

**SCHEDULE**  
**Telecommunications Regulatory Commission**  
**Draft Directive**

[Gazetted            2021]

With effect from the date of publication of this Directive in the Gazette, the licences of the following licensees:

- BVI Cable TV (**BVI Cable**)
- Cable and Wireless (BVI) Limited (**Flow**)
- Caribbean Cellular Telephone Ltd. (**CCT**)
- Digicel (BVI) Limited (**Digicel**)

shall be amended as follows:

**A. Article 2 (New Provisions)**

1. Article 2 shall be amended by inserting new paragraphs which would specify that:
  - a. the Licence does not grant exclusive rights;
  - b. the Licensee undertakes to comply with all applicable laws and rules; and
  - c. the Licensee must administer and manage the business of the Licensee from premises based in the BVI.
2. The Commission has experienced some difficulty in securing consistent compliance by the Unitary Licensees with their obligations, in particular their reporting obligations. These new provisions should have the effect of improving overall compliance, by strengthening the obligation to comply with the rules and by ensuring local management that will clearly be subject to the jurisdiction of the Commission and responsible for responding to and complying with the Commission's instructions.
3. The following provisions shall be inserted:

**2.3 No Exclusivity**

*In no event does this Licence grant any exclusive right to operate any Telecommunications Network or to provide any Telecommunications Service, or convey any proprietary rights.*

**2.4 Licensee Undertaking**

*Subject to all other applicable laws and regulations of the British Virgin Islands for the time being in force, the Licensee undertakes to comply with the conditions of this Licence, the Telecommunications Code, the Commission Regulations, Commission instructions, and the provisions of the Telecommunications Act.*

**2.5 Local Premises**

*The Licensee shall ensure that the administration and management of the business associated with the establishment, operation and maintenance of the Telecommunications Network*

*and the provision of the Licensed Services shall be conducted from premises in the British Virgin Islands.*

**B. Article 2.3 (Services of Notice)**

4. The present Article 2.3 shall be moved to Article 21, to sit immediately after Article 21.10, as it addresses matters other than the scope of the authorisations granted to the Licensee. This revision is detailed at section [TT] of this Directive.

**C. Article 2.6 (Obligation to Provide Licensed Services) (New)**

5. A new article, Article 2.6, shall be inserted to impose on Licensees the obligation to use their authorisations to provide Licensed Services within a reasonable period of time. Since the issuance of licences in 2007, which grant various authorisations, the Commission has noticed, with concern, that some services have not been provided by respective licensees. The right to offer a Telecommunications Service ought to include a corresponding obligation to use that right, as only persons with the interest and ability to participate in the telecommunications sector should be licensed to do so. The Commission has indicated in its application form that key criteria for the grant of a Licence includes the “Promise to deliver” and the “Ability to deliver.”. Granting an authorisation that is ultimately not used would be inconsistent with this focus.
6. The following provision shall be inserted:

**2.6 Obligation to Provide Licensed Services**

*Subject to the terms and conditions of this Licence, the Licensee shall render the Telecommunications Services listed in Article 2.1(b) within [twelve (12) months] of the Effective Date, and shall continue to render those Telecommunications Services during the Term. In the event the Licensee does not begin to render one or more Telecommunications Services within [twelve (12) months] of the Effective Date, or ceases to render one or more Telecommunications Services for a continuous period of [six (6) months] or longer (excluding any periods of Force Majeure under Article 20) or for such other period as may be agreed by the Commission, the Commission may terminate by directive the authorization to render the applicable Telecommunications Service or Services. Before adopting a directive under this Article 2.6, the Commission shall apply the procedure set out in Article 18.5.*

7. This new Article 2.6 would ensure Licensees use the authorisations granted to them within a reasonable period of time and continue to use those authorisations or risk losing them. The application of the procedures in Article 18.5 ensures the Licensees will not lose any such rights without notice and will have the opportunity to make submissions to the Commission.

**D. Article 3.1 (Length of Licence Term)**

8. Article 3.1 shall be amended to clarify that the 15-year term of the Licence was subject to lapsing or to earlier suspension or termination in accordance with the terms of the Licence. This modification would not alter the substantive rights and obligations of the Licence and Article 18 addresses the normal expiration and earlier termination of the Licence. The revised Article 3.1 would read as follows:

*The term of this Licence (the "Licence Term") shall be fifteen (15) calendar years, commencing on the Effective Date, unless the Licence is suspended or terminated sooner in accordance with Article 18 of this Licence or under the Telecommunications Act.*

[additions underlined, deletions struck out]

#### **E. Article 3.2 (Extension of Licence Term)**

9. Article 3.2 shall be amended to refer to the requirements and procedures of the Telecommunications Code. The Commission has recently consulted on a new Part 5A to the Telecommunications Code, which when implemented would set out the requirements and procedures for licensing of telecommunications networks and services – including for renewal of Licences. This would make any procedures in the Licence redundant. The heading of Article 3.2 shall also be revised to reflect the substance of the provision more accurately.
10. The revised Article 3.2 would read as follows:

##### **3.2 Renewal of Authorisations**

*Pursuant to Section 24 of the Act, the Commission may, upon application by the Licensee in accordance with the Act, the Telecommunications Code, and the Commission Regulations no later than twelve (12) calendar months prior to the end of the Licence Term, issue a new ~~renew~~ the Licence upon expiration of the Licence Term in accordance with the following: for such term and subject to such terms and conditions as may be set out in the Telecommunications Code or the Commission Regulations at the time the application is made Licensee may apply for a renewal of fifteen (15) years from the expiration of the Licence Term, subject to Article 19.2, by submission of an application for same to the Commission in accordance with Section 24 of the Act, the Telecommunications Code, and the Commission Regulations no later than twelve (12) calendar months prior to the end of the Licence Term.*

[additions underlined, deletions struck out]

11. Given that the effect of these changes is that the Licence would not be renewed or extended, but rather, would be replaced by a new Licence, it is necessary to amend Article 18.2 to remove the reference to the “Extension Term.” The revisions are detailed in section [OO] of this Directive.

#### **F. Article 3.3 (Renewal Procedure)**

12. Article 3.3 shall be deleted, in light of the revisions to Article 3.2 indicated in the preceding section [E].

#### **G. Article 5 (Fees)**

13. Articles 5.1, 5.2, 5.3 and 5.4 shall be amended to more accurately reflect the applicable provisions in the Act and respond to changes that have occurred since 2007. The most substantive change would be in Article 5.2 and would permit the Commission to better manage its cash flow by requiring Licensees to seek the Commission’s approval to make payments on a quarterly basis instead of annually.
14. The revised Articles would read as follows:

##### **5.1 Payment of Industry Levy and Royalty Fees.**

*(a) Consideration for Licence. In consideration for the granting of this Licence and for the Licence to be effective, the Licensee shall pay to the Commission:*

*(i) an annual Industry Levy calculated pursuant to Section 59 of the Telecommunications Act, 2006, and*

(ii) an annual Royalty fee in the amount of three percent (3%), or such other rate as may be prescribed from time to time, of the gross revenues from services provided under this Licence collected by the Licensee, payable in US Dollars no later than 5 April of each year, commencing on the first 5 April, 2007 following the Effective Date.

(b) Adjustments. The Licensee may seek an adjustment from the Commission in the following year for payment on gross revenues not collected by the Licensee during the prior year.

(c) Late Payment Fee. Any such fee not so paid by the date due shall thereafter accrue interest at a rate equal to five percent (5%) per annum in excess of the rate announced by the National Development Bank of the Virgin Islands, or its equivalent, from time to time as its prime lending rate.

### 5.2 Optional Quarterly Payments.

The Licensee may, at its option and with the prior approval of the Commission, pay the annual fee under Article 5.1(ii) for any calendar year in equal quarterly installments on each April 5, July 5, and October 5 of such calendar year and on ~~the~~ January 5 of the following calendar year. Each installment shall be in an amount equal to one quarter (1/4) of the lesser of (i) the Licensee's required annual payment for the prior calendar year; and (ii) the Licensee's estimated required annual payment for the then current calendar year as established in the Licensee's estimated financial statements certified by the chief financial officer of the Licensee and delivered to the Commission on the date of the first such installment. On the April 5 following any calendar year in which the Licensee made quarterly installments under this Article 5.2, the Licensee shall pay to the Commission an amount equal to the required annual fee for such calendar year minus the sum of the installment payments made by the Licensee in respect of such calendar year.

### 5.3 Spectrum Fees.

The Licensee shall pay to the Commission the annual charges for use of the radio spectrum as set forth in the Commission Regulations, or such other mechanism used by the Commission from time to time, beginning on the Effective Date of the Licence and payable in accordance with the Commission Regulations; ~~provided, however, that such fees.~~ The spectrum fees referred to above shall be reasonable in comparison with international standards and will be applied in a fair and equitable manner to all Operators using the radio spectrum.

### 5.4 Total Consideration.

The payments established in this Article 5, constitute the total fees and other consideration for the Licence granted to the Licensee under this Licence; ~~provided, however, that.~~ Notwithstanding the foregoing, all other fees and charges otherwise applicable under the Laws of the Virgin Islands shall continue to apply.

[additions underlined, deletions struck out]

## **H. Article 5.5 (Renewal)**

15. Article 5.5 shall be amended to allow for the fee as applicable to renewal of licences to be specified in an instrument before the date of application and applicable to all Licensees. In the present Licence, the fees payable for a renewal of the Licence “*shall be agreed upon between the Commission and the Licensee at the time the renewal is granted.*” This condition of the Licence is not transparent, as the licence renewal fee would technically not be known until well after the Licensee submitted its renewal application, which introduces an element of uncertainty into the Licence renewal process.

16. Article 5.5 shall be replaced in full to read as follows:

*In the event the Licensee applies for renewal of the Licence pursuant to Article 3, the Licensee shall pay the applicable fees for any renewal period in accordance with the Telecommunications Code or as otherwise stipulated by the Commission.*

17. Further, Article 5.5 (Renewal) and Article 5.6 (Submarine Cable Fees) shall be renumbered Article 5.6 and Article 5.5, respectively, in order to improve the arrangement of provisions in the Licence. .

#### **I. Article 6 (Works and Access to Land)**

18. Article 6 shall be amended by deleting all but the first paragraph. With the exception of the preamble paragraph, the current Article 6 reproduces verbatim the provisions in Part VI of the Telecommunications Act. As a result, it fails to add detail or clarity to the rights and obligations of the Licensee and is redundant. The remaining paragraph will be modified to reflect the fact that the Telecommunications Code is also a possible source of applicable rights and obligations.

19. The revised preamble of Article 6 will read as follows:

*In fulfilling its obligations with respect to the development, operation, and maintenance of a Telecommunications Network for the provision of Telecommunications Services provided in this Licence, the Licensee shall act in accordance with Part VI of the Telecommunications Act, 2006, the Telecommunications Code, the Physical Planning Act, 2004, and all other relevant laws of the Virgin Islands.*

[additions underlined, deletions struck out]

#### **J. Article 7.2 (Provision of Leased Line and Circuit Services)**

20. Article 7.2 shall be amended by deleting the last sentence (commencing “*In the event that (a)...*”) in the first paragraph of the Article.

21. It is not clear whether any Customer used this provision, which allowed for the provision of Lines or Circuits to itself where it was unable to secure the provision of those services from the Licensee or from another Operator within the “Maximum Response Time”. Further, even if it may have been useful in the early period following liberalisation to ensure Licensees provided services, it does not seem particularly relevant in a more mature, competitive market. In addition, the Commission has other tools at its disposal to regulate the timeliness of service delivery (including regulation of quality of services and of dominant operators).

22. The Licensee’s obligation to provide services within the Maximum Response Time would continue to apply. However, the definition of “Maximum Response Time” should also be amended to remove the standard that applied during the first two years of the current Licence, as it is no longer applicable and it would be inappropriate to revert to the lesser standard during the first two years of a renewal term.

23. The revised provision would read as follows:

*For the purposes of this Article 7.2, the “Maximum Response Time” means ~~(a) ninety (90) Working Days after receipt of any application submitted during the first and second years~~ and ~~(b) forty-five (45) Working Days after receipt of any application submitted on or after the second anniversary of the Effective Date.~~*

[additions underlined, deletions struck out]

**K. Article 7.4 (Telecommunications During a Public Emergency)**

24. With the exception of Article 7.4 (e) and of the words “*with other public suppliers*” in Article 7.4 (f), Article 7.4 reproduces verbatim the provisions in section 89 of the Telecommunications Act. As a result, it fails to add detail or clarity to the rights and obligations of the Licensee and is largely redundant. The Article will be modified to refer explicitly to section 89 and to reflect the fact that the Commission Regulations, the Telecommunications Code, and Commissions orders and instructions may also be possible sources of applicable rights and obligations.
25. The revised Article 7.4 will read as follows:

**7.4 Telecommunications During a Public Emergency**

*(a) The Licensee shall comply with section 89 of the Telecommunications Act, 2006, and with all applicable Commission Regulations, the Telecommunications Code and Commission orders and instructions. The Licensee shall cooperate with other public suppliers in the development and implementation of any plans under this Article 7.4.*

*(b) The Licensee shall provide an emergency alert system on all programmed channels of a cable television system or a wireless cable television system, and shall periodically test such emergency alert system in accordance with the Telecommunications Code.*

**L. Article 7.6 (a) (Public Pay Telephone Plan)**

26. Article 7.6 shall be amended by deleting Article 7.6(a) from the Licence.
27. Article 7.6 currently requires the Licensee to provide pay telephone services in accordance with a plan to be agreed with the Commission. The information received for renewal application thus far indicate either that licensees do not provide the service and/or are unable to indicate the main characteristics as applicable to make it possible for the Commission to evaluate the service.
28. Further, the service has largely (but not entirely) been made redundant through the proliferation of mobile services and handsets. Given the diminishing need for the service (and the diminishing associated revenues) but the steady requirement to maintain the pay telephone terminals (and the associated maintenance costs), it is likely no longer economic to provide.
29. Given the effect of this change, it is necessary to amend Article 19.2 (Non-Compliance with the Requirements Concerning Public Pay Telephone Requirements and Service Quality Requirements) to remove references to Article 7.6 (a). These revisions are detailed in section [RR] of this Directive.
30. However, Article 7.6 (b) (Access to Telephony Services) shall be retained. While the obligation to submit a plan for approval and to execute that plan would be removed, those Licensees who choose to offer public pay telephone services should continue to comply with reasonable requirements, such as providing access to all other voice telephony services. Article 7.6(b) will be renumbered Article 7.6(a).

**M. Article 7.7 (Service Quality Requirements)**

31. Article 7.7 establishes an obligation to meet certain minimum quality of service standards for Telephony Services, described in more detail in Annex 3. The Licensee is required to report annually on its performance

against those standards, using the standard form of report in Annex 4, and could be subject to certain monetary penalties set out in Annex 7 for failure to meet those standards.

32. However, Article 7.7 and the related Annexes 3, 4 and 7 should be updated. For instance, Article 7.7 currently refers to the “Local Call Completion Rate” and the “National Long Distance Call Completion Rate.” Annexes 3, 4, and 7, however, establish measurements, targets and/or penalties for the “Local Call Completion Rate Internal to network” and the “Local Call Completion Rate External to Network.” Article 7.7 should therefore be amended to reflect the two Service Quality Requirements that are listed in Annex 3.
33. In addition, Article 7.7 and the related Annexes should be updated by removing the references to digitalisation measurements, targets and penalties. Following the replacement of the networks damaged by the 2017 hurricanes, it is unlikely that any Subscriber Lines remain served by non-digital central office equipment or that this Service Quality Requirement serves any purpose.
34. Further, the targets set in Annex 3 should be updated to reflect today’s operating environment.
35. It should be noted that the measurements required by Annex 3 apply to both fixed and mobile telephony combined. This means issues concerning call completion or fault repair on one type of network would be less apparent by being averaged with the measurements from the other type of network, making it more difficult to focus on possible solutions, even though the customer’s experience on that network would be poor. This can be addressed by requiring separate measurements and targets for fixed and mobile telephony in Annex 3, separate reporting lines in Annex 4, and separate penalties in Annex 7.
36. Of greater concern is the fact that the Service Quality Requirements in the current Unitary Licence apply to the Licensee’s “Telephony Services.” While this includes both “Basic Telephony Service” and “Cellular Telecommunications Service,” it does not encompass packet-switched data services such as broadband Internet access. While this focus on voice services may have been appropriate in 2007 when the Unitary Licence was first issued, the economy and consumers today rely much more heavily on Internet access services and are correspondingly more affected by service quality problems involving those services.
37. This issue can be addressed by replacing the term “Telephony Services” in Article 7.7 with the broader term “Licensed Services,” and by adding one or more Service Quality Requirements applicable to Internet services.
38. As required by Part 3 of the Telecommunications Code, Licensees measure, among other things, “Data transmission speed achieved,” “Unsuccessful data transmission ratio,” and “Delay” in respect of their Internet services.<sup>1</sup> However, the Code does not establish targets.
39. The Commission considers that the following Service Quality Requirements are directly relevant to the concerns of consumers and the service quality issues they face, and are consistent with the Quality of Service Requirements in the Telecommunications Code that Licensees already measure: Download Speed, Upload Speed, Packet Loss, and Latency. These will be added to the Service Quality Requirements in Article 7.7(b) with appropriate measurements and targets added to Annex 3.
40. The Commission also considers that metrics designed for fixed networks do not adequately measure performance on mobile networks. However, mobile networks have clearly increased in importance to the public since 2007 and performance should be adequately measured. Service Quality Requirements specific to mobile networks, i.e. Call Setup Success Rate, Network Availability, Dropped Call Rate, Handover

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<sup>1</sup> These are separate from the “Minimum Guaranteed Access Line Speed” in the 2016 Flow “Customer Charter on Fixed Broadband Service.” This does include a target, and consequences for failure to meet the target, but applies only to Flow by virtue of their dominance in the markets for fixed retail broadband and fixed wholesale broadband access.

Success Rate, Call Setup Time and Blocked Call Rate, will therefore be added to the Service Quality Requirements in Article 7.7 (b) with appropriate measurements and targets added to Annex 3.

41. Further, to ensure consistency among all Licences, the provisions regarding inspection, maintenance and non-ionizing radiation that currently apply in the Licence issued to Digicel shall be included as Article 7.7(c).
42. Taking the foregoing into account, it is proposed, therefore, to replace Article 7.7 with the following:

(a) Quality of Service. The Licensee shall comply with the Quality of Service Requirements set out in the Telecommunications Code. The Licensee shall also comply with such other quality of service indicators, metrics, targets, reporting obligations and enforcement mechanisms as may be agreed upon between the Licensee and the Commission.

(b) Service Quality Requirements. Without limiting the foregoing, the Licensee shall be obligated to provide the minimum quality of service of its Licensed Telephony Services for calls carried within provided using the Telecommunications Networks of the Licensee in accordance with: (i) the Local Call Completion Rate Internal to Network, (ii) the Local Call Completion Rate External to Network National Long Distance Call Completion Rate, (iii) the International Call Completion Rate, (iv) the Fault Recovery Rate, (v) the digitisation of the network, (vi) the maximum connection time for Subscriber Lines in urban areas, and (vii) (viii) the average connection time for Subscriber lines in rural areas, (viii) the average connection time for Subscriber Lines on Sister Islands, (ix) download speed, (x) upload speed, (xi) packet loss, (xii) latency, (xiii) call setup success rate, (xiv) network availability, (xv) dropped call rate, (xvi) handover success rate, (xvii) call setup time, and (xviii) blocked call rate, in each case as set forth in Annex 3 (collectively referred to as "Service Quality Requirements").

(c) Inspection; Maintenance; Non-Ionizing Radiation. The Licensee shall ensure that its services meet the Commission's and international standards, and the Commission reserves the right to inspect the Licensee's premises during regular business hours to ensure the Licensee's services meet the required standards. The Licensee shall establish and maintain an efficient repair, maintenance and servicing system for equipment, devices and software utilized in its Services. For the protection of human health, the Licensee shall adhere to the International Commission on Non-Ionizing Radiation Protection Guidelines for Limiting Exposure to Time-Varying Electric, Magnetic, and Electro-Magnetic Fields (Up to 300 GHz) published in Health Physics Vol. 74, No. 4 of April 1998 as may be amended from time to time.

[additions underlined, deletions struck out]

## **N. Article 7.7A (Advertising and Marketing Practices) (New)**

43. A new provision, Article 7.7A, shall be inserted to address matters concerning the Licensee's advertising and marketing practices or delivering on promises made to Subscribers.
44. As the market matures and one Licensee's market share growth becomes increasingly dependent on acquiring customers from other Operators instead of from growth of the overall market, Licensees may become tempted to market their services more aggressively and it is expected that these issues will come more and more to the fore.
45. The Commission has not yet promulgated rules regarding advertising standards, marketing practices and delivering on promises, and does not intend to do so without consulting broadly with Licensees and the public. However, by including a reference in the Licence to such new rules, it ensures that they become Licence obligations once enacted.
46. The new provision shall be inserted immediately after Article 7.7 and read as follows:



*The Licensee shall ensure that its advertising and marketing communications are fair and not misleading and, without limiting the foregoing, shall comply with any applicable requirements specified in the Telecommunications Code or the Commission Regulations.*

47. Due to the effect of this change, the remaining Articles shall be renumbered accordingly.

**O. Article 7.8 (c) (Approval of Equipment) (New)**

48. A new provision, Article 7.8(c), shall be inserted to require the Commission's approval before new telecommunications equipment is introduced into a Licensee's network. This requirement is consistent with the Commission's powers under section 45 of the Act.

49. The new provision shall be placed after the current Article 7.8(b) and would read as follows:

*(c) Approval. The Licensee shall seek the Commission's prior written approval for any other equipment (including any new technology or change in any technology deployed) to be used in the operation of its Telecommunications Network or that is to be part of the Telecommunications Network or which is to be connected to the Telecommunications Network and which was not tested and approved under Section 45 of the Telecommunications Act, whether such other equipment is in addition to or is intended to replace the existing equipment or part thereof.*

50. The existing Article 7.8(c) (Rights of the Commission) will be renumbered Article 7.8(d).

**P. Article 7.9 (a) (Obligation to Maintain Confidentiality)**

51. Article 7.9(a) shall be amended to restrict the use of business secrets or personal data and to impose obligations regarding transparency of the use of data.

52. One of the fundamental changes in the telecommunications sector in the BVI since 2007 is the increased importance of Internet connectivity to individuals and the economy. However, the penetration of Internet services and platforms into every aspect of people's lives has enabled Licensees to collect more data about those people.

53. Article 7.9 imposes obligations on Licensees to protect the confidentiality of communications over its network, albeit only from intrusion by the Licensee or its employees or agents, and to protect the confidentiality of any business secrets or personal data that it may collect from its Subscribers in the normal course of business. Notably though, it does not restrict the use of those secrets and data, and it does not impose obligations regarding transparency of the use of the data or obtaining Subscriber consent to use or transfer of data.

54. There is support for such restrictions on use of customer information in section 18(1) of the Telecommunications Act which requires Public Suppliers to refrain from using confidential information or information obtained in connection with operation of a network or provisions of a service, except for certain specified reasons.<sup>2</sup>

55. It is proposed, therefore, that the following be inserted after the second sentence of Article 7.9 (a):

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<sup>2</sup> These are to "(a) operate the network or service, as the case may be; (b) bill and collect charges; (c) protect the rights or property of the public supplier; or (d) protect other licensees from fraudulent use of their networks or services."

*The Licensee shall not disclose or share such business secrets and personal data with any other person, including its Affiliates, without the Subscriber's prior express and written approval, except and only to the extent as may be necessary to (a) operate the network or service, as the case may be; (b) bill and collect charges; (c) protect the rights or property of the public supplier; or (d) protect other licensees from fraudulent use of their networks or services; and the Licensee shall not use such business secrets and personal data for any other purposes.*

56. Article 7.9 (a) shall also be amended by inserting an obligation to (1) require compliance with section 18 of the Act and any codes of practice issued by the Commission and (2) require disclosure of subscriber information to law enforcement agencies.

57. The full Article 7.9 (a) would read as follows:

***(a) Obligation to Maintain Confidentiality.** The Licensee shall maintain the confidentiality of the content of all communications over its network from interference, eavesdropping or recording by the Licensee or any of its employees or agents. The Licensee shall ensure the confidentiality of subscriber information, especially for ex-directory numbers, and comply with section 18 of the Telecommunications Act and any codes of practice or guidelines issued by the Commission in relation to the use of subscriber information. The Licensee shall institute reasonable measures and procedures to safeguard the confidentiality of business secrets and personal data concerning its Subscribers which it acquires in the course of its business. The Licensee shall not disclose or share such business secrets and personal data with any other person, including its Affiliates, without the Subscriber's prior express and written approval, except and only to the extent as may be necessary to (a) operate the network or service, as the case may be; (b) bill and collect charges; (c) protect the rights or property of the public supplier; or (d) protect other licensees from fraudulent use of their networks or services; and the Licensee shall not use such business secrets and personal data for any other purposes. Notwithstanding the foregoing, the Licensee shall disclose subscriber information, where deemed necessary, to the Commission or such other relevant law enforcement agencies in the lawful exercise of their functions and duties. The Licensee shall appoint one of its officers to be in charge of the implementation, compliance and supervision of such measures and procedures. On the 15th of February of each calendar year starting with the first calendar year following the Effective Date, 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.*

[additions underlined, deletions struck out]

#### **Q. Article 7.9 (c) (Lawful Intercept)**

58. Article 7.9 shall be amended to remove the reference to the 'Effective Date'. This Article mandates that the Commission specify a methodology for providing lawful intercept and that the Licensee implement it within 24 months of the Effective Date. As the original deadline for implementation passed in 2009, this aspect of Article 7.9 (c) is obsolete. However, a mandate to implement a methodology for providing lawful intercept remains appropriate.

59. The revised Article 7.9 shall read as follows:

*The methodology for providing lawful intercept shall be specified by the Commission and shall be implemented by the Licensee within twenty-four (24) months of ~~the Effective Date~~ being specified or modified by the Commission.*

[additions underlined, deletions struck out]

**R. Article 7.9A (Cyber Security) (New)**

60. A new article, Article 7.9A, shall be inserted to require Licensees to proactively address matters of cyber security and the protection of their networks.
61. As Internet access services have increased in importance and as the local global economy has become more interconnected in the years since 2007, the importance of attending to cybersecurity and protecting telecommunications networks has increased.
62. The following provision shall be inserted immediately after the existing Article 7.9:

**7.9A Cyber Security.**

*The Licensee shall at all times maintain the proper functioning of its Telecommunications Networks and its Telecommunications Services. The Licensee shall submit a plan to mitigate the impact of cyber threats and attacks on its Telecommunications Networks and Telecommunications Services to the Commission within [twelve (12) months] of the Effective Date for approval by the Commission and shall review and update that plan as required.*

63. Due to the effect of this change, the remaining Articles shall be renumbered accordingly.

**S. Article 7.10 (d) (Directory Assistance Requirements)**

64. Article 7.10(d) shall be amended by removing the obligation to produce a printed directory.
65. Article 7.10 (d) currently imposes on all four Unitary Licensees the obligation to maintain a directory database, to produce a printed directory, to provide a directory information service, and to comply with a number of related obligations including the sharing of directory listings. While it may make sense to require Licensees to make listings available to each other upon request, it appears impractical to require each Licensee to produce its own printed directory (“... shall create and update annually a printed directory ...”) as, taken to its logical conclusion, up to four different printed phone books would be distributed throughout the BVI. Even if each of the four contained a complete set of all listings, the commercial advertising which is critical to defraying the costs of the printed directory would be split among the four directories and it is possible that none would be commercially viable.
66. Further, and significantly, printed directories certainly do not retain the importance that they once held, given that a large majority of voice subscriptions are now mobile,<sup>3</sup> rather than fixed, and mobile telephone numbers tend not to be included in printed directories. Moreover, many commercial phone numbers can be easily accessed by searching for their websites.
67. The obligation to maintain a directory database shall be retained, along with the obligations, to provide a directory information/enquiry service, to share listings upon request, and to impose certain obligations in the event the Licensee chooses to produce and distribute a printed directory (e.g. include government listings free of charge).
68. The revised Article 7.10(d) shall read as follows:

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<sup>3</sup> The ITU reports that fixed subscriptions in the BVI have fallen from 14,753 in 2007 to 11,167 in 2016 (i.e. prior to the hurricanes) while the number of mobile subscriptions has increased over the same period from 20,700 to 39,689 (this last figure almost certainly understates the actual level of mobile subscriptions as it is based on data from 2 operators not 3). <https://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx>

(d) **Directory Assistance Requirements.** *The Licensee shall comply during the Licence Term with the following directory assistance requirements for Subscribers:*

(i) *The Licensee shall set up, operate, and maintain a directory database. This information shall be made publicly accessible on cost-based terms either manually or electronically. ~~Additionally, the Licensee shall create and update annually a printed directory which it shall distribute to Subscribers at no cost. The Printed directory shall list all Subscribers in the British Virgin Islands, including those Subscribers who are serviced by other Operators whose Subscriber base exceeds one thousand (1,000) subscribers and whose Subscriber information has been duly notified to the Licensee, but~~ Except for those Subscribers who have specifically requested not to be included, ~~the~~ The Licensee shall be obligated to provide such Subscriber information as necessary to compile and print a Directory to Other Operators. Government policy shall be to require all Operators to provide such information to each other in the best interest of the British Virgin Islands Subscribers. Such information supplied for the purpose of printing a Directory shall be used solely for that purpose. The directory shall include, as a minimum, the names of the Subscribers in alphabetical order, their addresses and Basic Telephony Service telephone number, a list of interurban and international area codes and a list of emergency numbers. ~~The Licensee shall be obligated to provide an updated printed directory to each of its Subscribers annually free of charge beginning six (6) months from the Effective Date.~~ The minimum Subscriber information in the Directory shall be published free of charge; provided, however, that the Licensee shall have the right to charge other Operators a reasonable service fee based on cost of the publication of their Subscriber information. Additionally, the Licensee shall have the right to charge for commercial advertising enhanced directory listings and the exclusion of unpublished numbers.*

(ii) *In the event the Licensee creates the directory referred to in Article 7.10(d)(i) ~~or through a separate directory, the form and content of which shall be agreed between the Licensee and the Commission,~~ the Licensee shall provide or make available to Subscribers, free of charge, ~~providing~~ a listing of national, provincial and local governmental authorities, institutions, and offices. The Commission shall coordinate with Licensee and such governmental entities so that the Licensee is provided with the information necessary to compile and update such directories on a regular basis.*

(iii) *The directory information services provided by the Licensee shall include a service or information, as the case may be, whereby directory information is made available in a form which is appropriate to meet the needs of persons who are blind or otherwise disabled as to be unable to use a telephone directory in a form which it is generally available to persons to whom the Licensee provides Basic Telephony Service. The service so provided to such persons shall, from a date agreed to between the Licensee and the Commission, be provided free of charge or, if the Commission is satisfied that is not practicable, the Licensee may be permitted by the Commission to levy a reasonable charge related to the cost of such service.*

(iv) *The Licensee shall cooperate with the other operators to provide a directory information service through which callers may receive information on the telephone numbers of Subscribers as well as international numbers for a reasonable charge to be approved by the Commission.*

[additions underlined, deletions struck out]

## **T. Article 7.11 (c) (Hearing Apparatus for Public Pay Telephone Service)**

69. Article 7.11(c) shall be amended by removing the last sentence, which refers to the timeline within which the target set in the provision shall be accomplished. The 5-year deadline has passed and this part of the provision is no longer applicable. It is also proposed that the percentage of accessible payphones be redefined to be at least 50% of all payphones operated or such other higher percentage as may be agreed between the Licensee and the Commission.

70. The latter change will ensure that a minimum standard continues to apply, to ensure that payphones remain accessible to those who require “hearing aids” and to require Licensees who provide payphone services to take reasonable steps to ensure they are suitably equipped, whether or not the Licensee and Commission agree to a different percentage.
71. Consistent with the proposal to remove the obligation to develop a public pay telephone plan, the obligation in this Article shall be limited to those Licensees who actually provide pay telephone services. Accordingly, Article 7.11 (c) would be modified as follows:

*(c) **Hearing Apparatus for Public Pay Telephone Service.** If the Licensee offers Public Pay Telephone services, the Licensee shall take all reasonable steps to install, and keep installed in at least fifty percent (50%) of Public Pay Telephones 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.*

[additions underlined, deletions struck out]

#### **U. Article 7.13 (a) (Establishment of Accounting System)**

72. Article 7.13(a) shall be amended to refer to all elements that an accounting system should record. Since 2007, the Licensee has included a requirement that the Licensee seek the Commission’s approval for an accounting system. There is, however, a gap in the specifications for this accounting system in so far as it inadvertently omitted a number of relevant items.
73. Given that several Licensees have been declared dominant in one or more relevant markets since 2007, it is also necessary that the accounting system established by a Licensee separately identify its wholesale and retail businesses if specified by the Commission. This requirement will be reflected in a new Article 7.13(b) (with the existing Article 7.13(b) renumbered accordingly).
74. The revised and new provisions will read as follows:

*(a) **Establishment of Accounting System.** The Licensee shall submit to the Commission within six (6) months after the Effective Date a proposal for an accounting system which allows the recording of assets, liabilities, equity, investments, expenses and revenues in accordance with Generally Accepted Accounting Principles ("GAAP").*

*(b) **Accounting Separation.** The Licensee shall within the period specified by the Commission prepare and maintain accounting records in a form that enables the activities of any business unit specified by the Commission to be separately identifiable. The accounting system referred to in subparagraph (a) shall:*

*(i) estimate the cost of discrete elements of the retail and wholesale services on a relevant market basis and identify the associated costs and revenues of providing those services;*

*(ii) identify individual wholesale and retail services and their respective cost*

elements in sufficient detail to support the development cost-oriented retail and wholesale charges, as applicable; and

(iii) be consistent with the Commission Regulations and the Telecommunications Code.

*(c) **Separate Subsidiary.** If (i) the Licensee fails to comply with its obligations under subparagraph (a) and (b) above or if the accounting system established by the Licensee fails to achieve the objectives set forth in subparagraph (a) above or if the accounting separation carried out by the Licensee fails to achieve the objectives set forth in subparagraph (b) above and (ii) if the Commission deems it necessary and appropriate to supervise compliance with the provisions of Article 8 below, it may order the Licensee to provide certain Licensed Services through a separate division or divisions, a separate branch or branches or a separate subsidiary or subsidiaries.*

[additions underlined, deletions struck out]

## **V. Article 7.14 (Record Keeping and Reporting Requirements)**

75. Article 7.14 shall be amended to reflect the applicable provisions and respond to changes since 2007 more accurately. This Article 7.14 establishes four obligations: a general obligation to maintain records, two obligations to file specific annual reports by specific dates, and a fourth general obligation to respond to other Commission requests. These four obligations shall be separated to reflect each requirement individually. The second obligation, now referred to as (b) shall make reference to International Financial Reporting Standards (IFRS), as opposed to GAAP. Reference to the applicable provisions of the Act shall also be included, to clarify the powers being exercised by the Commission.
76. Further, since issuance of the Licence, the Commission has experienced persistent or recurring issues with late or delinquent filing of reports required of Licensees under the Licence or the Code. The importance of accurate and timely information to the work of a regulator is likely to impact the ability of a regulator to fulfil its statutory functions. It is, therefore, necessary to strengthen the Licensee's reporting requirements. The penultimate sentence of the obligation now referred to as (d) shall be modified to require responses by deadlines set out by the Commission. This would help clarify the Licensee's obligations and, if necessary, facilitate the imposition of sanctions for infractions.
77. The list of information shall also be expanded to clarify that the Commission can also request other information, including information on the Licensee's Telecommunications Networks.
78. The revised Article 7.14 would read as follows:

*(a) Obligation to Maintain Records. The Licensee shall establish and maintain adequate records to permit the effective supervision and enforcement of the terms of this Licence.*

*(b) Audited Financial Statements. Pursuant to section 69 of the Telecommunications Act, 2006, ~~within ninety (90) Working Days of the end of each fiscal year of Licensee,~~ Licensee shall deliver to the Commission its year-end ~~balance sheet~~ audited financial statements and the related statements of operations, equity and cash flows of Licensee, in each case accompanied by a report thereon of independent public accountants stating that such financial statements fairly present the financial position of the Licensee at the dates indicated and were prepared in accordance with ~~GAAP~~ IFRS.*

*(c) Report on Operations & Services. Pursuant to section 69 of the Telecommunications Act, 2006, ~~within ninety (90) Working Days following each anniversary of the Effective Date,~~ 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 this Licence have been followed during the twelve (12) month period ending on such anniversary which report shall be certified by two directors of the Licensee and shall be substantially in the form of Annex 4 attached hereto.

(d) Other Requests for Information. In addition to the foregoing, pursuant to sections 69 and 70 of the Telecommunications Act, 2006, the Commission may request the Licensee to submit other periodic reports, financial statements, statistics, operating agreements, ownership agreements, business plans, service or network development plans and other data or information regarding the Licensee's operations and activities or Telecommunications Networks and Telecommunications Services, and the Licensee shall respond to the request within such timeframe as may be specified in the request.

[additions underlined, deletions struck out]

#### **W. Article 8.1 (Publication of Tariffs) (New)**

79. A new article, Article 8.1, shall be inserted to introduce a number of provisions which would regulate, among others, the publication of tariffs. This would ensure transparency for consumers and is consistent with the Commission's powers under section 29(3) of the Act.
80. The new provision shall be placed before the existing Article 8.1 (Dominant Public Supplier) and read as follows:

##### **8.1 Publication of Tariffs**

*The Licensee shall publish all Tariffs for the provision of its Telecommunications Services, whether regulated or unregulated, on its website, by providing a copy of the Tariff or a relevant part of it to a Customer, and by placing a copy of the Tariff in the Licensee's retail office. A Tariff shall include (i) the name of the Licensee, business address and contact number; (ii) a clear description of the Telecommunications Service offered or provided by the Licensee; (iii) any standard rates and retail prices (including discounts); (iv) the quality of service levels offered; (v) the time for initial connection; (vi) the standard contract conditions offered, including minimum contractual period; (vii) details of any compensation or refund policy; (viii) information on any types of maintenance services offered; and (ix) information on means for resolving disputes. The Licensee shall comply with any applicable requirements in the Telecommunications Code or the Commission Regulations regarding the terms and conditions of usage of the Licensee's Telecommunications Network or Licensed Services.*

81. Note that due to the effect of this change, all remaining articles in Article 8 will be renumbered accordingly.

#### **X. Article 8.1 (Dominant Public Supplier)**

82. The current Article 8.1 will be revised to reflect changes made in 2012 when the Commission designated Flow, CCT and Digicel to be dominant suppliers in their respective markets for call termination services, and changes made in 2015 when the Commission designated Flow to be a dominant supplier in the markets for the provision of terrestrial International Private Leased Circuit (IPLC) Services and for International Managed Data Services (IMDS).
83. The changes referenced above were inserted in Article 8.1 which refer to the applicable Annexes 8 and 9 setting out the relevant remedies to that dominance. However, the Commission only inserted the clauses in the Licences of the Licensees to which the designations and obligations apply. In order to ensure all Unitary Licences contain the same terms and conditions, Articles 8.1 (iii), (iv) and (v) shall be included in all

Licences. While these Articles refer to two Annexes (8 and 9) which would also be inserted into the Licences, they would be marked as “intentionally left blank” for those Licensees to which the Annexes do not currently apply.

84. This would ensure uniform terms and conditions in all Licences, without imposing new obligations on Licensees where they do not yet apply.

85. The full Article 8.1 (to be renumbered 8.2) shall therefore read as follows:

**8.1 Dominant Public Supplier**

i. *Prices for telecommunications services shall be determined by providers in accordance with the principles of supply and demand in the market.*

ii. *Should the Licensee be designated a supplier dominant in the market for call termination services in accordance with Section 26(4) of the Telecommunications Act, 2006 the Commission shall regulate the wholesale call termination rates payable to the Licensee by any other licensee or operator of telecommunications services interconnected to the Licensee’s networks and shall impose such rates as outlined in Annex 8.*

iii. *Annex 8 shall not apply to retail rates and prices chargeable by the Licensee.*

iv. *Should the Licensee be 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 shall:*

- a) *provide Wholesale Landing Station Services to any other licensee in the British Virgin Islands at rates which do not exceed the rates set out in Annex 9;*
- b) *provide Wholesale Landing Station Services to any OCM at rates which do not exceed the rates set out in Annex 9;*
- c) *notwithstanding (a) and (b) above, provide Wholesale Landing Station Services to any other licensee in the British Virgin Islands at rates which do not exceed the cost of self-provision;*
- d) *offer, at a minimum, the services detailed in the reference contracts drafted for the purposes of this regulation and shall not offer a Public Supplier or an OCM terms which are less favourable than those set out such in reference contracts. The reference contracts (the Colocation Agreement and the Colocation Remote Hands Agreement) shall contain minimum levels of performance parameters, environmental Key Performance Indicators and response times. These agreements follow the requirements of this regulation and are available upon request from the Commission;*
- e) *upon request by the Commission from time to time, provide the Commission with information in relation to the Licensee’s offer of rates to other licensees in the British Virgin Islands in such form and within such period of time as may be required by the Commission.*
- f) *in order to fulfil the obligations set out in paragraphs (a) to (e) above, execute revised agreements with other licensees and shall submit each such Agreement to the Commission no later than 30 days after [the Effective Rate Revision Date]. The Licensee shall offer the above Wholesale Landing Station Services to all OCMs and provide proof of such to the Commission within 30 days of this*



*Directive entering into force. The Licensee shall submit each such Agreement to the Commission within 30 days of an agreed contract.*

g) *not be obliged to provide Wholesale Landing Station Services where one or more of the following apply:*

i. *The person seeking such services is neither an OCM nor a Public Supplier*

ii. *The OCM and/or Public Supplier uses or seeks to use the Services other than in connection with gaining access to (other) international subsea cable systems hosted by the Licensee at its cable landing stations*

iii. *Provision of the Services would in the reasonable opinion of the Licensee give rise to significant health, safety, technical or operation issues that may adversely impact the operation of other equipment located at the facilities or services provided form or through the facilities*

iv. *There is no suitable and appropriate space available for the provision of the Services.*

v. *In the event that there is a dispute between the Licensee and a Public Supplier or between the Licensee and an OCM as to any other matter that might arise in relation to the Licensee's obligation to provide Wholesale Landing Station Services, either party may refer the dispute to the Commission and the Commission shall make a determination with respect to the guidelines set out under the Telecommunications Code (Part 6) (Interconnection and Access to Facilities and Utility Installations) Requirements, 2011.*

## **Y. Article 9.3 (Interconnection Agreement and Interconnection Charges for Telecommunications Services)**

86. Article 9.3 shall be deleted due to its obsolete nature.

87. This Article 9.3 established an obligation to negotiate interconnection agreements with named Licensees (the specific Licensees vary across the four Licences) without delay following issuance of the Licence in 2007, and a process for review of the interconnection agreements and approval by the Commission. This provision was critical during the liberalisation process in 2007, as it ensured the voice networks of the new Licensees would be interconnected as quickly as possible, thereby facilitating competition and ensuring customers on one network could call customers on any other network at equal/same rates.

88. However, interconnection among networks has been in place since 2007 and 2008 depending upon the networks. This Article is therefore obsolete. There are also general obligations to interconnect with other Licensees in Articles 9.1 and 9.2. This means that Article 9.3 does not need to be retained in order to ensure all networks are interconnected.

89. Note that due to the effect of this revision, all articles remaining in Article 9 shall be renumbered accordingly.

## **Z. Article 9.4 (Interconnection Default Rates)**

90. Article 9.4 shall be deleted due to its obsolete nature.

91. This Article empowered the Commission to establish default rates for interconnection services which would apply until the Licensees had agreed upon an interconnection agreement. Because the parties agreed to interconnection in 2007-2008, this provision is now obsolete. Further, the matter of appropriate interconnection rates for fixed and mobile voice calls has been addressed in Annex 8 of the Licence.

92. Note that due to the effect of this revision, all articles remaining in Article 9 shall be renumbered accordingly.

#### **AA. Article 9.7 (Number Portability)**

93. Article 9.7 shall be amended to allow the Commission to address the matter of number portability in the future through Regulations, recognising the value of the service to consumers and its representation of choice.

94. When the Licences were first drafted in 2007, it was assumed there would be a transition period following which an obligation to provide number portability services to other Licensees would be established. The transition period was not implemented, which left the obligation to provide number portability services “suspended”.

95. The revised Article 9.7 shall be revised as follows:

*The ~~implementation of Number Portability shall be suspended and thereafter the~~ Licensee shall provide Number Portability in accordance with and on terms and conditions specified in such Commission Regulations as may be ~~the regulations in effect~~.*  
[additions underlined, deletions struck out]

#### **BB. Article 9.8 (Carrier Pre-selection)**

96. Article 9.8 shall be amended to allow the Commission to address the matter of carrier pre-selection in the future through Regulations, in order to preserve the possibility of introducing the service.

97. As was the case with number portability, it was originally envisaged that Licensees would provide carrier pre-selection services after a transitional period. That concept of transition period was not implemented and, as a result, the obligation to provide carrier pre-selection was suspended.

98. The revised Article 9.8 shall be revised as follows:

*The ~~provision of Carrier Pre-selection shall be suspended and thereafter the~~ Licensee shall provide Carrier Pre-selection in accordance with and on terms and conditions specified in such Commission Regulations as may be ~~the regulations in effect~~.*  
[additions underlined, deletions struck out]

#### **CC. Article 10 (Competition Rules)**

99. Article 10 shall be amended by adding a new article, Article 10.1, and revising the present Article 10.1 (and renumbering that article and the other articles accordingly) to clarify the process as applicable to determine whether a Licensee is dominant and to reflect the provisions of the Act.

100. A number of provisions in the Licence address situations where a Licensee may have been found to be dominant and remedies are required to constrain that Licensee’s behavior. However, the Licence does not specify the procedures to be applied in determining whether a Licensee is dominant in a market. In addition, the language used in Article 10.1(a) does not reflect the language used in section 26 of the Act or international best practice regarding defining abuse of dominant position.

101. The new and revised provision shall read as follows:

**10.1 Market Analysis and Declaration of Dominance**

When determining whether the Licensee is dominant in a relevant market, the Commission shall consider the criteria under Section 26 of the Telecommunications Act, 2006, applicable Commission Regulations, and the framework, if any, that the Commission may have published for the review of Telecommunications markets.

**10.2 Prohibition against Monopolistic and Anti-Competitive Practices.**

(a) **Abuse of Dominant Position.** *Subject to the provisions of Section 26 and 29 of the Telecommunications Act, 2006, the Licensee shall not individually or jointly with others, engage in or continue or knowingly acquiesce in any activities or practices, 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 Telecommunications Networks or Communications Services. Without limiting the generality of the foregoing, any such act or omission shall include:*

(i) *any abuse by the Licensee, either independently or with others, of a dominant position which unfairly excludes, or limits permitted competition between the Licensee and any other party;*

(ii) *entering any Contract, agreement, arrangement or understanding or engaging in any concerted practice with any other party, which has or is likely to have the purpose or effect of unfairly preventing, restricting, or distorting ~~unfairly prevents, restricts or distorts~~ competition; or*

(iii) *the effectuation of anti-competitive changes in the market structure, and in particular, anti-competitive mergers, joint ventures and acquisitions in the communications sector.*

[additions underlined, deletions struck out]

102. Note that due to the effect of this revision, all articles remaining in Article 10 shall be renumbered accordingly.

**DD. Article 10.1 (b) (General Prohibition against Cross-Ownership Between the Licensee and [Named Licensees])**

103. Article 10.1(b) shall be amended to refer to “Public Suppliers” generally instead of the Unitary Licensees by name. This provision contains a general prohibition against one Licensee owning or being owned by another Licensee, whether directly or indirectly through an affiliate or a shareholder. However, the prohibition refers to the Licensees by name and, as a result, each Licence has a slightly different clause and therefore a slightly different set of obligations. For example, each of the CCT, Flow and CATV Licences refer to the other two Licensees but not Digicel (which was not licensed at the time), while the Digicel Licence refers to the other three. This structure reveals an assumption underlying the Article: that there would only be three, then four, Licensees. If another entity were to be licensed, the prohibition would not apply to that entity.

104. The prohibition, however, has been difficult to manage. While the Article is designed to police acquisitions of one Licensee by another, section 16 (2) of the Telecommunications Act effectively assigns responsibility

to approve transfers of significant interests in a Licensee to the Minister instead of the Commission. Nevertheless, it is still useful to retain this prohibition. Its fundamental purpose is to ensure competition among Licensees continues to be effective and is not compromised by market consolidation. It remains necessary until other tools to control consolidation (such as merger guidelines) are established.

105. The term “Public Supplier” is defined in Annex 1 of the Licence to mean “an operator or a service provider”. In modifying the provision to reflect this term, it will widen the scope of application of the Article to other entities in the event the Commission grants additional licences in the future. This would also widen the scope of application to licensees of services other than Telephony Services, which would acknowledge the increasing importance of Internet access services in the current market. Further it is recommended that the Article include an express reference to the Minister’s responsibility under section 16 (2) of the Act.
106. The revised Article 10.1 (b) shall be renumbered 10.2 (b) and read as follows:

**(b) General Prohibition against Cross-Ownership between the Licensee and Other Public Suppliers** ~~[Other Unitary Licensees]~~. Pursuant to Section 17(c) of the Telecommunications Act, 2006, neither the Licensee nor any of its Affiliates or any of its Shareholders shall hold or acquire any ownership interest in another Public Supplier ~~Cable & Wireless or any of its Affiliates, or BVI Cable TV or any of its Affiliates, or any other Licensee of Telephony Services; and neither Cable & Wireless nor any of its Affiliates or any of its Shareholders, nor BVI Cable TV~~ no other Public Supplier or any of its Affiliates or any of its shareholders shall hold or acquire any ownership interest in the Licensee or its Affiliates, unless prior approval is granted to the Licensee pursuant to Section 16 (2) of the Act.  
[additions underlined, deletions struck out]

107. As noted above, this proposal would extend the prohibition on cross-ownership to all Public Suppliers. If the Commission considers that the public interest would be better served by focusing the prohibition solely on persons holding Unitary Licences (i.e., if the Commission is less concerned about consolidation among Public Suppliers with network- or service-specific Licences), the revised Article could refer to “... *Public Supplier holding a Unitary Licence*” instead.

#### **EE. Article 10.1 (b)A (Joint Undertakings) (New)**

108. A new article, Article 10.1(b)A, shall be inserted to specify that two Licensees under common control (whether by virtue of common ownership or common management) would be deemed to be a single, joint enterprise, and regulated as if they held only one Licence.
109. A weakness has been identified in the licensing framework, namely that the licensing framework assumes there are four independent competing Unitary Licensees in the market which are regulated accordingly, but that two entities could nevertheless merge in practice into a joint enterprise and yet retain two full Unitary Licences with all the rights attached to them. This could mean that the joint enterprise could obtain preferential access to resources intended to be shared among Unitary Licensees (for example, spectrum) and therefore potentially secure a competitive advantage in the market. This was not contemplated in 2007 when the Unitary Licences were first issued. Indeed, the original intent of Article 10.1 (b) was to ensure the four Unitary Licensees remained independent, competing entities.
110. In order to ensure the licensing framework reflects the reality of the state of competition rather than the formalities of which entities hold which licensing documents, this new paragraph shall be inserted in Article 10.1 (accordingly renumbered 10.2, due to the effect of changes in this Directive) immediately after the prohibition on cross-ownership.

111. The new paragraph shall be renumbered 10.2 (c) and read as follows:

**(b)A Joint Undertaking.** *Notwithstanding Article 10.1 (b),<sup>4</sup> the Licensee and another Public Supplier shall be deemed to be a single undertaking and treated by the Commission as if they were a single Licensee, if*

*(i) the Licensee directly or indirectly controls, is controlled by, or is under common control with, the Public Supplier; or*

*(ii) one or more individuals hold senior management positions in both the Licensee and the Public Supplier.*

**FF. Article 10.1 (c) (General Prohibition against Cross-Subsidies) and Article 10.1 (d) (Cross-Subsidisation)**

112. Article 10.1(c) shall be amended to reflect the removal of the reference to paragraph (d) and Article 10.1(d) shall be deleted accordingly, due to it being obsolete in nature.

113. Article 10.1 (d) prohibits using revenues from Telephony Services to cross-subsidize other Telecommunications Services, but was to apply only during the transition period. The concept of transition period was removed from the Licences in 2007. Further, even if it had remained, that Transition Period would now have ended. Article 10.1 (d) is therefore obsolete and should be removed from the Licence. This would also require removing the reference to Article 10.1 (d) in Article 10.1(c).

114. The revised Article 10.1 (c) shall be renumbered 10.2(d) and read as follows:

**(c) General Prohibition against Cross-Subsidies.** *~~Subject to paragraph (d) below,~~  
~~the~~ The Licensee shall not cross-subsidise its Licensed Services in such a manner as to distort fair competition.*

[additions underlined, deletions struck out]

115. Note that due to the effect of this change, Article 10.1(e) shall be renumbered to Article 10.2(e).

**GG. Article 10.2(f) (Merger Control) (New)**

116. A new article, Article 10.2(f), shall be inserted to allow for the notification to the Commission of a proposed merger transaction and the adherence to merger control guidelines, as yet to be developed by the Commission.

117. During the term of the current Licences, the communications market experienced consolidation. Given the size of the market and given that there were only four Unitary Licensees, a consolidation of the nature experienced could well have an impact on competition in the market. This new provision ensure that the Commission can review any transaction for its impact on the market (in addition to any approvals that may be required under sections 16 and 20 of the Act).

118. The new provision shall read as follows:

**(f) Merger Control.** *The Licensee shall notify the Commission of a proposed transaction, and the Commission may review the proposed transaction in accordance with such mergers and acquisitions guidelines as may be published in the Telecommunications Code, if as a*

*result of the transaction the Licensee would merge or consolidate with another Public Supplier, or if a person owning or holding a significant interest in the Licensee would sell, transfer, charge or otherwise dispose of his interest in the Licensee or of any part of his interest, or if a person would acquire a significant interest in the Licensee.*

#### **HH. Article 11.1 (Assignments and Transfers)**

119. Article 11.1 shall be amended, in light of the consolidation that occurred in the market, to address the question of assignments and changes in control of the Licensee.

120. The revised article shall read as follows:

*The Licensee shall not either directly or indirectly assign, delegate, transfer or encumber in any manner the rights, interests, or obligations under this Licence in any manner whatsoever to a third party or enter into any agreement for sub-Licence and/or partnership relating to any subject matter of the Licence to any third party either in whole or in part, without the prior, express and written consent of the Commission or the Minister, as the case may be, in accordance with the provisions of Section 16 of the Telecommunications Act, 2006. Notwithstanding the foregoing, the Licensee may employ or appoint agents and employees for provision of the Licensed Services. For purposes of this Article 11.1, “transfer” includes the acquisition of Control of the Licensee. The Licensee, Telecommunications Operator(s), any Consortium Participant, any Shareholder or any of their respective Affiliates may only pledge or otherwise encumber capital, assets or properties of the Licensee so long as such pledge or encumbrance is not, and does not cause the Licensee, Telecommunications Operator(s), any Consortium Participant, any Shareholder or any of their respective Affiliates to be in violation of this Agreement, the Telecommunications Act, 2006, the Telecommunications Code or the Commission Regulations or other Laws of the British Virgin Islands. This Article shall not apply to a mortgage, charge or other transaction entered for the purpose of securing borrowings of the Licensee, being borrowings for the purposes of establishing, operating, or maintaining the Licensee’s Telecommunications Network or providing the Licensed Services or the provision of anything incidental to the Telecommunications Network or the Licensed Services.*

[additions underlined, deletions struck out]

#### **II. Article 14 (Use of Radio Frequency Spectrum)**

121. Article 14 shall be amended to delete the reference to Annex 6 and refer to the Spectrum Management Framework and National Frequency Allocation Table.

122. When the first Unitary Licences were issued in 2007, one of the concerns of the Commission and of the Licensees was to ensure the Licensee continued to be authorised to use the spectrum that it had been authorised to use prior to the grant of the new Licence. This concern is reflected in the existing Article 14 which refers to specific frequencies listed in Annex 6.

123. Since that time, the Commission has authorised the use of additional spectrum through the grant of separate frequency authorisations. It is appropriate that all spectrum authorised for use by a Licensee be covered by one or more separate Frequency Authorisations, rather than be included in the Unitary Licence. In this manner, the Unitary Licence can be focused on the rights and obligations for the operation of telecommunications Networks and the provision of Licensed Services, while the Frequency Authorisations would focus on the terms and conditions for use of radio spectrum. As a consequence, the reference to Annex 6 that is currently contained in Article 14 (and Annex 6) would be deleted.

124. Since 2007, the Commission has published a Spectrum management Framework and a National Table of Frequency Allocations. Licensees should be required to comply with those two documents. By including that requirement in the Unitary Licence, the Commission can ensure that Licensees will be bound even when they do not use licensed spectrum.

125. Article 14 therefore would be revised to read as follows:

*The Licensee shall have the right to apply to the Commission for, and shall be assigned frequencies and frequency bands subject to the availability of spectrum in accordance with Sections 19, 20, 21, 34, and 35 of the Telecommunications Act, 2006 and the information contained in Annex 6, which frequencies shall correspond to the Telecommunications Services provided by Licensee on or before the Effective Date. The Licensee shall comply with the terms of the Spectrum Management Framework and the National Frequency Allocation Table, and with the terms and conditions contained in any frequency authorisation granted to it.*  
[additions underlined, deletions struck out]

126. The change to Annex 6 is reference at section [YY] of this Directive.

#### **JJ. Article 15.1 (a) ([Named Unitary Licensees])**

127. Article 15.1(a) shall be amended to refer to “Public Suppliers” generally instead of the Unitary Licensees by name. This provision requires the Licensee to make available Basic Exchange Telecommunication Services to other Licensees for resale. However, as is the case in Article 10.1 (b), it refers to Unitary Licensees by name. Each Licence, therefore, has a slightly different set of obligations.

128. This requirement continues to be useful as a back-stop to enable competition. However, it is somewhat static and inflexible to refer to the Licensees by name, as that might not easily accommodate changes to the participants in the market. It would also prevent the obligation from being extended to other Public Suppliers, in the event the Commission should license additional entities, even though the public interest in facilitating competition by those other entities would be the same as for Unitary Licence holders.

129. The revised Article 15.1(a) shall read as follows:

*(a) ~~[Named Unitary Licensees]~~ Other Public Suppliers. Subject to the available capacity in the Licensee’s Telecommunications Network, the Licensee shall make Basic Exchange Telecommunications Services available for resale by ~~[named Unitary Licensees]~~ other Public Suppliers.*  
[additions underlined, deletions struck out]

#### **KK. Article 15.2 (Charges for Provision of Basic Exchange Services)**

130. Article 15.2 shall be amended to refer to “Public Suppliers” generally instead of the Unitary Licensees by name.

131. As in the case of Article 15.1, this Article refers to specific Unitary Licensees. Further, the specific named Licensees vary among the Licences and are not necessarily comprehensive (for example, the CCT Licence refers to Flow and BVI Cable but not to Digicel, while the Digicel Licence refers to the other three Unitary Licensees).

132. The revised provision shall read as follows:

~~*{Named Unitary Licensees}*~~, *The Public Supplier* and each Operator of Public Pay Telephone Services receiving Basic Exchange Telecommunications Services from the Licensee shall be responsible for all applicable charges for the resold services provided by the Licensee and all charges associated with services that ~~*{Named Unitary Licensees}*~~, *the Public Supplier* or such Operator resells to a Subscriber. The Licensee shall negotiate charges for resale services appropriate to the volume of circuits leased and shall bill ~~*{Named Unitary Licensees}*~~, *the Public Supplier* and such Operator for such charges. These charges shall conform to any regulations made by the Commission and relevant provisions of this Licence and the licence issued to ~~*{Named Unitary Licensees}*~~, *the Public Supplier* or such Operator, as applicable.  
[additions underlined, deletions struck out]

**LL. Article 15.3 (Receipt of and Charges for Basic Exchange Service)**

133. Article 15.3 shall be amended to refer to “Public Suppliers” generally instead of the Unitary Licensees by name, to allow for unity and any future changes in the market.
134. The revised provision shall read as follows:

*Basic Exchange Telecommunication Services made available to the Licensee by ~~*{Named Unitary Licensees}*~~ *another Public Supplier* may be resold by the Licensee only for its authorised and intended or disclosed use and only to the same class of Subscriber ~~as to which the Licensee sells Basic Exchange Telecommunication Service (e.g., residence service may not be resold to business customers)~~. The Licensee shall be responsible for all charges associated with services that the Licensee resells to a Subscriber.  
[additions underlined, deletions struck out]*

**MM. Article 18.1A (Licence Review) (New)**

135. A new article, Article 18.1A, shall be inserted to allow the Commission to conduct periodic reviews of the terms and conditions of the Licence to assess whether they remain fit for purpose.
136. The original Licences were issued in 2007 for a 15-year Licence term. If the Commission approves the renewal applications submitted (or to be submitted) by the Licensees in 2021, it can reasonably be expected that they will be renewed for an additional 15 years, as telecommunications operators generally seek the certainty of long licence terms before making decisions about investing in networks and services. However, circumstances in the BVI telecommunications sector changed significantly over the last 15 years and there is no reason to believe they will not change significantly over the next 15 years.
137. In order to better ensure the Licence evolves along with the market, this provision created a framework for periodic discussion between the Commission and the Licensee.
138. The new provision shall be placed before the current Article 18.1 (Amendment of the Licence) and read as follows:

*Provided the Commission has given the Licensee written notice of its intent to review the terms and conditions of this Licence no less than six (6) months prior to the 5<sup>th</sup> and 10<sup>th</sup> anniversaries of the Effective Date, the Commission and the Licensee shall review the terms and conditions of this Licence on each such anniversary with a view to discussing modifications or changes that might be necessary to reasonably reflect changed circumstances in the telecommunications sector in the British Virgin Islands since the Effective Date or the last review.*



139. Any modifications or changes would be implemented through the procedures set out in Articles 18.1 (Amendment of Licence) and 18.5 (Procedural Rules).
140. To reflect the addition of this new Article, the heading of Article 18 will be revised to read: “REVIEW, AMENDMENT, MODIFICATION, SUSPENSION, TERMINATION AND EXPIRATION OF THE LICENCE” (additions underlined).

**NN. Article 18.2A (Compliance Review) (New)**

141. A new article, Article 18.2A, shall be inserted to allow the Commission to conduct periodic compliance reviews.
142. The Commission monitors its Licensees’ compliance with their obligations under the Act, the Regulations and Code, the Licence and other instruments on a continuing basis. The current form of the Licence also provides for a comprehensive compliance review, in the form of the Evaluation Report, at the time of renewal of the Licence.
143. As noted earlier, the Commission has experienced some difficulty in securing consistent compliance by the Unitary Licensees with their obligations during the current term of Licence. In light of these circumstances, it would be useful to conduct compliance reviews on a more frequent basis, not just at the time of Licence renewal. This would give the Commission and the Licensee a regular framework to identify and address any areas of concern in a timelier manner.
144. As the Licence would be renewed for an additional 15-year term, the compliance reviews should occur every 5 years: this would give the Licensees sufficient time to establish a track record of compliance before a review but ensure reviews occur sufficiently frequently to identify issues and to determine and implement remedies as early as possible.
145. This new provision shall be placed before the current Article 18.2 (and the other Articles in Article 18 renumbered accordingly) and read as follows:

*Without limiting any other power or function of the Commission, the Commission shall review the Licensee’s compliance with the Licensee’s obligations under:*

*(i) this Licence;*

*(ii) the Telecommunications Act, the Commission Regulations, the Telecommunications Code;*

*(iii) any orders, directives or instructions of the Commission; and*

*(iv) any undertakings given by the Licensee to the Commission;*

*with such review to begin on the 5th and 10th anniversaries of the Effective Date. The Licensee agrees to provide any information reasonably requested by the Commission within the time frames specified by the Commission. The Commission shall send the report of its findings on the Licensee’s compliance, including the actions required to remedy any non-compliance, to the Licensee within 90 days of the start of the review. The Commission and Licensee shall meet to discuss the report within 30 days of receipt and the Licensee shall take such actions as may be required by the Commission to remedy non-compliance.*

**OO. Article 18.2 (Normal Termination)**

146. Article 18.2 shall be amended to remove the reference to the “*Extension Term*” given the effect of the changes in section [E] of this Directive is that the Licence would not be renewed or extended, but rather, would be replaced by a new Licence.
147. The revised Article 18.2 would read as follows:

*This Licence shall terminate upon expiration of the Licence Term, ~~or, if renewed in accordance with Article 3.2, upon expiration of the Extension Term.~~*  
[deletions struck out]

**PP. Article 18.3 (Suspension and Termination of the Licence Prior to Expiration)**

148. Article 18.3 shall be amended to consolidate Article 18.3(x) to (xii) into one which refers to the holding or acquisition of any interest in another Public Supplier, instead of named Licensees.
149. The approach of naming specific Unitary Licensees, as was done elsewhere in the Licence, has the advantage of providing the Licensee with absolute clarity regarding the proscribed conduct. However, it is rigid and does not accommodate the introduction of new Licensees into the market, even though the public policy of limiting consolidation might apply to those new Licensees.<sup>5</sup>
150. This amendment would expand the scope of the provision to other Public Suppliers, in the event the Commission issues Licences to new parties.
151. Further, the absolute prohibition in these provisions reflects the assumption that there would be four independent competing Unitary Licensees. However, this assumption no longer applies following consolidation that took place in the market. In addition, the underlying public interest being addressed here is principally to ensure consolidation does not take place without the appropriate approvals and corresponding regulatory adjustments. It would be particularly inappropriate to sanction a Licensee under this Article for an action that was approved by the Minister or Commission. It is therefore proposed that the provision be modified to provide for an exception where the holding or acquisition of the interest was approved by the Minister or the Commission, as applicable.
152. The revised Article 18.3 (x) would read as follows:

*(x) the Licensee or any of its Affiliates holds or acquires any interest in any other Public Supplier or any of its Affiliates, or any Public Supplier or any of its Affiliates holds or acquires any interest in the Licensee or any of its Affiliates, without the prior approval of the Minister or the Commission, as applicable.*

153. Other circumstances listed under Article 18.3 address violations of various terms of the Licence, non-compliance with orders or directives which have been duly promulgated by the Commission, or the making of incorrect or untrue representations or warranties contained in Article 17. These do not, however, address failure of the Licensee to honour other commitments or promises made to the Commission. Undertakings given by a Licensee to the Commission, particularly those given in relation to the performance of obligations under a licence or frequency authorisation, should be clearly and unequivocally enforceable. It is proposed, therefore, to introduce a new Article 18.3(xi) as follows:

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<sup>5</sup> This has already occurred. The BVI Cable, CCT and Flow Licences refer to each other but not Digicel, while the Digicel Licence refers to all three other Unitary Licensees.

(xi) the Licensee fails to comply with the undertaking given under Article 2.4 above or with the terms of any other written undertaking given by the Licensee to the Commission;

154. The existing Article 18.3(xiii) would be re-numbered accordingly.

**QQ. Article 19.1 (General Infractions)**

155. Article 19.1 shall be amended to clarify that the Commission has the jurisdiction to investigate potential infractions and breaches howsoever they come to the Commission's attention. Infractions and breaches may come to the attention of the Commission in different ways. This revision ensures that this does not become an impediment to investigation and determination.

156. The revised Article 19.1 will read as follows:

Breach or non-fulfillment of Licence conditions may come to the notice of the Commission through complaints or because of regular monitoring. Wherever considered appropriate the Commission may conduct an inquiry either suo moto or on complaint to determine whether there has been any breach in compliance by the Licensee of the terms and conditions of the Licence, the Telecommunications Act, 2006, the Telecommunications Code, and/or any other applicable legislation and upon such inquiry the Licensee shall extend all reasonable facilities and shall endeavor to remove hindrance(s) of every type to such inquiry. Except for the sanctions mentioned in the following Article 19.2 and without limiting the provisions of Article 18.3, non-compliance by the Licensee with its obligations under this Licence, the Telecommunications Act, 2006, the Telecommunications Codes and the Commission Regulations may be sanctioned by the Commission with a penalty that does not exceed the penalty set forth in Section 56 of the Telecommunications Act, 2006. The sanction shall be determined by the Commission taking into consideration the nature of the non-compliance and gravity of the same and shall be imposed pursuant to the procedures set forth in Article 19.3.

[additions underlined, deletions struck out]

**RR. Article 19.2 (Non-Compliance with the Requirements Concerning Public Pay Telephone Requirements and Service Quality Requirements)**

157. Article 19.2 shall be amended to remove referenced to Public Pay Telephone Requirements based on an amendment in section [L] of this Directive that these be removed from the licence. Additionally, the revisions to this provision shall also reflect the removal of references to the extension of the existing Licence.

158. In addition, the Commission considers it necessary to retain measures to impose clear and simple financial penalties for non-compliance with certain other terms and conditions of the Licence. For example, obtaining periodic reports from Licensees on a timely basis if at all has been a challenge for the Commission over the last 15 years. However, this information is necessary to the exercise of the Commission's functions and duties under the Act. The filing of periodic reports, such as audited statements or annual reports under Article 7.14, is a relatively clear obligation and it is relatively simple to determine whether the report was timely filed or not. It is therefore appropriate to give Licensees an incentive to file on a timely basis by establishing financial consequences to a failure to file.

159. Given that Article 19.3 requires the Commission to give the Licensee notice of the possible sanction, no Licensee would be taken by surprise by such a penalty and would have an opportunity both to cure the failure and to provide an explanation for the failure.

160. Article 19.2 will be modified to remove and add the applicable references:

*Without limiting the provisions of Article 18.3, non-compliance with any ~~Public Pay Telephone Requirement or Service Quality Requirement set forth in Articles 7.6(a), 7.7, and Annexes 3 and 4, or with any reporting requirement set for in Articles 7.14(b) or 7.14(c).~~ shall be sanctioned by the Commission with the payment of an initial penalty or penalties in accordance with the schedules established in Annex 7 ~~one or more of the following~~ pursuant to the procedures set forth in Article 19.3:*

*~~(i) the payment of an initial penalty or penalties in accordance with the schedules established in Annex 7; and~~*

*~~(ii) reduction of the period for which the Licence Term shall be extended in accordance with the procedure and rules contained in Articles 3.2 and 3.3.~~*

*The sanctions set forth in this Article 19.2 shall be applied from the Effective Date.*

[additions underlined, deletions struck out]

## **SS. Article 20 (Force Majeure)**

161. Article 20 shall be amended to clarify the process or addressing situation of Force Majeure. Normally, provisions like Article 20 are expected to be invoked infrequently as they are intended to address exceptional circumstances. Unfortunately, the incidence of extreme weather events is expected to increase over time, which raises the risk that Article 20 will be invoked more often. In 2017, two major storms hit the BVI in short succession, which allowed for the invocation of Article 20 by licensees, which the Commission has noted as being less than seamless, ineffective and based.
162. For instance, as currently drafted, Article 20 does not require the Licensee to notify the Commission when a situation of Force Majeure occurs, except to the extent that it damages the Licensee's network and the Licensee and the Commission are supposed to agree on a work plan and timetable for restoring the network. Furthermore, Article 20 automatically excuses the Licensee from performance of its obligations without any further action by the Licensee (provided, of course, that the reason for the Licensee's inability to perform falls within one of the events of Force Majeure listed in the Article).
163. Article 20 shall also be amended to reflect that Force Majeure cannot be used to justify termination of the Licence or extension of its term
164. The revised Article 20 would read as follows:

*(a) Force Majeure. The Licensee shall be excused from performance under this Licence including, without limitation, the payment of penalties pursuant to Article 19, but excluding the notification and restoration obligations set out in Articles 20(b) and 20(c), only to the extent, and for so long as, such performance is hindered or prevented by an Act of God, fire, flood or other natural disaster, emergency or extraordinary act of government or state, war, civil commotion or insurrection, riots, embargo, prevention from or hindrance in obtaining any materials, energy or other supplies, unlawful labour strikes outside the control of the Licensee and any other catastrophic cause beyond the control of the Licensee.*

*(b) Notification. The Licensee shall notify the Commission as soon as practicable, and in any event within forty-eight (48) hours of the event which hinders or prevents the Licensee's performance of its obligations, of the obligations which it is hindered or prevented from*

performing, the reasons why, and the period of time during which the Licensee expects its performance to be so hindered or prevented. The Licensee shall notify the Commission immediately after its performance ceases to be hindered or prevented by one or more of the circumstances set out in Article 20(a).

(c) **Restoration.** The Licensee shall resume the provision of its Licensed Services as soon as practicable after its performance ceases to be hindered or prevented by one or more of the circumstances set out in Article 20(a). In the event that any of these circumstances causes damage to the Telecommunications Network operated by the Licensee, the Licensee shall be obligated to repair or rebuild the Telecommunications 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. The Licensee shall submit the timetable and workplan to the Commission within **[one (1) week]** of submitting the first notification under Article 20(b) and, until its Telecommunications Network has been repaired or rebuilt, shall submit to the Commission a detailed weekly report on its progress against the workplan.

(d) **No Claims.** Neither the Commission nor the Licensee shall, by reason of the Force Majeure events noted above, be entitled to terminate the Licence, nor shall either Party have any claims for damages against the other, in respect of non-performance or delay in performance that is a result of the Force Majeure events. The Force Majeure events noted above will not in any way cause extension in the period of the Licence.

#### **TT. Article 21.10 (Services of Notice)**

165. Article 21.21 shall be amended to include the provision taken from Article 2.3, as indicated in section **[B]** of this Directive.
166. The following will be inserted at the end of the present Article 21.10:

*Any notice or other document required to be served on the Commission, or the Minister, or the Licensee, or Owner or Person as defined in Annex I, henceforth called Addressee in this Article, under the terms of this Licence, may be served by:*

- a) personal delivery to the Addressee or authorised employee;*
- b) delivery at the office or residence of the Addressee and the obtaining of evidence of receipt; or*
- c) courier delivery to the Addressee.*

#### **UU. Article 21.15 (Conflicts) (New)**

167. The Commission considers that it would be useful to clarify the order of precedence of various documents, in the event of a conflict in the obligations set out in them.
168. Accordingly the following Article 21.15 (Conflicts) shall be added to Article 21:

##### **21.15 Conflicts**

*In the event of a conflict between any of the provisions of this Licence and any of the provisions in the following documents, the provisions in the following documents shall prevail in the order in which they are listed below:*

- (a) *the Telecommunications Act, 2006;*
- (b) *the Commission Regulations;*
- (c) *the Telecommunications Code;*
- (d) *Commission instructions.*

## VV. Annex 1 (Definitions)

169. Annex 1 shall be amended to reflect the various changes described above.
170. Annex 1 shall be amended to add the definition of the term “*gross revenues*”. Article 5 refers to the requirement to pay an annual Royalty set as a percentage of the Licensee’s “*gross revenues*.” That term, however, is not defined in either the Licence or the Act. This is an issue principally because licence fees are often imposed on telecommunications operators as a percentage of net revenues, i.e. gross revenues after deduction of certain permitted categories of revenues or expenses (the most common of which is domestic interconnection payments between Licensees). In the absence of a clear definition, it is uncertain whether the Royalty is intended to be levied on gross revenues, per the plain language of the Licence and of the Act, or on the basis of net revenues, as is the practice in many other jurisdictions.
171. A plain-language reading of the term “*gross revenue*” in section 60 of the Act would support the view that the legislature did not intend for there to be any deductions from the Licensee’s total turnover for the purposes of calculating the Royalty payable under section 60 of the Act – because otherwise it would have provided a specific definition or used a different term.
172. The definition shall read as follows:
- revenue of reporting year received by, or due to the licensee and its affiliates, from whatever source derived before any deductions for expenses, discounts, returns or offsets of any kind*
173. Annex 1 shall also be amended to include the definitions already introduced by previous Licence amendments and required by the changes to Article 8.1 (to be renumbered 8.2), by inserting:
- a. the definition of “*other consortium members*” (OCMs) after the definition of “*operator*” as follows:
 

*“Other Consortium Members” or “OCMs” means other members of the consortium owning an international submarine cable connected to the British Virgin Islands.*
  - b. the definition of “*International Connectivity Services*” after the definition of “*International Call Completion Rate*” as follows:
 

*“International Connectivity Services” means the International Private Leased Circuits (IPLCs) and International Managed Data Services (IMDS) and the wholesale services required to facilitate the provision of those IPLCs and IMDS being Colocation, Cross-Connection, Inter-Connection, Fibre Access and Fibre Pair Management which collectively shall be referred to as “Wholesale Landing Station Services”.*
  - c. the definition of “*International Managed Data Services*” or “*IMDS*” after the definition of “*International Call Completion Rate*” as follows:

*“International Managed Data Services or “IMDS” means the packet-based services that provide managed connectivity between multiple user sites, at least one of which is located outside of the British Virgin Islands.”*

- d. the definition of “International Private Leased Circuit Services” or “IPLCs” after the definition of “International Managed Data Services” or IMDS” as follows:

*“International Private Leased Circuit Services” or “IPLCs” means the services provided over international submarine cables, which offer users the exclusive use of a point to point, dedicated transparent transmission path for voice, data or video between a location in the British Virgin Islands and a location outside of the British Virgin Islands.”*

- e. the definition of “Colocation Services” after the definition of “Circuit” as follows:

*“Colocation Services” means the provision and maintenance of space to enable either OCMs or Public Suppliers to store and operate telecommunications equipment.”*

- f. the definition of “Cross-Connection Services” after the definition of “Contract” as follows:

*“Cross-connection services” means the provision to OCMs or Public Suppliers of fibres between two subsea cable systems to allow the transfer of traffic between the systems.”*

- g. the definition of “Inter-Connection Services” after the definition of “Government Entity” as follows:

*“Inter-Connection Services” means the provision of fibres to Public Suppliers or OCMs to allow the transfer of traffic between an international subsea system and the domestic network of a Public Supplier.”*

- h. the definition of “Fibre Access” after the definition of “Fault Recovery Rate” as follows:

*“Fibre Access” means the provision to a Public Supplier or an OCM of buried ducts from the site perimeter to a man-hole outside the cable landing station, and conduits, ducts, trays, etc. between the manhole and the Colocation space of the Public Supplier or OCM coupled with a fibre pull-through service to enable a Public Supplier to connect their domestic fibre networks to the colocation space.”*

- i. the definition of “Fibre Pair Management” after the definition of “Fibre Access” as follows:

*“Fibre Pair Management” means, at the request of an OCM or Public Supplier, the administration of port positions on each Public Supplier’s and/or OCM’s Meet-Me Room panels and/or other equipment owned by such Public Supplier and/or OCM that is hosted in the cable landing station.”*

174. Annex 1 shall be amended by inserting the definition of “Internet access service” after the definition of “International Telephone Call” as follows:

*“Internet access service” means a public telecommunications service consisting of providing users with an access to the global Internet;*

175. Annex 1 shall also be amended by deleting definitions that are no longer required, including the definitions of “BVI Cable TV”, “CCT”, “Cable & Wireless”, “National Long Distance Call Completion Rate”, “National Long Distance Telephone Call”.

### **WW. Annex 3 (Service Quality Requirements)**

176. Annex 3 shall be amended to reflect the reporting requirements described above in Article 7.7.
177. Section 1 (Local Call Completion Rate Internal to Network) and Section 2 (Local Call Completion Rate External to Network) shall be changed by replacing the requirements for “Year 1”, “Year 2”, “Year 3”, “Year 4”, and “Year 5 and later” with “> 99.8%”, “> 99.85%”, “> 99.9%”, “> 99.93%”, and “> 99.95%”, respectively, and by clarifying that the requirements apply to Local Telephone Calls originating on a Voice Telephony Service provided via a fixed Telecommunications Network.
178. Section 3 (International Call Completion Rate) shall be changed by replacing the requirements for “Year 1”, “Year 2”, “Year 3”, “Year 4”, and “Year 5 and later” with “> 96%”, “> 96.5%”, “> 97%”, “> 97.5%”, and “> 98%”, respectively, and by clarifying that the requirements apply to International Telephone Calls originating on a Voice Telephony Service provided via a fixed Telecommunications Network.
179. Section 4 (Fault Recovery Rate) shall be changed by replacing the “24 Hours” requirements for “Year 1” through “Year 5 and later” with “92%”, “93%”, “94%”, “95%”, and “96%”, respectively, and the “72 Hours” requirements for “Year 1” through “Year 5 and later” with “95%”, “96%”, “97%”, “98%” and “99%”, respectively. Section 4 shall also be changed by clarifying that the requirements apply to fixed Telecommunications Networks.
180. Section 6 (Maximum Connection Time for Urban Areas) shall be changed by replacing the requirements for “Year 1”, “Year 2”, “Year 3”, “Year 4”, and “Year 5 and later” with “3 days”, “3 days”, “2 days”, “2 days”, and “1 days”, respectively. Section 6 shall also be changed by clarifying that the requirements apply to fixed Telecommunications Networks.
181. Section 6 of Annex 3 current defines “Urban Areas” as Road Town, Tortola and The Valley, Virgin Gorda. The Commission considers that it would be useful to apply a more precise definition and is considering defining Road Town as the area from and including Fish Bay to Pockwood Pond. Further, the Commission considers that East End, from Fat Hogs bay to the Queen Elizabeth II Bridge should also be included in the definition of “Urban Areas.” The revised definition would read as follows:
- Urban areas are defined as (1) the area around Road Town, Tortola, from Fish Bay to Pockwood Pond, inclusive, (2) East End, Tortola, from Fat Hogs Bay to the Queen Elizabeth Bridge, and (3) The Valley, Virgin Gorda.
182. Section 7 (Average Connection Time for Rural Areas) shall be changed by replacing the requirements for “Year 1”, “Year 2”, “Year 3”, “Year 4”, and “Year 5 and later” with “5 days”, “5 days”, “4 days”, “3 days”, and “2 days”, respectively. Section 7 shall also be changed by clarifying that the requirements apply to fixed Telecommunications Networks. “Rural Areas” shall be defined as all areas on Tortola and Virgin Gorda that are not “Urban Areas”.
183. Section 5 (Digitalisation of Network) shall be deleted, and all other sections renumbered accordingly.
184. A new section (Average Connection Time for Sister Islands) shall be added as follows:

**AVERAGE CONNECTION TIME FOR SISTER ISLANDS:** The Licensee will ensure the average connection time (from the time the subscriber pays the connection fee to the time the subscriber has access to the network) for all new applications for Subscriber Lines on the Sister Islands is as follows:



<u>YEAR</u>	<u>REQUIREMENT</u>
Year 1	10 days
Year 2	9 days
Year 3	8 days
Year 4	6 days
Year 5 and later	5 days

For the purposes of this Service Quality Requirement, “Subscriber Line” means a Subscriber Line connected to a fixed Telecommunications Network.

The Sister Islands are all inhabited islands and cays other than Tortola and Virgin Gorda.

185. A new section (Download Speed) shall be added, as follows:

**DOWNLOAD SPEED:** the median download speeds available on Internet access services offered by the Licensee on a fixed Telecommunications network

<u>YEAR</u>	<u>REQUIREMENT</u>
Year 1	150 Mbps
Year 2	175 Mbps
Year 3	200 Mbps
Year 4	225 Mbps
Year 5 and later	250 Mbps

186. A new section (Upload Speed) shall be added, as follows:

**UPLOAD SPEED:** the median upload speeds available on Internet access services offered by the Licensee on a fixed Telecommunications network.

<u>YEAR</u>	<u>REQUIREMENT</u>
Year 1	20 Mbps
Year 2	30 Mbps
Year 3	50 Mbps
Year 4	75 Mbps
Year 5 and later	75 Mbps

187. A new section (Packet Loss) shall be added, as follows:

**PACKET LOSS:** the percentage of packets lost during transmission over the Licensee’s fixed Telecommunications Network between an end user and the international gateway specified by the Commission.

<u>YEAR</u>	<u>REQUIREMENT</u>
Year 1	< 2 %
Year 2	< 1 %
Year 3	< 0.5 %
Year 4	< 0.5 %
Year 5 and later	< 0.5 %

188. A new section (Latency) shall be added, as follows:

**LATENCY:** the mean time it takes to transmit data between the end-user and destination and receiving the expected response (round-trip delay) on the Licensee’s fixed Telecommunications Network.

<u>YEAR</u>	<u>REQUIREMENT</u>
Year 1	< 30 ms
Year 2	< 20 ms
Year 3	< 10 ms
Year 4	< 5 ms
Year 5 and later	< 5 ms

189. A new section (Call Setup Success Rate) shall be added, as follows:

**CALL SETUP SUCCESS RATE:** the fraction of the attempts to make a call on a mobile network that results in a connection to the dialled number.

<u>YEAR</u>	<u>REQUIREMENT</u>
Year 1	> 99.5%
Year 2	> 99.5%
Year 3	> 99.5%
Year 4	> 99.5%
Year 5 and later	> 99.5%

190. A new section (Network Availability) shall be added, as follows:

**NETWORK AVAILABILITY:** the percentage value of the amount of time the mobile network is delivering services divided by the amount of time it is expected to deliver services. The time the network is not delivering services is defined as downtime.

<u>YEAR</u>	<u>REQUIREMENT</u>
Year 1	> 99%
Year 2	> 99%
Year 3	> 99%
Year 4	> 99%
Year 5 and later	> 99%

191. A new section (Dropped Call Rate) shall be added, as follows:

**DROPPED CALL RATE:** the fraction of the telephone *calls* on a mobile network which, due to technical reasons, were cut off before the speaking parties had finished their conversational tone and before one of them had hung up.

<u>YEAR</u>	<u>REQUIREMENT</u>
Year 1	< 1%
Year 2	< 1%
Year 3	< 1%
Year 4	< 1%
Year 5 and later	< 1%

192. A new section (Handover Success Rate) shall be added, as follows:

**HANDOVER SUCCESS RATE:** The most basic form of handover on a mobile network is when a phone call in progress is redirected from its current cell (called source) to a new cell (called target)

<u>YEAR</u>	<u>REQUIREMENT</u>
Year 1	> 97%
Year 2	> 97%
Year 3	> 97%
Year 4	> 97%
Year 5 and later	> 97%

193. A new section (Call Setup Time) shall be added, as follows:

**CALL SETUP TIME:** the time interval from the instant the user on a mobile network initiates a connection request until the complete message indicating call disposition is received by the calling terminal.

<u>YEAR</u>	<u>REQUIREMENT</u>
Year 1	< 10 s
Year 2	< 10 s
Year 3	< 10 s
Year 4	< 10 s
Year 5 and later	< 10 s

194. A new section (Blocked Call Rate) shall be added, as follows:

**BLOCKED CALL RATE:** An unsuccessful call attempt on a mobile network to a valid number, while in a coverage area, where neither the call is answered nor the called party busy tone nor ringing tone is recognised at the access of the calling user within 40 seconds from the instant when the last digit of the destination subscriber number is received by the network.

<u>YEAR</u>	<u>REQUIREMENT</u>
Year 1	< 1%
Year 2	< 1%
Year 3	< 1%
Year 4	< 1%
Year 5 and later	< 1%

## **XX. Annex 4 (Form of Annual Compliance Report)**

195. Annex 4 shall be amended by updating the current Part A, in order to reflect the quality of service indicators listed in Article 7.7, and by adding a new Part. This change is needed in order to simplify the administration of the Licensee's reporting requirements.
196. Article 7.14 requires the Licensee to submit an annual report, in the form set out in Annex 4, on its operations and services and the extent to which the conditions of the licence have been followed during the previous year. This report is to be filed within 90 working days of the anniversary of the effective date of the Licence reflecting the performance during the previous Licence year.
197. The Licence requires the Licensee to submit other reports on an annual basis, namely an annual report on the Licensee's compliance with its confidentiality obligations under Article 7.9 and, in the case of those Licensees landing submarine cables in the BVI, a report on the locations of and the capacity on those cables pursuant to Annex 10. However, the first of these two reports is to be filed by the 15<sup>th</sup> of February and relates to the preceding calendar year, while the second is to be filed by the 1<sup>st</sup> of May reflecting the state of affairs on the 1<sup>st</sup> of April.
198. A new Part A will be added which will read as follows:

*Attached hereto and forming a part hereof is true, correct and complete report, pursuant to Article 7.9(d), describing the measures and procedures which have been established by the Licensee to maintain the confidentiality of the content of all communications over its network and to safeguard the confidentiality of business secrets and personal data concerning its Subscribers, and describing the effectiveness of, and any necessary changes and improvements to, those measures and procedures.*

199. Due the effect of this amendment, the period covered by the report will also change, from the previous calendar year to the previous licence year.
200. Due to the effect of this amendment, the certificate at the bottom of the Annex will be amended to refer to Article 7.9, in addition to Article 7.14.
201. The current Part A will be renumbered Part B. Section V will be deleted, reflecting the deletion of the “Digitalisation of Network” Service Quality Requirement in Annex 3.
202. The reporting unit in the current section VI will be changed from “%” to “weeks”, to reflect the Service Quality Requirement in Annex 3.
203. New sections will be added to reflect the “Average Connection Time for Sister Islands”, “Download Speed”, “Upload Speed”, “Packet Loss”, “Latency”, Call Setup Success Rate”, “Network Availability”, “Dropped Call Rate”, “Handover Success Rate”, “Call Setup Time”, and “Blocked Call Rate” Service Quality Requirements added to Annex 3.

#### **YY. Annex 6**

204. This Annex shall be deleted from all Licences, to reflect the changes specified in section [II] of this Directive. This amendment allows for the Unitary Licence to be focused on the rights and obligations for the operation of telecommunications Networks and the provision of Licensed Services, while the Frequency Authorisations would focus on the terms and conditions for use of radio spectrum.
205. Note that due to the effect of this change, the remaining Annexes shall be renumbered accordingly.

#### **ZZ. Annex 7**

206. Section IV (Failure to achieve digitalisation of network targets by Due Date) of Annex 7 shall be deleted the subsequent sections renumbered accordingly.
207. The following new sections will be inserted to reflect the additional Service Quality Requirements in Annex 3. For consistency with the current Annex 7, the quantum of the applicable penalties will be set at US \$1,000. The Commission reserves the right not to impose a penalty for *de minimis* failures to reach these targets:

*VII. Failure to achieve average connection time targets at Due Date*

*For each week above target maximum connection time* [US \$1,000]

*VIII. Failure to achieve mean download speed targets at Due date:*

*For each Mbps below target download speed* [US \$1,000]

IX. Failure to achieve mean upload speed targets at Due Date:

For each Mbps below target upload speed [US \$1,000]

X. Failure to achieve packet loss speed targets at Due Date

For each percentage point below target packet loss percentage [US \$1,000]

XI. Failure to achieve latency targets at Due Date

For each ms below target latency time [US \$1,000]

(Notwithstanding Article 19.2, the Commission reserves the right not to impose the penalties in Sections VII, VIII, IX, X or XI where the Licensee's performance is less than 10% below the applicable target.)

XII. Failure to achieve call setup success rate targets at Due Date

For each percentage point below call setup success rate [US \$1,000]

XIII. Failure to achieve network availability targets at Due Date

For each percentage point below network availability target [US \$1,000]

XIV. Failure to achieve dropped call rate targets at Due Date

For each percentage point above target dropped call rate [US \$1,000]

XV. Failure to achieve handover success rate targets at Due Date

For each percentage point below target handover success rate [US \$1,000]

XVI. Failure to achieve call setup time targets at Due Date

For each second above target call setup time [US \$1,000]

XVII Failure to achieve blocked call rate targets at Due Date

For each percentage point above target blocked call rate [US \$1,000]

208. A new Part B (Reporting Requirements) will be added to Annex 7 to reflect the changes described above to Article 19.2, which will read as follows:

**B. REPORTING REQUIREMENTS**

I. Failure to deliver audited financial statements under Article 7.14(b) by the Due Date

For each week after the Due Date [US \$1,000]

II. Failure to deliver the Report on Operations and Services under Article 7.14 (c) by the Due Date

*For each week after the Due Date*

**[US \$1,000]**

Issued by the Telecommunications Regulatory Commission on the 30<sup>th</sup> day of December 2021.

(Sgd.) Guy L. Malone.  
**Chief Executive Officer**