. As an alternative to removing the phones, Mr. Auguste indicated that the Licensee was considering whether to evolve the payphone booths into stations to provide wireless Internet access. The Evaluation found nothing that indicates that this alternative or any other substitute service was implemented by the Licensee.

6.1.2.18.5 The Licence required that the Licensee provide a public pay telephone service throughout the Licence term. However, the Licensee ceased providing this service. Notwithstanding the letter referred to in paragraph 6.1.2.11.3 above,

the Evaluation found no evidence in the Commission's files that there was a formal engagement of, or discussion held with the Commission by the Licensee and consensus reached by the parties before the withdrawal of the public payphones across the Territory.

6.1.2.19 Service Quality Requirements

6.1.2.19.1 **Article 7.7 of the Licence** states that the Licensee shall be obligated to provide minimum quality of service of its Telephony Services for calls carried within the Telecommunications Networks of the licensee in accordance with Annex 3.

6.1.2.20 Evaluation of compliance with Service Quality Requirements

The Quality-of-service metrics provided by the Licensee as required by Annex 3 of the Licence exceeded the targets that were specified within the said Annex.

6.1.2.20.1 However, as discussed in paragraph 6.3, relative to its obligations under **the Telecommunications Code (Part 3)(Quality of Service)Requirements 2010**, the Licensee has failed to consistently include coverage maps, has not consistently published its QoS reports on its website within the statutory timeframe, and has often failed to provide complaints reporting and statistics within the statutory timeframe.

6.1.2.21 Inspection procedures and control requirements

6.1.2.21.1 **Section 45 of the Telecommunications Act, 2006**, specifies that all installations to be used for a public telecommunication network or a public telecommunication service need to be tested by the Commission unless the requirement of pre-installation testing is waived by the Commission.

6.1.2.21.2 Under **section 45 of the Telecommunications Act, 2006**, the Commission is authorized to enter, search and inspect any premises, place, vehicle, ship, aircraft, vessel or other contrivance from which any telecommunications network is operated or telecommunications service is provided, or from which any person is using spectrum for telecommunications, for the purposes outlined under that section, including for the examination of records or other documents relating to the operation of the telecommunications network, the provision of the telecommunications service or the use of spectrum.

6.1.2.21.3 Additionally, under **Article 7 of the Licence** the Licensee is mandated to comply with information requests and with inspection procedures and reporting requirements established from time to time by the Commission with regard to fulfilment of the provision of telecommunications services and services quality requirements.

6.1.2.21.4 **Section 3.1.9 of Frequency Authorisation Number VRGM/002/2016 sections 3.1.11 of Frequency Authorisation Number VRGM/006/2016 and Frequency Authorisations Numbers VRGFX/0148/2016 to VRGFX/0184/2016 (excluding VRGFX/0165/2016 to VRGFX/0168/2016)** indicate that the

Licensee/Frequency Authorisation Holder shall allow the Commission upon receiving reasonable notice to inspect the facilities, equipment, and related assistance to the Commission to ensure compliance with the frequency authorisations.

6.1.2.22 Evaluation of Licensee's compliance with Inspection procedures and control requirements

6.1.2.22.1 It is expected that over time new or replacement equipment would have been needed for the provision of services by the Licensee. Based on the data available, there is no evidence on the Commission's file that the Licensee has sought and was given permission by the Commission for any new equipment over the term of its Licence.

6.1.2.22.2 There are no recorded instances of denied access to the Licensee's facilities. However, in 2019 a request was made by the Commission to arrange an independent review of the Licensee's compliance over the term of the Licence by Harneys, which was effectively denied as the Commission was informed via a letter dated 1 March 2019 by Campbells, Counsel for the Licensee, that the Licensee had been advised not to allow access to any employee of the Commission or Harneys or any individuals associated with the same to the Licensee's premises at Flemming House, Road Town, Tortola.

6.1.2.22.3 While the Commission has the power under **section 48 of the Telecommunications Act, 2006** to apply to a Magistrate for a warrant, this is obviously not a route that the Commission will take unless it is necessary, as the Licensee has an obligation to abide by reasonable requests made by the Commission.

6.1.2.23 Customer and subscriber assistance requirements

6.1.2.23.1 Under **Article 7 of the Licence**, the Licensee is required to set up directory assistance services for its customers. It is also required to operate a database publicly accessible as well as produce a phone book to be free of charge.

6.1.2.24 Evaluation of Customer and subscriber assistance requirements

6.1.2.24.1 The Evaluation was able to determine that the Licensee provides a physical telephone directory for its landline customers free of charge. The terms and conditions relative to directories and landline are available on its website at [Flow | British Virgin Islands | Landline Service \(discoverflow.co\)](http://Flow | British Virgin Islands | Landline Service (discoverflow.co)).

6.1.2.24.2 The Evaluation notes correspondence from the Licensee to the Commission dated 31 August 2012, in which it was indicated that the Licensee intends to implement charges for calls made to its directory enquiry contact centre. The cost for ex-directory service was also to be increased. In that same correspondence it was indicated that the Licensee has made the directory available in hard copy and online for access.

6.1.2.24.3 There is no other correspondence pertaining to these issues on the Commission's files, but the Evaluation reveals that with the development of

its products and services, the Licensee discontinued its directory assistance services.

6.1.2.25 Assistance to disabled persons

- 6.1.2.25.1 Under **Article 7.11 of the Licence**, the Licensee is obligated to provide equipment or services during the licence term for disabled Customers and Subscribers.
- 6.1.2.25.2 **Article 7.11(a) of the Licence** states that the Licensee shall, at the request of the Commission, arrange for the supply of, and the provision of maintenance services for telecommunications apparatus designed or adapted to meet the reasonable demands of disabled people; the connection to the telecommunications networks of said telecommunications apparatus; and the Licensee's participation in any advisory group established to address the needs of persons who are disabled.
- 6.1.2.25.3 **Article 7.11(b) of the Licence** states that the Licensee shall use its reasonable endeavours to ensure that there are available for supply in such a way as to meet all reasonable demands for customer premises, equipment capable of being inductively coupled to hearing aids which have been designed to be so coupled to Customer Premises Equipment; and equipment incorporating sound amplification facilities, provided that this condition shall be deemed to be satisfied if the Licensee uses its reasonable endeavours to ensure that there is available for supply either one type of customer premises equipment which meets both descriptions or two types of customer premises equipment each of which meets one of the requirements set forth in **Article 7.11 (a) or (b)**.
- 6.1.2.25.4 **Article 7.11(c) of the Licence** states that the Licensee take all reasonable steps to install, and keep installed in at least fifty percent (50%) of Public Pay Telephone Service, apparatus enabling persons using hearing aids designed for use in conjunction with Public Pay Telephones to use such hearing aids in connection with Voice Telephony Services. The target specified in the immediately preceding sentence shall be achieved as soon as practicable but, in any event, no later than the fifth (5th) anniversary of the Effective Date. On the fifth (5th) anniversary of the Effective Date the percentage of such Public Pay Telephones at which the Licensee shall be obligated to install and keep installed such apparatus shall be agreed between the Licensee and the Commission.

6.1.2.26 Evaluation of Assistance to disabled persons

- 6.1.2.26.1 The Evaluation found nothing in the Commission's files that indicates that the obligation under **Article 7.11(a) of the Licence** was invoked by the Commission.
- 6.1.2.26.2 Based on the Commission's file, the Evaluation was unable to determine whether the obligations under **Article 7.11(b) and (c) of the Licence** were adhered to.

6.2 FINANCIAL AND REPORTING OBLIGATIONS

6.2.1 The Commission has assessed the Licensee's financial and reporting performance to evaluate the extent to which the Licensee's financial and reporting operations are compliant with its obligations under the financial and reporting provisions of its Licence, the Telecommunication Acts, the Telecommunication Code, and industry standards.

6.2.2 This appraisal indicates that the Licensee has throughout the term of the Licence been largely compliant with the various financial and reporting requirements, as discussed below: -

6.2.3 Financial Provisions

6.2.3.1 The Licensee is required to maintain accounting records in accordance with Generally Acceptable Accounting Principles in accordance **with Article 7.1 of the Licence.**

6.2.3.2 Under both **Article 5.1 of the Licence** and **section 59(1) of the Telecommunications Act, 2006**, the Licensee has an obligation to pay to the Commission an annual Industry Levy. The Act indicates that the industry levy is payable and due to be paid within four (4) weeks of receiving a notification from the Commission.

6.2.3.3 Under both **Article 5.1 of the Licence** and **section 60(1) of the Telecommunications Act, 2006**, the Licensee has an obligation to pay to the Commission an annual Royalty fee in the amount of three percent (3%) of the gross revenues from services provided under the Licence collected by the Licensee, payable in US Dollars no later than 5 April of each year. The Licence indicates that this payment shall commence on 5 April, 2007.

6.2.3.4 Under **Article 5.3 of the Licence**, the Licensee has an obligation to pay to the Commission the annual charges for use of the radio spectrum.

6.2.3.5 Under **Article 5.6 of the Licence**, the Licensee shall pay the annual fee for operation of an international submarine cable landing in the British Virgin Islands.

6.2.4 Reporting Provisions

6.2.4.1 **Article 7.3(a) of the Licence** states that the Licensee should not interrupt the operation of the telecommunications network or any portion thereof or to suspend the provision of any licensed service in the normal course of business, without giving written notification to the Commission.

6.2.4.2 Under **Article 7.14 of the Licence**, the Licensee has an obligation to establish and maintain adequate records to permit the effective supervision and enforcement of the terms of the Licence. Within ninety (90) working days of the end of each fiscal year, the Licensee shall deliver to the Commission its year-end balance sheet and related states of operation, equity, and cash flow, accompanied by an independent public accountant's report, in accordance with **section 69 of the Telecommunications Act 2006.**

- 6.2.4.3 According to **Article 7.14 of the Licence**, within ninety (90) working days following each anniversary of the effective date of the Licence, the Licensee shall deliver to the Commission, in accordance with **section 69 of the Telecommunications Act 2006**, a report on the operations and services of the Licensee and the extent to which the conditions of the Licence have been followed during the preceding twelve(12) months, substantially in the form of Annex 4 of the Licence.
- 6.2.4.4 **Annex 10 of the Licence** indicates that the Licensee shall report on submarine cable locations and capacity by May 1 each year.
- 6.2.4.5 Under **section 4(3) of the Telecommunications Code (Part 3)(Quality of Service)Requirements 2010**, the Licensee is obligated to notify the Commission no later than thirty (30) days after the end of each quarter of the commercial launch of any services within that quarter.
- 6.2.4.6 Under **section 4(4) of the Telecommunications Code (Part 3)(Quality of Service)Requirements 2010**, the Licensee is obligated to measure and report on quality of service in accordance with the quality of service (QoS) targets set by the Commission.
- 6.2.4.7 Under **section 8(3) of the Telecommunications Code (Part 3)(Quality of Service)Requirements 2010**, requires the Licensee to provide to the Commission a QoS report in terms of services provided under Schedules 1, 2 and 3 on paper and by email, in Microsoft Excel format, no later than thirty (30) days after the end of the reporting period. As per **section 11 of the said Code**, the report needs to contain a comparison with the same performance data in the previous period along with the proposed level of service for the next twelve (12) months.
- 6.2.4.8 As per **section 8(4) of the Telecommunications Code (Part 3)(Quality of Service)Requirements 2010**, the Licensee is required to provide coverage maps as well as calculations of coverage in terms of territory and population, against an outline map of the Virgin Islands, indicating the areas in which each of the services covered in the Requirements are available, and in the case of a wireless service, the map should indicate the signal strength in dBm (decibels referenced to 1 milliwatt) at the edge of the coverage area.
- 6.2.4.9 As per **section 11(1) of the Telecommunications Code (Part 3)(Quality of Service)Requirements 2010**, the Licensee must publish its QoS on its website no later than thirty (30) days after the end of the reporting period.
- 6.2.4.10 Under **section 13 of the Telecommunications Code (Part 3)(Quality of Service)Requirements 2010**, the Licensee shall include in the quality-of-service measurements the number of requests received for services that the Licensee cannot provide to a user because it is not technically feasible to install the service, or the Licensee does not supply the particular service in the requested geographical area.

- 6.2.4.11 In the event of a force majeure affecting the QoS, as estimated and reported, under **section 14 of the Telecommunications Code (Part 3)(Quality of Service)Requirements 2010** the Licensee is required to provide a second set of data showing the effect of the force majeure along with a note explaining the differences in detail; or the Licensee can apply for an exemption to submit said report.
- 6.2.4.12 **Section 15(2) of the Telecommunications Code (Part 3)(Quality of Service)Requirements 2010**, indicates that the Licensee shall notify the Commission of planned service interruptions at least forty-eight (48) hours in advance.
- 6.2.4.13 In the case of unplanned service interruptions, **section 16 of the Telecommunications Code (Part 3)(Quality of Service)Requirements 2010**, mandates that the Licensee notify the Commission, by email and SMS, of the service interruptions within three (3) hours of the service disruption event and include details on areas and number of users affected; provide continuous updates every twelve (hours) detailing progress in resolving the issue; and provide a full report within twenty-four (24) hours of the disruption.
- 6.2.4.14 **Sections 3.3.2 of Frequency Authorisations Numbers VRGM/002/2016, VRGM/006/2016, and VRGFX/0148/2016 to VRGFX/0184/2016 (excluding VRGFX/0165/2016 to VRGFX/0168/2016)** indicate that the Licensee/Authorisation Holder shall provide a quarterly report to the Commission specifying accurate, up-to-date, and detailed technical data, as outlined in section 3.3.1, in relation to its use of the assigned frequency bands.
- 6.2.4.15 Under **paragraphs 6 and 7 of the Cable and Wireless (BVI) Ltd. Customer Charter on Fixed Broadband Service**, the Licensee has an obligation to submit a quarterly fixed Broadband quality of service report which would outline whether the quality-of-service indicators as set out in Annex 1 of the Charter were met.

6.2.5 Analysis of compliance with Financial and Reporting Obligations

- 6.2.5.1 The Evaluation finds no written evidence of the Commission granting approval for the accounting system adopted by the Licensee. However, given that the Licensee has been submitting its financial statements for the past fourteen (14) years without there being any complaints from the Commission regarding its financial statements or accounting system, then it can be concluded there had been some approval given to the Licensee albeit not in writing.
- 6.2.5.2 The Evaluation reveals that the Licensee has not paid the Industry Levy throughout the term of the Licence. However, the Levy was not implemented until February 2017. The Commission's efforts in this regard have been met with resistance and the matter is presently before the High Court being judicially reviewed and payments have been stayed pending the outcome of the review.
- 6.2.5.3 According to the Commission's records the Licensee's fiscal year ends on 31 December. Audited financial statements are being provided but not consistently before 31 March 2019. Since then, the Licensee has been making efforts to be timely in its submissions.

- 6.2.5.4 Although there has been some correspondence from the Commission to the Licensee pertaining to the late submission of fees, the Licensee has for the most part made timely payment of the assessed Spectrum fees.
- 6.2.5.5 The Evaluation shows that in 2012, the Licensee had some outstanding Royalty payments for the years 2007 to 2011. The issue was resolved and since then the Licensee pays the relevant Royalty on time and generally, submits the applicable documentation.
- 6.2.5.6 The Evaluation finds consistent correspondence relative to the calculation and payment of submarine cable fees. However, except for the year 2016 when the correspondence was sent on 29 April, the subsequent reports were not in compliance with the 1 May due date and were no less than two (2) weeks late.
- 6.2.5.7 The Evaluation reveals numerous correspondences from the Commission to the Licensee relative to outstanding QoS reports since the implementation of **the Telecommunications Code (Part 3)(Quality of Service)Requirements 2010**. In the initial years, the data submitted was incomplete and was not in the format provided by the Commission. However, this has improved.
- 6.2.5.8 The Evaluation notes two letters dated 27 September 2018 and 5 February 2019 from the Commission to the Licensee which outline that a number of QoS reports remain outstanding from Quarter 4 2017 to Quarter 4 2018. New deadlines were not adhered to.
- 6.2.5.9 A notice of non-compliance was issued in 2019 in relation to these outstanding QoS reports. The Licensee's response was to invoke Article 20 'Force Majeure' under the Licence and provided explanations to variations.
- 6.2.5.10 The Evaluation notes that on 27 September 2019 the Licensee was sent correspondence from the Commission indicating outstanding QoS reports for Quarters 1 and 2 of 2019. On 18 February 2020 the Licensee received another correspondence about outstanding QoS reports for Quarters 1 and 3 of 2019. On 6 July 2020, the Licence was sent a reminder that QoS report for Quarter 1 of 2020 was outstanding and on 28 September was sent another reminder that QoS reports for Quarters 1 and 2 of 2020 were outstanding. The QoS reports are currently up to date.
- 6.2.5.11 Thus, regarding QoS reporting obligation, the Licensee has
- 6.2.5.11.1 after some initial prompting in 2012 and 2013, provided the majority of the data required in the QOS template;
 - 6.2.5.11.2 included complaints reporting and statistics;
 - 6.2.5.11.3 had some late submissions, especially post Hurricane Irma;
 - 6.2.5.11.4 not consistently included coverage maps;
 - 6.2.5.11.5 not been publishing its QoS reports on its website.
- 6.2.5.12 However, the Evaluation indicates that additional information from the Licensee is required for the Commission to be able to accurately assess the Licensee's service coverage.

- 6.2.5.13 The Evaluation found no evidence of correspondence from the Licensee to the Commission outlining the launch of new services over the period of the Licence.
- 6.2.5.14 The Evaluation notes there are no written notifications of service disruption, whether planned or unplanned, from the Licensee to the Commission. It is noted that in April 2014 the Commission wrote to the Licensee in relation to internet service disruption and expressed its dissatisfaction with the way in which the Licensee had handled the matter and its non-compliance with service interruption procedures to its customers and to the Commission. The Licensee was given several directives to provide written information on this issue. However, the Evaluation was unable to determine whether these directives were carried out as no reply was seen on the Commission's file.
- 6.2.5.15 The Evaluation notes correspondence on 14 February 2019 from the Commission to the Licensee regarding non-compliance with sections 3.3 and 3.3.2 of the terms and conditions of **Frequency Authorisations VRGM/002/2016 and VRGM/006/2016**, in that the Licensee failed to provide technical records to the Commission on a quarterly basis. It was given until 5 March 2019 to be compliant.

Licensee's response

- 6.2.5.16 The Licensee responded on 5 March 2019 to the Commission's letter of 14 February 2019 indicating that it did not agree that it was non-compliant as on 23 October 2017 it had invoked Article 20 of the Licence and the Commission had not indicated a period for which the provision would apply. It pointed to **section 2.6 of the Frequency Authorisations** which indicated that the Licensee is relieved from its obligations if same cannot be carried out because of Force Majeure. It also pointed out issues with the reporting periods indicated by the Commission. It produced the technical records for October 2018 and stated that it was working to have the reports for the period ending 30 December 2018 and 30 January 2019 by 19 March 2019. It is noted that an extension was not sought by the Licensee. The reports were provided to the Commission, but the Evaluation did not reveal if they were provided by 19 March 2019.
- 6.2.5.17 It is noted that in its 15 September 2021 response to the Draft Evaluation provided to it by the Commission on 1 September 2021, the Licensee made certain indications relative to the posting of its coverage maps, QoS reports; and interconnection agreements on its website; and relative to its service disruption process.

6.3 CONSUMER, COMPETITION, AND OTHER REGULATORY OBLIGATIONS

- 6.3.1** The Commission has assessed the Licensee's consumer, competition, and other regulatory obligations to evaluate the extent to which the Licensee operations are compliant with these obligations under its Licence, the Telecommunication Acts, the Telecommunication Code, and industry standards.

6.3.2 This appraisal indicates that the Licensee has throughout the term of the Licence been largely compliant with the various obligations, as discussed below: -

6.3.3 Conditions for effectiveness of Licence

6.3.3.1 As indicated previously, **Article 16 of the Licence**, set out some conditions for the effectiveness of the Licence, including providing to the Commission an officer's certificate signed by a duly authorised officer of the Licensee certifying that the representations and warranties of the Licensee are correct in all material respects.

6.3.3.2 The Licensee was also mandated to provide a certified copy of the Licensee's articles of association within ten (10) working days from effective date, a copy of the resolutions passed by the board of directors authorising the execution, delivery and performance of the Licence, a certified copy of the Licensee's registration certificate within ten (10) working days of the effective date, certified copies of the Licensee's by-laws, and signature and incumbency certificates of the officers of the Licensee executing the Licence.

6.3.4 Evaluation of compliance with the above conditions for effectiveness of Licence

6.3.4.1 The Evaluation found a copy of the Memorandum and Articles of Association on the file. However, there were no updates to these documents since establishment of the Licence.

6.3.4.2 On file is a Certificate of Incumbency dated 20 July 2015 from Harneys Corporate Services the registered agent of Cable and Wireless (BVI) Limited.

6.3.4.3 The review did not locate copies of the other documentation required under **Article 16 of the Licence**.

6.3.5 Price Obligations

6.3.5.1 **Section 29 (3) of the Telecommunications Act 2006** imposes an obligation on the Licensee to publish its prices and terms and conditions.

6.3.5.2 Additionally, **Article 8 of the Licence** imposes certain price caps where a public supplier is designated a Dominant Public Supplier.

6.3.6 Evaluation of the Licensee's compliance with its price obligations

6.3.6.1 The Evaluation notes that Licensee was designated a Dominant Public Supplier on the 22 day of September 2011 in both the wholesale market for voice call termination on its fixed network and in the wholesale market for voice call termination on its mobile network. **Article 8.1 of the Licence** was amended accordingly, and Annex 8 implemented. Pursuant to **Annex 8 of the Licence**, the prices for voice call termination services on the Licensee's fixed network and the Licensee's mobile network were fixed by the Commission. There is nothing on the Commission's files that indicates that the Licensee has failed to follow the procedure laid out under **Annex 8**.

6.3.6.2 The Evaluation notes that on the 26 day of September 2013 the Licensee was designated as a supplier dominant in the markets for the provision of terrestrial International Private Leased Circuit (IPLC) Services and International Managed Data Services (IMDS) in the VI. On the 12 day of November 2015 the Licensee's Licence was amended, including under **Article 2.1(b)**, the service "International Connectivity Services". **Article 8.1** was amended accordingly, and Annex 9 implemented. Pursuant to **Annex 9 of the Licence**, the prices for Wholesale Landing Station Services were fixed by the Commission. There is nothing on the Commission's files that indicates that the Licensee has failed to follow the procedure laid out under **Annex 9**.

6.3.6.3 The Evaluation finds several documentations from Licensee to the Commission informing the Commission of rate plans, change in price, changes to Mobile Terms and Conditions, its customer charter on Fixed Broadband service. The Evaluation is unable to determine if the Commission was informed of every price change, change in plans, or change in terms and conditions.

6.3.6.4 The Terms & Conditions in relation to the various services are available on the site at [Flow | British Virgin Islands | Terms and Conditions \(discoverflow.co\)](http://discoverflow.co).

6.3.7 Interconnection (Access, Agreements and Numbering)

6.3.7.1 **Article 9 of the Licence** imposes an obligation on the Licensee to provide interconnection to other operators. This obligation is reiterated by the **Part IV of the Telecommunications Act, 2006** and the **Telecommunications Code (Part 6) (Interconnection and Access to Facilities and Utility Installations) Requirements, 2011**.

6.3.7.2 Relative to interconnection Access, **section 16 of the Telecommunications Act, 2006** states that the Licensee shall provide for the transmission and routing of the services of other public suppliers at such technically feasible point and on such terms as may be specified by the Commission.

6.3.7.3 In relation to Interconnection negotiation timelines, **Article 9.3 of the Licence** required that the Licensee conclude interconnection agreements within six (6) months following the effective date of the other operator's Licence. This obligation was modified by **section 6 (3) of the Telecommunications Code (Part 6) (Interconnection and Access to Facilities and Utility Installations) Requirements, 2011**, which states that "*every public supplier must offer to provide and provide interconnection on a timely basis not to exceed 90 days subject to section 8, after requested by another public supplier, and on the basis of terms and conditions that are transparent and reasonable, having regard to economic feasibility*".

6.3.7.4 Interconnection Agreements

6.3.7.4.1 Under **Article 9.1(c) of the Licence**, it is indicated that the Licensee must file with the Commission an application for the Commission's approval or re-approval, as the case may be, of each proposed interconnection agreement to be entered into at least thirty (30) working Days before the effective date of such agreement and each interconnection agreement already approved by the Commission on the fifth anniversary of the

effective date of such interconnection agreement and on each successive five (5) year anniversary thereof.

- 6.3.7.4.2 Under **Article 9.3** of the Licence, the Licensee has an obligation to file with the Commission for the Commission's approval each interconnection agreement which it intends to enter no later than six (6) months following the effective date of the other operator's Licence.
- 6.3.7.4.3 Under **Article 9.6** of the Licence, the Licensee has an obligation to enter into an agreement to provide roaming services on a reciprocal basis to every other operator of cellular telecommunications service within the British Virgin Islands that requests such service.
- 6.3.7.4.4 Further guidance is provided by the **Telecommunications Code (Part 6) (Interconnection and Access to Facilities and Utility Installations) Requirements, 2011 (sections 5, 9, 11 and 13)** which stated that once a request for interconnection is received by the Licensee a standard written interconnection agreement, which complies with the said Requirements, must be provided to the requester within thirty (30) days of receipt of the request. Once the agreement is concluded, a copy of the agreement must be provided by the Licensee to the Commission within twenty-eight (28) days.
- 6.3.7.4.5 If the Licensee is deemed a dominant supplier, then it must publish the interconnection agreement on its website within twenty-eight (28) days of conclusion of the agreement (**section 8, Telecommunications Code (Part 6) (Interconnection and Access to Facilities and Utility Installations) Requirements, 2011**).
- 6.3.7.4.6 Under **Annex 8 of the Licence**, the Licensee was required to execute revised Interconnection Agreements with each licensee or operator of telecommunications services interconnected to the Licensee's networks to give effect to the rates prescribed from 1 August 2012 and submit each such Agreement to the Commission no later than 8 August 2012.
- 6.3.7.4.7 The Licence and the Code imposes an obligation on the Licensee to negotiate in good faith.

6.3.7.5 Access to Facilities

- 6.3.7.5.1 Under **section 27 of the Telecommunications Act, 2006** access to facilities and utility installations shall not be unreasonably denied by the Licensee and access shall be negotiated on a non-discriminatory and equitable basis.

6.3.8 Evaluation of Licensee's Interconnection Obligations

- 6.3.8.1 In respect to the Licensee's interconnection obligation, in accordance with **section 26(1) of the Telecommunications Act, 2006**, the Licensee has concluded interconnection agreements with Digicel (BVI) Ltd. and CCT BVI Ltd.

- 6.3.8.2 The Evaluation found evidence on the Commission's files that an application was submitted to the Commission for interconnection agreement between the Licensee and CCT BVI Ltd. in 2007, specifically, a letter from the Commission to the Licensee dated 14 December 2007 which referred to the Commission reviewing the "First Amending Agreement to C&W – CCT Standard Interconnection Agreement" dated 20 November 2007 and granting its approval of a revision made to said agreement. The letter noted that the amendment was not provided to the Commission until 13 December 2007, in violation of Article 9.1(d) of the Licence.
- 6.3.8.3 In reference to the original C&W – CCT Standard Interconnection Agreement, the Evaluation did not reveal when the application for same was filed with the Commission and thus no conclusion can be made relative to the Licensee's compliance with the prescribed time from the time of the request of interconnection, application for, establishment of the interconnection and the receipt of the interconnectivity agreement.
- 6.3.8.4 The Evaluation found on the Commission's files the following documents relative to interconnection between the Licensee and CCT BVI Ltd, namely, an interconnectivity agreement between the Licensee and CCT BVI, the Joint Working Manual on Interconnection Procedures, a Service Schedule, a Parameter Schedule, a Tariff Schedule, Standard Interconnection Agreement Legal Framework, Definitions, Service Descriptions. These documents were dated 7 May 2007 and were attached to a letter from the Licensee to the Commission dated 21 March 2014. There was also provided to the Commission a Precommercial Start of GSM/GPRS Roaming services between the Licensee and CCT BVI dated 2 January 2013.
- 6.3.8.5 The Evaluation found evidence on the Commission's files that an application was submitted to the Commission for an interconnection agreement between the Licensee and Digicel (BVI) Ltd. in 2009, namely, a letter from the Commission to the Licensee dated 30 June 2009 which indicated that the Commission had approved an application dated 8 June 2009 for proposed interconnection on an interim basis and requesting executed copies of the said agreement.
- 6.3.8.6 The Evaluation found on the Commission's files the following documents relative to interconnection between the Licensee and Digicel (BVI) Ltd., specifically, Definitions dated 15 May 2008, Standard Interconnection Agreement, and a Joint Working Manual on Interconnection Procedures both dated 2 June 2009, Service Descriptions, Legal Framework, Parameter Schedule, Service Schedule, and Tariff Schedule all dated 2 April 2009. It is noted that these documents were unsigned.
- 6.3.8.7 Based on the Commission's files, the Evaluation was not able to determine the Licensee's compliance within the prescribed time from the time of the request of interconnection, application for, establishment of the interconnection and the receipt of the interconnectivity agreement, when signed copies of these documents were submitted to the Commission or when any final interconnection agreements between the Licensee and Digicel (BVI) Ltd. were filed.

- 6.3.8.8 The Commission's files do not reveal that subsequent interconnection agreements were filed by the Licensee after these initial interconnection agreements as required by **Article 9.1(c) of the Licence**.
- 6.3.8.9 Additionally, the dates of the documents referred to in paragraphs 6.3.8.4 and 6.3.8.6 indicate that no new agreements were entered into between the Licensee and CCT BVI Ltd. and the Licensee and Digicel (BVI) Ltd. or, alternatively, not provided to the Commission, as required under the revision to **Annex 8 of the Licence** which required the Licensee to submit revised interconnection agreements by August 1, 2012.
- 6.3.8.10 Based on the Commission's file, the Evaluation did not find evidence that access to facilities have been unreasonably denied by the Licensee.
- 6.3.8.11 The Evaluation did not find evidence that Licensee published a copy of the interconnection agreements on its website as required by **section 8, Telecommunications Code (Part 6) (Interconnection and Access to Facilities and Utility Installations) Requirements, 2011**.
- 6.3.8.12 As indicated in paragraph 6.2.5.17 above, in its 15 September 2021 response to the Draft Evaluation provided to it by the Commission on 1 September 2021, the Licensee made certain statements relative to posting its interconnection agreements on its website.

6.3.9 Disclosure of information to the Commission

- 6.3.9.1 **Section 69 of the Telecommunications Act, 2006** requires the Licensee to make returns, or furnish documentation, to the Commission for statistical purposes or where the disclosure would facilitate the carrying out of the Commission's functions, powers or duties, or is in the public interest.
- 6.3.9.2 **Section 70 of the Telecommunications Act, 2006** allows the Commission to serve a notice on a Licensee to produce or furnish to the Commission at a time and place specified in the notice any documents specified or described in the notice that are in that person's possession or custody or under his control, where it appears to the Commission that a Licensee may be contravening, or may have contravened the Act, the Regulations, the Telecommunications Code, any instructions or any term or condition of a Licence or frequency authorization; or it is reasonably required for the purpose of discharging the Commission's functions or ensuring compliance with the Act, the Regulations, the Telecommunications Code or any term or condition of a Licence or frequency authorization.
- 6.3.9.3 Under **Article 8.1(iv)(e) of the Licence**, where the Licensee is designated as a supplier dominant in the markets for the provision of terrestrial International Private Leased Circuit (IPLC) Services and or for International Managed Data Services (IMDS), the Licensee is required to provide to Commission, upon request, information on the rates offered to other Licensees for these services.

6.3.9.4 **Article 8.1(iv)(e) of the Licence** further requires that the Licensee submits to the Commission within thirty (30) days of agreement with other consortium members on Wholesale Landing Station Services.

6.3.9.5 **Annex 8 of the Licence** stated that the Licensee must submit revised interconnection agreements within one week, August 1st, 2012.

6.3.10 Evaluation of Licensee's Information Disclosure Obligations

6.3.10.1 The Evaluation shows that the Licensee does not ordinarily comply with general requests for information.

6.3.10.2 Section 70 requests have to generally be invoked to obtain requested data and these are generally complied with.

6.3.11 Designation of a Compliance Officer

6.3.11.1 It is a statutory requirement that the Licensee appoint a compliance officer under **section 72 of the Telecommunications Act, 2006**, which indicates the qualifications that person must possess.

6.3.12 Evaluation of Licensee's compliance with requirement to appoint a Compliance Officer

6.3.12.1 The Evaluation found no documentation of a compliance officer being approved by the Commission. On 2 December 2015, the Licensee wrote to the Commission pertaining to **section 72 of the Telecommunication Act 2006**, Appointment of Compliance Officers, and indicated that Mr. Ravindra Maywahlall, appointment the Head of Retail Sales, will be responsible for all issues except customer complaints, which should be directed to Mr. Abraham Tarabay who oversaw the retail stores. Mr. Maywahlall is now the Country Manager of the Licensee. The Evaluation was unable to determine who is the current compliance officer.

6.3.12.2 Additionally, the Commission wrote to the Licensee on 8 April 2019 requesting that it be provided with the name of its compliance officer so that its Chief Economist would be able to liaise with said officer for the provision of essential data requests. Based on the Commission's files, the Licensee neither acknowledged nor responded to said correspondence.

6.3.12.3 The Evaluation was not able to locate any evidence of the Commission being provided with the statutory required compliance manual or any submitted written reports confirming compliance with the relevant legislation and the Licence by the Licensee and its staff.

6.3.12.4 Notwithstanding, paragraph 6.3.12.1 above, in its 15 September 2021 response to the Draft Evaluation provided to it by the Commission on 1 September 2021, the Licensee made certain indications relative to the person designated to be its compliance officer.

6.3.13 Management of Consumer Complaints

6.3.13.1 **Article 7 of the Licence** states that the Licensee shall establish an efficient conflict resolution procedure.

6.3.13.2 The **Telecommunications Code (Part 4) Investigation of Complaints, Facilitation of Relief and Resolution Procedures, 2010**, contains detailed guidance in relation to the complaint procedures. It outlines the period for acknowledgment and resolution of complaints, the requirement for an efficient complaint resolution procedure, and lists the duties of the Licensee in dealing with customer complaints.

6.3.13.3 **Section 5 of the Telecommunications Code (Part 4) Investigation of Complaints, Facilitation of Relief and Resolution Procedures, 2010** indicates that the Licensee shall acknowledge receipt of a complaint within five (5) business days and where possible, in writing and outline the time frame for resolution and contact details of the person dealing with the complaint and any other relevant information.

6.3.13.4 **Section 6 of the Telecommunications Code (Part 4) Investigation of Complaints, Facilitation of Relief and Resolution Procedures, 2010** indicates that the Licensee shall resolve the complaint within twenty (20) business days where possible.

6.3.13.5 **Section 17 (1)(c-d) of the Telecommunications Code (Part 4) Investigation of Complaints, Facilitation of Relief and Resolution Procedures, 2010** indicates that the Licensee shall establish and maintain channels for customers to submit complaints, must have a number available for this, and make the complaints submission process known to the public.

6.3.13.6 **Section 17 (1)(e) of the Telecommunications Code (Part 4) Investigation of Complaints, Facilitation of Relief and Resolution Procedures, 2010** requires that the Licensee create a reasonable process for registering, investigating and resolving complaints where customers are informed of the recourse.

6.3.13.7 **Section 17 (1)(g) of the Telecommunications Code (Part 4) Investigation of Complaints, Facilitation of Relief and Resolution Procedures, 2010** indicates that no more than ten (10) business days after the end of each reporting quarter, the Licensee must submit to the Commission a report of all the complaints received. The report should contain the number of complaints received related to billing and rates, and QoS; how many were resolved and rejected relative to each area; the number of complaints where Licensee fully or partially satisfied the grievances; the total value of reimbursements, compensations, credits et cetera in monetary reimbursements or compensations (services).

6.3.14 Evaluation of Licensee's compliance with management of Consumer Complaints

6.3.14.1 The Evaluation shows that the Licensee first provided the Commission with its Complaints Procedures in 2014. In September 2015, it provided an updated version in response to a request from the Commission. Since then, no updated versions have been provided to the Commission.

6.3.14.2 It is also a requirement that the Licensee, submit to the Commission a report of all the complaints that it received and resolved in that quarter. While the Licensee includes some complaints statistics in its quarterly QoS reporting it does not comply with the requirement to provide to the Commission complaints statistics and reporting on a monthly basis as per **the Telecommunications Code (Part 3)(Quality of Service)Requirements 2010**.

6.3.14.3 Additionally, although the Licensee's website has a "Support" section at [Flow | British Virgin Islands | Support \(discoverflow.co\)](https://www.flow.bm/Support) which has links to FAQs, live chats and feedback submission, it does not contain specific information in relation to conflict resolution or complaint submission.

6.3.14.4 Notwithstanding paragraph 6.3.14.1 above, in its 15 September 2021 response to the Draft Evaluation provided to it by the Commission on 1 September 2021, the Licensee's satisfactorily settled the issue of the status of its Complaints Procedure.

6.3.15 Competition Rules

6.3.15.1 Under **Article 10 of the Licence**, the Licensee is mandated not engage in any activities, whether by act or omission, which have or are intended to or likely to have, the effect of unfairly preventing, restricting, or distorting competition in relation to any business activity relating to communications services.

6.3.15.2 Additionally, the Licensee must comply with reasonable requests by the Commission to submit periodic reports, statistics, and other data and to inspect the Licensee's facilities, files, records, and other data as well as request additional information with a view to supervise and effectively enforce the terms of this Article.

6.3.15.3 Under **section 26(4) of the Telecommunications Act, 2006**, where the Commission determines that a public supplier is dominant in any market, the Commission shall include in the Licence of the public supplier, upon issuing or by amending the Licence, such additional terms and conditions to the Licence for the purposes of regulating tariffs, protecting the interest of users and other Licensees including the provision of adequate facilities and interconnection and access services, and of ensuring fair competition among Licensees as it considers appropriate.

6.3.16 Evaluation of the Licensee's compliance with competition rules

6.3.16.1 As noted in paragraph 6.3.6.1 above, the Licensee was designated a Dominant Public Supplier in both the wholesale market for voice call termination on its fixed network and in the wholesale market for voice call termination on its mobile network. The Licensee had an obligation to enter into a new interconnection agreement and to file it with the Commission in accordance with Annex 8 of the Licence. The Evaluation did not find any new interconnection agreements on the Commission's files.

6.3.16.2 As noted in paragraph 6.3.6.2 above, the Licensee was designated a Dominant Public Supplier in the markets for the provision of terrestrial International Private Leased Circuit (IPLC) Services and International Managed Data Services

(IMDS) in the VI. Relative to competition, there is nothing on the Commission's files that indicates that the Licensee has failed to follow the procedure laid out under **Annex 9**.

6.3.16.3 The Licensee was designated a Dominant Public Supplier in both the markets for the provision of fixed retail broadband service and fixed wholesale broadband access. The Licensee entered into a Customer Charter on Fixed Broadband Service effective from 15 November 2016. Relative to competition, there is nothing in the Commission's file that indicates that they have not been compliant with the Customer Charter on Fixed Broadband Service.

6.3.16.4 Since 2012 the Licensee has not complied with a request to liaise with the Commission's chief economist to improve the data being collected and monitored to better determine whether any anti-competitive or monopolistic practices are in place.

6.3.17 Confidentiality Obligations

6.3.17.1 Under **Article 7 of the Licence**, the Licensee shall maintain the confidentiality of the content of all communications over its network from interference, eavesdropping or recording by Licensee.

6.3.17.2 Additionally, the Licensee shall institute reasonable measures and procedures to safeguard the confidentiality of business secrets and personal data concerning its subscribers which it acquires during its business.

6.3.17.3 Furthermore, Under **Article 7.9 of the Licence**, the Licensee shall appoint one of its officers to oversee the implementation, compliance and supervision of such measures and procedures. On 15 February every year, the Licensee shall submit to the Commission an annual report for the preceding calendar year, or portion thereof, setting forth such measures and procedures which have been established by the Licensee and describing the effectiveness thereof and any necessary changes and improvements thereto.

6.3.17.4 Under the **section 7 of the Telecommunications Code (Part 6) (Interconnection and Access to Facilities and Utility Installations) Requirements, 2011**, the Licensee is required to protect personal information and details from disclosure.

6.3.18 Evaluation of Compliance with Confidentiality Obligations

6.3.18.1 The Evaluation finds that the Licensee partially complied with the obligation in relation to protecting its customers' personal details and usage, through eavesdropping, recording and disclosure,) through its Privacy Policy available on its website at <https://discoverflow.co/british-virgin-islands/privacy-policy>

6.3.18.2 The Evaluation finds no evidence on the Commission's files of an annual report being submitted to the Commission in relation to the effectiveness of its confidentiality and privacy obligation.

6.3.18.3 On 2 December 2015, the Licensee wrote to the Commission pertaining to **section 72 of the Telecommunication Act 2006**, Appointment of Compliance

Officers, and indicated that Mr. Ravindra Maywahlall, appointment the Head of Retail Sales, will be responsible for all issues except customer complaints, which should be directed to Mr. Abraham Tarabay who oversaw the retail stores. It was inferred that Mr. Maywahlall would thus be responsible for confidentiality matters. Since, then there is no indication of an officer appointed to oversee the implementation, compliance and supervision of confidentiality measures and procedures.

6.3.18.4 The Evaluation notes that an annual compliance report was provided by the Licensee in 2016 but notes non-compliance for all other years.

6.3.18.5 As stated in paragraph 6.3.12.4 above, in its 15 September 2021 response to the Draft Evaluation provided to it by the Commission on 1 September 2021, the Licensee made certain indications relative to the person designated to be its compliance officer. The Commission can only conclude that the compliance officer will also be the person responsible for ensuring compliance with its confidentiality measures and procedures.

6.3.19 Other Duties and Obligations

6.3.19.1 In accordance with **Article 7.1(b) of the Licence**, the Licensee shall not reduce or cease to provide a service unless, with the Commission's consent, it is substituted by a service more advantageous for customers.

6.3.19.2 According to **Article 7.10(e) of the Licence**, within three (3) months from the effective date of the Licence, the Licensee shall submit to the Commission for its approval a form of service agreement containing the terms and conditions for the provision of Licensed Services to subscribers and customers, the Master Service Agreement.

6.3.19.3 In accordance with **Article 7.16 of the Licence** the Licensee must file its consortium, shareholders, partnership or other such agreements with the Commission.

6.3.19.4 **Article 6.1 of the Licence** outlines the Licensee's right to place and maintain telecommunications lines.

6.3.19.4.1 This must be done in accordance with the provisions of the **Physical Planning Act, 2004**, the development plan for the area and the provisions of the **Road Ordinance** and any other relevant written law.

6.3.19.4.2 The Licensee's is obligated to obtain plans from the Chief Planner showing all utility installations that might be affected, to submit detailed plans of intended works to affected utility installation owners and, if applicable, obtain their written permission.

6.3.19.4.3 The Licensee must inform the Commission of intended works and the Commission shall notify other operators and public utilities.

6.3.19.5 **Article 6.2 of the Licence** outlines the Licensee's obligation to repair and restore.

- 6.3.19.5.1 If the Licensee damages any utility installation in carrying out works, it shall immediately request the utility installation owner to repair the damage to the utility installation and shall compensate the utility installation owner for the full cost of repair.
- 6.3.19.5.2 The Licensee shall, as speedily as possible, complete all works and restore any road or public grounds affected, including the removal of any debris, to the written satisfaction of the Chief Planner, and if the Licensee fails to comply it shall be held liable for any expenditure that the Chief Planner incurs in such restoration and for any other loss by any other person for a period of two years.
- 6.3.19.6 **Article 7.3(a) of the Licence** states that the Licensee should not interrupt operation of the telecommunications network or any portion thereof or to suspend the provision of any licensed service in the normal course of business, without providing reasonable advance notice to affected customers.
- 6.3.19.7 **Article 7.3(d) of the Licence** indicates that the Licensee shall give reasonable notice to the affected public of scheduled routine maintenance on the network which results in disruption of service exceeding thirty (30) minutes. The Licensee is obliged to perform all routine maintenance on the network which will result in service disruption between the hours of 2.00 a.m. and 5.00 a.m.
- 6.3.19.8 In cases of emergency interruptions, **Article 7.3(b) of the Licence** provides that the Licensee shall maintain adequate diagnostic equipment and shall employ sufficiently trained staff locally to ensure prompt restoration of licensed services.
- 6.3.19.9 Under **Article 13.3 of the Licence**, the Licensee is required to comply with the Commission Regulations concerning the implementation of the Numbering Plan and domain name management.
- 6.3.19.10 Under **Article 13.3 of the Licence**, the Licensee is required to obtain all necessary licences and permits including building permits to build and maintain installations and buildings.
- 6.3.19.11 Under **section 77(2) of the Telecommunications Act 2006**, the Commission has the power where it is considered necessary for the effective performance of its functions and prudential supervision of telecommunications services business to issue directives of a special or general nature not inconsistent with the provisions of this Act, the Regulations or the Telecommunications Code.

6.3.20 Evaluation of compliance with other duties and obligations

- 6.3.20.1 There is very little corporate documentation on the Commission's files on behalf of the Licensee except for proof of ownership, a certificate of incumbency and memorandum and articles of association.

- 6.3.20.2 As indicate in paragraph 6.2.3.14 above, the Evaluation notes that in April 2014 the Commission wrote to the Licensee in relation to internet service disruption and expressed its dissatisfaction with the way the Licensee had handled the matter and its non-compliance with service interruption procedures to its customers and to the Commission.
- 6.3.20.3 The Evaluation notes that the Licensee has made applications to the Commission for the assignment of national codes and short codes over there years. There are no complaints from the Commission relative to the Licensee using numbers or short codes without first obtaining the authorisation of the Commission.
- 6.3.20.4 The Evaluation notes a complaint filed with the Commission against the Licensee on 7 September 2015 for the unlawful use of private land. The matter was filed in the High Court. The evaluation was unable to determine the outcome of the matter based on the Commission's file. Apart from this complaint, there was no other evidence of failure to obtain permission or to compensate landowners.
- 6.3.20.5 There is no obligation on the Licensee to provide to the Commission copies of any permission obtained from the Planning Authority and thus, this can account for the fact that the Evaluation found nothing on the Commission's files indicating that the requisite permissions were obtained from the Planning Authority by the Licensee. Additionally, as the Licensee is not stated to have an obligation to provide same to the Commission, it is noted that there is nothing on the Commission's files that indicates that the Commission requested said permissions from the Licensee.

7 Audit by Harneys Fiduciary in 2019

7.1 The Audit

- 7.1.1 In or around February 2019, the Commission appointed Harneys Fiduciary to conduct an audit of the Licensee to identify areas of compliance and non-compliance with telecommunications obligations and to make any necessary recommendations.
- 7.1.2 Based on the audit done, the following recommendations were made to the Licensee:
- 7.1.2.1 Ensure that an experienced and suitably qualified Compliance Officer with sufficient resources is appointed and approved by the Commission. The role of the Compliance Officer, acting as the main liaison between the Commission and the Licensee's senior management, is an essential one as it relates to the implementation, maintenance, monitoring and reporting of an effective compliance monitoring system with documented procedures.
- 7.1.2.2 Appoint qualified resource(s) to act as the Licensee's Complaints Officer and Confidentiality Officer to ensure that documented policies and procedures in these areas are firmly in place (and made available to the public) and is compliant with the legislation.

- 7.1.2.3 Implement procedures to ensure that all of the required information is available for viewing on its website in a timely manner, such as QoS data, coverage maps, directory services, interconnectivity agreement/s and complaint submission forms/procedures.
- 7.1.2.4 Adopt a more collaborative and transparent approach to the Commission by improved compliance with reasonable requests for information; ensuring that the Commission is in receipt of all up-to-date policies and procedures, due diligence, relevant notifications and required approvals.
- 7.1.2.5 Settle unpaid industry levy.
- 7.1.2.6 Create and document a risk management framework that enables timely and correct prioritisation of technical fixes, areas of investment and improvement.

7.2 The Licensee's response to the Audit

- 7.2.1 Prior to the Audit been conducted, by letter dated 18 February 2019, the Commission informed the Licensee that Harneys was appointed to conduct an audit to identify areas of compliance and non-compliance with telecommunications obligations and to make any necessary recommendations. To allow the Licensee the opportunity to make relevant input, the Licensee was asked by the Commission to provide the name of a person with whom Harneys can liaise when carrying out the audit.
- 7.2.2 The Licensee was not in agreement with the audit or the consultant. The audit went ahead using the Commission's records and resources. On 11 June 2020, written correspondence was sent by the Commission to the Licensee indicating that the audit was completed, and a copy of the audit was provided to the Licensee.
- 7.2.3 The said letter indicated that contact would be made to set a mutually convenient time to discuss the findings of the audit. The Licensee was asked to peruse the audit and contact the Commission if there were any questions or concerns. Furthermore, in an informal meeting on 19 April 2021 between the Commission and the Licensee, mention was made of liaising with the Commission to set up a meeting to discuss the audit. These proposed meetings between the Commission and the Licensee have not taken place.
- 7.2.4 In its letter dated 18 February 2019, the Commission informed the Licensee that the findings of the audit would help to inform the Commission in coming to its decision as to whether it is in the public's best interest to renew the licence. The finding of the audit was that the Licensee was *partially compliant* and the above recommendations were made by Harneys for the Licensee to become compliant.
- 7.2.5 The Evaluation notes a letter from the Licensee dated 16 February 2021 which referenced the Commission's letter of 11 June 2020, in which the Licensee's legal counsel questioned the independence of the Auditor, and whether certain documents and information were provided to the Auditor during the Audit. The letter also asked that the Commission confirm the other procedures that it had in place for its detailed evaluation so that the Licensee can prepare comprehensive answers to any queries or be prepared

to supply the Commission with information upon reasonable request. There is nothing on the Commission's files to indicate that the Commission responded to this letter.

- 7.2.6 By correspondence dated 20 May 2021, the Commission requested that the Licence provides an update as to what has been done to implement the recommendations made by Harneys, excluding the issue of Industry Levy. There is nothing on the Commission's files that indicates that the Licensee responded to this correspondence.

8 CONCLUSION

- 8.1 **Section 24 of the Telecommunications Act, 2006 states** that subject to the terms and conditions of a licence or frequency authorisation, the Commission may renew the licence or frequency authorisation provided that the licensee or authorisation holder has operated within the terms of the current licence or frequency authorisation; has complied in material respects with, or is not in persistent breach of, any of the provisions of this Act, the Regulations, the Telecommunications Code or the terms and conditions of the licence or the frequency authorisation, and has complied in material respects with, or is not in persistent breach of, any instructions.
- 8.2 Before determining not to renew a licence or a frequency authorisation, the Commission shall give the licensee or the authorisation holder adequate advance notice, which, absent exigent circumstances and except as provided for in subsection (1), shall not be less than thirty (30) days, in writing of its intention not to renew such licence or frequency authorisation, specifying the grounds on which it proposes not to renew, and shall give the licensee or the authorisation holder the opportunity to present its views, and to submit to the Commission within such time as the Commission may specify a written statement of objections to the decision not to renew the licence or the frequency authorisation, which the Commission shall take into account before reaching a decision on renewal.
- 8.3 This is reinforced by **Article 3.3(b) of the Licence** which requires the Commission to prepare an Evaluation Report stating the extent to which the Licensee has generally complied with its obligations under the Licence, the regulations and orders adopted from time to time by the Commission, generally provided the licensed services and conducted its business in accordance with the laws of the British Virgin Islands.
- 8.4 Based on the findings of the Evaluation contained herein, the Commission finds that
- 8.4.1 The Licensee has to a large extent provided uninterrupted telecommunication services to the Territory of the British Virgin Islands during the term of its Licence in accordance with the terms of its Licence, and the relevant laws and Codes;
- 8.4.2 the Licensee has to a large extent complied with most of its licence and regulatory obligations. However, as outlined in this Evaluation Report, there are several outstanding areas of non-compliance that must be addressed before the Commission can progress the application including: -

8.4.2.1 ensuring that its website has been updated to reflect the requirements of the Telecommunication Act and the Codes so that: -

8.4.2.1.1 coverage maps and QoS reports are available in accordance with **the Telecommunications Code (Part 3)(Quality of Service)Requirements 2010;**

8.4.2.1.2 having been deemed a Dominant Public Supplier, interconnection agreements are posted on its website in accordance with the **Telecommunications Code (Part 6) (Interconnection and Access to Facilities and Utility Installations) Requirements, 2011;**

8.4.2.1.3 customers can easily find the procedure on how to submit a complaint in accordance with **the Telecommunications Code (Part 4) Investigation of Complaints, Facilitation of Relief and Resolution Procedures, 2010** and if possible, be able to submit a complaint via the website.

8.4.2.2 providing to the Commission the relevant outstanding documents, procedures, manuals, and agreements referred to within this Evaluation, including but not limited to:

8.4.2.2.1 the coverage maps that are to accompany the QoS reports which have been outstanding since 2017;

8.4.2.2.2 interconnection agreements and all supporting/accompanying documentation as required by **Article 9.1(c) of the Licence;**

8.4.2.2.3 manual of Compliance Procedures;

8.4.2.2.4 annual compliance reports in compliance with **Article 7.9 of the Licence;**

8.4.2.2.5 annual Hurricane Preparedness and Business Continuity Plans;

8.4.2.2.6 written reports on the Licensee's compliance with the provisions of this Act, the Regulations, the Telecommunications Code, the conditions of its licence and any instructions in compliance with **section 72 of the Telecommunications Act, 2006;**

8.4.3 As was outlined above in paragraphs 6.1.2.16.5, 6.2.5.17, 6.3.8.12, 6.3.12.4, 6.3.14.4, and 6.3.18.5, in its 15 September 2021 response to the Draft Evaluation provided to it by the Commission on 1 September 2021, the Licensee made certain indications relative to the matters listed under paragraph 8.4.2.2 which have been taken into consideration by the Commission in this Evaluation. The requisite amendments were made to the Evaluation to take into account these indications by the Licensee.

Dated this 30 day of September 2021

For and on behalf of the Telecommunications Regulatory Commission

Guy L. Malone

Chief Executive Office