

June 18, 2010

Hiram Edwards  
Acting Director of Telecommunications  
Department of Telecommunications  
F.B. Perry Building  
2<sup>nd</sup> Floor  
40 Church Street  
Hamilton HM 12  
Bermuda


Dear Hiram,

**Re: Comments on Draft Telecommunications Regulatory Reform Legislation Submitted on Behalf of M3 Wireless Ltd. ("M3") and Logic Communications Ltd. ("Logic")**

**A. M3 and Logic**

As a general matter, we are concerned that the efforts to hastily implement the Regulatory Authority Act ("RAA") and Electronic Communications Act ("ECA") will foreclose the opportunity for all stakeholders to engage in a fully participatory and constructive process of examining the implications of enacting legislation in the form of the draft RAA and ECA, respectively. It is important that all comments and feedback provided by industry participants are given proper and deliberate scrutiny and thorough consideration.

In addition, the draft legislation contemplates the imposition of excessive regulatory authority fees (service fees and general regulatory fees), the weight of which will ultimately be borne by consumers, employees who lose their jobs, and prospective investors who are not able to justify a substantial outlay of funds for uncertain returns on their investment. There is a danger that the much vaunted innovation that should be the inevitable by-product of new telecommunications legislation will be stunted and severely circumscribed if it is not enacted after careful deliberation and prudent planning.



## 1. The Minister and the Regulatory Authority

The RAA fails to provide a clear distinction between and division of responsibilities of the Minister and the Regulatory Authority. The Minister should retain the authority to ensure that the policies he or she promulgates are actually implemented in full by the Regulatory Authority. The Minister must be permitted to delegate responsibility for implementation of such policies without abdicating his or her responsibility.

We recommend that the Minister be empowered to direct the Regulatory Authority to reconsider and/or effect the implementation of any policy that does not reflect fidelity to the Minister's declared policies and objectives. This would serve as a check on any potential abuse by the Regulatory Authority of its authority to bring into effect the express intention of Parliament and the Cabinet as conveyed by the Minister.

## 2. Civil Damages

The RAA provides that any person who suffers damage as a result of any breach of the RAA (together with the ECA, the "Bills") or associated legislation can sue a sectoral provider (per section 96 of the RAA). This allows a carrier to sue its rival in Supreme Court rather than pursue a complaints process.

Section 104<sup>1</sup> of the UK's Communications Act 2003 provides for civil liability on a limited basis. There is civil liability only for breaches of an enforcement directive or a license

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### <sup>1</sup> 104 Civil liability for breach of conditions or enforcement notification

(1) The obligation of a person to comply with—


- (a) the conditions set under section 45 which apply to him,
- (b) requirements imposed on him by an enforcement notification under section 95, and
- (c) the conditions imposed by a direction under section 98 or 100, shall be a duty owed to every person who may be affected by a contravention of the condition or requirement.

(2) Where a duty is owed by virtue of this section to a person—

- (a) a breach of the duty that causes that person to sustain loss or damage, and
- (b) an act which—
  - (i) by inducing a breach of the duty or interfering with its performance, causes that person to sustain loss or damage, and
  - (ii) is done wholly or partly for achieving that result, shall be actionable at the suit or instance of that person.

(3) In proceedings brought against a person by virtue of subsection (2)(a) it shall be a defence for that person to show that he took all reasonable steps and exercised all due diligence to avoid contravening the condition or requirement in question.

(4) The consent of OFCOM is required for the bringing of proceedings by virtue of subsection (1)(a).



condition. Further, the regulator must approve any such civil suit and there is a defence of reasonable diligence.

The RAA provides no such safeguards. This will result in increased litigation, especially since many of the obligations imposed upon dominant carriers or carriers with significant market power (“SMP”) are subjective in nature and vague, and will have to be clarified in the Courts. For example, section 85 of the RAA forbids a sectoral provider in a dominant position from using that position in a manner that unreasonably restricts, or is likely to unreasonably restrict, competition. This is a wide provision and, if a breach of it entitles anyone to sue for damages, then there will be litigation. This could occur in circumstances where a sectoral provider whose business model fails to succeed relies upon this section in combination with section 96 of the RAA, and pursues a lawsuit against the dominant carrier.

To address these problems, we recommend that the RAA include provisions which mirror those found in the UK’s Communications Act 2003, and incorporate the same protections to reduce the threats of civil litigation against dominant carriers.

### 3. Proportionality

In the UK, the Communications Act 2003 (which implements the EU legislation in the UK) requires the UK regulator (as part of a proportionality requirement) to:


- (a) carry out impact assessments for important proposals; and
- (b) regularly review the regulatory burden to ensure it goes no further than necessary.

The Bills provide for proportionality. Examples include sections 16(d) and (e) of the RAA and section 20(c) of the ECA. The Bills do not, however, provide for impact assessments and burden reviews to ensure proportionality at the start and during the lifetime of ex ante remedies. The Regulatory Authority may include such processes in its guidelines (pursuant to section 22(1)). However, they are not mandated to do so.

The UK legislation provides that the regulator must keep the regulatory burden under review to ensure proportionality during the process of increasing competition. The ECA does not provide this protection.

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(5) Where OFCOM gives consent for the purposes of subsection (4) subject to conditions relating to the conduct of the proceedings, the proceedings are not to be carried on by that person except in compliance with those conditions.



Section 20 of the RAA does require the Regulatory Authority to consider the withdrawal and limitation of ex ante remedies on its regular reviews of each market (which take place every four years, per section 22(6)). Section 20 of the RAA provides for removal of ex ante remedies if/when the market is nearly fully competitive and section 24 similarly provides that ex ante remedies must be removed if the Regulatory Authority determines the market is fully competitive.


Section 58(2)(c) of the RAA does refer to maintaining proportionate remedies as an aim of the Regulatory Authority but the other sections suggest that, unless and until a market is fully competitive, the Regulatory Authority is not obliged to consider adjusting the regulatory burden to ensure it remains proportionate.

Further, section 23(5) of the ECA provides that the burden of proving that any remedy should be modified rests on the sectoral provider with SMP. This is in contrast to the UK system, where the Regulatory Authority is required to monitor the regulatory burden to ensure it remains proportionate. There seems to be no reason why these aspects of the UK system could not be incorporated into the ECA.

We recommend that the Regulatory Authority be obliged to carry out and provide copies of impact assessments on important proposals (such as ex ante remedies) and be positively obliged to review the regulatory burden and its proportionality, as per UK legislation, as part of its market reviews.

#### 4. Accountability

We recommend that an operational report on the activities of the RAA, beneficial changes in the industry achieved, and so forth, be tabled annually in the House of Assembly to ensure that there is some measure of true accountability. It would not be sufficient for the RAA to show the amount of money the RAA spent in any given year, and how the RAA reached their decisions (transparency). True accountability requires more than this, so that the objectives that benefit Bermuda may be achieved.



5. Annual Appointment of Commissioners

The Commissioners should be appointed annually. The “rotating board” structure embedded in the RAA does not provide for an adequate level of accountability. It stands to reason that if the Commissioners are doing a good job, they will be re-appointed. A rotating Board would not ensure continuity as any Commissioner could resign at any time.

6. Definitions

The term “sustainable” competition is not defined in the RAA. This creates ambiguity and invites differing and potentially contradictory interpretations. Moreover, certain reasonable interpretations of the term conflict with the very concept of competition in that not all carriers survive in competitive markets. A better definition would embody the notion of “sufficient” competition in markets.

The term “relevant revenues” for fee calculations should be defined in the RAA.

We were advised during the workshop that the term “proportionate”, as included in section 20 (c) of the ECA in relation to the establishment of ex ante remedies that are effective, contemplates an analysis of the costs relative to the benefits of the application of such remedies. Yet there is no such provision for any such assessment expressly set forth in the ECA. Moreover, the standard reflected in the ECA does not reflect UK best practice even though the language was derived from the UK legislation. At a minimum, the Regulatory Authority should be required to undertake a cost versus benefit analysis in support of their decisions.

7. Moratorium

The reason given (at the workshop) for including the moratorium in the ECA, is to protect the Regulatory Authority from the increased work load that would be associated with issuing licenses in the first year on the direction of the Minister. This is an unnecessary and troubling attempt to restrict the Minister’s authority. Surely, the Minister would only request that a license be issued if he or she thought that it would be in the public’s interest to do so after considering all relevant matters, including the Regulatory Authority’s workload.



## 8. Market Review Procedures

Section 22 of the ECA governs the process by which the Regulatory Authority will decide whether a particular communications market is characterized by SMP. Unfortunately, the main subsection 22(2) does not focus upon the characteristics of the market. Instead, the characteristics of the communications provider are scrutinized. This is to confuse the analysis of whether a market is characterized by SMP and whether a communications provider, operating in that market, has SMP and may lead to confusion.

We recommend that subsection 22(2) be redrafted. For example, subsection 22(2)(a) would read as follows: “the overall size of the market and the market shares of the relevant communications providers” rather than “the overall size of the communications provider and its share of the relevant market”, etc.

## 9. Drafting Issues

The ECA includes several incorrect references to “subsection” instead of “section”. Further, section 17(4)(a) of the RAA provides a timeframe for renewal of licenses “no less than nine months and no later than six months”. This does not make sense. Is a license application submitted 7 months before expiry in time?


The RAA uses two terms for the same concept: SMP versus dominant position (section 85 versus Part V, Division III). Why use two different terms?

### B. M3

#### 1. Joint Dominance

During the workshop, we were advised that if one of a number of carriers deemed to be jointly dominant in a market satisfied the ex ante remedies imposed against them, the compliant carrier would be free to benefit from the ICOL even if the other jointly dominant carriers did not comply with their obligations relative to the ex ante remedies.

The ECA should expressly state that a compliant carrier in such circumstances would benefit from an ICOL, and be permitted to enter other relevant markets. Otherwise a compliant carrier might find that it is subjected to unreasonable and unwarranted punishment due to the failure on the part of other carriers to comply with the remedies. This might plausibly occur



in connection with tower sharing arrangements, given that a number of carriers already have towers.

2. Spectrum

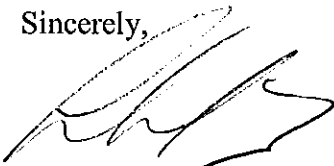
The Bills do not provide for a clear plan for dividing up spectrum. They do not contain an explanation of the methodology to be used for allocating spectrum, and there is tremendous uncertainty surrounding the time frame for determining rules/criteria for allocation of spectrum.

There is also uncertainty surrounding how a determination that spectrum is being used will be made. Furthermore, there is no guidance contained in the Bills for determining how unused spectrum will be dealt with. How will the Government charge for spectrum?

C. Logic

Logic's corporate customers have expressed concerns regarding the uncertainty around the potential requirement that they obtain a license to operate private network.

Sincerely,



Lloyd Fray  
Chief Executive Officer  
Logic Communications Ltd.  
M3 Wireless Ltd.