

COMMENTS ON DRAFT TELECOMMUNICATIONS
REGULATORY REFORM LEGISLATION

SUBMITTED BY

NORTH ROCK COMMUNICATIONS LTD.

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Executive Summary

North Rock Communications Ltd ("NR") has based its comments upon the premise that the four corners of the debate are now set by the draft Acts, and it does not in these comments seek significantly to rewrite the draft legislation or to argue for significant changes to or omissions from the regulatory architecture contemplated by it.

However, NR nevertheless raises a number of points in relation to the drafts, ranging from a number that are of deep and important principle, to some which are simply matters of (hopefully constructive) drafting suggestion.

The draft Regulatory Authority Act

It is not the function of this summary to repeat all the comments made by NR, but the more substantive points which call for real, careful and informed debate include the following points worthy of early highlighting:

- sections 5 and 7: the sections ought to provide a 'legislative steer', specifying that in making any policy/issuing any declaration, the Responsible Minister shall take into account or have regard to the principal objects identified in section 12 of the RAA and also in section 6 of the Electronic Communications Act 2010 ("ECA")
- section 7(2) ought also to proscribe directions affecting, not only individual sectoral participants, but also any identifiable class thereof
- section 12: rather than listing out a number of objectives which might conflict from time to time with no guidance as to how conflicts should be handled, the Act ought to accord primacy to the objective "*to promote the development of the Bermudian economy, Bermudian employment and Bermudian ownership*"
- section 16 (and numerous others) water down the proscription of discriminatory behaviour by forbidding acts etc that are "unreasonably discriminatory"; as a matter of definition, 'discriminatory' means 'marked by or showing prejudice', so by definition any degree of discriminatory behaviour or content ought to be clearly proscribed
- section 31: NR strenuously contends (and will at any further debate contend) that no conflicts of interest within any decision-making process ought to be tolerated, and there is no need to tolerate them

- section 60: NR contends that it would be undesirable for the Authority to hold informal, unpublished, discussions with sectoral providers, or at least with sectoral providers which have been identified as having significant market power
- section 88: section 88(2)(a) ought to be revised so as to proscribe not only practices that provide a sectoral participant with an advantage, but also practices that place one or more other sectoral participants at a disadvantage

The draft Electronic Communications Act

Again NR's comments contain a range of points, all of which have been developed with care and will repay reading in full but the most important include:

- section 6: again some hierarchy within the objects is appropriate and necessary. On the current draft, the setting of the priorities – likely in at least some cases to be a matter of great governmental and constitutional importance - is left to the opinion of the Minister or the Authority. Presumably different opinions may be formed from case to case or from time to time. NR submits that the identification of at least some order of priority is properly a matter for Parliament, and that the object identified at section 6(1)(f) (encouragement of sustainable competition and creation of an invigorated telecommunications sector) ought to be accorded primacy. If this object is served, the others ought to follow
- section 15: a number of points arise, including a further repetition of the objectionable concept of "reasonable discrimination" via the use of words proscribing "
- section 17: again this is an important section and a number of points are made; in particular however, section 17(6), so far as it concerns change of control, is on the current draft dangerously wide and untrammelled, and is in any event unnecessary. There is no need as a matter of principle for the heavy-handed provision requiring that licence holders apply to the Authority for authorisation of a proposed transfer of shares, or other transfer of control. All that is required in fact is a reporting obligation in the event of a transfer of control. Once the Authority has been notified of a change of control it will be in a position closely to monitor the conduct, performance and compliance of the new controller; should any concerns materialise then the ICOL may be revoked for cause
- section 21: NR submits that it is imperative that cellular is deemed as characterised by significant market power under section 21 of the ECA, and is so characterised such that the power will, if remedies are not imposed, unduly favour the cell companies in moving to new markets. NR submits that 'mobile voice & data' can be identified as a relevant market or market segment that falls within section 21. The ECA ought to enumerate, non-exhaustively, all markets that have been so identified as at the date it passes into force, and mobile voice & data ought plainly to be included

- section 23: the current draft appears to impose a standard of absolute necessity before *ex ante* remedies may be imposed, and NR suggests drafting amendments to remedy this. Moreover NR submits that, again in the light of the circumstances of the Bermuda market, the provision at section 23(3)(c) requiring account to be taken of relevant investment risks incurred by an operator designated as having significant market power, is inappropriate and may tend to lead to a failure to impose *ex ante* remedies in circumstances where they ought to be imposed
- sections 36 and 38: section 38(1)(d) ought to be deleted, moreover under section 36 the Minister ought to be required to have regard to the statutory objectives of the RAA and the ECA, and under section 38(2) a hierarchy ought to be established and that the identification of at least some order of priority is properly a matter for Parliament. NR submits that primacy ought to be accorded to section 38(1)(e) (preservation or promotion of effective competition in the provision of electronic communications services)
- section 39: NR submits that maximum term for spectrum licences ought to be 20 years, or at a minimum 15 years
- section 76: NR submits that the consultation process will be severely hindered if matters such as the basic terms and conditions of the ICOL are not published, with a facility for consultation and revision, prior to the enactment of the draft ECA. These terms and conditions are of central importance to the new regulatory regime and ought to be published before the new regime finds its way into the statute books

THE DRAFT REGULATORY AUTHORITY ACT 2010 ("RAA")

Part I. Preliminary

RAA section 2 (Interpretation)

See the comments below relating to RAA section 5.

Part II. The Responsible Minister

RAA section 5 (Authority of the Responsible Minister)

If this section is to contain provision expressly declaring that a Responsible Minister can make, or empowering a Responsible Minister to make, policy, and declaring that s/he can issue Ministerial declarations, then North Rock Communications Ltd. ("NR") submits this should not be *in vacuo*. Rather the section ought to provide a 'legislative steer', specifying that in making any such policy/issuing any such declaration, the Responsible Minister shall take into account or have regard to the principal objects identified in section 12 of the RAA and also in section 6 of the Electronic Communications Act 2010 ("ECA").

NR proposes the following revision to section 5(2) of the draft RAA:

"(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. In so doing, the Responsible Minister shall have regard to the principal objects of the Authority identified in section 12 and to the objects identified in the Electronic Communications Act 2010 section 6."

Further (and whether or not that revision is adopted), 'Ministerial declaration' ought to be a defined term within RAA section 2, and provision ought to be made for its position within the hierarchy legislation, secondary legislation, declared policy and so on.

RAA section 7 (Ministerial directions)

NR submits that section 7(1) ought also to provide a 'legislative steer', specifying that in making any Ministerial direction, the Responsible Minister shall take into account or have regard to the principal objects identified in RAA section 12 and in ECA section 6, and proposes a revision to section 7(1) *mutatis mutandis* to that proposed in relation to section 5(2).

Moreover NR submits that there is a lacuna in the wording of section 7(2)(b). Whilst for obvious reasons it prevents a Ministerial direction regarding the rights or obligations of any individual sectoral participant, it allows, for example, such a direction regarding the rights or obligations of two, or some other small number or single class, of such participants.

NR proposes the following revision to section 7(2)(b) of the draft RAA:

“(b) the rights or obligations of any individual sectoral participant or of any identified sectoral participant, or of any identifiable class of sectoral participants.”

RAA section 10 (Requests from the Authority)

NR proposes the following revision to section 10(4) of the draft RAA:

“Any notification from the Responsible Minister pursuant to subsection (2) 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 any one or more of the standards specified in section 7(3).”

Part III. Establishment and Organisation of the Authority

RAA section 12 (Principal objects)

MR submits that section 12 ought to specify some sort of 'pecking order' of the objects, and/or ought to specify how the Authority is to go about resolving a conflict in the event that one or more of the objects conflicts or appears to conflict with another.

If a hierarchy is set out then the conflict-resolution provision need only say that the conflict is to be resolved in accordance with the specified hierarchy.

NR submits that in fact the object identified at section 12(c) (promotion and development of the Bermudian economy, Bermudian employment and Bermudian ownership) ought to be accorded primacy. It is hard to see why any other object should ever be allowed to prevail over this object in the event of any conflict. Equally, promotion of this object is very likely to promote the other objects at least over the medium and long term.

NR proposes the following revision to section 12 of the draft RAA (which revision also encompasses correction of a typographical error):

*“12 (1) The principal objects of the Authority, in relation to any regulated industry sectoral, 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.

(2) Where any of these objects appear to be in conflict, then:

(a) if any object appears to be in conflict with that specified at section 12(1)(c), that latter object shall prevail;

(b) otherwise, the priorities shall be set or the conflict otherwise resolved in a way that best serves the public interest in the opinion of the Authority."

RAA section 16 (Regulatory principles)

It is not immediately apparent why the word "and" appears after section 16(e).

NR submits that the phrase "unreasonably discriminatory" as used in section 16(h) is inappropriate. It contemplates, or appears to contemplate, that some degree of 'discrimination' is permissible or that there can be reasonable levels of discrimination. This is (a) incorrect and (b) unconstitutional. As a matter of definition, 'discriminatory' means 'marked by or showing prejudice', so by definition any degree of discriminatory behaviour or content ought to be clearly proscribed.

This provision is to be contrasted with, for example, section 38(1)(a) of the draft Electronic Communications Act 2010 which (correctly it is submitted) contains an unqualified prohibition on discrimination.

NR proposes that section 16(e) be revised so as to delete or remove the word "unreasonably".

RAA section 17 (Sectoral review)

NR proposes the following revision to section 17(1):

"(1) The Authority shall periodically, and in any event not less than once every 4 years, conduct a comprehensive review of each regulated industry sector, including all policies, legislation, regulations and administrative determinations applicable to the sector."

RAA section 31 (Conflict of interest)

NR submits that the approach set out in section 31(2) to conflicts of interest is flawed, undesirable and unnecessary. NR considers that it is of the utmost importance in Bermuda that the Authority should be, and should be seen to be, utterly incorruptible and independent, both domestically and on the international stage.

Accordingly NR proposes that there should simply be no machinery allowing the Commissioner or any member of staff to participate in any process referred to in the section, in the event of a conflict. There is no good reason to allow such a dubious situation to obtain, particularly given the power to appoint a temporary replacement for any conflicted person under section 31(5).

The view has been expressed (including at a workshop on this draft legislation) that 'conflicts of interest are simply a fact of life in Bermuda which cannot be avoided'. NR strenuously takes exception to this view, which, if promulgated or used as justification for the approach in the draft section 31(2), is likely (and rightly) to result in Bermuda being perceived as accepting or tolerant of cronyism. This is wrong; Bermuda is, albeit a small nation, highly advanced. If it is to retain and increase its status (and its ability to attract investment capital) it simply cannot afford to adopt such anachronistic and nepotistic legislative measures.

NR proposes the following revision to section 31(2):

*"(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 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."~~*

Moreover, some machinery ought to be provided for disciplinary measures, and for a re-consideration of any affected decision or adjudication, in the event that it later transpires or is discovered that a breach of this absolute prohibition has occurred.

RAA section 35 (Advisory panels)

NR proposes the following revision to section 35(3):

*"(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; and
(c) the principal objects of the Authority identified in section 12 and to the objects identified in the Electronic Communications Act 2010 section 6."*

Part V. Powers and Functions of the Authority

RAA section 50 (Conditions)

Section 50(3)(b) again uses the phrase "unreasonably discriminatory".

NR repeats *mutatis mutandis* its submissions made above in relation to section 16(h).

Part VI. Administrative Procedures

RAA section 60 (Informal fact finding)

NR contends that it would be undesirable for the Authority to hold informal, unpublished, discussions with sectoral providers, or at least with sectoral providers which have been identified as having significant market power. This could lead to allegations or perceptions of a lack of neutrality, unless such discussions were conducted on a sector-wide basis, with each provider being involved.

NR submits that either after the words "any person" the words "(excluding any sectoral provider)", or "(excluding any sectoral provider which has been identified as having significant market power)" should be inserted, or machinery ought to be included to require the Authority to hold such discussions with all sectoral providers (in the event that any are to be spoken to).

RAA section 75 (Notice)

NR submits that section 75(1) does not at present provide a satisfactory basis for commencing, and for notification of the commencement of, an adjudication. For example it appears to contemplate that the Authority shall 'commence' an adjudication so far as a party is concerned by giving notice that some 'other' stage of an adjudication will be conducted.

NR submits that an adjudication ought to be commenced by the giving (to all interested parties) of a specified type of notice (which might be entitled an "Adjudication Notice"), which ought to set out the matters (subject always to later amendments or additions as appropriate) to be decided at the adjudication, and to notify to the parties what is required of them or what they may do if so advised, and when, in terms of their participation.

RAA section 76 (Presiding officer)

NR submits there may be a typographical error in section 76(1)(b) and that the word "be" in the second line thereof ought to read "being".

RAA section 82 (Reconsideration)

NR proposes (so as to bring these provisions into line with the *Ladd v Marshall* principles) the following revision to section 82(4):

"(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, unless there was some good reason for their not having been presented during the adjudication."

RAA section 85 (Prohibition of abuse of dominant position)

Section 85(1) speaks of dominant position holders being prohibited from using such position in a manner that "unreasonably" restricts competition. NR submits that this is insufficiently specific and/or insufficiently strong. *Prima facie* no provider that holds a dominant position ought to be able to use that position so as to restrict competition at all. No doubt when any provider (dominant position holder or not) e.g. signs up a customer for a fixed term, that to some extent can be said to restrict competition (as that customer is taken out of the market for a period), but such matters would not be caught by an absolute prohibition on use of the dominant position to restrict competition (unless the new customer were gained by some abuse of the dominant position – in which case there is no room for a concept of 'reasonable' restrictions flowing from such abuse).

NR proposes accordingly the following revision to section 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."

As a fall back position, the word "unreasonably" might appropriately be substituted with the word "appreciably".

Further section 85(3) speaks of the Authority "*making the finding provided for in subsection (2)...*". However it is not immediately apparent that section 85(2) provides for the making of any findings by the Authority.

RAA section 87 (Concentration review)

NR submits that this section ought to specify the consequences of a transgression of section 87(2); presumably it is intended that any purported transaction undertaken in breach of the obligation should be null and void and of no effect.

RAA section 88 (Prohibition of unfair trade practices)

NR submits that section 88(2)(a) ought to be revised so as to proscribe not only practices that provide a sectoral participant with an advantage, but also practices that place one or more other sectoral participants at a disadvantage.

NR proposes accordingly the following revision to section 88(2):

*"(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;*

(i) 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; or

(ii) has placed, or is likely to place, any other sectoral participant (which expression shall include that other's affiliates) at a competitive disadvantage in any such market, for reasons unrelated to the availability, price or quality of the service that such other sectoral provider or its affiliate offers."

Part IX. Actions in the Supreme Court

RAA section 96 (Action for damages in the Supreme Court)

Section 96(2) imposes a limitation period of 2 years in relation to actions for losses sustained as a result of breaches of the RAA. However, it is likely that some, if not many, of the acts or omissions that may be committed contrary to the provisions of the RAA will be done secretly, covertly or in a concealed manner.

Thus, whilst NR does not take issue in principle with a 2 year limitation period, it submits that the RAA ought to make provision for an extended period, or for a delay (until discovery or reasonable discoverability of the concealment) to the commencement of the running of time, in cases of fraud, deliberate concealment and so forth. Such a provision could appropriately be modelled upon section 33 of the Limitation Act 1984.

THE DRAFT ELECTRONIC COMMUNICATIONS ACT 2010 ("ECA")

Part I. Preliminary

ECA section 6 (Purposes of the Act)

NR submits, in line with its submissions above as to section 12 of the RAA, that section 6 ought to specify a hierarchy relating to at least some of the objects. On the current draft, the setting of the priorities – which may very well be a matter of great governmental and constitutional importance - is left to the opinion of the Minister or the Authority. Presumably different opinions may be formed from case to case or from time to time. NR submits that the identification of at least some order of priority is properly a matter for Parliament.

To achieve this the conflict-resolution provision ought to be appropriately amended to provide that any conflict is to be resolved in accordance with the specified hierarchy.

NR submits that in fact the object identified at section 6(1)(f) (encouragement of sustainable competition and creation of an invigorated telecommunications sector) ought to be accorded primacy. Again, it is hard to see why any other object should ever be allowed to prevail over this in the event of any conflict. Equally, promotion of this object is very likely to promote the other objects at least over the medium and long term.

There is also a very strong case for arguing that the object at section 6(1)(i) (promotion of Bermudian ownership and employment) ought to be accorded primacy over the remaining objects. However in the interests of pragmatism NR does not contend for this at this stage.

NR proposes the following revision to section 6(2) of the draft ECA:

"(2) Where any of these objects appear to be in conflict, then:

(a) if any object appears to be in conflict with that specified at section 6(1)(f), that latter object shall prevail,

(b) otherwise, 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

ECA section 8 (Responsibilities, functions and powers of the Authority)

At present section 8(3) provides that the Authority must endeavour to remain informed of the viewpoints of consumers. NR submits that the Authority ought also to be required to endeavour to inform itself of the viewpoints of sectoral providers and access seekers.

Accordingly NR proposes the following revision to section 8(3):

"(3) In carrying out its functions, the Authority shall endeavour to remain informed of the viewpoints of the residents and consumers of Bermuda, and of sectoral participants and access seekers, 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; and

(c) establishing and maintaining effective arrangements for seeking the views of sectoral providers and access seekers."

ECA section 15 (Communications operating licences)

There are a number of points that arise in relation to this section in NR's submission, some of terminology and some of substance and principle.

First, section 15(1)(b) uses (and introduces) the phrase "class COL". This is not defined in section 2. Section 15(2)(b) (by way of example) speaks of "class licences" (which is a defined term) so as a matter of drafting it appears that a Class COL is not the same thing as a class licence.

Secondly, section 15(2)(a) contemplates that there shall be "particular type[s] of individual COL" but it is nowhere specified what 'types' of licence or COL may be granted. NR submits that the types of licence that shall be capable of grant at the time of entry into force of the ECA ought (most probably in a Schedule to the ECA) to be enumerated clearly. This point arises in relation to further sections (e.g. section 17(1) and section 18(a)) but will not further be repeated in this document.

Thirdly, section 15(2)(a) ought to refer not only to licencees but also to persons seeking a licence.

Fourthly, section 15(2)(a) requires that the terms and conditions applicable to licensees shall be "not unduly discriminatory". NR submits that the phrase "unduly discriminatory" is inappropriate and oxymoronic. It contemplates, or appears to contemplate, that some degree of 'discrimination' is due (or not undue) or permissible or that there can be reasonable levels of discrimination. This is (a) incorrect and (b) unconstitutional. As a matter of definition, 'discriminatory' means 'marked by or showing prejudice', so by definition any degree of discriminatory behaviour or content ought to be clearly proscribed.

This provision is to be contrasted with, for example, section 38(1)(a) of the ECA which (correctly it is submitted) contains an unqualified prohibition on discrimination.

NR proposes that section 15(2)(a) be revised as follows:

"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 and those

seeking or applying for licenses that are eligible for a particular type of individual COL shall be as homogeneous as possible and not ~~unduly~~ discriminatory."

ECA section 17 (Integrated communications operating licences)

Again NR submits that a number of points arise.

Section 17(4)(a) is nonsensical. It ought to be revised to provide as follows:

"(a) the licence holder files an application requesting renewal no ~~less~~ earlier than nine months and no later than six months prior to the expiry date".

Section 17(5) speaks of revocation of an ICOL by the Authority "for cause" but without defining what such a "cause" might be. This generates uncertainty and creates the possibility, or the appearance of a possibility, of arbitrary, capricious or inconsistent revocations.

NR presumes that the terms and conditions of the ICOLs shall be appropriately worded such that anything that might amount to a good ground for revocation of the ICOL will constitute a breach of the terms and conditions thereof. Accordingly NR proposes the following revision to section 17(5):

"An ICOL may be revoked by the Authority if the licence holder commits any breach of the terms and conditions applicable thereto ~~for cause~~ or based on a determination that revocation is in the public interest..."

Section 17(6), so far as it concerns change of control, is on the current draft dangerously wide and untrammelled, and is in any event unnecessary. There is simply no call as a matter of principle for licence holders to be required to apply to the Authority for authorisation of a proposed transfer of shares, or other transfer of control. There are a number of related points here:

- there is no indication of any grounds upon which the Authority might properly block a transfer of control or proposed transfer
- there is a danger that transfers might be blocked arbitrarily, or that changes of personnel within the Authority will result in inconsistencies of approach from time to time
- in fact, if there is no requirement for pre-transfer authorisation, then where a transfer of control of the holder of an ICOL takes place and events demonstrate that the new controller is not fit and proper, or that there is some other cause or public interest justifying the removal of that ICOL from the new controller's control, there is perfectly adequate power for addressing the situation in the form of the power of revocation under section 17(5). Thus there is on analysis no call for prior authorisation of transfers of control – any adverse consequences flowing from a transfer can be dealt with after the event. This also has a great advantage of fairness – better to judge the position on actual facts rather than apprehensions that might be unjustified.

Accordingly it is submitted that all that is required in fact is a reporting obligation in the event of a transfer of control. Once the Authority has been notified of a change of control it will be in a position closely to monitor the conduct, performance and compliance of the new controller. A blanket ban on transfers of

shareholdings etc, subject to the Authority's consent, is far too heavy handed an approach, and the resulting fetter on the owner's ability to deal with its own property is (particularly when an alternative exists, that involves no such fetter, and that provides completely adequate protection for the public interests involved) most probably open to challenge under the constitution.

If this suggestion is not adopted then at the very least:

- the grounds upon which the Authority might properly block a transfer of control or proposed transfer of control must be enumerated in the ECA and this enumeration ought to be exhaustive – i.e. there can be no ground other than those set out, and there should be no 'sweep-up' ground ("for any other substantial reason" etc)
- the Authority must be obliged to act speedily – and within a fixed time - on requests for consent to a transfer. Deals can be lost through only minor delays
- there must be specified a rapid appeal process to the courts in the event of a refusal of authorisation, and in order to render such process meaningful the Authority must be obliged to give full reasons for its decisions

Finally, and so far as an assignment of an ICOL is concerned, it is arguable that section 17(6) ought to provide that no purported transfer or assignment of an ICOL, absent the necessary authorisation of the Authority, shall be of any effect. There is also a case for arguing that a purported transfer or assignment that is wilfully done without such authorisation shall bring about the automatic revocation or suspension of the relevant ICOL.

Part IV. Process for Imposing Significant Market Power Obligations *Ex Ante*

ECA section 19 (Determination of significant market power in relevant markets)

NR submits that as presently drafted, the draft ECA does not adequately or sensibly address the requirement for the first market review under section 19(2) to take place immediately after the ECA enters into force (as NR submits it should).

This is further addressed below in relation to section 77 (which it appears is intended to address this requirement but which, for the reasons set out below, fails to do so).

ECA section 21 (Preliminary identification of markets characterised by significant market power)

NR submits that it is imperative that cellular is deemed as characterised by significant market power under section 21 of the ECA, and is so characterised such that the power will, if remedies are not imposed, unduly favour the cell companies in moving to new markets.

The cell companies control the entirety of the spectrum and most of the cellular towers (which are limited in number). These are non-transitory barriers, not likely to be affected by technological changes, and the

application of *ex post* remedies alone would not be sufficient to promote competition if current cellular providers move into new markets.

NR submits that 'mobile voice & data' can be identified as a relevant market or market segment that falls within section 21. The ECA ought to enumerate, non-exhaustively, all markets that have been so identified as at the date it passes into force, and mobile voice & data ought plainly to be included.

ECA section 23 (Imposition of *ex ante* remedies)

NR contends that *ex ante* remedies are highly likely to be desirable given the specific circumstances of the market in Bermuda; one example is the significant (albeit now less than was the case prior to the laying of the third cable) market power and/or dominant position that is enjoyed by the concerns that have ownership of the undersea pipelines that serve Bermuda. Until the number of such pipelines has greatly increased or until technological advances mean that they become less crucial, such owners automatically enjoy significant market power.

As presently drafted, section 23(1) appears to dictate that no *ex ante* remedies may be imposed unless they meet a standard of absolute necessity. Accordingly NR proposes the following revision to section 23(1):

"(1) If, as part of the market review process, the Authority concludes that the imposition of one or more ex ante remedies is or may necessary or desirable to prevent or to aid in the prevention of or deter or aid the deterrence of 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 on a communications provider..."

Moreover NR submits that, again in the light of the circumstances of the Bermuda market, the provision at section 23(3)(c) requiring account to be taken of relevant investment risks incurred by an operator designated as having significant market power, is inappropriate and may tend to lead to a failure to impose *ex ante* remedies in circumstances where they ought to be imposed.

The fact is that such operators will already enjoy a sufficient and appropriate level of protection against relevant investment risks by the very fact that they have acquired (presumably as a result of making the relevant investments) significant market power. It risks unduly emasculating the *ex ante* remedies provisions of the ECA if such operators can gain an argument against the imposition of such remedies by the making of, or having made, investments that have led to the position of significant market power that renders *ex ante* remedies necessary, or potentially necessary, in the first place.

Part VII. Use of Radio Spectrum and Equipment for Electronic Communications

ECA section 36 (Spectrum policy and management)

As with section 5 of the RAA, if this section is to contain provision expressly declaring that the Minister can make, or empowering the Minister to make, policies and regulations NR submits this should not be *in vacuo*. Rather the section ought expressly to specify that in making any such policies or regulations, the Minister shall take into account or have regard to the principal objects identified in section 6 of the ECA.

NR proposes the following revision to section 36 of the draft ECA (by way of addition of a new subparagraph (3)):

"(3) In making any policies or regulations and in issuing any directions under this section, the Minister shall have regard to the purposes identified in section 6, and shall resolve any or any apparent conflicts between such purposes in accordance with the provisions of section 6(2)."

ECA section 38 (Objectives of spectrum management)

NR is concerned that the inclusion of section 38(1)(d) may tend unduly to favour those operators that have significant market power (and that are likely to have made investments in order to acquire such power, or in order to consolidate it). NR submits that again the touchstone is the drive to preserve or promote effective competition; if the giving of recognition to the level of investment in existing equipment may tend to undermine or restrict competition then, quite simply, it ought not to be recognised. Otherwise there is a risk of ossification of existing power structures – which must be the opposite of what the introduction of a new regulatory regime, armed with real teeth against anti-competitive practises, is designed to achieve.

Accordingly NR proposes that section 38 be revised by the deletion of section 38(1)(d).

Moreover, as to subsection (2) NR submits, in line with its submissions above as to section 12 of the RAA, that this subsection ought to specify a hierarchy relating to at least some of the objects. On the current draft, the setting of the priorities is again left to the opinion of the Minister or the Authority. Again, presumably different opinions may be formed from case to case or from time to time. NR submits that again the identification of at least some order of priority is properly a matter for Parliament.

To achieve this the conflict-resolution provision ought to be appropriately amended to provide that any conflict is to be resolved in accordance with the specified hierarchy.

NR submits that in fact the object identified at section 38(1)(e) (preservation or promotion of effective competition in the provision of electronic communications services) ought to be accorded primacy. Again, it is hard to see why any other object should ever be allowed to prevail over this in the event of any conflict. Equally, promotion of this object is very likely to promote the other objects at least over the medium and long term.

NR proposes the following revision to section 38(2) of the draft ECA:

"(2) *Where any of these objects appear to be in conflict, then:*

(a) if any object appears to be in conflict with that specified at section 38(1)(e), that latter object shall prevail;

(b) otherwise, 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."

ECA section 39 (Spectrum licences, permits and exemptions)

NR submits that the maximum term for a spectrum licence as provided for by section 39(7) – i.e. not to exceed 10 years – is much too short to enable the necessary financial planning and commitment (at least in the case of medium-sized entities, whose ability to participate in the market is necessary if effective competition is to be promoted). NR's primary position is that spectrum licences ought to run for the same term as ICOLs – 20 years (and indeed it is hard to see why there is such a disparity between the ICOL term and the *maximum* term for spectrum licences). On any footing, a term of not less than 15 years is required if market participation in this respect is to be workable. Very few (actual or aspiring) market participants will be able to build a business case on a 10 year model.

ECA section 41 (Fees for spectrum licences and permits for radio stations and apparatus)

Section 41(1)(a) provides that the fees applicable for the use of spectrum shall not be "unduly discriminatory".

NR submits that the phrase "unduly discriminatory" is inappropriate and oxymoronic. It contemplates, or appears to contemplate, that some degree of 'discrimination' is due (or not undue) or permissible or that there can be reasonable levels of discrimination. This is (a) incorrect and (b) unconstitutional. As a matter of definition, 'discriminatory' means 'marked by or showing prejudice', so by definition any degree of discriminatory behaviour or content ought to be clearly proscribed.

This provision is to be contrasted with, for example, section 38(1)(a) of the ECA which (correctly it is submitted) contains an unqualified prohibition on discrimination.

NR proposes that section 41(1)(a) of the draft ECA be revised by the deletion of the word "unduly".

Further NR submits that a point arises in relation to section 41(2) of the ECA. It submits that it would be appropriate (and in accordance with the principal objects of the Authority provided for by section 12 of the draft RAA) for section 41 to provide that in the event of parity being reached between 2 or more bidders on all selection requirements (and in the bidding) in a competitive bidding procedure, then the Authority shall grant the licence to the entity that has the largest share of Bermudian ownership.

It is in accord with longstanding policy for Bermudian ownership of national resources to be protected and promoted. As the draft ECA recognises at section 36 radio spectrum is a scarce natural resource, and it is submitted that it is appropriate, other selection criteria being equal, that resource should be managed and developed by Bermudians for the benefit and profit of Bermudians.

In this respect it would also be appropriate for the definition of Bermudian ownership to be considered and treated with some care. NR is aware of recent developments amounting to the circumvention of such concepts, e.g. by the use of apparent trusts where the so-called beneficiaries really stand as ciphers or nominees for foreign-owned enterprises. The Authority ought, if the above suggestion is adopted, to be in

a position (under express statutory machinery) to inquire and make findings as to, and to receive evidence and submissions from interested parties as to, ultimate control and/or ultimate beneficial ownership. If such control or ownership lies outside Bermuda then (for these purposes at least) the Authority ought to conclude that the relevant entity does not enjoy Bermudian ownership (or does not enjoy such ownership to the extent of such foreign ultimate control or beneficial ownership).

Part XI. Miscellaneous Provisions

ECA section 56 (Forfeiture)

It would appear necessary in order to avoid infringement of the constitution for regulations to be made governing the conduct of forfeiture applications, and in particular ensuring that the respondent enjoys due process and that the rules of natural justice are observed.

ECA section 57

NR submits that the leases caught by section 57(1)(b) ought to include not only those whose term is one year or more in duration but also any lease whose initial term is less than that but which will automatically be renewed unless either party terminates, such that (unless terminated) its duration may extend beyond one year.

Part XII. Offences

ECA section 64

NR proposes the following revision to section 64 of the draft ECA:

"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 destroys, secretes or alters any message that they have received for transmission or delivery;*
- (b) forges any message, or utters or transmits any message that they know to be forged;*
- (c) wilfully abstains from transmitting any message or wilfully intercepts or detains or delays any message, unless for legitimate service purposes; or*

(d) otherwise than in pursuance of ~~their~~ duty or as directed by a court, wilfully [or knowingly] ~~copies~~ any message or discloses any message or the purport of any message to any person other than the person to whom the message is addressed."

ECA section 65 (Destruction of messages by a person other than a director, officer or employee of a communications provider)

NR proposes that section 65(c) be revised as follows:

"(c) knowingly ~~or negligently~~ delivers a message or communication to any person not authorised to receive the same."

NR submits that it is inappropriate and disproportionate to elevate merely careless misdelivery to the status of a criminal offence. Rather such a matter can adequately be dealt with by a complaint to the Authority or by civil proceedings if loss is occasioned thereby.

Further and in any event, it is inappropriate that both deliberate and merely careless misdelivery should potentially attract the same punishment.

Part XIII. Transitional Provisions

ECA section 76

NR submits that the consultation process will be severely hindered or emasculated if matters such as the basic terms and conditions of the ICOL are not published, with a facility for consultation and revision, prior to the enactment of the draft ECA.

Plainly, such terms and conditions are of central importance to the new regulatory regime and ought to be published before the new regime finds its way into the statute books. Participants such as NR may well have valid points to make in relation to the statutory provisions which will be informed by the proposed contents of the terms and conditions, and *vice versa*.

If it is proposed that the basic terms and conditions be published within a maximum of 15 days after the commencement of Part XIII, then surely such terms and conditions will have had to be prepared and drafted well before then. They are central to the impact and efficacy of the new regime, and if they exist there is no reason why they ought not to be published for consultation purposes before the new regime is set in stone.

Further section 76(2)(b)(iii) uses the phrase "unduly discriminatory". NR repeats *mutatis mutandis* the submissions made above in relation to section 41 of the draft ECA.

ECA section 77 (Timing of other actions by the Authority to facilitate the transition to ICOLs)

Section 77(a) requires the Authority to issue a notice "in accordance with section 1" and section 77(b) requires it to initiate a public consultation "in accordance with section 1(4)".

