

**DRAFT REGULATORY AUTHORITY ACT 2010 and  
DRAFT ELECTRONIC COMMUNICATIONS ACT 2010**

**RESPONSE TO THE CONSULTATION ISSUED BY THE MINISTRY  
OF ENERGY, TELECOMMUNICATIONS & E-COMMERCE ON 3rd  
MAY 2010**

**18th June 2010**

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Cable and Wireless Bermuda Limited ("C&WB") welcomes the opportunity to respond to the consultation paper, "Draft Regulatory Authority Act 2010 and Draft Electronic Communications Act 2010" (the "Acts"), issued by the Minister of Energy, Telecommunications and E-Commerce (the "Ministry" or "METEC") on 3rd May 2010 ("Consultation"). We note that the original deadline for responses of 11<sup>th</sup> June 2010 was extended by the Ministry at the request of the licensees to 18<sup>th</sup> June 2010.

C&WB's interest in this Consultation is as an existing Class A licensee providing international connectivity and services, and as a company wishing to take advantage of the proposed unified licence regime allowing it to operate and compete in different telecommunications markets in Bermuda.

### **Introduction**

In addition to its specific comments on the draft legislation set out below, C&WB wishes to highlight other key issues or concerns that it believes the Ministry should address in advance of, or at least in parallel with, the tabling of both these draft Acts and their progression through Parliament:

- The Ministry should publish an overall, end to end timetable including when it is expected the Minister will specify the various sections and provisions of each Act will come into operation. Whilst we note the various timescales referred to in the Acts, for example those set out in s76 of the Electronic Communications Act, C&WB believes it would be beneficial for a separate consolidated timetable, similar to that distributed at the workshops on 3<sup>rd</sup>/4<sup>th</sup> June, to be published with actual dates shown;
- The Ministry should clarify how and when it will be defining the relevant markets, in order for determinations of SMP to be made and appropriate and relevant remedies to be agreed, implemented and verified. Is this all intended to be part of the SMP consultation to be initiated as provided for in the Electronic Communications Act?
- There were a considerable number of consultations previously outlined in the Ministry's Regulatory Reform Policy Paper which were never undertaken. These included such significant subjects as licensing, costing, universal service and consumer protection. The Ministry has asked in this Consultation for comments, both general and specific, from all current licensed operators and other interested parties. In such circumstances C&WB would support any consideration that the Acts are not tabled until such time as the Ministry has advised all the respondents to the Consultation of the outcome of this Consultation and consulted and discussed the key issues arising and outstanding.

## **Executive Summary:**

We set out below our comments on, and where appropriate and necessary, proposed amendments to, the Acts. The Ministry will note comments on a number of the sections, however, we would refer the Ministry to the following as particular key issues and concerns:

Whilst the Acts themselves set the basic framework and outline timetable for reform and implementation of a new regulatory and licensing framework and process for the telecommunications markets in Bermuda, the regulations, policy documents and consultations required to support the implementation of these Acts are key to the development and promotion of competition in the Bermuda market. It is those documents that will ensure that these Acts are and can be used to promote, develop and maintain competition in the Bermuda market. It must therefore be recognised that there must be swift and effective action on the regulations and more detailed policy and process.

### **Section 59 RAA:**

We have significant concerns over an obligation on providers to seek to resolve any dispute through negotiation. There are and should be occasions where cooperation will be the appropriate solution to issues, such as commercial discussions on interconnection. However, there will be many occurrences that will require intervention, investigation and direction by the Authority from the outset. Where a provider is in breach of its licence conditions, any regulation or administrative determination made by the Authority or codes that have been developed with or by the Authority, it must be the primary responsibility of the Authority to direct remedy of such breaches. We would question a regulatory regime which allowed unilateral agreement between operators in such circumstances, and whether such agreement could have any binding effect in law, and indeed whether such agreement might be contrary to the generally accepted principles of competition law.

### **Costs:**

The Acts appear to provide for two sets of fees to be charged to licensed operators, in Government Authorisation Fees as well as RA (licence) fees, both potentially at c3% of relevant turnover. In the workshops we understand that both were variously described as being for the issue of authorisations as well as on-going regulation and policy. We also recall that the Ministry's consultants stated that any regulatory fees would be set purely as to recover the costs of regulation as opposed to being used as a means to raise government revenue, in line with accepted best international practice. Costs of this magnitude will be a considerable burden on the industry and will eventually need to be passed on to the consumer. As noted below in our comments on section 44 RAA, it is unclear to us from this primary legislation what the actual quantum and basis for these costs may be. It is important that (1) the industry has a clear and transparent understanding of the fees to be charged; (2) that such fees are justified, proportionate and not excessive; (3) that they are set at such a level as to cover the costs incurred in regulating the sector.

### **Spectrum:**

The proposal to continue the current spectrum allocations for a period of three years following the issuing of new spectrum licences to existing spectrum holders is

inappropriate as it will not allow other operators to take advantage of the proposed unified licence regime so as to allow them to operate and compete in different telecommunications markets. We propose that this period should be reduced to six months.

## **Draft Regulatory Authority Act 2010 ("RAA")**

C&WB has the following specific comments on the RAA:

### Section 1

On what date does the Ministry expect the Minister to specify that the sections covered by paragraph 2 of Schedule 1 will come into operation?

### Section 2 – Interpretation

There is no definition of "advisory guideline" which we suggest could read:

"advisory guideline" means a guideline issued by the Authority pursuant to section 68

The definition of "decision" is limited to "an administrative determination adopted pursuant to section 65", however section 65 itself refers to both the adoption of any administrative determination and "in any other circumstances in which it is required to do so..." (section 65 (b)). We note that for example section 80 (2) and (3) refer to "the preliminary decision". Either the definition of "decision" should be amended to remove the limitation, or other sections such as section 80 (2) and (3) should be amended to be specific as to "the preliminary adjudicative decision"

The definition of "dominant position" is a shortened version of the definition used by a number of regulatory bodies, most notably the European Commission. In using a shortened version, however, it seems to leave open the possibility of the mere holding of a dominant position being regarded as contrary to the Act. We feel it is important that the Act makes clear that the mere holding of a dominant position is not in itself a problem; rather it is the potential or actual abuse of that dominant position. We would therefore suggest that the definition of "dominant position" be amended to read:

"dominant position" means a position of economic strength that enables an entity to prevent effective competition being maintained on a relevant market, by affording it the power ~~How~~ ~~an entity to~~ behave to an appreciable extent independently of its competitors, customers and, ultimately of consumers;

This would also make the definition also consistent with the wording of section 85 (2).

In addition, it should be made clear that "significant market power" and "dominant position" are analogous and that the possibility of joint as well as single dominance/SMP needs to be recognised. We would suggest that the definition of "significant market power" is amended to read:

"significant market power" is analogous to holding a dominant position and means a position of economic strength in the relevant market or markets that enables an entity to prevent effective competition being maintained on a relevant market, by affording it the power to ~~provides the capability of acting~~ ~~behave~~ to an appreciable extent independently of ~~its~~ competitors, ~~customers and ultimately~~ ~~of~~ consumers, ~~and thereby impeding the development or maintenance of effective and sustainable~~

~~competition~~An entity may hold a position of significant market power (SMP) or dominance either individually or jointly with others.

We would also propose that the definition of end user is amended to be clear that a consumer is an end user:

“end user” means a person who purchases goods or services from a sectoral provider on a retail basis and “consumer” shall have the same meaning.

## Section 5

The views and comments of the Authority and the sectoral participants should be of importance and relevance to the Responsible Minister, such that Section 5 (3) should read:

- (1) 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.

## Section 8

Where the Board of Commissioners have failed to resolve a matter, there should be swift action and remedy such that Section 8 (2) should read:

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, and in any event within 10 days of the requirement to do so, to discuss the matter

## Section 9

We believe there is a typographical error in Section 9 (5) which should read:

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.

## Section 12

We suggest that the objects of the Authority, in relation to any regulated industry sector should be carried out in a proportionate manner and that the section should read:

The principal objects of the Authority, in relation to any regulated industry ~~sector~~sector, shall be—

- (a) to promote and preserve sustainable competition in a manner proportionate to the circumstances of Bermuda;
- (b) to promote the interests of the residents and consumers of Bermuda in a manner proportionate to the circumstances 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.

## Section 13

The Authority should be concerned about both prevention of competition arising in the first instance and the subsequent restriction of such competition, such that this section should be amended to read:

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

## Section 16

The Authority should act in an accountable and objective manner. We propose the following amendments to this section:

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

- (e) act in a timely manner;
- (f) rely on market forces, where practicable;
- (g) rely on self-regulation and co-regulation, where practicable;
- (h) act in a reasonable, proportionate, accountable, objective and consistent manner;
- (i) act only in cases in which action is needed; and
- (j) operate transparently, to the full extent practicable;

- (k) act without favouritism to any sectoral participant, including any sectoral participant in which the Government has a direct or indirect financial interest;
- (l) not act in an unreasonably discriminatory manner; and
- (m) act free from political interference.

#### Section 17

The amount of time to issue a preliminary report should be reduced to ensure action in a timely manner:

- (3) Not later than ~~six~~-three 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).

#### Section 19

There is a potential conflict between the provisions of this section, and in particular section 19 (3), and the provisions of section 112. We propose the following amendment:

- (3) Each Commissioner shall be a voting member of the Board, and, save as provided for the initial Commissioners in section 112 of this Act, shall serve for a three-year term.

#### Section 20

To ensure consistency with other sections of this Act, we propose some minor typographical amendments to this section:

- (2) The Selection Committee shall consist of—
  - (a) the Minister responsible for jJustice, who shall serve as the Chairman of the Committee;
  - (b) the Minister responsible for Labour;
  - (c) the Opposition Leader or such person as the Opposition Leader may designate; and
  - (d) each Responsible Minister.
- (3) If the Minister responsible for jJustice 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.

Section 21 requires a typographical amendment as follows:

- (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 appointed~~ment~~ for successive terms.

#### Section 25

We understand the intention to be that whilst the Chief Executive of the Authority will generally attend every meeting of the Board, he will not have a vote at such meetings. This is also consistent with section 29 (5). To be clear we propose the section 25 (7) is amended to state this:

- (7) The Board may only meet without the presence of the Chief Executive with the unanimous consent of the Commissioners. The Chief Executive shall not count towards a quorum for the purposes of subsection (3), nor shall the Chief Executive have a vote.

Pursuant to section 25 (9) the Board may establish committees for the discharge of its functions. There is no provision made for the Chairman to attend any such committee, which could lead to conflict with the intent of subsection (7)

#### Section 26

We are unclear whether there will be any circumstances in which any notice could be served on the Board, rather than the Authority, and whether the RAA needs to provide for such circumstance?

There is a typographical error in section 26 (5) as follows:

- (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

Section 29 (5) (c) refers to the Chief Executive serving as the "Records Officer" , however, there is no such defined term.

#### Section 31

It is unclear whether there is any contemplation of the possibility of a conflict of interest arising in relation to the Chief Executive, although we assume the phrase "member of staff" includes the Chief Executive. We suggest that subsections 7 and 8 are amended to read:

- (7)\_\_\_\_ The Commissioners and the members of the staff shall submit an annual written declaration to the Chief Executive (and the Chief Executive shall submit such written declaration to the Chairman of the Board) 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 and the Chairman of the Board (as applicable) shall retain the declaration forms for not less than three years, and shall provide a copy of any declaration, to any person, on request.

#### Section 33 (2)

We do not understand the reason for the express exclusions from subsections (a) and (c) of the requester. It would seem to us that there would be a legitimate expectation of any person submitting its trade secrets to the Authority to have such trade secrets treated as confidential. We therefore propose the subsection be amended to provide:

- (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.

#### Section 35 (3)

We propose that section 35 (3) is amended as follows:

- (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;

~~++(b)~~ the provisions of section 31 in relation to any possible conflict of interest of the candidates; and

~~++(c)~~ the need to ensure representation of diverse views.

#### Section 41

Subsection (1) requires amendment as follows for consistency with subsection 40 (5):

- (1) In any year in which the Authority realises a net surplus, the Authority, after recouping any net losses pursuant to subsections 40 (2) and/or 40 (5), shall transfer any remaining surplus in the following manner—

We also believe subsection (2) needs amendment as follows to refer to the 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

#### Section 44

It is unclear to us from this primary legislation what the actual quantum and basis for these costs may be. It is important that (1) the industry has a clear and transparent understanding of the fees to be charged; (2) that such fees are justified, proportionate and not excessive; (3) that they are set at such a level as to cover the costs incurred in regulating the sector. It should also be the case that there should be no duplication of fees between the Regulatory Authority fees and any Government authorisation fees. We would therefore propose that, as a minimum, subsection (6) be amended as follows:

- (6) In developing the proposed Regulatory Authority fees, the Authority shall give ~~no~~ all due consideration to the revenue received from any Government authorisation fee established pursuant to section 52 to ensure that there is no duplication of fees to be paid by the sectoral provider.

#### Section 50 (3)

We propose that this is amended to include reference to "proportionate" action as follows:

- a. Any condition imposed by the Authority shall be—

i. objective;

ii. proportionate;

~~iii.~~ not unreasonably discriminatory; and

~~iv.~~ specified expressly in the authorisation.

#### Section 59

We have significant concerns over an obligation on providers to seek to resolve any dispute through negotiation. There are and should be occasions where cooperation will be the appropriate solution to issues, such as in the case of commercial disputes. However, there will be many occurrences which will require intervention, investigation and direction by the Authority from the outset. Where a provider is in breach of its licence conditions, any regulation or administrative determination made by the Authority or codes which have been developed with or by the Authority, it must be the primary responsibility of the Authority to direct remedy of such breaches. We would question a regulatory regime which allowed unilateral agreement between operators in such circumstances, and whether such agreement could have any binding impact in law, and indeed whether such agreement might be contrary to the general accepted principles of competition law.

We would urge the Ministry to reconsider this section and these provisions as a matter of urgency. We would also propose that subsection 3 is reworded:

- (3) The general determination provided for in subsection (2) ~~shall~~ may, dependent on the circumstances and subject matter of the dispute under consideration, provide that—

#### Section 61

We propose that the Authority should at all times consider international best practice, data and benchmarks that are relevant to Bermuda, and therefore propose amendment to subsection (5) as follows:

- (5) In ~~the absence of sufficient~~ addition to evidence that is specific to Bermuda, the Authority ~~may~~ shall consider and rely on international best practices, benchmarks and data from countries that the Authority deems relevant and proportionate.

#### Section 80

The definition of "decision" is limited to "an administrative determination adopted pursuant to section 65", however section 65 itself refers to both the adoption of any administrative determination and "in any other circumstances in which it is required to do so..." (section 65 (b)). We note that for example section 80 (2) and (3) refer to "the preliminary decision". Either the definition of "decision" should be amended to

remove the limitation, or other sections such as section 80 (2) and (3) should be amended to be specific as to "the preliminary adjudicative decision"

## Section 85

We propose a number of amendments to this section, with the most significant being the time for making regulation under subsection (6). Taking account of the time the Regulatory Reform Process has been in progress, since 2005, the consultations and information gathering already undertaken, we believe that a period of one year is inappropriate.

We also note however that this section, and other subsequent sections such as 86 and 88 refer specifically to "telecommunications". Whilst the only regulated industry sector currently shown in the Second Schedule is "electronic communications (other than broadcasting)" we understand this Act as likely to apply to other regulated industry sectors from time to time, As such should such specific reference be in the ECA, as the sectoral legislation, rather than this Act? If agreed, the proposed amendments to subsection (6) should also be made to those other sections. In the alternative, and if these sections are only expected to apply to that sector, references to "telecommunications" should be replaced with "electronic communications (other than broadcasting)".

- (1) A sectoral provider that occupies a dominant position in a relevant market shall not use its dominant position in a manner that prevents, unreasonably restricts, or is likely to prevent or unreasonably restrict, competition in any relevant market.
- (2) A sectoral provider occupies a dominant position in a relevant market if the sectoral provider occupies a position of economic strength that allows it to behave to an appreciable extent independently of its competitors, customers and, ultimately, of consumers
- (3) In making the finding provided for in subsection 0, the Authority may, in its discretion, rely on—
  - i. the administrative record compiled during adjudication; or
  - ii. 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.
- (4) A sectoral provider that has significant market power engages in unilateral conduct that has prevented, restricted, or is likely to prevent or restrict, competition if such conduct—
  - i. 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

ii. 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 (4), 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;

(b) price squeezing;

(c) unreasonable discrimination;

(d) exclusionary refusals to deal;

(e) tying; or

(f) any other anti-competitive conduct that may be stipulated in sectoral legislation.

(6) Not later than the earlier of one year after the date of assent to this Act or three months after the date of assent to the relevant sectoral legislation, the Responsible 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 0.

(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.

## Section 86

Consistent with our comments and amendments to previous sections in respect of the need to ensure that there is no prevention, as well as restriction of competition, and for the need to act urgently on the information and data already collected in the Reform Process to ensure a competitive market, we propose that subsections (1) and (3) are amended as follows:

(1) A sectoral provider shall not enter into any agreement, whether or not legally enforceable, that prevents, unreasonably restricts, or is likely to prevent or unreasonably restrict, competition in any relevant market.

- (3) Not later than the earlier of one year after the date of assent to this Act or three months after the date of assent to the relevant sectoral legislation, the Responsible 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 2.

#### Section 88

Consistent with our comments and amendments to previous sections in respect of the need to act urgently on the information and data already collected in the Reform Process to ensure a competitive market, we propose that subsection (4) is amended as follows:

- (4) Not later than the earlier of one year after the date of assent to this Act or three months after the date of assent to the relevant sectoral legislation, the Responsible 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.

#### Section 92 (3)

We believe there is a typographical error to be corrected in this subsection as follows:

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 an authorisation holder, the Authority shall first obtain a warrant from a magistrate.

#### Section 93 (1)

We believe there is a typographical error to be corrected in this subsection as follows:

The Authority, at the direction of the Chief Executive ~~Officer~~, 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—

#### Heading to Part XI, Sections 111 and 115

Taking account of the wording in the Second Schedule to this Act, we propose that "telecommunications" is replaced with "electronic communications (other than broadcasting)" as follows:

**Transitional authority of the Minister responsible for electronic communications (other than broadcasting) ~~telecommunications~~**

111:

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 electronic communications (other than broadcasting)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—

115:

- (1) Notwithstanding section 43, the Board, with the approval of the Minister responsible for electronic communications (other than broadcasting)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.

#### Section 112

We propose that a maximum period of time is set for the publication of the notice soliciting nominations for the position of Commissioner. The Regulatory Reform Process has been in progress since 2005 and all such preparatory matters should either be completed and ready for implementation or capable of being completed without undue delay.

- (1) FollowingWithin five days of 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.

## **Draft Electronic Communications Act 2010 ("ECA")**

C&WB has the following specific comments on the ECA:

### Section 2 – Interpretation

Whilst the definition of "day" includes reference to "business day", there is no definition of "business day". We propose the definition to be:

"business day" means any day on which commercial banks are open"

The definition of "class licence" in the ECA is different from that in the RAA. For consistency we suggest the definition should be amended to read:

"class licence" means a licence that is granted by the Authority pursuant to section 15 (1) (b), the Regulatory Authority Act and the requirements established by the Authority to all persons that fall within the class and have the required qualifications;

The definition of "decision" is limited to "an administrative determination adopted pursuant to section 65", however section 65 itself refers to both the adoption of any administrative determination and "in any other circumstances in which it is required to do so..." (section 65 (b)). We note that for example section 80 (2) and (3) refer to "the preliminary decision". Either the definition of "decision" should be amended to remove the limitation, or other sections such as section 80 (2) and (3) should be amended to be specific as to "the preliminary adjudicative decision"

The definition of "functional internet access" refers to a minimum speed and quality of service, however, we are unclear how the appropriate standards will be assessed and determined?

We are unclear as to the meaning of the phrase "common ownership" in the definitions of "subscription audiovisual/radio/television services"?

In this Act there is no definition of end-user, which term is used in the definition of "wholesale", although there is such a definition in the RAA. The definition of "wholesale" is also unclear in relation to own use by the retail arm of a service provider. We therefore propose:

- Inclusion of the definition of end user from the RAA - "end user" means a person who purchases goods or services from a sectoral provider on a retail basis;
- That the existing definition of wholesale is amended as follows:

"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, excluding provision of such services for the service provider's own internal purposes or to those of its divisions or subsidiaries.

We note that in various sections of this Act, including section 10 (2) there is reference to an "authorisation holder" although there is no such defined term. We also note that section 13 (c) states that the Authority is responsible for "granting licences, permits and other authorisations". We further note that in some instance, such as the definition of "assignment of spectrum" there is reference to a "licensee" again undefined.

We propose that a new definition be included in section 2:

"authorisation holder" means the holder of any licence, permit or other authorisation granted under this Act and "licensee" shall have the same meaning;

### Section 3

There a number of terms used in this Act which are defined in the RAA, but not repeated as definitions in this Act, such as "advisory guideline" and "adjudicative decision". We propose that subsection (2) be amended:

To the extent possible, the provisions of this Act shall be construed consistently with the provisions of the Regulatory Authority Act, and the definitions and interpretation of the Regulatory Authority Act shall apply to this Act.

### Section 8

We would expect the Authority to also be stated to be responsible for the development and maintenance of sustainable competition in a similar manner to the obligations on the Authority set out in section 20. We propose this section is amended by inclusion of a new subsection to section 8 (1):

(a) Implementing policies and regulations to develop or maintain sustainable competition in a manner proportionate to the circumstances and requirements of Bermuda.

### Section 15

We are unclear as to what the phrase "not unduly discriminatory" as used in section 15 (2) (a) and elsewhere in this Act means and would ask the Authority to provide further explanation and guidelines. Without such further explanation we would question what justification there is for any licences to be discriminatory to any extent.

In what circumstances is it envisaged that there might be no requirement for any Regulatory Authority of Government authorisation fees? (section 15 (2) (c) (ii)).

### Section 16 (2) (b)

We propose that this subsection be amended to read:

the duty to comply with any applicable universal service obligations imposed by the Authority in accordance with Part VI of this Act

## Section 17

As Part XIII of the ECA deals with the transitional provisions for existing licence holders, we propose that subsection (2) be amended to read:

- (2) The Minister shall, subject to Part XIII of this Act, by regulation establish the maximum number of ICOLs and the procedures pursuant to which the Authority may grant ICOLs.

## Section 20

We do not agree that ex ante remedies should be withdrawn, reduced or limited until markets are effectively competitive, and therefore propose amendment to subsection 20 (e). Such an amendment would also be consistent with section 24:

- (e) rely on market forces and withdraw, reduce or limit *ex ante* remedies in circumstances where the Authority concludes that markets are effectively competitive ~~or likely to become so within a reasonable period of time~~, taking into account actual and expected market circumstances.

## Section 22

We suggest that four years is too long a period, even as a long stop date, and should be reduced to three in subsection (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.

## Section 23 (1) (b)

It is unclear what "resale" means in respect of the obligation to provide wholesale services. We would expect the Authority to require cost justified wholesale pricing to be offered, as is referred to in subsection (1) (g).

## Section 23 (1) (j)

It is unclear whether the reference to "publish" in this subsection is an obligation to publish to the Authority alone, or to the sector as a whole and should be clarified.

## Section 37 (2) (e)

Whilst we note that auctions or lotteries are only some of the possible processes for award of spectrum, we would question whether the cost of such a process is or could be appropriate to a small, licensed jurisdiction such as Bermuda.

## Section 41 (1) (b)

Again, we would question whether the cost of an auction process is or could be appropriate to a small, licensed jurisdiction such as Bermuda, even where apparent demand exceeds supply.

s51 - why manage etc domain names?

### Part XIII

Whilst we note the various timescales referred to in this Part of the Act, for example those set out in s76 of the Electronic Communications Act, C&WB believes it would be beneficial for a separate consolidated timetable, similar to that distributed at the workshops on 3<sup>rd</sup>/4<sup>th</sup> June, to be published with actual dates shown. Such a timetable should be "end to end" including when it is expected the Minister will specify when the various sections and provisions of each Act will come into operation.

#### Section 76 (2) (c) (i)

We consider that maintaining the existing spectrum allocations for a further three years, which period will itself only commence 105 days after the Act comes into effect is unreasonable and excessive. We propose that this subsection (and section 81) is amended to allow an interim spectrum licence period of six months:

any such spectrum licences shall have a duration of ~~three years~~ six months from the date of issue

#### Section 77

The Ministry has previously recognised the possibility of operators being found to be jointly dominant in any market or markets. We note that the wording of section 19 of this Act shows that this possibility is still accepted, as it should be subject to the need for very strict criteria for establishing joint dominance and the need to ensure application consistent with international best practice. As such we propose that section 77 (b) is amended to that effect:

on that basis make one or more general determinations designating any operators with significant market power, whether individually or together with others in, in a relevant market or markets no later than ninety days after initiating the consultation.

Cable and Wireless Bermuda Limited

18 June 2010

