

# Telecommunications Decision 2022-01



## Decision on the Application for Renewal of Cable and Wireless (BVI) Limited's Licence

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### 1. INTRODUCTION

1.1 Through the release of this document, the Telecommunications Regulatory Commission (**Commission**) hereby announces its decision resulting from the application for renewal of Cable and Wireless (BVI) Limited's (**Flow or Licensee**) Licence for the Operation of a Telecommunications Network providing Telecommunications Services in the British Virgin Islands (**Licence**).

### 2. MANDATE

2.1 The Commission was established under the Telecommunications Act 2006 (as amended) law of the Virgin Islands (**Act**) and is responsible for the licensing, regulation and development of the telecommunications services industry in the Virgin Islands and other matters connected therewith.

2.2 In accordance with section 6(e) of the Act, the 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.

### 3. BACKGROUND

3.1 On 25 May 2007, the Commission granted Flow a Licence for the Operation of a Telecommunications Network providing Telecommunications Services in the British Virgin Islands, pursuant to section 15 of the Act.

3.2 The Licence was granted for a period of 15 years and expires on 24 May 2022. It includes a provision at Article 3.2 that Flow may apply for renewal of its Licence by submitting an application for renewal to the Commission no later than 12 months prior to the expiration of its Licence term.

3.3 By virtue of Article 2.1(a) of the Licence, the Licensee was authorised to establish, install, operate, maintain, exploit, and use within, into and from the British Virgin Islands and all territorial waters a telecommunications network. Article 2.1(b) of the Licence specified the services that the Licensee was authorised to provide.

3.4 On 23 May 2021, the Commission received an application from Flow seeking renewal of its Licence, in accordance with Article 3.2 of the Licence. The Commission has since undertaken the requisite actions to appropriately consider the Licensee's application and now issues this decision (**Decision**).

3.5 The Commission has been mindful throughout this process that, in accordance with section 15(7) of the Act, it shall determine applications for all licences on an objective, transparent and non-discriminatory basis.

#### **4. LEGAL PROVISIONS**

4.1 The process for renewal of a licence granted by the Commission under the Act is governed by section 24 of the Act and Article 3 of Flow's Licence.

4.2 Section 24(1) of the Telecommunications Act, 2006 states that subject to the terms and conditions of a licence, the Commission may renew the licence provided that the licensee (a) has operated within the terms of the current licence, (b) has complied in material respects with, or is not in persistent breach of, any of the provisions of the Act, the Regulations, the Telecommunications Code or the terms and conditions of the licence, and (c) has complied in material respects with, or is not in persistent breach of, any instructions.

4.3 Before determining not to renew a licence pursuant to section 24(1) of the Act, the Commission shall give the licensee adequate advance notice, which, absent exigent circumstances and except as provided for in subsection (1), shall not be less than thirty (30) days, in writing of its intention not to renew such licence, specifying the grounds on which it proposes not to renew, and shall give the licensee the opportunity (a) to present its views, and (b) to submit to the Commission within such time as the Commission may specify a written statement of objections to the decision not to renew the licence, which the Commission shall take into account before reaching a decision on renewal.

4.4 Article 3.2 of the Licence states that, pursuant to section 24 of the Act, the Commission may, upon application by the Licensee renew the Licence upon expiration of the Licence Term in accordance with the following: Licensee may apply for a renewal of fifteen (15) years from the expiration of the Licence Term by submission of an application for same to the Commission in accordance with section 24 of the Act and the Commission Regulations no later than twelve (12) calendar months prior to the end of the Licence Term.

4.5 In considering an application for renewal, the Commission must follow the procedure outlined at Article 3.3 of the Licence, which specifies (a) within ten (10) working days from the date at which the application was received, the Commission shall give notice to the public by publication in the Gazette and at least one (1) other domestic newspaper of general circulation which notice shall state (i) that Licensee has applied for renewal of the Licence Term, (ii) the length of the renewal sought, (iii) the time within which comments or objections to the proposed application shall be made in writing by any interested third party, such time not being less than thirty (30) nor more than forty-five (45) working days from the date of the publication of the notice; (iv) the fact that the Commission shall send to the Licensee an evaluation report within ninety (90) working days from the date of receipt of the application, which report shall be a matter of public record at the Commission, and (v) the date and the place for a hearing during which the Licensee and any third party with a legitimate interest may make comments or objections, such date being within ten (10) working days of the date of publication of the Evaluation Report.

- 4.6 Upon receipt of an application for renewal in accordance with Article 3.2, the Commission shall prepare the Evaluation Report stating if and to what extent the Licensee has during the preceding Licence period up to the date of the application (i) complied with its obligations under this Licence, (ii) complied with the regulations and orders adopted from time to time by the Commission and (iii) generally provided the Licensed Services and conducted its business in accordance with the laws of the British Virgin Islands. The Commission shall send its Evaluation Report to the Licensee within the deadline set forth in the Commission's notice.
- 4.7 On the date set forth in the Commission's notice in accordance with Article 3.3(a), the Commission shall call a public hearing during which the Licensee and third parties with a legitimate interest that have duly filed comments or objections which the Commission deems to be relevant, shall have a right to be heard.
- 4.8 The Commission shall deliver its written decision on the renewal of the Licence Term within one hundred and twenty (120) working days from the date of receipt of the renewal application, and notify the Licensee of such decision in writing. In the event that the Commission does not issue a decision within one hundred and twenty (120) working days of the Commission's receipt of a renewal application, the Commission shall notify the Licensee in writing that a decision has not been adopted and that the current Licence shall remain in effect until such time as the Commission issues a decision, but in no event shall a decision be rendered later than one (1) year from the date of receipt of the renewal application by the Commission. The Commission may approve Licence renewal with conditions based upon the same terms and conditions of this 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 Licence renewal shall be subject to the Licensee continuing to comply with the terms and conditions of the Licence for the remainder of the term of the Licence. The Commission shall have the right to assess a fee for any renewal granted as set forth in Article 5.5.
- 4.9 In the event the Commission denies the Licensee's renewal request, after following the procedure set out in section 24(2) of the Act, the Licensee shall be entitled to appeal the denial to the Court.
- 4.10 Article 5.5 of the Licence states that in the event the Licence is renewed pursuant to Article 3, fees payable for any renewal period (**Licence Renewal Fee**) shall be agreed upon between the Commission and the Licensee at the time the renewal is granted.

## 5. RENEWAL PROCESS

- 5.1 On 3 June 2021, the Commission published a notice (**Notice**) which, inter alia, informed the public that Flow sought renewal of its Licence and allowed the opportunity for comments or objections to be filed with the Commission within a particular time.
- 5.2 The Notice specified that (i) Flow had applied for renewal of its Licence term, (ii) the renewal period sought was 15 years (iii) comments or objections to the proposed application should be made in writing to the Commission by 30 July 2021, (iv) an Evaluation Report would be sent to the Licensee and become a matter of public record on 30 September 2021 and (v) a public hearing would be held by the Commission, in relation to the Licensee's application for renewal, on 12 October 2021 at Maria's by the Sea.

5.3 The Notice was issued in accordance with Article 3.3(a) of Flow’s Licence and, accordingly, published in the Gazette, a local newspaper and on the Commission’s website. The Notice is available via this link: <https://www.trc.vg/wp-content/uploads/2021/06/Notice-of-Application-for-Renewal-of-Flows-Licence.pdf>.

5.4 Further to the Notice, the Commission can confirm that the Notice was duly advertised and no comments or objections, or notice of desire to be heard were received by the Commission.

5.5 Additionally, the Commission’s Evaluation Report in relation to Flow was submitted to the Licensee on 30 September 2021 (**Evaluation Report**). The Evaluation Report is available via this link: <https://www.trc.vg/wp-content/uploads/2021/09/Evaluation-Report-Cable-and-Wireless-BVI-Ltd.pdf>.

5.6 Accordingly, the application for renewal of Flow’s Licence was assessed based on the legal provisions outlined above in this Decision, the Evaluation Report, and the criteria found at Annex 1 of the Public Supplier Application Form (**Criteria**). The Criteria are available via this link: <http://www.trc.vg/wp-content/uploads/2021/04/Application-for-Public-Supplier-Licence-Final-Version.pdf>.

## **6. SUMMARY OF COMMENTS**

6.1 The Commission confirms that it received no written comments or objections to Flow’s application for renewal by 30 July 2021, the specific timeline for submission of comments or objections.

## **7. EVALUTION REPORT**

7.1 A draft of the Commission’s Evaluation Report in relation to Flow was provided to the Licensee on 1 September 2021 and Flow submitted comments to the Commission on 15 September 2021. The Commission’s Evaluation Report dated 30 September 2021 was issued after taking Flow’s 15 September 2021 comments into account.

7.2 The Evaluation Report states if and to what extent the Licensee has, during the preceding Licence period up to the date of the application, complied with its licence obligations, regulations and orders of the Commission, and generally provided the Licensed Services and conducted business in accordance with the Laws of the British Virgin Islands.

7.3 The Evaluation Report concluded that (i) the Licensee has to a large extent provided uninterrupted telecommunications services to the Territory of the British Virgin Islands during the term of its Licence in accordance with the terms of its Licence, and the relevant laws and Codes, and (ii) the Licensee has to a large extent complied with most of its Licence and regulatory obligations.

7.4 There were several outstanding areas of non-compliance to be addressed, which included (i) ensuring that its website has been updated to reflect the requirements of the Telecommunications Act and the Codes, and (ii) providing to the Commission certain relevant outstanding documents, procedures, manuals, and agreements referred to within the Evaluation Report.

7.5 Flow responded to most of these areas of non-compliance in its 15 September 2021 comments on the 1 September 2021 Draft Evaluation Report, noting that it had already addressed them, would be addressing them, or was seeking further guidance from the Commission.

7.6 In light of the conclusions in the Evaluation Report and of Flow's promises to cure remaining deficiencies, the Commission considers that Flow:

- a. has operated within the terms of the current Unitary Licence,
- b. has complied in material respects with, and is not in persistent breach of, any of the provisions of this Act, the Regulations, the Telecommunications Code or the terms and conditions of the Unitary Licence, and
- c. has complied in material respects with, and is not in persistent breach of, any instructions of the Commission,

as required by section 24(1) of the Act.

## **8. PUBLIC HEARING**

8.1 On 12 October 2021, the Commission held a public hearing in relation to Flow's application for renewal of its Licence during which the Licensee, and any third parties with a legitimate interest who may have filed relevant interest who may have filed relevant comments or objections on Flow's application, had a right to be heard.

8.2 Following the public hearing, the Commission produced a report, which is available via this link: [2022-05-20-Public-Hearing-Report-Cable-and-Wireless-BVI-Limited.pdf](https://trc.vg/2022-05-20-Public-Hearing-Report-Cable-and-Wireless-BVI-Limited.pdf) (trc.vg).

## **9. ASSESSMENT OF APPLICATION FOR RENEWAL**

9.1 The Licence for the Operation of a Telecommunications Network providing Telecommunications Services in the British Virgin Islands, also known as a Unitary Licence, allows a licensee to provide a broad range of services within the telecommunications services industry. Licensees that have been granted such a licence, are eligible for renewal of their licence, unless they have operated outside the terms of their licence or not complied in material respects or are in persistent breach of, inter alia, the Act, the Regulations or the Telecommunications Code, or if renewal is not in the public interest.

9.2 Notwithstanding the foregoing, in considering whether to renew a licence, the Commission must give due consideration of the Criteria found at Annex 1 of the Public Supplier Form. These criteria include, inter alia, (i) a promise by the Licensee to deliver, (ii) the ability to deliver and (iii) an assurance that proposed services(s) do not cause prejudice.

9.3 In assessing a Licensee's promise to the deliver, the Commission must consider whether the proposed services will positively contribute to the socio-economic development of the Virgin Islands to an

appreciable extent: (i) technically - in terms of quality of services, new services, innovative services, (ii) economically - how the proposed services would contribute to the general economic development of the Virgin Islands, (iii) socially - how the proposed services would benefit the general community, in terms of general services and additional initiatives (corporate social responsibility), and (iv) environmentally - that the facilities will have minimal possible environmental (particularly visual) impact (corporate sustainability)

- 9.4 The requirement of the ability to deliver consists of assessing whether the Licensee (i) has sufficient resources, skills and expertise to establish and operate the telecommunications services; (ii) in the case of a natural person, has a right to legally reside in the Virgin Islands; (iii) in the case of a company, it is incorporated in the Virgin Islands; (iv) has no outstanding payments due to the Government, including any public authorities, of the Virgin Islands, social security payments and taxes, payroll and property taxes, which are not the subject of a dispute or awaiting a determination of the Commission, courts or other relevant authority; and (v) any other legal documentation requested by the Commission.
- 9.5 Further, the assurance that the proposed service does not prejudice (section 23 (3) of the Constitution) includes giving due consideration to the (i) interests of defence, public safety, public order, public morality or public health, (ii) reputations, rights and freedoms of persons, or the private lives of persons concerned in legal proceedings or proceedings before statutory tribunals, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulation of telecommunications, posts, broadcasting or public shows, and (iii) restrictions on public officers that are reasonably required for the proper performance of their functions.
- 9.6 In all cases, the Commission shall be mindful of any existing licensed operations in the Virgin Islands held by the applicant. In particular, the Commission must consider the extent to which they have (i) operated within the terms of their licence and (ii) complied with the Act, Regulations, Codes, licences and instructions issued by the Commission, during their term of operation. Further, the Commission may (i) not award a licence or (ii) make recommendations to the applicant concerning required divestment of existing operations, to ensure a competitive market and compliance with the telecommunications framework.
- 9.7 Following the receipt and preliminary assessment of Flow's application for renewal, on 30 August 2021 the Commission sent the Licensee a number of Requests for Information (RFIs) relating to that application, in order to obtain missing documentation and to gain greater clarity on the Licensee's current and future operations. Following the exchange of correspondence between the Commission and Flow, Flow addressed more than half of the RFIs. Most of the remainder of the RFIs sought clarification of, or data in greater granularity than, information that was provided in the original 23 May 2021 application.
- 9.8 By not providing the clarifications or additional detail requested in the unanswered RFIs, Flow affected in particular the Commission's ability to gain a full understanding of Flow's current network and future network and services plans. It is not clear, therefore, that Flow presently has concrete or detailed "*promises to deliver*" telecommunications networks or services to the Territory.
- 9.9 Given Flow's current ownership structure, Flow's "*ability to deliver*," notwithstanding the apparently-limited "*promises to deliver*" noted above, raises no concerns. Nor was there anything in the application to raise concerns that the proposed service does not prejudice section 23(3) of the Constitution.

9.10 Further, as noted earlier, there are no concerns with respect to the extent to which Flow has (i) operated within the terms of their licence and (ii) complied with the Act, Regulations, Codes, licences and instructions issued by the Commission, during its term of operation.

## **10. DECISION**

10.1 The Commission has considered the matters to which it is to have regard under section 24 of the Act, Article 3 of the Licence, Annex 1 of the Public Supplier Form, and the Evaluation Report of Flow dated 30 September 2021.

10.2 Current unitary Licensees must demonstrate that their conditions of licence have been satisfied before the expiry of their current Licence in order to be eligible for a new licence.

10.3 The Evaluation Report, which was published by the Commission on 30 September 2021, found Flow to have been in largely compliance with their legal and regulatory obligations from 2007 and up to the time of their application for renewal.

10.4 Flow has complied with the requirements of section 24(1) of the Act and their application raises no concerns under the published criteria for grant of a public supplier licence (other than the apparently-limited promises to deliver to the Territory).

10.5 The Commission is satisfied that all conditions for renewal of licence, pursuant to section 24 of the Act and Article 3.3 of the Licence, were met. Flow is eligible to be issued a new licence for a period of 15-years. The conditions that will apply to the renewed licence are set out below.

## **11. CONDITIONS**

11.1 Renewal of the Licence is subject to the following conditions:

- i. Implementation of outstanding compliance matters listed at section 8 of the Evaluation Report of Flow dated 30 September 2021, and agreement on a compliance programme with the Commission within 6 weeks of the Effective Date of the renewed Licence, with all outstanding compliance matters to be resolved within 6 months of the Effective Date of the renewed Licence.
- ii. Payment of the Licence Renewal Fee to the Commission within 14 calendar days of the Effective Date of the renewed Licence.
- iii. Execution of a renewed licence with updated terms and conditions as described in the Commission's 1 May 2022 Directive on Terms of Renewed Unitary Licences.

Issued by the Telecommunications Regulatory Commission on the 23<sup>rd</sup> day of May 2022.

(Sgd.) Guy L. Malone.

**Chief Executive Officer**