

The Bermuda Telephone Company
Comments on Draft Telecommunications Regulatory Reform
Legislation
June 18, 2010

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EXECUTIVE SUMMARY

BTC has reviewed the REGULATORY AUTHORITY ACT 2010 and the ELECTRONIC COMMUNICATIONS ACT 2010 pursuant to the Ministry of Energy, Telecommunications and E-Commerce's Consultation Paper published May 3, 2010, which required responses from the industry by June 18, 2010. Our comments are included herein.

First, BTC finds the broad and sweeping transfer of authority and power from the Minister to the Regulatory Authority incomprehensible and unlawful on its face. Although the CONSTITUTION OF BERMUDA in Section 61(4) permits the Minister to establish boards and committees to *assist* him in the discharge of his duties, the Constitution does not permit the wholesale transfer of the Minister's authority to the Regulatory Authority as contemplated in these two bills.

Although the Ministry and its consultants and drafters suggested that there is no "bright line test" for determining what activities appropriately fall within the domain of the Minister (in his policy-making role) and the domain of the Regulatory Authority (in its implementation role), BTC sets forth a conceptual approach -- the Institutional Analysis and Development framework -- developed by a recent Nobel laureate in economics that can be used to make just such determinations. We describe that approach herein, and we rely on it throughout our comments.

Second, BTC believes the costs of the proposed legislation to be exorbitant. In addition to the current 3% Government Authorization fee required of most service providers, the bills contemplate an additional 3% to support the Regulatory Authority plus service fees to cover the costs of conducting spectrum auctions, managing numbering resources, and certifying equipment. In addition to these fees, the industry will face the direct costs of compliance, the indirect costs associated with regulatory delay and uncertainty, and the opportunity costs associated with monies diverted from economically productive investments. Including the new payroll taxes, BTC estimates that its effective tax rate will rise to 55% of revenues with this legislation. The new fees equate to about 17 jobs at average salaries. Thus, we look for ways throughout the legislation to cut unnecessary regulations like private network licensing and to transfer functions like consumer protection to boards already established to serve those purposes.

Third, BTC maintains that the bills are unworkable due to omitted definitions and to incompletely specified regulations. Many of the provisions in these bills are not sufficiently detailed to enable the industry to comply with them, in part because the legislation leaves the details (which we argue constitute policy-making determinations that are the prerogative of the Minister) to the Authority. As one significant example, anti-competitive offenses which attract criminal penalties are not defined. Yet, as a matter of fundamental fairness and common sense a person cannot be held liable if the statute fails to state clearly what conduct is unlawful.

Similarly, the many purposes and objectives of the bills make implementation of the legislation impracticable since there is no single, underlying principle that motivates reform. In this regard, BTC draws on the November 18, 2008 TELECOMMUNICATIONS REFORM POLICY paper, approved by Cabinet in June 2008, to recommend that the legislation's primary focus be "promoting long-term consumer welfare by fostering incentives for firms to invest in innovation." Indeed, the deployment of high-speed next generation networks would be *the most effective way* of advancing the long-term consumer welfare of Bermudians, although the bills are silent with regard to establishing a vision for Bermuda's electronic communications future.

Finally, we note that the Ministry has allowed a mere seven weeks to respond to sweeping legislation that will affect our industry and Bermuda's economy well into the 21st Century. Indeed, the legislation incorporates several significant policy areas for which there has been no public consultation whatsoever, even though these subjects were slated for consultation in the Milestone Plan and were to precede the legislation. These policy areas include regulations and administrative procedures governing the Regulatory Authority, licensing, universal service, and consumer protection. There has been no consultation on industry costs or cost accounting nor does the legislation make any reference to it, presumably because the Authority would deal with this matter later. BTC submits, however, that costs and cost accounting are policy-level determinations that are the responsibility of the Minister.

In this regard, BTC also notes that there have been no draft Ministry determinations on any of the reform consultations that have occurred to date. Therefore, we have had no indication whether our comments are read or considered. Judging from the proposed bills, BTC suggests that industry comments have had virtually no impact on the Ministry's proposals for reform. BTC has taken considerable time and spent considerable sums in responding to the Ministry's proposals including our responses to these proposed bills. Thus, we would appreciate a full, open and reciprocal response from the Ministry, detailing its reasons for rejecting any of our suggestions.

STATEMENT OF INTEREST

The Bermuda Telephone Company Limited (BTC) has served Bermuda's residential and business customers continuously since 1887. Although BTC is the largest of the KeyTech Group's affiliate companies with 2008/09 revenues of \$57.5 million, BTC operates as a fully separate business entity with its own Board of Directors and its own set of books.

BTC operates under its own authorizing legislation, as amended from time to time, dating from 1887, although we are considered a Class B wireline carrier under Bermuda's current regulatory regime. As such, BTC provides local access and private line services to more than 27,500 residential households and businesses. Our local access products include single line residential and business broadband DSL services (at speeds ranging from 1 to 6 Mbps) as well as traditional voice access services, offered with a full suite of features and functions. Our business data services, first introduced to Bermuda businesses in 1985, range from ISDN services to gigabit Ethernet products. BTC also owns and operates the Island's payphones for the convenience of Bermuda's residents and international visitors.

BTC interconnects with each of the Island's other carriers to provide BTC customers full access and termination. We also provide our carrier colleagues a full range of carrier transport and backhaul services at tariffed rates along with the transit capabilities.

At one time, BTC provided virtually every household and business on the Island with telephone service. Today, competition from new fixed and mobile wireless technologies, international VOIP services, cable broadband, and business service providers like Quantum has ensured that BTC no longer controls the local access market. Indeed, BTC has lost 21 percent of its residential access lines since March 2003 (including residential DSL lines) and 15 percent of its business access lines since March 2001 (including business DSL lines).

BTC line losses, however, are dwarfed by our losses in voice traffic because customers who have retained their access lines nonetheless rely on wireless services or global VOIP services for a significant amount of their communications. Between March 2002 and March 2009, BTC experienced a 59% drop in calls and call revenues. In business data markets, BTC revenues have fluctuated over the last several years, but remain at essentially the same level as at the end of our 2005/06 fiscal year. Although BTC employs the most Bermudians of any telecommunications provider in the sector, our head count has dropped from about 300 five years ago to about 200 employees today largely as a consequence of our diminishing business position.

INTRODUCTION

BTC supports regulatory reform because we believe that all carriers should be allowed to provide all services to ensure that Bermuda's consumers enjoy competitive choice and innovation in the communications products available to them. We also believe that a robust competitive market will ensure continuous capital investment in Bermuda's electronic communications infrastructure, providing reliable, high speed, innovative communications technologies that are essential to keeping international businesses in Bermuda and attracting new investment to the country.

As we have said previously,¹ BTC does not believe that the policies and regulations adopted in the newly privatized and liberalized European market in 1998 and replicated in the proposed Electronic Communications Act 2010² (ECA) and the draft Regulatory Authority Act 2010³ (RAA) are appropriate for Bermuda's multiple-competitor market. Not only are these policies too costly, too time-consuming and too complex, they also deliver the wrong results.

Although the Ministry's consultation paper accompanying these bills states that the purpose of these acts is to "ensure that the legislative and regulatory framework governing the sector...continues to promote critical service provision and accommodate future technological advancements,"⁴ rather than encouraging innovation and investment, the ECA and RAA as drafted will dampen and delay investment, ensuring that Bermuda falls further behind countries with more enlightened telecommunications policies. What is needed most in this environment is what the Government has focused on the least: immediate licensing accompanied by strong competition law that ensures that anticompetitive behaviour is precluded.

That said, there are several major issues that require attention in the existing proposals. First, the draft legislation is unclear as to its single, underlying objective to drive policy making and regulatory decision-making. Although the legislation

1. BTC Response to Consultation Document, Reforming Telecommunications Regulation in Bermuda August 15, 2006 (Sept. 29, 2006); BTC Response to Questions and Requests for Clarification, Consultation Document, Reforming Telecommunications Regulation in Bermuda August 15, 2006 (Dec. 1, 2006); BTC Response to Review of Consultation Responses and Draft Proposals for Regulatory Reform for Telecommunications in Bermuda, 12 January 2007 (Feb. 19, 2007); BTC Response, A Dominant Framework for Bermuda – Consultation Paper, 20 August 2008 (Sept. 29, 2008); BTC Response to Department of Telecommunications April 20, 2009 Data Request Regarding Relevant Markets, (Public Version) (June 12, 2009); The Bermuda Telephone Company Limited, Comments on Access and Interconnection in Bermuda Published October 6, 2009 (Nov. 19, 2009).

2. METEC, A BILL ENTITLED ELECTRONIC COMMUNICATIONS ACT 2010, at § 6(1) (May 2010) [hereinafter ECA].

3. METEC, A BILL ENTITLED REGULATORY AUTHORITY ACT 2010 (May 2010) [hereinafter RAA].

4. METEC, Draft Regulatory Authority Act 2010 and Electronic Communications Act 2010 Consultation Paper, at 1 (May 3, 2010).

appears to include the preservation and promotion of competition as an objective, a number of the policy recommendations in the drafts would suppress competition through provisions that favour the welfare of individual competitors rather than that of consumers. A key theme in our comments is that competition does not simply increase with the number of competitors in a market, and it is not the welfare of competitors but the competitive process itself that enhances consumer welfare. Thus, BTC strongly recommends that the legislation adopt as its primary, guiding objective the promotion of long-term consumer welfare of Bermudians, and we use this principle to motivate many of our comments.

Second, rather than promote investment, innovation, and competition, the draft legislation creates a high degree of regulatory uncertainty arising from the legislation's many purposes, missing and vague definitions of key economic terms on which market determinations hinge, unspecified rules, and the ambiguous and sometimes conflicting roles of the Minister and the Regulatory Authority (RA). Many provisions in the RAA and ECA create uncertainty as to whether private firms could recoup the costs of their sunk investments, which means that firms would forbear from making investments in next-generation technologies that are necessary for the advancement of Bermuda's economy. Thus, in our comments we look for ways to increase certainty.

Third, the legislation imposes real costs on the industry in addition to telecommunications fees and taxes already paid including new RA costs, compliance costs, and indirect costs associated with regulatory uncertainty, regulatory delay, and the opportunity costs incurred by directing monies to regulatory structures rather than productive investments that will grow the economy. Thus, BTC will look for places throughout the legislation to recommend cost cutting efforts where regulation can be streamlined or eliminated. Obvious targets for these cost cutting measures are eliminating private licensing and equipment certification activities and allowing other boards to handle consumer protection issues.

Finally, the legislation lacks a standard by which it allocates authority and responsibilities between the domain of the Responsible Minister and that of the Regulatory Authority. It is understood that the Minister is responsible for policy making and the RA is responsible for implementation, but throughout the legislation, policy and rule-making activities are assigned to the Authority. Thus, we provide a conceptual framework (i.e., the Institutional Analysis and Development (IAD) framework) for determining the authority and responsibilities of the Minister and the RA, which serves as the basis for the revisions to the RAA and the ECA that we make with respect to the responsibilities of the Minister and the Authority.

A. The Draft Legislation Should Adopt the Promotion of Long-Term Consumer Welfare As Its Primary Objective

The draft legislation does not have a single, underlying objective for the acts. The Electronic Communications Act 2010 currently lists nine different purposes, and the Regulatory Authority Act 2010 lists four principal objects of the Authority. Although many of the purposes set out in the ECA have been reiterated throughout the course of reform consultations, the November 18, 2008 Telecommunications Reform Policy Paper, approved by Cabinet on June 24, 2008, states what should be the focus of the acts, i.e., that “it remains the steadfast aim of the Government’s policy to foster the development of the public telecommunications sector to the benefit of the people and the economy of Bermuda.”⁵

Taking this statement as our guide, from an economic perspective, the “benefit of the people and the economy of Bermuda” is synonymous with the long-term consumer welfare of Bermudians, and the “development of the public telecommunications sector” implies investment in innovative products and technologies in the telecommunications sector. As such, BTC supports the objective stated in the Policy Statement, and we strongly recommend that the draft RAA and ECA be rooted in the overarching goal of advancing the long-term welfare of Bermudian consumers. Doing so will ensure that we have a single standard on which to base regulatory rulemaking.

BTC recommends that the RAA and ECA take as their foundation the overarching goal of advancing the long-term welfare of Bermudian consumers because this objective is directly linked to the creation and preservation of incentives for businesses to invest in new communications technologies – which is what this country needs. Moreover, promoting long-term consumer welfare by fostering incentives for firms to invest in innovation promotes dynamic competition. The result is a virtuous cycle in which investment-driven innovation begets competition and competition begets innovation. By establishing the promotion of consumer welfare through investment incentives as the principal goal of the Regulatory Authority Act 2010 and the Electronic Communications Act 2010, the draft legislation would have a stronger foundation from which to promote policy and regulatory decisions that will advance Bermuda in the global economy.

Although numerous provisions of the draft legislation purport to facilitate sustainable competition for the benefit of Bermudian consumers, the current legislation is highly process-oriented and focuses on how the government will

5. Ministry of Energy, Telecommunications and E-Commerce, Telecommunications Reform Policy, at 12 § 3.2 (Nov. 18, 2008).

broker outcomes for existing competitors, rather than for consumers.⁶ To say that consumer welfare is an afterthought is an understatement. The legislation, in fact, does not describe how the provisions will credibly and concretely advance consumer welfare.

Oddly enough, although ostensibly promoting sustainable competition, the bill's current framework *suppresses* competition—by limiting the number of licences, limiting the scope of licences so as to limit the product offerings available, and erecting barriers to entering other markets for existing licencees. These policies may preserve an appearance of competition by allowing the Government to control the number of firms in a market, but effective and sustainable competition is not measured by the number of firms in a market. None of these policies can credibly be said to advance consumer welfare, and certainly none of them promotes investment in sunk-cost infrastructure required to deliver new services that rely on new technologies.

B. The Draft Legislation Should Seek to Promote Investment and Innovation by Minimising Regulatory Uncertainty

With the fourth-highest GDP per capita in the world,⁷ Bermuda should demand communications technologies that are representative of—and conducive to—the Island's prosperity. In this regard, the legislation is completely void in providing any vision for a high speed broadband future for Bermuda. Rather, it looks to imposing old remedies on old technologies.

Indeed, the deployment of high-speed broadband networks would be *the most effective way* of advancing the long-term consumer welfare of Bermudians because broadband would create the significant positive spillovers (in the form of investment and innovation) that would continue to propel Bermuda's economy forward. Rather than a vision for the future and certainty in how we get there, however, this legislation provides high degrees of regulatory uncertainty which would *reduce or nullify* the incentives of private firms to invest in next-generation broadband networks.

In industries that are characterised by large sunk investments, such as electronic communications, a firm's survival depends on its ability to recover its substantial sunk and fixed investments. Regulation, however, can create uncertainty, raising the

6. The success or failure of an individual firm, however, is immaterial to the competitive *process* that generates gains in consumer welfare like lower prices at higher qualities and innovative new products. In fact, inherent in the competitive process is the weeding out of inefficient firms.

7. CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK, Country Comparison: GDP - Per Capita (PPP) (July 1, 2007), *available at* <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2004rank.html> (last visited May 28, 2010).

level of risk and thus increasing the return that investors will demand before choosing to invest. This increase in the cost of capital in turn reduces the magnitude of investments.⁸ If a firm is uncertain as to whether it will be able to earn returns on its investment sufficient to cover its sunk costs, it will have less incentive to make the investment.

As it currently stands, the draft legislation would, for two reasons, fail to create the degree of regulatory certainty necessary and conducive to investment in next-generation technologies. First, the lack of scientific rigor in the interpretation of key economic terms and market power concepts creates ambiguity with respect to the interpretation and implementation of statutes and regulations. To promote innovation and dynamic competition, the draft legislation should increase transparency by including clear definitions both of “cost” and of the anticompetitive offences. It should require that proceedings and market reviews incorporate rigorous economic analysis based on empirical evidence to ensure that *ex ante* policies are justified. Moreover, there should not be excessive judicial deference to the regulatory body in the interpretation of the two proposed statutes, as regulators have a natural tendency to favor statutory interpretations that expand and perpetuate their mandate.

Second, the draft legislation would apply legacy regulation, such as mandatory unbundling and universal services remedies, to existing and new networks. Regulators may claim to serve the immediate interests of consumers by undertaking or threatening such regulatory intervention, but such policies dampen the incentives of incumbents and new entrants alike to undertake the risky investments that make robust competition possible in technologically dynamic markets over an extended period of time. Because regulation is costly—both in terms of the direct costs of administration and in terms of the potentially damaging effects on incentives to invest and innovate,⁹ the draft legislation should favor market solutions in seeking to advance innovation and consumer welfare. A regulatory approach that reduces regulatory uncertainty and thereby promotes private investment in rapid deployment of next-generation fibre broadband networks would obviate a number of the draft legislation’s detailed sections.

8. See, e.g., PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 425 (16th ed. Irwin McGraw-Hill 1998).

9. See, e.g., J. Gregory Sidak, *The Failure of Good Intentions: The Worldcom Fraud and the Collapse of American Telecommunications After Deregulation*, 20 *YALE J. ON REG.* 207 (2003).

C. The Legislation Will Impose Substantial Costs on Bermudian Industry and Consumers

The proposed legislation will create substantial cost of several kinds. Consider, first, the direct, out-of-pocket costs to BTC. In 2009, BTC paid \$3.3 million in taxes, an effective corporate tax of 36 percent. The new Regulatory Authority fee will be up to 3 percent of revenues, which is equivalent to the company's existing licence fee of \$1.5 million. Added to the total taxes in 2009 and the increase in the payroll tax of \$0.2 million, BTC's effective corporate tax rate will rise to 55 percent of its revenues. The \$1.5 million in Regulatory Authority fees is equal to the cost of 17 jobs at average salaries at BTC.

Consider next the administrative costs of complying with a new and complex approach to sectoral regulation and Bermuda's first regime of competition law. In larger economies, regulated companies typically have legal, regulatory, and government affairs departments with expertise in the formulation, interpretation, implementation, and review of regulation and competition law. Given the relatively small size of many of the Bermudian firms subject to this legislation, the cost of hiring an expert staff (or of retaining consultants) will be prohibitive. At the same time, the legislation will impose significant administrative costs on the Government, because the legislation allows the Ministry little discretion to use simpler policies when circumstances justify them or to adapt to unforeseen circumstances.

The greatest cost of the legislation, however, will be the loss in economic welfare when regulatory policies distort consumption, production, and investment decisions. The legislation will create a high degree of regulatory uncertainty and, consequently, a high degree of uncertainty as to whether firms will have a reasonable opportunity to recover the sunk investments necessary to provide electronic communications services. This regulatory uncertainty will discourage firms from investing in new services and new markets. That result would harm Bermuda's consumers and stifle economic growth.

D. The Draft Legislation Needs a Clear Conceptual Framework to Determine the Authority and Jurisdiction of the Minister and the Regulatory Authority

BTC is stunned at the extent to which the RAA and the ECA together transfer broad authority from the Minister of Energy, Telecommunications and E-Commerce to the Regulatory Authority. Indeed, we contend that the legislation, in many instances, gives the RA *unlawful* authority to regulate the electronic communications industry. As we discuss in greater detail, below, section 61(4) of the Constitution of Bermuda permits the Minister to establish boards and committees to *assist* him. It does not allow a wholesale delegation of the Minister's power and authority to the RA.

Section 61(4) of the Constitution of Bermuda reads as follows:

A Minister charged under subsection (1) of this section with responsibility for the conduct of any business of the Government may be assisted in the discharge of that responsibility by a board, committee or other similar body consisting wholly or partly of persons who are not public officers and established by a law enacted by the Legislature or by directions in writing given by the Minister concerned; and any such body shall have advisory, consultative, and administrative functions as may be conferred on it by such a law or such directions, but, in exercising any such functions, the body shall be subject to the directions of the Minister concerned.

Thus, the Minister cannot delegate his power or authority; he can be *assisted* in carrying out his responsibilities by relying on a board or committee for advisory, consultative, and administrative functions, but he cannot assign his policy-making responsibilities to the RA as is the case throughout the RAA and the ECA.

In our view, this wholesale delegation of Ministry responsibilities to the RA is due to the fact that the Ministry has failed to articulate the details of many of its proposed reform policies, and thus leaves it to the RA to fill in the gaps. Unfortunately, many of these gaps are “policy” gaps that are the responsibility of the Minister, not “implementation” gaps. Thus, BTC believes that the legislation needs to be completely revamped (1) to include the policy-level detail missing in the ECA that is necessary to fully articulate the regulations governing any specific policy matter (or simply state that the Minister has the responsibility for these policy areas, assuming that a full articulation of the policy will follow at a later date) and (2) to ensure that the authority domains of the Minister and the RA are appropriately delineated and distinguished.

The Ministry and its consultants suggested at the June 3rd and 4th, 2010 Workshop on the RAA and ECA that there is no “bright line test” regarding what activities should fall under the policy-making powers of the Minister and which should be handled by the Regulatory Authority as implementation. At the Workshop, the drafters invited participants to provide such a test or to make suggestions if the division of responsibilities between the Minister and the RA should be handled differently. In the pages that follow, BTC provides a “bright line test” (i.e., a theoretical and conceptual framework) for determining which activities belong within the domain of the Minister and which can be addressed by the Regulatory Authority, and we rely on these concepts throughout our review of the RAA and the ECA to make suggested changes in keeping with this “test.”

The “bright line test” BTC recommends relies on a rich academic literature on institutional design that provides a conceptual framework for making exactly the

types of institutional determinations and delineations that we are trying to undertake in Bermuda and to do so in a thoughtful and deliberate way. Indeed, the 2009 Nobel Prize in Economics was awarded jointly in October 2009 to Professor Elinor Ostrom of Indiana University, Bloomington and Professor Oliver Williamson of the University of California at Berkeley, a political scientist and an economist who have devoted their academic careers to the development of conceptual frameworks for economic governance.

The approach we recommend the Ministry and its consultants adopt for creating the RA and implementing reform —the Institutional Analysis and Development (IAD) framework—was developed by Professor Ostrom and her academic colleagues at universities throughout the world over the course of the last thirty-five years.¹⁰ Although the literature on the subject is extensive, the essence of IAD can be readily understood. Most importantly, it can serve as a tool (1) to ensure that the essential institutional structure for the RA is fully fleshed out, (2) to facilitate the development of specific and comprehensive regulations for the many policy matters governing the electronic communications industry, and (3) to enable the Ministry, its consultants, and the legislative drafters to make theoretically-grounded determinations regarding what authority and actions rightly belong in the domain of the Minister *vis-à-vis* the Regulatory Authority.

In explaining the hallmarks of IAD, we risk oversimplifying the theoretical framework of IAD and the challenges involved in creating effective institutions. BTC presents the framework, however, because IAD offers some very helpful tools to create effective interdependent political-economic institutions similar to those contemplated in Bermuda.

As an initial matter, institutions are “the prescriptions that humans use to organize all forms of repetitive and structured interactions including those within families, neighborhoods, markets, firms, sports leagues, churches, private associations, and governments at all scale.”¹¹ That is, institutions are rule-structured “arenas” that govern the actions of individuals (“participants” in the theoretical language of IAD) in particular situations, leading to consequences for themselves and others. Importantly, consequences are impacted by the absence of rules as well as by explicit rule sets, so failures to get the rule sets right can lead to ambiguity, instability, contention and detrimental, counterproductive or unintended consequences.

10. An excellent explanation of this framework can be found in ELINOR OSTROM, UNDERSTANDING INSTITUTIONAL DIVERSITY (Princeton Univ. Press 2005), from which we borrow liberally in the description of the framework we provide herein.

11. *Id.* at 3.

The IAD framework posits that although there is an almost infinite diversity of implicit or explicit rule-structured situations in the world, there exists a basic, underlying, universal set of component parts that structure each situation. One component of the IAD framework is an action situation that consists of seven essential variables: the set of participants (where participants can be individuals, firms, legislatures, nation states, et cetera), the positions filled by participants, the set of allowable actions these participants must, may or may not take, the control that any individual has with regard to his actions affecting the outcome, the information available to participants about actions and outcomes, the costs and benefits assigned to actions and outcomes, and the potential outcomes themselves.

There is no need to elaborate on the components of an action situation further except to say that the rules (which we discuss below and focus on hereafter) are tied one-to-one to these action situation variables (but see Ostrom for a full appreciation of the framework). It is enough to know for the purposes of creating rule sets that the action situation simply refers to the social space where participants with diverse preferences interact whether that social space is a firm, a market, a courtroom, a legislative chamber, or a soccer field. In our case, these social spaces are (1) Bermuda's electronic communications market itself, (2) the arena of the Regulatory Authority, and (3) the immediate space in which the Ministry, its consultants and drafters and the industry work together to devise the rules that govern (1) and (2).

As we work our way through the IAD framework, it is important to appreciate that action situations exist within a broader theoretical framework that includes the *biophysical and material world, the nature of the community, and the rules themselves*. These are the essential elements of IAD for our purposes—that is, for constructing governance institutions. The biophysical and material world, the nature of the community and the rules jointly affect the types of actions individuals can take, the benefits and costs of these actions and potential outcomes, and the likely outcomes achieved. Where regulatory structures are designed to achieve long-term consumer welfare, for example, an appreciation of how these components interact together can help assure that the intended outcome is the outcome realized.

The biophysical and material conditions pertain to the real world of biophysical, material and human resources and capabilities related to producing goods and services (where producing can also mean producing government policy and regulations). These conditions include capital, labour, and technology and whatever other biophysical limits exist in the real world. Conditions in the biophysical and material world come into play because they both inform the specific rules that should be put in place and reflect the outcome of those rule-structured situations on the world. To simplify: the rules that are put in place to govern a competitive market will affect the outcomes in that market.

Although the last statement seems obvious, biophysical and material conditions that exist in the real world have significant implications for creating governance structures. In the case of Bermuda, for example, the amount of money available for regulatory rules and structures is dependent on the size of the Bermuda economy and the size of Bermuda's regulated industries. Thus, one would not expect to implement the same set of rules to the same extent in Bermuda as in much larger economies because it would be apparent that the physical pool of resources available in two different environments could not accommodate identical institutional structures. Similarly, technology differences that exist between one physical environment and another (or one decade and another even in the same environment) argue in favour of different rule sets to govern obviously different technological situations. BTC has argued previously that rule sets developed for newly privatized and liberalized markets are inappropriate for competitive markets like Bermuda. While we seem to harp on this point, from a theoretical perspective, the fact that something is done elsewhere is no justification for doing it in the immediate environment if the biophysical and material conditions differ.

- **The nature of the community** pertains to the size and composition of the relevant community, the extent of inequality of basic assets among those affected, values of behaviour generally accepted in the community, the level of common understanding that potential participants share about the structure of the situation and the extent of homogeneity in the preferences of those living in the community.

The nature of the community also has significant implications for the development of rules and rule sets. In large populations, for example, it may be possible to completely eliminate conflicts of interest among public officials and public servants. In small populations like Bermuda, however, conflicts of interest must be more narrowly circumscribed simply because eliminating conflicts completely is not feasible when numbers are small and family and professional relationships are extensive.

- **Rules** are shared understandings by participants about enforced prescriptions concerning what actions (or outcomes) are required, prohibited, or permitted. Well understood and enforced rules operate so as to rule out some actions and rule in others. As Ostrom notes, the stability of rule-ordered actions is dependent upon the shared meaning assigned to words that are used to formulate a set of rules. If no shared meaning exists when a rule is formulated,

confusion will exist about what actions are required, permitted or forbidden.¹² Thus, establishing clear definitions of significant terms used in the legislative language is crucial.

It is important to note that the stability of rule-ordered relationships is also dependent on enforcement. Breaking rules is always an option but the choice by participants to do so depends on the risk associated with being monitored and sanctioned. If the risk is low, participants have greater incentives to break the rules which lead to instability in the rule-structured situation in the short term and increasing instability and ineffectiveness in the long term. Where an investment is *not* made in monitoring the ongoing actions of participants, a considerable difference between the intended outcomes and the actual outcomes will occur. Thus, monitoring and enforcement are critical, and this monitoring and enforcement function pertains not only to industry participants but to the behaviour of the RA itself in its prescribed role.

The IAD framework includes seven types of rules that are sufficient and necessary to create or analyze any action situation. The seven types of rules are: *position, boundary, authority, aggregation, information, payoff, and scope rules.*

Position rules specify the set of positions or roles that participants assume and the number and type of participants who hold each position. Most situations contain more than a single position, and rule sets assign different kinds of authority to those in different positions. As an example, the legislation identifies the position of Commissioner and states that there will be four of them, one of whom is the Chairman and one of whom also holds the position of Chief Executive. Each of these positions has its own authority rules that differentiate that position's authority to act or effect outcomes. Similarly, position rules in the legislation identify the position of "public" electronic communications service providers, and while failing to define "private," the legislation nonetheless implicitly establishes the position of non-public providers and imposes licensing obligations on holders of this position as well.

Boundary rules can be thought of as entry and exit rules. These rules define who is eligible to enter a position, the process that determines which eligible participants may (or must) enter a position and how an individual may (or must) leave a position. Some entry rules specify the criteria to use to determine whether an actor is eligible to fill a particular position. The current proposal, as an example, states that Commissioners shall be appointed by a

12. *Id.* at 20.

Selection Committee, shall serve for three year terms and may be reappointed for successive terms. In some instances, participants can also control their own entry and exit into a position, e.g., when a Commissioner resigns.

Boundary rules may also assign fees for entry or exit and may be compulsory when eligible participants have no control over whether they enter a position. Licensing, for example, is compulsory for all electronic communications services providers, and those holding the position of *public* electronic communications providers will pay both Regulatory Authority and Government Authorization fees. The Government can increase entry (or exit) costs in any market by requiring, for example, RA fees, license fees, spectrum fees, numbering administration fees, equipment certification fees, et cetera.

Authority or choice rules specify what actions that participants in given positions must, may, or may not take at a particular time in light of the conditions that have or have not been met at that point. By widening or narrowing the range of actions assigned to participants, authority rules affect the basic rights, duties, liberties, and exposure of members in an action arena and the relative distribution of these to all participants. That is, authority or choice rules affect the total power created in action situations and the distribution of this power.¹³

RAA 29(6), for example, delineates the permissible actions associated with the position of Chief Executive. Although there is no specific section that delineates what actions individual Commissioners must, may, or may not take or what actions the Board together must, may, or may not take, permissible Board actions are sprinkled throughout the document. As examples, consider RAA 25(9), “the Board may establish such committees . . .” or RAA 29(7), “the Board of Commissioners . . . may suspend or revoke the Chief Executive’s appointment.”

Aggregation rules determine how decisions are made and affect the level of control that individuals exercise in and across action situations. They determine whether a decision of a single participant or of multiple participants is needed prior to taking action. When aggregation rules are non-symmetric, a single person is assigned full authority to take an action and may take that action without gaining the prior agreement of others.¹⁴ As

13. *Id.* at 201.

14. Symmetric aggregation rules, in contrast, assign joint control over an action to multiple participants so that all are treated alike. Ostrom cites JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (University of Michigan Press 1962) in noting that where votes are weighted equally, it is possible to conceptualize a simple voting rule ranging from allowing any one member of those given joint authority to make a decision for the collectivity (the anyone rule—used for calling

Ostrom points out, “unless regular expectations have been established about the rules used to aggregate the expressed preferences of others, such consultation is not required by the aggregation rule.”¹⁵

Several provisions throughout the proposed bills provide examples of aggregation rules. ECA 15(2) pertaining to the grant of licenses, for example, says that the RA will make a “general determination,” which by definition means that the RA will hold a public consultation before issuing its decision. (Public consultation rules are set out in RAA 69-73.) In other instances (see ECA 19(1) regarding determinations of significant market power), the RA may make an “administrative determination,” which by definition includes a general determination but may also be a “direction” or a “decision” with no public consultation.

Information rules affect the amount and type of information available to participants and the linkages between actions and outcomes. That is, information rules pertain to the information available to participants about the overall structure of the situation, the current state of affairs, the previous and current moves of other participants, and their own past moves. Information rules also authorize channels of information flow among participants (including regulations regarding the frequency of exchange of information and the accuracy of information), and they assign the obligation, permission or prohibition to communicate to participants at particular times or about particular subjects. Information rules can specify the language and forms in which communication shall take place.

RAA 79, for example, identifies the record keeping requirements for adjudications while RAA 83 sets out the prohibition on *ex parte* communications in adjudicatory situations. Similarly, although ECA 8(2)(c)(viii) gives the RA the authority to report and publish statistics relating to the quality of service of public electronic communications services, there is no obligation for the RA to do so and there is no obligation for the RA to produce reports and statistics on subscribers, penetration, prices, service usage, revenue, market share, et cetera regarding the current state of affairs of the industry.

out public emergency vehicles) to requiring all those given joint authority to agree prior to a decision (the unanimity rule)— with a variety of voting aggregation rules falling in between these two extremes. OSTROM, *supra* note 10, at 204. Importantly, aggregation rules must also contemplate the “no-agreement” condition (what happens when no agreement is reached).

15. OSTROM, *supra* note 10, at 203.

Payoff rules assign external rewards or sanctions to particular actions that have been taken or to particular outcomes experienced. Payoff rules are relatively straightforward; they involve paying or receiving something of value. RAA 44, for example, sets out the RA fee structure for sectoral providers and refers to the sectoral legislation (RAA 44(7)) regarding the fee basis and calculations. In this case, although ECA 10 lays out the criteria that the Authority will keep in mind in making a request for fees, there is no related language in the ECA specifying fee basis or fee calculations, an obvious disconnect. Nor is there a definition in either bill that notes that fees should be based on relevant “electronic communications service” revenue.

Scope rules specify a known outcome variable that must, must not, or may be affected as a result of the actions participants take in a situation. Scope rules affect action sets through their effect on outcome variables. ECA 41(1)(b), for example, says that competitive bidding for spectrum will be subject to a reserve price which will set the floor for acceptable bids for frequencies in any spectrum auction. The reserve price is the minimal acceptable outcome. As another example, Ostrom reports on a conference where organizers identified two types of rules for regulating industry. Either regulators can prescribe exactly what actions regulated industries must take to improve their performance or regulators can identify the goal, i.e., specify the desired level of performance and allow the participants to develop their own ways to meet the target.¹⁶ The first alternative is regulation via authority or choice rules; the second, regulation via scope rules. In some respects, *ex ante* remedies can be considered authority/choice rules and *ex post* remedies, scope rules—a known and proven outcome like predatory pricing will attract a known penalty.

As a rule of thumb, if a rule is not a position, boundary, information, payoff, or aggregation rule, it is an authority/choice rule if it impinges on an action and it is a scope rule if it impinges on an outcome. In addition, each of these rules will also typically contain an explicit or implicit “or else” condition, which may be a sanction for breaking the rule or may be a shift from permitted or required to prohibited or vice versa. “Or else” conditions require back up rules that specify what changes will occur for failing to follow the rule and what sanctions the enforcer will realize for failing to monitor compliance. Finally, it is important to note that these rules operate as a configuration, i.e., the rules do not operate independently of each other. Taken together, the set of rules defines the situation.

16. *Id.* at 209.

This configurational nature of rules suggests that if the rule set is not or cannot be fully specified, default rules come into play. Ostrom specifies the default rules as follows:¹⁷

Default position condition	One position exists
Default boundary condition	Anyone can hold the position
Default authority/choice condition	Each player can take any physically possible action
Default aggregation condition	Players act independently. Physical relationships present in the situation determine the aggregation of individual moves into outcomes
Default information condition	Each player can communicate any information via any channel available to the player
Default payoff condition	Any player can retain any outcome that the player can physically obtain and defend
Default scope condition	Each player can affect any state of the world that is physically possible

Although the default conditions may appear ridiculous on their face, Ostrom contends that these default conditions are “those that would be used by a participant or an observer in a general legal system that presumed general freedom unless a rule specifically prohibited or mandated an act or event. These are the broadest default conditions that would be used in a common law legal system as opposed to a Roman Law system that presumes that most things are forbidden unless specifically permitted.”¹⁸ While the default conditions offer those analyzing governance situations ways to get a handle on an ambiguous situation, they offer those creating governance situations, as we are here, a better appreciation of the need to fully specify the situation in terms of the complete set of rules. At this juncture, we think it is obvious that each of these rules should be fully specified in any policy determination or in the establishment of any governance institution both to ensure that the policies and institutions operate as intended and to provide certainty to the participants affected by the rule sets.

The previous explanation provides the bare bones for analyzing any single action situation, for example, the Authority itself or the Ministry itself, but the analysis becomes more complex when we consider that governance systems typically involve complex systems of interaction. In this case, one element of complexity is introduced simply by the interaction of the RA and the Ministry and sorting, appropriately, the domain of each.

17. *Id.* at 211.

18. *Id.*

By asking where rules come from, it becomes obvious that there are several levels of rule-making and rule-following situations. All rules are nested in another set of rules that define how the first set of rules can be changed. Fortunately, the IAD framework also helps understand governance systems where there are overlapping areas that are linked sequentially or simultaneously with several levels of rules. The IAD framework contemplates *three levels of rules*—*operational rules*, *collective choice rules*, and *constitutional choice rules*—to help tease out these complexities, although at each level there can be one or more arenas in which different types of decisions made at that level will occur.¹⁹ It is important to note that the same set of seven generic rules, discussed above, operate at each level.

Operational rules directly affect participants' day to day decision-making in specific political and economic settings. These are the working rules that individuals use in making decisions. In this instance, the operational rules are those in place in the day to day business of constructing and operating electronic communications networks, providing services, billing customers, et cetera. Similarly, the administrative rules established for the RA constitute the working rules for the regulator that will govern the day to day decision-making activities of the Authority, which include conducting adjudications or general determinations and engaging in monitoring and enforcement activities.

In both cases, the rules that govern the operational level will have been established at the collective choice level structured by collective choice rules (which participants, in what positions, chosen how, given information, and an assessment of costs and benefits can make operational rules). The examples above of the industry at work and the RA at work illustrate an important point. Both operate at the same level in the institutional hierarchy, the operational level, but they operate in different arenas, the arena of the Authority and the arena of the electronic communications market. Both also rely on the collective choice level for the source of their rule sets.

Collective choice rules determine who is eligible to be a participant at the operational level and how operational rules may be changed. It is at this level where the Ministry (with the Parliament) establishes the rules or law that will govern the Authority at the operational level. It is also at this level that the Ministry (with the Parliament) establishes the rules (or delegates this rule-making authority to the RA) that will govern the industry at the operational level. The development of this

19. It will be obvious in the discussion that follows that three levels of rules do not necessarily constitute the full set of "layering" that could be imposed on any institutional analysis as The Bermuda Constitution, for example, is derived from an even higher rule-making authority, the Crown. Nonetheless, three levels, as Professor Ostrom notes, are enough for most practical applications and surely sufficient for our purposes. *Id.* at 58.

legislation, including the immediate consultation, is taking place at the collective choice level.

What is confounding about this consultation and the legislation itself, however, is that collective choice rules (for example, RAA 61(2) which states that the “Authority shall make rules...setting out the procedures applicable to adjudications and public consultation”) and operational rules (for example, RAA 69-73 which sets forth the procedures the RA must follow for public consultations, albeit without required timeframes) are both contained in the same legislation, which (in addition to these two provisions being internally inconsistent) means that rule-making and rule-following provisions are intertwined in these documents, making it much more difficult to discern appropriate and proper rule sets for the activities of the various participants.

In this particular case, the solution is to eliminate RAA 61(2) and assure that the procedures for both adjudications and consultations are fully fleshed out in the proposed bills. Going forward, however, if the adjudicative and consultative procedures that the Authority must follow are changed, those changes must occur at the collective choice (or rule-making) level which should be the domain of the Responsible Ministers because the RA cannot be both rule-maker and rule-follower for its own rules (other than its own internal procedures). This conundrum leads appropriately to a discussion regarding the third level of rules, the constitutional choice level.

Constitutional choice rules affect collective choice activities by determining who is eligible to be a participant at the collective choice level and the rules to be used in crafting collective choice rules. In this case, The Constitution of Bermuda (section 34) gives the power to make laws to the Legislature, which will consider a law to establish the RA and a law to govern the regulation of the electronic communications industry. Similarly, the Constitution (in section 61(4)) permits the Minister to establish a Board to assist him in the discharge of his duties where any such Board will have “advisory, consultative, and administrative functions... but...shall be subject to the directions of the Minister concerned.” Thus, the authority (as in IAD “authority rules”) of the RA, as embodied in the RAA and the ECA, must conform to the provisions outlined in the Constitution or risk a Constitutional challenge.

It is at this point that it appears that the Ministry, its consultants and its legislative drafters obfuscate the domain of the Ministry *vis-à-vis* the RA. Although it has been clear from the beginning that the Minister is responsible for policymaking and the RA is responsible for implementation, the legislation currently confuses the appropriate activities of each. And while the legislation says that the RA operates at the direction of the Minister (ECA 9(2)), it also gives the RA policymaking powers by

permitting the RA to establish its own aggregation rules (see RAA 61(2) pertaining to developing procedures applicable to adjudications and public consultations). The legislation also allows the RA to establish boundary rules for the industry (see ECA 13(b) permitting the RA to establish the licensing framework including eligibility and terms and conditions for all private licenses) and authority rules (see ECA Part V which delegates all policy-making with respect to consumer protection to the RA). The Constitution, however, does not permit a delegation of policy-making to the RA, and the legislation cannot legitimately make it so.²⁰

These errors and obfuscations can be clarified by reference to the IAD which would require the Minister to define the activities of the RA in terms of the seven rules *and* require the Minister to establish the regulatory regime governing the industry in terms of the same generic rule set. Having set the policy that governs the industry, the Minister may then look to the RA for administrative functions, i.e., the carrying out of policy, not the development of policy.

In practice, this means that *position, boundary, authority, aggregation, information, payoff* and *scope rules* should be specified by the Ministry for each substantive policy area that pertains to the regulation of the industry, i.e., licensing, spectrum use, universal service, consumer protection, and whatever other broad policy areas that may pertain like costing and cost accounting (which is delegated completely to the RA (see ECA 23(i)) albeit under the umbrella of an *ex ante* remedy). Having said this, BTC recognizes that the RA can legitimately engage in collective choice type actions where it is empowered to do so by the legislation and within the constraints imposed by the Constitution. This means that the RA can engage in rule-making activities that are administrative in nature and for the purpose of implementing the policies set by the Minister.²¹

20. At the June 3rd Workshop on the RAA, the Ministry's legislative drafters drove home the point that the Authority and the Chief Executive of the RA would be very, very powerful actors. Although we do not argue the point that implementation and enforcement can be inherently powerful, much of the power ascribed to the RA appears to arise from actions outside its legitimate domain.

21. Although the Consultation Paper at page 3 says that the "Regulatory Authority Act would establish an independent regulatory authority," The Bermuda Constitution does not contemplate the creation of independent boards. Rather, these boards work at the direction of the Minister. Thus, Bermuda cannot accommodate the type of "independent" regulators seen elsewhere and hailed as "international best practice." As such, the effort to establish an independent regulator in Bermuda is fundamentally flawed. Indeed, this attempt to fit a square peg into a round hole simply drives up the cost of regulation by establishing a separate entity to do the work that could be done within the Ministry by the Ministry's staff. Importantly, there has been no discussion as to how the Ministry will continue to do its work relating to policy development. Will the Ministry conduct consultations on policy, make determinations and turn those determinations over to the RA to conduct consultations on the implementation of policy? Or will the Ministry outsource its policy-making activities to the RA, reserving for itself the final decision-making? Either way the process is cumbersome, time-consuming and expensive, and as the Ministry cannot outsource policy-making *per se*, as may have been the initial intent, the separate structure seems only to put the Minister's staff well beyond his reach.

Having set out the framework for institutional design, albeit in highly abbreviated form, the challenge for industry, along with the Ministry, its consultants and legislative drafters, is to ensure that the policy provisions in the legislation are fully and appropriately fleshed out and the authority relationships between the domain of the Minister and the RA are appropriate and lawful. This is a task of no small proportion and one that is unlikely to be accomplished within the deadlines set by the Ministry for responding to the legislative consultation, since this is the first time the industry has seen any of the provisions for the Regulatory Authority, the licensing regime, universal service, or consumer protection. In the pages that follow, BTC will attempt to identify the more egregious shortcomings of the legislation with the expectation that further refinements to this legislation will take place in subsequent discussions or consultations with the industry prior to tabling these bills in the House.

A BILL
entitled
REGULATORY AUTHORITY ACT 2010

ARRANGEMENT OF SECTIONS

<p style="text-align: center;">PART I PRELIMINARY</p> <p>1. Short title and commencement</p> <p>2. Interpretation</p> <p>3. Application</p> <p>4. Crown binding</p> <p style="text-align: center;">PART II THE RESPONSIBLE MINISTER</p> <p>5. Authority of the Responsible Minister</p> <p>6. Request for Information</p> <p>7. Ministerial directions</p> <p>8. Enforcement of directions</p> <p>9. Delegation of powers and functions to the Authority</p> <p>10. Requests from the Authority</p> <p style="text-align: center;">PART III ESTABLISHMENT AND ORGANISATION OF THE AUTHORITY</p> <p style="text-align: center;"><i>Division 1 Constitution</i></p> <p>11. Establishment of the Authority</p> <p>12. Principal objects</p> <p>13. General powers</p> <p>14. Prohibited activities</p> <p>15. Scope of authority</p> <p>16. Regulatory principles</p> <p>17. Sectoral review</p> <p>18. Official website</p> <p style="text-align: center;"><i>Division 2 The Board of Commissioners</i></p> <p>19. Composition and function</p> <p>20. Selection Committee</p>	<p>21. Selection and replacement of Commissioners</p> <p>22. Chairman of the Board of Commissioners</p> <p>23. Removal</p> <p>24. Remuneration</p> <p>25. Meetings</p> <p>26. Documentary procedures</p> <p>27. Delegation of the Authority's powers and assignment of its duties</p> <p style="text-align: center;"><i>Division 3 The Staff</i></p> <p>28. Appointment of staff</p> <p>29. Chief Executive</p> <p>30. Transfer between the Authority and Government service</p> <p style="text-align: center;"><i>Division 4 Other matters</i></p> <p>31. Conflict of interest</p> <p>32. Liability</p> <p>33. Confidentiality</p> <p>34. Unauthorised disclosure of confidential information</p> <p style="text-align: center;"><i>Division 5 Advisory, self-regulatory and co-regulatory bodies</i></p> <p>35. Advisory panels</p> <p>36. Self-regulatory and co-regulatory bodies</p> <p style="text-align: center;">PART IV FINANCE AND BUDGET</p> <p style="text-align: center;"><i>Division 1 Finances of the Authority</i></p> <p>37. Financial year</p>
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38. Funds of the Authority
39. Operating Fund
40. Reserve Fund
41. Transfer of net surplus
42. Investment

Division 2
Budget of the Authority

43. Budget
44. Regulatory Authority fees
45. Grants and loans
46. Accounts and Audit
47. Publication of accounts and annual report

PART V
POWERS AND FUNCTIONS OF THE
AUTHORITY

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Authorisations

48. Licences, permits and other authorisations
49. Grant, assignment and transfer of control
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Supervision of entities with significant market power

58. Procedures for determining whether to impose ex ante remedies
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ADMINISTRATIVE PROCEDURES

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60. Informal fact finding
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First Schedule – Commencement
Second Schedule – Regulated Industry Sectors

Be it enacted by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Assembly of Bermuda, and by the authority of the same, as follows—

(1) **PART I**
PRELIMINARY

Short title and commencement

1 (1) This Act may be cited as the Regulatory Authority Act 2010.

This Act shall come into force in the manner stipulated in the First Schedule to this Act.

Interpretation

BTC believes that in several significant instances in both the RAA and the ECA, important and necessary definitions to ensure legislative clarity are missing. In some cases, the words imply broad meaning when the drafters intend something narrow, e.g., in the use of the word “content” in the ECA. In other instances, it is apparent that the words have been selected and employed purposefully, but their meaning is reserved to the drafters, for example, “sustainable competition,” which occurs in both bills. BTC believes that where the words used have a specific intent and meaning, definitions are required to ensure transparency and clarity and to minimize litigation. We do not agree with the Ministry or its consultants, when these issues were raised at the Workshop on June 3rd and 4th, that “everyone knows” what these words mean or that the implications are insignificant enough to require no clear definition.

As we failed to note in our earlier discussion of rules (even though it may be obvious), rules are formulated in human language, and, as such, rules share problems of lack of clarity, misunderstanding and change that typify any language based phenomenon.²² As we *did* note earlier, the stability of rule-ordered relationships depends on the shared meaning assigned to words used to formulate rules. If no shared meaning exists when a rule is formulated, confusion will exist about what actions are required, permitted or forbidden. In the case of “sustainable competition,” for example, the Ministry, its consultants and the legislative drafters clearly intend sustainable competition to be a scope rule, i.e., an intended outcome of regulation. As such, it behooves the Ministry to define it.

In addition, although we recognize that definitions and provisions included throughout the proposed acts are lifted from the current Telecommunications Act 1986, EU legislation and other established law, BTC does not believe that the fact that these definitions or provisions exist elsewhere is a sufficient or compelling justification for adopting them here. Not only were these other acts also crafted by

22. Ostrom, *supra* note 10, at 20 (citing Vincent Ostrom, *Artisanship and Artifact*, 40 PUB. ADMIN. REV. 309 (1980)).

mere mortals, they were crafted at a different time and place and the definitions or provisions may no longer be appropriate. BTC believes that such important legislation as that contemplated here merits a thoughtful review of any of the language included in the bills.

The draft RAA, for example, includes key economic terms, such as “cost,” “competition,” “predatory pricing,” and others, that are not defined in the legislation. The absence of definitions for these terms would increase uncertainty with respect to the interpretation, implementation, and enforcement of the legislation and of future regulation. Therefore, we add economic terms, including antitrust offences, to the list of definitions in RAA 2. Many of the terms that we add are familiar concepts in competition law.

To start, it is important that the legislation define competition, because regulation and antitrust law aim to achieve, or simulate attributes of, competition. We provide definitions for “anti-competitive,” “effective competition,” and “sustainable competition.” We provide further explanation as to the definition for each term, but as a general matter, it bears emphasis that defining “competition” and “competitive” (and, by extension, “anti-competitive”) rests on the principal understanding that competition is not measured by the number of firms in a market. As Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit, one of the world’s most respected authorities on competition law and regulation, explained:

[T]hough there is a sense in which the exclusion of any competitor reduces competition, it is not [that] sense of competition that is relevant to antitrust law. The policy of competition is designed for the ultimate benefit of consumers rather than of individual competitors, and a consumer has no interest in the preservation of a fixed number of competitors greater than the number required to assure his being able to buy at the competitive price.²³

We also provide definitions for antitrust concepts, including the antitrust offences (“or else” conditions) listed in RAA 85(5). Because antitrust offences are criminal offences, it is important that the antitrust concepts are defined clearly. Because they are currently undefined in the draft Regulatory Authority Act, the criminal statutes create significant uncertainty for sectoral providers with regard to which actions and behaviour will be considered lawful and which will be considered criminal under the proposed regulation.

The need for clear definitions is heightened by the fact that the legislation directs the RA to interpret the criminal offences on the basis of “international best practices,”

23. *Marrese v. American Academy of Orthopedic Surgeons*, 706 F.2d 1488, 1497 (7th Cir. 1983) (citing *University Life Ins. Co. of Am. v. Unimarc Ltd.*, 699 F.2d 846, 853 (7th Cir. 1983) (Posner, J.)).

but it does not specify on which practices the RA should rely. Given that the rules regarding certain antitrust offences in the European Union and the United States are in diametric contradiction, the reliance on international best practices creates ambiguity for the enforcement of criminal statutes. This ambiguity in the definition and scope of antitrust offences would render the legislation's criminal statutes unconstitutional if enforced. The failure to define key economic concepts in unambiguous and scientific terms will fail to give sufficient notice to firms subject to these prohibitions. A criminal statute should not be enforceable if it is so vague that a reasonable person cannot understand what conduct the statute prohibits.

Under U.S. constitutional law, insufficiently informative criminal statutes are "impermissibly vague" or "void for vagueness." Even if the Bermuda Constitution does not explicitly deem vague statutes unenforceable, it is a matter of fundamental fairness and common sense that a person cannot be held liable for a statute that fails to state clearly what conduct is unlawful. Enforcing criminal statutes that are impermissibly vague would thus be unconstitutional under the right to secure protection of law.²⁴ Indeed, the "void for vagueness" concept in American constitutional law is not based on any explicit language in the U.S. Constitution but has emerged essentially as a common law (if not a natural law) construction. U.S. courts have determined that enforcing vague statutes violates due process clauses in the Fifth and Fourteenth Amendments, but those clauses no more mention vagueness than does the Bermuda Constitution. As Justice Sutherland explained in *Connally v. General Construction Co.*:

That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.²⁵

The draft RAA's omission of definitions—in unambiguous and scientific terms—for key economic concepts will fail to give sufficient notice to firms subject to these prohibitions. Enforcing criminal statutes that are impermissibly vague would thus be unconstitutional under the right to secure protection of law.²⁶ To protect fundamental human rights of due process, and to prevent excessive, costly criminal prosecution, the RAA needs to explicitly define antitrust offences.

24. BERMUDA CONSTITUTION ORDER § 6(2)(b).

25. *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

26. BERMUDA CONSTITUTION ORDER § 6(2)(b).

In addition, unclear definitions of antitrust offences would likely lead to increased litigation as a business strategy. To give a specific example, if “unreasonable discrimination” is left undefined, competitors will surely allege out of self interest that a firm practicing (welfare-enhancing) differential pricing is engaging in “unreasonable” discrimination. The vagueness of what practices would constitute anticompetitive conduct increases the risk that competitors and the Regulatory Authority will interpret the market power abuses listed in the draft regulation too expansively. The resulting increase in litigation and overbreadth of regulation would deter investment to the detriment of long-term consumer welfare.

To clarify the meaning of important terms, we revise some terms in current RAA 2 and add definitions for key economic terms that are used in the legislation. The terms and definitions that we add in the RAA are:

“anti-competitive”

“consumer substitutability”

“consumer welfare”

“cost”

“cost-orientation”

“effective competition”

“exclusionary refusal to deal”

“international best practices”

“proportionality”

“predatory pricing”

“price squeeze”

“scientific” or “scientifically rigorous”

“sustainable competition”

“tying”

“unreasonable discrimination.”

2 (1) In this Act, unless the context otherwise requires—
“abuse of dominant position” means conduct by a sectoral provider that contravenes the prohibition contained in section 85;

“adjudication” means a proceeding conducted in accordance with the standards and procedures specified in sections 74 to 83 that establish the rights and obligations of the parties thereto;

Throughout the legislation, there are references to various types of “pronouncements” of the Regulatory Authority or the Minister. Because the legislation often assigns the RA responsibilities that belong to the Minister, definitions for these pronouncements should be neutral as to who makes them. In addition, each of the types of pronouncements, included in the definition below, should have a specific definition that states the ramifications of that type of pronouncement vis-à-vis another. That is, which pronouncements require Cabinet or Parliamentary agreement or negative or affirmative resolution (aggregation rules). Which have statutory as opposed to advisory force? Defining these terms generically would also allow the definitions of these pronouncements to be freed from their references to particular positions or particular sections of the bills as is now the case.

We recognize that we are unable to sort this problem, but BTC urges the drafters to do so. We presume, for example, that the adjective “administrative” is included in the following definition because the drafters assumed that the RA would be the only position to make these kinds of decisions. Adding “or the Minister” obviously wreaks havoc with the intent. Our point is simply that the definitions for all these pronouncements need to be both generic as to position and complete. If the text requires a modifier like the “Regulatory Authority” or “the Minister,” the text rather than the definition should provide the context.

“administrative determination” includes a general determination, order, direction, decision, declaration, or other written determination by which the Authority or the Minister establishes the legal rights and obligations of one or more sectoral participants, but does not include an advisory guideline or an adjudicative decision and order;

“Anti-competitive” requires a definition. The phrase is used repeatedly in the RAA and ECA, and is the basis for criminal offences. It would be unconstitutional to hold parties liable if they are not informed as to what constitutes unlawful behavior.

Because consumer welfare is not generated by there being a certain number of firms in a given market (but rather by robust investment, innovation, and price competition among the firms that exist in that market and new entrants), whether the Government considers a firm’s actions to be “anti-competitive” should not depend on whether those actions harm other competitors alone. The welfare of an individual competitor may have no impact on the competitive process and

consumer welfare. Indeed, the entry *and exit* of firms is an inherent part of competition.

The building of telecommunications networks requires large sunk and fixed investments; naturally, the number of firms that generate an effectively competitive (defined below) telecommunications market likely will be smaller than in industries that do not require similarly large sunk and fixed investments—that face lower barriers to entry. Robust competition in any industry entails the culling of less efficient producers from the market. It should not be the case that telecommunications firms are subject to greater antitrust scrutiny simply because there are fewer firms participating in the rivalrous process that characterises effective competition. Put simply, the nature of an act that is “anti-competitive” in the economic sense of the term is not that it harms any one particular competitor in the market or even that it reduces the number of competitors in a market. Rather, to be “anti-competitive,” an act must harm the competitive process—which is the process by which consumers benefit from greater investment, innovation, and price competition. The Ministry therefore should define “anti-competitive” to mean only those actions that harm the competitive process and, by extension, harm consumer welfare.

“anti-competitive” means not actions that merely injure individual competitors, but rather actions that harm the competitive process, a process that aims to bring consumers the benefits of lower prices, better products, and more efficient production methods;

“authorisation” means a licence, permit or other type of permission that the Authority may grant, including an individual licence granted by the Authority, by administrative determination, pursuant to section 48;

“Authority” means the Regulatory Authority, established under section 11;

“Board of Commissioners” or “Board” means the body established under section 19 to act on behalf of the Authority;

“Chairman” means the Chairman of the Board of Commissioners selected pursuant to section 22;

“Chief Executive,” means the person appointed by the Board of Commissioners pursuant to section 29;

“class licence” means a licence that is granted by the Authority, in accordance with this Act, the provisions of sectoral legislation and the requirements established by the Authority, to all persons that fall within the class that has the required qualifications;

BTC opposes co-regulation as a mechanism for the Authority to delegate its responsibilities to industry participants. Delegating a responsibility or task to a co-

regulated body after the responsibility already has been delegated to the Authority by the Minister constitutes double delegation. Double delegation is problematic because each time an additional delegation occurs accountability to complete the task in a lawful or proportionate manner decreases. Requiring industry participants to adopt and implement codes of practice—which falls under the advisory responsibility of the Authority—is impractical (as the Industry Working Group on LNP demonstrated) and undesirable and should be stripped here as well as in the licensing conditions.

~~“co-regulation” means a process by which a private sector body authorised by the Authority adopts and implements a code of practice, and performs any other function specified by the Authority pursuant to this Act or sectoral legislation, in consultation with, and subject to the approval of, the Authority;~~

“code of practice” or “code” means a set of requirements and procedures governing certain aspects of sectoral providers’ business conduct;

“Commissioner” means a person appointed under section 21 to be a member of the Board of Commissioners;

“concentration” means a transaction described in section 870;

The current draft legislation neglects to define “consumer substitutability,” which requires a definition because it is a key metric of significant market power. The standard economic meaning of “consumer substitutability” is the ease with which consumers may switch among existing providers. The ability of a consumer to switch providers is influenced by both the cost of switching and the availability of similar (though not necessarily identical) products. It bears noting that competition can still be present in an oligopolistic market if consumer substitutability is high, for, absent collusion, the ease at which consumers can switch from one provider to another would constrain prices.

“consumer substitutability” means a consumer’s willingness to switch from one product to another in reaction to a change in the relative prices of the two products;

As we have already emphasized, long-term consumer welfare should be the paramount standard by which the Authority evaluates the need for *ex ante* regulations and the efficacy of any existing regulations that it has imposed. To enable the Authority to properly apply the consumer-welfare standard, it is essential that the draft regulation define “consumer welfare” explicitly.

It bears reiterating that consumer welfare is advanced by competition rather than by the protection of any particular competitor’s interests. Consumer welfare accrues (1) in the short term from price competition among existing market producers—static competition—and (2) perhaps more fundamentally, in the long term from competition among firms to produce innovative new technologies over time—a

process known as dynamic competition. Consumer welfare is influenced directly by lower prices in the short run generated by increased output, lower prices at higher qualities generated by innovative production methods, increased customer choice enabled by product differentiation, and higher quality or new products generated by innovative technologies. We define “consumer welfare” as the net benefit to consumers from the combination of these short- and long-term factors.

“consumer welfare” means the benefits that consumers receive from the combination of lower quality-adjusted prices in the short term and from continued innovation that generates new products and services, lower prices, and higher quality and increased customer choice in the long term;

“control” means, in respect of a corporation, the power, whether held directly or indirectly, to exercise decisive influence over a body corporate, including by directing its management and policies through ownership of shares, stocks or other securities or voting rights, or through an agreement or arrangement of any type, or otherwise, and “controls” and “controlled” shall be construed accordingly;

“Cost” needs to be defined. The legislation’s antitrust offences and significant market power determinations rely heavily on sectoral providers’ costs. All market and sectoral review will surely involve some measurement of provider and industry costs. The absence of a clear definition of cost—and, by extension, of market power and antitrust offences—would raise serious due process questions, as the statute would be so vague as to fail to put parties on notice as to the legal obligations it imposed.

An excessively narrow definition of cost would lead to inefficient cost-based price setting by the Authority, which would prevent firms from recovering their sunk investments and would lead to findings of significant market power and anticompetitive behavior where it does not exist. The potential for antitrust liability or for uncompensatory rate regulation would discourage firms from investing in new technologies. At the same time, a definition of cost that generates excessively high estimates of cost would increase the likelihood of finding predatory pricing. As a general matter, there should be a symmetric definition of cost for the purposes of setting cost-based prices and prosecuting predatory pricing.

It is a widely accepted economic principle that the efficient marginal and average-incremental costs must include *all opportunity costs* incurred by the supplier in providing the product.²⁷ Opportunity cost in this context refers to all potential earnings that the supplying firm forgoes either by providing inputs of its own rather than purchasing them or by offering services to competitors that force it to relinquish

27. See, e.g., William J. Baumol & J. Gregory Sidak, *The Pricing of Inputs Sold to Competitors*, 11 YALE J. ON REG. 171 (1994).

business to those rivals and thus to forgo the profits on that lost business. In a competitive market, price always includes compensation for opportunity costs, such as the interest forgone by the firm when it uses retained earnings rather than borrows funds from a bank.

For the purposes of measuring cost, it is useful to understand the concepts of total cost, incremental cost (and average incremental cost), stand-alone cost, and marginal cost. *Total cost* represents the lowest total dollar expense needed to produce a level of output. *Incremental cost* is a generic concept that refers to the increase in the firm's total cost when it expands its output of a particular product by some specified increment, holding constant the amount of other products that the firm produces. Often, the increment in question is the entire output of the relevant product. *Average incremental cost* is incremental cost per unit of the output in question. *Marginal cost* generally differs from average incremental cost. The marginal cost of a product *X* refers to the increase in the firm's total outlays that result from a small increase in the output of *X*. Marginal cost can be approximated by average incremental cost if the increment in question is small. But if the increment is large, marginal cost and average incremental cost can differ substantially.

The incremental cost of product *X* is computed by taking the difference between (1) the total cost of the firm if it were to produce all of its products and (2) the total cost of the firm if it were to produce all of its products except product *X*. This difference in the firm's total costs is the incremental cost of producing *X*. If the resulting incremental cost measure is divided by the number of units of product *X* that the firm produces, then the result will be an average, or per-unit, estimate of that product's incremental cost—namely, the average-incremental cost of *X*, or AIC_{*X*}. Although such calculations are relatively fact-intensive, they are routinely generated for regulatory proceedings in electronic communications, energy, and other network industries.

Average-incremental cost generally is the long-run figure obtained after plant and equipment are adjusted so as to minimize the average cost of the pertinent output. It is therefore often called *long-run average-incremental cost*. The average-incremental cost of *X* includes *any fixed cost that must be incurred to produce that product alone*.²⁸ A price floor equal to the average-incremental cost of product *X* would require the producer to recover in its revenue from the sale of *X* both the fixed costs and the variable costs attributable only to product *X*.

Finally, the *stand-alone cost* of service *X* (SAC_{*X*}) is the outlay that would be required for a firm to produce service *X* and no other service. The concept of stand-alone cost

28. See WILLIAM J. BAUMOL & J. GREGORY SIDAK, TOWARD COMPETITION IN LOCAL TELEPHONY 57-58 (MIT Press & AEI Press 1994).

also applies to combinations of services or products. The stand-alone cost of products Y and Z (SAC_{YZ}), for example, is the cost incurred by a firm producing only products Y and Z. Stand-alone cost differs from incremental cost in part because the stand-alone cost of producing multiple products can include costs that are common to the group of products in question, even if the costs are not incremental to the production of any one of the products individually.

“cost” means the highest-valued opportunity necessarily forsaken with the provision of a product or service and, as circumstances require, may be measured in terms of—

“total cost,” which means the lowest total dollar expense needed to produce each level of output;

“incremental cost,” which means the increase in the firm’s total cost when it expands its output of a particular product or products by some specified increment holding constant the amount of other products that the firm produces;

“stand-alone cost,” which means expenditure that would be required for a firm to produce a particular service and no other service; or

“marginal cost,” which means the increase in the firm’s total expenditure that results from an increase in output by one unit;

“covered services” means services provided by a sectoral participant that are subject to supervision by the Authority pursuant to sectoral legislation;

“decision” means an administrative determination, adopted pursuant to section 65;

“designated sectoral provider” means an authorisation holder, designated by the Authority pursuant to section 87(1), who is required to obtain the Authority’s approval prior to entering into a concentration;

“direction” means an administrative determination made pursuant to section 64 instructing a sectoral participant to do, or not do, such things as are specified in the direction;

Throughout the legislation, the term “dominant position” is used in a manner that implies that a firm with a “dominant position” possesses market power. To add clarity and consistency to the definitions, we recommend that “dominant position” simply mean possessing *significant market power*. “Significant market power” is defined below in RAA 2.

“dominant position” means ~~a position of economic strength that allows an entity to behave to an appreciable extent independently of its competitors, customers and, ultimately, consumers~~ possessing significant market power;

“Effective competition” and the variant “effectively competitive” also require a definition. The phrase is evidently used in the draft Regulatory Authority Act and the draft Electronic Communications Act in a manner distinct from “sustainable competition” or other described forms of competition. The basis for the distinction should be made clear.

Perfect competition is a condition in which price equals marginal cost and there is costless entry and exit. Perfect competition is an academic concept that does not obtain in the real world and is particularly ill-suited to describe competition in industries with large fixed and sunk costs, such as the electronic communications industry. The draft legislation’s use of the term “effective competition” is useful because, as we interpret it, the qualifying term “effective” implies the departure from “perfect.” However, the draft legislation is opaque as to the ways in which the Authority should evaluate “effective competition,” which is why we provide a definition for the term.

Effective competition is achieved when a sufficient number of competitors exist in a market to maximise consumer welfare under the dual concerns of price competition and innovation. In a given period in time, a certain number of firms will be necessary to generate rivalry that maximises consumer welfare. However, the relationship between consumer welfare and the number of firms is not indefinitely linear. Therefore, given that the maximisation of consumer welfare depends on both short-term static competition and long-term dynamic competition, effective competition cannot be defined solely on the basis of the number of firms in a market, especially if any of those firms could not have successfully entered or survived in a deregulated market.

A second point regarding the draft legislation’s use of “effective competition” is that “effective competition” is evidently used in the draft Regulatory Authority Act and the draft Electronic Communications Act in a manner distinct from “sustainable competition.” However, the difference between the two phrases is never identified. The basis for the distinction should be made clear. We propose that there is a temporal difference between the two concepts. Specifically, “effective competition” means whether, in any one period, competition among firms serves to maximise consumer welfare in that period. “Effective competition” is then a static measure of competition—it relates to the efficacy of competition in a cross-sectional period in time. In contrast, “sustainable competition” refers to competition over time. We discuss “sustainable competition” in greater detail later in our modifications.

“effective competition” means not the preservation of all existing competitors but the maintenance of a sufficient number of competitors to assure that consumers get the best possible quality of product at the lowest possible price;

“end user” means a person who purchases goods or services from a sectoral provider on a retail basis;

“enforcement action” means any of the actions specified in section 93(4);

“ex ante remedy” means a regulatory obligation imposed by the Authority on one or more sectoral providers with significant market power in order to prevent anti-competitive conduct and promote competition;

“ex parte communication” means any written or oral communication made to a Commissioner, member of the staff or a presiding officer regarding a matter in issue in an on going public consultation or adjudication, other than: (a) a written submission made pursuant to a consultation document; (b) a written submission served on all parties to an adjudication; or (c) an oral statement made in a hearing for which a transcript is prepared;

The legislation includes exclusionary refusal to deal as an antitrust offence and, therefore, needs a definition so that firms are informed of what conduct might constitute an antitrust offense. An exclusionary refusal to deal may be unilateral or may be agreed upon by two or more firms. Typically, concerted exclusionary refusals to deal raise greater antitrust concern.

The definition of an exclusionary refusal to deal is relatively intuitive. However, as an antitrust offence, it is important to define the scope of anticompetitive “exclusionary refusal to deal.” The Ministry should clarify that a firm cannot be held liable under antitrust law for an “exclusionary refusal to deal” if that firm has not been found to possess significant market power using scientific methods of empirical analysis. A unilateral refusal to deal by a firm that lacks significant market power cannot reduce competition as the party that is excluded has the ability to approach other firms for business. In cases where a firm has been found by scientific, empirical analysis to have significant market power, the Authority should still exercise caution in imposing liability for an exclusionary refusal to deal. Not all refusals to deal harm the competitive process, and only those that do are relevant to consumer welfare.²⁹ Moreover, a prohibition on unilateral refusals to deal would encroach on the property rights of firms for a firm has the right to exercise its own independent discretion with respect to the parties with which it deals. Encroaching on property rights by means of antitrust law would reduce investment and thereby harm long-term consumer welfare.³⁰ Thus, in the antitrust sense of the term, the Government should define “exclusionary refusal to deal” as those refusals to deal that create or preserve significant market power, given that significant market power or the ability to obtain significant market power through the exclusionary refusal to deal has been proven with scientific evidence.

29. See EINER ELHAUGE & DAMIEN GERADIN, *GLOBAL ANTITRUST LAW AND ECONOMICS* 401-02 (Foundation Press 2007).

30. See MASSIMO MOTTA, *COMPETITION POLICY: THEORY AND PRACTICE* 69-70 (Cambridge Univ. Press 2004).

“exclusionary refusal to deal” means a refusal to do business with another party or other parties that creates, increases, or preserves a firm’s market power or multiple firms’ joint market power;

“final Authority action” means a decision and order issued by the Authority in making an administrative determination or concluding an adjudication that is subject to judicial review without any further administrative proceeding, and does not include the adoption of requests pursuant to section 10, advisory guidelines pursuant to section 68, or recommendations or reports pursuant to section 72;

The definition of “finite resource” is vague and imprecise as an economic matter because it does not specify the price at which “the supply is limited.” If regulation suppresses the price of a resource below its market-clearing price, demand will necessarily exceed supply. Consequently, the supply of the resource will be made to appear “finite” but only because of the endogenous effect of regulation. Similarly, a resource like spectrum, whose supply depends on government allocation, can be made to appear “finite” for reasons entirely outside the control of any entity currently licenced to use spectrum.

“finite resource” means an input used to provide a covered service, for which the supply is limited at an unregulated market-clearing price, other than an input whose supply is limited by government allocation or licensure;

“general determination” means a statutory instrument, made pursuant to section 62, that is applicable to all sectoral participants, or to such sub-category of sectoral participants as fall within the scope of the general determination;

“Government authorisation fees” means the fees established in connection with the grant of an authorisation pursuant to section 52;

“individual licence” means a licence that is granted by the Authority to a specific person in accordance with this Act, the provisions of this sectoral legislation and the requirements established by the Authority, for which a person must file an application and obtain the approval of the Authority;

“industry sector” means a portion of the economy in which undertakings pursue a common business;

“informal adjudication” means an adjudication conducted in the manner specified in section 81;

“International best practices” needs to be defined. It is an important concept used throughout the draft legislation as it is a key factor in important decisions regarding price and cost measures and *ex ante* remedies.

As used in the legislation, “international best practices” is misleading. Its suggested meaning is “international best intentions.” Citing to the adoption by other countries of a particular set of regulatory provisions tells nothing as to whether those

provisions, once adopted and implemented, achieved their stated purpose. In the case of mandatory unbundling, for example, the stated goals of regulators outside the United States have not been achieved.³¹

Rather than following international best intentions, Bermuda should demand that any regulatory system, if it is to enlist guidance from international experience, be designed to reflect international best *results*. In fact, we propose that, as a threshold matter, the Responsible Minister or Regulatory Authority bear the burden of proving, with clear and convincing evidence, that an international best practice on which it makes its decision has had beneficial results in the country in which it was implemented. Then, when the Minister or Authority publishes a decision that relies on international best practices, it must provide a rationale, manifesting scientific analysis, for why the selected practice qualifies as a “best” practice and which explains how it can be applied to Bermudian industry in a manner that also benefits Bermudian consumers.

Currently, the draft legislation adopts a European regulatory framework, particularly with respect to market review and the assessment of significant market power. This Euro-centric approach is misguided. Bermuda already has the best of international practices when it comes to a regulatory infrastructure. It has the English common law system of jurisprudence, supplemented by a written constitution. Yet, in creating this new regulatory regime, the drafters of the legislation conspicuously do not rely on examples from the nations whose legal systems also are similarly based on English common law: the United States, Canada, Australia, and New Zealand. There is no reason to diverge from this legal structure to favour a regulatory structure that more closely resembles the legal systems of the countries of continental Europe. Is Bermuda more like Belgium than Canada in its legal system?

Under the draft legislation, the interpretation of many economic and antitrust terms will be derived from international interpretations. However, some terms have conflicting meanings in different jurisdictions to which the Regulatory Authority would look for “international best practices.” It will be a criminal offence for a dominant firm to engage in a price squeeze. This result is based on EU practice, as reflected in cases in Germany, Spain, and elsewhere. But in the United States, the U.S. Supreme Court has rejected the identical theory of liability on the basis that it lacks economic support.³² Antitrust law, telecommunications regulation, and economic analysis of law did not originate in Europe, and it is disingenuous to suggest that EU practices are “best” simply because they are certain to produce

31. See Jerry A. Hausman & J. Gregory Sidak, *Did Mandatory Unbundling Achieve Its Purpose? Empirical Evidence from Five Countries*, 1 J. COMPETITION L. & ECON. 173 (2005).

32. *Pacific Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 129 S. Ct. 1109 (2009).

different outcomes than what would likely happen under U.S. or Canadian law. Therefore, international best practices should mean giving consideration to the practices of other countries—not the exclusion of consideration of U.S. and Canadian experiences.

Even in focusing on the European regulatory framework, the drafters selectively invoke EU law when and where it suits their purposes, but they do not take the bitter with the sweet. That is, they do not mention European constraints on the exercise of governmental power. Two such examples are the drafters' failure to consider that the Government's actions under the draft legislation could effect "state aid" (which the European Union prohibits under Article 87 of the EC Treaty) or infringe on the rights of "freedom of expression," "freedom . . . to receive and impart information and ideas without interference by public authority," and the "freedom and pluralism of the media," all of which the European Union guarantees under Article 11 of the Charter of Fundamental Rights of the European Union, adopted in 2007.

If the Government chooses to adopt European practices as "best practices," it would be biased to select powers to the regulatory body without also considering the safeguards that the EU legal system contains to counter the excessive exercise of governmental powers. EU telecommunications rests within a larger framework of EU law—most significantly, the Treaty of Rome—which expressly guarantees various fundamental rights and expressly imposes various limitations on governmental activity. For example, the Treaty bans state aid to companies, and DG Comp brings cases to that effect. Moreover, Article 82 is routinely applied to state-controlled companies (there evidently being no trace of the American tendency of the government to hide behind sovereign immunity when the state competes against private firms). Furthermore, it would be surprising if the Treaty of Rome does not have far more extensive and more explicit guarantees of the freedom of speech and due process than one finds in either the Bermuda Constitution or the draft RAA and ECA. In short, it is not intellectually defensible for the drafters to cherry pick the invasive aspects of EU telecommunications regulation while ignoring all of the limitations that other EU law—some of it clearly having a higher (constitutional or treaty) status than a mere statute or regulatory policy directive—which would give context to, and circumscribe, the interpretation and enforcement of European telecommunications regulation.

"international best practices" means objective consideration of the best practices and the results of those practices, benchmarks, and data of countries, including countries in North America having a high level of economic development.

"investigation" means the procedure described in section 89;

“licence exemption” means an administrative determination made by the Authority ruling that no form of authorisation from the Authority is required in order to undertake an activity that would otherwise require authorisation;

A responsibility of the Minister, pursuant to RAA 5(2) is “making policy and issuing Ministerial declarations that shall apply to a regulated industry sector.”³³ Therefore, the term “Ministerial declaration” needs to be defined.

As we noted earlier, our preference would be that each of these pronouncements be defined in a neutral way and include information as to the conditions or ramifications pertaining to each type of pronouncement, although BTC has not undertaken to sort that problem (see Ministerial direction, below, as another example of the problem).

“Ministerial declaration” means a written statement by the Minister giving broad direction to the Ministry’s staff and to the Authority identifying policy objectives to be pursued, but such a declaration need not contain scientific analysis or detailed instructions establishing the best way to achieve the identified policy objectives;³⁴

“Ministerial direction” means a direction made pursuant to section 7;

“net loss” means a situation in which, in any year, after accounting for bad and doubtful debts, depreciation in assets and other contingencies, the Authority’s costs exceed its revenues;

“net surplus” means a situation in which, in any year, after accounting for bad and doubtful debts, depreciation in assets and other contingencies, the Authority’s revenues exceed its costs;

“order” means an administrative determination issued for any of the purposes specified in section 63;

The legislation uses the term “proportionality” without defining it. Seeing as one of the regulatory principles in RAA 16 is to act in a “reasonable, proportionate and consistent manner,” “proportionate” or “proportionality” needs to be defined. The European interpretation of “proportionality” is passing a cost-benefit test so that the benefits of a proposed regulation exceed the costs of the proposed regulation. If the Government chooses to import this European regulatory term, it must also adopt the explicit cost-benefit requirement in the term. The cost-benefit requirement is essential for containing the administrative costs of regulation—in terms of both the

33. RAA, *supra* note 3, § 5(2).

34. For examples of ministerial declarations, see World Trade Organization, Ministerial Declarations and Decisions, http://www.wto.org/english/thewto_e/minist_e/min_declaration_e.htm (last visited June 16, 2010); European Commission, Ministerial Declaration, European eGovernment Conference 2003 (July 8, 2003), *available at* http://ec.europa.eu/information_society/policy/psi/docs/pdfs/other_activities/ministerial_declaration.pdf (last visited June 16, 2010).

cost to firms to comply with the new regulation and the cost to the Government to implement the regulation. A cost-benefit analysis will indicate which regulations are inefficient, ineffective, or an unsound use of Bermuda's resources and should be either reformed or eliminated. Allocating regulatory expenditures to those areas with the highest payoff to Bermudian consumers could save millions of dollars.

A cost-benefit analysis shows whether the benefits of a regulation exceed the costs of the regulation and whether alternatives to the regulation are more effective or less costly. A cost-benefit analysis is an incremental analysis—it compares the costs and benefits of a regulation with a baseline of “no action,” which represents an assessment of the world absent the proposed regulation. Cost-benefit analyses should be subject to the standard of scientific rigor so that junk science cannot be used to justify proposed regulations.

“proportionality” means the present value of the total benefits of a policy or regulation are greater than the present value of the total costs of the policy or regulation, and that the scale or scope of the policy or regulation is of such an extent that the marginal costs of the policy or regulation do not exceed its marginal benefit, where—

- (a) costs include private-sector compliance costs, Government administrative costs, losses in consumer or producer surplus, and loss of time; and
- (b) benefits include benefits to businesses, wages, and economic growth;

The legislation includes predatory pricing as an antitrust offence and, therefore, needs a definition so that firms are aware of what conduct might constitute an antitrust offense. Predatory pricing is the practice of attempting to drive competitors out of business or to discourage competitive entry by selling output at an “artificially” low price. Once the competitor(s) are driven out of the market, the predator will be able to charge monopoly prices, which compensate for the losses incurred during the predation period. This recovery of the “investment” in predation is termed “recoupment.”

The difficulty associated with defining the scope of predatory pricing is that, often, a price that is allegedly “predatory” is a price that merely reflects the fact that the firm in question is more efficient than its competitors. As Professors Einer Elhauge and Damien Geradin observe,

predatory pricing is often hard to distinguish from desirable competitive price-cutting, so that attempts to condemn the former may mistakenly condemn and deter the latter. The pervasive concern of predatory pricing

doctrine is thus to fashion a rule that adequately deters harmful predatory pricing without overly deterring competitive price-cutting.³⁵

In the absence of significant market power, it is unlikely that a firm could effect a successful predatory pricing strategy, because it would risk insolvency if it sustained predatory prices long enough to drive its competitive rivals from the market. Thus, to ensure that it does not deter “competitive price-cutting,” the Government should clarify that a firm will be held liable for predatory pricing only if (1) that firm is found to possess significant market power and (2) it is shown through scientific analysis that the price that the network operator is charging would reduce effective and sustainable competition by excluding *efficient producers*.

“predatory pricing” means reducing prices below the appropriate measurement of cost to unprofitable levels for the purposes of driving competitors from the market or discouraging potential competitors to enter the market to maintain existing significant market power, after which the firm is able to recoup the losses it incurred during the predation period through supracompetitive or monopoly prices;

“presiding officer” means a person designated in accordance with section 76;

The legislation includes “price squeeze” as an antitrust offence and, therefore, needs a definition so that firms are aware of what conduct might constitute an antitrust offense. Price squeeze occurs when a supplier that has monopoly power in both an upstream market for inputs and a downstream market for finished products prices the inputs it supplies at a high price to raise the price of inputs for its downstream rivals. Concomitantly, the monopolist prices the downstream product at or below the price of its downstream competitors. The result is that the monopolist’s downstream competitors are “squeezed” out of the downstream market because they are unable to recoup the high cost of inputs—enforced by the monopolist in the upstream market—by charging the price that the monopolist has set in the downstream market.³⁶

It has been argued that the theory of price squeeze as a violation of antitrust law relies on an implicitly competitor-centric interpretation of antitrust law. It is in fact possible that price squeeze can benefit consumers, even in the presence of monopoly power, where the vertically integrated monopolist’s pricing behavior serves to constrain the prices of a downstream monopolist. In this way, a price squeeze eliminates “double marginalization” and ultimately lowers prices to consumers.³⁷

35. ELHAUGE & GERADIN, *supra* note 29, at 343.

36. *Id.*

37. See, e.g., J. Gregory Sidak, *Abolishing the Price Squeeze as a Theory of Antitrust Liability*, 4 J. COMPETITION L. & ECON. 279, 306 (2008); Dennis W. Carlton, *Should “Price Squeeze” Be a Recognized Form of Anticompetitive Conduct?*, 4 J. COMPETITION L. & ECON. 271 (2008).

The U.S. Supreme Court has recognized that the antitrust harm alleged against defendants under a theory of price squeeze—that “the defendants (upstream monopolists) abused their power in the wholesale market to prevent rival firms from competing effectively in the retail market”—does not harm consumers as long as those lower downstream prices are not predatory.³⁸ In contrast, the potential for price squeeze liability may induce a vertically integrated firm to refrain from lowering its retail prices even if it is a more efficient producer of the downstream product. This distortion of incentives caused by price squeeze liability would deprive consumers the benefits of price competition in the retail market.

Further, it is only logical that price squeeze be a theory of antitrust harm only when the upstream monopolist has a statutory or regulatory duty to deal in the input market. Where a vertically integrated monopolist can refuse freely to deal with a downstream competitor, it would make no sense to hold the monopolist liable for raising the price of its upstream input to a level that would constitute a refusal to deal (in a situation in which the monopolist has a duty to deal).³⁹ Moreover, price squeeze as a theory of antitrust harm can reduce consumer welfare if the upstream monopolist has no preexisting duty to deal in the input market.⁴⁰ If the upstream monopolist has no duty to deal, then the monopolist might exit the market for the supply of the input to avoid price squeeze liability. Consequently, consumers would be deprived of the additional products that require the input supplied by the upstream monopolist. The implication of accepting price squeeze as a theory of antitrust harm—that a competitor is entitled to receive a minimum profit margin—is irreconcilable with a consumer-welfare objective of antitrust law. The potential for price squeeze liability would discourage investment, retail price competition, and the voluntary provision of inputs on negotiated terms by vertically integrated monopolists to current and potential rivals otherwise unable to self-obtain or provide them, all of which increase consumer welfare.

To ensure that it does not discourage consumer-welfare enhancing practices by vertically integrated firms, the Bermuda Government should first condition liability for price squeeze as an antitrust offense on a firm’s possession of significant monopoly power in both the upstream and downstream markets. Following the finding of SMP, the Government should only impose antitrust liability where (1) the

38. *Pacific Bell Tel. Co. v. linkLine Commc’ns, Inc.* 129 S. Ct. 1109 (2009).

39. For example, in *Covad Commc’ns Co. v. Bell Atlantic Corp.*, Judge Douglas Ginsburg concluded that “it makes no sense to prohibit a predatory price squeeze in circumstances where the integrated monopolist is free to refuse to deal” or determine the nonprice terms of dealing. *Covad Commc’ns Co. v. Bell Atlantic Corp.*, 398 F.3d 666, 673 (D.C. Cir. 2005). Similarly, in *Cavalier Tel., LLC v. Verizon Virginia, Inc.*, the Fourth Circuit of the U.S. Court of Appeals reasoned that because, in the absence of the Telecommunications Act, Verizon “would not have been obligated to rent its facilities and provide access to its elements to competitors to enable them to enter the market,” it is of no consequence under the Sherman Act that Verizon does not provide its facilities in a manner and at a price preferred by Cavalier. *Cavalier Tel., LLC v. Verizon Virginia, Inc.*, 330 F.3d 176, 190 (4th Cir. 2003).

40. See Carlton, *supra* note 37.

monopolist has a preexisting duty to deal in the input market, established by law or (2) the monopolist's low downstream prices constitute predatory prices that reduce effective competition in the downstream market. In all cases, the guiding criterion should be whether the network operator's pricing strategy reduces consumer welfare.

“price squeeze” means a practice in which a firm, having a preexisting duty to deal and possessing significant market power in both the upstream market for inputs and the downstream market for finished products, charges anticompetitively high prices in the input market or charges predatory prices in the downstream market, for the purpose of foreclosing rivals in the downstream market, such that its exclusionary refusal to deal or predatory pricing reduces consumer welfare;

“public consultation” means the procedure, pursuant to sections 69 to 73, by which the Authority may establish rights and obligations of general applicability;

“regulated industry sector” means an industry sector, specified in the Second Schedule to this Act, subject to supervision, monitoring or regulation by the Authority, pursuant to sectoral legislation;

“regulation” means a statutory instrument made by a Responsible Minister that is applicable to all sectoral participants in the sector for which the Minister is responsible, or to such sub-category of sectoral participants as fall within the scope of the regulation;

“Regulatory Authority Operating Fund” or “Operating Fund” means the fund established pursuant to section 39;

“Regulatory Authority fees” means the fees established to fund the operation of the Authority pursuant to section 44;

“Regulatory Authority Reserve Fund” or “Reserve Fund” means the fund established pursuant to section 40;

The definition of “relevant market” should be based on scientific analysis and should not assume that a market necessarily exists “*within* a regulated industry sector.” From a consumer-substitutability perspective, a relevant market may include products supplied by regulated firms as well as products supplied by unregulated firms. The current definition excludes the latter possibility.

“relevant market” means a market ~~within a regulated industry sector~~ within which significant substitution in consumption or production occurs, and may include unregulated products that consumers regard as substitutes for regulated products;

“reserve price” means the minimum price that the Government will accept as a winning bid in an auction;

“Responsible Minister” means, in connection with a regulated industry sector, the Minister responsible for that sector;

“Responsible Ministers” means the Minister or Ministers who are responsible for all regulated industry sectors;

“rule” means, when referring to the Authority, a rule of procedure or internal rule applicable to the conduct of the Authority’s activities or affairs;

We add a definition for the term “scientific,” which can be used interchangeably with “scientifically rigorous,” because we use this term in our revisions to the provisions of the legislation to qualify economic and empirical analysis that is used to develop and enforce legislation and regulation. We explain below why we add the term “scientific” or “scientifically rigorous” in a particular provision. To be brief, we add “scientific” and “scientifically rigorous” throughout the legislation to ensure that the Authority’s regulatory decisions are necessary to fix a market failure and that the social benefits of the regulation outweigh its social costs. As Justice Stephen Breyer of the U.S. Supreme Court explained in the *Reference Manual on Scientific Evidence*, published by the Federal Judicial Center, regarding the standards in U.S. courts for the admissibility of expert testimony, the purpose of a requirement of scientific methods and evidence “is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.”⁴¹ To ensure proportionate regulations, this standard should be applied to the work of the Authority and the Ministry.

“scientific” or “scientifically rigorous” means based upon sufficient facts or data; is the product of reliable principles and methods that have been and can be tested or whose theories or techniques have been subjected to peer review and publication or have been generally accepted by the scientific community; and has been applied reliably to the facts of the market.

“Secretary” means the Secretary of the Authority;

“sectoral legislation” means primary legislation empowering the Authority to supervise, monitor and regulate an industry sector and specifying substantive provisions governing that sector;

“sectoral participant” means a person who provides, uses or seeks to use a good or service in a regulated industry sector;

“sectoral provider” means a person, including but not limited to an authorisation holder, who provides a good or service in a regulated industry sector;

“Selection Committee” means the committee established pursuant to section 20 to select the Commissioners;

41. Stephen Breyer, *Introduction*, in FEDERAL JUDICIAL CENTER, *REFERENCE MANUAL ON SCIENTIFIC EVIDENCE* 1, 6 (2d ed. 2000) (quoting *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999)).

The definition of “self-regulation” should not include the requirement that forming a self-regulatory body must be authorised by the Authority. Self-regulation, by definition, is *self-initiated* regulation. The establishment of a self-regulatory body encompasses the formation of coalitions, such as trade associations or *ad hoc* committees, to address industry-wide problems and to propose ideas to the Government. Requiring authorisation to establish self-regulatory bodies would violate the constitutional right of the freedom of expression, which protects the individual’s right to “impart ideas and information without interference,”⁴² as well as the constitutional right of freedom of assembly and association, which protects the right to “assemble freely and associate with other persons and in particular to form or belong to political bodies or to form or belong to trade unions or other associations for the protection of his interests.”⁴³ Whether singularly or collectively, private parties in Bermuda have the right to come together to present ideas and criticisms to the Minister. For example, firms in the electronic communications industry should be able to form an *ad hoc* coalition for broadband deployment without permission. A statutory requirement cannot supersede constitutional freedoms.

Further, the Government needs to ensure that the actions undertaken in those self-regulatory bodies cannot be found to violate antitrust law or sectoral legislation. The definition should add before the semicolon: “with immunity from any action by the Authority or any other public or private party alleging a restraint of trade among the participants in the private sector body.”

“self-regulation” means a process by which a private sector body acts collectively to petition the Government or to voluntarily develop and announce policies with which its members will comply authorised by the Authority adopts and implements a code of practice and performs any other function specified by the Authority pursuant to this Act or sectoral with immunity from any action by the Authority or any other public or private party alleging a restraint of trade among the participants in the private sector body;

The definition of “significant market power” is vague and ambiguous with respect to the phrase “to an appreciable extent” and neglects to condition that the entity’s behavior is profitable and nontransitory. The vague phrase should thus be stricken. We also strike the phrase “the development or maintenance of effective and sustainable,” because it is internally inconsistent to attempt to maintain both effective and sustainable competition if the meaning of “effective competition” differs from that of “sustainable competition.”

42. BERMUDA CONSTITUTION ORDER 1968 sched. 2 § 9(1).

43. BERMUDA CONSTITUTION ORDER 1968 sched. 2 § 10(1).

“significant market power” means a position of economic strength in the relevant market or markets that provides the capability of acting ~~to an appreciable extent profitably for a nontransitory period~~ independently of competitors or consumers, and thereby impeding ~~the development or maintenance of effective and sustainable~~ competition;

“staff” means the officers, servants and agents of the Authority, including the Chief Executive, but does not include the Commissioners;-

“Sustainable competition” requires a definition. The phrase is used repeatedly in the RAA and ECA, including in the definition of “significant market power.” Without a sufficient definition, any provision of the RAA or ECA relying on “sustainable competition” is excessively vague. This vagueness is significant as the statute exposes firms and individuals to criminal penalties, the risk of which would deter competitive behavior.

In defining sustainable competition and creating policies related to sustainable competition, one must not think in terms of *maintaining* sustainable competition. Sustainable competition is not achieved by external control of market forces. The competitive process and consumer welfare are not enhanced by controlling a market’s composition such that the market indefinitely maintains some predetermined, artificial equilibrium.

Sustainable competition can thus be thought of in terms of effective competition occurring over time. Competition is a process, not a preconceived outcome among a set of players. Competition is not measured by counting the number of firms in a market or by computing their market shares. Competition may occur not only simultaneously among multiple firms producing the same product, but also sequentially over an extended period to achieve prominence in a market through the introduction of new products that are differentiated by their technological superiority. Unlike static competition, which manifests itself in the form of multiple providers of existing products offered at low prices but omits new entry and rapid price changes driven by innovation, this process is a manifestation of what economists call dynamic competition.⁴⁴ The adjective “dynamic” is a shorthand descriptor for a variety of rigorously competitive activities such as significant product differentiation and rapid response to change whether from innovation or new market opportunities ensuing from changes in taste or other forces of disequilibrium. Dynamic competition is in fact more intuitive and much closer to today’s everyday view of competition than is the stylized notion of static competition. Based on these economic principles of competition, consumer welfare, and dynamic competition, we provide the following definition for “sustainable competition.”

44. See JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 8 (Harper & Bros 1942).

“sustainable competition” means a process that continues over an extended period of time, in which rivalry among firms stimulates the introduction of innovative goods or goods of higher quality at lower prices through innovative production methods, which stimulates market entry and further investment in innovative products and production methods;

The legislation includes tying as an antitrust offence and, therefore, needs a definition so that firms are aware of what conduct might constitute an antitrust offense. Tying occurs when a firm sells a product (the “tying” product) on the condition that the purchaser buys another product (the “tied” product). A necessary condition for tying to be anticompetitive is that the firm has significant market power in the sale of the tying product. If a consumer is able to obtain the tying product independently of the tied product—that is, if the network operator is not a monopolist in the tying-product market—tying cannot result in harm to consumer welfare. Thus, a firm should not be held liable for tying unless it can be shown using scientific analysis that the firm has sufficient significant market power in the tying market to foreclose its competitors.

Moreover, the Government should exercise caution in imposing liability for tying even if it finds that a network operator possesses significant market power in the tying market because distinguishing between welfare-enhancing bundling and anticompetitive tying can be empirically challenging. Bundling is welfare-enhancing for several reasons. Not only are bundles associated with lower per-product prices, but many consumers prefer bundles as a means to simplify the purchasing process. Bundling products may also achieve greater production efficiency, which increases consumer welfare by lowering prices. To ensure that regulation does not prohibit procompetitive bundling—which is a form of product differentiation—the Government needs to ensure that its assessment of “tying” relies on its ultimate effect on consumer welfare. Specifically, it is unlikely that a firm lacking significant market power in the tying-product market would be able to tie a product such that consumers who demanded the tying product would be unable to purchase it without the tied product.⁴⁵

“tying” means conditioning, without any legitimate efficiency enhancing purpose that benefits consumers, the purchase of one product (the tying product), in the supply of which the firm has significant market power, on the purchase of another product (the tied product), in the supply of which the firm does not have significant market power, for the purposes of gaining or preserving significant market power in the tied-product market;

The legislation includes “unreasonable discrimination” as an antitrust offence, and therefore the term needs a definition so that firms are aware of what conduct might

45. See MOTTA, *supra* note 30, at 467-68.

constitute an antitrust offense. “Discrimination” is often used in the sense of “price discrimination,” or “differential pricing.” The government would risk reducing consumer welfare, however, if it prohibited price discrimination or differential pricing under an overly broad non-discrimination policy. Differential pricing is welfare-enhancing because it allows firms to charge lower prices to consumers who have a lower willingness to pay for a product by subsidising the lower prices through higher prices charged to consumers with a higher willingness to pay. Offering different levels or grades of service allows firms to lower the price to customers who would otherwise be priced out of the market if the firm were constrained to charge a higher uniform price. In economic terms, when a firm engages in “third-degree” price discrimination—which sets prices to each group of consumers based on its respective willingness to pay—total social welfare increases because output increases. Differential pricing is commonplace in competitive markets, such as airlines, hotels, retailing, package delivery, personal computers, and book publishing.

The draft legislation is unclear as to whether differential pricing for different service offerings would be permitted under the prohibition of “unreasonable discrimination.” To avoid punishing or deterring consumer-welfare enhancing discrimination, we propose the following definition.

“unreasonable discrimination” means imposing differential terms and conditions on customers that are similarly situated in terms of their preferences and willingness to pay.

Application

To ensure that the Regulatory Authority “act in a timely manner,” in accordance to RAA 16(a), the Government needs to preserve the right of a sectoral provider to compel the Authority to issue a decision in a reasonable period of time through legal mechanisms including, but not limited to, petitioning for a writ of mandamus in any court of competent jurisdiction, which is a court order compelling the regulator to issue a decision. Thus, we include this provision in RAA 3(4), below.

- 3 (1) The provisions of this Act shall apply in any case in which sectoral legislation empowers the Authority to supervise, monitor or regulate an industry sector.
- (2) To the extent possible, the provisions of this Act shall be construed consistently with the provisions of the relevant sectoral legislation.
- (3) In the event of irreconcilable conflict between this Act and the sectoral legislation, the provisions of the sectoral legislation shall prevail.
- (4) No provision in this Act will diminish any person’s rights under the common law or equity, including but not limited to the person’s right to petition for a writ of mandamus in any court of competent jurisdiction.

Crown binding

4 This Act binds the Crown.

(3) PART II THE RESPONSIBLE MINISTER

Authority of the Responsible Minister

5 (1) A Responsible Minister shall have those powers over a regulated industry sector for which he is responsible that are specified in this Act and in sectoral legislation.

(2) A Responsible Minister may from time to time, with the approval of the Cabinet, make policy and issue Ministerial declarations that shall apply to a regulated industry sector.

BTC does not believe that the Ministry should be making policy that affects the industry behind closed doors. Thus, we recommend that public consultations be required for all policy level matters in the interest of transparency, openness, and the development of good public policy. This following suggested change is consistent with RAA 5(9), below.

(3) A Responsible Minister ~~may~~shall—

(a) confer with the Authority when developing policies applicable to a regulated industry sector; and

(b) consult with sectoral participants in the regulated industry sector that would be affected by the proposed policy.

(4) Any Ministerial declaration made by a Responsible Minister pursuant to this section shall remain in effect until the earlier of—

(a) any date specified in the Ministerial declaration; or

(b) the date on which the Responsible Minister modifies or revokes the Ministerial declaration.

(5) A Responsible Minister, on his own initiative or at the request of the Authority, may make regulations, that—

Because the Regulatory Authority acts at the direction of the Minister and is Constitutionally subservient to the Minister, any “regulation” that the Minister makes must be detailed to avoid ambiguity, uncertainty and litigation (in reference to the IAD’s seven rules) because it has statutory effect.

(a) establish ~~general~~specific requirements regarding the means by which the Authority is to implement this Act, sectoral legislation or approved sectoral policies; and

(b) address any other matter that this Act or sectoral legislation specify are to be addressed by regulation made by the Responsible Minister.

(6) A Responsible Minister, on his own initiative or at the request of the Authority, may make a regulation waiving, or authorising the Authority to waive, the application of any provision of this Act, relevant sectoral legislation or any regulation to a sectoral participant or a class of sectoral participants.

(7) A Responsible Minister may only grant or authorise a waiver, pursuant to subsection (6), if he has determined that application of the provision to a sectoral participant or class of sectoral participants is not necessary for any of the following purposes—

- (a) to promote the interests of residents and consumers;
- (b) to promote or preserve sustainable competition;
- (c) to promote the development of the Bermudian economy, Bermudian employment and Bermudian ownership; and
- (d) to fulfil any additional objects specified by sectoral legislation.

(8) Any regulation made by a Responsible Minister pursuant to subsection (6) may contain any condition the Responsible Minister deems appropriate.

(9) Prior to making any regulation pursuant to this Act, or pursuant to sectoral legislation, the Responsible Minister shall confer with the Authority and, where appropriate, shall seek public comments.

(10) Unless this Act or sectoral legislation expressly provides to the contrary, any regulation made by a Responsible Minister pursuant to this Act, or pursuant to sectoral legislation, shall be subject to the negative resolution procedure.

(11) In the event that more than one sector is designated as a regulated industry sector—

- (a) any regulation made by a Responsible Minister shall specify the regulated industry sector or sectors to which the regulation applies; and
- (b) any regulation that must be applied to all regulated industry sectors may only be adopted with the concurrence of all Responsible Ministers.

Request for Information

BTC finds section RAA 6, below, as crafted, to be unduly deferential to the RA. Since the Minister is constitutionally responsible for governing the electronic communications industry and since the RA is subservient to the Minister, the Minister has the right to have information about the industry that the RA may have in its possession. BTC recommends that this section be redrafted to accommodate that change.

6 (1) A Responsible Minister may ~~request~~require the Authority to provide information regarding a regulated industry sector.

(2) The Responsible Minister may specify a reasonable period of time for the Authority to provide the required information.

(3) The Authority shall submit a written report to the Responsible Minister containing the ~~requested~~required information within the time period specified by the Responsible Minister.

(4) The report shall identify any information to which the Authority has granted confidential treatment.

Ministerial directions

The term, “Ministerial direction” requires a definition that is more complete (and less circular) than the one offered under RAA 2. In particular, the definition of the term “direction” should provide an indication of the substance and import of a “direction” versus some other pronouncement.

7 (1) A Responsible Minister, after conferring with the Authority, may issue in writing a Ministerial direction regarding any matter within his authority pursuant to sectoral legislation.

(2) A Responsible Minister shall not direct the Authority regarding—

- (a) the application of general policies to specific matters before the Authority; or
- (b) the rights or obligations of any individual sectoral participant.

(3) Any Ministerial direction shall be published in the Gazette, but the Responsible Minister may cause to be redacted any portion of the direction if he reasonably concludes that publication of that portion of the direction would—

- (a) jeopardise national security;
- (b) result in the disclosure of confidential, proprietary or sensitive information; or
- (c) harm the public interest.

(4) The Authority shall act in accordance with any Ministerial directions made pursuant to subsection (1).

Enforcement of directions

8 (1) In any case in which a Responsible Minister concludes that the Authority has not complied within a reasonable period of time with a Ministerial direction that he has issued, the Responsible Minister may require the Board of Commissioners to provide a written response, within a reasonable period of time specified by the Responsible Minister, that identifies and explains the actions that the Authority has taken, or will take, to implement the Ministerial direction.

(2) If the Responsible Minister concludes that the Board of Commissioners' response does not resolve the matter, the Responsible Minister may require the Board to meet with the Responsible Minister, at a reasonable time specified by the Responsible Minister, to discuss the matter.

(3) Following the meeting with the Board of Commissioners, the Responsible Minister may issue—

- (a) a further Ministerial direction that clarifies, modifies or reaffirms the Ministerial direction; or
- (b) a notice that rescinds the Ministerial direction.

(4) The further Ministerial direction or notice, as the case may be, shall be published in the Gazette, and on the Authority's official website, but the Responsible Minister may cause to be redacted any portion of the direction or notice that he reasonably concludes meets the standards specified in section 70.

(5) In any case in which the Responsible Minister concludes that the Authority has not complied with a further Ministerial direction that the Responsible Minister issued pursuant to subsection 0, and is not likely to do so within a reasonable period of time, the Responsible Minister may seek judicial review in the manner provided for in the Supreme Court Act 1905.

Delegation of powers and functions to the Authority

BTC contends that RAA 9, below, as crafted, is unconstitutional on its face. As we suggested in our introductory remarks regarding the IAD framework with respect to constitutional choice rules, section 61(4) of the Constitution of Bermuda permits the Minister to establish boards and committees to *assist* him. It does not allow a wholesale delegation of the Minister's power and authority to the RA.

Section 61(4) of the Constitution of Bermuda reads as follows:

A Minister charged under subsection (1) of this section with responsibility for the conduct of any business of the Government may be assisted in the discharge of that responsibility by a board, committee or other similar body consisting wholly or partly of persons who are not public officers and established by a law enacted by the Legislature or by directions in writing given by the Minister concerned; and any such body shall have advisory, consultative, and administrative functions as may be conferred on it by such a law or such directions, but, in exercising any such functions, the body shall be subject to the directions of the Minister concerned.

Thus, the Minister *cannot* delegate "any power or function...regarding a regulated industry sector for which he is responsible," as stated in RAA 9(1) below. The Minister can be *assisted* in carrying out his responsibilities by relying on a board or

committee for *advisory, consultative, and administrative functions*, but he cannot assign his policy-making responsibilities to the RA.

9 (1) A Responsible Minister may, in writing, delegate to the Authority, either generally or for a particular occasion, any power or function of the Responsible Minister regarding a regulated industry sector for which he is responsible, provided that—

- (a) the Responsible Minister may not delegate policy-making responsibility to the Regulatory Authority
- (b) no delegation made under this section shall preclude the Responsible Minister from exercising or performing, at any time, any of the functions so delegated;
- (c) the Authority may not delegate to any person any function that the Responsible Minister has delegated to it under this section; and
- (d) the Responsible Minister may, in writing, revoke or modify such delegation at any time.

(10) In any case in which a Responsible Minister delegates a power or function to the Authority, the Responsible Minister, if requested by the Authority, shall either—

- (a) advance to the Authority; or
- (b) reimburse the Authority in a timely manner for the reasonable costs and expenses, including the cost of staff and any advisors, necessary to perform the delegated function.

(11) In any case in which a Responsible Minister advances funds to the Authority pursuant to subsection 0, the Authority shall return any unexpended funds to the Responsible Minister.

(12) The Authority shall maintain records detailing the amount of any actual expenditures, and shall provide such records to the Responsible Minister, upon request.

(13) In any case in which a Responsible Minister and the Authority do not agree regarding the amount of the reasonable costs and expenses, including the cost of staff, necessary to perform the delegated function, either one may refer the matter to the Responsible Minister of Finance, whose determination shall be final and binding.

Requests from the Authority

10 (1) A Responsible Minister shall have the power to approve, or decline to approve, actions of, or requested by, the Authority where expressly provided for in this Act or in sectoral legislation.

(2) A Responsible Minister shall notify the Authority whether or not he grants approval, within—

- (a) thirty days of receiving a request for approval; or

- (b) such other period as the Responsible Minister may specify by written notification submitted to the Authority within thirty days of receiving a request for approval.

(3) In any case in which a Responsible Minister declines to grant approval pursuant to subsection 0, the Responsible Minister shall provide the Authority with a written explanation as to the reasons why the Responsible Minister has declined to do so.

(4) Any notification from the Responsible Minister pursuant to subsection 0 shall be published in the Gazette, and on the Authority's official website, but the Responsible Minister may cause to be redacted any portion of the notification that he reasonably concludes meets the standards specified in section 70.

(5) In the event that more than one sector is designated as a regulated industry sector—

- (a) (a) any notification of approval or disapproval made by a Responsible Minister shall specify the regulated industry sector or sectors to which the approval or disapproval applies; and
- (b) (b) where an approval or disapproval must be applied to all regulated industry sectors, the request may only be approved with the concurrence of every Responsible Minister responsible for a regulated industry sector.

(6) The following requests by the Authority shall be subject to the requirement specified in paragraph 0b—

- (a) a request for consent to establish the remuneration of the Commissioners, pursuant to section 24;
- (b) a request for consent to establish the remuneration of the staff, pursuant to section 280;
- (c) a request to carry forward the financial loss from a prior financial year, pursuant to section 40(5);
- (d) a request for approval of the budget, pursuant to section 43(3); and
- (e) a request to exceed the approved budget, pursuant to section 43(6).

PART III ESTABLISHMENT AND ORGANISATION OF THE AUTHORITY

Division 1 Constitution

The RAA grants the Authority considerably broad power as a multisector regulatory body and a competition law authority. The Authority is governed by the Board of Commissioners which "shall be responsible for the actions of the Authority" (RAA 19 (1) and whose members are placed in their positions by the Selection Committee.

The Chief Executive, however, is appointed by the Board (see RAA 29 (1)) and can be removed by them (see RAA 29 (7)). Thus, the Chief Executive should not be a member of the Board, even a non-voting member, but rather should serve at the pleasure of the Board which is ultimately responsible for the actions of the RA.

Establishment of the Authority

11 (1) There shall be established an authority to be known as “the Regulatory Authority” which shall have such powers and shall perform such functions as are assigned to it by this Act and by sectoral legislation.

(2) The Authority shall be a body corporate, having perpetual succession and a common seal.

(3) The Authority may sue and be sued in its corporate name and may for all purposes be described by that name.

(4) The Authority shall be governed by the Board of Commissioners.

Principal objects

As we explain in the introduction, the RAA should adopt a primary objective of fostering long-term welfare of Bermudian consumers. It is important to note that we distinguish “long-term” consumer welfare (i.e., sustainable and dynamic competition) from “short-term” consumer welfare (i.e., static competition).

This section is insufficiently clear with regard to whether the long-term welfare of Bermudian consumers is the paramount concern of the RA and whether the Government will advance this objective by protecting incentives for private investment in innovative technologies. The absence of a consumer-welfare framework increases the regulatory risk that policies will favour individual competitors, which would distort the competitive process and reduce private firms’ incentives to invest in next-generation technologies, to the detriment of Bermudian consumers. We propose the following revisions, which make the promotion of long-term consumer welfare of Bermudians through the promotion of innovation the draft legislation’s primary objective. The draft legislation’s existing objectives 12(a)-(c) should be secondary objectives that serve as additional guiding principles but receive less weight than the principle object. RAA 12(d) is too vague and should be stricken, because it could be used to undercut the principal object of long-term consumer welfare.

12 (1) The principal objects of the Authority, in relation to any regulated industry sectoral, shall be to promote the long-term welfare of Bermudian consumers through the protection and enhancement of incentives for private investment in innovative technologies.—

(2) Secondary objects of the Authority, which in aggregate shall receive less weight than the principal object, shall be—

- (a) to promote and preserve sustainable competition;
- (b) to promote the interests of the residents and consumers of Bermuda;
- (c) to promote the development of the Bermudian economy, Bermudian employment and Bermudian ownership; and
- (d) to fulfil any additional objects specified by sectoral legislation.

General powers

RAA 13(q) and 13(t) should be stricken, as these should be functions of the Responsible Minister, not of the Authority. RAA 13(r), as a boundary rule that is the prerogative of the Minister, must limit the RA to making a recommendation to the Responsible Minister.

13 For the purpose of the performance of its objects and functions, the Authority, to the extent consistent with this Act **and pursuant to the relevant sector legislation**, may—

- (a) collect, retain and expend funds;
- (b) appoint, promote, remove and discipline staff;
- (c) establish its internal organisation and procedures;
- (d) conduct its internal administrative operations;
- (e) make administrative determinations, adjudicative decisions and rules;
- (f) provide advisory guidance to sectoral participants;

The RA is supposed to be (1) expert, (2) have qualified staff, and (3) have the power to conduct public consultation. RAA 13(g) is unnecessary.

~~(g) establish external advisory panels and take appropriate actions to foster industry self-regulation and co-regulation;~~

~~(h)(g)~~ establish and maintain an official website;

~~(i)(h)~~ enter into leases for real property and contracts for goods and services;

~~(j)(i)~~ grant, modify and revoke authorisations;

~~(k)(j)~~ collect Government authorisation fees and Regulatory Authority fees;

~~(l)(k)~~ establish operating and reserve funds, open bank accounts, and accept grants and loans;

~~(m)(l)~~ allocate finite resources used by sectoral providers;

~~(n)(m)~~ establish technical standards for the provision of covered services;

~~(n)~~ review and, as appropriate, approve, reject or modify tariffs filed by a sectoral provider governing the provision of covered services;

“Establish” in the provision that follows is the prerogative of the Minister.

~~(o)~~ ~~establish and~~ enforce quality of service standards applicable to covered services;

~~(p)~~ ~~define relevant markets, assess the competitiveness of relevant markets and identify sectoral providers that have significant market power in such markets;~~

RAA 13(r), as a boundary rule that is the prerogative of the Minister, must limit the RA to making a recommendation to the Responsible Minister.

~~(q)~~ ~~Recommend adopt~~ remedies **the Responsible Minister may adopt** to deter anti-competitive conduct by sectoral providers in any relevant market;

~~(r)~~ modify or find to be void, agreements involving one or more sectoral providers that unreasonably restrict competition in any relevant market;

~~(t)~~ ~~review and, as appropriate, approve or reject proposed concentrations involving a designated sectoral provider;~~

~~(s)~~ prohibit unfair trade practices by sectoral providers in any relevant market;

~~(t)~~ prohibit unfair trade practices by sectoral providers in any relevant market;

~~(u)~~ resolve disputes between sectoral providers, and between sectoral providers and end users;

~~(v)~~ conduct public consultations and adjudications;

~~(w)~~ require the production of documents and other information, conduct inspections and compel attendance at proceedings;

~~(x)~~ take appropriate enforcement action, including the imposition of monetary sanctions, in any case in which a sectoral participant has contravened this Act, sectoral legislation or any regulation or administrative determination; and

~~(y)~~ take any other action, not expressly prohibited by law, that is necessary and proper to perform its duties under this Act and sectoral legislation.

Prohibited activities

14 Except as expressly authorised by sectoral legislation, the Authority may not—

(a) engage in trade or otherwise have a direct or indirect financial interest in any commercial, agricultural, industrial or other undertaking, except such interest as the Authority may acquire in the course of the satisfaction of debts due to it, in which case the Authority shall dispose of the interest at the earliest suitable opportunity;

(b) purchase shares of any company;

- (c) make loans to any person; or
- (d) purchase, acquire or lease real property, except for use as a business premises for the Authority or for the performance of its functions under this Act.

Scope of authority

15 (1) The Authority shall have the power to supervise, monitor and regulate any regulated industry sector, in accordance with this Act, sectoral legislation and any regulations or policies made by a Responsible Minister.

(2) The Authority, when acting within the scope of its authority, may make administrative determinations that are binding on sectoral participants, including general determinations to implement this Act, sectoral legislation and regulations and policies made by a Responsible Minister.

(3) The Authority, following an adjudication, shall have the power to issue an adjudicative decision as to whether a specific person satisfies the criteria specified in sectoral legislation and, therefore, is a sectoral participant.

Regulatory principles

It is a widely accepted principle that regulatory intervention risks upsetting well functioning markets.⁴⁶ Therefore, the regulator should not impose *ex ante* remedies unless clear and convincing evidence confirms that they are necessary to correct a market failure. Reliable evidence is, by nature, based in science. Thus, regulatory decisions should be based on scientifically rigorous analysis and grounded in real-world facts which prove that a market failure exists *and* that the proposed regulation would fix the market failure without creating additional inefficiencies or otherwise harming social welfare. Moreover, given the requirement that the Chief Executive (and, as we propose below, the Commissioners and staff) have “substantial knowledge and experience in economic regulation” and in additional areas of expertise, it should be expected that scientific rigor be reflected in their practices. Market review lacking in scientifically rigorous economic analysis, particularly empirical analysis, increases the likelihood that regulators would come to erroneous conclusions in market and sectoral reviews, including misdiagnoses of significant market power. The result would be arbitrary and capricious regulation that would distort market forces and the incentives of market participants. Unnecessary

46. See, e.g., Daniel F. Spulber & Christopher S. Yoo, *Network Regulation: The Many Faces of Access*, 1 J. COMPETITION L. & ECON. 635, 675 (2005). Moreover, the U.S. Court of Appeals for the District of Columbia Circuit has rebuked the FCC for failing to provide sufficient factual evidence of the need for regulation:

[R]eview would be a relatively futile exercise in formalism if no inquiry were permissible into the existence or nonexistence of the condition which the Commission advances as the predicate for its regulatory action. A regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.

ALLTEL Corp. v. FCC, 838 F.2d 551, 561 (D.C. Cir. 1988).

regulation can impede the competitive process and reduce private firms' incentives to invest and innovate. Ultimately, consumers would be deprived of the benefits of innovations and rivalry among firms. For these reasons, reliance on scientific evidence should be a guiding principle for the Regulatory Authority.

We add the regulatory principle that the Authority act in accordance with the administrative procedures (aggregation rules) established by the Responsible Ministers. As we explained above, it is important that the Ministers establish procedural rules for the Authority rather than allow the Authority essentially to be a self-governing body. Because Bermuda does not have an equivalent to the U.S. Administrative Procedure Act,⁴⁷ which establishes the rules on regulatory decision-making by administrative government agencies and judicial review of regulatory decisions, we recommend that this principle be added here. We recommend that these procedures be spelled out in detail in the RAA (many of which are not) with reference to the IAD's seven generic rules or in an accompanying act.

16 In performing its duties under this Act, the Authority shall—

- (a) act in a timely manner;
- (b) rely on market forces, where practicable;
- (c) rely on self-regulation ~~and co-regulation~~, where practicable;
- (d) act in a reasonable, proportionate and consistent manner;
- (e) act only in cases in which action is needed; and
- (f) operate transparently, to the full extent practicable;
- (g) act without favouritism to any sectoral participant, including any sectoral participant in which the Government has a direct or indirect financial interest;
- (h) not act in an unreasonably discriminatory manner; and
- (i) act free from political interference~~;~~;
- (j) rely on scientific evidence and scientific methods;
- (k) act in accordance with the administrative procedures established by the Responsible Ministers, who shall take due consideration of the administrative procedures of developed nations having experience in conducting sectoral regulation.

47. 5 U.S.C. § 500 *et seq.* (1946).

Sectoral review

BTC believes that the requirement to conduct a sectoral review is an important piece of the legislation, and we support this provision. We add that any sectoral review conducted by the Authority should be transparent and scientifically rigorous. A transparent sectoral review is necessary to ensure that the Authority's sectoral reviews will be conducted "without favouritism to any sectoral participant" and "free from political interference" and will not be conducted "in an unreasonably discriminatory manner" as RAA 16 requires of the Authority. Scientifically rigorous sectoral review is necessary to ensure that the Authority make accurate conclusions regarding relevant markets, make appropriate diagnoses of market power, and implement necessary and proportionate *ex ante* remedies. Put differently, requiring scientific rigor will ensure that these sectoral reviews will allow the Authority to "rely on market forces" and "act only in cases in which action is needed" as is required by RAA 16.

We also add that the Authority should invite comment regarding relevant issues of concern to consumers or to the industry.

17 (1) The Authority shall periodically conduct a comprehensive, transparent, and scientifically rigorous review of each regulated industry sector, including all policies, legislation, regulations and administrative determinations applicable to the sector.

(2) The Authority shall initiate the review process by publishing a consultation document, pursuant to section 70, inviting comment regarding—

- (a) market conditions in the sector;
- (b) regulations and administrative determinations applicable to the sector that should be made, modified or revoked; and
- (c) any other relevant issues specified by the Authority or the Responsible Minister and any other relevant issue of concern to consumers or the industry.

(3) Not later than six months after the date on which the Authority issues the initial consultation document, the Authority shall issue a preliminary report and, if appropriate, a preliminary decision, in accordance with section 72(2).

(4) Not later than nine months after the date on which the Authority issues the initial consultation document, the Authority shall issue a final report and, if appropriate, a final decision, in accordance with section 72(4).

(5) Unless sectoral legislation provides otherwise, for each regulated industry sector, the Authority shall initiate the first sectoral review no later than three years after the date of coming into operation of the applicable sectoral legislation.

(6) The Authority shall initiate each subsequent sectoral regulatory review no later than three years after the date on which the Authority issues the final report or decision specified in subsection (4).

Official website

In the interest of transparency and accountability, BTC recommends that the Authority's website also contain the Authority's current and past financial statements of account and reports and meetings and minutes of the Board, including the Board's upcoming calendar showing the items that are on the Board's agenda on specific dates.

- 18 The Authority shall maintain an official website, on which it shall publish—
- (a) a directory, which shall include the name, position, official telephone number and email address of each Commissioner and each member of the staff;
 - (b) a list of each open adjudication or public consultation;
 - (c) the full text of—
 - (i) this Act;
 - (ii) all sectoral legislation;
 - (iii) all regulations, policies and declarations made by the Minister pursuant to this Act and to sectoral legislation; and
 - (iv) all general determinations made by the Authority pursuant to this Act and to sectoral legislation;
 - (d) the full text of all other administrative determinations and all adjudicative decisions, with the exception of any portion of any such administrative determinations or adjudicative decisions that contain information that the Authority deems to be confidential;
 - (e) an index of this Act, of all sectoral legislation, and of all regulations and administrative determinations adopted pursuant to this Act or pursuant to sectoral legislation; ~~and~~
 - (f) the Authority's current and past audited statement of accounts and report;
 - ~~(e)~~(g) meetings and minutes of the Board, including the Board's upcoming calendar showing the items that are on the Board's agenda on specific dates; and
 - ~~(f)~~(h) any additional information that the Authority is required to publish on the website pursuant to this Act or sectoral legislation.

Division 2
The Board of Commissioners

Composition and function

There is ambiguity in the legislation as crafted with respect to the rules regarding the Chief Executive and his powers. To provide a check against the powers of the Chief Executive, the Chief Executive should not be a member of the Board. Indeed, the Chief Executive should work *for* the Board, and he cannot if he is coequal with the Board.

19 (1) There shall be a Board of Commissioners of the Authority which, subject to the provisions of this Act and relevant sectoral legislation, shall be responsible for the actions of the Authority and the general administration of its affairs and business.

(2) The Board shall consist of three Commissioners ~~and the Chief Executive.~~

(3) Each Commissioner shall be a voting member of the Board, and shall serve for a three-year term.

~~(4) The Chief Executive shall be a non-voting member, and shall serve for a three-year term.~~

~~(5)~~(4) The name of each Commissioner shall be published in the Gazette at the time the Commissioner is appointed and at beginning of every calendar year.

~~(6)~~(5) The name, term of office, telephone number and email address of each Commissioner shall be published on the Authority's official website.

To ensure that the Board acts in an unbiased manner and free from political interference, the Board should not consist of more than two Commissioners of the same political party.

~~(6) No more than two Commissioners may be associated with the same political party.~~

Selection Committee

20 (1) There shall be a body known as the Selection Committee.

(2) The Selection Committee shall consist of—

(a) the Minister responsible for justice, who shall serve as the Chairman of the Committee;

(b) the Minister responsible for labour;

(c) the Opposition Leader or such person as the **official** Opposition Leader may designate; and

(d) each Responsible Minister.

(3) If the Minister responsible for justice is unable to preside at a meeting of the Selection Committee, or perform any other function specified in this Act, and has not

designated another member of the Selection Committee to perform that function, the Minister who has served on the Committee for the longest period of time shall perform the function.

(4) A simple majority of the members of the Selection Committee shall constitute a quorum.

(5) The Selection Committee shall make all decisions by simple majority vote and, except as provided in subsection (6), each member of the Selection Committee shall have a single vote.

(6) In the event of an equality of votes of the Selection Committee, the Chairman of the Selection Committee, in addition to a deliberative vote, shall also have a casting vote.

Selection and replacement of Commissioners

With respect to the selection of Commissioners, BTC maintains that the Commissioners must understand the markets and the economic and legislative concepts on which their practices rely simply because the Commissioners are the ultimate decision-makers and responsible for the actions of the Authority. Thus, as is required for the Chief Executive, the Commissioners should be required to “have substantial knowledge and experience in economic regulation and in one or more of the following areas: accounting, economics, engineering, finance, public policy, regulation, law or other fields related to the functions of the Authority.”

To require the Chief Executive but not the Commissioners to have industry expertise as well as knowledge and experience in economic regulation would diminish the decision-making capabilities of the Commissioners vis-à-vis the Chief Executive, giving the position of Chief Executive increased and unwarranted powers of persuasion, which could bias regulatory decision-making. Given the considerable amount of work that the Regulatory Authority will need to do once the Regulatory Authority Act 2010 and Electronic Communications Act 2010 are enacted, having qualified Commissioners is a necessity.

To prevent dynasty power from dominating the Board and regulatory decision-making, Commissioners should only be permitted to be reappointed once rather than enjoy limitless successive terms.

21 (1) The Chairman of the Selection Committee shall cause a notice to be published in the Gazette, and on the Authority’s official website, soliciting nominations for the position of Commissioner at the earlier of—

- (a) ninety days prior to the date on which a Commissioner’s term is set to expire; or
- (b) fifteen days after—

- (i) receiving a notice from a Commissioner stating that he intends to resign prior to the expiration of his term; or
- (ii) a vacancy occurs for any other reason.

(c) Nominations, including self-nominations, shall be submitted to the Selection Committee, in writing, pursuant to the procedures specified in the notice.

(d) Nominees, including self-nominees, shall have substantial knowledge and experience in economic regulation and in one or more of the following areas: accounting, economics, engineering, finance, public policy, regulation, law or other fields related to the functions of the Authority.

(2) A person who has held office as a Commissioner, may be nominated, or may submit a self-nomination, in the manner specified in paragraph (1)(c) and, at the discretion of the Selection Committee, may be ~~reappointed~~ for ~~successive terms~~ only once.

(3) Within forty-five days after the date on which the notice specified in subsection (1) has been published, the Selection Committee shall select the person who will serve as a Commissioner.

(4) When assessing a candidate, the Selection Committee shall consider—

- (a) the relevant qualifications of the candidate vis-à-vis the eligibility requirements;
- (b) the extent to which the candidate may have any conflict of interest that would preclude the candidate from fulfilling the obligations of a Commissioner; and
- (c) the need to ensure that, collectively, the members of the Board of Commissioners have a broad range of views, skills and training.

(5) A Commissioner may resign prior to the conclusion of his term by giving written notice to the other members of the Board of Commissioners and the Chairman of the Selection Committee, and shall cease to be a member of the Board from the later of—

- (a) the date on which the Chairman of the Selection receives the notice; or
- (b) the resignation date specified in the notice, provided that such date shall not be more than 90 days after the date on which the Chairman of the Selection Committee receives the notice.

(6) In the event that a Commissioner does not complete his term of appointment, the person appointed by the Selection Committee to fill the vacancy shall be appointed to serve as a Commissioner for a period of time equal to the remaining portion of the prior Commissioner's term.

Regarding RAA 21(7)(c), below, a straightforward solution to the problem of conflict of interests that arises in RAA 31(2) and (5) is to deem any person ineligible to serve

as a member of the Board of Commissioners if the person has a conflict of interest. According to RAA 31, a conflict of interest means that the person, or his “spouse, parent or child, has any direct or indirect financial interest in any sectoral provider or in any other person who has or may directly benefit from any regulation or administrative determination made by the Authority.” We apply this definition to our revision of RAA 21(7) which is now also consistent with the current provision of RAA 23(1)(c) regarding the removal of a Commissioner.

This revision also solves the problem of the Chief Executive having a conflict of interest, as it would apply to RAA 29(8), which reads, “No person may be appointed to serve as, or allowed to remain as, Chief Executive who is ineligible to serve as a member of the Board of Commissioners pursuant to RAA 21(7).” This revision also simplifies RAA 31(5), under “Conflict of interest.” That is, if a Commissioner is disqualified from participating in an adjudication or public consultation as a result of a conflict of interest, it would be inconsistent *not* to require the Commissioner to resign or be removed.

Additionally, we place a time limit on temporary assignments to the Board of Commissioners, RAA 8 below, to prevent the Chairman of the Selection Committee from becoming the sole decision-maker with respect to appointments to the Board. Finally, the Act should not imply a distinction between a “criminal offence” and a “serious” criminal offence. The qualifier “serious” creates vagueness, and requiring the Selection Committee to distinguish between “non-serious” and “serious” criminal offences would be a waste of resources.

(7) A person shall be ineligible to serve as a member of the Board of Commissioners if the person—

- (a) is a member of either House of the Legislature;
- (b) is a public officer;
- (c) or the person’s spouse, parent, or child is a director, officer or employee of a sectoral provider, or is a shareholder or has any private interest in the sectoral provider;
- (d) has been declared bankrupt or has made an arrangement with his creditors; or
- (e) has been convicted of a ~~serious~~ criminal offence.

(8) Where a Commissioner is temporarily unable to perform his functions as a Commissioner, the Chairman of the Selection Committee, after conferring with the Board of Commissioners, may appoint a person to act in the place of such Commissioner during the period of the Commissioner’s absence from the Board so long as that absence does not exceed three months in which case the Selection Committee must make the appointment.

(9) Any person appointed pursuant to subsection (8), when acting within the scope of the appointment, shall be deemed to be a Commissioner, and shall be eligible for remuneration commensurate to the service provided.

Chairman of the Board of Commissioners

22 (1) The Commissioners shall select, by simple majority vote, a Commissioner to serve as Chairman.

(2) In the event that no Commissioner receives a majority vote, the Chairman of the Selection Committee shall select a Commissioner to serve as Chairman.

(3) The Chairman shall be appointed for a two-year term, subject to his remaining a Commissioner, and no Commissioner shall serve more than two consecutive terms as Chairman.

(4) The Chairman shall have ultimate responsibility for ensuring that the Authority performs the functions specified in this Act and in sectoral legislation, and shall be answerable to the Board for his actions and decisions.

(5) The Chairman, after conferring with the other members of the Board, shall establish the agenda, and shall preside at meetings of the Board.

(6) The Chairman shall have a deliberative as well as a casting vote in all matters to be decided by the Board.

(7) If the Chairman is unable to preside at a meeting, or perform any other function specified in this Act, and has not designated another Commissioner to perform that function, the Commissioner who has served on the Board for the longest period of time shall perform the function.

(8) The Chairman may resign his position by giving written notice to the other Commissioners, in which event he may serve out the remainder of his term as a Commissioner.

Removal

23 (1) The Selection Committee, after providing a Commissioner with written notice and an opportunity for a hearing, may revoke the Commissioner's appointment if the Committee concludes that the Commissioner—

- (a) is unable to perform the functions of his office;
- (b) has engaged in malfeasance in office;
- (c) has a conflict of interest specified in section 31(1);
- (d) has failed, without adequate justification, to attend three successive meetings of the Board; or
- (e) has become ineligible to serve as a Commissioner pursuant to section 21(7).

(2) Prior to making a decision to revoke a Commissioner’s appointment, the Selection Committee may establish an independent panel to review the matter and make a written recommendation, a copy of which shall be provided to the Commissioner.

(3) Any decision to revoke a Commissioner’s appointment shall require the concurrence of at least two-thirds of the members of the Selection Committee.

(4) In any case in which the Selection Committee revokes a Commissioner’s appointment, the Selection Committee shall—

- (a) provide a written explanation to the Commissioner whose appointment has been revoked; and
- (b) publish a notice in the Gazette and on the Authority’s official website.

Remuneration

24 The Authority may pay to the Commissioners reasonable remuneration and allowances, subject to the approval of all Responsible Ministers.

Meetings

In the provisions that follow, BTC offers several revisions to increase the transparency and accountability of the Authority. First, we recommend that the Board meet no less frequently than monthly. This requirement would help commit the Authority to issuing decisions in a timely manner. Second, we urge that the quorum of the Board be set at three and not two Commissioners. A quorum of three will guarantee that two Commissioners cannot disempower a single Commissioner—that the Board cannot act in an “unreasonably discriminatory manner.”⁴⁸ A quorum of three also ensures that the minutes will reflect broader discussion—that is, represent “diverse views”⁴⁹—which is important for informed decision-making. To ensure transparency, the vote should be a recorded vote, and the meetings and minutes should be made public (a provision added as new RAA 25(11)).

We also make recommendations that would provide a check against the powers of the Authority and the Chief Executive in particular. First, in accordance with our recommendation that the Chief Executive not be a member of the Board, we recommend that the Board be permitted to meet without the presence of the Chief Executive. Secondly, the Authority should not establish its own procedural rules (other than internal procedures); rather, the Responsible Ministers should establish procedures for the Authority with reference to IAD’s seven generic rules either in this legislation or as a separate statutory instrument.

48. RAA, *supra* note 3, § 16(h).

49. RAA, *supra* note 3, § 35(3)(b).

25 (1) The Board of Commissioners shall meet as often as necessary or expedient for the performance of its functions, but not less frequently than monthly.

(2) Meetings of the Board shall be held at such places, on such days and at such times as the Chairman, or the two other Commissioners acting together, may determine.

(3) The quorum of the Board shall be ~~two~~ three Commissioners.

Following our revisions to 25(3), 25(4) is unnecessary.

~~(4) Subject to subsection (3), the Board may act notwithstanding any vacancy in its membership, and no act of the Board shall be deemed to be invalid only by reason of a defect in the appointment of any Commissioner.~~

(5) Members of the Board may attend meetings, and Commissioners may cast votes, by means of audio or video conference, but no Commissioner shall purport to vote by proxy or delegate voting authority to any other person.

(6) Except as otherwise expressly provided in this Act or in sectoral legislation, the Board shall act by simple majority vote of the Commissioners, and the vote shall be a recorded vote.

(7) The Board may only meet without the presence of the Chief Executive with the unanimous consent of the Commissioners.

(8) The Secretary shall prepare minutes of every meeting of the Board, specifying any matters discussed and decisions made, and the Board shall approve the minutes at its next meeting, subject to any revisions.

(9) Subject to subsection (8), if the Secretary is not in attendance at a meeting of the Board, the Chairman will appoint one of the members of the Board to record the minutes.

(910) The Board may establish such committees, consisting of some or all members of the Board, as it deems necessary for the discharge of its functions.

~~(1011)~~ The Authority shall ~~make rules consistent with this section establishing the procedures to be followed by the Board~~ follow the procedures established by the Responsible Ministers.

~~(1112)~~ The record of the meetings and minutes shall be public.

Documentary procedures

26 (1) Any notice to the Authority shall be provided by service upon the Secretary.

(2) Copies of all official documents filed or deposited in the office of the Secretary and certified by the Chairman or the Secretary to be true copies of the originals shall be evidence in like manner as the originals in all courts.

(3) All deeds, documents and other instruments required to be made under seal shall be sealed with the common seal of the Authority in the presence of the Chairman and the Secretary.

(4) The seal of the Authority shall be authenticated by the signature of the Chairman and the Secretary and shall be judicially and officially noticed.

(5) All documents (other than those required by law to be under seal) made by the Board may be signified under the hand of the Chairman, Secretary or any member of the staff authorised to act on either of their respective behalves.

Delegation of the Authority's powers and assignment of its duties

27 Except to the extent prohibited by this Act, or by sectoral legislation, the Board may, by written instrument, delegate any power vested in the Authority, and assign any duty of the Authority, to any Commissioner or to any member of the staff, and in particular may—

- (a) delegate a power, or assign a duty, subject to any conditions, qualifications or exceptions specified in the instrument of delegation;
- (b) authorise the further delegation of any power, or the further assignment of any duty, to other members of the staff;
- (c) revoke or vary any delegation or assignment by subsequent written instrument; and
- (d) exercise any power or fulfil any duty, notwithstanding the delegation or assignment.

Division 3 The Staff

Appointment of staff

In regard to RAA 5, below, BTC believes that permitting the Regulatory Authority to arbitrarily expand its staff would risk escalating administrative costs. To ensure that the Authority's staff is not wastefully large and that newly hired staff members are necessary for the operation of the Authority, the Authority should be required to obtain the approval of the Responsible Ministers with regard to the size, organisational structure, and job descriptions of its staff.

Just as the Commissioners should have the same qualifications as that of the Chief Executive, the staff members of the Authority should "have substantial knowledge and experience in economic regulation and in one or more of the following areas: accounting, economics, engineering, finance, public policy, regulation, law or other fields related to the functions of the Authority." Clearly, this requirement would be in effect where practical—for example, it would not apply to an administrative position.

28 (1) The Authority shall appoint and employ such staff as the Authority considers necessary for the performance of its functions subject to the approval of all Responsible Ministers.

(2) No member of the staff shall be deemed a public officer during the period in which he is employed by, seconded to or under contract with the Authority.

(3) The Authority shall establish the remuneration, terms and conditions of employment of each member of the staff, subject to the approval of all Responsible Ministers.

(4) Notwithstanding subsection 0, the Authority may provide the members of the staff the option of participating in the Government pension and health insurance plans.

(5) The organisational structure and job descriptions for the staff members shall be approved by the Responsible Ministers.

(6) To the extent that each job function practically necessitates it, the staff members shall have substantial knowledge and experience in economic regulation and in one or more of the following areas: accounting, economics, engineering, finance, public policy, regulation, law or other fields related to the functions of the Authority.

Chief Executive

29 (1) There shall be a Chief Executive of the Authority, who shall be appointed by the Board of Commissioners, and serve at their pleasure.

(2) The Chief Executive shall have substantial knowledge and experience in economic regulation and in one or more of the following areas: accounting, economics, engineering, finance, public policy, regulation, law or other fields related to the functions of the Authority.

Because the Chief Executive should not be a member of the Board for reasons explained above, RAA 29(3) should be stricken.

~~(3) The Chief Executive shall serve for a term of three years, and may be reappointed by the Board of Commissioners for one or more subsequent terms.~~

(4) The Chief Executive shall be the principal administrative officer of the Authority and shall be responsible, subject to the direction of the Board, for carrying out the functions of the Authority.

As stated in the revisions for RAA 19(4), the Chief Executive should not be a member of the Board.

(5) The Chief Executive shall serve as—

~~(a) a non voting member of the Board of Commissioners;~~

(b) the Secretary, but may, with the written consent of the Chairman, delegate this responsibility to another member of the staff; and

(c) the Records Officer, but may, with the written consent of the Chairman, delegate this responsibility to another member of the staff.

(6) The Chief Executive shall—

- (a) retain, suspend and dismiss staff as otherwise allowed by law;
- (b) supervise, direct and give assignments to the staff;
- (c) prepare the budget, and monitor the finances, of the Authority;
- (d) engage persons having technical or special knowledge that the Authority requires to carry out its functions under this Act;
- (e) enter into contracts for the provision of goods and services required by the Authority for the conduct of its business; and
- (f) perform such other duties as the Board may direct.

(7) The Board of Commissioners, after providing the Chief Executive with notice and an opportunity to comment, by unanimous vote of the Commissioners, may suspend or revoke the Chief Executive's appointment for serious misconduct or unsatisfactory performance.

(8) No person may be appointed to serve as, or allowed to remain as, Chief Executive who is ineligible to serve as a member of the Board of Commissioners pursuant to section 21(7).

RAA 29(9) and 29(10) are misnumbered. RAA 29(10) is a continuation of RAA 29(9).

- (9) In any case in which—
 - (a) the Board of Commissioners has suspended or revoked the Chief Executive's appointment pursuant to subsection (7); or
 - (b) the Chief Executive is unable to perform his duties for an extended period due to ill-health or absence from the country or other good cause,

~~(10)~~ The Board of Commissioners shall appoint a member of the staff, or other qualified person, to serve as the interim Chief Executive.

~~(11)~~(10) Any person appointed pursuant to subsection (9), when acting within the scope of the appointment, shall exercise the full authority of the Chief Executive, and shall be eligible for remuneration commensurate to the service provided.

Transfer between the Authority and Government service

30 Any public officer who accepts employment with the Authority, or is transferred to the Authority, may elect to continue to participate in the Government pension fund and health insurance plan as if he were continuing in the service of the Government, and shall remain subject to the Public Service Superannuation Act 1981.

*Division 4
Other matters*

Conflict of interest

31 (1) A conflict of interest shall be deemed to exist in any case in which a Commissioner or member of the staff participates in a decision-making or advisory capacity in any adjudication or public consultation that concerns—

- (a) a business in which that person, or that person's spouse, parent or child, is a member or shareholder or has any private interest, whether direct or indirect; or
- (b) any matter in which the person's private interest may reasonably be perceived as conflicting with the person's official duties.

With regard to RAA 31(2), below, BTC believes that if a Commissioner or member of the staff has a conflict of interest and is permitted to participate in any capacity in the adjudication or public consultation, there would be an inside lobbyist at the Authority. Therefore, if a Commissioner or member has a conflict of interest, he should no longer be permitted to participate in or influence the Authority's decisions.

(2) In any case in which a conflict of interest exists, the Commissioner or member of the staff that has the conflict shall not participate in ~~a decision-making or advisory any~~ capacity in the adjudication or public consultation ~~unless he~~.

- ~~(a) submits a written declaration to the Board of Commissioners that fully discloses the nature of the conflict; and~~
- ~~(b) receives the unanimous approval of, the voting members of the Board of Commissioners; and~~
- ~~(c) in the case of an adjudication, also receives the written consent of all parties to the adjudication at the time the conflict of interest is disclosed.~~

(3) The Chairman shall take all reasonable actions to ensure that no member of the Board of Commissioners contravenes the prohibition contained in subsection 0.

(4) The Chief Executive shall take all reasonable actions to ensure that no other member of the staff contravenes the prohibition contained in subsection 0.

RAA 31(5) as crafted permits double delegation of a Commissioner in the event of conflicts of interest—first by the Selection Committee that appoints the Commissioner and then by the Commissioner who is disqualified from participating. Double delegation is unlawful.

In addition, due to the practical difficulty of managing these conflicts at the Board level, BTC recommended in RAA 21(7)(c) that the Ministry remove the source of the problem and harmonize the eligibility requirements for Commissioners with the

definition of conflict of interests in RAA 31(1)(a), thus requiring the resignation or removal of any Commissioner who finds himself in that position following an appointment and eliminating the need for RAA 31(6) below.

(5) In any case in which a Commissioner is disqualified from participating in an adjudication or public consultation pursuant to subsection 0, the Commissioner shall resign or be removed~~the Chairman (or, in any case in which the Chairman is disqualified, the Commissioner who has served on the Board for the longest period of time), after conferring with the members of the Board who are not disqualified, may appoint a person to act in place of such Commissioner.~~

~~(6) — Any person appointed pursuant to subsection (5), when acting within the scope of the appointment, shall be deemed to be a Commissioner, and shall be eligible for remuneration commensurate to the service provided.~~

(7) The Commissioners and the members of the staff shall submit an annual written declaration to the Chief Executive stating whether they, or their spouse, parent or child, has any direct or indirect financial interest in any sectoral provider or in any other person who has or may directly benefit from any regulation or administrative determination made by the Authority.

(8) The Chief Executive shall retain the declaration forms for not less than three years, and shall provide a copy of any declaration, to the Commissioners and to any person, on request.

(9) The Commissioners and the staff shall not accept any gift or gratuity, either directly or indirectly, from any sectoral provider or from any other person who has or may directly benefit from any regulation or administrative determination made by the Authority unless the Authority has granted a waiver pursuant to subsection 0.

(10) Contravention of the prohibition contained in subsection 0 shall provide a basis for removal of Commissioner or dismissal of a member of the staff.

(11) The Authority shall make rules specifying the circumstances and the procedures by which a Commissioner or member of the staff may be granted a waiver of the prohibition contained in subsection 0.

Liability

32 (1) No action, suit, prosecution or other proceedings shall lie against any member of the Board of Commissioners, any member of the staff or any person acting on behalf of the Authority in respect of any act done, or any omission made, in good faith in the execution or intended execution of any function under this Act.

(2) The Authority may procure any liability insurance that the Authority deems prudent.

Confidentiality

33 (1) Any person submitting information to the Authority may request that the Authority treat such information as confidential.

(2) The Authority shall grant a request to treat information as confidential if the Authority concludes that the information is—

- (a) a trade secret of any person other than the requester;
- (b) information, the commercial value of which would be, or could reasonably be expected to be, destroyed or diminished by disclosure;
- (c) other information, the disclosure of which would have, or could reasonably be expected to have, an adverse effect on the commercial interests of any person to whom the information relates, other than the requester;
- (d) information—
 - (i) that is given to a public authority by a third party (other than another public authority) in confidence on the understanding that it would be treated as confidential; and
 - (ii) the disclosure of which would be likely to prevent the authority from receiving further similar information required by the authority to properly fulfil its functions; or
- (e) information, the disclosure of which would constitute a breach of a duty of confidence provided for by a provision of law.

(3) A person claiming confidentiality in respect of any information submitted to the Authority must provide—

- (a) a full justification for its claim; and
- (b) a version of such information without the confidential provisions and in a form that may be made available to the public.

(4) Following receipt of any information submitted subject to a request for confidential treatment, the Authority shall issue a decision as to whether the justification offered by the submitting party meets the standard for confidential treatment specified in subsection (2).

(5) If the Authority concludes that the justification offered by the submitting party meets the standard for confidential treatment, the Authority shall issue an order granting the request.

(6) In any case in which the Authority grants a request for confidential treatment, the information may only be disclosed to—

- (a) the Responsible Minister;
- (b) the Commissioners;
- (c) the staff;

- (d) a court of competent jurisdiction; or
- (e) where necessary to conduct a public consultation or adjudication, to specific parties pursuant to a non-disclosure agreement or protective order.

(7) If the Authority concludes that the justification offered by the submitting party does not meet the standard for confidential treatment, the Authority shall—

- (a) issue an order denying the request; and
- (b) either—
 - (i) return the information to the submitting party, and shall not consider or rely on the information; or
 - (ii) disclose the information if disclosure would be in the public interest.

Unauthorised disclosure of confidential information

34 The Responsible Minister, the Commissioners and the members of the staff shall not reveal or in any manner communicate to any other person, except as authorised or required by law, any information for which the Authority has granted confidential treatment.

Division 5

Advisory, self-regulatory and co-regulatory bodies

Advisory panels

As stated previously, the Authority's market analysis and regulatory decision-making should rely on sufficient evidence and reliable methods. It follows that the analysis conducted by the advisory panels, which the Authority will incorporate in its own analysis and decision-making, should follow scientifically rigorous methods.

35 (1) The Authority may appoint advisory panels, consisting of knowledgeable persons from outside the Authority, to provide information and recommendations regarding any matter within the competence of the Authority.

(2) In any case in which the Authority appoints an advisory panel, the Authority shall publish on its official website a statement setting out—

- (a) the purpose for which the panel has been established;
- (b) the membership of the panel including each individual's qualifications to serve;
- (c) any financial, staffing or other resources that the Authority will provide to the panel;

~~(e)~~(d) the procedures the panel must follow, including periodic written reports on its progress and findings;

~~(d)~~(e) any deliverables to be provided by the panel; and

~~(e)~~(f) the duration of time in which the panel will remain in existence.

(3) In considering candidates for appointments to any advisory panel, the Authority shall give due regard to—

(a) the qualifications and experience of the candidates; and

(b) the need to ensure representation of diverse views.

(4) Each advisory panel shall provide a report to the Authority regarding its work, at such times as the Authority may specify, which the Authority shall publish on its official website.

~~(4)~~(5) The work of any advisory panel shall be conducted in accordance with, and shall manifest, scientifically rigorous methods.

Self-regulatory and co-regulatory bodies

Two elements of the proposed provisions on self-regulatory and co-regulatory bodies are problematic. First, it would be unconstitutional for the Government to require authorisation of the ability to self-regulate by the Regulatory Authority. Second, the provision to require co- and self-regulation through the delegation of powers and responsibilities to sectoral providers is problematic as a legal and as an economic matter.

As we explained earlier, a statutory requirement should not supersede the constitutional right of assembly and association. Moreover, it bears emphasis that there is a clear distinction between collective action aimed at influencing competition through private means and collective action aimed at petitioning the Government to address an industry-wide problem, consider a proposition, or undertake other such actions. The ability to self-regulate without permission may be all the more important given that companies will have the opportunity to propose “fix-it-first” alternatives to *ex ante* remedies. If a proposed solution includes fostering facilities-based competition through, for example, a fibre-network capacity auction consortium of broadband network operators, the Government should not prevent or delay this process by requiring authorisation by the Authority. To preserve the incentives of firms to form trade associations and *ad hoc* coalitions, the Government should not require authorisation of self-regulatory bodies. Most importantly, self-regulation is beyond the scope of the Authority because self-regulation, by definition, is *self-initiated* regulation.

We find the requirement of industry participants to engage in self- and co-regulatory bodies as a means to execute the responsibilities of the Authority problematic on legal and economic grounds. As a legal matter, delegating a responsibility or task to a co-regulated body after the responsibility already has been delegated to the Authority by the Minister constitutes double delegation. Double delegation is problematic, because each time an additional delegation occurs, accountability to complete the task in a lawful or proportionate manner decreases.

As an economic matter, requiring private firms to adopt the responsibilities of the Authority and to develop a system of operating rules—such as developing codes of conduct—invites cartelization. For instance, requiring co-regulatory bodies to self-regulate would facilitate the exchange of information among competitors, which would make it easier to collude on, for example, price-fixing. Even if sectoral providers did not engage in anticompetitive behaviour through co-regulation, the requirement to adopt the duties of the Authority whenever the Authority wishes to impart its duties to the industry sector would give the Government the opportunity to accuse the participants in the self-regulating or co-regulating body of collusion. Finally, delegating responsibilities to industry self-regulatory or co-regulatory bodies would push the costs of regulation onto the firms. This requirement is an unfunded mandate.

To address the problems with respect to (1) requiring authorisation of self-regulation and (2) requiring self- or co-regulation when the Authority chooses to delegate its own responsibilities and duties to the industry sector, we have revised the definition of “self-regulation” and removed “co-regulation” from RAA 2, and we also make the following revisions to RAA 36, which strike the provisions relating to the requirement of sectoral providers to self- or co-regulate as a means to undertake responsibilities delegated by the Authority.

36 (1) The Authority, ~~by general determination, may~~ shall have no power to authorise ~~or prohibit~~ the establishment of industry self-regulatory ~~or co-regulatory~~ bodies.

(2) The Authority may ~~not~~ delegate to an industry self-regulatory ~~or co-regulatory~~ body ~~the authority its powers and authority pursuant to sections 13 and 15.—~~

~~(a) — to adopt codes of conduct;~~

~~(b) — to conduct dispute resolution proceedings;~~

~~(c) — to refer matters to the Authority for investigation and, if appropriate, enforcement action; and~~

~~(d) — to take other actions specified in sectoral legislation.~~

~~(3) In any case in which the Authority authorises or requires the establishment of an industry self-regulatory or co-regulatory body, the Authority shall publish in the Gazette and on its official website a statement setting out—~~

~~(a) the specific authority being granted to the body;~~

~~(b) the procedure by which membership in the body will be determined; and~~

~~(c) any financial, staffing or other resources that the Authority will provide to the body.~~

(3) In any case in which ~~the Authority~~ sectoral providers establishes a co-regulatory body, the Authority may take actions reasonably necessary to oversee the work of that body.

PART IV FINANCE AND BUDGET

Division 1 Finances of the Authority

Financial year

37 The financial year of the Authority shall consist of twelve months, and shall end on the thirty-first day of March.

Funds of the Authority

38 (1) The funds of the Authority shall consist of—

(a) the authorised and paid-up capital; and

(b) the operating fund; and

(c) the reserve fund.

(2) The Authority shall only create special funds with the express approval of the Minister of Finance.

(3) The authorised capital of the Authority shall be [TBA], which shall be subscribed at such times and in such amounts as the Board of Commissioners, with the approval of the Minister of Finance, may require.

(4) The Authority may increase the authorised capital, subject to the approval of the House of Assembly signified by resolution.

Operating Fund

39 (1) The Authority shall establish and maintain a fund, to be known as the Regulatory Authority Operating Fund.

(2) The Authority shall pay into the Operating Fund—

- (a) such monies as may be appropriated by the Legislature;
- (b) any Regulatory Authority fee that the Authority assesses pursuant to section 44;
- (c) other revenues that the Authority, by virtue of this Act, or any sectoral legislation, may raise;
- (d) grants, contributions or endowments from any source; and
- (e) loans.

(3) The Authority, consistent with its approved budget, may authorise payment to be made out of the Operating Fund such funds as are necessary to—

- (a) pay remuneration to the Commissioners, the staff and other persons employed or engaged by the Authority; and
- (b) meet all other costs and expenditures properly incurred in exercising the functions and powers of the Authority.

Reserve Fund

40 (1) The Authority shall establish a fund to be known as the Regulatory Authority Reserve Fund.

(2) At the conclusion of each financial year, the Authority shall determine the net surplus or net loss, if any, after—

- (a) allowing for expenses of operations; and
- (b) provision has been made for bad and doubtful debts, and for depreciation of the assets of the Authority; but
- (c) before account has been taken of unrealised gains or losses.

(3) In any financial year in which the Authority incurs a net surplus, revenue shall be transferred to the Reserve Fund in the manner specified in section 41.

(4) In any financial year in which the Authority incurs a loss, the Authority may recoup the loss from the Reserve Fund, to the extent the Reserve Fund is sufficient.

(5) In any financial year in which the Authority incurs a loss and the Reserve Fund is not sufficient to meet the loss, the Authority, with the approval of all Responsible Ministers, may carry forward and recoup the losses from any future surplus, before payment is made to the Consolidated Fund.

Transfer of net surplus

41 (1) In any year in which the Authority realises a net surplus, the Authority, after recouping any net losses pursuant to section 40(2), shall transfer any remaining surplus in the following manner—

- (a) fifty percent shall be transferred to the Consolidated Fund;
- (b) twenty-five percent shall be transferred to paid-up capital of the Authority; and
- (c) twenty-five percent shall be transferred to the Regulatory Authority Reserve Fund.

(2) Notwithstanding subsection (1), in any year in which making the payment specified in paragraph (1)(b) would cause paid-up capital and the Regulatory Authority Reserve Fund to exceed the Authority's authorised capital, the Authority, after making the payment specified pursuant to paragraph (1)(a), and making any payment necessary to cause paid-up capital and the general reserve fund to equal the Authority's authorised capital, shall pay the balance of the net surplus to the Consolidated Fund.

Investment

42 (1) The Authority may open bank accounts, and purchase the financial instruments specified in subsection (3), in its own name.

(2) The Authority shall maintain the Operating Fund in interest-bearing bank accounts within Bermuda.

(3) The Authority shall maintain the Reserve Fund in—

- (a) interest-bearing bank accounts;
- (b) certificates of deposit; and
- (c) Treasury bills issued by the government of any country in any freely convertible currency.

Division 2 Budget of the Authority

Budget

43 (1) The Authority shall prepare an annual budget, which shall include—

- (a) an estimate of total operating expenditures for the upcoming financial year, allocated to the extent feasible among regulated industry sectors;
- (b) an estimate of the total capital expenditures for the upcoming financial year; and
- (c) an estimate of the total revenues, by source.

(2) Not later than six months before the commencement of each financial year, the Authority shall initiate a public consultation regarding its proposed budget for the upcoming financial year.

(3) Not later than three months before the commencement of each financial year, the Authority shall submit to all Responsible Ministers, with a request for approval, a proposed budget, in such form and in such detail as the Responsible Ministers may require, for the upcoming financial year.

(4) If the Responsible Ministers and the Authority cannot reach agreement regarding the Authority's proposed budget by the date one month prior the commencement of the financial year, the Authority shall submit its proposed budget to the Public Accounts Committee, which shall—

- (a) consider any information submitted by the Responsible Ministers and the Authority;
- (b) make any modifications to the proposed budget that it deems necessary and proper; and
- (c) issue a decision approving the budget, which shall be published in the Gazette.

(5) The approved budget, shall constitute the Authority's budget for the upcoming financial year.

(6) The Authority shall not, without the approval of all Responsible Ministers, spend in total in any financial year more than the total amount of expenditures specified in the approved budget for that financial year.

Regulatory Authority fees

44 (1) At the same time that the Authority submits a proposed budget to the Responsible Ministers pursuant to section 43(3), the Authority shall submit to the Responsible Ministers, a request that the Responsible Ministers make a regulation establishing the Regulatory Authority fees that some or all sectoral participants shall pay to the Authority during the upcoming financial year.

(2) The regulation made by the Responsible Ministers shall be subject to the affirmative resolution procedure.

Just as regulations and policies must be proportional, regulatory fees must be proportional and must be specified. Moreover, the fees should have cost orientation. To ensure accountability and transparency in setting proportional fees, the Responsible Minister or the Authority should be required to report annually the sufficiency of the cost orientation of the fees and the proportionality of the fees. We add new subsections RAA 44(3) and 44(15) to address this proportionality requirement.

(3) **Regulatory Authority fees shall be cost-orientated and proportional to the benefits generated by the regulations for the industry and Bermudian consumers.**

BTC sees no justification for imposing additional service fees on the electronic communications industry that will likely only ratchet up over time as the RA

identifies additional tasks for which it can assess fees. First, we see no reason for the RAA to engage in equipment certifications if all equipment must meet U.S., Canadian or EU standards as required by ECA 52. Second, any expenses incurred by the Authority in conducting spectrum auctions can be taken from the proceeds of those auctions (reference ECA 41(3)). Third, proposed fees for managing numbering resources as required by ECA 48 (7), given the infinitesimal effort involved in doing so should fall well within the budget of the RA. Thus, we eliminate RAA 43(3)(a) and RAA 43 (4), below.

(4) The Regulatory Authority fees recommended by the Authority, shall be consistent with the Authority's budget, and shall consist of—

~~(a) service fees, which shall be payable by a sectoral participant in connection with specific functions performed by the Authority; and~~

~~(b)~~(a) general regulatory fees, which shall be payable by a sectoral provider annually or at such other intervals as the Authority may establish.

~~(5) Service fees recommended by the Authority shall be designed to recover from a sectoral participant a reasonable estimate of the cost to the Authority of performing the function for which the fee is assessed.~~

(6) For each financial year, the general regulatory fees recommended by the Authority shall be designed to recover from all sectoral providers within a regulated industry sector, in the aggregate, an amount equal to—

(a) the estimated costs incurred by the Authority that are directly related to the supervision of that regulated industry sector that are not recovered from service fees or other sources; and

(b) a reasonable portion of the remaining operating costs of the Authority.

As we explained in the introduction, existing government fees and new Regulatory Authority fees will impose substantial costs on firms. To ensure that additional fees are proportionate, the Authority must give due consideration to existing Government authorisation existing fees.

(7) In developing the proposed Regulatory Authority fees, the Authority shall give ~~no~~every consideration to the revenue received from any Government authorisation fee established pursuant to section 52.

(8) The Authority may recommend that the general regulatory fee to be paid by a sectoral provider shall be based on—

(a) a percentage of the sectoral provider's total or relevant turnover, to be calculated in the manner specified in sectoral legislation; or

(b) any other basis provided for in sectoral legislation.

(9) The Authority may recommend that different general regulatory fees may be imposed on—

- (a) sectoral providers in different regulated industry sectors; and
- (b) different sectoral providers within a regulated industry sector;

provided, any such differences shall be based on objective and non-discriminatory criteria.

(10) In any case in which the Authority has determined that a sectoral provider is required to pay a Regulatory Authority fee, the Authority may collect from the sectoral provider any information the Authority deems necessary to have in order to assess the amount of the general regulatory fee owed by that provider.

(11) The Authority shall take all reasonable measures to collect all Regulatory Authority fees, including the issuance of a direction pursuant to section 64, and the initiation of enforcement action pursuant to section 93, and shall pay all revenue generated from Regulatory Authority fees to the Operating Fund.

(12) In any case in which a sectoral provider is required to pay the Authority a service fee designed to recover the costs that the Authority incurs in connection with the grant of an authorisation, and a Government authorisation fee pursuant to section 52, the Authority may collect a single charge, provided that the Authority shall inform the party required to pay the charge as to the portion of the charge attributable to the Government authorisation fee and the portion of the charge attributable to the service fee.

(13) In any case in which a sectoral provider pays a single charge to the Authority pursuant to subsection (12), the Authority shall pay the portion of the charge attributable to the Government authorisation fee to the Consolidated Fund and the portion of the charge attributable to the service fee to the Operating Fund.

(14) In the event that the regulation to be made by the Responsible Ministers pursuant to this section has not come into effect by the start of a financial year, the Regulatory Authority fees in effect during the prior financial year shall remain in effect, as adjusted based on the change in the Consumer Price Index from the prior financial year, until such time as the Responsible Ministers make, and the Legislature approves, such a regulation setting the regulatory Authority fees for the balance of the financial year.

(15) The Responsible Minister shall report annually the sufficiency of the cost orientation of the fees and the proportionality of the fees.

Grants and loans

45 (1) A Responsible Minister may, with the consent of the Minister of Finance—

- (a) make grants to the Authority for the purpose of enabling the Authority to incur or meet liabilities in respect of capital or revenue expenditures; and

- (b) make loans to the Authority, in which case the Responsible Minister shall specify in writing the terms and conditions of the loan, including the duration of the loan and the rate of interest to be charged, so long as the rate does not exceed a long-term rate for government bonds.

(2) The Authority, with the consent of the Minister of Finance, may enter into loan agreements with licenced financial institutions.

(3) The Minister responsible for finance may provide a guarantee to any financial institution that makes a loan to the Authority pursuant to subsection (2).

Accounts and Audit

46 (1) The Authority shall maintain proper statements of its financial affairs and, for each financial year, shall prepare a statement of its accounts in such form as the Accountant General may direct.

(2) The Authority shall appoint an independent auditor, which may be either—

- (a) the Auditor General; or
- (b) any enterprise or individual that is independent of the Authority and licenced to perform certified financial auditing in Bermuda.

(3) Within three months of the end of its financial year, the Authority shall submit to the independent auditor a statement of its accounts and shall meet any reasonable request from the auditor for information relevant to the audit.

(4) Upon completion of the audit, the independent auditor shall present the audited findings to the Board of Commissioners.

(5) A Responsible Minister, at any time, may direct the Auditor General, or may retain any other independent auditor, to examine and report on the accounts of the Authority as a whole, or on any aspect of the Authority's operations.

(6) The Authority shall provide any auditor appointed pursuant to subsection (5) with all necessary and proper facilities for any examination conducted pursuant to this section.

Publication of accounts and annual report

47 (1) The Authority, within thirty days of receiving the audited findings of the independent auditor specified in section 46(4), shall prepare and transmit to the Responsible Ministers—

- (a) a report on the operations of the Authority during that year; and
- (b) a copy of the annual statement of accounts of the Authority certified by the independent auditor.

(2) The Responsible Ministers shall as soon as practicable after their receipt—

- (a) cause a copy of the report and annual statement of accounts to be laid before both Houses of the Legislature; and
- (b) cause a copy of the annual statement of accounts to be published in the Gazette.

(3) As soon as practicable after the Responsible Ministers have taken the actions specified in subsection (2), the Authority shall publish the report and annual statement of accounts on its official website.

PART V POWERS AND FUNCTIONS OF THE AUTHORITY

Division 1 Authorisations

Licences, permits and other authorisations

In regard to Part V, BTC asserts that the powers and functions of the Authority are limited to implementing the rules and regulations established by the Responsible Minister, which in our case is the Minister of Energy, Telecommunications and E-Commerce. To be effective, those regulations must be complete, specific and detailed. Thus, we strongly urge that the Ministry craft those regulations with reference to the seven generic rules that comprise the IAD, described above in section D of the Introduction.

Having said this, we realize that some of these regulations are set forth (more or less completely) in the ECA. In no case are those regulations complete, specific and detailed. Indeed, in many instances, the ECA leaves it to the RA to fill in the gaps, which is unacceptable and unlawful. Although we do not have adequate time to address all the omissions and commissions inherent in these two bills (nor would we attempt to do so without the benefit of a public consultation on these matters), we have attempted to mark up this section with respect to its deficiencies.

48 (1) The Authority may grant licences, permits or other authorisations, if authorised to do so by sectoral legislation and pursuant to regulations established by the Responsible Minister.

The following provision is the responsibility of the Minister with respect to establishing boundary, authority and aggregation rules.

(2) The Authority shall, by general determination, ~~establish the procedures and criteria~~ pursuant to which it will grant—

- (a) individual licences;
- (b) class licences; or
- (c) licence exemptions.

(3) In determining whether to grant an individual licence, a class licence or a licence exemption, the Authority shall—

- (a) comply with any requirements, and consider any factors, specified in sectoral legislation and in any other regulations issued by the Responsible Minister; and
- (b) give due consideration to the costs and benefits of each option.

(4) The Authority, by general determination, shall establish—

The following is the responsibility of the Minister with respect to establishing aggregation rules governing the industry and authority rules governing the RA.

- (a) ~~the process for obtaining a class licence~~, including whether a sectoral provider must notify the Authority in advance that it intends to offer a service for which a class licence is required; and
- ~~(b) the process for obtaining an individual licence, including—~~
 - ~~(i) any information that must be provided;~~
 - ~~(ii)(i) the standards and criteria that will be used to consider any application; and~~

The following determinations are all the responsibility of the Minister with respect to establishing boundary and information rules governing the industry.

- ~~(c) the process for granting and terminating a licence exemption.~~

(5) In any case in which the Authority grants a licence, permit or other authorisation, the Authority, consistent with sectoral legislation, may—

- (a) modify;
- (b) authorise the assignment of;
- (c) authorise the transfer of control of;
- (d) suspend; or
- (e) revoke,

the licence, permit or other authorisation, pursuant to procedures and criteria to be established by the Authority—Responsible Minister by general determination.

(6) In the event of a conflict between any provision of an authorisation granted by the Authority, and—

- (a) this Act;

- (b) applicable sectoral legislation; or
- (c) any regulation,

the provisions of this Act, sectoral legislation or regulation shall supersede the provision of the authorisation.

(7) When authorised by sectoral legislation, and pursuant to regulations established by the Responsible Minister, the Authority may use competitive bidding or other procedures specified to grant licences, permits or other authorisations.

(8) Unless subsequently modified or revoked, every licence, permit or other authorisation granted by the Authority, shall be valid for—

- (a) the period specified in accordance with sectoral legislation, regulation or a general determination; or
- (b) in all other cases, for the period specified by the Authority in the authorisation pursuant to regulations established by the Responsible Minister.

Grant, assignment and transfer of control

It is essential to the preservation and promotion of effective competition that the Authority acts in a timely manner with respect to granting licences and authorising assignments and transfers of control. Under the current draft legislation, a competitor can enter a market only if it obtains a license through grant, assignment, or transfer of control of a licence to the potential entrant. In the absence of provisions ensuring timely action by the Authority in this regard, the Authority may intentionally or unintentionally impede the ability of firms to enter markets. By delaying the granting of a licence, the Authority would limit entry into a market, which would benefit incumbents and deprive consumers of the benefits of a competitive market. To ensure that the Regulatory Authority acts in a timely manner, we add provisions as new RAA 49(7) and RAA 49(8) below, which require the Authority to consent to the grant, assignment, or transfer of control of a licence, permit, or other authorization within a reasonable period of time and establishes the automatic approval of a license grant or other authorisation if the Authority does not issue a decision within 90 days following the application.

As BTC noted above, the licensing procedures are aggregation rules that must be established by the Responsible Minister. In addition, the Minister has the authority to establish the criteria that the Authority will use to assess licence, permit, or authorisation requests; to grant temporary authorisations; and to establish the conditions of a temporary licence, permit, or authorisation. On a related note, the Minister also has the authority to grant temporary authorisation when individual authorisation is required. Thus, the responsibilities expressed in RAA 49(1)(c), 49(5), and 49(6) should be allocated to the Minister, not the Authority.

The following provision is the responsibility of the Minister with respect to establishing aggregation rules governing the industry and authority rules governing the RA.

49 (1) The Authority shall, by general determination or as otherwise specified by sectoral legislation, ~~establish the procedures~~ to be followed by any person seeking to obtain, assign or transfer control of a licence, permit or other authorisation that is granted on an individual basis, including—

- (a) any application form to be used;
- (b) any information that must be provided;
- (c) the criteria the ~~Authority~~ Minister will use to assess the request;
- (d) the timeframe within which the Authority will act on the application; and
- (e) any additional standards or procedures specified in sectoral legislation.

(2) In any case in which an application is filed in connection with an individual licence, the Authority shall—

- (a) conduct a public consultation;
- (b) if requested by the applicant, conduct an investigative hearing; and
- (c) issue a decision and order pursuant to regulations established by the Minister.

(3) When authorised by sectoral legislation, a Responsible Minister may direct the Authority to use an auction or comparative selection process to grant an individual licence.

(4) In any case in which an auction process is used, the reserve price shall be established by the Minister of Finance pursuant to the Government Fees Act 1965.

(5) Notwithstanding subsection (2), the ~~Authority~~ Minister may grant a temporary authorisation to perform any act for which an individual authorisation is required.

(6) Any temporary authorisation granted pursuant to subsection (5) shall be issued for a period not to exceed six months, and shall be subject to such conditions as the Authority Minister determines to be necessary.

(7) The Authority's consent to the grant, assignment, or transfer of control of a licence, permit, or other authorization shall not be unreasonably withheld.

(8) If the Authority fails to take final action on any petition for the grant, assignment, or transfer of control of a licence, permit, or other authorization within 90 days after the filing of the petition, the petition shall be deemed granted, and the validity of that automatic grant shall be immune from judicial appeal.

Conditions

As explained above, the Authority's legitimate authority over of the issuing of licences, permits, and other authorisations, pursuant to regulations established by the Minister, gives the Authority considerable control over the competitive environment of the various markets for telecommunications services. By extension, the Authority's power to impose conditions on the granting of a licence, permit, or other authorisation could permit the Authority to construe the market to arrive at some desired outcome. Examples of such regulatory behaviour can be found in the United States after the passage of the Telecommunications Act of 1996 when the FCC conditioned its approval of mergers between telecommunications providers on a commitment to charge total element long-run incremental cost (TELRIC) prices even though, simultaneously, U.S. courts were ruling against the legality of TELRIC pricing. Although we do not challenge the regulator's legitimate authority pursuant to regulations established by the Minister to impose conditions on licences, permits, and other authorisations, we add the requirement that all conditions imposed should be based on findings rooted in scientific evidence and methods. The requirement of scientific rigor would ensure that conditions are necessary and proportionate, which can help check the powers of the Authority over the terms and conditions of licences.

Pursuant to our elimination of the provision that the Authority require a sectoral provider to participate in a self- or co-regulatory body as a means of delegating its responsibilities, RAA 50(1)(i) should also be stricken

50 (1) The Authority may include, as a condition of any licence, permit or other authorisation and pursuant to regulations established by the responsible Minister a requirement that the authorisation holder—

- (a) pay any fees or penalties that may be imposed by the Authority;
- (b) comply with all duties specified in Part VII;
- (c) comply with applicable sectoral legislation;
- (d) comply with any regulation made by the Responsible Minister;
- (e) comply with any administrative determinations made by the Authority;
- (f) meet any consumer protection requirement specified by the Authority;

Remedies are boundary rules that must be established by the Minister before being imposed by the RA pursuant to conditions that the Minister sets forth in the regulations governing the industry.

- (g) if found to have significant market power in any relevant market, comply with any remedy agreed by the Minister and imposed by the Authority;

- (h) comply with any information request issued by the Authority; and
- ~~(i) participate in industry self-regulatory or co-regulatory bodies, when directed to do so by the Authority.~~

(2) The Authority may only include, as a condition of any licence, permit or other authorisation, any additional condition if the condition is—

- (a) specified by sectoral legislation or regulations established by the Responsible Minister; or
- (b) adopted with the consent of the Responsible Minister.

(3) Any condition imposed by the Authority shall be—

- (a) Objective and based on scientific evidence and methods;
- (b) not unreasonably discriminatory; and
- (c) specified expressly in the authorisation.

Modification, suspension or revocation

By retaining the power to alter or revoke a licence, the Government creates uncertainty for a sectoral provider with respect to the future terms of its licence. This uncertainty reduces the commercial value of the licence, which reduces the sectoral provider's incentive to invest in the licence and the complementary assets that attach to it. Stable property rights consequently are of heightened importance in these industries because strong property rights help to ensure that a firm will be able to recover the cost of its investment in the future.

The degree of uncertainty regarding the future state of a licence depends on the extent to which the Authority can arbitrarily alter or revoke a licence. To ensure that the Authority will not be able to do so, the legislation should include a provision stating that the Authority bears the burden of proving, with clear and convincing evidence, that the specific alterations or the revocation of the licence are justified pursuant to the regulations established by the Minister.

When a given modification, suspension, or revocation is in fact justified, to ensure that the Authority's decision to modify, suspend, or revoke a licence is effective, the decision should take effect in a short period of time. We propose 30 days.

To ensure that the Authority is held accountable for proving with clear and convincing evidence the allegations that warrant the modification, suspension, or revocation of a licence, permit, or other authorisation, the licence holder should have the right to appeal the Authority's decision.

51 (1) The Authority, when authorised by sectoral legislation or regulation established by the Responsible Minister, on its own motion, or at the request of an authorisation holder, may modify or vary any term or condition of a licence, permit or other authorisation if the Authority concludes that such modification or variation is necessary in the public interest.

(2) Before taking any action pursuant to subsection (1), the Authority shall give the authorisation holder reasonable notice and an opportunity to comment, and shall take into account any representations made by or on behalf of the authorisation holder.

(3) The Authority may suspend or revoke any licence, permit or other authorisation where the authorisation holder has—

- (a) made false statements of material facts, committed fraud or made a misrepresentation in the application for the licence, permit or other authorisation or in any subsequent statement to the Authority;
- (b) failed to comply with—
 - (i) any applicable requirements contained in this Act ~~or~~ in sectoral legislation or any regulation established by the Responsible Minister;
 - (ii) any regulation or administrative determination made by the Authority or a Responsible Minister; or
 - (iii) the terms or conditions of the licence, permit or other authorisation; or
- (c) failed to pay to the Authority any authorisation fees, regulatory fees or any other required payment.

(4) The Authority may suspend or revoke any licence, permit or other authorisation in—

- (a) any other circumstances provided for in sectoral legislation or in any regulation established by the Responsible Minister; or
- (b) any case in which the authorisation holder has breached a condition in the authorisation.

(5) Before the Authority issues a decision and order suspending or revoking a licence, permit or other authorisation, the Authority shall provide written notice to the authorisation holder.

(6) The notice specified in subsection (5) shall include—

- (a) the action that the Authority proposes to take;
- (b) the basis on which the Authority proposes to take the action;

(c) the timeframe within which the authorisation holder may submit written comments regarding the proposed action; and

(d) the actions that the authorisation holder must take to avoid suspension or revocation, and the timeframe in which such actions must be taken.

(7) In any proceeding to suspend or revoke any licence, permit, or other authorization, the Authority shall bear the burden of proving its allegations against the authorization holder by clear and convincing evidence.

(8) Any decision or order by the Authority suspending or revoking any licence, permit, or other authorization shall take effect 30 days after its issuance by the Authority and shall be automatically stayed upon the authorization holder's filing of a notice of appeal in any court of competent jurisdiction.

Government authorisation fees

52 (1) The Government authorisation fees payable in respect of any licence, permit or other authorisation granted by the Authority, unless otherwise provided by sectoral legislation, shall be established by the Minister of Finance pursuant to the Government Fees Act 1965.

(2) The Authority, at the request of a Responsible Minister, shall submit a recommendation to the Responsible Ministers regarding the Government authorisation fees to be adopted.

(3) In preparing the recommendation specified in subsection (2), the Authority shall act in accordance with any requirement contained in sectoral legislation.

(4) The Responsible Ministers, after giving due consideration to any recommendations made by the Authority, shall forward a recommendation to the Minister of Finance.

(5) In any case in which the Authority has determined that a sectoral provider is required to pay a Government authorisation fee, the Authority may collect from the sectoral provider any information the Authority deems necessary to have in order to assess the amount of the Government authorisation fee to be paid by that provider.

(6) The Authority shall take all reasonable measures to collect all Government authorisation fees, including the issuance of a direction pursuant to section 64, and the initiation of enforcement action pursuant to section 93, and shall pay them to the Consolidated Fund.

Reporting requirements

The Regulatory Authority should be subject to regular, periodic performance reviews to ensure that the Authority is tangibly achieving its designated objectives. Examples of this type of regulatory oversight include the Digital Britain Programme Board, which was created as part of the United Kingdom's national broadband plan, whose responsibilities include the "[o]verall monitoring of the implementation, both legislative and non-legislative against agreed project plans," "tracking milestones

and deliverables for the non-legislative actions,” and “maintaining an up to date risk register/issues log and providing updates”⁵⁰ so as to “ensur[e] the value for the public’s financial investment.”⁵¹ The U.K. government also periodically releases implementation updates to inform the public of the progress of its Digital Britain programme.⁵²

The purpose of including reporting and monitoring mechanisms is to establish a continuing regulatory commitment to policies that promote investment incentives and long-term consumer welfare. As long as regulations remain in effect, the regulator should be required to periodically provide transparent, rigorous, and verifiable evidence that market conditions warrant the regulations and that the remedies are effective. Good intentions do not suffice. There should be an objective standard by which the regulator’s success or failure at increasing long-term consumer welfare is transparently observed and periodically judged.

BTC recommends that the legislation require the Authority to publish an annual report on the level of competition and innovation in certain electronic communications sectors. In these reports, the regulator would track metrics for competition, investment, innovation, and consumer welfare—for example, for the telecommunications sectors, the sum of consumer surplus and producer surplus over time, performance-adjusted consumer price indices for various telecommunications services, the growth of broadband penetration, and the degree of competitive entry. Doing so would ensure that consumers and producers would have more information with respect to the efficacy of current regulation and could determine whether future regulation would continue to be necessary. The requirement to produce an annual report helps to ensure that the RA does not impose costly regulation beyond its useful lifespan. Thus, we urge the Ministry to revise its draft legislation to include a role for regulatory oversight and accountability, which would significantly increase the Regulatory Authority’s commitment to imposing only efficient regulations.

53 (1) The Authority may require pursuant to regulations established by the Responsible Minister an authorisation holder to submit, by such date as the Authority may direct—

- (a) a copy of its annual report;

50. DIGITAL BRITAIN, IMPLEMENTATION PLAN 4 (Aug. 2009), *available at* http://webarchive.nationalarchives.gov.uk/+http://www.culture.gov.uk/images/publications/DB_ImplementationPlanv6_Aug09.pdf (last visited May 24, 2010).

51. FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN 334 (Mar. 16, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296935A1.pdf (last visited May 24, 2010).

52. *See, e.g.,* Digital Britain, Implementation Update (Dec. 2009), *available at* http://webarchive.nationalarchives.gov.uk/20100407120701/http://www.culture.gov.uk/images/publications/DB_Implementationplan_Dec09.pdf (last visited May 24, 2010).

- (b) a copy of its annual financial statements and its auditor's report;
- (c) a list of shareholders owning one percent or more of the total shares in the body corporate, their nationality, the number of shares held by each and whether or not control of the body corporate is vested in persons possessing Bermudian status within the meaning of the Bermuda Immigration and Protection Act 1956; and
- (d) the percentage of its employees possessing Bermudian status within the meaning of the Bermuda Immigration and Protection Act 1956.

(2) The Authority may require pursuant to regulations established by the Responsible Minister an authorisation holder to submit, at the time specified by the Authority, any additional reports or information—

- (a) specified pursuant to sectoral legislation; or
- (b) that the Authority requires to be submitted pursuant to—
 - (i) an authorisation condition; or
 - (ii) a regulation or administrative determination.

(3) The Authority shall file with the Minister and post on the Authority's website, not later than March 30 of each calendar year, an annual economic analysis of the electronic communications industry for the calendar year most recently ended that shall contain, at a minimum, the following information:

- (a) Accurate and timely monthly, quarterly, and annual statistics on prices, number of lines or subscribers, minutes of use, transmission speeds, and service quality for each category of service whose provision requires the grant of a licence by the Authority.
- (b) Scientifically rigorous monthly, quarterly, and annual consumer price indices for each category of service whose provision requires the grant of a licence by the Authority.
- (c) A scientifically rigorous quantification of the effect on consumer welfare in the most recent calendar year of the policies previously adopted by the Authority as a result of any final report, recommendation, or decision issued by the Authority following a public consultation.

~~(3)~~(4) Failure of the Authority to comply with subsections (1) through (3) shall be cause for removal of the Chief Executive, notwithstanding any other provision of this Act to the contrary.

Register

54 (1) The Authority shall maintain a public register of all licences, permits or other authorisations that it grants, modifies, revokes or suspends.

- (2) The register shall contain—
 - (a) the name of the authorisation holder;
 - (b) the address of the authorisation holder;
 - (c) any additional information required by sectoral legislation; and
 - (d) any additional information that the Authority determines would be useful to the public.
- (3) The Authority shall update the register on a timely basis.
- (4) The Authority shall make the register available for public inspection at its offices during normal office hours and shall publish a copy on its official website.

Division 2
Consumer Protection

Industry codes

As BTC noted previously, while the Authority may encourage self-regulation or co-regulation, it cannot mandate either self-regulation or co-regulation and further delegate its legitimate authority to other parties. The Ministry's attempt to mandate self-regulation is, in fact, a contradiction in terms since self-regulation implies *self-initiated* regulation. Any regulation that is mandated is inherently *not* self-regulation. That said, there may be instances where the industry *does* take the initiative to self regulate (which the industry may determine would require a statutory instrument to enforce), and the Ministry and the Authority should welcome and assist such efforts. Thus, BTC does not agree that the following principles are lawful or desirable. With respect to consumer protection, see our comments at ECA 25.

55 ~~—The Authority, by general determination, may authorise industry self-regulatory or co-regulatory bodies to adopt codes of practice concerning the provision of covered services to end users.~~

~~(2) Any code adopted pursuant to subsection (1) shall comply with any applicable requirements contained in sectoral legislation, and may contain any or all of the following—~~

- ~~(a) procedures regarding disclosure of the rates, terms and conditions on which a sectoral provider will supply covered services to end users;~~
- ~~(b) quality of service requirements;~~
- ~~(c) requirements regarding the accuracy, contents and timeliness of bills for covered services provided to end users;~~

~~(d) — dispute resolution procedures designed to resolve end user complaints;
or~~

~~(e) — any additional consumer protection requirements.~~

~~(3) — In any case in which the Authority has delegated to a co-regulatory body the power to adopt a code, the Authority, by general determination, may take any or all of the following actions —~~

~~(a) — review and, if appropriate, approve any code proposed by the co-regulatory body;~~

~~(b) — review and, if appropriate, approve any modifications to the code;~~

~~(c) — withdraw approval of the code; or~~

~~(d) — give notice that the Authority will not approve, or will withdraw its approval, unless the co-regulatory body makes specific modifications to the code.~~

~~(4) — The Authority shall only approve a code of practice prepared by a co-regulatory body if the Authority concludes that the dispute resolution procedures contained in the code —~~

~~(a) — are administered by a person who is independent of both the Authority and the parties to the dispute;~~

~~(b) — are easy to use and effective;~~

~~(c) — allow end users who are natural persons to use the procedures free of charge;~~

~~(d) — ensure that all information necessary to resolve the dispute is obtained;~~

~~(e) — ensure that disputes are effectively investigated;~~

~~(f) — include provisions conferring power to make awards of appropriate compensation; and~~

~~(g) — provide for review by the Authority.~~

~~Codes adopted by the Authority~~

~~56 The Authority, by general determination, may adopt, modify or revoke codes specifying the obligations of sectoral providers, or of any category of sectoral provider, in the conduct of their businesses.~~

Dispute resolution

57 (1) The Authority, by general determination, and pursuant to regulations established by the Responsible Minister shall establish procedures to resolve disputes between sectoral providers and end users regarding the provision of covered services.

(2) The general determination provided for in subsection (1) shall provide that—

- (a) an end user that has a dispute with a sectoral provider must first seek to resolve the dispute through negotiation within a reasonable timeframe;
- (b) if the sectoral provider is subject to an approved code that contains a dispute resolution procedure, the end user must make use of that procedure;
- (c) if the parties are unable to resolve a dispute through negotiation, or through any industry dispute resolution procedure contained in an approved code, the end user may file a complaint with the Authority, which shall contain all relevant information;
- (d) if the Authority is unable to facilitate an informal resolution of the dispute within sixty days after receiving the complaint, the Authority shall—
 - (i) if both parties consent, refer the matter to arbitration, at the parties' expense;
 - (ii) conduct an adjudication; or
 - (iii) if the Authority determines that the complaint is plainly without merit, issue a decision and order dismissing the complaint; and
- (e) if the Authority conducts an adjudication, after issuing an adjudicative decision and order, the Authority also may—
 - (i) direct the sectoral provider to take a specified action; and
 - (ii) where appropriate, take enforcement action.

Division 3

Supervision of entities with significant market power

Procedures for determining whether to impose *ex ante* remedies

The legislation should incorporate explicitly the role of economic analysis—particularly empirical analysis—in the Regulatory Authority's procedures for determining whether a provider in fact possesses "significant market power." Given the significant administrative and economic costs of *ex ante* regulation, it is imperative that the Authority base its decision to impose *ex ante* regulation on scientifically rigorous economic analysis, particularly empirical analysis.

Antitrust scholarship has accepted that there are two types of errors in antitrust enforcement, discussed in a seminal article by Judge Frank Easterbrook: type I errors

("false positives") and type II errors ("false negatives").⁵³ False positives involve mistakenly finding and penalising an antitrust offence when the party in question did not behave anticompetitively (that is, even if a party harmed a competitor, the party's conduct had no anticompetitive effect on the competitive process or consumer welfare). False negatives involve mistakenly failing to punish a party guilty of anticompetitive conduct. False positives are analogous to regulators imposing *ex ante* remedies where no market failure exists; false negatives are analogous to failing to impose remedies when a market failure does exist. False positives occur frequently when a firm that happens to possess market power engages in a practice that may appear to be anticompetitive on its face, but to no anticompetitive effect.

It bears emphasis that many so-called anticompetitive practices result in procompetitive outcomes. For example, in U.S. antitrust law, exclusive dealing is an antitrust offence, but because it can generate competition-enhancing efficiencies,⁵⁴ it is not anticompetitive or unlawful on its face. The scholarship on false positives and false negatives widely concludes that the social costs of false positives are substantially higher than the social costs of false negatives. Consequently, antitrust enforcement is justified only if the costs from the anticompetitive conduct dominate any precompetitive benefits that accrue from the conduct in question. In the context of regulation, the literature on false positives and false negatives implies that even if a market is not perfectly competitive—there may be a firm with market power—there can still be robust rivalry among firms through which consumers benefit from reduced prices at higher qualities.

Simplistic market share analysis often fails to account for a host of factors that indicate effective competition. Consequently, a regulator that relies only on market-share calculations without conducting further scientifically rigorous empirical analysis is far more likely to generate false positives. Regulation is costly to firms, both in terms of compliance and the uncertainty that regulation creates with respect to the ability to recoup investments. Thus, overly broad regulation resulting from superficial market analysis would reduce incentives of firms to invest in new technologies. The effect would be to distort incentives and competition rather than promote competition. Moreover, it is often the case that overly broad regulation reduces incentives of firms to enter markets. Consequently, by employing only simplistic market-share analysis, a regulator would increase the risk that it would perpetuate unnecessary and harmful regulation on the basis of falsely positive

53. See Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984).

54. For example, a dominant automobile manufacturer may hesitate to enter a geographic market because there is considerable risk that demand will be insufficient to justify the investment in the market. To reduce risk and thereby reduce cost, the manufacturer may make exclusive dealings with car dealerships in the area. The effect is to increase output in the market, which benefits consumers.

assumptions of market failure. Arbitrary regulation creates inefficiency, reduces investment incentives, and harms long-term consumer welfare.

To reduce the likelihood that it leads the Regulatory Authority to inadvertently and continuously pass regulations that are unnecessary or even harmful, BTC recommends that the draft legislation include a standard of scientific rigor that rests upon economic principles. The particular metrics that the Authority will use in market and sectoral review need not be determined in this legislation, but to provide a general framework, the use of scientific evidence to establish market failures must be required. Scientific evidence for analysing the competitiveness of markets includes demand complementarities, price elasticities (reflecting consumer substitutability or supplier substitutability), the rate of technological change, and the type of economic rents that prevail in a market (that is, whether supranormal returns are attributable to the possession of scarce resources, possession of innovative products and processes, or to anticompetitive abuses of market power).⁵⁵ Analysing these metrics would most likely yield significantly different results than relying on market shares and market concentration alone. For these reasons, the Regulatory Authority Act should explicitly incorporate the role of scientifically rigorous economic analysis, particularly empirical analysis, in the threshold requirements for determining the existence of significant market power and the resulting need to impose *ex ante* remedies.

In the case that the Authority imposes *ex ante* remedies that are unjustified by scientific evidence, the sectoral provider in question should have the right of judicial review with respect to the relevant market and the need for the particular *ex ante* remedy. The Authority's determination of the relevant market would be erroneous if it equated the relevant market to the service that a given firm is licenced to sell.

The Authority may also have defined the relevant market too narrowly if it failed to account for network products supplied by private networks or competitive constraints created by *intermodal* competition—particularly competition between wireless and wireline. The failure to account for such factors would lead to misleadingly narrow relevant markets, which would cause the Authority either to find significant market power where it either does not exist or to impose *ex ante* remedies on a provider who has significant market power but has no incentive to exercise its market power because it could not *profitably* do so. For these reasons, we add RAA 58(3) that outlines the rebuttable presumptions that should be granted to sectoral providers subject to *ex ante* remedies.

55. These economic rents are also referred to as scarcity (Ricardian) rents, entrepreneurial (Schumpeterian) rents, and monopoly (Porterian) rents, respectively. Although all forms of economic rents yield supranormal returns, only monopoly rents ought to be the target of regulation. See J. Gregory Sidak & David J. Teece, *Dynamic Competition in Antitrust Law*, 5 J. COMPETITION L. & ECON. 581 (2009).

58 (1) Without prejudice to its authority to impose obligations on sectoral providers pursuant to section 85, the Authority may impose ex ante remedies on a sectoral provider with significant market power, when authorised to do so by sectoral legislation and pursuant to regulations established by the Responsible Minister.

(2) In any case in which sectoral legislation or regulations established by the responsible Minister directs the Authority to conduct a market review that relies on scientifically rigorous methods prior to imposing or maintaining ex ante remedies on a sectoral participant, the Authority, in accordance with sectoral legislation, shall—

- (a) identify those relevant markets in which ex ante remedies may be appropriate;
- (b) conduct a market review of each relevant market identified to determine whether any sectoral provider has significant market power; and

It is important to keep in mind that remedies are boundary rules governing the industry that must be established by the Minister prior to being implemented by the RA.

- (c) determine whether imposition or maintenance of ex ante remedies on a sectoral provider with significant market power is necessary and, if so, impose or maintain proportionate remedies.

(3) For purposes of conducting market review or imposing or maintaining ex ante remedies on a sectoral participant, rebuttable presumptions shall exist that—

- (a) the existing categories of licences do not constitute definitions of relevant markets based on scientific evidence;
- (b) the Government's existing policies on the number of licences, the scope of licences, and the availability of spectrum understate consumer substitutability and producer substitutability and tends to create a false appearance of significant market power;
- (c) actual or potential self-provision of private networks by end users prevents sectoral participants from acquiring or exercising market power with respect to business services; and
- (d) voice services supplied by wireless networks compete in the same relevant market as wireline networks.

Resolution of disputes involving sectoral providers with significant market power

59 (1) The Authority, when requested to do so, shall seek to resolve disputes between sectoral providers regarding the alleged failure of a sectoral provider with significant market power in a relevant market to discharge a duty to which it is subject by virtue of this Act, sectoral legislation, or any regulation or administrative determination made by the Authority or the Responsible Minister.

The following dispute procedures constitute aggregation rules that fall under the responsibility of the Responsible Minister in governing the sector.

(2) The ~~Authority~~Responsible Minister, by general determination, shall establish procedures to resolve the type of disputes specified in subsection (1).

(3) The general determination provided for in subsection 0 shall provide that—

(a) a sectoral provider who claims that another sectoral provider that has significant market power in a relevant market has failed to discharge a duty to which it is subject by virtue of this Act, sectoral legislation, or any regulation or administrative determination made by the Authority must first seek to resolve the dispute through negotiations; and

(b) after seeking to resolve any dispute through negotiation, the sectoral provider may file a complaint with the Authority, which shall contain all relevant information;

(c) if the Authority is unable to facilitate an informal resolution of the dispute within sixty days after receiving the complaint, the Authority shall—

(i) if both parties consent, refer the matter to either binding or non-binding arbitration;

(ii) conduct an adjudication; or

(iii) if the Authority determines that the complaint is plainly without merit, issue a decision summarily dismissing the complaint.

(4) If the Authority conducts an adjudication, the Authority, after issuing an adjudicative decision and order, may also take one or both of the following actions—

(a) direct either sectoral provider to take specified actions; or

(b) where appropriate, take enforcement action.

PART VI ADMINISTRATIVE PROCEDURES

Division 1

Administrative determinations and advisory guidelines

Informal fact finding

60 (1) The Authority may perform research, conduct analysis and hold informal discussions with any person for the purposes of collecting information regarding any matter over which it has authority without commencing a public consultation or an adjudication.

(2) Any communications to the Authority in connection with any activity specified in subsection (1) shall not be subject to the restrictions on ex parte communications.

Selection of administrative procedures; use of evidence

We revise RAA 61(3) and RAA 61(5) so that the legislation holds the Authority accountable for selecting and creating nonarbitrary regulations.

First, regulatory decision-making should be required to rely on scientific evidence. This means giving due regard to all the relevant facts of the market and industry. Failure to do so could result in (1) the failure to use and impose remedies when a problem needs fixing, (2) the use of *ex ante* remedies that attempt to fix a problem that does not exist, or (3) the use of remedies that fail to fix a problem. In the latter two scenarios, it can be said that the regulator's decisions are "arbitrary." It is obvious that failure to use remedies when a market failure exists imposes social costs on consumers. Arbitrary regulation imposes even greater costs because it can create additional market failures in the form of reduced incentives to invest or heightened Government-imposed barriers to entry.

To reduce the risk of harmful, arbitrary regulation, regulatory decisions—whether regulation is necessary and what remedy should be selected or created—should be based on scientific evidence. Currently, RAA 61(3) requires the use of "best available evidence." This term is vague and would not hold the Authority accountable for making regulatory decisions that are specifically directed toward increasing consumer welfare. Therefore, we replace "best available evidence" with "scientifically rigorous evidence."

Second, there should not be a reliance on international best practices and benchmarking unless benchmarking can be based on scientific evidence and methods if there is insufficient evidence, as is directed in RAA 61(5). As it stands, this provision would permit the Regulatory Authority to choose international benchmarks arbitrarily, without regard to the actual relevance of those benchmarks to the environment of Bermuda's telecommunications industry ("physical and material conditions" in the lexicon of the Institutional Analysis and Development framework), including benchmarks that favour the implementation of Euro-centric *ex ante* remedies. As we explain above in our given definition of "international best practices," the countries examined when using international best practices should not result from a selection bias to achieve a desired regulatory outcome. If the Government aims to advance the long-term benefit of Bermudian consumers, it should give due regard to international best *results* when making regulations.

More generally, it is questionable whether the Authority could find a country similar enough to Bermuda's unique economic and competitive climate to justify the use of that country's regulatory regime as a benchmark for Bermudian regulation. Particularly when compared with the European Union, the practices of which the draft regulation seems to rely on heavily, Bermuda clearly has a very different economic profile. Bermuda has the fourth highest per capita GDP—which exceeds

all of the countries in Europe. But Bermuda's education expenditures as a percentage of GDP rank 177th in the world, far below every country in the EU.⁵⁶ If one plots per capita income against education expenditures as a percentage of GDP for the developed nations of the world, Bermuda is far above the line, and to the left, whereas the EU nations are lower and to the right. Because of the high labor costs and cost of living in Bermuda, international benchmark prices could suggest that industry prices in Bermuda are supracompetitive when price competition actually exists as a result of intercarrier or intermodal competition.

The use of international benchmarking in the context of electronic communications reflects that the drafters of the legislation conspicuously ignore an important characteristic of Bermuda's electronic communications industry that distinguishes it from the industries in virtually every nation that employs the regulatory structure the draft legislation advocates. Bermuda's electronic communications industry has arisen exclusively from private ownership and private investment. Unlike the nations of the EU, Bermuda did not have a government-owned telephone company. All investment in Bermuda needed to be coaxed from private sources in the belief that there would be a return of, and on, the capital being invested. Moreover, that return on investment needed to be competitive, for the amount of risk being borne, with the returns that could be earned from investing that amount of capital elsewhere instead. Bermuda had no state-owned industry to privatize, as in Britain, Germany, France, Spain, Italy, Belgium, the Netherlands, Ireland, Portugal, and so on.

If the Authority is to rely on international cost and price benchmarks, it must analyse the usefulness of those benchmarks to Bermuda's particular regulatory needs in accordance with recognised scientific methods. To factor out the substantial differences between Bermuda and other countries that affect costs and prices, the Authority could, for example, use multiple regression analysis. Multiple regression analysis is a widely accepted statistical method used by economists and social scientists alike to determine the effect that independent factors ("independent variables") have on a given phenomenon (the "dependent variable").⁵⁷ Multiple regression analysis allows one to isolate the effect of a particular factor on the dependent variable while holding other confounding factors constant. Incorporating this sort of scientific method in the practice of international benchmarking would enable the Authority to minimise the arbitrariness of regulated rates.

56. CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK, Country Comparison: Education Expenditures available at <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2206rank.html?countryName=Bermuda&countryCode=bd®ionCode=na&rank=177#bd> (last visited June 15, 2010).

57. See, e.g., FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 180 (2d ed. 2000).

In a 2002 article published in the *Journal of Network Industries*, J. Gregory Sidak and a coauthor used multiple regression analysis to determine a nonarbitrary interim rate for access to unbundled local loops in the Republic of Ireland.⁵⁸ In 2001, the Office of the Director of Telecommunications Regulation (ODTR) set interim prices for access by competitors to the local network of the incumbent carrier that equaled an average of the prices in ten EU countries for the same service. A simple average does not produce reliable in-sample predictions when the sample variance is large relative to the sample mean—as is the case with the prices of unbundled loops in the EU countries. A benchmarking method like averaging would ignore relevant information that affects costs and therefore price, such as population, wage rate, population density, and the degree of urbanization. It bears repeating that Bermuda would very likely be an outlier with respect to all of those factors, which is all the more reason to use scientific methods when benchmarking against other countries' costs and prices. The price determined by the multiple-regression model that accounted for those factors generated an interim rate that was 42 percent higher than the rate set by the ODTR. By using such scientific methods, the Authority would be able to set prices that are appropriate for Bermuda and Bermuda's industries, to the long-run benefit of Bermudian consumers. Indeed, the use of scientific analysis such as multiple regression reduces the risk that the Authority would set regulated prices so low as to discourage investment and innovation, as is typically the result of artificially low prices.

Finally, the decision even to adopt an international best practice must give due regard to Bermuda's unique geography and electronic communications industry. It is not simply a matter of adjusting international policies to "fit" Bermuda. Policies that are "international best practices" may be completely inapplicable to Bermuda, given the country's small and uniquely urbanised population. For example, universal service provisions have been widely adopted internationally, but most countries implement universal service funding provisions only in rural areas that do not yet have broadband access.⁵⁹ Bermuda, however, does not have the expansive, sparsely populated rural regions that commonly justify universal service provisions. Put differently, the *need* for a particular *ex ante* remedy or policy should not be established by the fact that the remedy or policy has been adopted elsewhere.

For these reasons, the provisions with regard to using international benchmarks should include the use of scientific methods.

58. J. Gregory Sidak & Hal J. Singer, *How Can Regulators Set Nonarbitrary Interim Rates? The Case of Local Loop Unbundling in Ireland*, 3 J. NETWORK INDUS. 273 (2002). See also J. Gregory Sidak & Hal J. Singer, *Interim Pricing of Local Loop Unbundling in Ireland: Epilogue*, 4 J. NETWORK INDUS. 119 (2003).

59. See, e.g., Stefan Heng, *Broadband Infrastructure: The Regulatory Framework, Market Transparency and Risk-Sharing Partnerships Are the Key Factors* 11-13 (Deutsche Bank Research, May 26, 2010) (surveying the national broadband policies in Australia, Finland, the United Kingdom, Japan, Sweden, South Korea, and the United States).

61 (1) Except where this Act or sectoral legislation expressly requires the use of a specific administrative procedure, the Authority may choose whether to conduct—

- (a) a public consultation; or
- (b) an adjudication.

(2) The Authority shall make rules, consistent with the provisions of this Act, setting out the procedures applicable to adjudications and public consultations.

(3) In making administrative determinations in accordance with this Act, the Authority shall base its conclusions on ~~the best evidence available~~ scientifically rigorous evidence.

(4) The Authority shall have the power to access, review and rely on all relevant information in the possession of a Responsible Minister or any regulatory body previously authorised by law to supervise, monitor or regulate a regulated industry sector.

(5) In the absence of sufficient evidence that is specific to Bermuda, the Authority may consider and, after scientifically rigorous confirmation of the relevance to Bermuda, and rely on international best practices, benchmarks and data from countries ~~that the Authority deems relevant~~. If the Authority considers any best practices, benchmarks, and data from other countries, it shall include objective consideration of the best practices, benchmarks, and data of countries in North America having a high level of economic development.

General Determinations

62 (1) Except where this Act or sectoral legislation provides that a Responsible Minister or the Minister of Finance is to make a regulation, the Authority may make general determinations to carry out the provisions and purposes of this Act, sectoral legislation or any regulation.

(2) Any general determination—

- (a) shall be made following a public consultation;
- (b) shall constitute a statutory instrument, pursuant to the Statutory Instruments Act 1977;
- (c) shall be subsidiary to this Act, sectoral legislation and any regulation; and
- (d) may be revoked or modified by the Authority or the Responsible Minister through the adoption of a subsequent general determination.

(3) In any case in which the Authority makes a general determination, the Authority shall issue a decision and order adopting the general determination and shall promptly forward the general determination to the Cabinet Secretary, who shall—

- (a) assign a number to the general determination, pursuant to the Computerisation and Revision of Laws Act 1989; and

(b) cause it to be published in the Gazette.

(4) Section 6 of the Statutory Instruments Act 1977 does not apply to any general determination made by the Authority.

Orders

- 63 (1) The Authority may issue orders that do any or all of the following—
- (a) granting or denying any application or request received from a sectoral participant;
 - (b) approving, modifying or disapproving any submission received from a sectoral participant;
 - (c) clarifying the application of any statutory provision, regulation or administrative determination to a specific factual situation; and
 - (d) taking any other action within the scope of its authority, other than an action that may only be taken by the adoption of a general determination or an adjudicative decision.
- (2) The Authority shall provide written notice of the order to any sectoral participant specified in an order.
- (3) Any order shall be binding on any sectoral participant specified therein.

Directions

- 64 (1) In any case in which the Authority concludes that a sectoral participant is acting in a manner not in accord with its duties and obligations under this Act, sectoral legislation, any regulation, any administrative determination, an adjudicative decision or any authorisation, the Authority may direct the sectoral participant to take, or refrain from taking, such actions as the Authority reasonably determines to be necessary to ensure that the sectoral participant acts in conformity with its duties and obligations.
- (2) Before issuing a direction, the Authority shall give the sectoral participant notice and shall specify a reasonable period of time during which the sectoral provider may present its views or take action that would obviate the need for the direction.
- (3) Any direction—
- (a) shall be binding on the sectoral participant to which it is addressed; and
 - (b) may be modified or revoked by the Authority, after giving notice of the proposed modification or revocation and following the procedures specified in subsection (2), at any time.

Decisions

In addition to using scientific methods in regulatory decision-making, the Authority should explain the specific scientific methods that it has used. Requiring the

Authority's written decisions to reflect scientific rigor will ensure transparency. This transparency would help to hold the Authority accountable for using scientific methods, and it would help to protect the Authority from unwarranted challenges to its decisions. To ensure that the Authority and sectoral providers benefit from increased transparency, RAA 65 should require that the written decisions demonstrate the use of scientific evidence and methods.

65 The Authority shall issue a written decision incorporating scientifically rigorous methods of analysis, specifying the relevant facts and providing a reasoned explanation for its actions—

- (a) in connection with the adoption of any administrative determination; and
- (b) in any other circumstances in which it is required to do so pursuant to this Act or sectoral legislation.

Interim and emergency determinations

66 (1) The Authority may make a general determination on an interim basis, pending the completion of the public consultation, provided that the Authority—

- (a) issues a statement explaining the basis on which it has issued the general determination on an interim basis; and
- (b) files the interim general determination with the Cabinet Secretary for publication in the Gazette, at which point it will become effective.

(2) The Authority may make a general determination on an emergency basis without complying with the public consultation procedures specified in this Act whenever the Authority concludes that the urgency of a particular case requires that it do so.

(3) The Authority shall promptly publish on its official website any general determination made pursuant to subsection (2).

(4) Any general determination made pursuant to subsection (2) shall be effective, as applied to a specific sectoral participant, at the earlier of the date on which—

- (a) the sectoral participant has actual notice of the general determination;
or
- (b) the general determination is published in two newspapers of general circulation in Bermuda.

(5) In any case in which the Authority makes a general determination pursuant to subsection (2), the Authority shall—

- (a) file the emergency general determination with the Cabinet Secretary for publication in the Gazette as promptly as possible; and

- (b) within fourteen days after the day on which the Authority makes the emergency general determination, or any longer period approved by the Responsible Minister, commence a public consultation.

(6) Any general determination adopted on an interim or emergency basis pursuant to this section shall remain in effect for no more than six months, unless the Authority, with the approval of the Responsible Minister, causes a notice to be published in the Gazette extending the effective period for up to an additional six months.

Effective date of administrative determinations

67 (1) Unless the Authority has granted confidential treatment, the Authority shall publish on its official website—

- (a) the administrative record of each public consultation; and
- (b) all administrative determinations.

(2) A general determination shall become effective on the later of—

- (a) the date on which it is published in the Gazette; or
- (b) the date specified by the Authority in the general determination.

(3) Any administrative determination, other than a general determination, shall become effective on the later of—

- (a) the date on which it is published on the Authority’s official website; or
- (b) the date specified by the Authority in the administrative determination.

Advisory guidelines

68 (1) The Authority may issue advisory guidelines regarding any matter within the scope of its authority.

(2) Any advisory guideline—

- (a) may be adopted following a public consultation;
- (b) shall be published on the Authority’s official website;
- (c) shall provide the Authority’s reasoned views regarding the matter, but shall not impose legally binding obligations on the Authority or on any person; and
- (d) may be modified or revoked by the Authority at any time.

*Division 2
Public Consultations*

Request to initiate a consultation

69 (1) The Authority may initiate a public consultation in order to—

- (a) prepare a report;
 - (b) make a recommendation to a Responsible Minister; or
 - (c) adopt an administrative determination.
- (2) The Authority may initiate a public consultation—
- (a) on its own initiative; or
 - (b) in response to a written request from any person.
- (3) The Authority shall initiate a consultation when requested to do so by a Responsible Minister.
- (4) In any case in which a person submits a request to initiate a public consultation, but the Authority determines not to grant the request, the Authority, within a reasonable period of time, shall issue a decision and order denying the request.

Consultation document

70 (1) The Authority shall commence a public consultation by publishing a consultation document on its official website and by advising all parties under its jurisdiction of that fact.

- (2) The consultation document shall include—
- (a) the relevant factual and legal background;
 - (b) the issues on which public comment is sought;
 - (c) any tentative conclusions that the Authority has reached including, where appropriate, proposed language for any regulation that the Authority proposed to recommend to the Responsible Minister or any administrative determination that the Authority proposes to adopt;
 - (d) any questions that the Authority may request interested parties to address;
 - (e) the date by which responses must be filed; and
 - (f) the name and contact information for the staff member who will serve as the principal point of contact for interested persons during the public consultation.

Record

71 The administrative record in a public consultation shall include—

- (a) the consultation document;
- (b) any public notices issued by the Authority;
- (c) any responses submitted to the Authority;

- (d) the transcript of any hearing conducted by the Authority;
- (e) a record of any *ex parte* communications regarding the public consultation;
- (f) any additional material, not generally available to the public, on which the Authority relied;
- (g) any reports, recommendations or decisions, whether preliminary or final, adopted in the course of the public consultation; and
- (h) the decision and order adopting any administrative determination following a public consultation.

Preliminary and final reports, recommendations and decisions

We have stressed the need for scientific evidence in market reviews. It is just as important that the conclusions that the Authority reaches based on its scientific analysis—and thus the decisions that it makes with respect to whether it imposes *ex ante* remedies or which remedy it selects—result from scientific reasoning as well. If the connection between the evidence and the decision reflects no scientific rigor, then the decision is still arbitrary.⁶⁰ Thus, to ensure that the conclusions and decisions that the Authority makes are appropriate given the evidence, and to ensure transparency between the Authority and sectoral providers, the “explanation of the basis on which the Authority revised any significant factual finding, policy determination or legal conclusion contained in the preliminary report, recommendation or decision”⁶¹ should reflect scientific rigor. Thus, we add “and scientifically rigorous” before “explanation” in RAA 72(4)(b).

72 (1) Within a reasonable period after the conclusion of the initial consultation period, the Authority shall issue—

- (a) a preliminary report;
- (b) preliminary recommendation; or
- (c) a preliminary decision and order.

(2) The preliminary report, recommendation or decision and order shall—

- (a) summarise significant material in the administrative record;

60. It is instructive to consider the standards for the admissibility of expert testimony as analogous to the standards for scientifically rigorous regulatory decision-making. In *General Electric Co. v. Joiner*, the U.S. Supreme Court specified that “nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.” *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

61. RAA, *supra* note 3, § 72(4)(b).

- (b) provide a reasoned explanation of the basis on which the Authority made any significant factual finding, policy determination and legal conclusion;
- (c) in the case of a preliminary report, state the Authority's preliminary conclusions;
- (d) in the case of a preliminary recommendation, state any policy or regulations that the Authority proposes to recommend to the Responsible Minister;
- (e) in the case of a preliminary decision and order, state the proposed administrative determination that the Authority proposes to make; and
- (f) establish the procedures and timeframes for submitting responses regarding the preliminary report, recommendation or decision.

(3) The Authority shall provide the public with a reasonable period in which to file written responses to the preliminary report or decision.

(4) Within a reasonable period of time after the close of the period specified by the Authority pursuant to subsection (3), the Authority shall publish a final report, recommendation or decision, which shall—

- (a) summarise the responses received regarding the preliminary report, recommendation or decision;
- (b) provide a reasoned and scientifically rigorous explanation of the basis on which the Authority revised any significant factual finding, policy determination or legal conclusion contained in the preliminary report, recommendation or decision;
- (c) in the case of a final report, state the Authority's final conclusions;
- (d) in the case of a final recommendation, state the policy or regulation that the Authority recommends the Responsible Minister adopt; and
- (e) in the case of a final decision and order, specify—
 - (i) any administrative determinations that the Authority has adopted; and
 - (ii) the date on which such administrative determinations will become effective.

Restrictions on ex parte communications

73 (1) Unless the Authority provides otherwise, any interested person may make an ex parte communication during the course of a public consultation.

(2) In any case in which a person makes an ex parte communication to the Authority during the course of a public consultation, within one business day after the date on

which the ex parte communication occurred, the person who made the ex parte communication shall submit to the Secretary—

- (a) a written description of the issues discussed and the positions espoused; and
- (b) a copy of any written materials provided.

(3) A Commissioner or member of the staff to whom an ex parte communication is made shall take all reasonable measures to ensure that the party that made the ex parte communication complies with the obligation specified in subsection 73.

(4) Within one business days after the submission required pursuant to subsection 73 is submitted to the Secretary, the Secretary shall cause to be posted on the Authority's official website—

- (a) a notice of the ex parte communication;
- (b) a copy of the submission specified in paragraph 73(a); and
- (c) any written materials submitted pursuant to paragraph 73(b), other than materials for which the Authority has granted confidential treatment.

Division 3
Adjudication

Situation in which adjudication required

74 (1) The Authority shall proceed by means of adjudication when—

- (a) conducting an enforcement proceeding; or
- (b) in any case in which the Authority is required to do so by this Act or by sectoral legislation.

(2) The Authority, with the consent of the Chief Justice, shall make rules governing the procedures to be followed in an adjudication.

Notice

75 (1) The Authority shall commence an adjudication by giving notice to the parties that a prehearing conference, hearing or other stage of an adjudication will be conducted.

(2) The notice shall set the time and place of the hearing, which shall be at least fourteen days after the date on which the notice is served on the parties.

Presiding officer

76 (1) In any adjudication, the Chairman shall select a qualified person to serve as a presiding officer, provided that the person selected—

- (a) must not have had any prior direct involvement in the matter that is the subject of the adjudication;

- (b) must not have any conflict of interest or experience that would preclude him from being able to act, and be perceived as acting, in an impartial manner in regard to the adjudication over which he is to preside; and
- (c) must be a barrister and attorney in good standing.

(2) In any case in which the Authority conducts an adjudication in connection with an enforcement action pursuant to section 93, the Chairman, with the consent of the Chief Justice, shall select an independent presiding officer who meets the standards specified in subsection (3).

(3) A person may serve as an independent presiding officer in an enforcement proceeding, if the person—

- (a) meets the standards specified in subsection (1); and
- (b) is not—
 - (i) a member of the Board of Commissioners;
 - (ii) a member of the staff; or
 - (iii) an agent or legal representative of the Authority.

(4) An independent presiding officer—

- (a) shall receive remuneration for services rendered, in accordance with the Government Authorities (Fees) Act 1971, without regard to any substantive or procedural decision made by the presiding officer in the performance of his duties; and
- (b) may only be removed by the Board of Commissioners—
 - (i) for cause;
 - (ii) with the unanimous consent of the Commissioners; and
 - (iii) with the approval of the Chief Justice.

Intervention

77 (1) Any person who seeks to intervene in an adjudication shall file a request with the presiding officer stating the basis on which he seeks to intervene.

(2) The presiding officer shall grant a petition for intervention upon determining that the person seeking to intervene—

- (a) has a legal interest in the matter that is the subject of the adjudication that will be affected by the outcome of the adjudication; or
- (b) has any other substantial interest that will be affected by the outcome of the adjudication; and

- (c) intervention by that person will not impair the orderly conduct of the proceedings.

(2) The presiding officer may impose conditions or limitations upon an intervenor's participation in the proceedings, at any time.

Hearing Procedures

78 (1) The presiding officer shall regulate the course of the proceedings, in conformity with the rules made by the Authority.

(2) The presiding officer shall have the power to issue orders necessary for the conduct of the proceedings including, but not limited to, orders—

- (a) convening hearings;
- (b) summoning witnesses, expert or otherwise;
- (c) requiring the examination of witnesses on oath or otherwise; and
- (d) compelling the production of any document, record or thing relevant to the subject matter of the proceeding.

(3) If any party fails to comply with a valid order issued by a presiding officer, the Authority may issue a direction pursuant to section 64(1) and, in addition, may either—

- (a) initiate an enforcement action; or
- (b) refer the matter to the Director of Public Prosecutions.

(4) The presiding officer, at appropriate stages of the proceeding, shall give all parties full opportunity to submit and respond to pleadings, motions, objections and offers of settlement.

(5) The presiding officer shall cause any hearing to be recorded or transcribed.

Record

79 The administrative record in an adjudication shall include—

- (a) notices of all proceedings;
- (b) any order;
- (c) any motions, pleadings or stipulations filed by the parties;
- (d) all evidence submitted;
- (e) any intermediate rulings;
- (f) the recording or transcript of any hearing; and
- (g) any preliminary adjudicative decision, final adjudicative decision or adjudicative decision on reconsideration.

Preliminary and final adjudicative decisions and orders

80 (1) The presiding officer shall prepare a preliminary adjudicative decision and order, which shall be submitted to the Board of Commissioners and provided to the parties.

(2) The preliminary decision and order shall contain—

- (a) a summary of the positions of the parties;
- (b) proposed findings of fact and conclusions of law; and
- (c) the proposed disposition of the matter, including any enforcement action to be taken or damages to be awarded.

(3) The preliminary decision and order also may propose requiring the payment of costs, which may include either or both of the following—

- (a) costs incurred by a party in connection with the adjudication; and
- (b) administrative costs and expenses incurred by the Authority in connection with the adjudication.

(4) The Board shall provide the parties to the proceeding with an opportunity to respond to the preliminary adjudicative decision and order.

(5) After the Board has made any revisions to the preliminary adjudicative decision and order that it deems appropriate, the Authority shall adopt a final adjudicative decision and order which shall be—

- (a) served on the parties; and
- (b) published on the Authority's official website with notice to all parties under its jurisdiction advising of that fact.

Informal adjudication

81 (1) Unless this Act or any sectoral legislation requires an adjudicative hearing, the Authority may conduct an informal adjudication.

(2) In any informal adjudication, the presiding officer may prepare a proposed preliminary adjudicative decision, solely on the basis of written pleadings filed by the parties.

(3) Once the presiding officer has prepared the preliminary adjudicative decision, the adjudication shall be conducted in the manner specified in section 80.

Reconsideration

82 (1) Any party to an adjudication may seek reconsideration of the Authority's adjudicative decision and order on the grounds that they are—

- (a) inconsistent with this Act or with any applicable sectoral legislation, regulation or general determination;
- (b) procedurally improper; or

(c) not supported by the administrative record.

(2) Any party seeking reconsideration must submit a written petition for reconsideration to the Board of Commissioners within twenty-one days of the date on which the final adjudicative decision is published on the Authority's official website, unless the Board specifies a longer period.

(3) Any petition for reconsideration must specify in reasonable detail the basis on which the party seeks reconsideration.

(4) A petition for reconsideration shall not—

- (a) repeat arguments that were made during the adjudication; or
- (b) introduce new arguments, or new evidence, that could have been, but were not, presented during the adjudication.

(5) Within a reasonable period of time following the close of the period for filing petitions for reconsideration, the Board of Commissioners shall issue an adjudicative decision on reconsideration which—

- (a) denies the petition in full;
- (b) grants the petition in part, and denies it in part; or
- (c) grants the petition in full.

(6) The decision and order on reconsideration shall be—

- (a) served on the parties; and
- (b) published on the Authority's official website.

(7) A final adjudicative decision and order shall not constitute final Authority action until either—

- (a) the time for filing petitions for reconsideration has ended, and no party has filed a request for reconsideration; or
- (b) one or more petitions for reconsideration have been filed and the Authority has issued an adjudicative decision and order on reconsideration.

Prohibitions on ex parte communications

83 (1) A presiding officer may not initiate or receive an ex parte communication regarding any issue in the adjudication over which he is presiding.

(2) Notwithstanding subsection (1), a presiding officer may receive aid from staff members who—

- (a) are subject to the presiding officer's supervision;

- (b) have no conflict of interest or who have complied with the procedures specified in section 310; and
 - (c) have not have had any prior direct involvement in the specific matter that is the subject of the adjudication.
- (3) Notwithstanding subsection (1), a presiding officer may—
- (a) provide information to persons employed by the Authority regarding scheduling and administrative matters related to the adjudication; and
 - (b) conduct settlement negotiations with the parties.
- (4) A presiding officer who receives a prohibited ex parte communication shall, within one business day after receiving the communication, place a notice in the administrative record stating the substance of the communication received, and the identity of each person from whom the presiding officer received such a communication.
- (5) The presiding officer shall not consider any information provided as a result of a prohibited ex parte communication in making any decision regarding the adjudication.

PART VII DUTIES OF SECTORAL PROVIDERS

General Duties

- 84 (1) All sectoral providers shall comply with—
- (a) any applicable requirement or prohibition contained in this Part;
 - (b) any applicable requirement or prohibition contained in sectoral legislation;
 - (c) all terms and conditions contained in any authorisation granted by the Authority;
 - (d) any applicable regulations or administrative determinations made by the Authority or the Responsible Minister; and
 - (e) any information requests made by the Authority.
- (2) In any case in which the Authority has reason to believe that a sectoral provider has contravened one of the requirements or prohibitions contained in this Part, the Authority may conduct an investigation pursuant to section 89 and, if appropriate, either—
- (a) initiate an enforcement action pursuant to section 93; or
 - (b) refer the matter to the Director of Public Prosecutions for appropriate judicial enforcement.

Prohibition of abuse of dominant position

85 (1) A sectoral provider that occupies a dominant position in a relevant market shall not use its dominant position in a manner that unreasonably restricts, or is likely to unreasonably restrict, competition in any relevant market.

The definition of dominant position should be revised to be consistent with the definition provided in RAA 2.

(2) ~~A sectoral provider occupies a dominant position in a relevant market if the sectoral provider possesses significant market power, as defined in this Act occupies a position of economic strength that allows it to behave to an appreciable extent independently of its competitors, customers and, ultimately, consumers.~~

(3) In making the finding provided for in subsection 0, the Authority may, in its discretion, rely on—

- (a) the administrative record compiled during adjudication; or
- (b) any relevant findings made by the Authority during a market review completed not more than eighteen months before the date on which the adjudication commenced.

The following general definition is overbroad and unnecessary in light of the specific offences listed in subsection (5).

~~(4) A sectoral provider that has significant market power engages in unilateral conduct that has restricted, or is likely to restrict, competition if such conduct—~~

- ~~(a) substantially restricts output below the level that would exist in a competitive market, increases prices above cost, reduces quality below the level that end users seek, reduces end users' choice or deters innovation in the relevant market; or~~
- ~~(b) preserves or enhances its dominant position by deterring or precluding undertakings from participating in the relevant market by means other than competing based on service availability, price and quality.~~

(5) Without limiting the generality of subsection 0, a sectoral provider that occupies a dominant position in a relevant market abuses its dominant position if the sectoral provider engages in—

- (a) predatory pricing;

The term of art in antitrust law is “price squeeze,” not “price squeezing.”

- (b) a price ~~squeezings~~squeeze;
- (c) unreasonable discrimination;
- (d) exclusionary refusals to deal; or

- (e) tying; ~~or.~~

The following residual category is too vague. If such sectoral legislation is subsequently enacted, this provision can be amended.

- ~~(f) — any other anti-competitive conduct that may be stipulated in sectoral legislation.~~

(6) Not later than one year after the date of assent to this Act, the Minister responsible for telecommunications, after conferring with the Authority, and giving due regard to international best practices, shall make a regulation establishing the criteria to be used to determine whether a sectoral provider has contravened any of the prohibitions specified in subsection (5).

(7) In any case in which the Authority determines that a sectoral provider occupies a dominant position in a relevant market and has engaged in conduct that constitutes an abuse of dominant position, the Authority may take any or all of the following actions—

- (a) direct the sectoral provider to cease the abusive conduct; or
- (b) take any other enforcement action.

Prohibition of unreasonable restraints of trade

86 (1) A sectoral provider shall not enter into any agreement, whether or not legally enforceable, that unreasonably restricts, or is likely to unreasonably restrict, competition in any relevant market.

(2) A sectoral provider contravenes subsection (1) if the sectoral provider agrees, expressly or tacitly, to—

- (a) fix prices;
- (b) restrict output;
- (c) co-ordinate separate bids;
- (d) allocate customers or geographic markets; or
- (e) not to do business with a specific supplier, sectoral participant or customer.

(3) Not later than one year after the date of assent to this Act, the Minister responsible for telecommunications, after conferring with the Authority, and giving due regard to international best practices, shall make a regulation establishing the criteria to be used to determine whether a sectoral provider has entered into an agreement that falls within one of the categories specified in subsection 86.

(4) In any case in which a sectoral provider has entered into an agreement that falls within one of the categories specified in subsection 86, no assessment of the actual or likely effects on competition of the agreement need be made in order to conclude that the sectoral provider has contravened subsection (1).

- (5) A sectoral provider has contravened subsection (1) if—
- (a) the sectoral provider agrees, expressly or tacitly, to perform an act that does not fall within one of the categories specified in subsection 86; and
 - (b) the actual or likely effect of the agreement is to unreasonably restrict competition in any relevant market.

(6) In any case in which the Authority, by means of an adjudication, determines that a sectoral provider has entered into an agreement that has unreasonably restricted, or is likely to unreasonably restrict, competition in any relevant market, the Authority may take any or all of the following actions—

- (a) direct the sectoral provider to modify the agreement to remove the unreasonable restriction;
- (b) declare the agreement to be void, in whole or in part; or
- (c) take any other enforcement action.

(7) A Responsible Minister, when authorised by sectoral legislation, may make a Regulation exempting all sectoral providers or specific classes of sectoral providers from the prohibitions contained in this section in connection with one or more categories of agreements.

Concentration review

87 (1) The Authority, by order published in the Gazette, and on its official website, may declare certain sectoral providers as designated sectoral providers, pursuant to the standards established in sectoral legislation or in regulations established by the Responsible Minister.

As the following provision constitutes a fundamental boundary rule governing the industry, the Responsible Minister has the responsibility for making this determination.

(2) No designated sectoral provider, and no person seeking to enter into a concentration that would provide it with control of a designated sectoral provider, shall close any transaction that would constitute a concentration without notifying the Authority Responsible Minister and obtaining the Authority's Responsible Minister's prior written approval.

- (3) A transaction shall be deemed to constitute a concentration if it results in—
- (a) a lasting change in control of a sectoral provider as a result of—
 - (i) a merger involving one or more previously independent sectoral providers; or
 - (ii) the acquisition of direct or indirect control of one or more sectoral providers; or

(b) the creation of a joint venture involving one or more sectoral providers performing on a lasting basis all the functions of an autonomous economic entity.

(4) The notification required pursuant to subsection 87 shall contain—

(a) a description of the proposed transaction;

(b) an assessment of the likely impact of the proposed concentration on competition in any relevant market within a regulated industry sector; and

(c) any proposed undertakings or conditions which the entity created by the concentration would agree to accept in order to mitigate or eliminate potential anti-competitive effects.

(5) The Authority shall issue a standard notification form to be completed by any designated sectoral provider and any person specified in subsection 87 in order to complete the notification process.

(6) The Authority may require any person seeking to enter into a concentration with a designated sectoral provider to provide any information that the Authority reasonably requires in order to conduct its review.

(7) Within four months of receiving the completed notification, or any longer period approved by the Responsible Minister, the Authority shall issue a recommendation to the Responsible Minister~~final order~~, which may—

(a) approve the proposed concentration;

(b) approve the proposed concentration, subject to conditions designed to reduce any adverse effect of the concentration on competition; or

(c) reject the proposed concentration.

(8) The four-month review period shall not include the period between the date on which the Authority issues an information request pursuant to subsection 0 and the date on which the person to whom the information request is directed has submitted a complete response.

(9) The Authority shall not recommend that the Responsible Minister approve a concentration where the Authority determines that the proposed concentration is likely to—

(a) create an entity with a dominant position or enhance an existing dominant position in any relevant market;

(b) substantially lessen competition in any relevant market; or

(c) harm the public interest.

(10) The conditions that the Authority may recommend that the Responsible Minister impose include—

- (a) compliance with any of the ex ante remedies specified in sectoral legislation;
- (b) partial divestiture to a purchaser approved by the Authority; or
- (c) any other condition that the ~~Authority Minister, with the approval of the Responsible Minister,~~ may adopt.

Prohibition of unfair trade practices

- 88 (1) A sectoral provider shall not engage in unfair trade practices.
- (2) A sectoral provider engages in an unfair trade practice where the sectoral provider—
- (a) engages in an improper, unethical or unscrupulous practice; and
 - (b) the practice has provided, or is likely to provide, the sectoral participant with a competitive advantage for itself or an affiliate in any regulated market in Bermuda, for reasons unrelated to the availability, price or quality of the service that the sectoral provider or its affiliate offers.
- (3) For the purpose of this section an “affiliate” means a person who directly or indirectly controls, is controlled by or is under common control of another person.
- (4) Not later than one year after the date of assent to this Act, the Minister responsible for telecommunications, after conferring with the Authority, giving due regard to international best practices, shall make a regulation establishing specific practices that constitute unfair trade practices.
- (5) In any case in which the Authority determines that a sectoral provider has engaged in an unfair trade practice, the Authority may take any or all of the following actions—
- (a) direct the sectoral provider to cease engaging in the unfair trade practice;
 - (b) declare void any agreement that was entered into as a result of the unfair trade practice; or
 - (c) take any other enforcement action.

**PART VIII
INVESTIGATION AND ENFORCEMENT**

Investigations

- 89 (1) The Authority may conduct an investigation, either on its own initiative or at the request of any person for any or all of the following purposes—
- (a) to gather information prior to, or as part of, a public consultation;
 - (b) to assess whether to initiate enforcement action against a sectoral participant;

- (c) to respond to a request for information from a Responsible Minister pursuant to section 6;
- (d) in any circumstance provided for by sectoral legislation; or
- (e) in other situations in which the Authority determines that doing so would be expedient.

(2) In order to conduct an investigation, the Authority may do any or all of the following—

- (a) convene an investigative hearing pursuant to section 90;
- (b) issue an order pursuant to section 91 requesting the production of information; and
- (c) appoint inspectors to gather information pursuant to section 92.

Investigative hearings

90 (1) In any case in which the Authority chooses to conduct an investigative hearing, the Chairman shall designate a presiding officer.

(2) A presiding officer—

- (a) shall meet the standards specified in section 76(1); and
- (b) shall have the authority specified in sections 78(1) and 78.

(3) The presiding officer shall cause the investigative hearing to be recorded or transcribed.

(4) At the conclusion of the hearing, the presiding officer shall submit a report to the Board of Commissioners.

(5) The presiding officer's report shall—

- (a) summarise the evidence gathered;
- (b) state any factual findings; and
- (c) make any appropriate recommendations.

Order to produce information

91 (1) Where necessary to perform its obligations under this Act or under sectoral legislation, the Authority may issue an order requiring a sectoral participant to take any or all of the following actions—

- (a) furnish such information as the Authority may reasonably require;
- (b) produce to the Authority any documents specified or described; or
- (c) keep such records as may be specified or described.

(2) An order under subsection (1) may specify the means by which, and the period during which, it is to be complied with.

(3) The power under this section to require a person to produce documents includes the power—

- (a) if the documents are produced, to take copies of them or extracts from them; or
- (b) if the documents are not produced, to require the sectoral participant who was required to produce them to state, to the best of its knowledge and belief, where they are located.

Inspectors

92 (1) The Authority, when necessary to conduct an investigation, may designate any member of the staff, or any other qualified person, to be an inspector.

(2) The Authority may authorise the inspector to—

- (a) enter any premises during ordinary business hours;
- (b) search the premises; and
- (c) seize any document or object.

(3) In any case in which the Authority seeks to have an inspector enter the premises of, or seize any document or object from, a person who is not a licensee, the Authority shall first obtain a warrant from a magistrate.

(4) A magistrate may issue a warrant under this subsection if satisfied on information given under oath by a representative of the Authority that there are reasonable grounds for suspecting that—

- (a) a party has contravened, or is about to contravene, this Act, sectoral legislation, a regulation or a general determination; and
- (b) there is on the premises specified in the warrant recorded information relevant to whether that contravention has been, is being or is about to be committed.

(5) The Authority shall provide every inspector with a written instrument of appointment, which shall specify the scope of the inspector's authority.

(6) An inspector shall, upon request, produce the instrument of appointment, and any warrant, when acting within the scope of his authority.

(7) All persons shall give the inspector all reasonable assistance in their power, and shall furnish him with such access and information as he may reasonably require.

Enforcement procedures

Enforcement is a power properly exercised solely by the Board.

93 (1) The Authority, ~~at the direction of the Chief Executive Officer~~upon a unanimous vote of the Board, may initiate enforcement proceedings in any case in which there is reason to believe that a sectoral participant has contravened any or all of the following—

- (a) this Act;
- (b) sectoral legislation;
- (c) any regulation;
- (d) any administrative determination;
- (e) any adjudicative decision and order; or
- (f) a condition contained in any authorisation.

(2) The Authority shall initiate the enforcement proceeding by sending a written notice to the sectoral participant that the Authority believes committed the contravention, which shall—

- (a) set forth the alleged facts;
- (b) state the statutory, administrative or authorisation provisions that the person allegedly contravened; and
- (c) state the timeframe and procedures by which the person must respond.

(3) The Authority shall determine whether a contravention has occurred by conducting an adjudication, whether formal or informal, which shall be conducted by an independent presiding officer appointed in the manner specified in section 76.

(4) If the Authority determines that a sectoral participant has committed a contravention, the Authority may take one or more of the following actions—

- (a) issue a warning;
- (b) direct the sectoral participant to take such actions as may be necessary to remedy the violation;
- (c) impose financial penalties in accordance with section 94;
- (d) require the sectoral participant to make restitution to any person directly injured as a result of the contravention; or
- (e) issue a decision and order modifying, suspending or revoking any authorisation held by the sectoral participant.

(5) In lieu of taking enforcement action, the Authority may refer a matter that involves an offence specified in this Act, or sectoral legislation, to the Director of Public Prosecutions for appropriate judicial enforcement.

Financial penalties

94 (1) Upon finding that a sectoral provider has contravened—

- (a) this Act;
- (b) sectoral legislation;
- (c) any regulation;
- (d) any administrative determination; or
- (e) any condition contained in any authorisation held by the sectoral provider,
- (f) the Authority may impose a penalty of up to ten percent of total annual turnover, as defined by sectoral legislation.

The determination of the amount of a financial penalty should be based on scientific methods and evidence.

(2) In determining the amount of any financial penalty, the Authority shall rely upon scientific methods and evidence and shall consider all relevant factors including, but not limited to—

- (a) the seriousness of the contravention;
- (b) the duration of the contravention;
- (c) whether the contravention resulted in harm to third parties;
- (d) whether the party acted wilfully, recklessly or in a grossly negligent manner;
- (e) whether the party has a previous history of contraventions; and
- (f) whether the party disclosed or sought to conceal the contravention.

(3) The Authority shall pay all penalties collected to the Consolidated Fund.

95 Executive Summary

An undertaking could result in a significant change to any of the rules governing the sector or the individual party and thus falls under the responsibility of the Responsible Minister.

96 (1) In lieu of taking enforcement action pursuant to section 93, the Authority may recommend that the Responsible Minister issue a decision and order accepting, from any persons subject to enforcement action, an undertaking to take or not take specific actions.

(2) In considering whether to accept an undertaking in lieu of taking enforcement action, the Authority shall consider the need to achieve as comprehensive a solution as is reasonable and practicable to the adverse effect caused by the conduct that provided the basis for the enforcement action.

(3) An undertaking under this section—

- (a) may be varied or superseded by another undertaking made in accordance with subsection (1); or
- (b) may be released by the Authority.

PART IX ACTIONS IN THE SUPREME COURT

Action for damages in the Supreme Court

The potential ramifications of the private cause of action are highly significant for the incentives of firms to enter markets and invest in innovative technologies and business models. The draft legislation already grants the Regulatory Authority the power to enforce regulations and to punish noncompliance. Permitting private parties to sue sectoral providers for compensatory damages if the parties believe the providers to be in violation of a determination adds uncertainty with regard to what sort of actions are permissible under the Authority's determinations. To protect themselves from the prospect of costly private actions, firms might forbear from engaging in what would be social-welfare-enhancing investments in innovative technologies and experimentation with innovative business models. Because the scope of activity that could warrant cause of action could expand significantly as the Regulatory Authority implements further regulation, sectoral providers would potentially face increasing liability.

Moreover, the private right of action could confound the objectives of the Regulatory Authority. The Regulatory Authority is required to "act without favoritism to any sectoral participant."⁶² Thus, although the Regulatory Authority is permitted to penalize any sectoral provider that it finds to have violated a regulation or administrative determination,⁶³ the Authority should do so without seeking to advance the private interests of a competitor of the sectoral provider in question. However, a party bringing a private action will naturally act in its self interest, which need not be convergent with the public interest. The private right of action will encourage competitors to seek action against providers for the purely selfish motive of harming a competitor or seeking through litigation an insurance policy against failure in the marketplace. The private right of action could be used purely as

62. *Id.* § 16.

63. *Id.* § 94(1).

a business strategy to deter aggressive price competition or innovation in products and processes. To prevent abuse of the private right of action, the Ministry should narrowly construe standing to sue; require economic rigor in pleading a complaint alleging restraint of trade; require “clear and convincing” economic proof of the existence of common evidence of harm in any aggregation of claims; and award attorneys’ fees and costs to the defendant in unsuccessful cases.

97 (1) Subject to any limitation of liability imposed in accordance with this Act or sectoral legislation, a person who has sustained loss or damage as a result of any act or omission that is contrary to any provision of this Act, sectoral legislation or any regulation or general determination, may sue for and recover in the Supreme Court an amount equal to the proven loss or damage from any person who engaged in, directed, authorised, consented to or participated in the act or omission.

(2) Unless provided otherwise in sectoral legislation, an action may not be brought in respect of any loss or damage referred to in subsection (1) more than two years after the day on which the act or omission occurred.

Appeals to the Supreme Court

An administrative determination (under a preponderance of evidence standard) with respect to the possession of SMP will be admissible into evidence in a criminal prosecution for violation of *ex ante* regulations imposed on a firm declared to have SMP. Because the existence of SMP is a necessary element, if not the most difficult-to-prove element, in such a criminal prosecution, the practical effect is to reduce, below the standard of clear and convincing evidence, the standard of proof that the Government must prove in a criminal case. Furthermore, the criminal prosecution provision may actually have the practical effect of reversing the burden of proof—placing it on the defendant—because the defendant now must prove a negative (namely, that SMP does *not* exist). To address this problem of increased liability, in appealing a final action of the Minister or the Authority to the Supreme Court, a sectoral provider should be permitted to appeal points of law or mixed fact with respect to the determination of SMP and other determinations made in a market review that were elements in the criminal prosecution. In RAA 97(2), we provide a list of determinations that the sectoral provider should be permitted to appeal.

Because we believe that the Minister must himself make policies having binding legal effect, it is necessary that the right of appeal apply to the Minister.

98 (1) Any person aggrieved by a final ~~Authority~~ action of the Minister or the Authority having binding legal effect may appeal on that account to the Supreme Court.

(2) Except as provided in subsection (3), any appeal shall be limited to points of law or mixed fact and law. Notwithstanding any other provision in this Act to the contrary, appealable points of law or mixed fact and law shall include—

- (a) the jurisdiction of the Authority to regulate the service in question;
- (b) definition of the relevant market;
- (c) determination of the presence or absence of significant market power;
- (d) abuse of significant market power;
- (e) economic defenses to abuse of significant market power;
- (f) the admissibility of any expert testimony; and
- (g) calculation of any damages, restitution, penalty, fine, or other monetary punishment or relief.

(3) In any case in which a sectoral participant appeals from the imposition of an enforcement action pursuant to section 93, the appellant may seek a full rehearing before the Court.

(4) An appeal under subsections (1) or 0 shall be lodged in the Registry within twenty-one days after the effective date of any final Authority action, or such longer period as the Court may allow.

(5) On any such appeal the Court may make such order, including an order for costs, as it thinks fit.

(5) Section 62 of the Supreme Court Act 1905 [title 8 item 1] shall be deemed to extend to the making of rules to regulate the practice and procedure on an appeal under this section.

(7) An appeal under subsection (1) shall not result in a stay of the administrative determination of the **Minister or the** Authority appealed from, unless the party seeking the stay can demonstrate to the court that it will suffer irreparable harm if the stay is not granted.

PART X OFFENCES

Failure to obtain required authorisation

99 Any sectoral participant that knowingly provides a service for which a licence, permit or other authorisation is required pursuant to sectoral legislation who fails to obtain the required licence, permit or authorisation commits an offence and, unless sectoral legislation provides otherwise, is liable on conviction on indictment to a fine of up to \$50,000 or imprisonment for up to two years, or both.

Failure to comply with a direction of the Authority

100 Any sectoral participant that knowingly refuses or fails to comply with a direction issued to it by the Authority directing the sectoral participant to comply with its duties and obligations under this Act, sectoral legislation, any regulation, any general determination or any authorisation condition commits an offence and, unless sectoral legislation provides otherwise, is liable on summary conviction to a fine of up to \$5,000 for each day during which the refusal or failure continues.

Failure to comply with statutory duties or regulations

101 Any sectoral participant that knowingly contravenes any statutory duty contained in this Act, or who contravenes any regulations made, by a Responsible Minister pursuant to this Act or to sectoral legislation, commits an offence and, unless sectoral legislation provides otherwise, is liable on conviction on indictment to a fine of up to \$50,000 or imprisonment for up to two years, or both.

Failure to comply with general determinations

Failure to comply with general determinations

102 Any sectoral participant that knowingly fails to comply with any general determination commits an offence and, unless sectoral legislation provides otherwise, is liable on conviction on indictment to a fine of up to \$30,000 or imprisonment for up to one year, or both.

Failure to comply with orders issued by a presiding officer

103 Any sectoral participant that knowingly fails to comply with any order issued by a presiding officer in an adjudication or an investigative hearing commits an offence and is liable on summary conviction to a fine of up to \$20,000 or imprisonment for up to six months, or both.

Violation of requirements and prohibitions regarding anti-competitive conduct

104 Any sectoral provider that knowingly fails to comply with the requirements and prohibitions contained in Part VII, or the regulations adopted pursuant to that Part, commits an offence and is liable on conviction on indictment to a fine of up to \$50,000 or imprisonment for up to two years, or both.

Failure to file reports

105 The secretary of a sectoral provider that is a body corporate and is required to submit a report required by the Authority pursuant to section 53, or by sectoral legislation, commits an offence in any case in which the secretary knowingly fails to submit the report at the specified time without prior written approval from the Authority, and is liable on summary conviction to a fine of up to \$20,000 or imprisonment for up to six months, or both.

Failure to comply with information requests

106 (1) Any sectoral provider that knowingly fails to comply with an order to produce information issued by the Authority pursuant to section 91 commits an offence and is liable on conviction on indictment to a fine of up to \$50,000 or imprisonment for up to two years, or both.

(2) Any individual who knowingly fails to comply with a notice to produce information issued by the Authority pursuant to section 91, commits an offence and is liable on summary conviction to a fine of up to \$20,000 or imprisonment for up to six months, or both.

Obstruction of the Authority

107 Any person who wilfully obstructs any Commissioner or any member of the staff or any Inspector appointed by the Authority in the exercise of any power conferred by this Act or by sectoral legislation commits an offence and is liable on summary conviction to or a fine of up to \$20,000, or imprisonment for up to six months, or both.

Disclosure of Confidential Information by the Authority

108 Any Commissioner or member of the staff who knowingly contravenes section 34 commits an offence which shall be punishable—

- (a) on summary conviction by imprisonment for one year or a fine of up to \$20,000, or both; or
- (b) on conviction on indictment by imprisonment for two years or a fine of up to \$50,000, or both.

Liability where offence committed by corporation

109 (1) Where an offence under this Act committed by a sectoral participant that is a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of any director, manager, company secretary or other officer of the sectoral participant, he, as well as the body corporate, is guilty of an offence and is liable to be proceeded against and punished accordingly.

(2) Where the affairs of a body corporate are managed by its members, subsection (1) applies in relation to the acts and defaults of a member in connection with its functions of management as if he were a director of the body corporate.

Liability where offence committed by unincorporated entity

110 (1) Where a sectoral participant that is a partnership is guilty of an offence under this Act, every partner, other than a partner who is proved to have been ignorant of or to have attempted to prevent the commission of the offence, is guilty of the offence and is liable to be proceeded against and punished accordingly.

(2) Where any other association, incorporated or not, is guilty of an offence under this section—

- (a) every officer of the association who is bound to fulfil any duty of which the breach is the offence; or
- (b) if there is no such officer, every member of the governing body other than a member who is proved to have been ignorant of or to have attempted to prevent the commission of the offence,

is guilty of the offence and is liable to be proceeded against and punished accordingly.

Repeat offences

111 Any penalty provided for in this Part—

- (a) may be doubled where the party has been convicted of the same offence on one previous occasion; and
- (b) may be trebled where the party has been convicted of the same offence on more than one previous occasion.

PART XI
TRANSITIONAL PROVISIONS

Transitional authority of the Minister responsible for telecommunications

112 From the date of assent to this Act, and until such time as the Board of Commissioners holds its initial meeting, the Minister responsible for telecommunications shall exercise all powers vested in the Authority, and take all necessary and proper actions to facilitate the establishment of the Authority, and in particular may—

- (a) arrange for the transfer of staff, equipment, paper and digitised records and any other resource from the Ministry of Energy, Telecommunications and E-Commerce, the Department of Telecommunications and the Telecommunications Commission that may be necessary for the establishment of the Authority;
- (b) hire staff, including the initial Chief Executive, and purchase equipment, supplies and other resources that may be necessary for the establishment of the Authority; and
- (c) enter into contracts, leases and other arrangements on behalf of the Authority.

Selection of Initial Commissioners

113 (1) Following assent to this Act, the Chairman of the Selection Committee shall cause a notice to be published in the Gazette soliciting nominations for the position of Commissioner.

(2) Within forty-five days after the publication of the notice specified in subsection (1), the Selection Committee shall meet and select the three initial Commissioners.

(3) Notwithstanding section 19(3), the Selection Committee shall designate one Commissioner to serve a two-year term, one Commissioner to serve a three-year term and one Commissioner to serve a four-year term.

Initial meeting of the Board of Commissioners

114 (1) The Board of Commissioners shall hold its initial meeting within forty-five days after the Selection Committee selects the initial Commissioners, pursuant to section 113.

(2) The Commissioner selected to serve for a four-year term shall convene the initial meeting of the Board.

(3) At its initial meeting, the Board shall select the Chairman in the manner provided for in section 22(1).

Initial paid-up capital

115 On or before the day on which the Board of Commissioners conducts its initial meeting pursuant to section 114, the Government shall make an initial payment of **[TBA]** as paid-up capital, which shall be used to fund the start-up of the Authority and to cover the operating expenses that the Authority incurs prior to receiving sufficient revenues from Regulatory Authority fees to cover operating expenses on a going forward basis.

Initial Budget

116 (1) Notwithstanding section 43, the Board, with the approval of the Minister responsible for telecommunications, shall establish an initial budget covering the period from

the initial meeting of the Board of Commissioners until the thirty-first day of March of the year following the initial meeting of the Board of Commissioners.

(2) The Board shall publish the first report required pursuant to section 47 within four months after the end of the period covered by the initial budget.

FIRST SCHEDULE

COMMENCEMENT

The following sections shall come into operation on assent—

sections 1 to 5;

sections 11 to 0;

section 14;

section 19;

section 20;

section 21(4) to 21(9);

sections 22 to 32;

sections 37 to 47; and

sections 112 to 116.

All other sections shall come into operation on the date specified by the Minister responsible for telecommunications.

SECOND SCHEDULE

REGULATED INDUSTRY SECTORS

The following sectors constitute regulated industry sectors—

1. Electronic communications (other than broadcasting).

A BILL

entitled

ELECTRONIC COMMUNICATIONS ACT 2010

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- 168. *[REFER TO RELEVANT PROVISIONS OF BILL ENTITLED "TELECOMMUNICATIONS AMENDMENT ACT 2010", WHICH SHALL BE INCORPORATED IN THE FINAL BILL]*

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Second Schedule – List of communications networks and services not subject to section 78 licence moratorium

Third Schedule – List of communications providers authorised notwithstanding the section 78 licence moratorium

**PART I
PRELIMINARY**

Short Title and commencement

- 1 (1) This Act may be cited as the Electronic Communications Act 2010.
- (2) The provisions of this Act come into operation on the day or days that the Minister appoints by notice in the Gazette, provided that—
- (a) no provision may take effect before the date specified by the Minister in accordance with paragraph 2 of the First Schedule to the Regulatory Authority Act; and
 - (b) the entirety of Part XIII shall come into operation on the same date.

Interpretation

As we stated in the Interpretation to the RAA, BTC believes that where the words used have a specific intent and meaning, definitions are required to ensure transparency and clarity and to minimize litigation. As we also noted earlier in discussing the IAD, the stability of rule-ordered relationships depends on the shared meaning assigned to words used to formulate rules. If no shared meaning exists when a rule is formulated, confusion will exist about what actions are required, permitted or forbidden. Thus, BTC recommends this legislation include the following definitions and we have inserted them alphabetically where they fit:

“consumer substitutability”

“consumer welfare”

“content”

“cost”

“cost-orientation”

“dominant”

“effective competition”

“exclusionary refusal to deal”

“information”

“predatory pricing”

“price squeeze”

“private network”

“scientific” or “scientifically rigorous”

“sustainable competition”

“tying”

“unreasonable discrimination”

2 (1) In this Act, unless the context otherwise requires—

“access seeker” means a communications provider requesting access from another communications provider within the meaning of section 23(7);

“administrative determination” includes a general determination, order, direction, decision, or other written determination by which the Authority establishes the legal rights and obligations of one or more sectoral participants, but does not include an advisory guideline or an adjudicative decision and order;

“allocation of spectrum” means the designation of a given frequency or frequencies for use by one or more types of radiocommunication service, under specified conditions where appropriate;

“applicable regulatory framework” means this Act, the Regulatory Authority Act and any regulation, administrative determination, adjudicative decision, order, direction, licence or other form of authorisation made or issued in accordance with these Acts;

“assignment of spectrum” means the grant of spectrum usage rights to a particular licensee;

“associated facilities” means those associated services, physical infrastructures and other facilities or elements associated with electronic communications that enable or support the provision of services via an electronic communications network or service or have the potential to do so, and include buildings or entries to buildings, building wiring, antennae, towers and other supporting constructions, ducts, conduits, masts, manholes, cabinets and such other facilities that may be specified by the Authority;

“associated services” means those services associated with electronic communications which enable or support the provision of services by means of an electronic communications network or electronic communications service (or both) or have

the potential to do so, including any such service that may be specified by the Authority;

“Authority” means the Regulatory Authority established under the Regulatory Authority Act;

“Bermuda Telephone Company Acts” means the Bermuda Telephone Company Acts of 1887, 1928 and 1929;

“broadcasting” means the act of transmitting or re-transmitting a radiocommunication intended for direct reception and use by any member of the public without charge, and cognate expressions shall be construed accordingly;

“broadcasting station” means a radio station that is used for broadcasting;

“cell ID” means the identity or location of the cell from which a mobile telephony call originated or in which it terminated;

“class licence” means a licence that is granted by the Authority pursuant to section 15(1)(b), to all persons that fall within the class and have the required qualifications;

“co-location” means the provision of physical space and technical facilities necessary to reasonably accommodate and connect the relevant equipment of an access seeker, as may be determined by the Authority;

“COL” means a communications operating licence granted under section 15(1) and includes an ICOL;

“communications provider” means an entity that constitutes a sectoral provider pursuant to the Regulatory Authority Act and provides electronic communications;

“competitive bidding procedures” means an auction process or a combined comparative selection process and auction;

The following definition replicates the definition we provide in our comments on RAA 2.

“consumer substitutability” means a consumer’s willingness to switch from one product to another in reaction to a change in the relative prices of the two products;

The following definition replicates the definition we provide in our comments on RAA 2.

“consumer welfare” means the benefits that consumers receive from the combination of lower quality-adjusted prices in the short term and from continued innovation that generates new products and services, lower prices, and higher quality, and increased customer choice in the long term;

Below we supply a definition for “content.”

“content” means any information embodied in electronic form, regardless of whether it consists of words, symbols, numbers, data, images, or sounds;

“Convention” means the International Telecommunication Convention currently in force which is applicable to Bermuda or to which Bermuda is a party, and includes any modifications thereof, or any agreements or regulations made under it from time to time which are applicable to Bermuda;

The following definition replicates the definition we provide in our comments on RAA 2.

“cost” means the highest-valued opportunity necessarily forsaken with the provision of a product or service, and as circumstances require, may be measured in terms of—

- (a) “total cost,” which means the lowest total dollar expense needed to produce each level of output;
- (b) “incremental cost,” which means the increase in the firm’s total cost when it expands its output of a particular product or products by some specified increment holding constant the amount of other products that the firm produces;
- (c) “stand-alone cost,” which means expenditure that would be required for a firm to produce a particular service and no other service; or
- (d) “marginal cost,” which means the increase in the firm’s total expenditure that results from an increase in output by one unit;

The concept of “cost orientation” has significant implications for finding antitrust offences and for setting regulated rates. RAA 85 states that a sectoral provider with market power restricts, or is likely to restrict, competition if, among other actions, it “increases prices above cost.” It is true that economic theory dictates that, in perfectly competitive outcomes, prices approach the marginal cost of production. However, in determining whether a firm exercises market power based on the relationship between the firm’s prices and costs, it is essential to account for the basic economic principle that, in the presence of economies of scale or scope, prices set at a firm’s marginal cost will not generate revenues sufficient to cover the firm’s total costs. Consequently, it would not be an indicator of market power for a firm to price all of its products above marginal cost. To the contrary, it is essential for a firm’s survival. Because the incremental cost of adding a new subscriber to an existing network is low, marginal-cost pricing is insufficient to recover a firm’s sunk costs.⁶⁴ To recover its sunk investment with a usage-based fee, the firm must price above

64. See, e.g., WILLIAM J. BAUMOL & J. GREGORY SIDAK, TOWARD COMPETITION IN LOCAL TELEPHONY 34 (MIT Press & AEI Press 1994).

marginal cost, seeking as its goal the “optimal departures from marginal cost pricing.”⁶⁵

The interpretation of “cost orientation” also influences the rates that the Authority sets. In the context of electronic communications regulation, the Regulatory Authority should recognize that a network operator in a competitive market would adopt pricing mechanisms that price the variable *and* fixed and sunk cost of network access, which would enable it to recoup its sunk investment over time. An example of such a departure from marginal-cost pricing is Ramsey pricing, in which the price of a product is inversely related to its price elasticity of demand—the less elastic the demand, the higher the markup from marginal cost. U.S. Supreme Court Justice Stephen Breyer, a former Harvard professor who is a respected authority on regulation, observed in *AT&T Corp. v. Iowa Utilities Board* that “[m]any experts strongly prefer the use of [Ramsey pricing]” because it “assigns fixed costs in a way that helps maintain services for customers who cannot (or will not) pay higher prices.”⁶⁶ The use of Ramsey pricing ensures an economically efficient allocation of access services, an outcome that maximises consumer welfare. In practice, however, electronic communications regulators often reject Ramsey pricing and, instead, impose prices that more closely resemble “reverse Ramsey pricing,”⁶⁷ which would prevent a firm from charging markup according to consumers’ elasticities of demand as a means to recover sunk investments.

The implications of sunk-cost recovery for defining “cost” are that an excessively narrow definition of cost would lead to inefficient cost-based price setting by the Authority, and would lead to findings of significant market power and anticompetitive behavior where it does not exist. In the practice of setting rates, basing prices on cost involves factoring in the incremental or marginal cost of producing the product or service *and* the willingness of consumers to bear a portion of the common costs associated with the firm that produced the good or service. The portion of the common costs that a consumer is willing to bear can be measured by the margin above marginal or incremental cost that a firm can charge as a means to recover the cost of its sunk investment in the good or service.

65. See William J. Baumol & David F. Bradford, *Optimal Departures from Marginal Cost Pricing*, 60 AM. ECON. REV. 265 (1970).

66. *Iowa Utils. Bd. v. FCC*, 120 F. 3d 753, 426-27 (8th Cir. 1997), *rev'd in part and aff'd in part sub nom. AT&T Corp. v. Iowa Utils Bd.*, 119 S. Ct. 721, 752 (Breyer, J., concurring in part and dissenting in part) (citing 1 ALFRED E. KAHN, *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS* 137-41 (rev. ed. 1988); J. GREGORY SIDAK & DANIEL F. SPULBER, *DEREGULATORY TAKINGS AND THE REGULATORY CONTRACT: THE COMPETITIVE TRANSFORMATION OF NETWORK INDUSTRIES IN THE UNITED STATES* 427 (Cambridge Univ. Press 1997)).

67. SIDAK & SPULBER, *supra* note 66, at 340 (citing DAVID E. M. SAPPINGTON & DENNIS L. WEISMAN, *DESIGNING INCENTIVE REGULATION FOR THE TELECOMMUNICATIONS INDUSTRY* 16 (MIT Press & AEI Press 1996)).

“cost orientation” means giving due consideration to the incremental cost of producing a product or service and the sunk and common costs associated with the firm that produces the product or service;

“customer premises equipment” means equipment utilised by end users for the purpose of originating or receiving electronic communications;

“Customs” means H.M. Customs Department of Bermuda;

“day” means calendar days, but shall mean the first business day following a weekend or national holiday in any case in which a deadline stipulated by this Act falls on other than a business day;

The following definition replicates the definition we provide in our comments on RAA 2.

“dominant” means possessing significant market power;

The following definition replicates the definition we provide in our comments on RAA 2.

“effective competition” means not the preservation of all existing competitors but the maintenance of a sufficient number of competitors to assure that consumers get the best possible quality of product at the lowest possible price;

“electro-magnetic” means of or pertaining to electric waves propagated by an electrostatic and magnetic field of varying intensity covering the entire range of wavelengths of electro-magnetic waves, including all forms of radiocommunication signals;

To minimize confusion, the definition of “electronic communications” contained in the ECA and in the Telecommunications Amendment Act 2010 (i.e., CALEA legislation), tabled before Parliament on June 4, 2010, should be identical.

In the CALEA draft document (page 2), electronic communication was defined as follows:

“electronic communication” means any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo-electronic or photo-optical system ...”

Here, “electronic communications” is defined in terms of both networks and services where “electronic communications service” encompasses the definition of “electronic communications network” and transmissions that are “normally provided for remuneration” (see below).

BTC finds that the clause “normally provided for remuneration” muddies what should be a straightforward technical description of these services. A service that might otherwise be an electronic communication service, e.g., Skype-to-Skype VOIP service, can arguably escape the provisions of this act if it is provided at no cost even if it is offered as a subscription service. While BTC is not making the case that Skype-like services should be regulated, we raise this example to show that “remuneration” does not define current (or future) electronic communications services and should not be included in the definition. When voice becomes “free” it is no less an electronic communication service than it is now.

With respect to the definition of “electronic communications network,” we see no relevance (and only mischief) in the clause “including network elements that are not active.” Elements that are not active are not providing “electronic communications service” since they are not capable of “the conveyance of signals.” Further, “elements that are not active” are not telecommunications services currently regulated under the Telecommunications Act 1986 and should not be swept into this act via the addition of a simple clause.

Thus, BTC recommends that the definitions of “electronic communication,” “electronic communication networks,” and “electronic communication service” be harmonized in both the ECA and CALEA by defining them as follows:

“electronic communications” means electronic communications networks or electronic communications services, or both, as the context so requires;

“electronic communications network” means a transmission system and, where applicable, switching or routing equipment and other resources, ~~including network elements that are not active,~~ which permit the conveyance of signals by wire, radio, optical or other electro-magnetic means, irrespective of the type of information conveyed, including—

- (a) satellite networks;
- (b) fixed (circuit and packet-switched, including Internet Protocol) and mobile networks;
- (c) electricity cable systems to the extent used for the purpose of transmitting signals;
- (d) wireless networks outside the band allocated for broadcasting and wireline circuits used for the purpose of transmitting programming or other content to, or for the reception of same by, a broadcasting station; and
- (e) networks used for the distribution of subscription audiovisual services;

“electronic communications sector” means the regulated industry sector involving the supply and consumption of electronic communications;

“electronic communications service” means a service ~~normally provided for remuneration~~ which consists wholly or mainly in the conveyance of signals by means of electronic communications networks, including the distribution and provision of subscription audiovisual services;

The following definition replicates the definition we provide in our comments on RAA 2.

“exclusionary refusal to deal” means a refusal to do business with another party or other parties that creates, increases, or preserves a firm’s market power or multiple firms’ joint market power;

“*ex ante* remedy” means a type of regulatory obligation imposed by the Authority on one or more sectoral providers with significant market power in order to prevent anti-competitive conduct and promote competition;

“*ex post* competition rules” means any rules, requirements or obligations established by the Authority in accordance with the provisions of section 85 of the Regulatory Authority Act;

“financial year” means the Authority’s financial year as defined in section 37 of the Regulatory Authority Act;

“functional Internet access” means a minimum speed and quality of service for accessing the Internet, as appropriate for Bermuda, taking into account local requirements and regional and international trends;

“general determination” means a statutory instrument, made by the Authority pursuant to section 62 of the Regulatory Authority Act, that is applicable to all sectoral participants, or to such sub-category of sectoral participants as fall within the scope of the general determination;

“harmful interference” means an emission, radiation, induction, conduction or other electro-magnetic effect which endangers the functioning of a radionavigation service or other safety services or seriously degrades, obstructs or repeatedly interrupts any radiocommunication service operating in accordance with applicable regulations or administrative determinations and the Convention, as determined by the Authority, but does not include interference from a radio transmitter operated on its allocated frequency in accordance with applicable regulations or administrative determinations and the Convention;

“ICOL” means an integrated communications operating licence as described in section 17(1);

“individual licence” means a licence that is granted by the Authority to a specific person pursuant to section 15(1)(a);

Below we supply a definition for “information.”

“information” means any pattern that can be recognised by a human being, an electronic system, or a mechanical device, including, but not limited to, signs, signals, writing, images, sounds, or intelligence of any nature.

“interconnection” means the physical and logical linking of public electronic communications networks used by the same or a different undertaking in order to allow the users of one undertaking to communicate with users of the same or another undertaking, or to access services provided by another undertaking within the meaning of section 23(7);

“Internet” means the global information system that is able to support communications using the Transmission Control Protocol/Internet Protocol (TCP/IP) suite or its subsequent extensions or follow-ons, and/or other IP-compatible protocols;

The following definition for “Internet access service” is not clear. Do the words apply to broadband/dial-up (the domain of the current B carriers), to Internet access as offered by the existing ISPs (the domain of the current A and C carriers), or to both?

“Internet access service” means an electronic communications service that provides an end-user with the ability to access and send information by means of the Internet;

“interoperability” means the technical features or functional capability of a group of interconnected systems, including equipment owned and operated by the customer that is attached to a public electronic communications network, which ensure end-to-end provision of a given service in a consistent and predictable manner;

“location data” means data processed in an electronic communications network indicating the geographical position of the terminal equipment of a user of a public electronic communications service, including data relating to—

- (a) the cell ID or the latitude, longitude or altitude of the terminal equipment;
- (b) the direction of travel of the user; or
- (c) the time the location information was recorded;

“loop” means the physical circuit connecting the network termination point to a distribution frame or equivalent facility in a fixed public electronic communications network;

“Minister” means the Minister responsible for telecommunications, which includes electronic communications;

BTC removes “optical fibre” from the definition of network element for all the reasons we set out herein regarding the regulatory impact of dampening investment in next generation networks. In addition, as this definition pertains to unbundling remedies, the paper by J. Gregory Sidak that we included as an attachment to our November 19, 2009 response to the Ministry’s “Access and Interconnection” consultation shows unbundling to be ineffective and counterproductive in encouraging investment.

“network element” means a local loop, sub-loop or other element of ~~an optical fibre,~~ copper or co-axial access network, as specified by the Authority in relation to a relevant product market;

“North American Numbering Plan” means an integrated telephone numbering plan serving 19 North American countries, including Bermuda, which shares its resources;

“numbering system” or “numbering plan” means the system or plan established in accordance with Part VIII that establishes a format of codes and subscriber numbers for routing public electronic communications services to specific locations in Bermuda and to facilitate switching to international destinations;

“personal data” means any information relating to an identified or identifiable natural person;

The following definition replicates the definition we provide in our comments on RAA 2.

~~“predatory pricing” means reducing prices below the appropriate measurement of cost to unprofitable levels for the purposes of driving competitors from the market or discouraging potential competitors to enter the market to maintain existing significant market power, after which the firm is able to recoup the losses it incurred during the predation period through supracompetitive or monopoly prices;~~

BTC sees no compelling reason to include the definition of “premium rate service” in the legislation. “Premium rate service” is “content,” and regulating content flies in the face of Bermuda’s Constitutional provisions protecting free expression.

If the intent of inserting this definition in the legislation is to ensure that users of chat lines know what they will be charged for services prior to engaging the service (as expressed by the drafters at the Ministry’s June 3rd and 4th, 2010 Workshop), provisions in Bermuda’s *Consumer Protection Act 1999* should suffice to protect those users. There is no need for another regulatory board – at additional cost to industry – to duplicate the efforts of the Consumer Affairs Board. BTC recommends that this term – and the associated provisions contained in section 27 – be eliminated.

~~“premium rate service” means a service involving the provision of the contents of an electronic communications service or by means of which the user of an electronic~~

~~communications service is allowed to make use, by the making of a transmission by means of that service, of a facility made available to users of the electronic communications service if—~~

- ~~(a) — there is a charge for the provision of the service or facility;~~
- ~~(b) — the charge is required to be paid to a person providing an electronic communications service by means of which the service or facility in question is provided; and~~
- ~~(c) — the charge is imposed in the form of a charge made by that person for the use of the electronic communications service, over and above the tariff for the underlying electronic communications service involved;~~

The following definition replicates the definition we provide in our comments on RAA 2.

“price squeeze” means a practice in which a firm, having a preexisting duty to deal and possessing significant market power in both the upstream market for inputs and the downstream market for finished products, charges anticompetitively high prices in the input market or charges predatory prices in the downstream market for the purpose of foreclosing rivals in the downstream market such that its exclusionary refusal to deal or predatory pricing reduces consumer welfare;

The 1986 Telecommunications Act definition for “private wire telecommunications system” is “a system of instruments and lines not rented from a carrier intended exclusively for the use of a particular person and not available for use by others, the circuit connections of which terminate at private locations and access to which cannot be obtained ordinarily from a public network.” The same interpretation should be applied to the definition of “private network.”

“private network” means non-public network where public network means public electronic communications network;

“public COL” is a COL held by a licensee that is authorised to provide one or more public electronic communications services;

“public electronic communications” means a public electronic communications network or a public electronic communications service;

“public electronic communications network” means an electronic communications network that is used wholly or mainly for the provision of public electronic communications services;

“public electronic communications service” means an electronic communications service that is offered, and is generally available, to members of the public;

“public telecommunications licence” means any public telecommunications licence, including any subscription television licence, subscription radio licence or any other form of authorisation allowing the provision of electronic communications,

held in the name of any person listed in the First Schedule to Part XIII as at the date of commencement of this Act;

“radio apparatus” means any equipment, machinery or device used for the transmission of radio signals utilising radio spectrum;

“radio apparatus permit” means an authorisation that the Authority may grant to a person operating a radio apparatus;

“radiocommunication” means the transmission or reception of signals by means of radio spectrum;

“radiocommunication service” means an electronic communications service that is transmitted or received by means of radio spectrum;

“radiocommunication system” or “radiocommunication equipment” means a system or equipment, as the case may be, that transmits or receives electronic communications by means of radio spectrum;

“radio spectrum” or “spectrum” means a radio frequency or frequencies of naturally propagated electro-magnetic waves that are used for the transmission and reception of electronic communications signals;

“radio station” means facilities for the transmission of radio signals;

“recognised spectrum usage rights” means rights to the use of radio spectrum that are enjoyed without a licence or licence exemption in accordance with the provisions of this Act and applicable regulations by—

- (a) a Government Department; or
- (b) a user to which spectrum rights have been transferred by a duly authorised spectrum licensee where permitted by any applicable regulations and the terms of the original licence;

“regulation” means a statutory instrument, made by the Minister pursuant to the Statutory Instruments Act 1977, that is applicable to all sectoral participants, or to such sub-category of sectoral participants as fall within the scope of the regulation;

“Regulatory Authority Act” means the Regulatory Authority Act 2010;

“relevant geographic market” means the geographic area in which sectoral providers offer products or services in competition with each other;

The following definition is revised to be consistent with the definition for “relevant market” provided in our comments on RAA 2.

~~“relevant product market” means the products or services which consumers perceive as substitutable or interchangeable based on the products’ characteristics, their pricing and their intended use;~~

“relevant product market” means the products and services among which significant substitution in consumption or production occurs, and may include unregulated products that consumers regard as substitutes for regulated products;

“relevant turnover” means, for the purposes of calculating applicable fees under this Act, the portion of a licence holder’s total turnover minus specified payments to other COL holders;

“retail” means a type of market or service that involves the provision of public electronic communications services to end-users which do not themselves operate or provide public electronic communications to others;

The following definition replicates the definition we provide in our comments on RAA 2.

“scientific” or “scientifically rigorous” means based upon sufficient facts or data; is the product of reliable principles and methods that have been and can be tested or whose theories or techniques have been subjected to peer review and publication or have been generally accepted by the scientific community; and has been applied reliably to the facts of the market.

“sectoral participant” means suppliers of electronic communications, consumers, users and subscribers of such services, and any other persons who provide, use or seek to use a good or service in the electronic communications sector of Bermuda;

“sectoral provider” means a person, including an authorisation holder, who provides a good or service in the electronic communications sector;

The following definition is replaced with the definition we provide in our comments on RAA 2.

~~“significant market power” means a position of economic strength in the relevant market or markets that affords an undertaking, either individually or jointly with others, the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers;~~

“significant market power” means a position of economic strength in the relevant market or markets that provides the capability of acting profitably for a nontransitory period independently of competitors or consumers, and thereby impeding competition;

“social tariff” means a tariff set pursuant to section (1) which contains terms, conditions and charges that are designed to assist or benefit a defined group or groups of disadvantaged users or persons with special needs, including provisions specifying any special services or facilities that may be covered by the tariff;

“subscriber” means any natural person or legal entity that is party to a contract with a communications provider for the supply of public electronic communications services or subscription audiovisual services;

In the following three definitions, the meaning and significance of “under common ownership and control” are unclear. Ownership and control by whom? Why does the combination of ownership and control within a single entity affect the proposed definition of the respective subscription services? Could not ownership and control be separate, yet coordinated through contract to simulate the practical effect of common ownership and control?

“subscription audiovisual services” means programming, applications, electronic programming guides and other services under common ownership and control that are provided on the basis of a subscription for a fee or some other form of prior individual permission, by means of electronic communications networks, and may include subscription radio services, subscription television services or both;

“subscription radio service” means a service, under common ownership and control, providing programmes and other services to authorised subscribers for their instruction, information and entertainment by means of visual images or sounds conveyed by radiocommunication from a common centre but does not include any service for which—

- (a) no fee or charge is levied or made in respect thereof; or
- (b) the transmission includes only matter which is being simultaneously broadcast to the public in Bermuda by a broadcasting station;

“subscription television service” means a service, under common ownership and control, providing programmes and other services to persons for their instruction, information and entertainment by means of visual images and sounds conveyed by wire or wireless communication from a common centre but does not include—

- (a) any such service that serves—
 - (i) fewer than five dwelling houses; or
 - (ii) persons in one or more contiguous multiple unit dwelling(s) under common ownership, control or management; and
- (b) any service for which—
 - (i) no fee or charge is levied or made in respect thereof; or
 - (ii) the transmission includes only content which is being simultaneously broadcast to the public in Bermuda by a broadcasting station;

The following definition replicates the definition we provide in our comments on RAA 2.

“sustainable competition” means a process that continues over an extended period of time, in which rivalry among firms stimulates the introduction of innovative goods or goods of higher quality at lower prices through innovative production methods,

which stimulates market entry and further investment in innovative products and production methods;

The Ministry's definition of "telecommunication" has been expanded significantly from the current regime by the introduction of the word "information" in the definition. The definition of telecommunications in the Telecommunications Act 1986 is as follows:

"telecommunication" means any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by wire, radio, optical or other electromagnetic system and cognate expressions shall be construed accordingly".

Thus, while the Telecommunications Act 1986 rightly limits regulation to transmission services, the proposed ECA proposes to regulate the content that transits the networks, a significant challenge to free expression. To ensure the rights of individuals to communicate freely, BTC strongly recommends that the definition of telecommunication be modified, as follows, to limit the regulatory reach of the Ministry and the Regulatory Authority and to uphold the Constitutional freedoms of individuals residing in Bermuda.

Finally, packet switching that occurs over the Internet is not "among points of the user's choosing." The end user has no control over what packets go where as they are delivered over the Internet.

"telecommunication" means any domestic or international transmission of information-signs, signals, writing, images, sounds or intelligence of any nature by wire, radio waves, optical media or other electro-magnetic systems, between and among points ~~of the user's choosing~~, including by means of the Internet;

"total turnover" means all revenue generated by or otherwise attributable to the provision of any and all electronic communications under a licence holder's COL, regardless of where the agreement for the provision of such services is executed or remuneration for the provision of such services is paid;

The following definition replicates the definition we provide in our comments on RAA 2.

"tying" means conditioning, without any legitimate efficiency enhancing purpose that benefits consumers, the purchase of one product (the tying product), in the supply of which the firm has significant market power, on the purchase of another product (the tied product), in the supply of which the firm does not have significant market power, for the purposes of gaining or preserving significant market power in the tied-product market;

"unbundled access" means the provision to an access seeker of a network element, which is owned or controlled by an access provider that has been determined to have significant market power in the relevant market;

“universal service” means the minimum set of services defined pursuant to sections 33 and 34;

The following definition replicates the definition we provide in our comments on RAA 2.

“unreasonable discrimination” means imposing differential terms and conditions on customers that are similarly situated in terms of their preferences and willingness to pay.

“user” means any natural person using a public electronic communications service, for residential or business purposes, whether or not the person has subscribed to such service;

“user ID” means a unique identifier allocated to persons when they subscribe to or register with an Internet access service;

“voice telephony” means the transmission of signals representing the human voice over a public electronic communications network, including transmissions using Internet Protocol technology that involves the origination and termination of voice transmissions over the public switched telephone networks as may be determined by the Authority;

BTC assumes that “wholesale” means services provided by one “public COL” to another “public COL” to enable the second “public COL” to build out a network or to provide retail services via resale over fully functioning facilities acquired at wholesale rates. Wholesale should not apply to the sales of similar services sold to private networks or to enterprise customers to enable them to provide services to *their* end users. In that regard, the following definition must be clarified to limit wholesale to other public electronic communications networks providers. Thus, we recommend the following modifications:

“wholesale” means a type of market or service that involves the provision of public electronic communications networks or public electronic communications services ~~to customers who are not end-users~~ to other public COLs.

- (2) Unless a term is defined in this Act or the context otherwise requires—
 - (a) terms defined by the Regulatory Authority Act shall have the same meaning when used in this Act; and

Why is resolution of ambiguity dependent here on “the Convention” when elsewhere throughout the RAA and ECA repeated reference is made to reliance on “international best practices”? The policies of the Convention are not specifically delineated. By identifying the Convention as the source for resolving ambiguity in the legislation, the Government risks relying on a singular source that may not be informative. Moreover, if the standards of the Convention can be modified in a nontransparent manner, then Bermuda’s electronic communications law will

continue to be redefined by people not in Bermuda for as long as ambiguity exists in the legislation.

- (b) terms not otherwise defined in this Act or the Regulatory Authority Act shall be interpreted in a manner consistent with the Convention.

Relationship to the Regulatory Authority Act

3 (1) This Act constitutes sectoral legislation within the meaning of the Regulatory Authority Act.

(2) To the extent possible, the provisions of this Act shall be construed consistently with the provisions of the Regulatory Authority Act.

(3) In the event of an irreconcilable conflict between this Act and the Regulatory Authority Act, the provisions of this Act shall prevail.

Application

4 (1) This Act shall apply to the electronic communications sector, including—

- (a) the establishment, construction, operation, provision and use of electronic communications;
- (b) the use or exploitation of radio spectrum within the territorial limits of Bermuda for the transmission of electronic communications;

As there is no definition for “ancillary activities” in the bill, we assume the reference to associated facilities or services is sufficient. If not, a definition for “ancillary services” must be included to ensure transparency and clarity.

- (c) associated facilities or services ~~or ancillary activities~~; and

As drafted, this bill contains no definition of “content,” As such, to propose such a sweeping affront to the freedom of speech and expression for individuals residing in Bermuda is breathtaking and surely unconstitutional. BTC believes that there is no reason to include “content” or its definition in this legislation, as the regulation of content generally should be beyond the reach of any Ministry. That said, the Ministry can surely achieve any objectives the Government may have in regulating some kinds of content that traverse electronic communications networks, e.g., pornography aimed at children, by undertaking narrowly tailored legislation amending Bermuda’s Criminal Code as it did in 2007. Consequently, BTC sees no reason to include “content” within the purview of the Minister’s regulatory authority.

- (d) ~~content provided by means of electronic communications.~~

(2) Save as otherwise expressly provided, this Act shall not apply or have effect in relation to any electronic communications service operated by the Police or the Bermuda Regiment, except in so far as they relate to—

- (a) the establishment of radio stations or apparatus at permanent sites;
- (b) the allocation and assignment of frequencies;
- (c) the mode of transmission to be used in connection with radio stations and apparatus and the power to be radiated therefrom;
- (d) the prevention of harmful interference;
- (e) distress calls, distress messages and distress signals; or
- (f) the manner of conveying radiocommunications pursuant to the Convention.

(3) Subject to subsection (2), a Government Department or a Government Board may operate a radiocommunication system, construct a radio station, and import and manufacture radiocommunication equipment only under a permit granted by the Minister and in accordance with this Act and any administrative determinations made hereunder.

(4) Diplomatic or consular missions established in Bermuda may install and use radio stations and radio apparatus only with the consent of the Governor.

(5) This Act shall not apply to or have effect in relation to—

- (a) the broadcasting of audio or video services;
- (b) the use of radio stations and radio apparatus and associated spectrum for the broadcasting of audio or video services; or
- (c) broadcasting content.

Crown Binding

5 (1) This Act binds the Crown.

The Government should be subject to the same regulation as private firms if it seeks to compete against them.

(2) Nothing in this Act shall prevent the Government from establishing and maintaining any means of electronic communications for official use, provided that, if the Government uses any means of electronic communications to provide services, with or without payment, that compete with privately supplied services, the Government shall, to that limited extent, be fully subject to this Act and the Regulatory Authority Act and shall, by virtue of offering or supplying such service, waive sovereign immunity with respect to claims by private parties for violations of this Act or the Regulatory Authority Act.

The following subsection 3(3) should be added to address the danger of state aid, which distorts or threatens to distort competition by favouring certain firms or the production of certain goods.

(3) Any aid granted by the Government or through Government resources in any form whatsoever, including but not limited to

- (a) an order of mandatory access to privately owned network elements or other assets, resources, or facilities at uncompensatory prices, or
- (b) the provision of access to Government-owned infrastructure or other assets, resources, or facilities at less than fair market value.

shall constitute state aid and be incompatible with the purposes of the Regulatory Authority Act and the Electronic Communications Act.

(4) Upon a complaint filed by any person in the Supreme Court and proven by a preponderance of the evidence, any firm receiving state aid shall be made to refund the fair market value of the state aid to the Government or to the private firm from which such aid has been appropriated by the Government, as the case may be.

Purposes of the Act

The statement of purpose in the Electronic Communications Act lists nine different purposes.⁶⁸ By listing so many goals, the drafters of the proposed legislation have avoided making choices. The indecision means that the regulators implementing the legislation and the courts interpreting it will not have the guidance of a single animating principle. Instead, they will have a compendium of highly detailed rules that focus on process. The likely result would be process-laden decisions that lack economic rigor, a clear purpose, and a coherent relationship between that purpose and the means chosen to achieve it.

In its consultation paper for the draft Regulatory Authority Act and Electronic Communications Act, METEC states, “The purpose of this reform is to ensure that the legislative and regulatory framework governing the sector—which currently is based on the Telecommunications Act 1986—continues to provide critical service provision and accommodate future technological advancements.”⁶⁹ METEC would clarify the purpose of the Electronic Communications Act significantly by stating this objective at the forefront, in Section 6 of the draft Electronic Communications Act, and giving this expression of purpose more economic specificity. METEC should adopt the goal of maximising long-term consumer welfare through investment and innovation as the primary objective of the Electronic Communications Act.

Many of the listed purposes in the draft Electronic Communications Act are in fact *products* of policies that aim to foster investment in next-generation

68. ECA, *supra* note, § 6(1).

69. METEC, Draft Regulatory Authority Act 2010 and Electronic Communications Act 2010 Consultation Paper, *supra* note 4, at 1.

telecommunications technologies. Examples include “encourag[ing] the development and rapid migration of innovative electronic communications technologies to Bermuda,”⁷⁰ “encourage[ing] the development and maintenance of resilient and fault-tolerant communications infrastructures,”⁷¹ and “promot[ing] investment in the electronic communications sector and in communications-reliant industries, thereby stimulating the economy and employment.”⁷² Even increasing broadband affordability to consumers⁷³ can be achieved over the long run by promoting investment.

In determining the purpose and priorities of the Electronic Communications Act, Bermuda should not seek short-term gains to consumer surplus from price-cap regulation to the exclusion of long-term gains from investment and innovation. Technologically mediocre service delivered at a low price does not maximise the long-term welfare of Bermudian consumers. The incentive to invest depends on the likelihood of recouping the cost of one’s investment, including a risk-adjusted return. Thus, the importance of a clear and unambiguous regulatory regime is paramount. Without regulatory clarity, firms will invest less because they will have less certainty that they will have a reasonable opportunity to recoup their investments. The government would increase firms’ incentives to invest if it adopted a more concise statement of objectives in its proposed legislation. Finally, one clear purpose will prevent courts from ruling on which purposes take precedence in disputes, thus eliminating the requirement for subsection 2.

6 (1) The principal purposes of this Act shall be to promote the long-term welfare of Bermudian consumers through the protection and enhancement of incentives for private investment in innovative technologies.—

(2) Secondary purposes of this Act, which in aggregate shall receive less weight than the principal purpose, shall be to—

- (a) ensure that the people of Bermuda are provided with reliable and affordable access to quality electronic communications services;
- (b) enhance Bermuda’s competitiveness in the area of electronic communications so that Bermuda is well positioned to compete in the global tourism and international business markets;
- (c) encourage the development of an electronic communications sector that is responsive to the requirements of users (both individuals and businesses) and provides them with choice, innovation, efficiency and affordability;

70. ECA, *supra* note, § 6(1)(d).

71. *Id.* § 6(1)(g).

72. *Id.* § 6(1)(h).

73. *E.g., id.* § 6(1)(a).

- (d) encourage the development and rapid migration of innovative electronic communications technologies to Bermuda;
- (e) promote the orderly development of Bermuda's electronic communications sector;
- (f) encourage sustainable competition and create an invigorated electronic communications sector that will lay the groundwork for the further development of communications-reliant industries;
- (g) encourage the development and maintenance of resilient and fault-tolerant communications infrastructures;
- (h) promote investment in the electronic communications sector and in communications-reliant industries, thereby stimulating the economy and employment; and
- (i) promote Bermudian ownership and Bermudian employment at all levels of the electronic communications sector.

(2) ~~Where any of these purposes appear to be in conflict, the priorities shall be set or the conflict otherwise resolved in a way that best serves the public interest in the opinion of the Minister or the Authority, as the case may be.~~

PART II

POWERS AND FUNCTIONS OF THE MINISTER AND THE AUTHORITY

As BTC noted in our introductory comments, the Institutional Analysis and Development framework which we set out above is a useful conceptual framework for creating economic governance structures like those envisioned here. The framework, and in particular, the seven generic rules—position, boundary, authority, aggregation, information, payoff, and scope rules—along with the concept of the three levels of rules—operational rules, collective choice rules, and constitutional choice rules—can serve as a tool set both to ensure that the essential institutional structure for the RA is fully fleshed out and to enable us to make theoretically-grounded determinations (rather than arbitrary ones) regarding what authority and actions rightly belong in the domain of the Minister vis-à-vis the RA.

The rule-making authority of Bermuda’s Government—conducted at the collective choice level—derives from the Constitution and is vested in the Legislature, which is comprised of her Majesty plus 11 Senators appointed by the Governor and 36 elected members of the House of Assembly. Ministers are appointed by the Governor, in accordance with the advice of the Premier from among the members of the House and Senate and empowered by the Governor with the responsibility for the administration of any department.

The Constitution makes clear that the Minister shall exercise general direction and control over that department. With respect to boards and committees like the Regulatory Authority contemplated here, the Constitution is explicit about the relationship between the board and the Minister, i.e., the board is subservient to the Minister and derives its power from the Minister. There is no Constitutional provision for “independent” boards.

§61(4) A Minister charged under subsection (1) of this section with responsibility for the conduct of any business of the Government may be assisted in the discharge of that responsibility by a board, committee or other similar body consisting wholly or partly of persons who are not public officers and established by a law enacted by the Legislature or by directions in writing given by the Minister concerned; and any such body shall have such advisory, consultative and administration functions as may be conferred on it by such a law or such directions, but in exercising any such functions, the body shall be subject to the directions of the Minister concerned.

Similarly, the Constitution vests the authority of the Ministry with the Minister. There is no provision for delegating the Minister’s responsibility (except in instances of illness or absence where the Governor may appoint a temporary Minister from

among the members of the same House or assign responsibility to another Minister) to any other person or authority.

§61(2) Nothing in this section shall empower the Governor to confer on any Minister authority to exercise any powers or discharge any duty that is conferred or imposed by this Constitution or any other law on the Governor or any person or authority other than a Minister.

Thus, the Minister *must* take responsibility for governing the sector, and this responsibility cannot be delegated. Having said this, “advisory, consultative and administration functions” *may* be delegated to a board like the RA “subject to the directions of the Minister concerned.”

In practice, this means that the Minister’s policy-making responsibility must encompass determinations pertaining to the IAD’s full set of seven rules. The Minister cannot, for example, establish a policy requiring licensing but leave eligibility (boundary rules) or conditions (authority rules) to the RA. The Minister’s policy on licensing must specify the full set of seven rules to be complete. Once specified, the Minister may delegate monitoring and enforcement, including the promulgation of rules pertaining to monitoring and enforcement, to the RA.

The IAD’s framework of seven rules can also be helpful in determining what constitutes “policy.” BTC would argue that any determination pertaining to any of the seven rules is legitimately a “policy” determination because the seven rules— position, boundary, authority, aggregation, information, payoff, and scope rules— are necessary and sufficient for establishing the social space or “action situation” in which the industry operates. Further, by specifying each of these rules, the Ministry will have provided industry participants both the essential rule elements and the certainty about their situation required to operate effectively under a regulatory regime.⁷⁴

This suggests that the Minister’s policy authority, as specified in the legislation, should include: the licensing of private systems as well as public ones (a position rule) along with requirements pertaining to concentrations (a boundary rule), determinations of significant market power (implicating boundary, aggregation and scope rules), carrier costs and cost accounting (a payoff rule), carrier fees (a payoff rule), and carrier data collection and reporting (an information rule) in addition to the ones enumerated below. As stated before, the seven rules should also be considered in fleshing out the policy for each of the subjects enumerated above.

74. Of course, this statement requires a caveat. It is unlikely that the Ministry will get the full rule set “right” on its first attempt. Crafting rules for economic governance is an exercise in ongoing refinements as rules are used and tested and in ongoing modifications as the conditions in the physical and material world change.

Missing from this legislation are rules regarding how the Minister will establish general policies and regulation, which should be spelled out with reference to the seven rules.⁷⁵ For each of the items enumerated in ECA 7, below, BTC believes that the legislation should require that the Minister conduct public consultations.

Authority of the Minister

7 The Minister shall have the power to establish general policies and to make regulations for the electronic communications sector via public consultations with respect to—

- (a) the licensing of public and private electronic communications as provided in Part III and Part IV;
- (b) the establishment of electronic communications costs, cost accounting, pricing rules, rate design, and fee requirements
- (c) the establishment of electronic communications notice, data collection and reporting requirements
- (d) the provision and funding of universal services ~~as provided in Part VI~~;
- (e) the management of the radio spectrum as provided in Part VII;
- (f) the management of the numbering system as provided in Part VIII;

As noted above, a sweeping regulation of content is an affront to the Constitutional protection of freedom of expression and should be eliminated here. BTC believes that “where necessary in the public interest” is an insufficient clause to temper such a broad authority and, as such, is a danger to the commonwealth.

~~(g) — content provided by means of electronic communications, where necessary in the public interest~~

~~(h)~~(g) directing the Regulatory Authority with respect to the implementation and enforcement of this sectoral legislation; and

~~(i)~~(h) other matters of fundamental importance to the public interest.

Regulation of the fundamental right to free speech through electronic communications should only address a compelling governmental interest and should employ only the least restrictive means of achieving that governmental objective. Therefore, we add the following section explaining the limits on the

75. It is not at all clear whether the Ministry intends to “outsource” this effort to the RA or whether the Ministry will have its own staff to handle policy-making. If this effort is “outsourced,” the Ministry must ensure that the RA’s work is consultative and administrative only; policy decisions rest with the Minister.

authority of the Minister concerning freedom of speech by electronic communications.

Limits on the authority of the Minister concerning freedom of speech by electronic communications

7A Neither the Minister, the Authority, nor any other entity within the Government shall have the authority to regulate the content of electronic communications unless such regulation advances a compelling governmental interest and is pursued by the least restrictive means. The Minister, the Authority, or the Government shall bear the burden of proving by a preponderance of the evidence, at the time that the regulation is being enforced, that the purpose of the regulation continues to be a compelling governmental interest and that the regulation in question continues to be the least restrictive means of advancing that compelling governmental interest. In weighing such evidence, the Supreme Court shall give greater weight to scientifically rigorous empirical evidence than to statutory preambles or hortatory statements of legislative intent.

Responsibilities, functions and powers of the Authority

8 (1) The Authority shall be responsible for—

- (a) implementing the general policies and regulations made by the Minister; and
- (b) supervising, monitoring and regulating the electronic communications sector and enforcing compliance with the applicable regulatory framework.

(2) The functions and powers of the Authority shall include—

- (a) those accorded to it by the Regulatory Authority Act;
- (b) those accorded to it by this Act, including the powers and functions necessary to effectively and efficiently achieve the purposes set forth in section 6;

BTC believes that many of the actions noted in the following list of permissible “administrative determinations” (which, by definition, incorporates the determination of carriers’ legal rights and obligations) fall outside the permissible purview of the RA. Many of these provisions pertain to policies (and associated rules) that must be determined by the Minister and do not constitute implementation.

- (c) the making of administrative determinations to provide for the control and conduct of public electronic communications, including—

The following provisions are boundary rules that must be specified by the Minister under his authority to develop licensing policy and regulations. Once those rules are determined by the Minister, the RA may enforce them.

- (i) the award, renewal, modification, termination or revocation of licences for the provision of electronic communications;

The following is permissible once the Minister establishes a policy that says there will be notice requirements (information rules).

- (ii) transparency measures and notice requirements relating to the rates, charges and other terms and conditions for the provision of public electronic communications services for the benefit of consumers;

The following provision is unnecessary and counterproductive in Bermuda's current competitive market and should be eliminated. It also raises concerns about the freedom of commercial speech. If at some point in the future (perhaps if the market evolves into monopoly) such a rule is required, there will be sufficient opportunity to impose it then (in fact, the entire legislative structure will require revisiting). This legislation should not be burdened with infinite "what ifs" and "make work" for regulators which simply drive up fees and divert attention from the essential work required. That said, this provision falls under the baliwick of the Minister in establishing the authority/choice rules that govern the industry.

- (iii) ~~restrictions on the marketing and advertising of public electronic communication services;~~

The following is permissible once the Minister sets out a policy requiring carriers to transfer customers (authority rules).

- (iv) procedures to be followed in transferring a customer from one communications provider to another to effectuate customer requests for a change of provider;

As above, the following is unnecessary and counterproductive in a competitive market and seemingly at odds with the "physical and material conditions" in Bermuda. As is, this provision would be considered an authority/choice rule that the Minister must first establish, not the RA. To avoid expansive regulation and unnecessary fees, BTC recommends that any consumer protection legislation deemed necessary be handled by the existing Consumer Affairs Board. Otherwise, carrier T&Cs are one element of service provision that can distinguish one service provider from another, adding to consumer choice.

- (v) ~~credit vetting and disconnection of customers for non-payment;~~

As before, the following is unnecessary, counterproductive and costly given the "physical and material conditions" in Bermuda. ECA 52(1) requires carriers to use equipment that is FCC, CSAI, and EU certified. There is no need for Bermuda regulators to take any further actions to establish technical standards and drive up

the costs of regulation. This provision and ECA 52 (2-5) should be eliminated, and the RA should be limited to enforcing the provisions of ECA 52(1))

- (vi) ~~the establishment and supervision of technical standards for equipment used in connection with the provision of or use of public electronic communications services, including equipment used by communications providers and equipment to be connected to the electronic communications networks of communications providers;~~.

As above, carrier service level commitments are one element of service provision that can distinguish one service provider from another, adding to consumer choice. These should not be mandated and made homogenous in a competitive market. Indeed, forcing differentiated services to become more homogeneous is a well recognised characteristic that predisposes a market to collusive pricing. To the extent these pertain to authority/choice rules associated with a Ministerial policy on universal service, they belong within the bailiwick of the Minister to specify.

- (vii) ~~the specification of key performance indicators or the offering of minimum service level commitments by communications providers for the provision of designated public electronic communications at the wholesale or retail levels, and applicable penalties in the event of non-compliance;~~

The following is permissible once the Minister has specified what carriers are required to do in this regard (i.e., having established the authority and information rules). That said, BTC believes that reporting and publication requirements ought to be broad to enable all members of the industry to have insight into the operation of the market, and we suggest that this requirement be expanded to include the factors inserted below.

- (viii) the reporting and publication of statistics relating to services, service plans, subscribers, subscriber usage, market penetration, market share, revenue and the quality of service of public electronic communication services offered by communications providers;

Although procedures for discontinuing a public electronic communications service may be handled by the RA as a facet of implementation, the “standards” that come into play are boundary rules that must be determined by the Minister.

- (ix) procedures ~~and standards~~ for the discontinuation of a public electronic communications service;

Again, although procedures for enforcing interconnection and the establishment of “technical” standards may be handled by the RA as a facet of implementation, the

establishment of interconnection requirements and standards generally are boundary rules that must be determined by the Minister.

- (x) the establishment and enforcement of procedures and technical standards for the interconnection of the facilities of communications providers;

Again, although procedures for enforcing sharing and the establishment of “technical” standards may be handled by the RA as a facet of implementation, the establishment of sharing requirements generally are boundary rules that must be specified by the Minister. That said, BTC does not support the unbundling requirements of this legislation. Not only are they out of date, but they have been proven to be ineffective (see J. Gregory Sidak attachment to BTC’s November 19, 2009 Comments on Access and Interconnection).

- (xi) ~~the establishment and enforcement of procedures and technical standards for the use and sharing of support structures by communications providers where, in the Authority’s view, such measures are necessary for environmental, touristic, or other public interest reasons;~~

Although the RA may be responsible for the assignment of spectrum following procedures set out by the Minister or the compliance and enforcement of conditions pertaining to radio stations, the RA cannot *establish* the conditions and requirements for the operation and use of radio stations because these constitute boundary rules that fall within the policy-making authority of the Minister.

- (xii) the assignment of spectrum and compliance with established conditions and requirements ~~the establishment of conditions and requirements~~ for the operation and use of radio stations and apparatus for the provision of electronic communications;

The classification of various types of electronic communications services is part and parcel of defining the position rules pertaining to the regulated sector and, thus, falls within the bailiwick of the Minister as part of his policy-making responsibility.

- (xiii) ~~classification of the various types of electronic communications services; and~~

While the RA is responsible for implementation, many of the provisions of ECA 16 are policy-level rule determinations that must be established by the Minister.

- (xiv) detailed measures implementing any of the licence conditions set forth in section 16;

In general, the terms, conditions and requirements governing any policy that pertain to boundary rules must be established by the Minister.

(xv) ~~the establishment of any other terms, conditions or requirements that are authorised or stipulated by this Act;~~

(d) those accorded by any other enactment; and

While the Minister can “direct” the RA and rely on the board for advice, consultation and administrative assistance, he cannot strictly “delegate” his responsibility to them.

(e) those expressly ~~delegated~~ directed by the Minister to the Authority in respect of the electronic communications sector.

Section 3, below, pertains to the RA generally and should be transferred to the RAA where its provisions should be broadened to cover any regulated sector. The provisions regarding the handling of complaints are significant enough “authority rules” as to be specified in a list of the RA’s permitted, required, or prohibited actions rather than buried in a paragraph pertaining to opinion polling. If the point is to poll regarding these subjects as well, BTC has no objection, although we would contend that “complaint handling” and “disseminating information to consumers” is missing from ECA 8(2).

(3) In carrying out its functions, the Authority shall endeavour to remain informed of the viewpoints of the residents and consumers of Bermuda, including by—

(a) making arrangements for ascertaining from time to time the state of public opinion about the manner in which electronic communications services are provided and the experiences of consumers in relation to the same, including the handling of complaints made to providers of communications networks and facilities and the resolution of disputes; and

(b) establishing and maintaining effective arrangements for seeking the views of consumers and consumer groups in the electronic communications sector, and for disseminating information to consumers relevant to the sector, including through the facilitation of consumer advisory committees.

Duties of the Authority under directions ~~and delegations of authority~~ by the Minister

As we noted previously, although the Minister can “direct” the RA and rely on the Board for advice, consultation and administrative assistance, he cannot strictly “delegate” his responsibility to them as explicitly stated in ECA 9, below.

9 (1) It shall be the duty of the Authority to carry out its functions in accordance with such general directions as may be given to it by the Minister for the following purposes—

(a) to protect national security interests or in the event of national emergency;

- (b) to further relations with the government of a country outside Bermuda;
- (c) to negotiate, and secure compliance with, Bermuda's international obligations, including in the area of spectrum management;
- (d) to protect the safety of the public or public health;
- (e) to implement the general policies and regulations made by the Minister for the electronic communications sector;
- (f) to ensure that the Authority establishes and adheres to a reasonably prompt timetable in carrying out its various duties, activities and functions, including the issuance and enforcement of administrative determinations; and
- (g) to implement the modification of pre-existing licences held by the communications providers listed in the First Schedule to Part XIII and the transition to ICOLs, in accordance with section 76.

(2) The Authority shall comply with the directions of the Minister.

As BTC noted previously, although the Minister can "direct" the RA and rely on the Board for advice, consultation and administrative assistance, the Constitution appears to prohibit the Minister from "delegating" his responsibility as we discussed above and as RAA 9 (unlawfully) permits. In addition, BTC asserts that the functions described in (3)(a) and (b) constitute unlawful "delegations" of the Minister's responsibility as these functions exceed the parameters of advice, consultation, or administrative assistance.

(3) The Authority shall have the duty to undertake such functions as may be ~~delegated~~ directed by the Minister from time to time in accordance with section 9 of the Regulatory Authority Act, including the following—

- ~~(a) becoming or serving as a member of an international body or subscribing to such a body, and providing representation on behalf of Bermuda on international and other bodies having communications functions;~~
- ~~(b)(a) providing representation at international meetings about electronic communications; and~~
- ~~(e)(b) providing research, analysis or similar support to the Minister in connection with any or all of these activities.~~

The following section inappropriately places the responsibility for fees on the RA. Fees constitute a payoff rule that governs the industry generally, and, as such, establishing fees to support the RA is the Minister's policy-making responsibility, not the RA's. The RA can surely advise the Minister in this regard as to what the RA's budget requirement may be, but this section of the ECA requires policy-level

statements as to what the Minister requires of the industry, i.e., who will be required to pay fees (position rule); whether there are exceptions or exemptions to fee payments (boundary rule); to whom they will be paid and with what frequency, including an “or else” clause that addresses what happens if parties fail to pay fees (authority rule); how fees will be determined and how fee levels or the fee structure can be changed (aggregation rule); how fees and fee schedules will be communicated to industry and the public (information rules); the costs and benefits associated with fees, including, for example, the fee structure; what activities will attract special fees; the requirement that the RA publish an annual budget and an annual review to enable the Ministry, the industry, and the public to assess its performance (payoff rules); and what cap the Ministry will impose on fees to ensure that the RA does not spiral out of control (scope rules). The language in section 10(2), below, to the extent it is appropriate, belongs in the RAA, with an elaboration on the above points included here in the ECA instead. This section must specify that Regulatory Authority fees can be assessed only on “electronic communications services.”

Regulatory Authority fees

10 (1) Regulatory Authority fees for the electronic communications sector shall be established for each financial year in accordance with the principles and procedures set forth in section 44 of the Regulatory Authority Act and those specified in this section.

~~(2) In making a request for the establishment of Regulatory Authority fees, the Authority shall have due regard for—~~

~~(a) the comparative costs of regulatory administration attributable to different types of authorisation holders when proposing the applicable general regulatory fees for the various types of authorisations;~~

~~(b) the cumulative effect of all sources of Regulatory Authority fees, including both general regulatory fees and service fees, on each type of authorisation holder;~~

~~(c) the financial and commercial impact of the timing of the payment or payments for general regulatory fees on authorisation holders, taking into account the financial requirements of the Authority; and~~

~~(d)(a) the efficient management of the Authority’s resources.~~

~~(2)~~ (2) The Authority’s request to the Minister shall be accompanied by reasonable supporting data to justify the requested fees.

PART III PROVISION OF ELECTRONIC COMMUNICATIONS

Licensing policy is the prerogative of the Minister, and, as such, regulations pertaining to each of the seven rules—position, boundary, authority, aggregation, information, payoff, and scope—should be specified in this part as completely as

possible. That said, the Ministry failed to undertake a consultation on licensing as set out in its April 2009 update to the Milestone Plan that accompanied the November 18, 2008 Telecommunications Regulatory Reform Policy Paper, which was approved by the Cabinet on June 24, 2008. Thus, we have had no opportunity to consider, discuss, or debate these policies prior to having them codified in the immediate legislation. As a matter of principle, BTC believes that all policy matters should be subject to public consultation prior to being crafted into legislative language. Indeed, we continue to be vexed by the Ministry's predictable and consistent behaviour in this regard while at the same time championing transparency and advocating consultation rules, for example for the RA, that they themselves refuse to follow.

As an initial matter, the RA cannot "establish the licensing framework for ...other than public electronic communications," ECA 13(b), below, or "make general determinations to establish...the distinction between public and private electronic communications networks and services," ECA 13(d), below. These are policy determinations (i.e., position rules) that fall within the responsibility of the Minister. It cannot be the case that regulations that govern some "positions," e.g., private electronic communications networks, can be separated from the overall rule set governing the sector as a whole because doing so undercuts the integrity of the rule set itself by offering only an incomplete portion of the institutional structure of licensing. Thus, the Minister must establish the specific licensing rules pertaining to each of the seven generic rules—i.e., position, boundary, authority, aggregation, information, payoff, and scope rules—and these rules should be explicitly spelled out in this part.

This part must include, for example, the list of "positions" (i.e., public, private, individual, class, or other types of licenses) and the number and type of participants in each position.⁷⁶ In like manner, the Minister is responsible for regulations pertaining to licensing generally (including exceptions and exemptions), eligibility, terms and conditions, renewals and revocations, the licensing process, and significant market power (SMP) (all boundary rules) and for specifying these factors, as appropriate, with respect to each license "position" established. In addition to specifying the licensing process, the Minister must establish the criteria for granting, denying, renewing, or refusing to renew a license and must specify how these decisions will be made and who will make them, e.g., by the Minister or by the Board (aggregation rules).

The Minister must also specify the rights, duties and obligations for holders of each type of license (authority rules). These rights, duties and obligations pertain to specifying the permitted, required, or prohibited actions regarding: services offered;

76. We note at ECA 12(a) that the Minister may limit the number of public COLs (which is a proper position rule), but we question the validity of doing so. If the intent of the Ministry is to promote consumer welfare, managing the market by restricting entry through licensing is surely counter-productive.

rates and conditions; costs, cost accounting and auditing; interconnection; reporting; fees; remedies; CALEA et cetera. In addition, the Minister is responsible for establishing the information rules pertaining to the sector and including actions like publishing licenses and license applications, grants, renewals and revocations; requiring the publication of rates and charges, public audits, or interconnection agreements; or in the case of SMP, requiring a general determination accompanied by the publication of a full public record.

The Minister's licensing regulations must also address licensing fees and the "or else" ramifications of license infractions (payoff rules) as well as any limits to licensing or limits on transferring or selling licenses (scope rules). Thus, the Minister's list in ECA 12 must be expanded considerably, but we refrain from doing so both in the absence of time and without having had the benefit of a full industry consultation on these points.

That said, BTC see no justification whatsoever for licensing private networks, and we recommend that all proposals for private network licensing be struck from this legislation. Sweeping private licensing under the regulatory umbrella of the RA simply drives up regulatory costs for industry and burdens the RA with unnecessary activities with no discernible benefit to anyone.

Licences for operation or provision of electronic communications

The following is a permissible RA action as long as the Minister has established the criteria for license exemptions.

11 No person may construct, establish, maintain or operate an electronic communications network or provide an electronic communications service within the territorial limits of Bermuda or between Bermuda and another country, without a valid COL authorising such activities, unless the Authority has made a general determination expressly authorising a licence exemption for the provision of the particular type or types of electronic communications that the person is operating or providing, in accordance with section 15(2)(c).

Licensing policy

12 The Minister shall establish general policies and, as necessary, regulations with regard to—

As noted above, BTC sees no value in placing limits on the number of public licenses as the market will sort this out by demanding more, fewer, or different licenses than the Minister might contemplate. Indeed, restricting output through licencing regulation harms consumer welfare and thus flouts the stated purposes of the RAA and ECA.

- (a) the limit, if any, on the number of public COLs that may be in effect at any given time for any particular type of individual licence and the timing of the grant of such licences;

- (b) if not otherwise specified in this Act, the scope and duration of such licences and any conditions that the Minister deems to be necessary as a matter of general policy;
- (c) any general limitations on eligibility for the grant of such licences; and
- (d) the timing of and procedures for the award of such licences and provisions for renewal, if applicable.

Functions of the Authority

13 The Authority shall be responsible for—

- (a) implementing the licensing policies and regulations made by the Minister under section 12;
- ~~(b) establishing a licensing framework for the operation and provision of electronic communications, other than public electronic communications, by general determination, including the applicable procedures eligibility criteria, terms and conditions; (see comments as above)~~
- (c) granting licences, permits and other authorisations according to processes and criteria established by the Minister;
- ~~(d) making general determinations to establish or clarify the distinction between public and private electronic communications networks and services, as necessary, in accordance with this Act and any applicable policies or regulations made by the Minister; (see comments as above)~~
- (e) monitoring compliance with licence terms and conditions and enforcing such provisions; and
- (f) exercising any of the other functions set forth in this Act or the Regulatory Authority Act to promote an efficient and effective licensing framework for the electronic communications sector.

Duties of communications providers

The following, ECA 14, is too abstract and requires detailed specification as discussed above. As we noted, the duties of carriers are typically authority rules implicating permitted, required, or prohibited actions regarding: services offered; rates and conditions; costs, cost accounting and auditing; interconnection; reporting; fees; remedies; and CALEA among others, but because rules operate in a configuration, there may be additional duties implicated by other rules, e.g., information or scope rules.

14 Every communications provider has the duty to—

- (a) comply with any applicable conditions, obligations, requirements or limitations set forth in the applicable regulatory framework; and

- (b) pay on a timely basis any and all applicable Regulatory Authority fees and Government authorisation fees.

Communications operating licences

The following provision is permissible as long as the Minister has established the requirements for licenses and license exemptions

15 (1) The Authority, in accordance with this section and the general policies and regulations made by the Minister, may grant—

- (a) COLs in the form of individual licences, including ICOLs referred to in section 17;
- (b) class COLs; and
- (c) exemptions from the requirement to hold a COL.

Specifying licensing criteria, conditions, requirements, and procedures (boundary rules) are all the domain of the Minister, as we discussed above.

~~(2) The Authority shall, by general determination, specify the criteria, conditions, requirements and procedures that shall apply to the grant of individual COLs, class COLs and licence exemptions, in accordance with the following principles—~~

RAA 48(2) pertaining to establishing procedures and criteria constitutes an unlawful action for the RA.

- (a) individual licences shall be granted by administrative determination in accordance with sections 48(2) to (3) of the Regulatory Authority Act, and the terms and conditions applicable to all licensees that are eligible for a particular type of individual COL shall be as homogeneous as possible and not unduly discriminatory;
- (b) the provision of electronic communications by means of a class licence may be authorised, with or without a registration or notification requirement, where the conditions applicable to a particular group of communications providers or the provision of a particular type or types of electronic communications are limited in number and scope and can be applied generally to all of the members of a specified class in a manner that is administratively efficient;

Conditions for license exemptions must be specified by the Minister (boundary rules governing the sector). These are not determinations the RA can make.

- (c) a licence exemption may be authorised by the Authority if—

~~(i) no conditions, or only limited conditions, need apply to the exempted group of communications providers or the provision~~

~~of the exempted type or types of electronic communications;
and~~

~~(ii)(i) no Regulatory Authority fees or Government authorisation fees
are required in respect of the exempt providers or electronic
communications;~~

As before, conditions for license exemptions must be specified by the Minister (boundary rules governing the sector). These are not determinations that the RA can make. Nor can the RA make regulations for part of the sector, i.e., private networks (position rules), separately from the rule set that governs the entire sector, otherwise undercutting the integrity of the fully specified regime for electronic communications.

(d) a class COL or a licence exemption may be authorised in any or all of the following circumstances, as determined and defined by the Authority—

~~(i) cases in which electronic communications are provided on a private rather than a public basis;~~

~~(ii) cases in which electronic communications are provided other than on a commercial basis;~~

~~(iii)(i) cases in which electronic communications are self-provided by a natural or legal person whose principal line of business does not include the provision of electronic communications; or~~

~~(iv)(ii) any other circumstances in which the Authority deems the authorisation of a class licence or the grant of a licence exemption to be appropriate and administratively efficient, in accordance with paragraphs (2)(b) and (2)(c).~~

(3) Each COL holder shall be responsible for securing any related spectrum licences or permits for radio stations or apparatus that may be useful or necessary for the provision of any electronic communications to which the COL applies in accordance with Part VII.

(4) Where feasible, the Authority shall coordinate the timing of the grant, the duration, and any relevant provisions of related spectrum licences and radio apparatus permits; provided, however, that nothing in this section shall be construed as an entitlement on the part of a COL holder to a spectrum licence or a radio apparatus permit.

Communications operating licence conditions

ECA 16, below, is the prerogative of the Minister, not the RA, as discussed above at the beginning of this part. Thus, the RA cannot establish terms and conditions (boundary and authority rules) for licensing. Rather, the RA ensures that licenses

include the appropriate terms and conditions when issued and that licensees comply with the terms and conditions of their licenses.

16 (1) The Authority shall specify in a ~~general determination the terms and conditions with which COL holders must comply under each type of individual licence and class licence,~~ which may include any or all of the following, depending on the type of electronic communications covered by the applicable licence—

RAA 50(1) may constitute conditions that the Minister wishes to impose on licensees, but these must be established by the Minister (boundary and authority rules governing the sector), not the RA.

- (a) the conditions provided in section 50 of the Regulatory Authority Act;
- ~~(b) the term of the licence;~~
- ~~(c) the conditions, if any, for renewal of the licence upon expiry; and~~

The following provision cannot stand as it gives free reign to the RA to regulate the industry apart from any written “direction” given by the Minister, as required.

- ~~(d) any other terms, conditions and obligations that the Authority deems necessary or appropriate, in accordance with the applicable regulatory framework.~~

The use of the word “may” in ECA 16(2) below suggests that not all ICOLs will be subject to the same license conditions. This is problematic for two reasons. Not only are “conditions” a determination for the Minister to make at a policy level (boundary and authority rules), as we discussed above, but the application of those conditions to various licenses must be prescribed by the Minister as well, including any exemptions from or exceptions to meeting the conditions. These cannot be arbitrary decisions made by the RA. Once the Minister has established the decision rules regarding what conditions apply in what circumstances, the RA is free to apply them in granting or renewing any license.

(2) In addition to the conditions set forth in subsection (1), the following may be specified as conditions applicable to operators or providers of public electronic communications—

- (a) any of the obligations specified by the Authority in accordance with section 8(2)(c); (see comments above at ECA 8(2)(c).)
- (b) the duty to comply with any applicable universal service obligations;
- (c) the obligation to interconnect with the electronic communications networks of other COL holders or registrants on reasonable terms, where permitted by applicable rules and where necessary to provide consumers with any-to-any connectivity;

- (d) the requirement to comply with any *ex ante* remedies in respect of significant market power that may be imposed by the Authority in accordance with Part IV;
- (e) obligations in respect of emergency call services;
- (f) obligations in respect of directory information and the directory enquiry facilities;
- (g) the obligation to provide performance bonds in respect of compliance with specified conditions or requirements if required by the Authority; and
- (h) any other conditions allowed or required by regulation.

As we discussed in our introduction to this part, ECA 17, below, is incomplete in addressing the full set of rules that must be specified for ICOLs.

Integrated communications operating licences

Some provisions of ECA 17 are unlawful actions for the RA to take. The RA cannot, e.g., revoke an ICOL “based on a determination that revocation is in the public interest” (ECA 17(5)) absent regulations established by the Minister which set forth the criteria for revocation. A “public interest” criterion would surely be too broad and constitute an unlawful delegation of the Minister’s authority to the RA.

17 (1) An ICOL shall constitute a particular type of COL authorising the licence holder to operate and provide public electronic communications networks and electronic communications services distributed by means of such networks, within the territorial limits of Bermuda or between Bermuda and another country, subject to the availability of spectrum and the grant of any necessary spectrum licences or permits in accordance with Part VII.

As we noted above, BTC sees no justification for limiting the maximum number of ICOLs. We believe that the market and the availability of capital will sort these matters. The Ministry should only be concerned with too few providers, not too many. Restricting output through licencing regulation harms long-term consumer welfare and thus flouts the stated purposes of the RAA and ECA.

- (2) The Minister shall by regulation establish the maximum number of ICOLs and the procedures pursuant to which the Authority may grant ICOLs.
- (3) The term of an ICOL shall be twenty years.
- (4) An ICOL may be renewed for an additional term or terms if—
 - (a) the licence holder files an application requesting renewal no less than nine months and no later than six months prior to the expiry date; and

The Minister must set out specific regulations regarding renewals that the RA will implement. The RA cannot assume the cloak of the Minister in determining whether a specific license renewal meets the “public interest.”

(b) ~~the Authority determines that renewal of the licence would be in the public interest, subject to any modifications that the Authority may deem it necessary or appropriate to impose at the time of renewal.~~

(5) An ICOL may be revoked by the Authority pursuant to the procedures and the criteria established by the Minister ~~for cause or based on a determination that revocation is in the public interest;~~ provided, however, that no such decision may be taken without—

(a) an adjudication;

(b) the unanimous vote of the Board of Commissioners; and

The following is not required if the Minister sets the boundary rules for revocation that the RA need only implement. If the RA errs in its determination, parties can appeal the decision to the Supreme Court.

~~(c) the written consent of the Minister.~~

The clause “An ICOL shall not be transferred or assigned” constitutes a scope rule that must be established by the Ministry. The full set of rules governing the industry should be set forth in one place and not buried among others provisions of the law.

(6) An ICOL shall not be transferred or assigned, and may be terminated by the Authority in the event of any such transfer or assignment or if there is a change of control over the licensed entity unless the transfer, assignment or change of control is authorised in advance, in writing, by the Authority acting ~~with the written consent of the Minister.~~ in accordance with the procedures set forth by the Minister.

(7) For the purposes of this section, “control” shall mean the power, whether held directly or indirectly, to exercise decisive influence over an ICOL holder, including by directing its management and policies, whether through ownership of shares, stocks or other securities or voting rights, or through an agreement or arrangement of any type, or otherwise. “Control” shall not mean the power conferred to a bondholder in the covenants typically found in an indenture agreement.

Government authorisation fees for communications operating licences

ECA 18, following, regarding fees should be included with ECA 10 on fees so that all payoff rules pertaining to fees are situated in the same place. Although it is permissible for the RA to advise the Minister regarding Government Authorization fees, ECA 18(a-c) must be specified by the Minister in the fees section of the ECA. As it stands, ECA 18 is vague and ambiguous and provides no certainty to industry as to the level or structure of fees or to whom they might apply.

18 The Authority, when requested by the Minister, shall submit recommendations to the Minister concerning—

- (a) the types of COLs that shall be subject to Government authorisation fees, which shall include all ICOLs and may include other types of COLs;
- (b) the amount of, or the basis for, setting such fees for each type of COL to which the fees apply; and
- (c) the timetable for payment.

PART IV
PROCESS FOR IMPOSING SIGNIFICANT MARKET POWER
OBLIGATIONS *EX ANTE*

The legislation should be revised to clearly delineate the separate roles of the Minister and of the Authority with respect to the procedure for determining significant market power in the market for electronic communications services.

The conflict manifest in the current draft legislation is that the Authority is endowed with both the responsibility of establishing the framework for determining whether to impose *ex ante* remedies, and the authority to make final decisions regarding the imposition of *ex ante* remedies. This framework gives too much power to the Authority. The conflation of the Authority's general duty to follow the orders of the Ministry with the Authority's authority to make policy itself as granted in the provisions of the ECA (and RAA) significantly obscures what powers the Authority would practically possess under the current draft legislation. Given that policy-making duties are delegated to the Minister, the legislation should be revised. The Minister should bear sole responsibility for creating policy that establishes the standard indicators of significant market power (which implicate boundary, authority, aggregation, information, and payoff rules), and the Authority should be responsible for administering that policy—that is, the Authority should conduct the market review according to the Minister's guidelines. This sort of top-down approach to determining significant market power will provide the appropriate checks to the Authority's discretion to help ensure that the Authority is acting in a non-discriminatory and proportionate manner.

Determination of significant market power in relevant markets

ECA 19 assigns policy-level responsibilities to the Authority, in particular, the responsibility of establishing the criteria according to which it will review the relevant market to determine the existence (or non-existence) of significant market power. This structure is flawed on its face and should be revised. Instead, the Minister should establish the guidelines for determining and measuring market power, and the Authority should conduct the analysis pursuant to those guidelines,

taking the Minister's criteria as given, and making recommendations to the Minister with respect to additional or alternative criteria. From the perspective of the IAD framework discussed in the Introduction, the framework and decision rules that are established for determining and addressing significant market power constitute a boundary rule because they affect the ability of firms to enter and exit telecommunications markets by determining which firms will receive licences conditional on compliance with *ex ante* remedies. Additionally, the *process of establishing* the framework for determining and addressing significant market power is a collective choice rule, because it produces the rules that will govern the Authority and the industry at the operational level.

19 (1) The Authority may make administrative determinations that impose *ex ante* remedies on a communications provider in respect of its provision of public electronic communications in a relevant market or markets if, individually or together with others, the communications provider has significant market power in that market.

(2) In order to determine whether a communications provider has significant market power, the Authority shall conduct a review of a relevant market or markets in accordance with section 58 of the Regulatory Authority Act and section 22.

Principles and objectives of the market review process

Imposing, modifying, and withdrawing significant market power obligations are policy-level functions (i.e., boundary rule). Therefore, the Authority can recommend, based on its market review, that the Minister impose, modify, or remove an obligation.

20 In determining whether to recommend that the Minister impose, modify or withdraw significant market power obligations with respect to a particular provider or providers based on its the Authority's review of the relevant market, and in deciding which types of obligations to recommend the Minister apply, the Authority shall seek to—

- (a) develop or maintain sustainable competition for the benefit of consumers with regard to price, innovation and choice;
- (b) promote investment in the electronic communications sector;

The establishment of *ex ante* remedies is a policy decision (i.e., boundary rule) and must be done by the Minister. Following public consultation, the Authority can make recommendations to the Minister as to which of the established *ex ante* remedies should apply in a market.

- (c) ~~establish—recommend to the Minister~~ *ex ante* remedies that are effective but proportionate, taking into account the costs of compliance;
- (d) ~~establish—recommend to the Minister~~ *ex ante* remedies that apply on a technology-neutral and service-neutral basis whenever feasible; and

- (e) rely on market forces and recommend the that Minister withdraw, reduce or limit *ex ante* remedies in circumstances where the Authority concludes, and the Minister confirms, that markets are effectively competitive or likely to become so within a reasonable period of time, taking into account actual and expected market circumstances.

Preliminary identification of markets characterised by significant market power

Because the identification of relevant markets is a policy-level decision that affects market entry (that is, it is inherently related to the establishment of boundary rules), before the Authority can issue a notice on relevant markets characterised by significant market power, the Minister must identify those relevant markets.

21 (1) The Authority shall issue a notice that identifies any relevant product and geographic markets which the Minister has concluded as in its view appear to be characterised by significant market power and may requires the imposition of *ex ante* remedies.

The criteria that guide the Authority in identifying and assessing markets characterised by significant market power must be established by the Minister.

(2) The markets identified pursuant to subsection (1) may include retail markets and wholesale markets and shall be identified on the basis of the Authority's preliminary assessment that the markets meet the following three criteria and any others that the Authority Minister deems to be pertinent—

- (a) the relevant market is characterised by high and non-transitory barriers to entry, other than barriers to entry that are controlled by the Government itself through licencing spectrum allocation or other policies;
- (b) the relevant market is not likely to be affected by technological changes or other developments that would render it effectively competitive within a reasonable period of time two years, taking into account actual and expected market circumstances; and
- (c) the application of *ex post* competition rules alone would not be sufficient to promote or preserve effective competition in the relevant market.

(3) The Authority may, in its discretion, confer formally or informally and transparently with sectoral participants and others, and may consider relevant international benchmarks in order to make a preliminary assessment of significant market power under subsection (1). If the Authority considers any best practices, benchmarks and data from other countries, it shall include objective consideration of the best practices, benchmarks, and data of countries in North America having a high level of economic development.

The process of identifying relevant markets characterised by significant market power must be fully specified by the Minister, including information rules.

(4) The Authority shall provide a ~~summary~~detailed explanation of its preliminary views, and the scientific evidence supporting it, as part of the notice referenced in subsection (1).

Market review procedures

Again, the establishment of criteria for identifying relevant markets, assessing market power, and determining *ex ante* remedies is a policy-level function that governs the actions of the Authority. Therefore, the Minister must establish market review criteria.

22 (1) The Authority ~~may~~shall publish advisory guidelines, that identify ~~or~~and clarify the criteria, established by the Minister, for—

- (a) defining relevant product markets and relevant geographic markets;
- (b) assessing market power in such markets;
- ~~(c)~~ establishing effective *ex ante* remedies and obligations; and
- ~~(d)~~ evaluating the likelihood that regulatory barriers to entry will be removed within two years; and
- ~~(e)~~(e) evaluating the accuracy of market review procedures over time.
- ~~(d)~~ any other aspect of the market review process.

We find ECA 22(2) to be problematic in several ways. First, as we have emphasized above, the factors that will be used to determine the existence (or non-existence) of market power should be established by the Minister—not the Authority. The Minister thus needs to set the specific decision-making criteria that the Authority will use (probably in some subsequent “statutory instrument”).

Second, the list of factors in ECA 22(2) under which market power will be determined should be revised to contain more informative economic considerations. Moreover, those revised economic criteria should be analyzed within a dynamic framework of competition, not merely a static framework. (Here, BTC is recommending the adoption of aggregation and information rules that pertain to the analysis of SMP.)

The first factor by which the government proposes to measure market power is “the overall size of the communications provider and its share of the relevant market.”⁷⁷ However, reliance on market shares can produce diagnoses of monopoly power

77. ECA, *supra* note, § 22(2)(a).

where none exists. Market power refers to the ability of a firm to raise price above the competitive level for a sustained period of time without losing so many sales as to make the price increase unprofitable. The danger with market-share metrics, including the Herfindahl-Hirschman Index (HHI), is that it frequently produces misleading inferences of market power when none actually exists (as in the presence of substantial sunk costs) or when more direct evidence of the margin between price and cost is readily available. Three scientific methods for determining significant market power and the potential for anticompetitive exercise of significant market power are (1) the Lerner Index, (2) the critical share framework, and (3) competitive benchmark prices.

The Lerner Index is an estimate of the proportion by which a firm's price deviates from its marginal cost at the firm's profit-maximising output level.⁷⁸ Professor William E. Landes and Judge Richard A. Posner derived a form of the Lerner Index that is useful in regulatory analysis.⁷⁹ It enables one to infer the market power of any firm by simultaneously considering (1) the entire market's price elasticity of demand, (2) the firm's market share, and (3) the price elasticity of supply of the other firms on the competitive fringe of the market.⁸⁰ In perfectly competitive industries with no barriers to entry and no sunk costs, the Lerner Index approaches zero as price approaches marginal cost. However, regulators using the Lerner Index should recognize that it is not reasonable to expect the Lerner Index to approach zero at a telecommunications providers' profit-maximising output level. Because of the substantial common sunk costs of a telecommunications network, it is not feasible for a carrier to price its products at marginal cost. Further, because it is common for firms in telecommunications markets to operate in multiple markets with demand complementarities, the price elasticities of demand in the other markets in which a firm operates constrain the firm's ability to exercise market power.⁸¹ If a firm raises prices in its primary market, then it will decrease demand for its good in the complementary market. Therefore, a dominant firm that operates in multiple, complementary markets has less incentive to exercise market power, regardless of the firm's market share in the primary market.

78. Abba Lerner, *The Concept of Monopoly and the Measurement of Monopoly Power*, 1 REV. ECON. STUD. 157 (1934).

79. William E. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 944-45 (1981).

80. As long as all three variables are considered, one should arrive at a similar conclusion as to a firm's market power, regardless of how broadly or narrowly one defines the relevant market. If one variable is overstated or understated, then the other two variables will assume larger or smaller values that precisely offset the distorted estimate.

81. See Dennis L. Weisman, *Assessing Market Power: The Trade-Off Between Market Concentration and Multi-Market Participation*, 1 J. COMPETITION L. & ECON. 339, 340, 346-53 (2005); Timothy F. Tardiff & Dennis L. Weisman, *The Dominant Firm Revisited*, 5 J. COMPETITION L. & ECON. 517, 521-24 (2009).

A further refinement over simple analysis of market share is the critical share framework, which measures a communications provider's share of marginal customers, who would substitute away from the provider's networks to a rival network or a reseller on the provider's network if the provider were to raise its price.⁸² The critical-share analysis indicates whether or not a network operator could sustain a supracompetitive price increase. The network operator would raise its price for network access above the competitive level if the profits after the price increase would exceed the profits before the price increase. The profitability of the price increase depends on the firm's own-price elasticity of demand and its marginal cost. If the firm raises prices too high, demand decreases by a greater percentage than revenues rise—in other words, demand falls below the critical share—and the firm's profits drop. Thus, if a firm can sustain a price increase without losing critical share, there is evidence of market power and the incentive to exercise it.

Another alternative to simple examination of market share and HHIs is to examine competitive benchmark prices.⁸³ Under this method, prices in the market in question are compared with competitive prices for the same good or service observable in a comparable market (for example, an effectively competitive market for the same good in a different country). The benchmark price is adjusted to account for differences in quality, cost, and currency. If a firm in the market at issue possesses significant market power, consumers will pay supracompetitive prices. Thus, a benchmark will indicate whether prices are supracompetitive. In contrast to market structure metrics such as the HHI that are often ambiguous as to the question of market power, competitive benchmark prices provide important and possibly conclusive evidence of whether significant market power is being exercised.

Second, many of the factors in ECA 22(2) are not market characteristics but firm characteristics that are irrelevant to the determination, measurement, and analysis of significant market power. In particular, because many of the factors listed characterize firms operating in dynamically competitive markets, as opposed to firms with significant market power, treating those factors as indicators of significant market power would lead the government to impose *ex ante* remedies that would target innovative firms and would reduce consumer-welfare enhancing dynamic competition. For example, it is unclear how "the volatility of shares in the relevant market"⁸⁴ would inform one about the likelihood of anticompetitive conduct. Under dynamic competition, a firm might have a small market share at one period in time

82. See Jerry A. Hausman & J. Gregory Sidak, *A Consumer-Welfare Approach to the Mandatory Unbundling of Telecommunications Networks*, 109 YALE L.J. 417, 477-79 (1999).

83. See Jerry A. Hausman & J. Gregory Sidak, *Evaluating Market Power Using Competitive Benchmark Prices Instead of the Herfindahl-Hirschman Index*, 74 ANTITRUST L.J. 387 (2007). Hausman and Sidak define a competitive benchmark as "the market outcome of a competitive process where no single dominant firm is exercising unilateral market power and no group of firms is exercising joint dominance." *Id.* at 390.

84. ECA, *supra* note, § 22(2)(b).

but quickly gain large market share with the introduction of a new product. Indeed, an alternative explanation for the performance of dynamic markets is that firms compete through innovation for temporary market dominance, from which they may be displaced by the next wave of product advancements.⁸⁵ Thus, market share volatility could indicate the *presence* of dynamic competition rather than its absence.

A similar incongruity with the objective of promoting sustainable and dynamic competition is that, if METEC seeks to promote dynamic competition, it makes no sense to include “the communications provider’s technological advantages or superiority”⁸⁶ as an indicator of market power that would warrant *ex ante* remedies. Such a framework would amount to punishing firms for innovation, an outcome which would confound the government’s goal of “encourage[ing] the development of an electronic communications sector that is responsive to the requirements of users (both businesses and individuals) and provides them with choice, innovation, efficiency, and affordability.”⁸⁷ Similarly, regulation should not penalize a provider for possessing a better “ability to access capital and financial markets relative to that of its competitors,”⁸⁸ for that competitive advantage likely is attributable to the provider’s superior business model, the technological advancement of its products, or its enhanced productivity. A firm’s competitive advantage in technology or in its ability to access capital is not only irrelevant to the question of the ability and incentive to abuse market power, but it instead suggests the presence of dynamic competition. Far from preserving competition, determining market power and the need for *ex ante* remedies on the basis of a firm’s superior technology and performance would create perverse incentives for firms to withhold innovations that drive dynamic competition. This aspect of the draft legislation is profoundly misguided and would reduce the welfare of Bermudian consumers.

Even under a framework of static competition, the factors of significant market power proposed in ECA 22(2) would target firms that engage in consumer-welfare enhancing practices typical of effectively competitive markets. For example, a firm’s superior “diversification of products or services (including bundles)”⁸⁹ benefits consumer welfare. Product diversification and product bundling—as distinct from anticompetitive tying—increase customer choice and lower prices. The ability to exploit economies of scope to enter markets and provide a menu of services is not anticompetitive on its face nor does it say anything about market power. If anything, the presence of product differentiation and heterogeneity in a market should be treated as an attribute of an effectively competitive market.

85. See SCHUMPETER, *supra* note **Error! Bookmark not defined.**, at 81-86.

86. ECA, *supra* note, § 22(2)(d).

87. *Id.* § 6(1)(c).

88. *Id.* § 22(2)(f).

89. *Id.* § 22(2)(h).

Our revisions to ECA 22 reflect our belief that the Minister should set the decision-making criteria that the Authority will use (probably in some subsequent “statutory instrument”). Moreover, these criteria need to meet the standards of scientifically rigorous evidence and methods. If a market review is conducted using methods that lack scientific rigor, the government would risk misdiagnoses of significant market power, which would entail a significantly greater risk that unnecessary or overly broad regulation would be imposed. And, as is explained in our comments on the RAA, regulation is costly. A regime of heavy-handed regulation would not only imply large administrative costs, but would deter market entry and investment in next-generation technologies—which would be far more costly to Bermudian consumers in the long-term.

(2) The Authority shall, in conducting a market review, consider all factors that it deems relevant under the circumstances, including—

- (a) the overall size of the communications provider and its share of the relevant market;
- ~~(b) the volatility of shares in the relevant market;~~
- ~~(e)(b)~~ the communications provider’s control of infrastructure not easily duplicated;
- ~~(d) the communications provider’s technological advantages or superiority;~~
- ~~(e)(c)~~ the degree of countervailing buyer power;
- ~~(f) the communications provider’s ability to access capital and financial markets relative to that of its competitors;~~
- ~~(g)(d)~~ the existence of economies of scale or scope;
- ~~(h) the diversification of products or services (including bundles);~~
- ~~(i)(e)~~ the relative advantages of vertical integration enjoyed by the sectoral provider;
- ~~(j)(f)~~ the presence of *de jure* or *de facto* barriers to market entry or expansion; and
- ~~(k)(g)~~ evidence of previous anti-competitive behaviour.

Establishing criteria for dominance also belongs to the domain of the Minister, because the guidelines for identifying joint dominance govern the operational actions of the Authority and thus are part of the Minister’s exclusive policy-making authority.

(3) In assessing whether two or more communications providers operating in the same relevant market jointly have significant market power, the Authority shall consider, among other relevant factors, whether—

- (a) the market is concentrated;
- (b) each provider has a relatively high and stable market share;
- (c) significant and enduring barriers to entry exist; and

Subsection 22(3)(d) should be deleted for the reasons explained above for subsection (2). Moreover, the analysis of joint dominance fails to address the essential question posed by the economic theory of oligopoly. Consequently, new language for subsection 22(3)(d) is supplied.

- (d) ~~there is compelling scientific evidence that the communications providers make pricing and other strategic decisions in a cooperative rather than noncooperative manner. there are reasonable grounds for concluding that these factors, in combination with those set forth in subsection (2), give rise to a market structure that will prevent, restrict or distort competition in the provision of products or services in the relevant market.~~

If the Minister establishes a set of relevant markets, and the Authority finds evidence that indicates that the scope of the relevant market is incorrectly defined, the Minister will need to redefine the relevant market. Under the current draft legislation, the process by which the Ministry will redefine the relevant market is not clearly outlined. The legislation must lay out the procedure for the first round and subsequent rounds of market review, especially as it pertains to entry. In particular, no new ICOLs should be issued until all markets that the Authority recommends be revisited have been reviewed by the Minister, remedies have been finalized, and a reasonable period of time (we suggest six months) has passed to allow firms with significant market power some time to comply.

(4) The Authority shall conduct a public consultation to review those markets identified in accordance with section 21 that in its view are susceptible to *ex ante* regulation, if any, or pursuant to subsection (6), for the purposes of—

- (a) evaluating whether these relevant markets are, or continue to be correctly defined based on an economic assessment of supply and demand;
- (b) analysing whether a communications provider, individually or with others, in fact possesses, or continues to hold, significant market power in one or more of these relevant markets based on the applicable facts and circumstances; and
- (c) ~~deciding-recommending~~ which obligations, if any, should be imposed in respect of each relevant market characterised by significant market

power in order to promote or preserve effective and sustainable competition, in accordance with section 23.

(5) The Authority shall issue one or more general determinations ~~designating recommending to the Minister~~ communications providers, if any, with significant market power in each relevant market and specifying any ~~recommended~~ *ex ante* obligations that shall apply in accordance with section 23.

Four years is too long to delay the reevaluation of a market and the significant market power obligations imposed on it. In a market characterised by dynamic competition, such as electronic communications, innovation can rapidly overturn an entire market structure. Moreover, because the granting of licenses depends on the provider's compliance with *ex ante* remedies, and the determination of *ex ante* remedies depends on market review, delaying subsequent market reviews very likely would slow competitive entry and constrain dynamic competition.

(6) The Authority shall conclude a further review of each relevant product and geographic market within a period of not more than ~~four~~ ~~three~~ years from the date of its completion of the previous review of the same relevant market in any case in which has made a finding of significant market power.

(7) In determining when to initiate an initial or further review of a relevant product or geographic market, the Authority shall, ~~upon direction of the Minister~~, take into account requests from sectoral participants, the views of consumers and any relevant market developments.

(8) A general determination made by the Authority ~~recommending a~~ finding that a relevant market is characterised by significant market power shall be considered interim, and shall not constitute final ~~Authority-Ministry~~ action for purposes of the Regulatory Authority Act, until the ~~Authority-Ministry~~ makes a determination specifying the *ex ante* obligations, if any, that shall apply in respect of such relevant market or markets in accordance with section 23.

Imposition of *ex ante* remedies

The following remedies should constitute the list established by the Minister from which the Authority can draw to make recommendations to the Minister. Some of these provisions such as audits, cost accounting, and interconnection should apply as conditions for all ICOL licences, as these requirements are not just remedies for significant market power.

Mandatory unbundling is not applicable to Bermuda's electronic communications industry today and, as has been shown in other countries in which the government required network unbundling, can deter facilities-based competition. It would be a wasteful expenditure of resources to mandate unbundling of copper networks while those networks are nearing the end of their life span, and there is no justification for

mandating the unbundling of fibre networks, which will have the effect of significantly delaying or nullifying its deployment.

More importantly, the *ex ante* remedies articulated in the draft legislation seem to assume that the traditional justifications offered for telecommunications regulation today will continue to be necessary after the development of a next-generation fibre-optic network that could enable multiple firms to compete to offer broadband service to the same household (consider the IAD principle regarding “physical and material conditions” that impact the development as well as the outcome of rule sets). The existing justification for legacy regulation in the form of mandatory unbundling has no relationship to the market conditions created by next-generation networks, and METEC therefore should not extend the current set of access regulations for implementation in fibre networks.

ECA 20 states that the Authority and the Minister must seek to “promote investment in the electronic communications sector”⁹⁰ in determining whether to impose *ex ante* obligations and which ones to impose. If promoting investment is a key objective of the government’s imposition of *ex ante* remedies, ECA 23(1)(c)(ii) should be stricken from the legislation, for there is unlikely to be any scenario in which mandatory unbundling would promote investment in next-generation technologies. Empirical evidence indicates that mandatory unbundling is ineffective in promoting investment in new networks by both entrants and incumbents. Although regulators have portrayed mandatory network unbundling as a remedy intended to induce entrants to advance towards full facilities-based competition, there is very little evidence that entrants invest in their own networks once cheap access to incumbent facilities is extended to them. Empirical studies of the United States have found that, under regimes of mandatory unbundling, competitive local exchange carriers increasingly have relied on unbundling as their preferred mode of entry instead of transitioning to facilities-based competition as regulators intended.⁹¹ Those studies also indicated that competitive networks result from policies that nurture the development of rival infrastructure, including networks using alternative technologies (such as wireless).⁹²

Economic analysis also indicates that mandatory unbundling deters investment by incumbents in new networks. A regulator’s use of cost-based rates to price unbundled network access can substantially distort the incentives of incumbents, particularly because those firms make continuing, sequential sunk investments in their existing

90. *Id.* § 20(b).

91. Jerry A. Hausman & J. Gregory Sidak, *Did Mandatory Unbundling Achieve Its Purpose? Empirical Evidence from Five Countries*, 1 J. COMPETITION L. & ECON. 173 (2005); Thomas W. Hazlett, *Rivalrous Telecommunications Networks With and Without Mandatory Sharing* 1 (Working Paper, AEI-Brookings: Joint Center for Regulatory Studies, May 2005).

92. Hazlett, *supra* note 91, at 26.

networks. If the network operator's new investment succeeds, an entrant can purchase the incumbent's unbundled element at or below cost. If the new investment fails, the entrant does not bear any of the cost, but the incumbent's shareholders bear the cost of the unsuccessful investment. Thus, the regulators force the incumbent to provide entrants a free option on its investment.⁹³ The free option diminishes the expected return of an incumbent's investment by the value of the option given to the entrant. Thus, the grant of the option decreases the incumbent's incentive to invest.⁹⁴ Regulatory reliance on cost-based pricing causes these free options to be given to competitors at the expense of the incumbent. Even if such an option is never exercised, it nonetheless represents for the entrant a thing of considerable value, procured for the entrant's advantage by the government through involuntary exchange. The result is an inefficiently low level of investment and innovation by the incumbent. New services will be underprovided, and consumers and businesses will suffer. In contrast, in the United States, investment by AT&T, Verizon, and Qwest in fibre-to-the-node and fibre-to-the-premise accelerated after the FCC determined in 2003 that it would not mandate the unbundling of hybrid fibre-copper infrastructure.⁹⁵

In short, to promote investment, METEC should eliminate cost-based unbundled access provisions. Unbundling will still occur, but at *commercially negotiated prices, terms, and conditions* that reflect the sunk investment in the network infrastructure and consumers' willingness to pay for a portion of the common and sunk costs associated with the provision of network access. It holds with greater force that the government would reduce consumer welfare by mandating unbundling of the next-generation of fibre networks.

23 (1) If, as part of the market review process, the Authority concludes that the imposition of one or more *ex ante* remedies is necessary to prevent or deter anti-competitive effects that are, or are likely to be, caused by the presence of significant market power in a relevant market, the Authority may make an administrative determination imposing one or more of the following obligations, if previously established by the Minister, on a communications provider—

Interconnection should be the duty of all carriers.

- (a) the obligation to interconnect its electronic communications network with the network of another communications provider for the purpose of originating, transiting or terminating traffic, and to provide such

93. See Hausman & Sidak, *A Consumer-Welfare Approach to the Mandatory Unbundling of Telecommunications Networks*, *supra* note 82, at 458; Jerry A. Hausman, *Valuing the Effect of Regulation on New Services in Telecommunications*, 1997 BROOKINGS PAPERS ON ECON. ACTIVITY: MICROECONOMICS 1, 33 n.57.

94. For a discussion of conservation-of-value principles, see RICHARD A. BREALEY, STEWART C. MYERS & FRANKLIN ALLEN, *PRINCIPLES OF CORPORATE FINANCE* 448-52 (8th ed. 2006).

95. See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Reconsideration, 19 F.C.C.R. 20,293 (2004) (reversing the FCC's earlier decision to subject FTTC to mandatory unbundling requirements).

interconnection pursuant to terms and conditions specified by the Authority;

- (b) the obligation to provide wholesale services to other communications providers on a resale basis and, where the Authority deems it necessary, to offer specified minimum features, functionality or other attributes;
- (c) the obligation to meet reasonable requests for access to, and the use of, specified network elements and associated facilities and services and to provide such access pursuant to specifications, terms and conditions that may be established or approved by the Authority including, and as the circumstances may warrant, the obligation to provide—

The following facilities are not telecommunications facilities and should not be regulated.

- ~~(i) co-location with third parties or other forms of facility sharing, including the sharing of ducts, conduit, buildings, cabinets or masts;~~
- ~~(ii) unbundled access to specified network elements and associated databases;~~
- ~~(iii)~~(ii) information about technical interfaces, protocols or key technologies that are required for the interoperability of services and timely information with regard to any planned changes to the same;

The following facilities are not telecommunications facilities and should not be regulated.

- ~~(iv)~~(iii) software systems necessary for provisioning electronic communications, including operational support systems; and

The following facilities are not telecommunications facilities and should not be regulated.

- ~~(v) up to date information systems or databases containing information relating to the location or availability of particular mandated access components or for ordering, provisioning, maintenance and repair requests and billing;~~
- (d) the obligation to meet reasonable requests for access pursuant to terms and conditions that may be established by the Authority including, as the circumstances may warrant—

The following facilities are not telecommunications facilities and should not be regulated.

- (~~g~~) ~~physical infrastructure including buildings, ducts and masts;~~
 - (ii) number translation or systems offering equivalent functionality;
 - (iii) fixed and mobile networks, in particular, access necessary to facilitate virtual network services;
 - (iv) subscription audiovisual services; and
 - (v) such other forms of access to wireline or wireless network features and functionality as may be determined by the Authority to be necessary to promote or protect sustainable competition in a relevant market;
- (e) the obligation to provide access and interconnection subject to terms and conditions that are transparent, including the publication of reference interconnection and access offers, pursuant to a framework approved by the Authority;
 - (f) the obligation of non-discrimination, including the requirements to apply equivalent conditions in equivalent circumstances to other communications providers which provide equivalent services, and to provide facilities, services and information to others under the same conditions and of the same quality as it provides for its own internal purposes or to those of its divisions, subsidiaries, or partners;
 - (g) the obligation to comply with requirements relating to cost recovery and the pricing of wholesale and retail services or facilities, including obligations relating to the cost orientation of prices;

The following provision is harmful to consumer welfare because it reduces the legitimate returns to new product introductions and thus reduces the likelihood that new products will actually be offered. The provision should be stricken.

- ~~(h) the obligation to provide certain types of wholesale access or interconnection prior to introducing associated downstream services that rely on such inputs;~~
- (~~g~~)(h) the obligation to establish and maintain a cost accounting system in accordance with cost allocation and separation rules that are stipulated or approved by the ~~Authority~~ Minister for the purpose of ensuring that a vertically integrated communications provider's costs and revenues are properly attributed or assigned to specific activities and facilitate the detection of anti-competitive cross-subsidies by an independent auditor;

The following provision is relevant to all carriers.

- (~~g~~)(i) the obligation to publish audit information in a format that contributes to an open and competitive market while preserving the confidentiality of accounting data deemed commercially sensitive by the Authority;

The following provision elevates competitor welfare over consumer welfare and should be stricken. The definition of “efficient competitor” is subject to reasonable disagreement on rigorous economic grounds, due to the extent of economies of scope achieved by the communications provider and the decision of the competitor to offer a narrower range of services that do not achieve the same degree of efficiencies. Consumers should not be denied the benefit of lower retail prices so that a particular competitor’s business model can be assured of achieving profitability.

- ~~(k)~~(j) the obligation not to unreasonably bundle other services with a service that is contained in a relevant market characterised by significant market power, including a prohibition against anti-competitive tying arrangements or ~~offering bundles at retail prices that cannot be replicated by an efficient competitor~~, as defined by the Authority;
- ~~(l)~~(k) the obligation to provide carrier selection and related terms and conditions in the manner specified by the Authority; or
- ~~(m)~~(l) in exceptional cases where the Authority determines that other measures have not prevented or deterred anti-competitive effects, the obligation to offer specified access and interconnection facilities and services through a functionally separate and independently operated business entity, and to provide such services and facilities to competitor communications providers and its own retail business operators on the same terms and conditions including those relating to pricing, availability and service quality, and by means of the same systems and processes; ~~or~~.

The following is too vague and expansive.

~~(n) such other obligations as the Authority may, following a public consultation, deem necessary to promote or preserve effective and sustainable competition in a relevant market or markets.~~

(2) The Authority shall specify in a general determination, the categories of communications providers that are eligible to obtain interconnection, access or associated facilities and services in accordance with subsection (1).

(3) Any obligations imposed in accordance with this section shall be proportionate and justified in light of the relevant circumstances and the purposes and objectives set forth in sections 6 and 20 and shall, in the case of any access obligations, take account of—

- (a) the technical and economic feasibility of using or installing competing facilities, taking into account the type of interconnection or access involved;
- (b) the feasibility of providing access in relation to available capacity; ~~and~~
- (c) relevant investment risks incurred by an operator designated as having significant market power; ~~and~~.

(e)(d) the possibility that the access seeker could have competed to be first to have built the facilities in question.

Given the current market review criteria—which lack economic rigor—there is a risk that the Authority would make false diagnoses of market power. Moreover, ECA 23(4) would allow the Authority to perpetuate *ex ante* remedies premised on the incorrect finding of market power. For example, if the Authority made a finding of market power based on high market shares—which, in a price-regulated industry are meaningless from a competitive perspective—it may impose *ex ante* rate regulation under the current draft regulation. Rate regulation that forces a firm to charge at- or below-marginal-cost rates in a given market will create “only the appearance and not the reality of monopoly power.”⁹⁶ The appearance of market power is then used to justify further cost-based price regulation. The U.S. Court of Appeals for the Ninth Circuit comprehended that relationship when it said: “Reliance on statistical market share in cases involving regulated industries is at best a tricky enterprise and is downright folly where . . . the predominant market share is the result of regulation. In such cases, the court should focus directly on the regulated firm’s ability to control prices or exclude competition.”⁹⁷

Price distortion that results from regulation can also increase the risk that the regulator will continue to impose unnecessary regulation by causing substitutes to appear weaker than they would be at competitive price levels and therefore lead to false conclusions of market power.⁹⁸ In an SSNIP test applied to below-cost pricing, the small price increase examined in the test may still result in a price below the competitive level. However, the proper interpretation of the SSNIP test is whether a company could profitably hold the price at a *supracompetitive* level. The fact that a firm can profitably increase a price to competitive levels does not prove the existence of market power. Thus, even if a SSNIP test demonstrated that a service provider could profitably increase prices, it does not follow that the service provider has market power. A price increase by a firm subject to price regulation does not necessarily verify an exercise of market power. Taken together, the draft legislation’s current market review framework and ECA 23(4) would increase the risk that *ex ante* regulation, once imposed, would never be lifted. That prospect of perpetual regulation would reduce the incentives of service providers to make sunk investments in next-generation networks.

These examples demonstrate the risk that, by neglecting to require the standard of scientific rigor in significant market power analysis, the government will risk a

96. Landes & Posner, *supra* note 79, at 975-76.

97. Metro Mobile CTS, Inc. v. NewVector Commc’ns, Inc., 892 F.2d 62, 63 (9th Cir. 1989); *accord*, Consolidated Gas Co. of Fla. v. City Gas Co., 880 F.2d 297, 300 (11th Cir.), *vacated and reh’g granted*, 889 F.2d 264 (11th Cir. 1989), *on reh’g*, 912 F.2d 1262 (11th Cir. 1990), *rev’d per curiam on other grounds*, 499 U.S. 915 (1991).

98. Debra J. Aron & David E. Burnstein, *Regulatory Policy and the Reverse Cellophane Fallacy*, 6 J. COMPETITION L. & ECON. (forthcoming 2010).

creating a cycle of false market power diagnoses and disproportionate and costly regulation. To avoid perpetuating unnecessary regulation at the expense of consumers and the industry, the determination to modify existing regulations and impose additional remedies must be based on scientific evidence and should be a final Ministry action.

(4) Following further review by the Authority of a relevant market that is already subject to one or more *ex ante* remedies and that continues to be characterised by significant market power, the Authority may, following public consultation, recommend that the Minister make an administrative determination, based on scientific evidence, modifying any relevant obligations or imposing such additional remedies as ~~it~~ the Minister deems necessary, taking into account the impact and efficacy of the existing obligations and the costs and benefits of any changes.

The Authority should bear the burden of proving the necessity of its *ex ante* regulations. This provision reverses the burden and should be stricken.

(5) For the purposes of assessing the costs and benefits of imposing, ~~modifying or withdrawing~~ a proposed *ex ante* remedy and evaluating the relevant scientific evidence, including cost data and factors relating to technical or commercial feasibility, the burden of proof for demonstrating that a remedy should ~~not~~ be imposed, ~~or should be modified or withdrawn~~, shall rest with the Authority ~~communications provider that is designated as having significant market power in the relevant market~~.

(6) Any communications provider on which the Authority recommends and the Minister imposes *ex ante* remedies shall comply promptly, fully and in good faith with any and all such obligations.

“Undertaking” is too vague a term. More precise terms are defined in the statute.

(7) For the purposes of this section, “access” means the making available of facilities or services to another undertaking ~~communications provider~~, under defined conditions, on either an exclusive or non-exclusive basis, for the purpose of providing electronic communications services, including when they are used for the provision of information services or subscription audiovisual services.

Withdrawal of *ex ante* remedies

The term “closely related relevant market” is vague and lacking in any economic relevance or rigour. The final clause should be deleted.

24 Where, as a result of a market review conducted pursuant to section 22, the Authority recommends and the Minister determines that a relevant market is effectively competitive, ~~it~~ the Minister shall not impose any *ex ante* remedies in respect of that market and shall remove any *ex ante* remedies previously imposed, ~~unless the Authority determines that certain obligations, including transparency and accounting separation, are necessary to preserve effective competition in cases where a closely related relevant market is characterised by significant market power~~.

PART V
CONSUMER PROTECTION PROVISIONS

As an initial premise, regulations regarding consumer protection must be established by the Minister as authority rules governing the regulation of the sector generally, not the RA. That said, BTC does not believe that these regulations should be included in this legislation at this time for several reasons. First, there has been no public consultation on this matter to enable the industry with the Ministry to fully consider, discuss and debate any required regulations pertaining to consumer protection. BTC would argue that proposed legislative language about to be dropped in the House without formal industry consultation (as is also the case with licensing, universal service, and the administrative procedures to be followed by the RA) does not constitute a legitimate consultation, especially considering the very short timeframe for responding to what turned out to be very extensive proposals seen for the first time here. A better law would result from a proper consultation with alternative proposals and adequate time for consideration.

Second, in some instances, these provisions are directed at the wrong party. Unsolicited direct marketing, ECA 26, for example, attempts to hold communications providers accountable, but it is marketers, not communications providers, that are engaged in the undesirable activity—which suggests that the Consumer Affairs Board rather than the RA should take up this matter. This is particularly important because BTC sees no justification for paying the RA to do what other existing boards can or should do.

Third, some provisions like premium rate services, ECA 27, have as their impetus treating consumers fairly. If the intent as expressed at the Workshop is to ensure that consumers know what they will be charged for services before they engage the service provider, this is a consumer protection principle that reaches beyond electronic communications. Similarly, ECA 28, regarding the confidentiality of customer information, pertains as well to customer information that is held by a bank, an insurance company, or another utility. Thus, BTC contends that both of these provisions would be proper fodder for the Consumer Affairs Board, allowing us to eliminate unnecessary expenses requiring the RA to do what other boards can and should do.

ECA 29, ECA 30, and ECA 31 all pertain to legitimate and illegitimate call intercepts and should be included in the same part of the legislation that includes the CALEA requirements since the concepts are related. ECA 32 is an authority rule regarding obligations of electronic communications service providers to ensure the security of their networks and, as such, should be included in Part III with the list of obligations required of licensees (and referenced out as a separate part of the legislation if needed).

Functions of the Authority

25 ~~The Authority may make general determinations —~~

~~(a) governing the commercial and marketing practices of communications providers to protect the rights of customers, subscribers, users and consumers, having due regard for the vulnerability of certain categories of consumers; or~~

~~(b)(a) issuing or approving codes of practice relating to such practices.~~

Unsolicited communications

26 ~~The Authority shall make general determinations to establish the requirements and procedures that shall govern the activities of communications providers and users of electronic communications services when engaged in unsolicited direct marketing by means of electronic communications networks in order to minimise intrusion, annoyance, inconvenience or anxiety to consumers, including activities by means of —~~

~~(a) automated calling and communications systems or machines that do not involve human interaction;~~

~~(b) facsimile machines; and~~

~~(c)(a) electronic mail.~~

Premium rate services

27 ~~The Authority may make general determinations governing the provision of premium rate services for the purpose of ensuring that consumers are treated fairly and reasonably by communications providers and persons responsible for providing content, transaction services or other offerings using the services of such providers.~~

Confidentiality of customer information

28 ~~The Authority may make general determinations governing the processing, disclosure and use by communications providers of personal data and other customer proprietary data which they obtain from customers, subscribers or users in the course of business other than for the purpose of conveying communications, including —~~

~~(a) disclosure of a customer's name, address and telephone number (including fixed and mobile numbers), including for purposes of inclusion in a printed or electronic directory;~~

~~(b) use or disclosure of traffic or location data;~~

~~(c) use or disclosure of subscription data provided when a customer orders a service; and~~

~~(d)(a) any other customer related data, as defined for this purpose by the Authority, that is obtained by communications providers from users or sub-users.~~

Privacy of communications

29 (1) The privacy of communications shall be inviolable, subject to the provisions of subsections (6) and (7) and sections 30, 31, 46, 53 and 54.

(2) No person who is not authorised by the sender or the addressee shall intercept any signal in the course of a telecommunication or wilfully divulge or publish the existence, content, substance, purport, effect or meaning of such intercepted signal to any person.

(3) No person who is not entitled thereto shall receive, or assist in receiving, any such intercepted signal and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto.

(4) No person having received such intercepted signal or having become acquainted with the same (or any part thereof), knowing that such information was so obtained, shall divulge or publish the contents, substance, purport, effect or meaning of the same (or any part thereof) or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto.

(5) Subsections (2), (3) and (4) shall not apply to the transmitting, receiving, divulging, publishing or utilising of the contents of any radio message or communication broadcasted or transmitted by amateurs or others for the use of the general public or relating to ships or aircraft in distress.

(6) An operator of a switchboard or an officer, employee or agent of any communications provider, the facilities of which are used in the transmission of a wire communication, may intercept, disclose or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his services or the protection of the rights or property of the communications provider transmitting such communication.

(7) No communications provider shall utilise a service for the observation or random monitoring of electronic communications except for mechanical, electronic, optical or service quality control checks; provided, however, that an officer, employee or agent of the Authority, in the normal course of his employment and in discharge of the radio monitoring responsibilities exercised by the Authority in the pursuance of its powers under section 39(3), may intercept a communication transmitted by radio and disclose or use the information thereby obtained.

(8) No person who is not authorised by all the parties to any private signal shall tap any wire, cable, optical fibre or wireless transmission medium, nor use any other device or arrangement to secretly overhear, intercept, or record such signal in the course of telecommunication.

(9) No person shall, in performing the act or acts prohibited in this section, knowingly possess any tape record, wire record, disc record, digital electronic copy or any other such record, or copies thereof, of any communication or spoken word secured in a manner prohibited by this Act, or replay the same for any other person or persons, or communicate the contents thereof, either verbally, in writing or otherwise, or furnish transcriptions thereof, whether complete or partial, to any other person.

Access by public bodies

30 (1) Notwithstanding section 29(8), a police officer or officer of a communications provider acting with the consent of the person renting a wireless or wireline circuit may tap or

trace such circuit, or use any other device secretly to overhear, intercept or record a communication passing over such circuit in order to detect an offence under section 71.

(2) Notwithstanding section 29, a police officer, or other person who is authorised by a written order of the Governor under the powers granted to him by section 54 or a person designated by him, may execute any of the acts declared to be unlawful in section 29, and subsection (3) shall not apply to evidence thus secured.

(3) Any message, communication or spoken word, or the existence, contents, substance, purport, effect or meaning of the same or any part thereof, or any information therein contained, obtained or secured by any person in contravention of section 29, shall not be admissible in evidence in any judicial, quasi-judicial, legislative or administrative hearing except for the purpose of proving the contravention of that section and for that purpose the person adjudicating shall make such order as he considers appropriate to preserve confidentiality.

Prohibition of transmission of messages in public interest

31 Where he is satisfied that the interests of defence, public safety, public order or public morality so require, the Governor, acting in his discretion, may by warrant under his hand direct that any message or any class of messages intended for transmission by telecommunication shall not be transmitted or that any telephone call or message or any class of messages intended for transmission, or transmitted or received or being transmitted, by telecommunication shall be intercepted or detained and disclosed to the Governor or to the public officer specified in the warrant.

Security of customer data and reporting of data breaches

32 (1) A provider of public electronic communications shall take adequate technical and organisational measures to protect the security of its services and networks, including measures to ensure that the personal or proprietary data of its customers or users that is stored or transmitted by it in connection with the provision of electronic communications—

- (a) can be accessed by authorised personnel for legally authorised purposes only; and
- (b) is protected against accidental or unlawful loss, destruction, or alteration and unauthorised or unlawful storage, processing, access or disclosure.

(2) The provider of public electronic communications shall develop a security policy and processes designed to ensure compliance with subsection (1), which shall be subject to review, approval and audit by the Authority.

(3) If there is a breach of the security obligations set forth in subsection (1) or the policy approved pursuant to subsection (2), the communications provider shall, without undue delay, notify the breach to—

- (a) the Authority pursuant to regulations set forth by the Minister; and
- (b) any subscriber or individual affected by the breach if, in the view of the Authority, the breach is likely to have an adverse effect on the subscribers or individuals concerned.

Communications providers will be subject to the notification rules (information rules) established by the Minister. This section should fully specify what the Minister requires. Any additional information the RA would like constitutes a *may* not a *must* rule for providers.

(4) The notification required under subsection (3) shall describe the nature and consequences of the breach, the measures which the communications provider has taken or proposes to take to address the breach and its effects, and any other information which the Authority, acting pursuant to rules established by the Minister, may ~~require~~ request.

(5) The Authority may make adjudicative decisions and orders requiring a communications provider to take specific measures to prevent data breaches from occurring or recurring and may impose appropriate sanctions in cases where such obligations are not met pursuant to regulations established by the Minister.

(6) For the purposes of subsection (1), “processing” means any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise, alignment or combination, blocking, erasure or destruction.

PART VI
UNIVERSAL SERVICE PROVISION AND FUNDING

Universal service is another significant policy that has not benefited from a proper industry consultation which would allow the industry, with the Ministry, to fully consider, discuss and debate these measures or to entertain alternative ways of ensuring that indigent individuals can access basic services at affordable rates. Rather than lay out broad language that allows the Minister (we would argue, not the RA) to fill in the contours of this requirement at a later date, BTC recommends that the Ministry eliminate this provision from the current bill and conduct a consultation that establishes the full rule set required to specify a universal service policy, including all the appropriate position, boundary, authority, aggregation, information, payoff, and scope rules. Doing so will ensure that the resulting legislation includes specific language regarding the expectations of consumers and the obligations of providers—all of which is currently missing. At this juncture, it is sufficient to note that the Minister has the authority to establish a universal service policy (as is included in ECA 7(b)).

That said, it is important to note that this part and this legislation is silent on the Ministry's vision for a next-generation network for the provision of wideband services for all business and residential premises. Forward-looking governments are taking this opportunity to revisit their universal service policies; to consider what technologies are crucial to support education, health care, public services, employment, and economic development in the 21st Century and to devise plans and strategies for ensuring the roll-out of fibre to the premises. For this reason especially, BTC urges the Ministry to take up the subject of universal service in a broader consultation that also contemplates a national broadband plan.

Universal service policy

~~33 — The Minister may make general policies and, as necessary, regulations concerning the provision of universal service by one or more providers of public electronic communications, including—~~

- ~~(a) — the types of services that shall be subject to mandatory universal service provision;~~
- ~~(b) — whether any particular type or group of users should be eligible for certain universal services pursuant to social tariffs; and~~
- ~~(c) — the sources of any special funding that may be required and the basic framework of the funding scheme.~~

~~(2) — Any policies made by the Minister, and any applicable regulations, shall ensure that requests for connection by end-users at a fixed location to a public electronic communications network or networks covering the island of Bermuda and offering international access via undersea cable can be met by at least one ICOL holder, and that~~

~~the connection provided is at a minimum capable of supporting voice telephony, facsimile and functional Internet access.~~

Functions of the Authority

~~34 ——— The Authority shall assist the Minister in formulating and implementing any general universal service policies and regulations that may be considered or made pursuant to section 33.~~

~~(2) ——— The Authority may make general determinations implementing the policies and regulations made by the Minister, including by —~~

- ~~(a) ——— defining the specific electronic communications services which shall be subject to a universal access obligation based on consideration of the relevant costs, needs of the public, affordability of the service or services, and advances in technology;~~
- ~~(b) ——— specifying the criteria of eligibility for any social tariffs that may be imposed as a matter of policy or by regulation;~~
- ~~(c) ——— establishing the terms and conditions pursuant to which one or more designated communications providers shall be obligated to provide universal services defined or specified pursuant to paragraph (2)(a) or (2)(b);~~
- ~~(d) ——— establishing the detailed provisions of a universal service funding scheme, if applicable, pursuant to section 35; and~~
- ~~(e) ——— ensuring that designated communications providers comply with any universal service obligations or conditions that may be imposed and facilitating the functioning of the scheme.~~

~~(3) ——— The Authority may, by administrative determination, require providers of public electronic communications networks to negotiate reasonable interconnection agreements with one another if necessary to ensure the interoperability of public electronic communications throughout Bermuda or access on the part of end users to any to any communications by means of such networks.~~

~~(4)(1) Following the establishment of a universal service policy by the Minister, the Authority shall periodically submit to the Minister, following a public consultation, a report that details the measures taken by the Authority and sectoral participants to implement the policy, including the operation of any funding scheme that may be established, and offering recommendations for any changes in policy that it deems to be in the public interest.~~

Establishment of universal service fund

~~35 ——— The Authority on its own initiative may, or upon request of the Minister shall, prepare a report that assesses whether the establishment of a fund to support or promote the provision of universal service is necessary and proportionate, taking into account all factors specified by the Minister or deemed relevant by the Authority, including —~~

- ~~(a) ——— whether the mandatory provision of access to universal services or the offering of social tariffs imposes a financial burden on one or more~~

~~designated communications providers, and the extent of any such burden; and~~

~~(b) whether any financial burden identified under paragraph (1)(a) is unreasonable, based on an evaluation of all relevant factors, including the value of any historic commercial advantages enjoyed by a communications provider as a result of special rights previously enjoyed.~~

~~(2) The Authority shall submit the report referenced in subsection (1) and any accompanying recommendations to the Minister, and shall publish the report and recommendations on the official website.~~

~~(3) If the Authority recommends the establishment of a universal service fund, its submission to the Minister shall propose the procedures and requirements for—~~

~~(a) establishing a fund into which a group of designated communications providers shall make periodic contributions;~~

~~(b) estimating, on an annual basis, the total amount of funding required to compensate for the provision of universal services at prices below cost, in accordance with the approved scheme;~~

~~(c) designating the communications providers that shall be required to make such contributions and the basis on which the payments shall be calculated; and~~

~~(d) determining the eligibility of communications providers that offer universal service below cost to receive contributions to fund the deficit, including any accounting, reporting and true-up obligations that it deems appropriate.~~

~~(4) Any recommendation provided by the Authority shall be—~~

~~(a) consistent with the purposes of this Act and the universal service policy established by the Minister pursuant to section 33(1);~~

~~(b) reasonable, effective and conducive to administration of the fund in a fair, transparent, non-discriminatory and competitively neutral manner; and~~

~~(c) no more burdensome than is necessary to achieve the objectives of the universal service policy.~~

~~(5) The Minister shall give due consideration to the recommendation of the Authority in deciding whether to make a regulation establishing a funding scheme for the provision of universal service.~~

~~(6) Any regulation made by the Minister pursuant to this section shall—~~

- ~~(a) establish the basis for determining the amount of the universal service contribution to be made by designated communications service providers;~~
- ~~(b) comply with the criteria set forth in subsection (4); and~~
- ~~(c) be subject to the affirmative resolution procedure.~~

~~(7)(1) The Authority shall be responsible for administering any universal service funding scheme that may be established by regulation.~~

PART VII USE OF RADIO SPECTRUM AND EQUIPMENT FOR ELECTRONIC COMMUNICATIONS

As with the other major policy areas, the Minister is responsible for establishing the rules that govern the licensing and use of the spectrum, not the RA. Once again, the Minister can rely on the full set of rules—position, boundary, authority, aggregation, information, payoff, and scope rules—to fully specify requirements for participants in this arena. Although BTC suspects that this Part is not fully specified with respect to the seven rules, we have insufficient time to address these shortcomings except in a cursory way. That said, it is important to note that the Minister must also establish the rules governing the RA with respect to spectrum allocations and spectrum licensing in this legislation because the RAA is broadly construed to cover any sectoral regulation.

Spectrum policy and management

36 (1) The Minister, giving due regard to the purposes and objectives of this Act and the importance of radio spectrum as a scarce national resource and a public good of significant social, cultural and economic value, shall make general policies and, as necessary, regulations with respect to—

- (a) the management and allocation of spectrum for particular or liberalised uses in accordance with the provisions of this Act; and
- (b) the procedures to be followed by the Authority in the assignment of spectrum for use in connection with the provision of electronic communications, whether by means of the grant of an individual licence, the designation of a class licence, or the grant of a licence exemption.

(2) The Minister shall confer and coordinate with any Government Department or agency that has recognised spectrum usage rights prior to adopting any policies or issuing any directions that could affect such rights.

Functions of the Authority

37 (1) The Authority shall have the responsibility to implement the general policies and regulations made by the Minister in respect of radio frequencies comprising the electro-

magnetic spectrum which are, or are available to be, used to transmit or receive electronic communications.

(2) Following the promulgation of regulations by the Minister, The—the Authority shall have the power to carry out the following functions and activities in respect of radio spectrum—

Permissible implementation once the Minister has established the information rule requiring this action.

- (a) maintaining and publishing the Bermuda Frequency Allocation Table which shall detail, among other things, the purposes and priorities for which the Minister has allocated the frequencies;

The Minister is responsible for specifying criteria and procedures for assigning radio frequencies (boundary, authority and aggregation rules), not the RA.

- (b) specifying the criteria and procedures for the assignment of radio frequencies, awarding individual spectrum licences, establishing spectrum class licences and granting licence exemptions;

License terms and conditions are boundary rules that must be established by the Minister; usage priorities are aggregation rules; and limitations are scope rules.

- (c) establishing the applicable licence terms and conditions, including technical conditions and usage priorities and limitations;
- (d) coordinating licensing procedures and conditions with associated operating licences for the provision of electronic communications;

Lotteries were proven to be hugely costly in terms of transactions costs when used by the U.S. Federal Communications Commission to assign cellular telephone licences in the 1980s because nearly every winner transferred the licence to a serious communications company within a short period of time, thereby necessitating transfer of control proceedings.

- (e) conducting comparative selection processes, auctions, ~~lotteries~~ or hybrid processes pursuant to regulations and procedures established by the Minister for the award of spectrum licences in cases where demand for the right to use a specific portion of the radio spectrum is expected to exceed supply;

Fee levels and structures are payoff rules that are the responsibility of the Minister.

- (f) setting the appropriate level and structure of fees for radio apparatus permits and the award of spectrum licences, or the process for determining such fees, as appropriate;

Permissible implementation once the Minister has established the information rule requiring this action.

- (g) establishing, maintaining and providing convenient access by the public to a frequency database and register which identifies spectrum licence holders, relevant technical conditions, priorities of use, and any additional information that the Authority deems helpful to actual and potential users of spectrum;

As a position rule, classification is the domain of the Minister. Establishing technical requirements and conditions (authority rules) is likewise the responsibility of the Minister. Once set, the RA is free to monitor and ensure compliance.

- (h) classifying the various types of radio stations and apparatus, issuing permits and establishing technical requirements and conditions for the same;
- (i) conducting tests to monitor the use of frequencies and ensure compliance with technical requirements;
- (j) conducting tests to check for harmful interference;

Permissible implementation once the Minister has established the aggregation rule regarding harmful interference.

- (k) conducting administrative proceedings to consider the merits of complaints alleging harmful interference;
- (l) conducting public consultations on its own initiative or at the request of the Minister, licence holders or consumers, and undertaking studies where appropriate, to evaluate the extent to which spectrum is available for use for radiocommunications in Bermuda, to assess current and potential demand, and to consider any other factors relevant to the Minister in formulating or modifying spectrum policies;

The last clause in (m) is a boundary rule that must be established by the Minister.

- (m) examining persons in connection with the operation of apparatus for radiocommunication, the grant and endorsement of certificates of competency in the operation of such apparatus, the fees payable in respect of any such examination or the grant or endorsement of any such certificates, and the authorisation of persons to hold positions in radio stations and the cancellation or suspension of any such authority pursuant to regulations established by the Minister;

Permissible once the Ministry requires standby facilities of radio stations.

- (n) specifying requirements for standby facilities to be maintained by radio stations for use in case of natural disasters or other emergencies;

“Prohibiting” is an authority rule that must be established by the Minister; “regulating” is permissible once the prohibition has been established.

- (o) prohibiting or regulating the sale or use of any apparatus or machinery causing or capable of causing harmful interference to radio reception;

Again, “Prohibiting” is an authority rule that must be established by the Minister; “regulating” is permissible once the prohibition has been established.

- (p) prohibiting and controlling electrical or radiated interference with the working of apparatus for telecommunication;
- (q) regulating the operations of ~~operating~~ foreign registered or licensed mobile radio stations while in or over Bermuda or its territorial waters or in Bermudian air space pursuant to rules established by the Minister; (position and authority rules)
- (r) regulating the operations of ~~operating~~ mobile radio stations licensed in Bermuda which are not for the time being in or over Bermuda, Bermudian air space, or its territorial waters pursuant to rules established by the Minister; (position and authority rules)
- (s) the licensing of persons wishing to maintain or repair radio apparatus and the qualifications to be held by such persons pursuant to rules established by the Minister; (position and authority rules)
- (t) regulating the importation, sale, trading in and demonstration of radio apparatus and radio receiving apparatus not excluded from the application of this Act pursuant to rules established by the Minister; (position and authority rules)
- (u) the dismantling, sealing or confiscation of any radio station, radio apparatus and radio receiving apparatus, not excluded from the application of this Act pursuant to rules established by the Minister; and (position and authority rules)
- (v) exercising such other functions as the Authority deems necessary to implement or facilitate the Minister’s policies with regard to radio spectrum.

Objectives of spectrum management

38 (1) In performing their functions and duties and exercising their powers under this Part, the Minister and the Authority shall ensure that radio spectrum is managed in a manner that—

- (a) is objective, transparent and non-discriminatory;
- (b) is economically and technically efficient and is allocated to users in a manner that minimises delay and transactions costs;

- (c) facilitates the introduction and evolution of new technologies and innovative electronic communications services;
- (d) gives due recognition to the level of investment in existing equipment configured for specific frequencies and the cost of migrating to other frequencies;
- (e) preserves or promotes effective competition in the provision of electronic communications services subject to this Act;
- (f) is compatible with the Convention; and
- (g) meets the radiocommunications needs of Government Departments and agencies.

(2) Where any of these objectives appear to be in conflict, the Minister shall, after conferring with the Authority, prioritise the objectives or otherwise resolve the conflict in a way that, in the Minister's opinion, best serves the public interest.

Spectrum licences, permits and exemptions

39 (1) No person shall—

- (a) use the electro-magnetic spectrum within the territorial waters of Bermuda to transmit or receive any electronic communications without first obtaining a spectrum licence; or

The procedures for doing so must be specified by the Minister (boundary rules).

- (b) import, install, place in operation, repair, or maintain any radio station or radio apparatus without a permit issued by the Authority

Exemptions must also be established by the Minister (boundary rules).

unless the Authority has granted the spectrum use and the radio station or apparatus a specific exemption by administrative determination.

(2) The holder of a spectrum licence shall conform to the conditions and standards specified in such licence, including—

- (a) the frequencies assigned to that licence holder;
- (b) the location, type and specifications of radio stations and apparatus;
- (c) the geographical area covered by the licence; and
- (d) any other technical conditions that may assist in the efficient and effective use of the radio spectrum.

(3) The Authority shall be responsible for monitoring and enforcing compliance with the use of any radio frequencies assigned to the holder of a spectrum licence or permit issued in accordance with this section.

(4) Nothing in this section shall be construed to allow a communications provider to engage in any of the activities specified in section 11 without holding a duly authorised COL or qualifying for a COL exemption.

Any restrictions to the licensing must be established by the Minister along with the criteria for imposing restrictions (boundary rules), although they can be enforced by the RA.

(5) The Authority may impose proportionate and non-discriminatory service or technology restrictions in a spectrum licence or permit for radio stations or apparatus for a limited or indefinite period if it determines that such restrictions are necessary to—

- (a) avoid harmful interference
- (b) protect public health against electro-magnetic fields;
- (c) ensure technical service quality;
- (d) maximise radio frequency sharing;
- (e) provide for the efficient use of spectrum;
- (f) protect or promote competition in the provision of electronic communications;
- (g) promote investment in new or innovative technologies or electronic communications services; or
- (h) otherwise advance the public interest.

(6) The Authority shall make general determinations establishing—

The basic provisions of spectrum licenses and permits are authority rules that must be established by the Minister.

- (a) the basic provisions of spectrum licences and permits for radio stations and apparatus;

Criteria and eligibility for exemptions are boundary rules that must be established by the Minister.

- (b) the criteria and eligibility for any exemptions, which may be granted in those cases in which no Regulatory Authority or Government authorisation fees are to be collected and the Authority determines that—
 - (i) there is no reasonable probability of harmful interference; and
 - (ii) the level of demand for use of the spectrum in the relevant frequency band or bands is not expected to exceed the spectrum available;

Procedures, criteria and conditions for licensing are boundary rules that are the responsibility of the Minister as is the decision to engage in competitive bidding or comparative selection. The RA may advise the Minister, but the RA cannot act independently in making these determinations.

- (c) procedures, criteria and conditions for the award of individual spectrum licences and the grant of permits for radio stations and apparatus, including competitive bidding procedures and comparative selection procedures;

Procedures, criteria and conditions for licensing are boundary rules that are the responsibility of the Minister

- (d) procedures, criteria and conditions for obtaining class licences for the use of specified frequencies or radio stations and apparatus; and

Permissible as these are not licensing provisions regarding market entry/exit (boundary rules).

- (e) procedures, criteria and conditions for obtaining licences or permits for technical testing or non-commercial trials involving the use of spectrum.

While the following provision is a perfectly legitimate provision (boundary rule governing the sector), it would be BTC's preference to see the full set of rules governing providers licensing all together in one section.

- (7) The term of a spectrum licence or a permit for radio stations and apparatus shall not exceed ten years.

This renewal "window" fails to consider situations where a provider might be prevented from making an investment due the uncertainty surrounding the renewal of a license if the provider were prohibited from petitioning for renewal prior to nine months in advance. Thus, BTC recommends this clause be changed as noted.

- (8) A spectrum licence associated with an ICOL shall be renewed for an additional term or terms co-extensive with that of the ICOL if the licence holder files an application requesting renewal ~~no more than nine months and~~ no later than six months prior to the expiry date—

Licensing and license renewals are the responsibility of the Minister and cannot be delegated to the RA. The RA can implement licensing and renewals pursuant to regulations established by the Minister, but the RA cannot make market entry and exit decisions of its own accord or (see below) license modifications of its own accord.

- (a) unless the Authority determines that renewal of the licence would not be in the public interest; and

- (b) subject to any modifications that the Authority may deem it necessary or appropriate to make at the time of renewal.

(9) A permit for a radio station or apparatus shall be reviewed by the Authority in accordance with the procedures, terms and conditions specified in the permit pursuant to regulations established by the Minister.

Spectrum liberalisation and trading

This is an authority rule pertaining to the rights of spectrum holders, and there should be a section of the law that lists these rights in one place.

40 (1) Spectrum licences and permits shall, to the extent practicable, allow the radio frequencies to which they pertain to be used liberally with all types of technologies and for all types of electronic communications, subject to the prohibition against harmful interference pursuant to section 43 in respect of any primary or co-primary spectrum usage rights held by other authorised users of the same frequencies.

Given the significance of this subsection, BTC recommends that this recommendation be made following a public consultation with industry, especially as industry would have the most insight regarding spectrum technologies and how spectrum could or should be used.

(2) The Authority may make recommendations to the Minister, following a public consultation, proposing the liberalisation of specific frequencies or frequency bands in any or all of the following ways—

- (a) with respect to the types of electronic communications that may be provided using the specified frequencies;
- (b) with regard to the technologies that may be utilised in providing electronic communications authorised in connection with the specified frequencies; or
- (c) by designating the specified frequencies as eligible for sublicensing or for one or more forms of spectrum trading, including the sale or lease of recognised spectrum usage rights under duly authorised spectrum licences.

BTC recommends that a reference to ECA 41, however brief, be included in the legislation where service provider fees (payoff rules) are discussed so that all the fees governing the industry can be found in one section, rather than spread throughout the document as is now the case. As we noted above, that section should be specific and detailed about the rules regarding fees and fee payments, i.e., who pays; for what; when and how (and, if not, what happens); how fees are determined; how fees are structured; how fees, fee schedules and fee payments will be communicated and published and how fees will be capped, monitored and enforced. Experience from the United States underscores that efficient procedures should exist for rapidly

redeploying spectrum in the event that the licensee defaults on spectrum fees owed and enters bankruptcy.

There needs to be accompanying provisions in the RAA that specify not only the *source* of the RA's funds (which is currently covered by RAA 43 and 44), but also what the RA is required, permitted, or forbidden to do with the funds (other than establish multiple accounts as covered in RAA 38, 39, 40, 41, and 42). Similarly, the legislation needs to state what positions, specifically, have budget authority to do what and how (and, if not, what happens). Although RAA 46 and 47 set out audit and reporting requirements, the information flow to industry (which fully pays for the RA) is limited to an annual statement of accounts published in the Gazette (RAA 47 (2)(b)) with the report and the annual statement subsequently available on the RA's web site (ECA 47(3)). This is wholly insufficient for an organization funded entirely by industry. At the very least, there should be provisions for quarterly budget reports sent directly to each of the companies that pay an RA fee of any sort.

Fees for spectrum licences and permits for radio stations and apparatus

41 (1) Government authorisation fees for specified types of spectrum licences and permits for radio stations and apparatus shall be established in accordance with section 52 of the Regulatory Authority Act and the following criteria—

- (a) the fees applicable for the use of spectrum suitable for similar types of radiocommunication services shall not be unduly discriminatory;
- (b) in order to optimise the use of spectrum, competitive bidding procedures, subject to a minimum reserve price, shall be used where practicable and, in particular, in circumstances where the level of demand for a particular frequency or band of frequencies is expected to exceed the spectrum available, in accordance with subsection (2);
- (c) where spectrum licences or permits for radio stations and apparatus are to be, or have been granted, other than on the basis of competitive bidding procedures, fees shall be imposed that reflect—
 - (i) a reasonable measure of the value of the spectrum assigned, based on an assessment of the opportunity costs of the current use and other potential uses of a particular frequency or frequency band; or
 - (ii) relevant benchmarks or other appropriate proxies where the information required to assess the value stipulated in subparagraph (1)(c)(i) is not reasonably available.

(2) In cases where a competitive bidding procedure is to be used in accordance with paragraph (1)(b)—

The following rules should reflect the full set of seven generic rules—position, boundary, authority, aggregation, information, payoff, and scope rules—and

include, for example, eligibility requirements for bidders; whether and how bidders are bound, e.g., to construct facilities, and what happens if they fail to do so; and reporting and recording requirements for the RA so all parties have full information on what happened and how both for immediate and future use.

- (a) the Minister, after conferring with the Authority, and with the consent of the Minister of Finance, shall make a regulation, subject to the affirmative resolution procedure, specifying—
 - (i) the type of auction and the rules, standards and procedures governing the bidding process;

Rules must specify how the reserve price will be set, by whom, and what happens if there is no offer at the reserve price.

- (ii) the reserve price or minimum Government authorisation fee that must be paid by the winning bidder; and

These terms should include an “or else” provision—that is, if a bidder fails to pay.

(iii) any applicable payment terms; and

~~(iii)~~(iv) procedures for promptly reauctioining the spectrum of a winning bidder that defaults on payment or enters bankruptcy;

- (b) the Authority shall conduct the auction pursuant to the standards and procedures specified by the Minister;
- (c) the Authority shall grant the licence to the entity or entities, if any, that satisfy the selection requirements specified in the regulation; and
- (d) in any case in which the Authority grants a licence pursuant to an auction process specified by regulation, the amount of the Government authorisation fee shall be conclusively established through the auction process provided that the amount equals or exceeds the reserve price established pursuant to subparagraph (2)(a)(ii).

BTC recommends that any expenses associated with conducting spectrum auctions be taken from the gross payments for spectrum, rather than establish one more fee for the industry to pay, i.e., an auction administration fee as suggested here. Doing so ensures that the RA has an incentive to keep administrative costs in check since unnecessary actions and expenditures would reduce the net proceeds to Government.

~~(3) The Authority may recommend, and the Minister may make, regulations in accordance with section 44(4) of the Regulatory Authority Act for the purpose of establishing Regulatory Authority fees to recover the administrative costs of conducting a competitive bidding procedure, undertaking a valuation, issuing a spectrum licence, testing for electro-magnetic interference or power levels, approving a licence exemption and~~

~~undertaking similar activities if the imposition of such fees is reasonable under the circumstances.~~

Measures to ensure the efficient use of spectrum

42 (1) The Authority may at any time, following an adjudication, issue an order requiring a spectrum licence holder to release or vacate any or all frequencies covered by its licence in order to ensure efficient use of the spectrum and re-licence it to others.

It is the responsibility of the Minister to establish criteria for requiring release of spectrum (boundary rule) including compensation that will be paid (payoff rules). In addition, the Minister should establish any appropriate information (e.g., any public or customer notice requirements) and scope rules (e.g., timelines and schedules for release) that should apply.

(2) The ~~Authority~~ Minister shall make a general determination which shall establish—

- (a) the criteria that shall be applied by the Authority to determine the circumstances in which such measures are appropriate and proportionate; and
- (b) the factors that shall be considered to determine whether and, if so, how much compensation shall be paid to the vacating licensee, the categories of costs that may be covered and the source or sources of funding for any such compensation.

The preceding statutory provision cannot constrain the licensee's right to just compensation under the Bermuda Constitution.

(2A) The Minister's determination of compensation under subsection (2)(b) shall not bind the Supreme Court in any appeal from, or court action collateral to, such determination.

(3) The grant of a COL or spectrum licence shall not preclude the application of any regulation made in accordance with this section, and the licence holder shall comply with any administrative determination duly issued by the Authority which mandates the vacation of a frequency or band of frequencies in accordance with this section.

Imposing license conditions is a prerogative of the Minister (boundary rule). As noted in the introduction to Part III, licensing must be fully specified by the Minister with respect to the full rule set—position, boundary, authority, aggregation, information, payoff, and scope rules.

(4) The Authority, having due regard to the objectives of promoting the efficient and effective use of spectrum and preventing or deterring the hoarding of spectrum, may ~~impose spectrum licence conditions~~ in accordance with section 50 of the Regulatory Authority Act which, among other things—

- (a) set out a fixed timetable, including the specification of milestones, for the effective exploitation of the rights granted to a spectrum licence holder; and
- (b) in the event of material non-compliance with the prescribed timetable, provide for modification or revocation of the spectrum licence and the imposition of financial penalties, including by means of performance bonds.

Harmful interference

43 (1) No person may use communications equipment for the purpose, or having the effect, of causing harmful interference to the operation of an authorised radio apparatus or station or the use of spectrum by a duly licensed person conducting its activities in accordance with the rights granted by its spectrum licence or permit and any applicable technical requirements or limitations.

(2) The ~~Authority~~ Minister shall adjudicate any complaints alleging harmful interference in accordance with this Act, any applicable general determinations, and the respective rights and obligations of the licence or permit holders involved.

Establishing procedures, rights, and obligations with respect to license and permit holders and harmful interference is the responsibility of the Minister (authority rules).

(3) The ~~Authority~~ Minister may, by general determination, establish a framework governing the basic procedures, rights and obligations applicable to spectrum licence and permit holders for the purpose of minimising the risk of harmful interference.

Operation of radio stations and apparatus

44 (1) A radio station or apparatus shall not be used by any person to carry out—

- (a) unnecessary transmissions;
- (b) the transmission of superfluous signals and correspondence;
- (c) the transmission of false or misleading signals;
- (d) the transmission of signals without identification except for—
 - (i) radiobeacons or certain other radio navigation services where identification signals are removed in case of malfunction or other non-operational service as a means of warning that transmissions cannot safely be used for navigational purposes;
 - (ii) survival-craft stations transmitting distress signals automatically; or
 - (iii) emergency position - indicating radiobeacons;
- (e) the transmission of signals containing profane or obscene words or language; or

(f) trials or tests, except pursuant to a temporary authorisation and under circumstances that preclude the possibility of interference with other stations.

(2) The operation of a radio station or apparatus shall be limited to the performance of such services as are specified in the relevant permit or spectrum licence.

(3) Radio stations and apparatus—

(a) shall not radiate more power than is necessary to ensure a satisfactory service;

(b) shall be established and operated in such a manner as not to cause harmful interference with other radio installations and other electronic communications; and

(c) shall be maintained in a condition which complies with the Convention, the terms and conditions of the licence, and any applicable regulations or administrative determinations.

Once the Ministry establishes the policy, the RA is free to implement it.

(4) A radio station or apparatus shall only transmit on frequencies or in frequency bands authorised by the Authority pursuant to regulations and frequency allocations established by the Minister and prescribed in the licence or permit.

(5) A radio station or apparatus shall accept distress calls and messages with absolute priority regardless of their origin and shall immediately take such action with regard thereto as may be required by the Convention.

(6) A radio station or apparatus may during a period of emergency in which normal communications facilities are disrupted as a result of a hurricane, flood, earthquake or similar natural disaster or force majeure event, be used for emergency communications and may be operated in a manner other than that provided in the Convention, the regulations or as specified in the licence, and any such emergency use shall be discontinued as soon as substantially normal communication facilities are again available.

The Bermuda Constitution makes clear that boards are advisory, consultative, and administrative in nature, thus the RA has no authority that it can delegate. The responsibility for governing the electronic communications industry rests with the Minister.

~~(7) The Authority may, with the consent of the Ministers involved, delegate its authority to issue particular types of permits for radio stations or radio apparatus, including permits for aviation and nautical uses, to a Minister with responsibility for a portfolio relevant to the particular use, provided that the Minister to whom the authority is transferred assumes full responsibility for—~~

~~(a) —the full costs of administration associated with such permits; and~~

~~(b) the establishment and collection of any applicable Regulatory Authority fees and Government authorisation fees.~~

Provisions relating to foreign ships and aircraft

45 (1) Unless otherwise provided by regulation, mobile radio stations and apparatus on board foreign-registered aircraft or ships temporarily located within the territorial waters of Bermuda or in Bermuda air space shall not require a licence or permit under section 39; however, the Convention and any relevant international agreements in respect of ships and aircraft shall apply to such stations.

(2) Mobile radio stations and apparatus located on foreign-registered aircraft and ships temporarily located in the territorial waters or airspace of Bermuda shall comply with section 43, as it relates to avoidance of harmful interference, and with relevant international regulations under the Convention and international agreements in respect of ships and aircraft.

(3) No radio apparatus on board an aircraft shall be used while the aircraft is in Bermuda air space or on the ground in Bermuda except for the purpose of communication with a licensed ground station, for operational and commercial control service, or for testing prior to flight of the apparatus used for air traffic control and air navigation purposes, notwithstanding that a licence, whether granted under this Act or the law of any other country or territory, is in force in respect of such apparatus.

(4) At all times when an aircraft is in Bermuda air space or is on the ground in Bermuda in an operational state a watch shall be maintained on the relevant traffic control service.

(5) The Authority may permit the use, on such occasions or for such periods as it specifies, of radio apparatus on board an aircraft that is in Bermuda air space or at an aerodrome in Bermuda or on board a ship that is located in the territorial waters of Bermuda for purposes not specified in subsections (3) or (4).

Emergency provisions

46 In the event of a public emergency or natural disaster, the Governor may temporarily take over control of the transmission and reception of messages via radio stations or apparatus through directions to licence or permit holders, or it may order the suspension of these activities as it deems necessary and in the public interest under the circumstances.

PART VIII NUMBERING, ADDRESSING AND NAMING SYSTEMS FOR ELECTRONIC COMMUNICATIONS

Because numbering is an essential resource for many electronic communications service providers and may be a physical condition of entry in some markets (boundary rule), numbering is the responsibility of the Minister and any regulations regarding numbering must be established by the Minister and should reference the full rule set—position, boundary, authority, aggregation, information, payoff, and scope rules—to ensure clarity and completeness in any regulations regarding numbering. A shortage of time prevents us from enumerating what these rules may

be, although we do point out glaring deficiencies in the legislative language that follows.

Numbering policy

47 The Minister shall make general policies and, as necessary, regulations with respect to management of the national numbering system.

Numbering plan and assignment of numbers

The Minister is responsible for determining eligibility.

48 (1) The Authority shall adopt, by general determination, and publish a national numbering plan pursuant to regulations established by the Minister for those categories of communications providers ~~that it deems eligible~~ for participation in the national numbering scheme.

(2) Eligible participants in the national numbering scheme shall include all ICOL holders and may include other licensees.

(3) The Authority shall update the national numbering plan from time to time as ~~it~~ the Minister deems appropriate, following a public consultation addressing any material revisions to the plan.

These provisions represent boundary and authority rules that are the responsibility of the Minister to establish.

(4) The Authority shall make general determinations governing the assignment and use of numbers and the implementation of numbering conventions or schemes applicable to particular types of electronic communications services ~~as it deems appropriate~~ pursuant to regulations established by the Minister, and it may authorise or restrict the assignment of numbers to certain licensees or groups of licensees pursuant to regulations established by the Minister based on objectively justifiable criteria.

ECA 48 (5), following, constitutes a very vague set of aspirations for managing Bermuda's numbering resources. As such, it is consistent with much of the legislative language throughout this document, most of which is not helpful in providing certainty to the regulated industry as to what *exactly* will be done or how. This section should be replaced with rules that state specifically and in detail how the numbering resource will be managed.

(5) The numbering plan and any regulations or administrative determinations applicable to the assignment or use of numbers by communications providers shall—

- (a) be fair, objective, proportionate and not unduly favour or discriminate against any eligible communications provider;
- (b) take account of relevant international regulations, and in particular, the requirements of the North American Numbering Plan;

- (c) ensure that sufficient numbers are available for the current and reasonably anticipated future needs of eligible communications providers;
- (d) specify whether and under what conditions assigned numbers may be reclaimed or re-assigned;
- (e) assign particular blocks or series of numbers having regard to the role that numbers can play in conveying useful information to customers, including information about the type of service being used;
- (f) promote the efficient use of numbers;
- (g) promote fair and sustainable competition; and
- (h) endeavour to avoid or minimise the imposition of costs on consumers as a result of changes in the numbering system.

As we note above, the significance of the numbering resource and its impact on entry (boundary rules) requires numbering to be addressed by the Minister, not the RA. The RA is free to assign numbers once the Minister has established the policy rules governing numbering.

(6) The ~~Authority~~ Minister may make a general determination designating numbers or blocks of numbers that the Authority deems to be of exceptional economic value and establish requirements for their allocation pursuant to a competitive or a comparative bidding process.

With respect to ECA 48(7), below, BTC strongly objects to being “nickel and dimed” by the RA for every administrative function it provides. Numbering is an essential and basic oversight responsibility of the Government, but if it chooses not to provide this function unless it can be paid “extra” to do so, it is our belief that the industry is fully capable of taking on this function itself. Given that numbers are plentiful, it is particularly objectionable for the Government to contemplate placing a value on numbers and charging accordingly.

~~(7) — The Authority may recommend, and the Minister may make, regulations in accordance with section 44 of the Regulatory Authority Act for the purpose of establishing Regulatory Authority fees to recover the reasonable costs of administering the numbering plan from any communications providers to which numbers are assigned, taking into account the level of numbering resources required by individual communications providers.~~

~~(8) — The Minister of Finance may establish Government authorisation fees in accordance with section 52 of the Regulatory Authority Act and the following criteria —~~

- ~~(a) — the fees shall reflect a reasonable measure of the value of a number or block of numbers based on an assessment of the opportunity costs of the current use and other potential users, including numbers or blocks~~

~~of numbers that the Authority deems to be of exceptional economic value; and~~

~~(b)(a) if an auction process is utilised, the procedures referred to in section 41(2) shall apply.~~

Number portability

The development of any policy regarding number portability is the responsibility of the Minister, not the RA. In addition, any such regulations should be fully specified with reference to the entire rule set—position, boundary, authority, aggregation, information, payoff, and scope rules—and be subject to a final public consultation with industry. Finally, as BTC has contended in prior consultations on this subject, no policy should be finalized without conducting a cost-benefit analysis to assess whether this policy meets any standard of proportionality.

49 The ~~Authority~~ Minister may make administrative determinations governing the ability of subscribers to retain a fixed or mobile telephone number assigned to them by their existing communications provider when they elect to switch to another communications provider, ~~and may approve or impose conditions on eligible communications providers to facilitate switching by customers and promote fair competition.~~

Emergency numbers

It may turn out, following consultation, that this is not possible or feasible given Bermuda's networks and processes.

50 The ~~Authority~~ Minister ~~following a public consultation may shall~~ require communications providers to make available to users, free of charge, access to a national three-digit number for emergency purposes, and may require communications providers to provide any user possessing a fixed or mobile terminal with automatic access to their networks for the purpose of making emergency calls by means of the national three-digit number, irrespective of whether such users are customers or subscribers.

Management of domain names

51 The Authority shall coordinate the management, allocation, and assignment of all domain names under the country code top level domain of Bermuda, subject to the direction of the Minister.

PART IX TYPE APPROVAL AND HOMOLOGATION OF EQUIPMENT

This section requires electronic communications networks to use equipment that is FCC, CSAI, and EU certified (see ECA 52(1)). BTC believes that there is no need whatsoever for the RA to take any further actions to establish technical standards for equipment unique to Bermuda, which simply drive up the costs of regulation. With respect to Customs enforcement, it will be clear whether imported equipment meets these required certifications, and, if not, Customs is equipped to deal with such

contraband. There is no need for regulation or any further actions by the RA beyond ECA 52(1).

Type approval procedures

52 (1) No equipment or system used for the provision of electronic communications networks or any radio station or apparatus shall be imported into or sold in Bermuda by any person unless it meets the standards of—

- (a) the Federal Communications Commission of the United States of America;
- (b) the Canadian Standards Association International; or
- (c) the European Union.

~~(2) The Authority may—~~

- ~~(a) by general determination, establish technical standards relating to electronic communications networks or apparatus and customer premises equipment or to any specified such network, apparatus or equipment; and~~
- ~~(b) following an adjudication, prohibit the sale, supply or use of any electronic communications network, apparatus or customer premises equipment which does not comply with the requirements of any such standard.~~

~~(3) A technical standard established under this section shall include only requirements that the Authority determines to be necessary to—~~

- ~~(a) protect the integrity of any electronic communications network; or~~
- ~~(b) protect the health and safety of any person.~~

~~(4) The Authority may recommend, and the Minister may make, regulations in accordance with section 44(4) of the Regulatory Authority Act for the purpose of establishing Regulatory Authority fees to recover the costs of administering the type approval and homologation process.~~

~~(5) Customs shall confer with the Authority in respect of any electronic communications equipment or radio apparatus that comes into Customs' possession and shall cooperate fully with the Authority by allowing its duly authorised representatives to undertake any or all of the following activities in relation to the type approval or homologation process with respect to such equipment—~~

- ~~(a) entering Customs' premises and obtaining access to such equipment for the purposes of on-site inspection;~~
- ~~(b) temporarily removing representative samples of such equipment for testing;~~

- ~~(e) clearing such equipment for importation into Bermuda if the Authority makes an administrative determination that the equipment complies with subsection (1) and any relevant standards established under paragraph (2)(a), provided that the equipment is otherwise compliant with applicable legislation and regulations relating to the importation of goods; or~~
- ~~(d) removing and confiscating such equipment if the Authority, after conferring with Customs, makes an administrative determination that such equipment fails to comply with subsection (1) or any relevant standards or restrictions established under subsection (2).~~

PART X
COMMUNICATIONS ASSISTANCE FOR LAW ENFORCEMENT

53 [REFER TO RELEVANT PROVISIONS OF BILL ENTITLED "TELECOMMUNICATIONS AMENDMENT ACT 2010", WHICH SHALL BE INCORPORATED IN THE FINAL BILL.]

PART XI
MISCELLANEOUS PROVISIONS

Emergency Powers

54 (1) Notwithstanding anything in this or any other Act or regulation or administrative determination to the contrary, when Her Majesty is at war or there is in force a proclamation of emergency made or continued in force under section 14 of the Constitution [title 2 item 1] the Governor may, when the public interest so requires by warrant under his hand—

- (a) direct and cause any electronic communications system, or any part thereof, which is in Bermuda or the territorial waters thereof to be taken possession of in the name and on behalf of Her Majesty to be used for Her Majesty's service and subject thereto for such ordinary service as the Governor may see fit, and in that event, any person authorised by the Governor may—
 - (i) enter upon the premises, ship, aircraft or vehicle where such telecommunication system, or any part thereof, is situated and take possession thereof; and
 - (ii) use the apparatus therein as stated in this paragraph;
- (b) direct and authorise such persons as he thinks fit to assume control of any electronic communications service within Bermuda either wholly or partly and in such manner as he may direct and such person may accordingly enter upon the premises of any person within Bermuda operating such electronic communications service and assume control of the whole or part thereof;
- (c) suspend or amend, for such time as he thinks fit, the laws, rules and regulations applicable to any or all radio stations or devices capable of emitting electro-magnetic radiation within Bermuda or the territorial waters thereof and—

- (i) cause the closing of any radio station or any part thereof, or any device capable of emitting electro-magnetic radiation which is suitable for use as a navigational aid beyond five miles, and the removal therefrom of its apparatus and equipment; or
- (ii) authorise the use and control of any such radio station or device or its apparatus and equipment by any Government Department under such regulations as he may prescribe,

and direct and authorise such persons as he thinks fit to enter upon the premises, ship, aircraft or vehicle where any radio station or device as aforesaid is located for the purposes of closing and sealing such radio station or device, and the removal of any apparatus or equipment or for the purpose of using or controlling any such radio station or device, as the case may be; and

- (d) direct any communications provider—
 - (i) to submit to him, or any person authorised by him, all messages tendered within Bermuda for transmission or arriving in Bermuda by the system of electronic communications of any communications provider or any class or classes of such messages;
 - (ii) to stop or delay the transmission of or delivery of any such messages or deliver the same to him or his agent or transmit any messages or class or classes of messages according to a priority to be prescribed by the Governor; and
 - (iii) to obey all such directions with reference to the public electronic communications services within Bermuda or between Bermuda and other countries as he may prescribe and any such person operating an electronic communications service in Bermuda shall obey and conform to all such directions.

(2) At any time during which a proclamation of emergency under section 14 of the Constitution [*title 2 item 1*] is in effect, the Minister may issue an order stating that the provisions of this Act and of the Convention relating to the matters specified in paragraphs 4(2)(a) to 4(2)(f) shall not apply to the Police and the Bermuda Regiment until such time as the Minister may revoke the order or the proclamation of emergency ceases, whichever is the earlier.

Compensation for the exercise of emergency powers

55 (1) If the Governor exercises his powers under section 54 and a communications provider shows that as a result of the exercise of such powers its receipts during the period of such exercise of powers from public electronic communications services with respect to which the said powers have been exercised, or from any other systems of electronic communications owned or operated by it, have been less than its receipts from the same source during the corresponding period (averaged over the three-year period immediately preceding the exercise of such powers) the communications provider shall, subject to subsection (2), be entitled to reasonable compensation.

The following section is unconstitutional because it attempts to compel a waiver of the communications provider's right to secure prompt payment of adequate compensation through direct access to the Supreme Court, pursuant to section 13 of the Bermuda Constitution.⁹⁹

~~(2) — Any compensation to be paid pursuant to subsection (1) shall be settled by agreement between the communications provider and the Governor or in case agreement cannot be reached may be determined by arbitration.~~

~~(3)(2)~~ The communications provider shall not be entitled to compensation if and so far as the exercise of the Governor's powers under section 54 is made for the purpose of preventing direct communication with any of Her Majesty's enemies and save with the consent of the Governor, no such compensation shall be paid if and so far as those powers are exercised for the purpose of—

- (a) preventing indirect or suspected communication with any of Her Majesty's enemies; or
- (b) protecting the interests of Her Majesty under the apprehension of impending war.

~~(4)(3)~~ In the event of an arbitration pursuant to subsection 1(1), the arbitrator shall take into account all the circumstances of the case including not only such loss as described in subsection (1) but also any additional profit accruing to a communications provider by reason of the emergency which gave rise to the exercise of those powers whether from—

- (a) the use of the communications provider's electronic communications system on services so taken possession of or controlled; or
- (b) the user by it of any other system of electronic communication for the transmission of traffic which would normally have been handled by the communications provider's electronic communications services so taken possession of or controlled.

~~(5)(4)~~ A certificate signed by the Minister to the effect that an order under the terms of section 54 was made in time of war or during a proclamation of emergency and in the public interest shall be conclusive evidence of a state of war or the existence of a proclamation of emergency and that the order was made in the public interest.

Forfeiture

56 A magistrate may, upon application by or on behalf of the Minister or by any public officer, order that any apparatus in respect of which there has been a contravention or attempted contravention of this Act be forfeited, whether or not proceedings have been taken against any person in respect of the contravention or attempted contravention.

Limitation of certain restrictions in leases, licences and other agreements

99. BERMUDA CONSTITUTION ORDER § 13.

The RA, of its own accord, cannot make laws pertaining to real estate leases since, thus far, its scope is limited to the electronic communications sector.

57 (1) The Authority, acting pursuant to regulations established by the Minister, may, in order to promote competition and consumer choice, issue an adjudicative decision and order which shall have the effect of limiting or voiding any provision—

- (a) contained in a lease, licence or other agreement relating to a particular end user's premise which imposes on the occupant a prohibition or restriction limiting the occupant's choice of communications provider, or the person through which such services are arranged, to a person with an interest in the premises or that person's designee; or
- (b) contained in a lease whose term is one year or more in duration which imposes any other prohibition or restriction on a lessee with respect to an electronic communications service or a related activity inside the building or on the premises such as installation, maintenance or repair by giving such provisions effect as if the lessor, licensor or other party to the agreement had agreed not to withhold consent unreasonably for deviations from the applicable restrictions or prohibitions.

(2) The Authority shall consider all of the relevant circumstances in determining whether consent has been unreasonably withheld, subject to the principle that no end user shall unreasonably be denied access to electronic communications.

In fact, the Minister is required to set out the full set of regulations pertaining to this matter, including what landlords, tenants, and the RA must, may, or may not do in regard to restricting access to electronic communications services, including the "or else" conditions. Again, reference to the full rule set—position, boundary, authority, aggregation, information, payoff, and scope rules—can assist in crafting the requisite regulations.

(3) In respect of leases, licences or agreements granted or entered into before the commencement of this Act, the consent of the Minister shall be required before an adjudicative decision and order issued by the Authority pursuant to this section may take effect.

PART XII OFFENCES

Contravention of section 11 an offence

58 (1) Any person who contravenes any provision of section 11 or of any regulation or administrative determination concerning the provision of electronic communications commits an offence and is liable on conviction on indictment—

- (a) if an individual, to imprisonment for up to two years or a fine of up to \$50,000, or both; or
- (b) if a body corporate, to a fine of up to \$150,000; and

- (c) in either case, in the event of a continuing offence, a further fine of up to \$25,000 for every day during which the offence continues.

(2) Where any person is convicted of an offence under this section the court, where it is proved to its satisfaction that the contravention includes the illegal operation or possession of any apparatus, may order the confiscation of the apparatus.

Contravention of sections 39(1) to 39(2) or 44 an offence

59 (1) Any person who contravenes any provision of sections 39(1) to 39(2) or 44 or of any regulation or administrative determination concerning radio spectrum, radio stations or radio apparatus commits an offence and is liable on conviction on indictment—

- (a) if an individual, to imprisonment for up to two years or a fine of up to \$50,000, or both; or
- (b) if a body corporate, to a fine of up to \$150,000; and
- (c) in either case, in the event of a continuing offence, a further fine of up to \$25,000 for every day during which the offence continues.

(2) Where any person is convicted of an offence under this section the court, where it is proved to its satisfaction that the contravention includes the illegal operation or possession of any apparatus, may order the confiscation of the apparatus and any antenna.

Failure to pay fees imposed in accordance with sections 10, 18, 41 or 48

60 Any person who fails to pay a fee established in accordance with the provisions of section 10, 18, 41 or 48 commits an offence and is liable on conviction on indictment—

- (a) to a fine of up to \$50,000 and a further fine of up to \$5,000 for every day during which the offence continues; and
- (b) to pay to the Authority a sum equal to 2 times the amount of any fee that would have been payable pursuant to the relevant section but for the commission of the offence.

Contravention of section 43 an offence

61 (1) Any person who wilfully contravenes any provision of section 43 commits an offence and is liable—

- (a) if an individual—
 - (i) on summary conviction, to imprisonment for up to two years or a fine of up to \$20,000, or both; or
 - (ii) on conviction on indictment, to imprisonment for up to five years or a fine of up to \$50,000, or both; or
- (b) if a body corporate, on conviction on indictment to a fine of up to \$150,000 and in the case of a continuing offence a further fine of up to \$5,000 for every day during which the offence continues.

(2) Where any person is convicted of an offence under this section the court, where it is proved to its satisfaction that the contravention includes the illegal operation or possession of any apparatus, may order the confiscation of the apparatus and any antenna.

(3) Where the court finds that harmful interference has been caused, whether wilfully or not, it may direct that the person responsible shall bear the costs of any technical investigation made in order to establish the existence and cause of such harmful interference.

Contravention of section 45(2) an offence

62 In the event of a contravention of section 45(2) the master of the vessel or the captain of the aircraft, as the case may be, or the person at whose direction the radio apparatus was used, commits an offence and is liable on conviction on indictment to a fine of up to \$50,000.

Transmitting or receiving messages by unlicensed means of telecommunication

63 Any person who, knowing or having reason to believe that a means of telecommunication is being maintained in contravention of this Act, transmits or receives any messages by such means of telecommunication or performs any service incidental to the transmission or reception of any such message or delivers any message for transmission by such means of telecommunication or takes delivery of any message sent thereby commits an offence and is liable on conviction on indictment to a fine of up to \$50,000.

Offences by communications providers and their directors, officers or employees

64 Any communications provider and any director, officer or employee of a communications provider who has official duties in connection with a public electronic communications service commits an offence if such person or persons—

- (a) wilfully destroy, secrete or alter any message that they have received for transmission or delivery;
- (b) forge any message, or utter or transmit any message that they know to be forged;
- (c) wilfully abstain from transmitting any message or wilfully intercepts or detains or delays any message, unless for legitimate service purposes; or

See ECA 31 for our rationale for the revision below.

- (d) otherwise than in pursuance of their duty or as directed by the Governor or a court, copy any message or disclose any message or the purport of any message to any person other than the person to whom the message is addressed,

and is liable on summary conviction to imprisonment for up to two years or a fine of up to \$50,000, or both.

Destruction of messages by a person other than a director, officer or employee of a communications provider

65 Any person, not being a director, officer or employee of a communications provider commits an offence if he—

- (a) wilfully destroys, secretes, detains or delays a message intended for delivery to some other person;
- (b) having been required by a telecommunication officer to deliver up to him a message in the possession of that person and intended for delivery to some other person, refuses or neglects to do so; or
- (c) knowingly or negligently delivers a message or communication to any person not authorised to receive the same,

and is liable on summary conviction to imprisonment for up to one year or a fine of up to \$20,000, or both.

Given the fact that ECA 52 is unnecessary, it follows that it would be inappropriate to threaten criminal prosecution.

~~Importation or sale of equipment in contravention of section 52~~

~~66 ——— A person commits an offence if he imports or sells any apparatus or equipment used for the provision of electronic communications networks or any radio station or apparatus in breach of section 52(1) and is liable on summary conviction —~~

~~(a) ——— if an individual, to imprisonment for up to one year or a fine of up to \$25,000, or both; or~~

~~(b) ——— if a body corporate, to a fine of up to \$50,000.~~

~~(2)(1) Where any person is convicted of an offence under this section the court, where it is proved to its satisfaction that the contravention includes the illegal importation or sale of any apparatus or equipment used for the provision of electronic communications networks or any radio station or apparatus, may order the destruction of the apparatus or equipment.~~

Damaging telecommunication apparatus with intent

67 (1) Any person commits an offence if he damages, removes or interferes in any way whatsoever with a telecommunication apparatus or uses it with intent to—

- (a) prevent or obstruct the transmission or delivery of a message;
- (b) intercept or discover the contents of a message; or
- (c) defraud any person.

(2) Any person commits an offence if he without authorisation connects to or wilfully damages, removes or interferes with any telecommunication apparatus including any apparatus which is designed or adapted for use in connection with the running of a cable television service and, in particular—

- (a) any line, that is to say, any wire, cable, tube, pipe or other similar thing (including its casing or coating) which is so designed or adapted; or

- (b) any structure, pole or other thing in, on, by or from which any telecommunication apparatus is or may be installed, supported, carried or suspended.
- (3) A person guilty of an offence under this section is liable—
- (a) if an individual, for each offence—
 - (i) on summary conviction, to a fine of up to \$20,000 or imprisonment for up to one year, or both, and in the case of a continuing offence a further fine of up to \$500 for every day during which the offence continues; or
 - (ii) on conviction on indictment, to imprisonment for up to five years or a fine of up to \$50,000, or both, and in the case of a continuing offence a further fine of up to \$1,000 for every day during which the offence continues; or
 - (b) if a body corporate, for each offence, on conviction on indictment to a fine of up to \$150,000 and in the case of a continuing offence a further fine of up to \$5,000 for every day during which the offence continues.

The following provision appears to be a “wire fraud” statute of broad application. The failure to give broader notice to the public of this revision of criminal law should give pause. This subject matter is not, strictly speaking, the stuff of telecommunications regulation.

Transmission of false messages

68 Any person who transmits, or causes to be transmitted by telecommunication, a message that he knows to be false commits an offence and is liable on summary conviction to imprisonment for up to one year or a fine of up to \$20,000, or both.

Obtaining public electronic communications service with intent to avoid charges

69 Any person who obtains a public electronic communications service with intent to avoid payment of applicable charges for such service commits an offence and is liable—

- (a) if an individual—
 - (i) on summary conviction, to imprisonment for up to one year or a fine of up to \$20,000, or both; or
 - (ii) on conviction on indictment, to imprisonment for up to two years or a fine of up to \$50,000, or both; or
- (b) if a body corporate, on conviction on indictment to a fine of up to \$150,000.

Improper use of public electronic communications service

70 (1) Any person commits an offence if he—

- (a) sends, by means of a public electronic communications service, a message or other matter that is grossly offensive or of an indecent, obscene or menacing character;
- (b) sends by those means, for the purpose of causing annoyance, inconvenience or needless anxiety to another, a message that he knows to be false or persistently makes use for that purpose of a public electronic communications service;
- (c) by means of the telephone—
 - (i) makes any comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy, or indecent;
 - (ii) makes multiple telephone calls, whether or not conversation ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number;
 - (iii) makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number; or
 - (iv) makes repeated telephone calls, during which conversation ensues, solely to harass any person at the dialled number; or
- (d) knowingly permits any telecommunication apparatus under his control to be used for any purpose prohibited by this subsection,

and is liable on summary conviction to imprisonment for up to one year or a fine of up to \$25,000, or both.

(2) A person commits an offence if he by means of a public electronic communications service—

- (a) obtains information from a computer which he is not authorised by the owner of the computer or the owner of the information to possess; or
- (b) without the authority of the owner of the computer or the owner of the information changes information stored in a computer or in any way interferes with a programme on the computer,

and is liable—

- (c) if an individual—
 - (i) on summary conviction, to imprisonment for up to one year or a fine of up to \$20,000, or both; or
 - (ii) on conviction on indictment, to imprisonment for up to two years or a fine of up to \$50,000, or both; or

(d) if a body corporate, on conviction on indictment to a fine of up to \$150,000.

(3) Every distinct contravention of either of subsection (1) or subsection (2) shall be a separate offence.

(4) Any person, be he a sectoral participant or not, who in the act or acts prohibited in subsection (1) knowingly possesses any tape record, wire record, disk record or any other record of any information secured in the manner prohibited by subsection (2), or replays the same to any person or communicates the contents thereof whether complete or partial either verbally or in writing or in any other manner to any other person commits an offence and is liable—

(a) if an individual—

(i) on summary conviction, to imprisonment for up to one year or a fine of up to \$20,000, or both; or

(ii) on conviction on indictment, to imprisonment for up to two years or a fine of up to \$50,000, or both; or

(b) if a body corporate, on conviction on indictment to a fine of up to \$150,000, or both.

(5) For the purposes of subsection (2) “computer” means a programmable electronic device that can store and process data and from which data can be retrieved.

Contravention of section 29 an offence

71 Any person who contravenes section 29 commits an offence and is liable—

(a) if an individual—

(i) on summary conviction, to imprisonment for up to one year or a fine of up to \$25,000, or both; or

(ii) on conviction on indictment, to imprisonment for up to two years or a fine of up to \$50,000, or both; or

(b) if a body corporate, on conviction on indictment to a fine of up to \$150,000.

Contravention of section 32 an offence

72 Any person who contravenes section 32(1) or 32(3) commits an offence and is liable on summary conviction—

(a) if an individual, to imprisonment for up to one year or a fine of up to \$25,000, or both; or

(b) if a body corporate, to a fine of up to \$50,000.

Contravention of section 31 an offence

73 Any person who fails to comply with a warrant under section 31 commits an offence and is liable on summary conviction—

- (a) if an individual, to imprisonment for up to one year or a fine of up to \$25,000, or both; or
- (b) if a body corporate, to a fine of up to \$50,000.

Contravention of section 53 an offence

74 [REFER TO RELEVANT PROVISIONS OF BILL ENTITLED “TELECOMMUNICATIONS AMENDMENT ACT 2010”, WHICH SHALL BE INCORPORATED IN THE FINAL BILL.]

**PART XIII
TRANSITIONAL PROVISIONS**

Having provided an extensive (and repetitive) discussion of rules, rule sets, and the appropriate domains of the Ministry *vis-à-vis* the RA to this point, BTC now finds that many of the transitional provisions are too thin to actually enable the Ministry or the RA to implement either of these acts effectively. Again, due to the shortness of time to comment fully, we point out the most obvious deficiencies.

Application of Transitional Provisions

75 The provisions of this Part, including the procedures and timetables set forth herein, shall apply notwithstanding any contrary provisions contained in this Act or the Regulatory Authority Act.

Transition to ICOLs and associated spectrum licences and permits

76 (1) The Minister shall, no later than ten days following the date of commencement of this Part, direct the Authority to initiate a public consultation concerning the basic terms and conditions of the ICOL, and the Authority shall—

This document cannot be merely a draft license. Rather, it must contain the full set of rules for all public and private licensing—position, boundary, authority, aggregation, information, payoff, and scope rules—so all parties know *exactly* the proposed rule set in which they are expected to operate their businesses.

- (a) initiate a public consultation no later than five days following receipt of the Minister’s direction by publishing ~~a document containing the proposed set of basic terms and conditions to be set forth in the ICOL,~~ including those provided in section 16(2); and

At the end of the day, the Minister must establish the full rule set for licensing, so the RA report (if the RA is to do the administrative work of conducting a public consultation) must include not only the RA’s recommendations, but those made by other commenters as well to enable the Minister to make final determinations.

- (b) submit to the Minister a proposal ~~for a standard form ICOL~~ no later than sixty days following the date of initiation of the consultation.

(2) The Minister shall, within thirty days of the date on which the Authority submits the proposed standard form ICOL—

As we said above, the terms and conditions for licensing (some subset of the required authority rules) are not sufficient. Somewhere, there must be a full set of rules, i.e., a statutory implement, governing licensing. If these rules are not in this ECA, which they are not, they must be fully specified with reference to the seven essential rules—position, boundary, authority, aggregation, information, payoff, and scope rules—so all parties know *exactly* the proposed rule set in which they are expected to run their businesses (at the operational level, to revert to the IAD theoretical framework).

- (a) make a regulation which establishes ~~the basic terms and conditions of~~ the ICOL; and
- (b) direct the Authority, in the public interest, to modify the terms and conditions of each licence that is listed in the First Schedule to this Part and was in effect as at the date of commencement of this Part, for the purposes of—
 - (i) expanding the scope of all such pre-existing licences to authorise each licence holder to operate and provide any and all public electronic communications in accordance with section 17(1), for a period of twenty years from the date on which the licence modifications come into operation, subject to the limitations set forth in subsection (5);
 - (ii) normalising all such pre-existing licences to ensure that they conform to the provisions of this Act and the regulation referenced in paragraph (2)(a); and

The rules established by the Minister should include provisions regarding what conditions are applicable to what types of licensees in what instances (boundary rules), so there should be little discretion on the part of the RA in this matter and clear communications to industry as to what can be expected.

- (iii) ensuring that the terms and conditions applicable to all ICOL holders are as homogenous as possible and not unduly discriminatory; and
- (c) direct the Authority to issue any associated spectrum licences reflecting each such licence holder's spectrum assignments as at the date of commencement of this Part, in accordance with section 39, provided that—
 - (i) any such spectrum licences shall have a duration of three years from the date of issue;
 - (ii) the holders of any such licences shall be subject to a requirement to pay any fees for use of the spectrum that may be imposed in accordance with section 41; and

- (iii) all such licence holders that were responsible for paying, or for collecting and remitting, to the Minister any licence fees for the use of radiocommunication equipment as at the date of commencement of this Part in accordance with [Head 60, section (1) of the Government Fees Act Amendment Regulations 2010] shall continue to be required to pay such fees until a new schedule of fees is established in accordance with subparagraph (2)(c)(ii).

(3) The Authority shall issue a decision and order modifying each of the licences of the communications providers in the First Schedule to this Part, which shall—

- (a) have the effect of converting their pre-existing licences into ICOLs in conformity with the regulation made by the Minister under paragraph (2)(a);
- (b) provide for the issuance of associated spectrum licences, if any; and
- (c) be issued by the Authority no later than 150 days following the date of commencement of this Part.

(4) The modifications ordered by the Authority for all pre-existing licences held by the communications providers listed in the First Schedule to this Part shall—

- (a) take effect on the date specified by the Minister in a direction to the Authority and stipulated in each of the modified licences, subject to the limitations of subsection (5) respecting the operation of certain provisions of the modified licences;
- (b) come into operation in any event no later than thirty days following publication of the modification orders issued by the Authority; and
- (c) take effect on the same date, subject to the limitations of subsection (5) respecting the operation of certain provisions of the modified licences.

(5) The operation of certain provisions of any ICOL referenced in subsection (3) shall be suspended automatically insofar as they authorise the licence holder to construct, provide or offer any additional electronic communications networks or electronic communications services that were not authorised by the licence holder's pre-existing public telecommunications licence, subscription television or radio licence, or otherwise lawfully permitted as at the date of commencement of this Part, under either of the following circumstances—

The Ministry is responsible for making any determinations of SMP and establishing compliance with any remedies imposed since SMP determinations affect market entry (a boundary rule). The RA can provide advice, consultation, or undertake SMP determinations pursuant to regulations established by the Minister, but the RA cannot make this determination because the RA does not have the Constitutional authority to do so.

- (a) if the ~~Authority~~ Minister determines, in accordance with section 77(b), that a licence holder has significant market power in one or more relevant markets, in which case suspension of the relevant provisions shall continue in effect until the ~~Authority~~ Minister issues a written notice, and publishes such notice on its official website, confirming that the licence holder has satisfactorily complied with any *ex ante* obligations imposed by the ~~Authority~~ Minister in accordance with section 23(5); or
- (b) if the Authority determines, in accordance with section 77(c), that a licence holder has failed to pay any fees found to be due and payable under its pre-existing licence, in which case suspension of the relevant provisions shall continue in effect until the Authority issues a notice, and publishes such notice on its official website, confirming that all amounts in arrears have been paid in full to the Authority for transfer to the Consolidated Fund.

(6) For the purposes of this section, the Bermuda Telephone Company Acts shall together be deemed to constitute a licence granted to the Bermuda Telephone Company and in effect as at the date of commencement of this Part.

(7) The licence held by the Bermuda Land Development Company Limited (“BLDC”) as at the date of commencement of this Part shall be modified in accordance with subsection (3), provided, however, that—

- (a) the geographic scope of the modified licence shall be co-extensive with the scheduled properties set forth in the Base Lands Development Act 1996 in respect of BLDC’s provision of electronic communications networks;
- (b) BLDC shall be authorised to market, offer, sell or provide services only to customers that are tenants occupying one or more of the scheduled properties referenced in paragraph (7)(a) for their use in connection with such property, or to other duly authorised communications providers serving or seeking to serve such customers; and
- (c) these geographic limitations shall remain in effect for at least as long as the total number of ICOLs in effect remains limited in accordance with the licensing policy established by the Minister.

Timing of other actions by the Authority to facilitate the transition to ICOLs

BTC has made the points repeatedly that the RA can advise and implement; the RA cannot establish policy. Thus, many of the decisions described below fall outside the lawful purview of the RA and must be made by the Minister.

77 The Authority shall—

- (a) issue a notice in accordance with section 21 no later than ten days following the commencement of this Part pursuant to regulations established by the Minister; (See BTC comments at ECA 21.)
- (b) initiate a public consultation in accordance with section 22(4) no later than thirty days after the date of commencement of this Part, and— (See BTC comments at ECA 22(4))
 - (i) on that basis make one or more recommendations to the Minister with respect to general determinations—designating any operators with significant market power in a relevant market or markets no later than ninety days after initiating the consultation; and
 - (ii) The Minister will issue a final decision specifying any applicable *ex ante* remedies in accordance with section 23 no later than 240 days following the date of commencement of this Part;
- (c) initiate an investigation no later than sixty days after the commencement of this Part to determine whether all fees due and payable by any licence holder listed in the First Schedule to this Part as at the date of commencement of this Part under its pre-existing licence have in fact been paid in accordance with the applicable schedule of the Government Fees Act 1965, and issue an administrative determination within sixty days following initiation of the investigation that specifies—
 - (i) any amounts which the Authority determines are in arrears, including any applicable interest and penalties; and
 - (ii) the calculations supporting its determination; and
- (d) initiate a public consultation in accordance with section 15(2) no later than thirty days after the date of commencement of this Part and, on that basis, make a general determination no later than ninety days after initiating the consultation. (See BTC comments at ECA 15(2)).

BTC does not agree that there should be any moratorium on licensing. Moratoriums serve no useful purpose but protecting current competitors to the detriment of consumers, and otherwise provide barriers to entry to service providers who might be more innovative, more cost effective, or better able to meet consumer needs and wants. ECA 78 is internally inconsistent with stated purposes of the ECA and should be stricken from the legislation.

~~**Moratorium on the award of ICOLs and other public communications operating licences**~~

~~78 ——— No earlier than one year following the date of commencement of this Part and no later than three years after such date, the Minister shall direct the Authority to commence a review to determine whether further liberalisation of the electronic communications sector would be in the public interest, including by means of awarding any additional ICOLs or other types of public COLs, taking into account among other factors the impact on~~

~~investment and sustainable competition in the electronic communications sector and the benefits to consumers.~~

~~(2) The Authority shall conduct the review referenced in subsection (1), following the procedures and timetable for sectoral reviews set forth in section 17 of the Regulatory Authority Act, unless the Minister directs otherwise.~~

~~(3) The Authority shall submit its recommendations to the Minister, and the Minister shall give due consideration to the Authority's findings and conclusions in making a decision whether to authorise the grant of any additional ICOLs or other types of public COLs and establishing a date or dates for the grant of any such licences.~~

~~(4) The Authority may, after conferring with the Minister, delay the commencement of the first sectoral review provided for in section 17(5) of the Regulatory Authority Act by no more than two years if the Authority concludes that such a postponement is justified in light of the data obtained or expected to be obtained from the market reviews and the liberalisation review referred to in subsection (1).~~

~~(5) Prior to the date or dates determined by the Minister pursuant to subsection (3), the Authority may not grant—~~

~~(a) any additional ICOLs to licensees not listed in the First Schedule to this Part; or~~

~~(b) any COLs not otherwise authorised by section 76, with the exception of—~~

~~(i) new or normalised COLs authorising the provision of the specific types of radiocommunications services listed in the Second Schedule to this Part, in conformity with the provisions of this Act; and~~

~~(ii) normalised COLs to the communications providers listed in the Third Schedule to this Part, provided that all of the following conditions are met—~~

~~(A) any such communications provider applies for a new or normalised COL to bring its pre-existing licence into compliance with the conditions stipulated in section 16 and any such others that may be determined by the Authority, no later than 150 days following the date of commencement of this Part;~~

~~(B) any such communications provider is determined by the Authority to have paid any and all fees due and payable in accordance with the Government Fees Act 1965; and~~

~~(C) the scope of electronic communications authorised by any licence issued or normalised pursuant to this paragraph shall be limited to the type or types of electronic communications which the communications~~

~~provider was lawfully providing as at 18 November 2008, as determined by the Authority; and~~

~~(c)(a) any class COLs or exemptions from the obligation to hold a COL, except as provided in section 15(2)(d).~~

Normalisation of other COLs and grant of associated spectrum licences and permits

79 The Authority, ~~with the consent of the Minister, pursuant to regulations established by the Minister~~ shall establish procedures for the normalisation of any COLs not covered by section 76 and the grant of any associated spectrum licences and permits reflecting each such licence holder's spectrum assignments as at the date of commencement of this Part, in accordance with section 39, provided that such spectrum licences shall have a duration of three years from the date of issue.

Nullification of certain licences

80 Any licences authorising the provision of electronic communications that were granted prior to the commencement date of this Part and which the ~~Authority~~ Minister determines, following an adjudication, are not eligible to be authorised under this Act in accordance with the First, Second or Third Schedules to this Part or section 15(2)(d) shall be null and void and deemed to be revoked by the Minister.

Transitional spectrum investigation

81 The Authority ~~pursuant to regulations established by the Minister~~ shall conduct an investigation of the spectrum assignments reflected in the spectrum licences granted to ICOL holders pursuant to section 76(2)(c) and any other COL holders pursuant to section 79 for the purpose of determining whether the frequencies assigned are being utilised efficiently, and the ~~Authority~~ Minister may, upon expiry of the three-year term—

- (a) decline to renew the spectrum licence; or
- (b) modify the spectrum licence to authorise the use of a reduced amount of spectrum,

if the licence holder fails to demonstrate a reasonable need for some or all of the spectrum assigned to it, and the ~~Authority~~ Minister concludes that such measures are necessary to ensure the efficient use of spectrum.

Status of pre-existing instruments

82 (1) All statutory instruments, administrative determinations, authorisations and adjudicative decisions and orders or their equivalent that—

- (a) relate to electronic communications;
- (b) were made or given effect in accordance with the Telecommunications Act 1986; and
- (c) were in operation as at the date of commencement of this Act,

shall remain in full force and effect until their disposition is determined by the Minister ~~or the Authority, as the case may be~~, in accordance with the provisions of this Act and section 17 of the Interpretation Act 1951.

The following provision cannot trump the protection of property (including rights under contracts) that exists under section 13 of the Bermuda Constitution.

(2) Notwithstanding subsection (1), in the event of an irreconcilable conflict between this Act and any legal instruments remaining in effect during the transition pursuant to subsection (1), the provisions of this Act shall prevail from the date of commencement of the relevant section of this Act, provided that any resulting impairment of any property right or contract right would be entitled to prompt payment of adequate compensation under section 13 of the Bermuda Constitution.

Transitional provisions relating to market reviews and other consultations

83 (1) Until the ~~Authority–Minister~~ issues a decision and order completing the first round of market reviews for all of the relevant markets identified pursuant to section 77(b), including the imposition of any *ex ante* remedies—

- (a) all applicable regulations, decisions, obligations or conditions that were in effect as at the date of commencement of this Part shall remain in full force and effect, unless revoked by the ~~Authority–Minister~~ in accordance with the principles set forth in section 20; and
- (b) the provisions of section 21 of the Telecommunications Act 1986 shall remain in full force and effect.

In a technologically dynamic industry, it is unreasonable for decisions being made in mid 2011 to rest on the stale record of a consultation completed three years earlier (and necessarily relying on even older data).

(2) In reaching a decision or decisions in the first round of market reviews in accordance with section 77(b) or in any other consultation that is completed within one year of the date of commencement of this Part, the ~~Authority–Minister~~ may rely on information and evidence obtained or conclusions reached by the Minister, the Department of Telecommunications or the Telecommunications Commission as part of any public consultation concluded after ~~30 June 2008~~ 1 January 2010.

Transitional provisions relating to government authorisation fees

84 The fees applicable to participants in the electronic communications sector under the Government Fees Act 1965 immediately prior to the commencement of this Part shall remain in effect without change until modified, suspended or withdrawn by amendment to the applicable schedule to the Government Fees Act 1965.

Interpretation of the Bermuda Telephone Company Acts and the Base Development Lands Act 1996

85 To the extent possible, the provisions of the Bermuda Telephone Company Acts and the Base Development Lands Act 1996 shall be construed consistently with the provisions of this Act and, in the event of an irreconcilable conflict, the provisions of this Act shall prevail.

SCHEDULES TO PART XIII

FIRST SCHEDULE

LIST OF LICENCES FOR CONVERSION TO INTEGRATED COMMUNICATIONS OPERATING LICENCES

Any public telecommunications licence, subscription television or radio licence, or any other form of licence or deemed licence authorising the provision of public electronic communications as at the commencement date of this Part and issued to any of the following undertakings or any parent corporation, subsidiary or affiliate thereof—

2. Bermuda Cablevision Limited
3. Bermuda Digital Communications Limited
4. Bermuda Land Development Company Limited*
5. Bermuda Telephone Company Limited
6. Brasil Telecom Subsea Cable Systems (Bermuda) Ltd.
7. Cable & Wireless Bermuda Limited
8. Cable Co. Ltd.
9. Deltronics Limited
10. Electronic Communications Limited
11. FKB Net Ltd.
12. BDB Ltd. (formerly Hardell Cable TV Ltd.)
13. ITECH Ltd.
14. Logic Communications Ltd.
15. M3 Wireless Ltd. (formerly Mobility Ltd.)
16. North Rock Communications Ltd.
17. Quantum Communications Limited
18. TeleBermuda International Limited and its affiliates, Atlantic Network (Bermuda) Ltd. and Globe Net Communications Ltd.
19. Telecommunications (Bermuda & West) Indies Ltd (d.b.a. Digicel)
20. Telecommunications Networks Limited
21. Transact Limited

* Subject to the geographic limitations set forth in section 76(7).

22. World on Wireless Limited

SECOND SCHEDULE

LIST OF COMMUNICATIONS NETWORKS AND SERVICES NOT SUBJECT TO SECTION 78 LICENCE MORATORIUM

Any electronic communications network or service provided under the Telecommunications Act 1986 pursuant to a class of radio licence that is listed below—

Current Class (under the Wireless Telegraphy (Licence) Regulations 1961)	Name
Class 02	Experimental Radio
Class 03	Amateur Radio
Class 04	Two-way Radio
Class 05	Small Craft Radio
Class 06	Aircraft Radio
Class 07	Special Service Radio
Class 08	Personal Radio (CB)
Class 09	Maritime Mobile Service
Class 10	Receiving Service
Class 11	Aeronautical & Marine Service Radio
STOCK Licence	Stock Licence
--	Satellite Services

THIRD SCHEDULE

LIST OF COMMUNICATIONS PROVIDERS AUTHORISED NOTWITHSTANDING THE SECTION 78 LICENCE MORATORIUM

[See section 1(1)(a)(i)(A)—Identities of communications providers (if any) to be confirmed – to include communications providers currently offering electronic communications on a lawful basis but which are not covered by any of the following—

- (1) the First Schedule to Part XIII;*
- (2) the Second Schedule to Part XIII; or*
- (3) Section 15(2)(b)-(d) [self-provision, non commercial or private networks.]*