

Telecommunications Decision 2022-03



Decision on the Application for Renewal of BVI Cable TV Limited's Licence

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 BVI Cable TV Limited's (**BVICTV 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 29 June 2007, the Commission granted BVICTV 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 28 June 2022. It includes a provision at Article 3.2 that BVICTV 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 28 June 2021, the Commission received an application from BVICTV 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 BVICTV'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 8 July 2021, the Commission published a notice (**Notice**) which, inter alia, informed the public that BVICTV 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) BVICTV 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 6 September 2021, (iv) an Evaluation Report would be sent to the Licensee and become a matter of public record on 5 November 2021 and (v) a public hearing would be held by the Commission, in relation to the Licensee's application for renewal, on 16 November 2021 at Maria's by the Sea.

- 5.3 The Notice was issued in accordance with Article 3.3(a) of BVICTV'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/2021/07/Notice-of-Application-for-Renewal-of-BVI-Cable-TVs-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 BVICTV was submitted to the Licensee on 5 November 2021 (**Evaluation Report**). The Evaluation Report is available via this link: <https://www.trc.vg/wp-content/uploads/2021/11/Evaluation-Report-BVI-Cable-TV-Final.pdf>.
- 5.6 Accordingly, the application for renewal of BVICTV'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 BVICTV's application for renewal by 6 September 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 BVICTV was provided to the Licensee on 12 October 2021 and BVICTV submitted comments to the Commission on 26 October 2021. The Commission's Evaluation Report dated 5 November 2021 was issued after taking BVICTV's 26 October 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) until September 2017, the Licensee provided a singular service, cable television services, to the Territory of the British Virgin Islands which was one of the services it was authorized to provide under the terms of its Licence in accordance with the laws of the British Virgin Islands, and, prior to 2017 the Licensee was largely compliant with its licence and regulatory obligations, and (ii) subsequent to September 2017 the Licensee has been largely non-compliant with its licence and regulatory obligations.
- 7.4 There were numerous outstanding areas of non-compliance to be addressed, which included (i) ensuring that it has a website for the purposes of carrying out its obligations under the law and its Licence (ii)

ensuring that its website has been updated to reflect the requirements of the Telecommunications Act and the Codes, (iii) providing to the Commission certain relevant outstanding documents, procedures, manuals, and agreements referred to within the Evaluation Report, and (iv) addressing various applicable outstanding issues in the 2019 Harneys Audit.

- 7.5 In its 26 October 2021 comments on the 12 October 2021 Draft Evaluation Report, BVICTV expressed confidence that they satisfied the relevant standards and stated that all current material concerns raised by the Evaluation Report were to the best of their knowledge addressed by their 28 June 2021 letter regarding the Harneys Compliance Audit and by their application for licence renewal.
- 7.6 In its 23 November 2021 letter in response to the public hearing held in relation to its application for Licence renewal, BVICTV asserted again that it was confident that it meets the standards articulated in section 24 of the Act with regards to licence renewal, and that all current material concerns raised in the Evaluation Report were already addressed in its 28 June 2021 letter regarding the Harneys Audit and in its 28 June 2021 application for licence renewal.
- 7.7 Under section 24(1) of the Act, renewal of a licence is conditional upon the licensee operating within the terms of its current licence and complying in material respects or not being in persistent breach of the Act, the Regulations, the Telecommunications Code, the Licence, and any instructions of the Commission. Merely asserting that it has complied with section 24(1) of the Act (as BVICTV did repeatedly throughout the licence renewal process) is not actual evidence of compliance.
- 7.8 A review of their 28 June 2021 letter regarding the Harneys Audit and of the Licensee’s 28 June 2021 application for licence renewal indicates that BVICTV did not address most of the areas of non-compliance noted in the Evaluation Report. It was noted that BVICTV did not appear to have a website for the purposes of carrying out its obligations under the law and its Licence. BVICTV had not provided most of the outstanding documents, procedures, manuals and agreement referred to in the Evaluation Report, although BVICTV has proposed a Compliance Officer and has provided an updated Complaints Procedures document and hurricane preparedness plan. BVICTV also indicated plans to respond timely to Commission information requests and to submit QoS reports on time moving forward. However, by 14 June 2022, no new QoS reports had been filed by the Licensee since submission of their 28 June 2021 application for licence renewal despite three quarterly QoS reports having fallen due since then. While BVICTV addressed several of the concerns raised in the Harneys Report, many others were not, including the three specifically highlighted in the Evaluation Report. It is noted that BVICTV has expressly declined to provide detailed information on the operational and business relationships between it and CCT, citing concerns regarding confidentiality.
- 7.9 As of 18 May 2022, BVICTV had not provided to the Commission a plan to improve compliance or indicated to the Commission significant efforts to come into compliance, despite being aware of the issues following transmission of the Harneys Audit report to BVICTV in June 2020 and of the Evaluation Report in November 2021. Finally, BVICTV had not fulfilled its 28 June 2021 promise to “ensure that Quality of Service reports are submitted on time moving forward.”
- 7.10 Such actions would have provided the Commission with greater assurance that the current state of non-compliance would be temporary. In the absence of such actions, the Commission had little assurance that BVICTV would substantially improve its level of compliance in the future. Accordingly, the Commission formed the preliminary view that BVICTV had not complied with the requirements of

section 24(1) of the Act and, therefore, would not have been eligible for renewal of its licence when it expires on 28 June 2022.

7.11 On 27 May 2022, the Commission notified BVICTV that it intended not to renew BVICTV's licence and set out the reasons why. The Licensee submitted a written statement of objections to the intended decision not to renew as well as outstanding QoS reports on 14 June 2022. Following a meeting with the Commission on 20 June 2022, at which the Licensee provided its views on the Commission's intended decision, the Licensee submitted the outstanding annual compliance reports, some of the outstanding ITU market data and indicated its willingness to agree a compliance programme with the Commission on several unaddressed matters. Throughout the Licensee asserted it would file its reports on a timely basis going forward.

7.12 The effect of the recent submissions is to increase BVICTV's level of compliance. Additionally, the Commission is mindful of BVICTV's level of compliance prior to 2017 and the events of force majeure which affected BVICTV and the entire Territory in that year, BVICTV's (limited) efforts to address the 2019 Harneys Audit on the date it submitted its licence renewal application in 2021 coupled with the recent submission, and BVICTV's undertaking to agree a compliance programme with the Commission.

8. PUBLIC HEARING

8.1 On 16 November 2021, the Commission held a public hearing in relation to BVICTV's application for renewal of its Licence during which the Licensee, and any third parties with a legitimate interest who may have filed relevant comments or objections on BVICTV'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: <https://www.trc.vg/wp-content/uploads/2022/06/2022-06-21-Public-Hearing-Report-BVICTV-Licence-Renewal.pdf>.

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 BVICTV's application for renewal, on 27 October 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. BVICTV did not respond directly to those RFIs at the time. It is noted that in a 23 November 2021 follow-up to questions posed at the public hearing to consider their licence renewal application, BVICTV addressed at a high level their ownership structure and the services they offer, but did not provide all the detail requested by the Commission.
- 9.8 The Commission followed up with the Licensee on 15 February 2022, to which BVICTV responded on 7 March 2021 by providing an updated signed application form and revised CVs for its senior management. However, BVICTV submitted that it could not accurately predict the future to the level of specificity requested and was not comfortable sharing proprietary forecasts with the Commission, and did not address the other RFIs.
- 9.9 Subsequent to a meeting held with the Commission on 15 March 2022, by letter dated 23 March 2021, BVICTV provided documents missing from their June 2021 application as well as responses to the RFIs. It is noted that, while BVICTV addressed almost all of the RFIs, BVICTV did not supply much

new substantive information, to a large extent either stating that it had already provided the information requested or noting that it was not comfortable providing it.

9.10 By not providing substantive answers to many of the RFIs (which requested clarifications or additional detail regarding their current operations as well as their future plans), BVICTV affected in particular the Commission’s ability to gain a full understanding of BVICTV’s current networks and services and its future network and services plans, especially the extent to which those networks and services are BVICTV’s as opposed to CCT’s. BVICTV’s statements regarding future network development consist of “look[ing] forward to expanding this service [its fibre network] beyond Road Town in short order” and “look[ing] forward to bringing this technology [5G] to the British Virgin Islands.” However, BVICTV has declined to provide any details regarding timing, geographic extent or financing of those proposals. Further, while BVICTV presently offers television distribution services as well as fibre optic network services, it is doing so solely in “partnership” with CCT. Therefore, the extent to which BVICTV presently has concrete or detailed “promises to deliver” telecommunications networks or services to the Territory, either on its own or in “partnership” with CCT, over the next 5 years, let alone the next 15 years, is not clear

9.11 BVICTV’s beneficial owners include an international operator. However, other than the fact that this entity indirectly holds 14% of BVICTV, no information was provided regarding the relationship of that owner to BVICTV, in particular the expertise (if any) it might supply BVICTV or its commitment (if any) to provide further investment in BVICTV. However, any concerns regarding BVICTV’s “ability to deliver” would be tempered by the apparently-limited “promises to deliver” noted above.

9.12 Nothing in the application raised concerns that the proposed service might prejudice section 23(3) of the Constitution.

9.13 However, while BVICTV’s application for licence renewal is deficient as it did not adequately address the Commission’s criteria regarding the applicant’s “promises to deliver” or “ability to deliver,” a Commission decision not to renew a licence under section 24 of the Act is based primarily on the level of a licensee’s non-compliance with its existing licence obligations. It would not be reasonable to determine to not renew the licence of a licensee with a deficient licence application who has made reasonable efforts to improve its level of compliance.

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 BVICTV dated 5 November 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 5 November 2021, found BVICTV to have been largely compliant with its licence and regulatory obligations prior to 2017, and largely non-compliant with its licence and regulatory obligations subsequent to September 2017 and up to the time of their application for renewal.

10.4 The Commission's preliminary view was that BVICTV had not complied with the requirements of section 24(1) of the Act and therefore would not have been eligible for renewal of its Unitary Licence when it expires on 28 June 2022. However, given that BVICTV has taken steps towards compliance with the requirements of section 24(1) of the Act following the Commission's 27 May 2022 notice of intention not to renew, and given that their application does not raise concerns under the published criteria for grant of a public supplier licence that might outweigh the compliance with section 24(1) of the Act, but noting that there remain compliance deficiencies listed in the Evaluation Report, the Commission will exercise its discretion to renew BVICTV's Unitary Licence.

10.5 BVICTV 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 BVICTV dated 5 November 2021.
- ii. Presentation to the Commission of the dates by which BVICTV shall implement each of the outstanding compliance matters listed in section 8 of the BVICTV Evaluation Report by 31 July 2022, with all outstanding compliance matters to be resolved within 12 months of the Effective Date of the renewed Licence.
- iii. Without limiting the foregoing, correction of all outstanding deficiencies relating to the BVICTV website, including without limitation publication of QoS reports, a clear complaints mechanism, and complete contact information for BVICTV, by 31 July 2022.
- iv. Without limiting the foregoing, presentation to the Commission of a detailed plan on how to achieve a higher level of compliance and agreement on a compliance programme with the Commission within 12 weeks of the Effective Date of the renewed Licence.
- v. Undertaking to meet with the Commission once every calendar quarter to review BVICTV's progress against that detailed plan, the first such meeting to be held in September 2022, until full compliance is achieved.
- vi. Undertaking to submit correct and timely quarterly QoS reports and annual compliance reports.
- vii. Payment of the Licence Renewal Fee to the Commission within 14 calendar days of the Effective Date of the renewed Licence.
- viii. Execution of a renewed licence with updated terms and conditions as detailed in the Commission's 1 May 2022 Directive on Terms of Renewed Unitary Licences.

Issued by the Telecommunications Regulatory Commission on the 27th day of June 2022.

(Sgd.) Guy L. Malone.

Chief Executive Officer