



Telecommunications Regulatory Commission

Report & Opinion On Terms Of Renewed Unitary Licences

(1st May 2022)

On 30 December 2021, the Telecommunications Regulatory Commission of the Virgin Islands (**Commission**) issued a notice in relation to the adoption of a Directive on the amendment of the terms and conditions of renewed Licences (**Notice**) because of changed circumstances in the telecommunications sector on the British Virgin Islands since the issuance of Unitary Licences in 2007. The Notice specified, *inter alia*, that comments or objections to the proposed Directive were to be filed with the Commission on or before 14 February 2022.

On 14 February 2022, the Commission received responses from BVI Cable TV Limited (**BVI Cable**), Cable & Wireless (BVI) Limited (**Flow**), Caribbean Cellular Telephone Limited (**CCT**), and Digicel (BVI) Limited (**Digicel**) (together, **Licensees**). On 11 April 2022, a public hearing was held by the Commission, during which time, the Licensees were given an opportunity to be heard. Thereafter, on 14 April 2022, the Commission provided a preliminary response to the Licensees on their 14 February 2022 filed comments and invited additional remarks. On 22 April 2022, the Commission received a further response from BVI Cable, CCT and Digicel.

In accordance with section 6(e) of the Telecommunications Act, 2006 (Act), the Telecommunications Regulatory Commission of the Virgin Islands (Commission) is responsible for determining applications for licences for any of the purposes specified in the Act. Additionally, in accordance with section 15(2) of the Act, a person who wishes to operate a telecommunications network or provide a telecommunications service shall apply to the Commission for a licence.

The Commission is presently in the process of considering applications for renewal of four Licences for the Operation of a Telecommunications Network Providing Telecommunications Services in the British Virgin Islands (**Licence or Unitary Licence**), which are due to expire in 2022.

In accordance with Article 3.3(d) of the Licence, the Commission may approve Licence renewal with conditions based upon the same terms and conditions of the Licence or based upon new terms and conditions which reasonably reflect changed circumstances in the telecommunications sector in the British Virgin Islands at the time of the renewal application.

The Commission considered the comments and objections received from all Licensees, which are set out in the attached Schedule to this Report & Opinion. The attached Schedule also sets out the Commission's conclusion and decision on the adoption or non-adoption of each proposed update to the Unitary Licences for the renewed Licences.

Issued by the Telecommunications Regulatory Commission on the 1st day of May, 2022.

(Sgd.) Guy L. Malone.

Chief Executive Officer

SCHEDULE

Key:

Proposed licence provisions with additions and ~~deletions~~

Commission explanation or clarification

Comments and objections of the Licensees

Commission conclusion and decision

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.

Explanation The Commission noted it 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.

Licensee Objections

Flow Regarding "no exclusivity", again this appears to permit the TRC to award additional Licences (in addition to the known current Licensees) to other competitors and dilute the current market. This could have a significant impact on the market conditions. This would lead to uncertainty regarding capital investment in the jurisdiction because there is no certainty that the market might not be materially impacted as a result of an unexpected issuance of additional Licences. FLOW queries the TRC's intentions in this regard. Absent satisfactory clarification, FLOW queries the changed circumstances reasonably requiring this new term, objects to such provisions on those grounds and confirms its position that they are contrary to the terms of the Current Licence.

April 14th Commission Follow-Up

Commission The proposed article 2.3 clarifies that no licence shall grant a monopoly to any person over any telecommunications network or service, which is consistent with the current regulatory framework and should be non-controversial. The Commission, as the regulator for telecommunications in the British Virgin Islands, may grant licences for telecommunications networks and services. This discretionary power must, however, be exercised in accordance with section 15(2) of the Act, by giving due consideration to applicable policies and regulations. These policies and regulations will be subject to consultation; during which time, Licensees can ensure that the Commission is fully and properly considering all applicable market conditions. Through the proposed Article 2.3, the Commission is ensuring that it does not fetter its discretion, at this time, to consider future public supplier licence applications should they be made.

April 22nd Licensee Responses

Digicel Digicel is concerned by the Commission's comments. If the sole intention of the Commission is to reproduce what is already provided for in the Telecommunications Act, 2006 ("Act"), then surely the provision is not required. If it is intended that the provision introduces some additional rights, obligations or limitations then that needs to be properly disclosed. Digicel therefore agrees with the concerns and objections expressed by Flow and considers this proposed change should not be made to the terms of Digicel's Licence.

Commission Conclusion

The Commission notes that the proposed provision would clarify the current state of affairs, namely, that a key policy objective of the Act is the promotion of competition. The granting of exclusive rights to any licensee would be fundamentally inconsistent with that policy. However, as it would simply re-state the current policy of the Act, it does not reasonably reflect changed circumstances in the telecommunications sector since 2007. As a result, it does not fall within the scope of Article 3.3 and the Commission will **not adopt** this provision at this time.

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.

Explanation The Commission noted it 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.

February 14th Licensee Objections

Flow Regarding the "Licensee Undertaking", as referred to above, this provision requires clarification by the TRC regarding whether it is the TRC's intention to seek to unilaterally amend the Licence by reference to future amendments to the applicable laws and "rules". Absent satisfactory clarification, FLOW queries the changed circumstances reasonably requiring this new term, objects to such provisions on those grounds and confirms its position that they are contrary to the terms of the Current Licence. Clause 2.4 is to be amended to replace "Commission Instructions" with "lawful instructions from the Commission" since any instruction from the Commission must be lawful.

April 14th Commission Follow-Up

Commission A licensee is subject to the terms of the Telecommunications Act and of any other relevant Acts passed by the legislature of the BVI, as well as to the provisions in any applicable regulations made under those Acts. It is noteworthy that any of these instruments could be made or changed at any time, outside of the control of either the licensee or the Commission and the licensee's compliance would still be mandated. The proposed clarification by inserting the word "lawful" is reasonable as the Commission's instructions would need to be lawful in any event. This provisions confirms a position that already exist – that licensees are subject to the laws of the British Virgin Islands – primary and secondary legislation – and Commission instructions. We propose that Article 2.4 note read: "*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, lawful Commission instructions, and the provision of the Telecommunications Act.*"

Commission Conclusion

The Commission notes that the proposed provision would clarify the current state of affairs, namely, that Licensees are required to comply with the Act, Commission Regulations, the Telecommunications Code, the Licence, and any instructions by virtue of section 16(1)(c) of the Act. Contrary to Flow's apparent position, Licensees continue to be subject to them, notwithstanding that they may have been amended or introduced following the Effective Date of a Licence. Nevertheless, because this provision would simply restate the existing obligations of Licences, it does not

reasonably reflect changed circumstances in the telecommunications sector since 2007. As a result, it does not fall within the scope of Article 3.3 and the Commission will **not adopt** it at this time.

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.

Explanation The Commission noted it 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.

February 14th Licensee Objections

Digicel While Digicel understands and agrees with the importance of Licensees having a local presence in the British Virgin Islands ("BVI"), Digicel is concerned that "administration and management" is undefined and could potentially be interpreted in a number of ways that may have a material impact on licensee's existing businesses. This is particularly the case where the Licensee is part of an international organisation that has businesses in various jurisdictions and has a Group operating structure where some management and administration activities (such as finance) are shared between countries. Importantly, such arrangements are not uncommon and allow the benefits of operating efficiencies to be reflected in greater network investment, improved services and lower prices in all jurisdictions. This is especially important in a small market such as BVI where economies of scale are not readily available and the ability to share resources is especially important.

The Commission has also not provided any detailed reasoning to support the inclusion of such a requirement and has not explained how it would improve compliance by the Unitary licensees with their obligations. In Digicel's respectful submission the proposed inclusion of a new Article 2.5 would amount to an unnecessary and inappropriate interference in the operations of licensees and should not be included. In any event, if the Commission remains of the view that such a provision should be included, it is essential that the provision be clarified to explain exactly what "administration and management" is intended to mean and how it is expected that the requirement sought to be imposed will improve compliance.

Flow Regarding the "local premises" requirement, as referred to above, a significant portion of FLOW's establishment, operation and maintenance are necessarily based in the BVI. Again, this proposed term is vague uncertain and the justifications given for it (paragraph 2) appear weak. It is also at odds regarding diversification and redundancy of management and operations to take into account future natural disasters (a stated "changed circumstance" justifying revised terms). If all of these functions are conducted from a single BVI-premises at the epicentre of a future natural disaster, the disruption could be debilitating to the business continuity. Absent satisfactory clarification, FLOW queries the changed circumstances reasonably requiring this new term, objects to such provisions on those grounds and also on the grounds of uncertainty and confirms its position that they are contrary to the terms of the Current Licence.

April 14th Commission Follow-Up

Commission The purpose of this provision is **not** to preclude licensees from structuring their networks in order to maximize economies of scale. It is intended to ensure a licensee has personnel within the territory of the BVI responsible for ensuring the licensee complies with its obligations and empowered to speak on behalf of and to bind the licensee if necessary. Section 73 of the Act requires licensee to have a local Compliance Officer to respond sufficiently well to enquiries relating to the licensee and the conduct of its business, and to be a liaison between the licensee and the Commission to ensure compliance with the Act, Regulations, Code and Commission instructions. Yet, over the past 15 years, the Commission has found that licensees are not earnest in fulfilling these obligations.

For the avoidance of doubt, the intent of this provision is not to impose personal liability upon the employees of a licensee where such liability would not otherwise exist. It is intended to ensure a licensee has personnel within the territory of the BVI responsible for ensuring the licensee complies with its obligations and empowered to speak on behalf of and to bind the licensee if necessary.

April 22nd Licensee Responses

Digicel Digicel notes the Commission's reference to the Act which requires public suppliers to appoint a Compliance Officer to, among other things, “respond sufficiently well to enquiries relating to the public supplier and the conduct of its business ... and ... act as the liaison between the public supplier and the Commission in matters relating to compliance”. Given this clear statutory requirement Digicel sees no merit in adding further layers of regulation requiring a local presence in the BVI. To the extent that the Commission has concerns around compliance and enforcement of existing laws and regulations, Digicel considers that they should be dealt with in that context rather than through additional regulation. Accordingly, Digicel continues to object to the inclusion of a new Article 2.5 or any additional requirement for “administration and management” to be conducted from premises in the British Virgin Islands.

Commission Conclusion

As noted, the Commission has experienced difficulty in securing consistent compliance by Licensees with their licence obligations, particularly their reporting obligations. The Commission is mindful of the benefits of regional organisations, including economies of scale which benefit consumers through lower prices, and the intent of this proposed provision is not to preclude consumers in the Virgin Islands from enjoying those benefits.

However, the Commission considers it important that Licensees comply with all of their Licence obligations, including without limitation reporting requirements and the appointment and approval of a Compliance Officer. The Commission also considers it important that the local management of a Licensee have access to all relevant information necessary to respond to a lawful Commission information request that a local, stand-alone telecommunications operator would normally be expected to have. This, however, has proven difficult on occasion in the past. The purpose of this proposed Article 2.5 is to address these gaps and to prevent historical trends of increasing concentration of network equipment, operations, and organisational decision-making in overseas locations (which the Commission acknowledges has brought benefits) from interfering with the Commission’s ability to fully and effectively regulate and promote the telecommunications sector within the British Virgin Islands.

The Commission is of the view that the proposed Article 2.5 reasonably reflects changed circumstances in the telecommunications sector since 2007. Nevertheless, the Commission has noted the concerns of the Licensees and will continue to work with them to determine an appropriate solution to the concerns of both Licensees and the Commission. As a result, the Commission will **not adopt** the proposed Article 2.5 at this time but reserves the right to do in the future.

2.3 Services of Notice

[to be moved]

Explanation 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.

February 14th Licensee Objections

No comments submitted

Commission Conclusion

The Commission notes that no party objected to this proposed change to the Licence. While it is non-controversial, it is an editorial change that does not reasonably reflect changed circumstances in the telecommunications sector since 2007. As a result, it does not fall within the scope of Article 3.3 and the Commission will **not adopt** it at this time, but reserves its right to propose it at a future date under a Licence amendment process pursuant to Article 18.1 of the Licence.

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.

Explanation 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.

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.

February 14th Licensee Objections

Digicel Digicel agrees with the inclusion of the proposed new Article 2.6. However, in our view, the Article should be redrafted so that there is a presumption the licensee would lose the right to offer the relevant service or services unless the licensee was able to satisfy the Commission that such services would be offered within the next six months period. We also suggest an additional clarification is

included in the Article stating that any termination of an authorisation would not preclude the licensee from making a future application to provide the relevant Telecommunications Service.

Flow Regarding an “obligation to provide services”, see comments at paragraph 1(d)(ii) on obsolescence of services particularly Licensee “paging services, store and forward messaging services, telex services, telegraph services, etc” It would be appropriate to clarify all obsolete services now so that Licensees are not placed in the impossible situation of providing services that cannot be provided because they no longer exist. Further, precisely what constitutes “render” is open to interpretation and is not defined under this provision, and FLOW seeks clarification of the same.

April 14th Commission Follow-Up

Commission The changes proposed by Digicel are noted but not necessary. Unused authorisations would be terminated only after the application of the procedures in article 18.5, which would give the licensee the opportunity to satisfy the Commission that the service(s) will be provided in due course. Introducing the presumption as proposed would not affect this. Termination of an authorisation would be without prejudice to any future application to provide the service in question, at which point the licensee would have the opportunity to satisfy the Commission that the service will in fact be offered. The Commission is considering, therefore, adding to Article 2.6 “*For the avoidance of doubt, the Licensee may apply for authorization to provide a Telecommunications Service notwithstanding that an authorization to provide the same or another Telecommunications Service was previously terminated pursuant to the terms of this Article 2.6.*”

Flow's concerns regarding the listed “obsolescent” services are expected to be addressed in its new licence, to the extent that Flow did not apply for authorisation to provide those services. The Commission's concern, addressed via this provision in the licence, is to ensure licensees exercise their rights to provide a service in a timely manner. Flow's request for clarification is reasonable. We propose to replace the term “render” with “provide” so that the provision reads: “*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 provide one or more Telecommunications Services within [twelve (12) months] of the Effective Date, or ceases to provide 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 provide 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.*”

April 22nd Licensee Responses

Digicel Digicel is concerned that the Commission is seeking to use the proceeding as a means to determine the specific range of services provided by licensees. However, and for the avoidance of doubt, Digicel advises that it continues to “render” or “provide” the full range of services described in the Digicel Licence. For the further avoidance of doubt, we also note that SMS is a form of “store and forward messaging service”.

Commission Conclusion

The Commission notes licensees did not object to the fundamental premise of the provision, namely, that licensed authorisations should be used. The Commission considers that the original expectation in 2007 was that all Licensees would seek to use, and to continue to use, all or substantially all of the authorisations included in their Licences. This did not occur. The proposed Article 2.6 therefore reasonably reflects changed circumstances in the telecommunications sector since 2007.

Regarding Digicel’s concern that the Commission is seeking to determine the range of services provided by Licensees, the Commission notes that Article 2.6 would apply only if a Licensee does not provide a service that it was authorised to provide for a significant period of time. In other words, the Licensee and not the Commission would be determining the range of services it would be offering. Further, the procedures in Article 18.5 would afford the Licensee the opportunity to demonstrate to the Commission that it is in fact planning to offer the service(s) in question before the Commission would terminate any authorisations.

The Commission will therefore **adopt** the proposed update to the Licence, subject to modifications to reflect the comments of the licensees regarding the word “render” and regarding the ability to re-apply to offer a service notwithstanding that an authorisation was previously terminated.

3.1 Length of Licence Term

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.

Explanation 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.

February 14th Licensee Objections

Digicel Digicel disagrees with the proposed amendment to Article 3.1 for two reasons. Firstly, the proposed amendment is unnecessary in circumstances where the Licence is terminated in its entirety. In such circumstances, the Licence Term provision would also be terminated and cease to have effect anyway. Secondly and most importantly, in circumstances where a licence is only suspended or is only terminated in part, the Licence Term specified in Article 3.1 should not be assumed to be affected. In our view, Article 3.1 should not be amended in the way that has been proposed by the Commission.

April 14th Commission Follow-Up

Commission The amendment simply clarifies that, under the appropriate circumstances, a licence could be terminated before the expiry of the normal full 15-year period, in which case the Licence Term would be shorter than 15 years. That clarification is required during the term of the licence even if it ceases to have effect at the end of the 15 year period.

Note that the proposed provision refers to suspension or termination of the licence, not to suspension or termination of any specific authorisation. Partial suspension or termination, therefore, would not invoke this article or affect the Licence Term applicable to the remaining licence. To address Digicel’s comment about partial suspension or termination, we propose to amend the article such that it reads: “*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 in full sooner in accordance with Article 18 of this Licence or under the Telecommunications Act.*”

April 22nd Licensee Responses

Digicel It appears that the Commission has missed the points made by Digicel in its earlier submission. If a licence is only suspended, then its underlying Licence Term will not be affected. The inclusion of the word "suspension" in the provision proposed by the Commission is therefore wrong and potentially misleading.

If a licence is terminated, but only in part (for example, the "termination" applies only in respect of a specific service), then the underlying Licence Term will also be unaffected.

In any case, provisions relating to termination are stated clearly in Article 18.3 of the Digicel Licence and, in Digicel's submission, there is no need to repeat them in Article 3.

Commission Conclusion

The Commission has carefully considered Digicel's objections to the proposed updates to Article 3.1. The Commission notes that the updates would not have changed the underlying term of the Licence and that they would be useful to clarify that the term of the Licence is subject to the provisions of Article 18.

However, the Commission notes that Article 18 continues to apply in any event, and that, while useful, a clarification is not an update that reasonably reflects changed circumstances in the telecommunications sector since 2007. The Commission will, therefore, **not adopt** the proposed update to Article 3.1 at this time, but reserves the right to propose it again at a later date.

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.

Explanation 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.

February 14th Licensee Objections

Digicel While Digicel is generally supportive of an approach whereby the terms of the Unitary licence and the Telecommunications Code are aligned, we are concerned that what has been proposed is premature. This is because Part 5A of the Telecommunications Code has yet to be finalised or brought into force. We therefore propose that the proposed amendment be deferred until such time as that occurs.

It is also unclear why the Commission appears to be seeking to make the terms of the "new licence" to be wholly reliant on the terms of the Telecommunications Code and Commission's Regulations (neither of which yet exist) rather than an extension of the terms of the existing Licence. Such an approach is likely to cause substantial uncertainty for Licensees and is at odds with Section 24 of the Telecommunications Act 2006 ("Act") which assumes the existing Licence would form the basis of any renewed Licence.

Digicel is also concerned with the Commission proposal that, rather than renewing existing Licences on their expiry, wholly new licences are intended to be issued in future. Such an approach appears

to be at odds with the provisions of Section 24 of the Act which expressly refers to licence to being "renewed" rather than being "replaced". We would therefore appreciate further clarification of the reasons behind these significant proposed changes.

Flow

Regarding the proposed new Part 5A of the Code and the intention of the TRC that Part 5A supersede this provision and do away with "renewals" of the Licence in favour of being replaced by a new licence, this is a significant material revision to the terms of the Licence. It appears to FLOW that, on each "renewal":

1. the Licensee is being asked to agree a term of the Licence incorporating by reference provisions which have not been seen by the Licensee in final form, namely the proposed new Part 5A of the Code;

2. a completely new licence would need to be negotiated on each "renewal". Given that the TRC apparently wishes to dispense with "renewals", the use of "renewal" is confusing and inconsistent. If there is to be no renewals (which FLOW objects to), this term must cease to be used;

3. the new licence would extinguish the provisions of the Current Licence that any new terms must reasonably reflect changed circumstances;

4. the TRC appears to seek to extinguish any ability of the Licensee to challenge any new terms of a "new" (renewed) licence on the basis that they are not reasonably required by changed circumstances because it would be an entirely new licence. This would be a material departure from the current terms and extinguish the security to Licensees that renewals would build on the previous licence(s); and

5. significant consequential uncertainties arise for Licensees and results in disruption and/or uncertainty to Licensees regarding the terms upon which they would be licensed (re-licensed?) once the current licence expires and will adversely affect the willingness of operators to invest in the BVI. FLOW queries the changed circumstances reasonably requiring this new term, objects to such provisions on those grounds and confirms its position that they are contrary to the terms of the Current Licence.

April 14th Commission Follow-Up

Commission

The Commission notes that the Act refers to "renewal" in sections 17 and 24. The purpose of these revisions is to avoid a presumption of renewal on the same terms and conditions, as with changes in circumstances over 15 years, the current terms and conditions may no longer be fit for purpose. It is also to ensure all licensees with the same licence operate with the same terms and conditions, irrespective of when they might have been licensed.

We appreciate that the countervailing public interest is that licensees generally seek certainty in their authorisations, especially if they would be making significant investments. Part of that certainty is knowing that, unless there is a specific reason not to renew, there is a presumption of renewal on acceptable terms and conditions.

The Commission is considering balancing these two objectives by providing for renewal on the standard terms and conditions at that moment in time. The conditions of licence would be potentially "new" but their authorisation would be "renewed". We propose to change the amendments to article 3.2 by saying "... renew the Licence ..." instead of "... issue a new Licence ...". The rest of the article would be as we proposed in the December 2021 Notice.

The changed circumstances necessitating this change is the need to ensure the terms of licence are known before the time of renewal. This year represents the first time since 2007 that the Commission (and licensees) are experiencing a renewal. Undoubtedly, we can all agree that there is much to be desired from the process, which was not contemplated at the time of execution of the 2007 licences. The Commission is, therefore, attempting to bridge the gap. The advantage of the proposed approach is that the terms of the new licence would be known to applicants at the time an application for a

new/renewed licence is made. The comment about being asked to agree to a term that has not been seen by the licensee in final form would therefore not apply in 15 years' time when Flow would be seeking re-licensing.

April 22nd Licensee Responses

Digicel It appears from the Observation and Comments Paper that the Commission has a fundamentally different view of what should be meant by the term "Renewal" rather than what is intended by the Telecommunications Act, 2006 ("Act"). It is also different from what is ordinarily meant by the term "renewal" as it applies to legal arrangements where the term "renewal" is synonymous with the term "extension" (see for example Article 3.2 of the current Digicel Licence which uses both terms interchangeably).

We are particularly concerned that the Commission proposes "providing for renewal on the standard terms and conditions at that moment in time" and that "the conditions of licence would be potentially "new" but their authorisation would be "renewed"".

To be clear, what the Commission is proposing is not "renewal" but "replacement" on as yet unknown terms and as such goes against the meaning would create substantial uncertainty and negatively impact on the investments and valuations of licensees.

In Digicel's submission any licence amendments that may be sought by the Commission in the future should be dealt with through the licence amendment process and should not become a new condition of the licence renewal process.

The concerns previously raised by Digicel therefore remain. In our submission Article 3.2 should not be amended in the way that has been proposed by the Commission.

Commission Conclusion

The Commission considers the concerns about "replacement" on as yet unknown terms to be overstated. Whether they are contained in individual Licence documents or set out in the Telecommunications Code or Commission Regulations, they would be available and known to the Licensees seeking renewal.

The Commission notes that the Act refers to "renewal" in sections 17 and 24. However, the Commission considers the renewal process in the current Licence to be cumbersome and difficult to manage, particularly as it involves four separate Licences that are nevertheless meant to be materially the same. The Commission is of the view that this process can be streamlined and will continue to work towards that goal. In particular, periodic reviews of the terms and conditions by Licensees and the Commission, as proposed below, should assist in this regard.

Nevertheless, while improving the Licence renewal process is in the public interest, it is not update that reasonably reflects changed circumstances in the telecommunications sector since 2007. The Commission will, therefore, **not adopt** the proposed update to Article 3.2 at this time, but reserves the right to revisit the matter again at a later date.

3.3 Renewal Procedure

[to be deleted]

Explanation Article 3.3 shall be deleted, in light of the revisions to Article 3.2 indicated in the preceding section

February 14th Licensee Objections

No comments submitted

Commission Conclusion

Notwithstanding that no party objected to this proposal, the Commission notes that it follows from the updates proposed to Article 3.2. Objections to updates to that Article therefore indirectly apply to this one. As the Commission has chosen not to adopt the proposed changes to Article 3.2, it will **not adopt** the proposed changes to Article 3.3.

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.*

Explanation 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.

February 14th Licensee Objections

Digicel Digicel proposes that the revised Article 5.1(a)(ii) be amended to read "an annual Royalty fee in the amount of three percent (3), or such other prescribed rate ... ", This is to align the wording with Section 60 of the Act.

April 14th Commission Follow-Up

Commission The Commission notes Digicel's suggestion and proposes to adopt the suggested wording such that Article 5.1(a)(ii) will read: "*(ii) an annual Royalty fee in the amount of three percent (3%), or such other prescribed rate, 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.*"

April 22nd Licensee Responses

No comments submitted

Commission Conclusion

The Commission notes that the Development Bank of the Virgin Islands changed its name to the National Bank of the Virgin Islands, and the reference in Article 5.1 must therefore be updated. The other changes are intended to provide

greater clarity. The proposed update therefore reasonably reflects changed circumstances in the telecommunications sector, and the Commission will **adopt** it, with the modification proposed by Digicel.

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.

Explanation 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.

February 14th Licensee Objections

Digicel Digicel disagrees that a licensee's right to make quarterly licence fee payments should be subject to the prior approval of the Commission. While the inclusion of such a provision may indeed "permit the Commission to better manage its cash flow", it would have a correspondingly negative impact on a Licensee's ability to do the same.

In Digicel's submission, the Commission is in a much better position to be able to manage its funding and cashflow than licensees, particularly given that licence fee payments are only one potential source of the Commission's funding which, among other things, may include money appropriated by the Legislative Council.

April 14th Commission Follow-Up

Commission The fundamental issue with the current wording is that it does not require the licensee to give the Commission any advance notice of a decision to make quarterly payments. This means the Commission cannot know its cash flow until after the fact. The Commission notes that prior incidences of non-payment and persistent late payment has occurred during the 15-year licence term and that, accordingly, guided our reasoning in proposing the amended article 5.2.

April 22nd Licensee Responses

Digicel Digicel continues to disagree that a Licensee's right to make quarterly licence fee payments should be subject to the prior approval of the Commission.

We are also concerned that the Commission has used "prior incidences of non-payment and persistent late payment" as the basis for its proposed amendment to the Digicel Licence when neither of these issues constitutes a 'change of circumstance', being the Commission's reason for embarking on its present path.

To the extent that any such concerns have any validity they should be dealt with as compliance matters and not as a reason for amending the terms of the licence.

Commission Conclusion

The Commission notes Digicel's argument that this issue is one of compliance and should be treated as such. However, this ignores the fact that the Commission's expected cash flow is, as a result of the current wording, subject to significant uncertainty as Licensees are not required to notify the Commission of their intention to make quarterly payments. This reduces the Commission's ability to plan its activities through the year.

However, the Commission notes that the underlying issue is lack of notice, not lack of approval, of the Licensee's decision to make quarterly payments. The Commission considers, therefore, that it may be useful to amend this provision of the Licence at a future date to introduce a requirement for the Licensee to provide prior notice should they wish to avail themselves of this option. If pursued, this will be done via a future consultation process under Article 18.1. The Commission will, therefore, **not adopt** this proposed update at this time.

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.

Explanation 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.

February 14th Licensee Objections

Digicel Digicel is also concerned that the Commission has sought to include a discretion to impose additional spectrum licence charges beyond what is already provided for in the Commission Regulations. In our submission, the imposition of any spectrum charges must be carefully considered and should only be imposed in accordance with the powers and processes specified in the Act.

April 14th Commission Follow-Up

Commission The proposed amendment does not result in additional spectrum licence charges, as it is written to apply in the alternative. The purpose of the change is to reflect the fact that some radio spectrum is currently subject to charges which are not set forth in Commission Regulations and to clarify that the licensee is subject to those charges notwithstanding that they are not set out in Regulations.

April 22nd Licensee Responses

Digicel With respect, the Commission's "assurance" that "the proposed amendment does not result in additional spectrum licence charges" is not consistent with provision that has currently been drafted and which appears to give the Commission an unfettered right to impose spectrum charges that are different to those that are specified in the Commission Regulations. Digicel remains of the view that the imposition of any spectrum charges must be carefully considered and should only be imposed in accordance with the powers and processes specified in the Act. The basis for any "special cases" or exemptions should be identified and clearly articulated.

Commission Conclusion

The Commission has carefully considered Digicel's objections to the proposed changes to Article 5.3. Noting that the intent is not to establish new charges for spectrum by this change, the Commission considers that this change does not reasonably reflect changed circumstances in the telecommunications sector since 2007. As such, it would fall outside the scope of Article 3.3(d) and the Commission will, therefore, **not adopt** the proposed update to Article 5.3 at this time.

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.

Explanation 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.

February 14th Licensee Objections

No comments submitted

Commission Conclusion

The Commission notes that no party objected to this proposed change to the Licence. While it is non-controversial, it is an editorial change that does not reasonably reflect changed circumstances in the telecommunications sector since 2007. As a result, it does not fall within the scope of Article 3.3 and the Commission will **not adopt** it at this time, but reserves its right to propose it at a future date under a Licence amendment process pursuant to Article 18.1 of the Licence.

5.5 Renewal

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.

Explanation 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.

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.

February 14th Licensee Objections

Digicel Digicel agrees that fees for Licence renewal should not be left as a matter for "agreement" between the Licensee and the Commission. However, consistent with Digicel's submission to the

Commission dated our view remains that the imposition of licence renewal fees is not justified at all. This is because: a. the Commission's practise has been to include the costs of licence renewals in its annual budget; b. the incremental costs of assessing any applications for renewal of a Unitary Licence should be minimal; and c. International practice does not support the imposition of such fees. We therefore propose that Article 5.5 should be removed in its entirety.

Flow Regarding “renewal”, if it is the TRC’s intention to deprive the Licensees of their right to a “renewal” of their licences (upon the purported imposition of Part 5A of the Code), this article will presumably not work and would need to be revised. Regardless, FLOW queries the changed circumstances reasonably requiring this new term, objects to this provision on those grounds and confirms its position that it is contrary to the terms of the Current Licence.

April 1th Commission Follow-Up

Commission The Commission notes the support for the proposition that renewal fees should not be the subject of an agreement. However, not all costs associated with the renewal of licences (unitary or otherwise) were included in the annual budget. In addition, it is appropriate that, as much as possible, the costs incurred by the Commission be borne by the licensee that caused them (in this case, an application for renewal) than by all licensees generally. There is, therefore, a need for Article 5.5 to remain in the licence.

The purpose of the change to Article 5.5 is to introduce greater transparency and certainty around the fee to be paid for renewal of a licence or authorisation. That transparency and certainty is maximized if the applicable renewal fee is published separately, for example, in the Telecommunications Code, rather than “agreed” after the fact. The current provision, which stipulates “agreement” of the applicable fee is not fit for purpose in a liberalised market where there are several competing licensees.

April 22nd Licensee Responses

Digicel Digicel disagrees that the wording provided by the Commission will “introduce greater transparency and certainty around the fee to be paid for renewal of a licence or authorisation”. On the contrary, all it appears to do is to provide the Commission with an unfettered discretion to set licence renewal fees at whatever level it sees fit.

Digicel's view remains that the imposition of licence renewal fees is not justified at all. This is because:

- a. the Commission's practise has been to include the costs of licence renewals in its annual budget;
- b. the incremental costs of assessing any applications for renewal of a Unitary Licence should be minimal; and
- c. International practice does not support the imposition of such fees.

We therefore propose that Article 5.5 should be removed in its entirety.

Commission Conclusion

The Commission notes that, in a liberalised and competitive market, fees relating to licences and authorisations should not be subject to agreement with individual Licensees. Rather, they should apply equally and transparently to all Licensees and should be determined and published prior to submission of any applications for renewal of the Licence.

Further, the Commission does not accept Digicel’s statements that: the Commission's practice has been to include the costs of licence renewals in its annual budget; the incremental costs of assessing any applications for renewal of a Unitary Licence should be minimal; and such fees are not supported by international practice.

The Commission is undertaking the first renewal of Unitary Licences and there is, therefore, no Commission practice to be applied. The Commission notes Digicel’s view of the costs incurred to renew a Licence. However, the review of Licence renewal applications is not a trivial matter. The Commission does incur costs in so doing. In any event, the

Commission notes that the matter being addressed here is not the quantum of the renewal fee but the transparency of the renewal fee. Further, the Commission is aware that other countries charge a fee for renewal of a licence. It is therefore not clear that “international practice does not support the imposition of such fees.”

Notwithstanding the foregoing, the Commission notes that the proposed update to Article 5.5 depends upon new provisions in the Code. The Commission considers therefore that, while the proposed update is justified and appropriate, it can be implemented at the same time as those are finalized and it is not necessary to adopt it at this time. The Commission will, therefore, **not adopt** the proposed update to Article 5.5 at this time, but reserves the right to address this matter again at a later date.

The Commission notes that all Licences currently include Article 5.6 (Submarine Cable Fees). Renumbering Articles 5.5 and 5.6 to be Articles 5.6 and 5.5, respectively, is not a change that reasonably reflects changed circumstances in the telecommunications sector, and therefore will not be included in the renewed licences at this time.

Article 6 **Works and Access to Land**

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.

Explanation 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.

February 14th Licensee Objections

Flow This is a prospective amendment noting the intention to make amendments to the “Telecommunications Act, 2006, the Telecommunications Code, the Physical Planning Act, 2004, and all other relevant laws of the Virgin Islands”. This appears to confirm the TRC’s intention that the Licensees be bound by subsequent amendments to numerous provisions notwithstanding the terms of the Licence. If this is the TRC’s intention, again, this results in material uncertainty for Licensees because they are unable to rely upon the terms of the licence, as entered into, in light of whatever further revisions are made to other statutes, regulations, the Code, directives and “rules”. This revised term means that the rights of Licensees may be materially and unilaterally changed as a result of these changes to other provisions. This change creates material and significant uncertainties for Licensees. FLOW queries the changed circumstances reasonably requiring this new term, objects to this provision on those grounds and confirms its position that it is contrary to the terms of the Current Licence.

April 14th Commission Follow-Up

Commission The proposed change to Article 6 does not indicate an intention to make amendments to the Act, the Code, the Physical Planning Act or any other relevant laws of the Virgin Islands, which is not within the Commission’s powers in any event. Rather, as noted in the Schedule to the December 2021 Notice, the current Article 6 (other than the preamble) reproduces verbatim the provisions already set out in Part VI of the Telecommunications Act. Further, the development of the industry since 2007 indicates that the Commission’s role in the planning process is not so intensive as to require detailed provisions in the Licence. As such, the current Article 6 is largely redundant and the Commission’s proposal is to delete them to the extent they are redundant. Note that a licensee is

subject to the provisions in those statutes, including to any changes to them made by the House of Assembly, whether or not they are reproduced in the licence. The only substantive change that applies here is the recognition that the Telecommunications Code could be a source of rights or obligations regarding works and access to land.

April 22nd Licensee Responses

No comments submitted

Commission Conclusion

The Commission notes that the proposed update to Article 6 would have resulted in no material change to the obligations of the Licensees, as Article 6 is, as noted, effectively a reproduction of Part VI of the Act. As such, Article 6 in its current wording does not add to or clarify the rights and obligations of Licensees, and it would be reasonable to simplify it and to incorporate Part VI of the Act by reference instead. However, this would be an editorial change that does not reasonably reflect changed circumstances in the telecommunications sector since 2007. As a result, it does not fall within the scope of Article 3.3 and the Commission will **not adopt** it at this time, but reserves its right to propose it at a future date under a Licence amendment process pursuant to Article 18.1 of the Licence.

7.2 Provision of Leased Line and Circuit Services

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.~~

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

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).

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.

February 14th Licensee Objections

No comments submitted

Commission Conclusion

The Commission notes that no party objected to this proposed change to the Licence. The Commission also notes that the proposed update to Article 7.2 is based on the fact that the standards that applied from 2007 to 2009 are no longer relevant in the current market. As a result, the proposed update reasonably reflects changed circumstances in the telecommunications sector since 2007 and the Commission will **adopt** it. As a consequence of the deletion of the last sentence of the first paragraph of Article 7.2, the last phrase of the second paragraph of Article 7.2 (reading “without prejudice to the Customer’s right to install its own lines pursuant to the foregoing paragraph.”) shall also be deleted.

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.*

Explanation 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.

February 14th Licensee Objections

Flow This provision regarding a “Public Emergency” highlights the problem of enabling the TRC and others to amend the Telecommunications Code (and other provisions) and impact the terms of Licences and the expectations on Licensees which are completely unknown and undisclosed at this time. The requirement that the Licensees must comply with TRC orders and “instructions” is vague and uncertain. Whilst FLOW will do its utmost to maintain services during times of public emergencies (and has ably demonstrated this resolve by its responses to hurricanes Irma and Maria), this provision is uncertain, vague and unnecessary. It also introduces the requirement to comply with TRC “instructions”, which instructions must be lawful. There are also reasonable limits to cooperation between different Licensees and their suppliers due to confidentiality obligations. FLOW queries the changed circumstances reasonably requiring this new term, objects to this provision on those grounds and confirms its position that it is contrary to the terms of the Current Licence.

April 14th Commission Follow-Up

Commission The current Article 7.4 largely reproduces section 89 of the Telecommunications Act, with two exceptions. Including it in the licence, therefore, does not change or add clarity to the licensee’s obligations during a public emergency and is largely redundant. The proposed changes simply reflect this by deleting the redundancy. The two exceptions are the requirement to provide an emergency alert system in the current article 7.4(e), and the requirement to cooperate with other public suppliers in the development of plans in the current article 7.4(f). These are not proposed to be removed from Article 7.4 and therefore do not represent a change to the licensee’s existing obligations.

April 22nd Licensee Responses

No comments submitted

Commission Conclusion

The Commission notes that the proposed update to Article 7.4 would have resulted in no material change to the obligations of the Licensees, as Article 7.4 is, as noted, effectively a reproduction of section 89 of the Act. As such, Article 7.4 in its current wording does not add to or clarify the rights and obligations of Licensees, with the exception of Article 7.4(e) and the additional words in Article 7.4(f), and it would be reasonable to simplify Article 7.4 by incorporating section 89 by reference instead. However, this would be an editorial change that does not reasonably reflect changed circumstances in the telecommunications sector since 2007. As a result, it does not fall within the scope of Article 3.3 and the Commission will **not adopt** it at this time, but reserves its right to propose it at a future date under a Licence amendment process pursuant to Article 18.1 of the Licence.

7.6 (a) Public Pay Telephone Plan

[to be deleted]

Explanation Article 7.6 shall be amended by deleting Article 7.6(a) from the Licence.

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.

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.

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.

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).

February 14th Licensee Objections

No comments submitted

Commission Conclusion

The Commission notes that no party objected to this proposed change to the Licence. The Commission also notes that the proposed update to Article 7.6 (a) is based on the changes to the use and provision of pay telephone services in the market since 2007. As a result, the proposed update reasonably reflects changed circumstances in the telecommunications sector since 2007 and the Commission will **adopt** it.

7.7 Service Quality Requirements

(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, (iii) the National Long Distance Call Completion Rate, (iii) the International Call Completion Rate, (iv) the Fault Recovery Rate, (v) the digitisation of the network, (vii) the maximum connection time for Subscriber Lines in urban areas, and (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.

Explanation 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.

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.

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.

Further, the targets set in Annex 3 should be updated to reflect today's operating environment.

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.

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.

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.

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.¹ However, the Code does not establish targets.

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.

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 1 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.

Further, to ensure consistency among all Licences, the provisions regarding inspection, maintenance and nonionizing radiation that currently apply in the Licence issued to Digicel shall be included as Article 7.7(c).

February 14th Licensee Objections

No comments submitted

April 22nd Licensee Responses

Digicel Digicel has considered the proposed amendments to Annex 3 of the Digicel Licence. In Digicel's submission many of the proposed amendments set targets that are either impractical or impossible to meet or would impose very substantial capital and operational costs on Digicel and by extension

¹ 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.

to the Commission which, pursuant to Article 18.1 of the Digicel Licence is bound to compensate Digicel for any expense incurred or damage caused as a result of an amendment or modification to the Licence.

We are also of the view that it is impractical for Digicel to provide detailed responses to each and every change that has been proposed by the Commission as that is unlikely to yield any useful results or uncover the Commission's objectives in making the proposed amendments. Instead, and consistent with the good faith negotiation process expected under Article 18.1 of the Digicel Licence, we submit that it would better for the Commission engage in a technical workshop with all interested parties with a view to understanding the Commission's service quality objectives and achieving a common approach on how standards and reporting arrangements may be used to support reaching those objectives.

Commission Conclusion

As noted previously, the telecommunications sector in the British Virgin Islands has changed considerably since 2007. Service Quality Requirements designed for fixed voice services are not aligned to a market that depends heavily on Internet access and mobile voice services. Updates to Article 7.7 are therefore warranted in light of the changed circumstance in the telecommunications sector. The Commission considers, therefore that the updated Article 7.7 reasonably reflects the changed circumstances in the telecommunications sector.

The Commission has set out in Article 7.7(b) and in Annex 3 a set of service quality parameters that are tailored to today's Internet- and mobile-centric market. The Commission also considers that the targets set out in Annex 3 are in line with the performance actually achieved by Licensees today. However, the Commission has considered Digicel's comments about the benefits of further consultation and discussion with the industry and will therefore **adopt** the proposed changes to Article 7.7(c) at this time. The Commission will **not adopt** Article 7.7(a) or the proposed changes to Article 7.7(b) at this time but reserves the right to do so following consultation and a Licence amendment process pursuant to Article 18.1.

7.7A Advertising and Marketing Practices (New)

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.

Explanation 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.

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.

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.

February 14th Licensee Objections

Digicel Digicel has no objection in principle to making reference to the Telecommunications Code in respect of advertising and marketing practices. However, without there being any such rules in place it

seems premature to be making any specific changes to the Unitary licence. Until that happens, it is Digicel's view that the obligation for a licensee to "comply with [the] Act, the Regulations, the Telecommunications Code, the terms and conditions of its licence and any instructions", which is set out in Section 16 of the Act is already sufficient to meet the Commission's intended purpose.

We are also concerned that the Commission has proposed to include a requirement in the licence that "advertising and marketing communications are fair and not misleading" without first seeking to provide any definition or guidance as to what those terms mean. In particular, the use of the term "fair" is subjective and is likely to result in interpretational issues. Again, Digicel considers the inclusion of this provision to be premature and we propose that any rules around advertising and marketing practices are deferred until appropriate consultation has taken place.

Flow Again, this provision regarding "Advertising and Marketing Practises" highlights the problem of the TRC intending to impose obligations on Licensees outside the terms of the Licence through unknown and undisclosed revisions to the Code "or the Commission Regulations". The requirement that the Licensees must comply with terms not yet disclosed or drafted creates material uncertainty for Licensees. It is, accordingly, vague and uncertain. FLOW queries the changed circumstances reasonably requiring this new term, objects to this provision on those grounds and confirms its position that it is contrary to the terms of the Current Licence.

April 14th Commission Follow-Up

Commission A specific requirement in the licence regarding advertising and marketing practices would constitute a stronger protection of the interests of consumers than the general obligation in section 16 of the Act. Further, in light of the maturation of the overall market, it is not premature to address advertising and marketing practices at this time, even if specific definitions of "fair and not misleading" have not yet been consulted on. As was noted in the Notice to Adopt a Directive to update the licence conditions, the Commission would consult on advertising standards, marketing practices and delivering on promises before enacting any rules on them. However, issues regarding advertising and marketing could come before the Commission today through complaints from consumers or other licensees, and it is possible to identify, for example, that a marketing statement is misleading or false without having pre-determined criteria for what constitutes misleading or false.

The proposed new licence condition is predicated on the maturation of the market and the increased incentive to market more aggressively than would have been the case in 2007. It would not require a licensee to comply with any Code or Regulations requirements before they are enacted, and any such requirements would be subject to consultation and therefore "disclosed." The proposed general requirement to ensure "*advertising and marketing communications are fair and not misleading*" would be, by definition, not unknown or undisclosed. Further, it is possible, even in the absence of specific provisions in the Code or Regulations, to assess whether a licensee's advertising is not fair or is misleading. Any such assessment, of course, would depend upon the facts of the specific case and the licensee would have an opportunity to comment on any allegations. Accordingly, it is not vague or uncertain.

April 22nd Licensee Responses

Digicel Digicel remains of the view that it is premature to be making any specific changes to the Unitary Licence to include consumer protection matters. In our submission the obligation for a licensee to "comply with [the Act, the Regulations, the Telecommunications Code, the terms and conditions of its licence and any instructions", which is set out in Section 16 of the Act is already sufficient to meet the Commission's intended purpose.

To the extent that the Commission has ongoing concerns around consumer protection and cybersecurity requirements we propose that they be dealt with as part of a separate proceeding. While it is accepted that consumer protection and cybersecurity related matters have developed over time, and may arguably be a 'change in circumstance', it is not enough to require the inclusion of premature provisions before they have been properly discussed and gone through the usual process of open and fair consultation. Rushing to include such provisions simply to arrive at a more modern document, or as part of its 'tick the box' exercise, is patently, is therefore susceptible to challenge. Digicel would be happy to participate in any such proceeding at the appropriate time.

Commission Conclusion

The telecommunications sector has evolved considerably since 2007 and, as it has matured, the importance of advertising and marketing to the operations of service providers has increased. This must be balanced however against the public interest in consumer protection. The Commission considers that a general obligation to comply with the Act, the Regulations, the Code, the Licence and any instructions is insufficient to achieve the objective of protecting the interests of consumers against unfair or misleading advertising or marketing practices. The Commission agrees with Digicel that the detailed rules and obligations should be properly discussed among all stakeholders in an open and fair consultation process, and the proposed Article contemplates this.

Having considered the concerns raised by the Licensees, the Commission will modify the proposed provision to refer solely to requirements in the Code or Regulations. This update to the Licence reasonably reflects changed circumstances in the telecommunications sector since 2007 and the Commission will **adopt** it as modified, as set out below:

The Licensee shall comply with any applicable requirements specified in the Telecommunications Code or the Commission Regulations.

7.8 (c) Approval of Equipment (New)

(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.*

Explanation 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.

February 14th Licensee Objections

Digicel Digicel strongly disagrees with the proposed inclusion of a new Article 7.8(c) which would, in effect, require Licensees to gain the Commission's approval for each and every piece of equipment forming part of or being connected to the Licensees network. Such a requirement would impose substantial costs on industry and would potentially delay the roll out and maintenance of networks and services. No justification has been provided by the Commission for the inclusion of such an onerous obligation which, on the face of it, appears to be entirely unnecessary.

Moreover, making reference to Section 45 of the Act as being "consistent" with the power sought to be imposed by the Commission appears to be somewhat disingenuous as Section 45 only provides a discretion for the Commission to require approval and not to mandate it in all cases. In the

circumstances, it is our view that the proposed Article 7.8(c) should not be included in the Unitary Licence.

Flow This appears redundant in light of section 45 of the Act, and FLOW queries why it is added to the terms of the Licence. FLOW queries the changed circumstances reasonably requiring this new term, objects to this provision on those grounds and confirms its position that it is contrary to the terms of the Current Licence.

April 14th Commission Follow-Up

Commission It is possible that this new licence condition might impose some additional compliance costs on a licensee, although it is not necessarily as onerous as Digicel would suggest as the Commission anticipates that Licensees will likely only use equipment that has been certified under international standards. The Commission notes that the proposed article 7.8(c) is not “unnecessary” as Digicel states, as it applies where section 45 approval has not been given and therefore fills a gap. It is therefore not redundant with the Act. Note that section 45 mandates that the Commission certify all equipment (unless we are satisfied that the equipment has been certified under international standards), therefore the Commission does not have as much discretion as Digicel suggests. The Commission proposes to add, to the new article 7.8(c) “*The Commission shall, for the purpose of certifying or approving such equipment, determine whether such equipment fulfills such requirements as the Commission may specify in the Telecommunications Code.*”

April 22nd Licensee Responses

Digicel Digicel disagrees that the additional words proposed by the Commission will provide any greater certainty or reduce compliance costs for industry.

We further note that no justification has been provided by the Commission for the inclusion of such an onerous obligation which, on the face of it, continues to appear to be entirely unnecessary and arbitrary at best.

Digicel also disagrees with the Commission's assessment of Section 45 of the Act as limiting its discretion in the way that has been described. The Commission has once again misinterpreted the legislation and ought to take advice on such matters before proceeding to assert such statements.

In the circumstances, it is our view that the proposed Article 7.8(c) should not be included in the Unitary Licence.

Commission Conclusion

The Commission has regularly experienced issues with the illegal use of spectrum during the current Licence term. These are the circumstances that have changed since 2007. The Commission does not consider the current terms and conditions of the Licence are sufficient to address these issues given their reoccurrence. The Commission disagrees that the proposed provision is unnecessary on the basis that section 45 of the Act would apply, given that the proposed provision would apply only where section 45 testing and approval was not procured.

The Commission notes Digicel's concerns regarding the scope and potential cost of the proposed provision. The Commission is minded to adopt Licence provisions that achieve its goals at the lowest burden to Licensees and, therefore, will **not adopt** it at this time but reserves the right to address this matter again at a later date.

7.9 (a) Obligation to Maintain Confidentiality

(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.*

Explanation 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.

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.

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.

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.²

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.

² 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.”

February 14th Licensee Objections

- Digicel Similarly, Digicel strongly objects to the proposed amendments to Article 7.9(a) without them first undergoing a detailed consultation and further consideration of how such obligations should best be implemented. In Digicel's submission obligations around confidentiality, while clearly an important issue, should be applied across the industry in a consistent and non-discriminatory way and should be implemented through the Telecommunications Code rather than specific licence obligations that are only applied to four Licensees.
- Flow FLOW will comply and is in compliance with all lawful provisions for confidentiality requirements. It is noted that the duty of the TRC to maintain confidentiality is missing from this provision. Further, contrary to the drafting of the above provision, the TRC is established by statute as a regulator not as a law enforcement agency. FLOW seeks satisfactory clarifications of the TRC's intentions in this regard and reserves its rights to object to this term on the bases that there are no changed circumstances reasonably requiring this new term, objects to this provision on those grounds and that this term is thus contrary to the terms of the Current Licence.

April 14th Commission Follow-Up

Commission The proposed changes to this article are intended to ensure subscriber information held by the licensee, not just subscriber messages, are held in confidence, and to ensure the licensee does not use any subscriber information it holds for any purposes except as agreed by the subscriber or covered by an applicable exception. As the market has developed and matured since 2007, protection of the interests of consumers has gained importance. As noted in the original Notice to Adopt a Directive, these changes reflect existing obligations in s 18 of the Act and clarify the requirements imposed on licensees. Further, these are not novel concepts and should be relatively straight forward to implement, i.e. by not using or disclosing the applicable information without the consent of the subscriber.

The TRC's duty to maintain confidentiality is addressed by section 68 and 80 of the Act, and therefore, do not need to be separately addressed in this Article. It should be noted that the proposed changes do not establish the TRC as a law enforcement agency. Rather, they require the licensee to protect and to not use the information they collect and hold on their subscribers, except as may be agreed by the subscriber.

April 22nd Licensee Responses

Digicel Consistent with Digicel's previous submissions on this issue, we remain of the view that obligations around confidentiality, while clearly an important issue, should be applied across the industry in a consistent and non-discriminatory way and should be implemented through the Telecommunications Code rather than specific licence obligations that are only applied to four Licensees. They are therefore outside of the scope of this proceeding and also cannot be argued as a 'change in circumstance' warranting such a rushed and unacceptable process.

Commission Conclusion

Section 18(1) of the Act requires Licensees to refrain from using or disclosing any confidential, personal and proprietary information of any user or licensee, and information regarding usage of the service or information received or obtained in connection with the operation of the network or provision of the service, for any purpose other than a purpose specified in section 18(2), except as otherwise permitted by the user or licensee, as the case may be, or as required by warrant, court order or other government agency with competent authority. Consequently, the Commission expects the Licensees to handle the confidential and personal information of their customers with the care and respect that it deserves, and the proposed update to Article 7.9 (a) would have clarified this. However, while this clarification is in the public interest, it does not reasonably reflect changed circumstances in the telecommunications sector since 2007. As a result, it does not fall within the scope of Article 3.3 and the Commission will **not adopt** it at this time, but reserves its right to address the matter of confidentiality and use of subscriber information at a future date.

7.9 (c) Lawful Intercept

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.

Explanation 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.

February 14th Licensee Objections

Flow “Lawful intercept” already exists in paragraph 7.9(c) of the Current Licence. This provision again gives rise to material uncertainty and vagueness in relation to incorporation by reference of a plan which has not yet been prepared, drafted or disclosed to the Licensees. It also appears to be a material change from the current requirements under the direction of the Governor. FLOW seeks satisfactory clarifications of the TRC’s intentions in this regard. FLOW queries the changed circumstances reasonably requiring this new term, objects to this provision on those grounds and confirms its position that it is contrary to the terms of the Current Licence.

April 14th Commission Follow-Up

Commission Flow appears to have misunderstood the intent and effect of the proposed changes. Flow is correct that lawful intercept is already addressed by Article 7.9 (c). However, the original article referenced an Effective Date that has long passed. The proposed change replaces that “Effective Date” with the date the Commission specifies or modifies the specification for the lawful intercept methodology. As such, it simply ensures the methodology required by this article is updated as necessary, something the current article does not require. Given that the obligations relating to lawful intercept can change from time to time – indeed they were changed in the years following 2007 by the Telecommunications (Amendment) Act, 2010 – this change is reasonably necessary.

April 22nd Licensee Responses

No comments submitted

Commission Conclusion

The existing Article 7.9 (c) requires Licensees to implement a methodology for lawful intercept to be specified by the Commission within 24 months of the Effective Date, i.e. at the time of licensing in 2007 the methodology was incorporated by reference and was unknown. If Article 7.9 (c) were not modified, there would be no change to the Licensee’s situation upon Licence renewal, except that the timeframe set out in the Article would restart from the new Effective Date.

The Commission notes that the methodology has not yet been specified or implemented. The Commission proposed to update this Article, therefore, in order to give the Licensees and Commission more flexibility in working with each other to develop the methodology while retaining the obligation to implement it in a reasonable time once it is specified. Given the changes that have occurred in the sector in relation to lawful intercept in particular since 2007, the Commission considers this update to reasonably reflect changed circumstances in the telecommunications sector since 2007 and, accordingly, will **adopt it.**

7.9A Cyber Security (New)

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.

Explanation 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.

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.

February 14th Licensee Objections

Digicel Similarly, Digicel strongly objects to the proposed inclusion of a new Article 7.9A without first undergoing a detailed consultation and further consideration of what such obligations should include and how they should best be implemented.

In Digicel's submission obligations around cyber security, while clearly an important issue, should be applied across the industry in a consistent and non-discriminatory way and should be implemented through the Telecommunications Code rather than specific licence obligations that are only applied to four licensees.

Flow FLOW is uncomfortable sharing detailed plans regarding its security in relation to cyberattacks because that would add another layer of vulnerability to FLOW's network. We are pleased to provide the TRC with a report if any such attacks affect service in the BVI on a wide scale. Further, with regard to the review and update "that plan as required", clarification is needed regarding the circumstances in which the review and update will be "required". How frequently will such reviews and updates be required? What circumstances are envisaged requiring such review and update? Does the TRC envisage making such requests of the Licensee?

April 14th Commission Follow-Up

Commission The Commission notes Digicel's agreement that cyber-security is an important matter. As noted in the Notice to Adopt a Directive, the purpose of this new condition is to ensure licensees proactively consider and address cyber-security matters and the protection of their networks. Given the relatively unique configuration of each licensee's networks and services, they will likely require a bespoke plan to mitigate the impact of cyber-threats and attacks. The plan is likely to be more targeted and effective if it is prepared by the licensee based on the licensee's specific circumstances rather than in response to a limited set of obligations developed following a consultation. However, the Commission agrees that all holders of Unitary or Public Supplier Licences should have the same obligation to develop and submit a plan to mitigate the impact of cyber threats and attacks.

Flow's concerns regarding disclosure of plans regarding security are noted and Flow can expect that the TRC would treat such plans in confidence under sections 68 and 80 of the Act. As noted in the Notice to Adopt a Directive, the purpose of the proposed new condition is to ensure licensees proactively address such matters. A post-event report on a cyber-attack that affects service in the BVI on a wide scale would not achieve this objective and is therefore not an adequate substitute.

April 22nd Licensee Responses

Digicel See comments above [regarding Article 7.9 (a)].

Commission Conclusion

The telecommunications equipment used by Licensees has changed significantly since 2007. In particular, it has increasingly become based on Internet Protocol technology. The importance of broadband and Internet-based services to consumers and businesses in the Virgin Islands has also increased significantly since 2007. As a result, attending to cyber security and cyber threats has become more important to ensuring the proper functioning of telecommunications networks and services than it was in 2007. Because of these changed circumstances, the Commission considers that the introduction of a provision addressing cyber security matters falls within the scope of Article 3.3 (d).

The Commission notes Digicel's submission that cyber security matters should be addressed via the Code and apply to all Licensees. The Commission agrees that all Licensees should address cyber security matters and considers that the Code may be an appropriate place to develop the requirements for what should be addressed by cyber security plans. However, this is distinct from the requirement to have a plan in the first place, which is the Commission's primary concern at this time and which the Commission views as appropriate for inclusion in each of the Unitary Licences.

The Commission continues to be of the view that cyber security plans should be developed by the Licensees and should be tailored to the Licensee's specific circumstances. With respect to Flow's proposal to provide a report if any such attacks affect service in the BVI on a wide scale, the Commission welcomes Flow's willingness to engage with the Commission on cyber security matters if issues arise, but notes that an *ex post* report would not address the Commission's concern to ensure all Licensees have a plan in place to mitigate the effect of such attacks.

However, until specific obligations are consulted upon and published in the Code, the Commission is of the view that approval of the plans by the Commission is not warranted. Accordingly, the Commission considers that an obligation to develop a plan, but not to submit it to the Commission for approval, would reasonably reflect changed circumstances in the telecommunications sector at this time. The Commission notes that such an obligation is similar to the obligation in the current Article 7.4 (f) to develop plans for operating networks and providing services during force majeure. The Commission will therefore **adopt** the following Article:

The Licensee shall at all times maintain the proper functioning of its Telecommunications Networks and its Telecommunications Services. The Licensee shall develop a plan to mitigate the impact of cyber threats and attacks on its Telecommunications Networks and Telecommunications Services and shall provide a copy to the Commission upon request.

The Commission will continue to monitor developments in this area and, if required in the public interest, reserves the right to propose changes pursuant to Article 18.1.

7.10 (d) Directory Assistance Requirements

(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.

Explanation Article 7.10(d) shall be amended by removing the obligation to produce a printed directory.

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.

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,³ 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.

³ 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>

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).

February 14th Licensee Objections

No comments submitted

April 22nd Licensee Responses

No comments submitted

Commission Conclusion

The Commission notes that no party objected to this proposed change to the Licence. Consistent with the update to Article 7.6 (a) above, this proposed update to Article 7.10 (d) is based on the changes to the use and provision of pay telephone services in the market since 2007. As a result, the proposed update reasonably reflects changed circumstances in the telecommunications sector since 2007 and the Commission will **adopt it**.

7.11 (c) Hearing Apparatus for Public Pay Telephone Service

*(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 Service, (or such higher percentage as may be agreed between the Licensee and the Commission) 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.*

Explanation 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.

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.

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.

February 14th Licensee Objections

No comments submitted

April 22nd Licensee Responses

No comments submitted

Commission Conclusion

The Commission notes that no party objected to this proposed change to the Licence. The Commission also notes that the proposed update to Article 7.11(c) is based on the changes to use and provision of pay telephone services in the market since 2007, as well as on the fact that the reference to an initial 5-year period is now obsolete. As a result, the proposed update reasonably reflects changed circumstances in the telecommunications sector since 2007 and the Commission will **adopt** it.

7.13 Accounting Requirements

(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.*

Explanation Article 7.13(a) shall be amended to refer to all elements that an accounting system should record. Since 2007, the Licence 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.

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).

February 14th Licensee Objections

Digicel Similarly, Digicel strongly objects to the proposed inclusion of a new Article 7.13(b) without first undergoing a detailed consultation and further consideration of what such obligations should include and how they should best be implemented. In particular, no cogent reasoning has been provided to

support the onerous requirements that have been proposed or how they will improve outcomes in the BVI market context

Flow

i. References to consistency with “the Commission Regulations and the Telecommunications Code” are uncertain and vague. FLOW seeks satisfactory clarifications of the TRC’s intentions in this regard.

ii. Furthermore, FLOW’s current accounting system is IFRS-based and its audited financial statements provided to the TRC under the terms of the Current Licence are IFRS-based. The reference to GAAP in the term is inconsistent with the TRC’s comment at paragraph 75 of the Draft Directive (“... The second obligation, now referred to as (b) shall make reference to International Financial Reporting Standards (IFRS), as opposed to GAAP. ...”) which requires that audited financial statements are to be IFRS-based. FLOW wishes to point out that FLOW seeks satisfactory clarifications of the TRC’s intentions in this regard.

iii. Finally, it is unacceptable for the TRC to determine the accounting system used by any provider notwithstanding that at page 26 of the TRC’s Evaluation Report Cable and Wireless (BVI) Ltd. Licence Performance from May 2007 – May 2021, the TRC acknowledged that “FLOW had been submitting its financial statements for the past fourteen years without there being any complaints from the Commission regarding its financial statements of accounting system...” With respect to sub clause (c), FLOW states that it is not appropriate for the TRC to require a licensee to change its corporate structure by the creation of a new subsidiary in any circumstances and specifically in the circumstances outlined in this proposed clause.

FLOW seeks satisfactory clarifications of the TRC’s intentions in this regard. FLOW queries the changed circumstances reasonably requiring this new term, objects to this provision on those grounds and confirms its position that it is contrary to the terms of the Current Licence.

April 14th Commission Follow-Up

Commission

The proposed condition in Article 7.13(b) gives the Commission more flexibility in designing remedies to address market power, as it introduces the option of accounting separation as an alternative to structural separation. Given that three of the four unitary licensees have been declared dominant in one or more markets over the last 14 years, it is necessary to have more flexible remedies at the Commission’s disposal than simply structural separation, which is very intrusive and onerous.

The references to consistency with Commission Regulations or the Code are not uncertain and vague. In the event any Regulations or provisions in the Code are enacted which address accounting matters, the accounting system must comply with them. However, greater clarity could be provided to licensees by specifying that the obligation is limited to the relevant Regulations and Code.

Note that the Commission is not determining the accounting system used by the licensee. It is only requiring that the accounting system conform to certain well-known standards, and that it enable the activities of any specific business unit be separately identifiable – if such a business unit has been identified.

Note also that it is not unusual for a regulator to impose accounting separation requirements as a remedy to address dominance in a market. Given the number of different markets in which one or more licensees have been declared dominant since 2007, it is necessary to have more flexible tools than simply structural separation, which may not be appropriate in all circumstances. However, it should be noted that, with the exception of references to the proposed new Article 7.13(b), Article 7.13(c) is not a new provision and exists in the current licence. There may be circumstances, as set out in Article 7.13(c), where structural separation might be necessary in order for the Commission to properly supervise compliance with rate regime provisions in Article 8. Article 7.13(c) should therefore remain.

April 22nd Licensee Responses

Digicel Digicel continues to strongly object to the proposed inclusion of a new Article 7.13(b) without first undergoing a detailed consultation and further consideration of what such obligations should include and how they should best be implemented.

In particular, no cogent reasoning has been provided to support the onerous requirements that have been proposed or how they will improve outcomes in the BVI market context.

If implemented in their current form the proposed amendments would impose very substantial set up and ongoing operational costs on licensees without any clear corresponding benefit.

Commission Conclusion

The proposed updates to Article 7.13 (b) were two-fold: one was to clarify the information that the accounting system was expected to capture, and the other was to establish an alternative to full structural separation in the event such measures were required to supervise remedies imposed under Article 8.

The Commission notes that, if a Licensee establishes a proper accounting system, it would capture the relevant information as a matter of course. This change would, therefore, not be particularly onerous for Licensees.

The Commission also notes that full structural separation is a draconian and intrusive remedy to address non-compliance with the requirement to have an approved accounting system or to supervise remedies imposed under Article 8 and should only be imposed as a last resort, not as the only option. The Commission considers that there may be circumstances where a less draconian remedy may be effective and more appropriate to achieve the objectives of the Act, and this is what the Commission hoped to achieve with the introduction of “accounting separation” as an alternative to “structural separation.” Given that a Licensee would not need to implement such a remedy unless a determination had first been made regarding non-compliance with the requirement to have an approved accounting system or regarding supervising remedies imposed under Article 8, it is not clear how onerous the proposed changes would be for Licensees at the present time.

The Commission considers that both changes are in the public interest. However, the Commission notes that the two changes do not necessarily reflect changed circumstances in the telecommunications sector since 2007. As a result, they do not fall within the scope of Article 3.3 and the Commission will **not adopt** them at this time, but reserves its right to propose them or equivalent changes at a future date under a Licence amendment process pursuant to Article 18.1 of the Licence

7.14 Record Keeping and Reporting Requirements

(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~~ 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~~ 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.

Explanation 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.

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.

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.

February 14th Licensee Objections

No comments submitted

Commission Conclusion

The Commission notes that no party objected to this proposed change to the Licence. The Commission also notes that the proposed updates to Article 7.14 that are not merely editorial in nature are based on the difficulties faced by the Commission in securing compliance with information requests which would not have been anticipated in 2007. As a result, the proposed updates reasonably reflect changed circumstances in the telecommunications sector since 2007 and the Commission will **adopt** them.

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.

Explanation 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.

The new provision shall be placed before the existing Article 8.1 (Dominant Public Supplier).

February 14th Licensee Objections

Flow FLOW seeks satisfactory clarifications of the TRC's intentions with regard to this proposed new clause which would essentially allow the TRC to regulate unregulated services. FLOW queries the changed circumstances reasonably requiring this new term, objects to this provision on those grounds and confirms its position that it is contrary to the terms of the Current Licence.

April 14th Commission Follow-Up

Commission The proposed Article 8.1 does not provide for regulation of unregulated services, as stated by Flow. It does however require the licensee to publish all relevant details of its services so that consumers may make informed purchasing decisions. This transparency is critical to the proper functioning of the now-fully liberalised and increasingly competitive markets in the BVI.

April 22nd Licensee Responses

Digicel Digicel supports the deletion of the last sentence in the proposed new Article 8.1.

Commission Conclusion

The telecommunications market in the Virgin Islands has evolved from the initial liberalization in 2007 to a more mature and competitive state in 2021. In these circumstances, where a Licensee's commercial success is increasingly likely to be derived from persuading an existing telecommunications user to choose their service, rather than from persuading new users to adopt telecommunications services for the first time, it is critical that consumers have adequate information upon which to base their decisions. The changes proposed for this new Article, therefore, reasonably reflect changed circumstances in the sector since 2007 and, except as discussed below, the Commission will **adopt** them.

The intent of the changes is to ensure transparency and availability of information for consumers. That information, though, would be developed by the Licensees themselves. It is not the Commission's intent to regulate the price and non-price terms and conditions of a Licensee's services where that Licensee has not been determined to be dominant in a market. To avoid any confusion as to the Commission's intent, the last sentence of the proposed provision will be deleted and not included in the Licence. The Commission considers that this will address Flow's concern that the Commission was seeking to regulate unregulated services.

8.2 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.*

Explanation 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).

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.

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

February 14th Licensee Objections

No comments submitted

Commission Conclusion

The Commission notes that no party objected to this proposed change to the Licence. The Commission also notes that the proposal in effect simply consolidates several amendments that had previously been made to Licences following Commission determinations since 2007. As a result, the proposed update reasonably reflects changed circumstances in the telecommunications sector since 2007 and the Commission will **adopt** it.

9.3 Interconnection Agreement and Interconnection Charges for Telecommunications Services

[to be deleted]

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

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.

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.

February 14th Licensee Objections

No comments submitted

Commission Conclusion

The Commission notes that no party objected to this proposed change to the Licence. The Commission also notes that the proposed deletion of Article 9.3 is based on the fact that, following the initial establishment of interconnection between the Licensees' networks, it is now obsolete. As a result, the proposed deletion reasonably reflects changed circumstances in the telecommunications sector since 2007 and the Commission will **adopt it**.

9.4 Interconnection Default Rates

[to be deleted]

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

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.

February 14th Licensee Objections

No comments submitted

Commission Conclusion

The Commission notes that no party objected to this proposed change to the Licence. The Commission also notes that the proposed deletion of Article 9.3 is based on the fact that, following the initial establishment of interconnection between the Licensees' networks, it is now obsolete. As a result, the proposed deletion reasonably reflects changed circumstances in the telecommunications sector since 2007 and the Commission will **adopt it**.

9.7 Number Portability

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.~~

Explanation 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.

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”.

February 14th Licensee Objections

Flow This revised term seeks to provide Number Portability on terms and conditions specified in such Commission Regulations “as may be the regulations in effect”. Again, this incorporation by reference is to regulations which are unknown and may be materially revised from time to time. This approach injects significant vagueness and uncertainty regarding the Licensee’s obligations under the Licence. FLOW queries the changed circumstances reasonably requiring this new term, objects to this provision on those grounds and confirms its position that it is contrary to the terms of the Current Licence.

April 14th Commission Follow-Up

Commission Article 9.7 is not a new obligation. In the original licence, it was intended to apply only after the expiry of a transition period. As the transition period was removed in 2007, the obligation was suspended but it was not eliminated. Number portability continues to be a service that the Commission may want to introduce at some time in the future, therefore the obligation in Article 9.7 should remain. However, for the avoidance of doubt, number portability would not be required until after consultation on the most appropriate methodology for implementing it, which would be reflected in regulations.

April 22nd Licensee Responses

No comments submitted

Commission Conclusion

As noted, Article 9.7 is not a new provision. The original intention in 2007 was for the obligation to provide number portability services to be suspended for an initial “Transition Period,” after which the obligation would apply and would be defined in regulations that were incorporated by reference and, at the time, had yet to be developed. However, before the first Licences were issued, the concept of a Transition Period was removed from the Licences, leaving the implementation of number portability simply “suspended”. Indeed, the Licences issued to BVI Cable TV, CCT and Cable & Wireless show the references to the Transition Period struck out and initialed.

The Commission considers that number portability remains a service that it may wish to consider at some time in the future. The Commission notes that the regulations in question remain yet to be developed and that this would not occur until after extensive consultation with Licensees. As a result, the proposed change to Article 9.7, while in the public interest, does not reasonably reflect changed circumstances in the telecommunications sector since 2007. As a result, it does not fall within the scope of Article 3.3 and the Commission will **not adopt** it at this time, but reserves its right to propose it at a future date under a Licence amendment process pursuant to Article 18.1.

9.8 Carrier Pre-selection

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.~~

Explanation 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.

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.

February 14th Licensee Objections

Flow This revised term seeks to provide Carrier Pre-selection on terms and conditions specified in such Commission Regulations “as may be the regulations in effect”. Again, this incorporation by reference is to regulations which are unknown and may be materially revised from time to time. This approach injects significant vagueness and uncertainty regarding the Licensee’s obligations under the Licence. FLOW queries the changed circumstances reasonably requiring this new term, objects to this provision on those grounds and confirms its position that it is contrary to the terms of the Current Licence.

April 14th Commission Follow-Up

Commission Article 9.8 is not a new obligation. In the original licence, it was intended to apply only after the expiry of a transition period. As the transition period was removed in 2007, the obligation was suspended but it was not eliminated. Carrier pre-selection continues to be a service that the Commission may want to introduce at some time in the future, therefore the obligation in Article 9.8 should remain. However, for the avoidance of doubt, carrier pre-selection would not be required until after consultation on the most appropriate methodology for implementing it, which would be reflected in regulations.

April 22nd Licensee Responses

No comments submitted

Commission Conclusion

As noted, Article 9.8 is not a new provision. The original intention in 2007 was for the obligation to provide carrier pre-selection services to be suspended for an initial “Transition Period,” after which the obligation would apply and would be defined in regulations that were incorporated by reference and, at the time, had yet to be developed. However, before the first Licences were issued, the concept of a Transition Period was removed from the Licences, leaving the implementation of carrier pre-selection simply “suspended”. Indeed, the Licences issued to BVI Cable TV, CCT and Cable & Wireless show the references to the Transition Period struck out and initialed.

The Commission considers that carrier pre-selection remains a service that it may wish to consider at some time in the future. The Commission notes that the regulations in question remain yet to be developed and that this would not occur until after extensive consultation with Licensees. As a result, the proposed change to Article 9.8, while in the public interest, does not reasonably reflect changed circumstances in the telecommunications sector since 2007. As a result, it does not fall within the scope of Article 3.3 and the Commission will **not adopt** it at this time, but reserves its right to propose it at a future date under a Licence amendment process pursuant to Article 18.1.

Article 10 Competition Rules

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.

Explanation 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.

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.

February 14th Licensee Objections

No comments submitted

Commission Conclusion

The Commission notes that no party objected to the introduction of the new Article 10.1 or to the proposed changes to the existing Article 10.1. While these proposed updates to the Licence largely reflect international practice regarding market analysis, determinations of dominance and prohibitions on anti-competitive behavior, and while the Commission considers them to be in the public interest, they do not reasonably reflect changed circumstances in the telecommunications sector since 2007. As a result, they do not fall within the scope of Article 3.3 and the Commission will **not adopt** them at this time, but reserves the right to propose them at a future date under a Licence amendment process pursuant to Article 18.1 of the Licence.

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

(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.

Explanation 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.

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.

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.

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.

February 14th Licensee Objections

Digicel Digicel disagrees with the broad nature of the prohibition contemplated by the proposed amendments to Article 10.1(b) but supports the removal of references to specific Licensees. In Digicel’s submission the prohibition should relate only to cross-ownership between holders of Unitary licences and should not extend to other Public Suppliers more generally. In our view, the more extensive prohibition would be likely to have unintended consequences and discourage market structures and arrangements that would benefit innovation and competition.

April 14th Commission Follow-Up

Commission The general prohibition in this article would only apply to cross-ownership that has not received prior approval under section 16(2). It is designed to ensure licensees seek approval before acquiring interests in other public suppliers. As any cross-ownership among licensees can change the dynamics of competitive markets, it is appropriate that it apply to all public suppliers, not just unitary licence holders.

April 22nd Licensee Responses

No comments submitted

Commission Conclusion

The Commission notes Digicel's agreement with the proposal to remove references to specific Licensees. The Commission also notes that the number of Licensees changed in 2007, leading to the current situation with inconsistent provisions across the Licences, and that some of the definitions describing the specific Licensees are no longer relevant (for example, the entity holding the Flow Licence is no longer "Cable & Wireless (West Indies) Limited" and BVI Cable is no longer a subsidiary of Innovative Communications Corp.). The Commission considers, therefore, that this proposed change reasonably reflects changed circumstances in the telecommunications sector and that it will **adopt** it as modified below.

With respect to the proposal that the Licence provision be limited to Unitary Licensees, the Commission notes that, based on the definitions in the Act and in the Licence, Unitary Licensees are, by definition, public suppliers. The Commission appreciates, though, that the existing Licences refer to specific holders of Unitary Licences and that no other Public Suppliers have been licensed. Extending this provision to Public Suppliers would not reasonably reflect changed circumstances in the telecommunications sector. The Commission will therefore substitute the words "Unitary Licensee" for the words "Public Supplier" in the provision. The Commission reserves the right to revisit this matter in the future.

10.1 (b)A **Joint Undertakings** (New)

(b)A ***Joint Undertaking.*** *Notwithstanding Article 10.1 (b), 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.*

Explanation 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.

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.

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.

February 14th Licensee Objections

BVI CTV However, the Commission has mistakenly interpreted commercial arrangements between Caribbean Cellular Telephone and BVI Cable TV to be a merger, joint venture or consolidation. This is categorically erroneous. Caribbean Cellular Telephone and BVI Cable TV have unique ownership groups and no one entity, beneficial owner or in fact person controls both public suppliers. ... However, Caribbean Cellular Telephone and BVI Cable TV remain separate and distinct competitor public suppliers. ... [remainder of submission noted but not reproduced here]

April 14th Commission Follow-Up

Commission It is factually incorrect to say no one entity or person controls both public suppliers. Per Tabs 3 and 5 of the BVI CTV licence renewal application, "*BVI Cable TV is owned and managed by TGM Holdings Limited,*" which holds 100% of the shares in BVI CTV. In Tab 3 of its licence renewal application, CCT notes that TGM Holdings Limited holds 50% of the shares, as well as a "*management share,*" in SCBF Holdings Limited, which in turn holds 100% of the shares in CCT. In Tab 5 of its licence renewal application, CCT states that "*TGM Holdings Limited has an additional no par value management share to insure management control of CCT.*" The same legal entity, therefore, controls both BVI CTV and CCT.

Further, the 5 individuals identified by BVI CTV in its licence renewal application as its senior management are the same 5 individuals identified by CCT in its licence renewal application as its senior management, holding the same positions in both companies.

It is similarly incorrect to say that the two companies "*remain separate and distinct competitor public suppliers.*" They may be separate legal entities but they are under common control and therefore not competitors.

Note that this common control affects competition in the market by reducing the number of competitors and has the potential to distort the market.

Note that situations where two entities come under common control can be considered to be "mergers". Cf. UK CMA: "Two enterprises cease to be distinct if they are brought under common ownership or control. This includes situations falling short of outright voting control, such as where one enterprise controls or has material influence over the policy of the other, even though it does not hold the majority of the voting rights in that other enterprise."⁴

No evidence was provided to prove that the various arrangements between BVI CTV and CCT are "*temporal arrangements*" or "*temporal commercial conveniences.*" In particular, copies of the relevant agreements between the two companies were not provided despite being requested by the Commission. In any event, whether or not the agreements between the two companies are temporary does not alter the fact that, as noted above, both companies are under common control. Further, as long as the two companies are under common control, the effects on competition and the market noted above remain relevant.

In addition, it is unlikely that the arrangements between the two companies were negotiated at arm's-length, in light of the common control.

Note that these observations are not taking a view on whether BVI CTV's decision to distribute its services via CCT is "prudent" as BVI CTV states, as that is not relevant to whether the fact of two public suppliers coming under common control can affect competition in a market.

The proposed provision on joint undertakings does not disenfranchise local owners or those individuals who are senior managers of two licensees. Indeed, it does not prevent two unitary licensees from being under common control or management. However, it does address the consequences of that common control and management.

⁴ Competition and Markets Authority, "A Quick Guide to UK Merger Assessment," 18 March 2021, at para 2.3. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970333/CMA18_2021version-.pdf

April 22nd Licensee Responses

BVI CTV Nevertheless, regarding the concerns and objections we raised that are specific to us, we absolutely reject the Commission's contention that it is incontrovertible that the common control and management of two unitary licensees has a negative impact on competition in the market, and we note with interest that the Commission asked us to prove harm after a violation their provisions for confidentiality pursuant to Schedule 3 of the Telecommunications Act, 2006 (the Oath of Confidentiality) but whereas the alleged the common control and management of BVI Cable TV Limited und Caribbean Cellular Telephone is assumed to have negative impact on competition in the market without any evidence or complaint that we are aware of. Furthermore, the Commission's contention that BVI Cable TV and Caribbean Cellular Telephone are not competitors is completely erroneous considering they have unique ownership groups with distinct fiduciary interest. In fact, the Commission has still not identified any anti-competitive behaviour it perceives, disadvantage to another public supplier it notices, or offence to the public interest it recognizes, pursuant to alleged the common control and management of BVI Cable TV Limited and Caribbean Cellular Telephone.

February 14th Licensee Objections

CCT However, the one glaring exception to these wholly reasonable amendments is the Commission's decision to arbitrarily treat two licensees as one based on a common ownership and or shared management. ... [remainder of submission noted but not reproduced here]

April 14th Commission Follow-Up

Commission The comments that "*any entity within Caribbean Cellular Telephone ownership group which has common ownership of another public supplier received specific authorizations for all their acquisitions*" and that "*Caribbean Cellular Telephone has the right to select whomever they want to manage their enterprise*" are noted.

However, it is incontrovertible that the common control and management of two unitary licensees has a negative impact on competition in the market. The proposed licence condition on joint undertakings is a reasonable and proportionate measure to address that impact and to promote competition.

This measure does not disenfranchise local owners or those individuals who are senior managers of two licensees. Indeed, it does not prevent two unitary licensees from being under common control or management. However, it does address the consequences of that common control and management.

April 22nd Licensee Responses

CCT Nevertheless, regarding the concerns and objections we raised that are specific to us, we absolutely reject the Commission's contention that it is incontrovertible that the common control and management of two unitary licensees has a negative impact on competition in the market, and we note with interest that the Commission asked us to prove harm after a violation their provisions for confidentiality pursuant to Schedule 3 of the Telecommunications Act. 2006 (i.e. the Oath of Confidentiality) but whereas the alleged the common control and management of BVI Cable TV Limited and Caribbean Cellular Telephone is assumed to have negative impact on competition in the market without any evidence or complaint that we are aware of. Furthermore, the Commission's contention that BVI Cable TV and Caribbean Cellular Telephone are not competitors is completely erroneous considering they have unique ownership groups with distinct fiduciary interest. In fact, the Commission has still not identified any anti-competitive behaviour it perceives, disadvantage to another public supplier it notices, or offence to the public interest it recognizes, pursuant to alleged the common control and management of BVI Cable TV Limited and Caribbean Cellular Telephone.

February 14th Licensee Objections

Digicel Digicel also disagrees that a joint undertaking between a Unitary licence holder and another Public Supplier should automatically be treated as if they were a single entity. There are any reasons why

such a joint undertaking may be entered into and there is no good reason to assume that all joint undertakings will reflect the characteristics of a single entity.

April 14th Commission Follow-Up

Commission Agreed that not all joint undertakings will reflect the characteristics of a single entity. The proposed provision, however, does not apply to *all* joint undertakings. It only applies in circumstances where two entities are under common control or common management. In those circumstances, the two entities share a common direction and cannot be said to be independent competitors in the market, and should not be treated as such.

February 14th Licensee Objections

Flow This provision is overly broad and could have unintended consequences. Any concerns regarding competition could and should be appropriately addressed by clear and specific merger guidelines. Further, FLOW does not perceive the changed circumstances reasonably requiring this new term. Accordingly, FLOW queries the changed circumstances reasonably requiring this new term, objects to this provision on those grounds and confirms its position that it is contrary to the terms of the Current Licence.

April 14th Commission Follow-Up

Commission Merger guidelines administered by the Commission would only apply to future events of two licensees coming under common control. Further, those guidelines would not apply directly to transactions falling under section 16 of the Act. However, events where two licensees cease to operate independently clearly have an impact on competition in BVI markets, and on the distribution of scarce resources which could distort competition in those markets.

As noted in the Notice to Adopt a Directive, it was envisaged in 2007 that there would be four independent, competing Unitary Licensees investing in networks and services in the country. These circumstances have changed. Two of those licensees have since come under common control. While that transaction was approved under section 16 of the Act, it nevertheless has an impact on potential competition in the BVI and, if not subject to licence conditions such as the proposed article on joint undertakings, could result in an unfair distribution of scarce resources and an unfair competitive advantage to the joint undertaking.

April 22nd Licensee Responses

Digicel Digicel continues to disagree that a joint undertaking between a Unitary Licence holder and another Public Supplier should automatically be treated as if they were a single entity. There are many reasons why such a joint undertaking may be entered into and there is no good reason to assume that all joint undertakings will reflect the characteristics of a single entity.

Accordingly, Digicel objects to this proposed amendment to the Digicel Licence.

Commission Conclusion

The Commission notes that BVI Cable TV and CCT are in fact under common control: the legal entity that is the sole shareholder of the former has management control of the latter and indirectly controls half the shares of the latter. BVI Cable TV and CCT have overlapping Boards of Directors. The senior management positions of BVI Cable TV and CCT are the same (i.e. Chief Executive Officer, Network and Engineering Manager, Finance and Administration Manager, Sales and Business Development Manager and Marketing and Media Manager) and are held by the same individuals at both Licensees. While both BVI Cable TV and CCT argue that they have “*unique ownership groups with distinct fiduciary interest,*” it cannot be reasonably argued that they are not under common control.

Nor can it be reasonably argued that the two Licensees are in fact competitors in the Virgin Islands given the common control, overlapping beneficial owners, overlapping Boards of Directors and common senior management. It is not

likely, for example, that the common owner in both Licensees would invest in two competing networks offering the same services in the same markets, knowing that the commercial success of one would necessarily come in part at the expense of the other.⁵ It is not likely, for example, that the individual who is the Sales and Business Development Manager for both Licensees would vigorously compete for customers for certain services on behalf of one Licensee and, at the same time, vigorously compete for the same customers for the same services on behalf of the other Licensee.

The Commission is aware that the transaction that led to this situation of common control was approved in 2017 by the Minister under section 16 of the Act. Notwithstanding this, it was contemplated in 2007 that all Unitary Licensees would be independent competitors. This is no longer the case, and this represents significant changed circumstances in the telecommunications sector since 2007.

The Commission notes that an act or behaviour does not necessarily need to be anti-competitive in order for it to have an impact on competition or on the market. From 2007 to 2017, there were four independent Unitary Licensees who were competing or could have been competing in the market. That has now been reduced to three. This clearly affects the actual and expected level of competition in the market.

This will also be of particular concern when the Commission considers the equitable distribution of scarce resources in the future, such as spectrum. Dividing such resources in four equal parts when two of the Licensees are in fact operating as a single undertaking could result in an inequitable distribution of those resources, to the detriment of the other two Licensees.

The Commission notes Digicel's objection that all joint undertakings should not be treated as single entities. The Commission notes that the new Article does not apply to all joint undertakings, only to those joint undertakings where the two Licensees are under common control.

The Commission notes Flow's objection regarding unintended consequences, although Flow does not provide any detail as to those possible unintended consequences. The Commission's objective with this proposed Article is to ensure fair competition among Licensees, and the Commission considers that it reflects the changed circumstances in the telecommunications sector. However, the Commission will **not adopt** it at this time, given the possibility that it might have consequences beyond the intended objective. However, the Commission considers this is matter that needs to be addressed and it reserves the right to propose changes in this regard in the future.

10.1 (c) General Prohibition against Cross-Subsidies

(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.

10.1(d) Cross-Subsidisation

[to be deleted]

Explanation 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.

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

⁵ While some customers might be gained from the other two Licensees, it is exceedingly unlikely all customers would come from those other two Licensees.

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).

February 14th Licensee Objections

No comments submitted

Commission Conclusion

The Commission notes that no party objected to these proposed changes to the Licence. The Commission also notes that the proposed updates to Articles 10.1 (c) and 10.1 (d) are based on the obsolescence of the “Transition Period.” As a result, the proposed updates reasonably reflect changed circumstances in the telecommunications sector since 2007 and the Commission will **adopt** them.

10.2(f) Merger Control (New)

(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.

Explanation 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.

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).

February 14th Licensee Objections

Flow This revised terms seeks to provide for adherence to Merger Control Guidelines which have neither been developed nor seen by the Licensee. Again, this incorporation by reference refers to guidelines which are unknown and may be materially revised from time to time. This approach injects significant vagueness and uncertainty regarding the Licensee’s obligations under the Licence. FLOW perceives this provision to be vague and uncertain, queries the changed circumstances reasonably requiring this new term, objects to this provision on those grounds and confirms its position that it is contrary to the terms of the Current Licence.

April 14th Commission Follow-Up

Commission The proposed provision ensures licensees give the Commission prior notice of all mergers or other changes in interests in or control of licensees, including those that fall under section 16 of the Act. As Flow notes, there are as yet no merger and acquisition guidelines. By extension, therefore, the Commission could not presently review any merger or acquisition against those guidelines. However, the Commission has the jurisdiction to establish such guidelines in the future, following public consultation. Such guidelines would then apply to subsequent events of mergers or acquisitions, including those involving licensees who were granted licences prior to the date of

establishment of the guidelines, at which point the Commission would be able to review the merger or acquisition.

April 22nd Licensee Responses

No comments submitted

Commission Conclusion

The Commission notes Flow's concerns with the incorporation by reference of Guidelines which have not been developed or seen by the Licensee. The Commission also notes that other provisions in the Licence refer to instruments that were not developed at the time the Licence was issued in 2007, including Articles 9.7, 9.8, 10.4 and 13.2. The Commission does not consider the approach adopted for this Article 10.1(f) to be materially different from the approach used in those other Article.

Further, the ability of the Commission to be notified in advance and to review such transactions in accordance with published merger control guidelines will be crucial to the Commission's ability to advise the Minister and to the effective regulation and development of the telecommunications sector.

In 2017, a transaction was approved under section 16 of the Act that resulted in two Unitary Licensees coming under common control. This changed the dynamics of the local telecommunications market, in particular by reducing the number of independent, competing service providers from four to three. As a result, the Commission considers that the proposed updates reasonably reflect changed circumstances in the telecommunications sector since 2007. However, the Commission also considers that merger control provisions will be more effective once the merger and acquisition guidelines are promulgated. Accordingly, the Commission will **not adopt** the proposed Article on Merger Control at this time, but reserves the right to proposed changes to address this matter in the future.

11.1 Assignments and Transfers

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.

Explanation 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.

February 14th Licensee Objections

Digicel Digicel disagrees with the proposed amendments to Article 11.1 as they seek to go far beyond the ambit of Section 16 of the Act which, in Digicel's submissions provides ample protections in respect of assignments and transfers of licence rights.

April 14th Commission Follow-Up

Commission Section 16 applies to assignments, sales, transfers, charges, dispositions, mergers and consolidation. It is difficult to see how the proposed amendments to article 11.1 “*seek to go far beyond the ambit of Section 16*” given the already wide ambit of section 16 of the Act. However, the proposed changes bring useful clarity to how section 16 would be applied.

April 22nd Licensee Responses

Digicel Digicel continues to disagree with the proposed amendments to Article 11.1 as there has been no adequate explanation as to why the protections already contained in Section 16 of the Act are insufficient. Accordingly, Digicel objects to this proposed amendment to the Digicel Licence.

Commission Conclusion

The Commission notes the update proposed to Article 11.1 would bring clarity to the application of section 16 of the Act. It is also not clear that the ambit of section 16 encompasses all arrangements that could affect competition in a market. However, adding clarity is not necessarily a change that reasonably reflects changed circumstances in the telecommunications sector since 2007. As a result, it does not fall within the scope of Article 3.3 and the Commission will **not adopt** it at this time, but reserves its right to review Article 11.1 at a future date under a Licence amendment process pursuant to Article 18.1 of the Licence.

Article 14 Use of Radio Frequency Spectrum

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.

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

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.

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.

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.

February 14th Licensee Objections

No comments submitted

Commission Conclusion

The Commission notes that no party objected to these proposed changes to the Licence. The Commission also notes that the proposed update to Article 14 is based on the change in the Commission's practice, namely, to issue a separate Frequency Authorisations instead of reflecting spectrum authorisations in the Unitary Licence. As a result, the proposed updates reasonably reflect changed circumstances in the telecommunications sector since 2007 and the Commission will **adopt** them.

15.1 (a) [~~Named Unitary Licensees~~]

(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.

Explanation 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.

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.

February 14th Licensee Objections

Digicel Digicel disagrees that the current obligation to provide resale services that is reflected in Article 15.1(a) of the Unitary licences should be extended so as to require the provision of resale services to all Public Suppliers on demand. In Digicel's submission the obligation to provide resale services is now outdated and irrelevant in the context of the current market and the Article should be deleted in its entirety.

April 14th Commission Follow-Up

Commission Note that the original article 15.1(a) is inconsistent across the four current unitary licences. It is therefore necessary to harmonize them. It is more appropriate to extend the obligation to all public suppliers than to limit it to the holders of unitary licences, as the resale of basic exchange telecommunications services remains a critical tool for the facilitation of competition. The mere fact that it is available to other licensees helps to ensure fair competition, as any attempt by one licensee to price its services unfairly or anti-competitively

would be taken advantage of by its competitors. This is neither outdated nor irrelevant in the context of the current market and the provision should not be deleted in its entirety as proposed by Digicel.

April 22nd Licensee Responses

Digicel Digicel continues to disagree that the current obligation to provide resale services that is reflected in Article 15.1(a) of the Unitary Licences should be extended so as to require the provision of resale services to all Public Suppliers on demand.

Digicel understands and agreed to the existing provisions of the Article 15.1(a) on the basis that the risks to its business of doing so were known and quantifiable at that time. The Commission's proposal to extend this obligation to any and all holders of Unitary Licensees over the next 15 years represents a much greater risk and is likely to cause substantial commercial damage to Digicel's business.

In any case, the obligation to provide resale services is now outdated and irrelevant in the context of the current market, including the prevalence of wireless access technologies and services, including "Over the Top" services and the Article should be deleted in its entirety.

Commission Conclusion

The Commission notes the proposed change to Article 15.1 (a) is limited to replacing the references to specific Licensees with a reference to Public Suppliers in general. The proposal here, therefore, is similar to the proposed change to Article 10.1 (b) above, that is, given the inconsistencies in this Article across Licences and given the inconsistencies between the definitions of two specific Licensees and their actual identities, it is necessary to update and standardize the Article. The Commission considers, therefore, that this proposed change is reasonably based on changed circumstances in the sector and that it will **adopt** it, as modified below.

The Commission notes that the four Unitary Licensees are currently the only other licensed Public Suppliers. As a result, extending this provision to Public Suppliers would not reasonably reflect changed circumstances in the telecommunications sector. Consistent with the change to Article 10.1(b), the Commission will therefore substitute the words "Unitary Licensee" for the words "Public Supplier" in the provision. The Commission reserves the right to revisit this matter in the future.

The Commission further notes Digicel's position that the obligation to provide resale services is now outdated and irrelevant in the context of the current market, and should be deleted in its entirety. As stated on April 14th, the Commission believes there is still a role for the provision of resale services in the facilitation of competition in the sector.

15.2 Charges for Provision of Basic Exchange Services

~~{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.

Explanation Article 15.2 shall be amended to refer to "Public Suppliers" generally instead of the Unitary Licensees by name.

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).

February 14th Licensee Objections

Digicel This provision is irrelevant in the current market context and should be deleted.

Commission The provision remains relevant and necessary for the same reasons as articulated above in respect of Article 15.1.

April 22nd Licensee Responses

Digicel Consistent with Digicel's comments above, this provision is irrelevant in the current market context and should be deleted.

Commission Conclusion

For the reasons set out in respect of Article 15.1 (a) above, the Commission considers that this proposed change is reasonably based on changed circumstances in the sector and that it will **adopt** it, but will substitute the words “Unitary Licensee” for the words “Public Supplier”.

15.3 Receipt of and Charges for Basic Exchange Service

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.

Explanation 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.

February 14th Licensee Objections

Digicel This provision is irrelevant in the current market context and should be deleted.

April 14th Commission Follow-Up

Commission The provision remains relevant and necessary for the same reasons as articulated above in respect of Article 15.1.

April 22nd Licensee Responses

Digicel Consistent with Digicel's comments above, this provision is irrelevant in the current market context and should be deleted.

Commission Conclusion

For the reasons set out in respect of Article 15.1 (a) above, the Commission considers that this proposed change is reasonably based on changed circumstances in the sector and that it will **adopt** it, but will substitute the words “Unitary Licensee” for the words “Public Supplier”.

18.1A Licence Review (New)

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 5th and 10th 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.

Explanation 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.

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.

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.

The new provision shall be placed before the current Article 18.1 (Amendment of the Licence). Any modifications or changes would be implemented through the procedures set out in Articles 18.1 (Amendment of Licence) and 18.5 (Procedural Rules).

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).

February 14th Licensee Objections

Digicel In Digicel's submission this proposed new Article is unnecessary and should be deleted as the Commission already has power under the Act to be able to institute a review of Unitary Licence conditions.

Flow The review and potential revision to licences in five-year intervals is a material change to the terms of the Current Licence and creates significant uncertainty regarding the terms of the Licence. It is noted that whilst the TRC may trigger such a review, it is not contemplated that Licensees may trigger a review. It also imposes additional costs (to both Licensees and to the TRC) regarding such review process. FLOW queries the changed circumstances reasonably requiring this new term, objects to this provision on those grounds and confirms its position that it is contrary to the terms of the Current Licence.

April 14th Commission Follow-Up

Commission It is quite appropriate to review the conditions of a licence on a periodic basis in order to ensure they remain relevant and fit for purpose. A review at 5-year intervals is not particularly onerous and balances the public interest in timely reviews and the licensee's interest in regulatory certainty. The concern about additional costs is noted, but these are likely easier to manage if they are not incurred as part of one large exercise just prior to the expiration of the term of the licence. While such a 15-year review may have seemed reasonable in 2007, the experience of the last 15 years suggests the market evolves more rapidly than that, which indicates that a more frequent cycle of review is

necessary than originally contemplated in 2007. The concern about a licensee being able to trigger a review at 5-year intervals is reasonable. The Commission proposes to amend the provision to accommodate a licensee's desire to review the terms and conditions of the licence:

Provided the Commission has given the Licensee written notice of its intent, or provided the Licensee has given the Commission written notice of its wish, to review the terms and conditions of this Licence no less than six (6) months prior to the 5th and 10th 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.

April 22nd Licensee Responses

Digicel remains of the view that this proposed new Article is unnecessary and should be deleted as the Commission already has power under the Act to be able to institute a review of Unitary Licence conditions.

Those powers and the circumstances in which they may be applied are clearly specified in Section 23 of the Act and Article 18 of the existing Digicel Licence. In Digicel's submission, the inclusion of a further automatic power of review is inconsistent with the Act and will impose unnecessary and potentially substantial costs on licensees. Importantly, the inclusion of regular, 5 yearly reviews will not affect the Commission's existing power to institute additional ad hoc reviews and will therefore not add any additional value of certainty for licensees.

Commission Conclusion

The telecommunications sector is evolving rapidly. Services that were once optional or discretionary have become critical to consumers and businesses and others that were once critical have faded in significance. The technologies employed by Licensees have also changed over the past 15 years, resulting in a Licence whose terms and conditions are not fully tailored to the current circumstances of the sector.

The Commission notes Digicel's submission that the ability of Licensees and the Commission to institute *ad hoc* reviews will not be affected. However, the Commission considers that the Licence should be reviewed periodically on a holistic basis in order to ensure its terms and conditions are fit for purpose. The Commission notes that the *ad hoc* Licence amendments that have occurred in the past have not resulted in an overall up-to-date Licence and the Commission does not expect future issue-specific reviews to do so either. The Commission also considers it inadequate to have such holistic reviews only upon renewal every 15 years.

The Commission also notes that the provision is drafted such that a review is undertaken only if the Commission or a Licensee notifies the other that one is warranted. In other words, no work would be undertaken if no party sees a need for it, but including this provision in the Licence will ensure parties turn their minds to whether the Licence terms and conditions are fit for purpose as the sector evolves.

The Commission considers that the rapid evolution of the telecommunications sector in the British Virgin Islands represent changed circumstances since 2007, and that the proposed Article reasonably reflects those changed circumstances. Accordingly, the Commission will **adopt** the proposed Article as modified by the Commission on April 14th

18.2A Compliance Review (New)

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.

Explanation A new article, Article 18.2A, shall be inserted to allow the Commission to conduct periodic compliance reviews.

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.

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.

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.

This new provision shall be placed before the current Article 18.2 (and the other Articles in Article 18 renumbered accordingly)

February 14th Licensee Objections

Digicel In Digicel's submission this proposed new Article is unnecessary and should be deleted as the Commission already has power under the Act to be able to institute a review of any Licensee's compliance with its licensee's obligations or other relevant parts of the regulatory framework.

Flow Again, the review and potential revision to licences in five-year intervals is a material change to the terms of the Current Licence and creates significant uncertainty regarding the terms of the Licence. Further, the review is extraordinarily wide – making reference to obligations under the Licence, the Act, the Commission Regulations, the Code, any orders directives or instructions, which must be

lawful, of the TRC and any undertakings given by the Licensee. Again, such wide-ranging review will impose additional costs to both Licensees and to the TRC. FLOW queries the changed circumstances reasonably requiring this new term, objects to this provision on those grounds and confirms its position that it is contrary to the terms of the Current Licence.

April 14th Commission Follow-Up

Commission A regular review of a licensee’s compliance with its regulatory obligations will ensure any issues or gaps that may exist are addressed on a timelier basis. There is no reasonable basis for limiting the scope of that review to one regulatory instrument and not to another. Providing for it on 5-year intervals enables both the Commission and the licensee to better plan their resources for the exercise. The comment about being required to comply only lawful orders, directives or instructions is noted. The original expectation in 2007 was that a licensee’s compliance would need to be reviewed only once every 15 years, immediately prior to the expiry of the term of the licence. Given the difficulty experienced by the Commission in securing consistent compliance by the Unitary Licensees with their obligations during the current term of Licence, it is clear that expectation has not been borne out. This change in circumstances suggests a more frequent review is necessary. The Commission proposes to amend Paragraph (iii) to reflect “any lawful orders, directives or instructions of the Commission; and”.

April 22nd Licensee Responses

Digicel Digicel disagrees strongly with the Commission's comments. Compliance should be an ongoing activity and not just limited to the time of licence renewal. If the Commission is concerned about potential compliance issues they should be raised and addressed at the time they occur.

Commission Conclusion

The Commission notes Digicel’s comments regarding the Commission already having the power to institute a review of a Licensee’s compliance and regarding compliance being an ongoing activity.

The Commission, however, considers that the proposed provision is required because the apparent culture of non-compliance by Licensees was not envisaged when the Licences were issued in 2007. As noted elsewhere in this document, the Commission has experienced considerable challenges in securing timely filing of reports and with compliance with other Licence obligations. Even when concerns with respect to compliance are raised, for example, following the reviews performed by Harneys in 2019, some Licensees did not address them until immediately prior to applying for renewal of their Licence. The Commission notes there was also resistance by some Licensees to the review in the first place.

The Commission notes Flow’s comments in respect of the wide nature of the review and in respect of the uncertainty regarding the terms of the Licence. The Commission notes, however, that a Licensee’s obligations derive from several sources and, to be effective, a review of the Licensee’s compliance must be comprehensive. Further, the Commission does not consider that a review of a Licensee’s compliance with its regulatory obligations will in and of itself create any uncertainty with respect to the terms of those obligations.

The Commission is of the view that regular reviews at pre-determined intervals will be the most appropriate method for instituting a culture of compliance, if for no other reason that they would require Licensees to turn their minds to compliance matters. The Commission is also of the view that having reviews on predictable intervals represents the most cost-effective and efficient approach as it allows the Commission and the Licensees to plan the resources that may be required.

Accordingly, the Commission considers that including the proposed Article to address compliance matters reasonably reflects the changed circumstances in the telecommunications sector since 2007, and accordingly will **adopt** it as modified on April 14th.

18.2 Normal Termination

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.~~

Explanation 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.

February 14th Licensee Objections

Digicel For the reasons set out above, Digicel disagrees with the deletion proposed by the Commission. Section 24 of the Act expressly refers to licence renewal and it would therefore be wrong in Digicel's view to remove the reference to it in this Article.

Flow Again, this new term reflects the intention to terminate Licences at the end of the term. Again, the termination of Licences at the end of term gives rise to:

1. the Licensee being asked to agree a term of the Licence incorporating by reference provisions which have not been seen in final form by the Licensee, namely the proposed new Part 5A of the Code;

2. a completely new licence would need to be negotiated on each “renewal”. Given that the TRC wishes to dispense with “renewals”, the use of “renewal” is confusing and inconsistent. If there are to be no renewals (which FLOW objects to), this term must cease to be used;

3. the new licence would extinguish the provisions of the Current Licence that any new terms must reasonably reflect changed circumstances;

4. the TRC appears to seek to extinguish any ability of the Licensee to challenge any new terms of a “new” (renewed) licence on the basis that they are not reasonably required by changed circumstances because it would be an entirely new licence. This would be a material departure from the current terms and extinguish the security to Licensees that renewals would build on the previous licence(s); and

5. significant consequential uncertainties arise for Licensees and results in disruption and/or uncertainty to Licensees regarding the terms upon which they would be licensed (re-licensed?) once the current licence expires and will adversely affect the willingness of operators to invest in the BVI. FLOW queries the changed circumstances reasonably requiring this new term, objects to such provisions on those grounds and confirms its position that they are contrary to the terms of the Current Licence.

April 14th Commission Follow-Up

Commission The Commission notes the comments regarding the use of the term “renewal” being inconsistent with the objective of not “renewing” a licence.

Note that these concerns are addressed above in relation to article 3.2. However, it should be noted that, even if a licence is renewed instead of being granted anew, it would be for a new “Licence Term,” not an “Extension Term”. Consequently, in the event the changes to Article 3.2 discussed above are adopted, the Commission is considering retaining the existing wording of Article 18.2 but replacing the words “Extension Term” with the words “new Licence Term.”

April 22nd Licensee Responses

Digicel For the reasons set out above, Digicel continues to disagree with the deletion proposed by the Commission. Section 24 of the Act expressly refers to Licence renewal and not replacement and it would therefore be wrong in Digicel's view to remove the reference to it in this Article.

Commission Conclusion

For the same reasons as set out in respect of Article 3.2 above, the Commission considers improving the Licence renewal process to be in the public interest, but it is not an update that reasonably reflects changed circumstances in the telecommunications sector since 2007. The Commission will, therefore, **not adopt** the proposed update to Article 18.2 at this time, but reserves the right to revisit the matter again at a later date.

18.3 Suspension and Termination of the Licence Prior to Expiration

(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.*

(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;*

Explanation 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.

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.⁶

This amendment would expand the scope of the provision to other Public Suppliers, in the event the Commission issues Licences to new parties.

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.

Other circumstances listed under Article 18.3 address violations of various terms of the Licence, noncompliance 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).

February 14th Licensee Objections

Digicel Digicel also disagrees that the Licensee or any of its Affiliates holding or acquiring any interest in any other Public Supplier or any of its Affiliates, or any Public Supplier or any of its Affiliates

⁶ 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.

holding or acquiring any interest in the Licensee or any of Its Affiliates, without the prior approval of the Minister or the Commission, should give rise to an "automatic" licence termination event. It also runs contrary to the intent of the original Article which referred specifically to Unitary licence holders. In Digicel's submission Unitary Licence holders should remain the sole focus of this provision and it should be amended accordingly.

April 14th Commission Follow-Up

Commission It should be noted that the original article 18.3 referred to named licensees which led to inconsistency across the four unitary licences. This inconsistency was addressed by referring to public suppliers generally.

Limiting this provision to unitary licensees would not achieve the objectives of the provision, as acquiring a public supplier without the necessary prior approvals can have the same negative impact on competition in a market as acquiring a unitary licensee without prior approval.

It should also be noted that there is no "automatic" licence termination event as all actions to be taken by the Commission under this article are subject to the procedures in article 18.5.

April 22nd Licensee Responses

Digicel Digicel continues to disagree that the Licensee or any of its Affiliates holding or acquiring any interest in any other Public Supplier or any of its Affiliates, or any Public Supplier or any of its Affiliates holding or acquiring any interest in the Licensee or any of its Affiliates, without the prior approval of the Minister or the Commission, should give rise to an "automatic" Licence termination event. It also runs contrary to the intent of the original Article which referred specifically to Unitary Licence holders.

In Digicel's submission Unitary Licence holders should remain the sole focus of this provision and it should be amended accordingly.

In any case, Licensees are already restricted under Section 16 of the Act from acquiring an interest in another public supplier without first gaining Ministerial approval. This means that any further specific termination provisions under Article 18.3 are unnecessary and may conflict with any such Ministerial approval that is granted.

Commission Conclusion

Contrary to Digicel's assertion, suspension or termination under Article 18.3 is not automatic under the current Licence and will not be automatic under the updated Licence. Article 18.3 is explicit that the procedures set out in Article 18.5 must first be applied. These include notice to the Licensee with reasons, the ability to file objections and explanations in writing, and a hearing at which the Licensee may make objections. The Licensee is therefore afforded the opportunity to explain to the Commission any mitigating circumstances or issues beyond the reasonable control which the Commission can then take into account.

The Commission notes Digicel's position that the focus of the provision should be on Unitary Licensees and not Public Suppliers, and Digicel's comments regarding a potential conflict with Ministerial decisions.

The Commission considers that such a conflict is unlikely to arise because Article 18.3(x) expressly applies where prior Ministerial approval was not obtained.

With respect to the proposal that the Licence provision be limited to Unitary Licensees, the Commission notes that, based on the definitions in the Act, and in the Licence, Unitary Licensees are, by definition, public suppliers. The Commission appreciates, though, that the existing Licences refer to specific holders of Unitary Licences and that no other Public Suppliers have been licensed. Extending this provision to Public Suppliers would not reasonably reflect changed circumstances in the telecommunications sector. The Commission will therefore substitute the words "Unitary Licensee" for the words "Public Supplier" in the provision. The Commission reserves the right to revisit this matter in the future.

The Commission notes that referring to specific Licensees in this Article has resulted in inconsistencies across Licences, particularly as the number of Licensees changed in 2007. The Commission also notes that some of the definitions describing two specific Licensees are no longer relevant (for example, the entity holding the Flow Licence is no longer “Cable & Wireless (West Indies) Limited” and BVI Cable is no longer a subsidiary of Innovative Communications Corp.). The Commission considers, therefore, that this proposed change is reasonably based on changed circumstances in the sector and that it will **adopt** it as modified above. Due to the non-adoption of proposed Article 2.4, as noted earlier in this Report, the Commission will not adopt the proposed Article 18.3(xi).

19.1 General Infractions

Breach or non-fulfilment 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.

Explanation 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.

February 14th Licensee Objections

Digicel While Digicel does not object to the Commission investigating potential breach or non-fulfilment of Licence conditions suo moto, we do take issue with the Commission apparently also seeking to investigate, prosecute, determine and impose penalties for offences that are alleged to have occurred under the Act, the Telecommunications Code and Commission Regulations when that is properly the domain of the Courts. In our respectful view, the inclusion of such powers in the Unitary Licence would be to substantially overstep the role of Regulator.

We are also concerned that the proposed requirement for a licensee to "extend all reasonable facilities and shall endeavor to remove hindrance(s) of every type to such inquiry" is so broad as to be likely to unfairly restrain a Licensee from exercising its legitimate rights to defend its conduct. Accordingly, in our view the proposed amendments to Article 19.1 (excepting the ability of the Commission to investigating potential breach or non-fulfilment of Licence conditions suo moto) should be removed.

Flow FLOW is of the view that the TRC already has these powers within the Current Licence and applicable laws. FLOW queries the changed circumstances reasonably requiring this new term, objects to such provisions on those grounds and confirms its position that they are contrary to the terms of the Current Licence.

April 14th Commission Follow-Up

Commission The courts do not have exclusive power to investigate breaches of the Act, Regulations, or Code. As the expert administrative tribunal in the sector, the Commission can do so as well. However, the Commission is of the view that the current conditions of the Licence do not sufficiently clarify that the Commission may investigate infractions and breaches *suo moto*.

April 22nd Licensee Responses

No comments submitted

Commission Conclusion

The Commission remains of the view that it has the power to investigate potential breaches of the Act, Regulations or Code, in addition to breaches of or non-fulfillment of Licence conditions, inherent in the power to take enforcement action pursuant to section 75(1)(a) of the Act. Section 75(2) grants the Commission certain powers to sanction in the event it is entitled to take enforcement action. The proposed changes to Article 19.1 would have provided useful clarity in that regard and would be in the public interest. However, the Commission notes that the proposed updates do not necessarily reflect changed circumstances in the telecommunications sector since 2007. As a result, they do not fall within the scope of Article 3.3 and the Commission will **not adopt** them at this time.

19.2 Non-Compliance with the Requirements Concerning ~~Public Pay Telephone Requirements and Service Quality Requirements~~

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.

Explanation 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.

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.

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.

February 14th Licensee Objections

Digicel Digicel is concerned that the Commission has now sought to make penalties automatically apply in the event that service quality or reporting requirements are not met. In Digicel's view such an automated approach is unfair as it does not take into account any mitigating circumstances that may have resulted in a particular target being missed. While Digicel does not necessarily disagree with the concept of applying penalties where infringements occur they should be discretionary in nature and take into account any mitigating circumstances or other issues beyond the reasonable control of the licensee.

April 14th Commission Follow-Up

Commission The penalties provided for in this revised provision are not “automatic,” nor are they “automatic” in the current licence provision. In both cases, penalties are imposed only after application of the procedures in article 19.3, which allows the Commission to exercise its discretion not to apply the penalties if there are extenuating or mitigating circumstances.

April 22nd Licensee Responses

No comments submitted

Commission Conclusion

One of the proposed updates to Article 19.2 results from the changes to the Public Pay Telephone Requirements in Article 7.6. The Commission considers that this change reasonably reflects changed circumstances in the sector since 2007 for the same reasons as set out at Article 7.6 above, and therefore will **adopt it**.

The other proposed update to Article 19.2 would enforce timely compliance with specific reporting obligations. As noted previously, compliance by Licensees with their reporting obligations has been a challenge over the term of the current Licence, and the Commission considers that the possibility of penalties for failure to comply will encourage greater compliance. The Commission considers that this change reasonably reflects changed circumstances in the sector since 2007 and therefore will **adopt it**.

Contrary to Digicel’s assertion, the imposition of penalties under Article 19 is not automatic under the current Licence and will not be automatic under the update Licence. Article 19.2 is explicit that the procedures set out in Article 19.3 must first be applied. These include notice to the Licensee with reasons, the ability to file objections and explanations in writing, and a hearing at which the Licensee may make objections. The Licensee is therefore afforded the opportunity to explain to the Commission any mitigating circumstances or issues beyond the reasonable control which the Commission can then take into account.

20 Force Majeure

(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.

Explanation 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 abused.

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).

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

February 14th Licensee Objections

Digicel While Digicel does not object to providing the Commission notice of a Force Majeure occurring as soon as is practicable, it may not always be possible to do so within the 48 hour time frame sought to be imposed by the Commission. Depending on the nature of the Force Majeure event may also not be reasonably practicable to provide a restoration timetable and workplan within one week of the event first being notified.

In Digicel's experience, Force Majeure events invariably put severe strain on operations and management while necessary resources are deployed to restore service and rectify any issues. As such, it is our view that compliance will always be undertaken on a reasonable endeavours basis during times of Force Majeure and the Article should reflect that. To the extent that the Commission has encountered issues in the past in times of natural disaster, we are of the view that the best way

to resolve those issues is through further engagement and dialogue with licensees rather than by seeking to impose a more extensive penalties regime.

Flow This provision requiring action within 48-hours of the event may, in some circumstances, be unrealistic. Anyone who experienced Hurricane Irma (and, to a lesser extent, Hurricane Maria), will know that 48-hours to accomplish the tasks contemplated in this part are unrealistic. The submission of a detailed workplan on a weekly basis should be possible in most cases but not necessarily all. FLOW seeks satisfactory clarifications of the TRC's intentions in this regard. FLOW queries the changed circumstances reasonably requiring this new term, objects to this provision on those grounds and confirms its position that it is contrary to the terms of the Current Licence.

April 14th Commission Follow-Up

Commission The Commission notes the comments from both licensees in relation to the potential impracticability of complying with this provision with the proposed 48-hour timeframe. The comment about not always being able to provide notice within 48 hours is noted. The prescribed time frames can be adjusted if another time frame would be more reasonable. However, in the absence of a specific obligation to perform a specific task within a specific time frame, there would not be a clear and enforceable obligation – including an obligation to engage and dialogue with the Commission. This would result in a gap in the Commission's ability to promote timely restoration of networks and services. The strong public interest in restoration of services following an event of force majeure result in such an obligation being necessary. This particularly difficulty was noted after the 2017 Hurricanes, Irma and Maria, where licensee's compliance with article 20 of the Act was not forthcoming. Up until today's date, there are licensees from whom the Commission has yet to receive any work plans for reconstructions of their networks or any adequate updates about restoration of services. This non-compliance is the changed circumstances that necessitates a more comprehensive provision in the licence to cover such occurrences, which from all indications can no longer be considered a one-time event.

April 22nd Licensee Responses

No comments submitted.

Commission Conclusion

The experience of the Commission following Hurricanes Irma and Maria revealed the gaps in the current Article 20. In the absence of a specific obligation to perform a specific task within a specific time frame, there would not be a clear and enforceable obligation – including an obligation to engage and dialogue with the Commission. This would result in a gap in the Commission's ability to promote timely restoration of networks and services. The strong public interest in restoration of services following an event of force majeure results in such an obligation being necessary. This particular difficulty was noted after the 2017 storms, where Licensee's compliance with Article 20 of the Licence was not forthcoming. Up until today's date, there are Licensees from whom the Commission has yet to receive any proper work plans for reconstruction of their networks or any adequate updates about restoration of services.

The increasing likelihood of severe storms, such as those experienced in 2017, due to climate change and the need to guard against incidences of non-compliance and non-engagement represent the changed circumstances that necessitate a more comprehensive provision in the Licence to cover such occurrences. The Commission considers that the proposed updated Article 20 reasonably reflects those changed circumstances and the Commission will therefore **adopt** it, subject to the changes discussed below.

The Commission notes the comments from both Digicel and Flow in relation to the potential impracticability of complying in all cases with the time frames set out in the proposed provision. The Commission also notes neither party offered a specific alternative time frame. In the view of the Commission, providing for notification to the Commission "within a reasonable period of time," would not be effective at ensuring timely restoration of services and would not be effective at encouraging engagement with the Commission, given the wide variation in what persons

may consider to be “reasonable.” However, the Commission understands that greater flexibility and forbearance may be warranted in different circumstances, all of which will be difficult circumstances of force majeure. The timeframe for notification under Article 20(b) will therefore be modified to be “forty-eight (48) hours or such longer period of time as may be agreed with the Commission” and the timeframe for delivering the timetable and workplan under Article 20(c) shall be modified to be “two (2) weeks or such longer period of time as may be agreed with the Commission.”

21.10 Services of Notice

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 1, 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.*

Explanation Article 21.21 shall be amended to include the provision taken from Article 2.3, as indicated in section [B] of this Directive.

February 14th Licensee Objections

No comments submitted

Commission Conclusion

The Commission notes that no party objected to this proposed change to the Licence. While it is non-controversial, it is an editorial change that does not reasonably reflect changed circumstances in the telecommunications sector since 2007. As a result, it does not fall within the scope of Article 3.3 and the Commission will **not adopt** it at this time, but reserves the right to propose it at a future date under a Licence amendment process pursuant to Article 18.1 of the Licence.

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.*

Explanation 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.

February 14th Licensee Objections

Flow This provision is already clearly governed by the common law and statute. Further, it appears that the TRC wishes to be able to impose new terms upon Licensees by, for example, issuing “Commission instructions”, which instructions must be lawful. Accordingly, the TRC appears to wish to unilaterally amend the Licence by the issuance of instructions on terms and in circumstances which are neither known nor disclosed. This term is uncertain and vague. FLOW queries the changed circumstances reasonably requiring this new term, objects to this provision on those grounds and confirms its position that it is contrary to the terms of the Current Licence.

April 14th Commission Follow-Up

Commission Note that the Licence should be considered subordinate to the Act, the Regulations and the Code in the event of any conflict. The comment about Commission instructions being lawful is noted. The Commission proposes to amend paragraph (d) to read “lawful Commission instructions.”

April 22nd Licensee Responses

No comments submitted

Commission Conclusion

The Commission notes Flow’s objection that this proposed new provision addresses matters that are, in its view, already governed by common law and statute. The Commission considers that the proposed provision would provide useful clarity and would be in the public interest. However, as it would simply re-state the current situation, it does not reasonably reflect changed circumstances in the telecommunications sector since 2007. As a result, it does not fall within the scope of Article 3.3 and the Commission will **not adopt** it at this time, but reserves the right to propose it at a future date under a Licence amendment process pursuant to Article 18.1 of the Licence.

Annex 1 Definitions

Insert the following definitions:

“gross revenue” means 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

“Other Consortium Members” or “OCMs” means other members of the consortium owning an international submarine cable connected to the British Virgin Islands.

“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”.

“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.”

“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.”

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

“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.”

“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.”

“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.”

“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.”

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

Delete definitions of “BVI Cable TV”, “CCT”, “Cable & Wireless”, “National Long Distance Call Completion Rate”, “National Long Distance Telephone Call”.

Explanation 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.

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.

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).

February 14th Licensee Objections

Digicel Digicel disagrees that the terms "gross revenues" should be interpreted as broadly as has been proposed by the Commission or that it should include revenues earned by both the licensee and its affiliates. In Digicel's submission, the clear intention of the Act is to capture revenues earned by Licensees from the provision of licensed Services. There is no stated intention under the Act for gross revenues to include revenues that have been earned from services for which no licence is required or to include revenues earned by a Licensee's affiliates. Digicel is very concerned that the Commission's proposed approach will lead to perverse outcomes whereby unlicensed businesses will have an unfair competitive advantage of Licensees in the provision products and services and that Licensees will effectively be encouraged to structure their businesses to minimise their reported revenues. In Digicel's view the definition of gross revenue, if

included in Annex 1, must be amended so that it only includes the revenue earned by a Licensee from the provision of the services for which a Licence is required.

April 14th Commission Follow-Up

Commission The requirement to pay licence fees on the basis of gross revenues is already limited, by virtue of Article 5.1, to gross revenues from services provided under the licence collected by licensees. As the licence can only authorize the provision of licensed telecommunications services, no licence fees would be imposed on unlicensed or non-telecommunications services provided by the licensee. Further, any revenues collected by affiliates would, by definition, not be subject to licence fees under the licensee's licence. The definition therefore does not need to be amended in order to address Digicel's concerns.

However, licensees may have an incentive to structure their businesses to minimise their reported revenues, by having revenues collected by an affiliate, rather than by the licensee directly. For this reason, the Commission considers it is necessary to include revenues of affiliates in the gross revenues reported by the licensee, even if such revenues are not subject to licence fees.

April 22nd Licensee Responses

Digicel Digicel welcomes the Commission's confirmation that "the requirement to pay licence fees on the basis of gross revenues is already limited, by virtue of Article 5.1, to gross revenues from services provided under the licence collected by licensees. As the licence can only authorize the provision of licensed telecommunications services, no licence fees would be imposed on unlicensed or non-telecommunications services provided by the licensee.

However, Digicel does not understand the further comments made by the Commission, particularly in respect of reconciling the Commission's apparent view that "any revenues collected by affiliates would, by definition, not be subject to licence fees under the licensee's licence" with the statement that "it is necessary to include revenues of affiliates in the gross revenues reported by the licensee, even if such revenues are not subject to licence fees". With respect, such an approach to information collection appears to be nothing more than a regulatory fishing expedition in respect of businesses that are outside of the Commission's jurisdiction, and in any event is a new requirement that in Digicel's view is ultra vires and susceptible to challenge if it is pursued by the Commission.

Digicel remains of the view that the definition of gross revenue, if included in Annex 1, must be amended so that it only includes the revenues earned by a Licensee from the provision of the services for which a Licence is required.

Commission Conclusion

The Commission notes that most of the changes to the definitions in Annex 1 are related to updates to provisions being adopted as set out above. The updates to those other provisions either reasonably reflect changed circumstances in the telecommunications sector or, in the case of Article 8.2, consolidate several amendments that had previously been made to Licences. As a result, except as discussed below, the Commission will **adopt** them.

The Commission will retain those definitions that continue to be required as a result of not adopting changes to Article 7.7(b).

The Commission notes Digicel's objections to the proposed definition of "gross revenue" and Digicel's proposed changes to that definition. The Commission also notes that the definition would have added useful clarity to the Licence. However, while useful, a clarification is not an update that reasonably reflects changed circumstances in the telecommunications sector since 2007. The Commission will, therefore, **not adopt** the proposed definition of "gross revenue" at this time, but reserves the right to propose it again at a later date. At such time, the Commission will take Digicel's comments into account.

Annex 3 Service Quality Requirements

Annex 3 shall be amended to reflect the reporting requirements described above in Article 7.7. [Changes to specific targets and new parameters not reproduced]

February 14th Licensee Objections

Digicel Digicel is currently considering the extensive amendments that have been proposed to be made to Annex 3 and will respond separately regarding those.

April 22nd Licensee Responses

Digicel Digicel has considered the proposed amendments to Annex 3 of the Digicel Licence. In Digicel's submission many of the proposed amendments set targets that are either impractical or impossible to meet or would impose very substantial capital and operational costs on Digicel and by extension to the Commission which, pursuant to Article 18.1 of the Digicel Licence is bound to compensate Digicel for any expense incurred or damage caused as a result of an amendment or modification to the Licence.

We are also of the view that it is impractical for Digicel to provide detailed responses to each and every change that has been proposed by the Commission as that is unlikely to yield any useful results or uncover the Commission's objectives in making the proposed amendments. Instead, and consistent with the good faith negotiation process expected under Article 18.1 of the Digicel Licence, we submit that it would better for the Commission engage in a technical workshop with all interested parties with a view to understanding the Commission's service quality objectives and achieving a common approach on how standards and reporting arrangements may be used to support reaching those objectives.

Commission Conclusion

As noted previously, the telecommunications sector in the British Virgin Islands has changed considerably since 2007. Service Quality Requirements designed for fixed voice services are not aligned to a market that depends heavily on Internet access and mobile voice services. Updates to Annex 3 are therefore warranted in light of the changed circumstances in the telecommunications sector.

The Commission has set out in Article 7.7(b) and in Annex 3 a set of service quality parameters that are tailored to today's Internet- and mobile-centric market. The Commission also considers that the targets set out in Annex 3 are in line with the performance actually achieved by Licensees today. However, the Commission has considered Digicel's comments about the benefits of further consultation and discussion with the industry and, consistent with Article 7.7 above, will **not adopt** the proposed changes to Annex 3 at this time but reserves the right to do so following consultation and a Licence amendment process pursuant to Article 18.1.

Annex 4 Form of Annual Compliance Report

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.

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.

Explanation 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.

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 15th of February and relates to the preceding calendar year, while the second is to be filed by the 1st of May reflecting the state of affairs on the 1st of April.

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.

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.

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.

The reporting unit in the current section VI will be changed from "%" to "weeks", to reflect the Service Quality Requirement in Annex 3.

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.

February 14th Licensee Objections

No comments submitted

Commission Conclusion

The Commission notes that no party objected to this proposed change to the Licence. The Commission also notes that it largely reflects updates made elsewhere in the Licence, in particular Article 7.7 and Annex 3, which reasonably reflect changed circumstances in the telecommunications sector since 2007. The proposed new Part A would change the deadline for an existing reporting obligation, as the Commission considers that consolidating reporting requirements into the same annual report may help improve compliance. As noted above, compliance by Licensees with their reporting obligations has been a challenge over the term of the current Licence. This change, therefore, reasonably reflects changed circumstances in the telecommunications sector since 2007. As a result, the Commission will **adopt** the proposed changes to Annex 4 except as discussed below.

Consistent with the decision not to adopt the changes to Article 7.7(b) and Annex 3, the Commission will **not adopt** at this time the proposed changes to Part B of Annex 4

Annex 6 Frequencies

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.

February 14th Licensee Objections

No comments submitted

Commission Conclusion

The Commission notes that no party objected to this proposed change to the Licence. The Commission also notes that the proposed deletion of Annex 6 is based on the change in the Commission's practice, namely, to issue a separate Frequency Authorisation instead of reflecting spectrum authorisations in the Unitary Licence. As a result, the proposed update reasonably reflects changed circumstances in the telecommunications sector since 2007 and the Commission will **adopt** it.

Annex 7 Schedule of Penalties

Section IV (Failure to achieve digitalisation of network targets by Due Date) of Annex 7 shall be deleted the subsequent sections renumbered accordingly.

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 minimus* failures to reach these targets: [Specific sections not reproduced here]

A new Part B (Reporting Requirements) will be added to Annex 7 to reflect the changes described above to Article 19.2.

February 14th Licensee Objections

No comments submitted

Commission Conclusion

The Commission notes that no party objected to this proposed change to the Licence. The Commission also notes that it largely reflects updates made elsewhere in the Licence, in particular Article 19.2 and Annex 3, which reasonably reflect changed circumstances in the telecommunications sector since 2007. However, as noted above, the Commission has not adopted the proposed changes to Annex 3. As a result, the Commission will **adopt** the proposed changes to Part B of Annex 7 but not to Part A of Annex 7. The Commission serves the right to make changes to Part A of Annex 7 following consultation with Licensees.

General and Preliminary Comments

February 14th Licensee Objections

BVI CTV The amendments of unitary licences proposed by the Commission are largely cosmetic noncontroversial clean up adjustments to reflect the modernizations of the telecommunications industry and unobjectionable standardizations of all public supplier licences. ...

April 14th Commission Follow-Up

Commission Noted

April 22nd Licensee Responses

BVI CTV Further our letters of February 4, 2022 and February 14, 2022, the public hearing on April 11, 2022 and the Commission's "Observations and Comments on Submissions Made by Licensees Regarding Updates to the Unitary Licences" of April 14, 2022, we share our competitors, Caribbean Cellular Telephone Limited, Digicel BVI Limited and Cable & Wireless BVI Limited, concerns about the Commission's proposed amendments to the unitary licences. In fact, we are actually more concerned than we were before the public hearing where we focused on the concerns that are unique to us without specifically addressing all of the general issues. Therefore, after considering the depth of the concerns and objections raised by every single licensee to both the substance of the amendments of the unitary licences and the process by which the Commission proposes to implement these amendments of the unitary licences, we recommend the Commission postpone this initiative until after the unitary licence renewals and perform a proper consultation including must importantly a good faith negotiation, consistent with Article 18.1 of our Licence, "with the goal of reaching agreement with respect to such modifications or amendments acceptable to both Commission and the Licensee".

...

Lastly, Article 18.1 of our Licence states specifically that "the Commission shall compensate Licensee for any expense incurred or damage caused as a result of an amendment or modification". BVI Cable TV has already begun to incur expenses in anticipation of the proposed amendments to the unitary licenses and our potential damages are nothing short of the entire value of our unitary telecommunications licence together with all associated assets and obligations of the company.

Commission Conclusion

BVI Cable TV's recommendation to suspend this process is noted. The Commission notes however that Article 3.3(d) does not specify that the process under that Article should be undertaken pursuant to Article 18. This is not an amendment to a current Licence, rather it is a process to identify and adopt provisions that are appropriate as a result of changed circumstances in the telecommunications sector for inclusion in renewed Licences to be issued by the Commission. The Article 18.5 process was used, not because it was required by Article 3.3 (d), but because the Commission wanted to ensure that it followed a fair process, which allowed for transparency

February 14th Licensee Objections

CCT The amendments of unitary licences proposed by the Commission are largely cosmetic noncontroversial clean up adjustments to reflect the modernizations of the telecommunications industry and unobjectionable standardizations of all public supplier licences. ...

April 14th Commission Follow-Up

Commission Noted.

April 22nd Licensee Responses

CCT Further our letter of February 14, 2022, the public hearing on April 11, 2022 and the Commission's "Observations and Comments on Submissions Made by Licensees Regarding Updates to the Unitary Licences" of April 14, 2022, we share our competitors, BVI Cable TV Limited, Digicel BVI Limited

and Cable & Wireless BVI Limited, concerns about the Commission's proposed amendments to the unitary licences. In fact, we are actually more concerned than we were before the public hearing where we focused on the concerns that are unique to us without specifically addressing all of the general issues. Therefore, after considering the depth of the concerns and objections raised by every single licensee to both the substance of the amendments of the unitary licence and the process by which the Commission proposes to implement these amendments of the unitary licences, we recommend the Commission postpone this initiative until after the unitary licence renewals and perform a proper consultation including most importantly a good faith negotiation, consistent with Article 18.1 of our Licence, "with the goal of reaching agreement with respect to such modifications or amendments acceptable to both Commission and the Licensee".

...

Lastly, Article 18.1 of our Licence states specifically that "the Commission shall compensate Licensee for any expense incurred or damage caused as a result of an amendment or modification". Caribbean Cellular Telephone has already begun to incur expenses in anticipation of the proposed amendments to the unitary licences and our potential damages are nothing short of the entire value of our unitary telecommunications licence together with all associated assets and obligations of the company.

Commission Conclusion

CCT's recommendation to suspend this process is noted. The Commission notes however that Article 3.3(d) does not specify that the process under that Article should be undertaken pursuant to Article 18. This is not an amendment to a current Licence, rather it is a process to identify and adopt provisions that are appropriate as a result of changed circumstances in the telecommunications sector for inclusion in renewed Licences to be issued by the Commission. The Article 18.5 process was used, not because it was required by Article 3.3 (d), but because the Commission wanted to ensure that it followed a fair process, which allowed for transparency.

February 14th Licensee Objections

Digicel

1. Digicel BVI Limited ("Digicel") welcomes this opportunity to provide its comments with respect to the Draft Directive on the Amendment of Unitary Licences ("Draft Directive") issued by the Telecommunications Regulatory Commission ("Commission") on December 30, 2021 under cover of a Public Notice from the Commission of the same date ("Public Notice").
2. The stated purpose of the Draft Directive is to amend the terms of the Unitary Licence "because of changed circumstances in the telecommunications sector on the British Virgin Islands since the issuance of unitary licences in 2007".
3. Digicel agrees that there have been significant changes in the telecommunications sector and that it is appropriate for both the form and content of the Unitary Licence to be reviewed in the context of those changes.
4. However, we are very concerned that the Commission has attempted to use the review process as a means to impose a significant number of new obligations on Licensees and without first consulting properly on the need for those obligations or the detail on what has been proposed. While we comment below on the specific issues concerning us, we consider the Commission's actions in this regard to be a fundamental breach of process that should be addressed prior to this review proceeding further.
5. We also note the Commission's intention to amend the licences of:
 - BVI Cable TV (BVI Cable)
 - Cable and Wireless (BVI) limited (Flow)
 - Caribbean Cellular Telephone Ltd. (CCT)
 - Digicel (BVI) limited (Digicel)
6. While Digicel agrees that licences held by the above licensees should be amended in a consistent manner, we are concerned that it has not been made clear that all Unitary licences, including any licences for future new entrants, will be issued on non-discriminatory terms. In Digicel's view this is an important omission, especially as there is currently a risk that either:

- a. new Unitary Licences could be issued on terms that favour a new entrant over existing operators; or
- b. existing Unitary licences could be amended in ways that favour one licensee over another licensee.

7. Digicel submits that this fundamental issue would best be addressed by the inclusion of a non-discriminatory licensing requirement in the Telecommunications Code. Alternatively, the Commission may consider changing the structure of Unitary licences so that licence conditions are imposed by reference to standard and special conditions that are applicable to all licensees on a non-discriminatory basis and which are established by way of regulation.

8. Please note that where Digicel has not made comment on a particular provision of the Draft Directive that should not be taken to mean that Digicel either agrees or disagrees with it.

April 14th Commission Follow-Up

Commission For the avoidance of doubt, the purpose of the current proceeding is to ensure all unitary licensees are issued licences with the same terms and conditions, such that no unitary licensee is favoured in any way. As stated on the application form, the Commission does not intend to entertain applications for unitary licences from persons other than the four current unitary licensees.

The Commission notes Digicel’s suggestion that licence conditions be imposed by reference to standard and special conditions that are applicable to all licensees on a non-discriminatory basis and which are established by way of regulation. This will be considered as we plan the way forward in the future for the industry.

April 22nd Licensee Response

Digicel

1. Digicel BVI Limited (“Digicel”) provides this further submission in response to the letter issued on 14 April 2022 (“Commission Letter”) by the Telecommunications Regulatory Commission (“Commission”).
2. The Commission Letter follows a public hearing that was held on 11 April 2022 (“Public Hearing”), during which significant concerns were raised by Digicel and other parties in relation to the procedure that the Commission has adopted in this matter and incorrectly implies that there was an agreement reached at the Public Hearing that those concerns would be addressed by allowing “all Licensees to submit any additional comments on this matter to the Commission by 22 April 2022”.
3. Unfortunately, that is not the case. The concerns raised by Digicel in its submission to the Commission that was lodged on 14 February 2022 remain. As we stated in that submission, we are very concerned that the Commission has attempted to use the review process as a means to impose a significant number of new obligations on Licensees and without first consulting properly on the need for those obligations or the detail on what has been proposed. While we comment below on a number of the specific issues concerning us, we consider the Commission’s actions in this regard to be a fundamental breach of process that should be addressed prior to this review proceeding further to avoid unnecessary and costly litigation.
4. If anything, the Commission Letter only serves to strengthen those concerns and seems to indicate that the Commission is determined to continue with what we consider to be a fundamentally flawed and unlawful process. This is particularly in the light of the Commission’s requirement that Digicel provide a substantive response to the 27 pages of Observations and Comments on Submissions Made by Licensees Regarding Updates to the Unitary Licences (“Observations and Comments”) that was annexed to the Commission Letter within a period of less than four business days during the Easter Holiday period. In our view a 30 day timeframe for responses is the minimum period that should reasonably be applied. It is noteworthy that during the Public Hearing, both Digicel and Flow reserved their rights in regards to this shortened and arbitrary timeframe.

5. We are also still in the dark about the Commission's overall objectives in making the proposed amendments to Digicel's Licence. While some can be explained by a change in market circumstances since Digicel's Licence was granted in 2007, many others cannot. This has made responding to the proposed changes very difficult.

6. In such circumstances this submission is provided on a without prejudice basis and Digicel reserves its rights in respect of taking any further action it considers to be necessary to protect its legitimate interest in this matter.

7. In Digicel's opinion the only way to properly address the problems that now exist is for the Commission to abandon the current flawed proceeding and to “start again” by following the process that is laid out in Article 18 of Digicel's Licence for the operation of a Telecommunications Network Providing Telecommunications Services in the British Virgin Islands, dated 17 December 2007 (“Digicel Licence”).

8. Relevantly, Article 18.1 of the Digicel Licence provides:

*“(i) The Commission and the Licensee may agree in writing to modify or amend this Licence at any time subject to all relevant laws and regulations and (ii) pursuant to Section 33 of the Telecommunications Act, 2006, the Commission may modify or amend this Licence in accordance with the Telecommunications Act, 2006 if the Commission determines that such modification or amendment is necessary to achieve the objectives of the Telecommunications Act, 2006, or is in the best public interest, taking into account the reasonable interest and contractual rights of the Licensee and the principles of fair competition and equality of treatment; provided however, that **for a period of not less than thirty (30) days prior to the giving of any notice pursuant to Article 18.5(b)** with respect to any modification or amendment under this clause (ii), **the Commission shall negotiate in good faith with the Licensee with the goal of reaching an agreement** with respect to such modification of amendment acceptable to both the Commission and the Licensee. The Commission shall compensate the Licensee for any expense incurred or damage caused as a result of an amendment or modification made under clause (ii) above. Any modification or amendments to this Licence pursuant to this Article 18.1 shall be made in accordance with the procedures set forth in Article 18.5.”* (emphasis added)

9. The focus of this Article is clearly on good faith negotiation and reaching agreement between the Commission and the Licensee before the commencement of any Article 18.5 proceeding. It is also consistent with the nature of the Digicel Licence, which is expressed to be an “agreement” between the Commission and Digicel.

10. Digicel would therefore expect that the good faith negotiation required by Article 18.1 would include, at a minimum, the following:

- a detailed discussion paper prepared by the Commission identifying any licensing issues that the Commission considers need to be addressed and any preliminary views on how those issues might be addressed;
- a meeting (or meetings) with relevant parties, including affected Licensees, where the discussion paper is presented and an opportunity is provided for any initial questions to be asked;

- an opportunity for affected Licensees to provide initial feedback on the discussion paper to the Commission with any such feedback being shared (subject to any confidentiality claims) with other affected Licensees;
- a further meeting (or meetings) with relevant parties to discuss the feedback and determine whether any preliminary agreements on amendments may be reached, including agreements in relation to any expense incurred or damage caused as a result of an amendment or modification to the existing licences;
- a further discussion paper prepared by the Commission identifying any preliminary agreements between the affected Licensees and the Commission or, where agreement has not been reached a summary of outstanding issues (if any); and
- preparation by the Commission of a draft formal agreement and proposed licence amendments reflecting any agreements that have been reached between the Commission and affected Licensees, with any such agreement also covering any mechanisms that may need to be in place to address compensation of any expenses or damage suffered by affected Licensees due to the proposed licence amendment.

11. Only where that good faith negotiation has been unable to produce an agreement after a period of not less than 30 days may the Commission proceed to modify or amend the licence in accordance with the procedure set out in Article 18.5 of the Digicel Licence.

12. However, in this case, there has been no such “good faith negotiation” and the critical first step in the licence amendment process appears to have been ignored by the Commission. This has resulted in a flawed process where Digicel has been denied its rights under the Digicel Licence and, more generally, the fundamental requirements of natural justice and procedural fairness have not been observed.

13. Even if the Commission's failure to “negotiate in good faith” was overlooked, the current proceeding also does not meet the basic requirements of the consultation process set out in Article 18.5 of the Digicel Licence. These further procedural failures that have been identified by Digicel include but are not limited to the following:

- a failure by the Commission to publish prior to the Public Hearing (subject to any legitimate claims of confidentiality) the submissions that were made by interested parties in respect of the Draft Directive on the Amendment of Unitary Licences (“Draft Directive”) issued by the Commission on 30 December 2021 under cover of a Public Notice from the Commission of the same date;
- a failure by the Commission to adhere to the requirements of Article 18.5(b)(v) which requires the Commission to submit to Digicel (and other affected Licensees) a report and opinion on the proposed directive prior to any public hearing with such report taking into account any written comments or objections that had been received by the Commission in respect of the proposed directive;
- an unreasonable requirement for Digicel to provide comments on the Commission's 27 page Observations and Comments paper within only 4 working days of its release; and
- a failure to provide for a public hearing after the Commission's submission to Digicel of its report and opinion on its proposed directive.

14. It is also important to note that the timeframes contained in Article 18.S(b) of the Digicel Licence are expressed as minimum's and there is no presumption that the Commission should “rush” the consultation process.

15. These fundamental procedural failures are even more troubling given the Commission's statement that “the changes to the Unitary Licences will only take effect from the date of issuance of a renewal licence to each licensee”, i.e. from 17 December 2022 in Digicel's case, and the implication that no “exigent circumstances” exist that would require the process to be foreshortened.

16. By failing to consult meaningfully, we believe it will be inevitable that the Commission will also fail to take into account relevant information or take into account irrelevant information and that the quality of any decision made as a result will be undermined and that both licensees and the customers they serve will be adversely affected.

17. Digicel further submits that it is reasonable to infer from the Commission's conduct that it has, in effect, predetermined the outcome of this proceeding and the process it has followed has merely been a misguided attempt to “tick the consultation boxes”.

18. This is clear from the comments contained in the Observations and Comments paper and the Commission's apparent intention to publish “its report and opinion on the Directive by 1 May 2022” which is only one week after it has received these from Digicel and clearly an insufficient period to properly consider comments that are received.

19. For all of these reasons and as stated above, Digicel is of the view that the current proceeding should be suspended (or abandoned) and that a new proceeding that is consistent with the requirements of the Digicel Licence should be commenced. Such a proceeding would include an initial period of good faith negotiation and only then (and only if necessary) should a formal proceeding pursuant to Article 18.5 of the Digicel Licence be undertaken and in which all of the required steps and minimum timeframes are followed.

20. Alternatively, it may be possible (with the agreement of licensees) to continue with the current proceeding provided that additional time is afforded for written comments and objections on the Commission's report and opinion on the directive and that a further public hearing is held not less than 10 days after those written comments and objections are received. Digicel would be willing to discuss such an approach with the Commission if it so desires.

21. Finally, Digicel considers it to be appropriate to draw the Commission's attention to the compensation provisions contained in Article 18.1 of the Digicel Licence. That is, the Commission is required to compensate Digicel “/or any expense incurred or damage caused as a result of an amendment or modification made” to the Digicel Licence pursuant to this proceeding.

22. While Digicel has not yet made any detailed assessment of its anticipated expenses that will be incurred or likely damage that will be caused, we expect that any such claim will be substantial. For example, aside from the substantial costs that have already been caused as a result of this proceeding, the amendments that have been proposed to Articles 3.2, 7.8(c), 7.13(a), 1S.1(a), 18, Annex 1 and Annex 3 would all impose very substantial capital and operational costs on Digicel and for which compensation would be required to be paid by the Commission. It also seems likely that along with these direct costs, Digicel would be likely to suffer other damage to its business from the amendments which would also be required to be compensated.

23. The Commission should therefore consider itself to be on notice for the reasons as set out above, and all rights are reserved, including Digicel's lawful right to file proceedings necessary to protect

its interest, to require procedural fairness and natural justice, and mandate a lawful process be followed by the Commission, and assessing and claiming anticipated expenses likely to be incurred or likely damage that will be caused.

Commission Conclusion

Digicel's comments regarding procedure are noted. The Commission notes that the process for amending Unitary Licences upon renewal is pursuant to Article 3.3(d), not Article 18.1. The Commission further notes that Article 3.3(d) does not specify that the process under that Article should be undertaken pursuant to Article 18. This is not an amendment to a current Licence, rather it is a process to identify and adopt provisions that are appropriate as a result of changed circumstances in the telecommunications sector for inclusion in renewed Licences to be issued by the Commission. The Article 18.5 process was used, not because it was required by Article 3.3 (d), but because the Commission wanted to ensure that it followed a fair process, which allowed for transparency.

February 14th Licensee Objections

Flow FLOW notes that in the Draft Directive the Commission has proposed the incorporation into the proposed licence of matters that should properly, first be subject to the public consultation process. That is, the TRC is using the licence renewal process to bypass the public consultation process, which is unacceptable. FLOW objects to all proposed new definitions, terms, standards, service standards, payments, penalties, systems and procedures which have not gone to public consultation including but not exhaustively listed: -Carrier Pre-selection, Joint Undertakings, Merger Control, Licence Review, Compliance Review, Conflicts, Annex 1 -Definitions, Annex 3 – Service Quality Requirements, Annex 4, Annex 6, and Annex 7.

FLOW objects to any proposed provisions which restrict the ability of the Company to be responsive to the competitive environment; any proposed provisions which are more onerous than the Current Licence terms; and any provisions which exceeds the TRC's authority under the Act.

FLOW states that with respect to any sections of the Draft Directive that FLOW has not expressly commented on, as a general principle, FLOW objects to all proposed amendments.

1. The Notice

a. ...

This provision recognises that the terms of the Current Licence apply to this renewal and that any new terms must reasonably reflect changed circumstances at the time of renewal. If the revisions do not reasonably reflect such changed circumstances, then they are contrary to the provisions of the Current Licence.

That provision gives FLOW (and the other Licensees) the comfort that they are operating in the BVI and making significant investments in infrastructure based on known and reasonably anticipated terms regarding each renewal of their Licences.

The newly-proposed 5A of the Telecommunications Code referred to (and in Directive Articles 3.2 and 3.3) purports to do away with the current renewal provisions – presumably including those relating to the reasonableness of new terms (FLOW has not seen the new 5A of the Telecommunications Code). As explained in the Directive, existing licences will not in future be renewed or extended, but would be issued as entirely new licences. That is a material and significant change which introduces significant uncertainty for Licensees (for example, it not only removes the contemplation that licences are renewed on the same terms as previously existed but also does away with the “reasonableness” requirement regarding new terms) and indicates that each renewal is starting afresh with no guarantees or certainty for Licensees.

This provision is further referenced, below, under the Directive section.

b. ...

Under the existing licence, “changed circumstances” are the only grounds in relation to which additional terms may be introduced regarding a renewal. Further, the new terms must be “reasonably required”. It is FLOW's position that many of the proposed revisions to the Draft Directive neither arise due to “changed circumstances” nor are “reasonably required”. In the case of no changed circumstances existing which reasonably require the additional terms of the renewed licence, such

additional terms would be contrary to the terms of the Current Licence and the TRC's obligations to FLOW under the Current Agreement.

c. ...

The TRC's approach to "extreme weather events" is contradictory to its stated concern. FLOW is unaware of the evidence and forecasts that extreme weather events will increase in frequency. Otherwise, FLOW takes no issue with the above but, arguably, some of the new terms (notably the resident management term referred to below) run counter to the "extreme weather event" concern. This is addressed further in (d) below.

d. ...

i. Regarding the administration from local premises, this is not defined and thus is vague and uncertain. Without clarification, such a term may be void for uncertainty. As the TRC is aware, FLOW is a locally incorporated and licenced entity and already has local management administering its business in the BVI. FLOW asserts that it has accordingly met the proposed requirement for local management administering its business from local premises in the BVI. Note is to be made that it is the presence of FLOW affiliates and the distribution of FLOW affiliate networks throughout the Caribbean that allowed FLOW to restore its network relatively quickly, to source contractors for the re-build, and keep BVI connected after hurricanes Irma and Maria decimated its network in 2017. Such consideration would then call into question the changed circumstances reasonably requiring this new term.

ii. The "Licenced Services" under 2.1(b) of the Current Licence include "paging services, telex services, telegraph services, etc". Whilst some provisions of the Current Licence are sought to be modified (such as the requirement for public payphones) there are no provisions regarding deletions of these services which are also obsolete. These, too, need to be removed from the licence.

iii. Regarding a "Five-year review", this provision is uncertain and calls into question the need for and purpose of a "review" within the 15-year term of the licence. Depending upon the intended impact of this term, it may inject uncertainty into the Licensee's obligations under its licence. FLOW queries the changed circumstances reasonably requiring this new term.

iv. Regarding the "proposed amendments", generally, FLOW is of the view that a significant number of the new renewal provisions do not reasonably reflect changed circumstances since the earlier licence was entered into. For example, FLOW queries what "changed circumstances" have reasonably resulted in extinguishing the current renewal provisions in favour of only entering into "new" Licences? Expecting Licensees to invest huge capital funds in infrastructure without the comfort of knowing the general terms upon which renewals will occur (and requiring any additional terms to reasonably reflect changed circumstances) appears to be a material change to the licensing structure, is arguably unreasonable, and does not reasonably reflect terms arising due to changed circumstances. FLOW objects to such provisions on those grounds and confirms its position that they are contrary to the terms of the Current Licence.

April 14th Commission Follow-Up

Commission Note that these comments are generally addressed elsewhere above.

Commission Conclusion

The Commission notes these comments have been addressed elsewhere.