TeleBermuda International

# TBI's Response and Comments

# on the

# Draft ELECTRONIC COMMUNICATIONS ACT 2010

# and

# Draft REGULATORY AUTHORITC ACT 2010

**Company Confidential**

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## 1.0 Introduction

The document presents TBI's proposed comments to the Government of Bermuda's Ministry of Energy, Telecommunication and E-Commerce new REGULATORY AUTHORITY ACT 2010 ("RAA") AND ELECTRONIC COMMUNICATIONS ACT 2010 ("ECA"). The document will present comments to specific clauses within the RAA and ECA, provide TBI's rational for amendments / comments and, where appropriate, will propose alternative language (alternative / new terms to the ACT are presented as red italic text).

## 2.0 Brief Overview of Commenter – TeleBermuda International Limited

The comments within this document are presented on behalf of TeleBermuda International Limited ("TBI"). TBI is a Class A Bermuda licensed telecommunication service provider operating under the current Telecommunication ACT. TBI has been in operations for over twelve years, providing International voice and data services for Bermuda commercial and residential market segments.

## 3.0 Comments to the REGULATORY AUTHORITY ACT 2010

### *3.1 RAA Section 2 (Interpretation)*

To address any competitive issues that could arise in relation to a service provider who has been defined as dominant within one market and adopts predatory / anti-competitive behavior in markets that are deemed non-dominant for the dominant provider or any of the dominant provider's subsidiary, affiliate, partnerships or where the dominant provider is part of a group of companies, TBI recommends that we include a definition / interpretation for "tying" as presented within Section 85, part 5 (e). Thus we propose an inclusion of interpretation for "tying" as follows:-

*"tying" means a **sectoral** provider that makes the purchase of one product or service over which it **has** significant market power and **determined as** dominant (the "tying good") conditional on the purchase of a second, competitively **supplied,** product or service (the "tied good") either directly **or** through **a** subsidiary, **an** affiliate, a partner or where the dominant sectoral provider and sectoral provider of the tied good is part of a holding company.*

## 4.0 Comments to the ELECTRONIC COMMUNICATION ACT 2010

This section of the document presents TBI's comments to the ECA.

### *4.1 ECA Section 2 (Interpretation)*

TBI proposes incorporating a definition for 'tying" within the Electronic Communication ACT 2010 as with the Regulatory Authority ACT 2010, as the term is referred within the ECA.

*"tying" means a **sectoral** provider that makes the purchase of one product or service over which it **has** significant market power and determined as dominant (the "tying good") conditional on the purchase of a second, competitively supplied, product or service (the "tied good") **either** directly **or** through **a** subsidiary, **an** affiliate, a partner or where the dominant sectoral provider and sectoral provider of **the** tied good is part of a holding company.*

### 4.2 ECA Section 16 (Communications Operations License Conditions)

It is TBI's view that as Bermuda moves to the new licensing structure, the transition **should ensure that** all existing license carriers meet current obligations, primarily where such obligations are service impacting to the end Bermuda customer.

Today under the current Class License system, all Class B carriers are mandated to provide carrier pre-selection[1] (also know as PIC services) for long distance services. It is our understanding that this requirement under the new licensing structure is only subjected to a carrier that is defined as dominant within its relevant market.

A failure by MTEC to ensure continuity with regards to carrier pre-selection for all current Class B carriers would be disruptive to the end consumer as effectively a non-dominant Class B carrier can simply "turn off" PIC services offered today and force their customers to select their own long distance plan. As the current Class B carriers have significant market power over their customers (i.e. either through contract commitments imposed by the mobile providers or in the case of fixed line service, a failure to implement local number portability prior to the new licensing structure come into effect), these carriers can dictate the price for Long Distance services and effectively move the market from one that his highly competitive to a monopoly. TBI would strongly recommend that MTEC / DOT and Consultants review TBI's response to question 2 within its submission to Access and Interconnection Consultation submitted on the 24th of November for further evidence and argument for mandating carrier pre-selection on all COLs

Accordingly, TBI proposes that carrier pre-selection (i.e. PIC services) for long distance service is made a condition on the issue of a COL and propose expanding the scope of section 16, subsection (2) as follows:-

***subsection 16(2)***

(2) In addition to the conditions set forth in subsection (1), the following may be specified as conditions applicable to operators or providers of public electronic communications—

(a). any of the obligations specified by the Authority in accordance with section 8(2)(c);

(b). the duty to comply with any applicable universal service obligations;

(c). the obligation to interconnect with the electronic communications networks of other COL holders or registrants on reasonable terms, where permitted by applicable rules and where necessary to provide consumers with any-to-any connectivity;

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[1] The ACT within Section 23 (Imposition of ex ante remedies) has specified the obligation to provide Carrier Selection (i.e. subscribers can choose their carriers on a call by call basis) for dominant carriers. Note that Bermuda carriers are mandated to provide Carrier Pre-selection and thus, TBI proposes that within this section (i.e. Section 16), that COLs are mandated to support Carrier pre-selection. Note that the definitions of Carrier Select and Carrier Pre-selection is based on MTEC's Access and Interconnection Consultation Paper issued on the 6th of October 2009

(d). the requirement to comply with any ex ante remedies in respect of significant market power that may be imposed by the Authority in accordance with Part IV;

(e). obligations in respect of emergency call services;

(f). obligations in respect of directory information and the directory enquiry facilities;

(g). the obligation to provide performance bonds in respect of compliance with specified conditions or requirements if required by the Authority; and

(h). *the obligation to provide carrier pre-selection and retail services (i.e. 2020 service) for international long distance service and related terms and conditions in the manner specified by the authority*

*(i)* any other conditions allowed or required by regulation.

### *4.3 ECA Section 23 (Imposition of ex ante remedies)*

TBI applauds MTEC / DoT and the group of consultants in developing a comprehensive list of ex ante remedies that can be imposed on a sectoral provider determined as dominant with significant market power. However, it is TBI's view that some of the proposed remedies fail to take into consideration some of the inter-relationships and joint ownerships through conglomerates that currently operate within the existing licensing structure and propose that the scope of the following remedies is extended to specifically ensure that a sectoral provider determined as dominant and is subject to ex ante remedies does not use an affiliate, subsidiary, partner and/or another sectoral provider that is jointly owned by parent company (of the dominant provider) to adopt anti-competitive measures.

Furthermore, TBI would like to point out that subsection 23(1)(l) references **Carrier Selection** as a remedy requirement for dominant carriers. Note that Carrier selection (i.e. the ability for the subscriber to select their carrier on a call by call basis) is currently not supported under the existing Class license structure. Today, under the current Class structure, all Class B carriers are required to support **Carrier Pre-Selection** (ability for the subscriber to specify a carrier for certain types of calls such as international long distance) and retail services such as 2020 dialing. Accordingly, TBI proposes that subsection 23(1)(l) be amended to reflect the requirement for the dominant carrier to support the service currently offered within the market and limit any disruption or confusion to the end customer. Note that the definition of Carrier Selection and Carrier pre-selection is based on the Access and Interconnection Consultation document issued by MTEC on the 6th of October 2009.

Also note that dominant carrier (who has significant market power over their end customer) do not use this remedy requirement (i.e. Carrier Selection), under this clause to change the current service offering for LD services and at the same time offer a long distance service through their own network. The proposed clause would be disadvantageous to existing long distance providers in Bermuda who do not have access (fixed or mobile) and would not be able to compete effectively and on a level playing field with a dominant access provider who is able to offer both local and long distance service without the requirement for the customer to specify their carrier for each single long distance call that they make. For ease of making their long distance calls, subscribers would simply pick their local access provider rather than have to dial a prefix to make their long distance calls – the dominant carrier would have a non-price advantage over any of the other COLs that provide the service and would be in a position to charge higher rates for the convenience that it offers and make the market uncompetitive (i.e. Bermuda would see an increase in International long distance rates)

Accordingly, TBI proposes that the following subsections to Section 23 be amended as presented below:-

***Subsection 23(1)(f)***

the obligation of non-discrimination, including the requirements to apply equivalent conditions in equivalent circumstances to other communication providers which provide equivalent services, and to provide facilities, services and information to others under the same conditions and of the same quality as it provides for its own internal purposes or to those of its divisions, subsidiaries, partner *or another communications provider that is jointly owned by the same parent company*

***subsection 23(1)(h)***

the obligation to provide certain types of wholesale access or interconnection prior to introducing associated downstream services that rely on such inputs *either directly or through a subsidiary, affiliate, partner or another communication provider that is jointly owned by the same parent company*

***subsection 23(1)(k)***

the obligation not to unreasonably bundle other services offered *either directly or through a subsidiary, affiliate, partner or another communication provider that is jointly owned by the same parent company*, with a service that is contained in a relevant market characterized by significant market power, including a prohibition against anti-competitive tying arrangements or offering bundled at retail prices that cannot be replicated by an efficient competitor, as defined by the authority

***subsection 23(1)(l)***

the obligation to provider *carrier pre-selection and retail service (i.e. 2020 service)* and related terms and conditions in the manner specified by the authority

### *4.4 ECA Section 76 (Transition to ICOLs and associated spectrum licenses and permits)*

It is TBI's view that MTEC / Consultants should strengthen the current Transitional Provisions within the ECA act, primarily with respect to current spectrum license holders who will automatically be provided a spectrum license for a period of three years during which period the new RA will establish a more flexible spectrum management policy.

At this juncture, TBI would like to reference a study jointly undertaken by the European Regulatory Group (ERG) and the Radio Spectrum Policy Group (RSPG)[2] that reviewed competition issues arising from transition towards more flexible spectrum management. The study highlighted the fact that there could be distortion in competition between existing users / holders of spectrum and new entrants during a transition period. The study goes on to argue that although there are advantages in moving towards a flexible spectrum management, problems may arise within member states (of the European Union) that could entail the following:-

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[2] ERG / RSPG; - ERG-RSPG Report on transitional radio spectrum issues; ERG-RSPG report on competition issues arising from the transition towards more flexible radio spectrum management for electronic communication networks and services – June 2009, available at the following link: http://erg.ec.europa.eu/doc/publications/erg_8_60_rev_1_erg_rspg_report_on_transitional_spectrum_issues_090603.pdf

- By removing some of the constraints imposed on existing spectrum / license holders may give an unfair advantage, primarily if they alone are able to provide services either more cheaply or to a higher quality than others, as they have access to preferential spectrum.
- New technology may require higher bandwidth and thus impact the quality of service to the end-user.

The study also included analysis of individual National Regulatory Authority (NRA / Member state of the EU) and their current transitional issues and solutions / toolkit available to each NRA as it moves towards a flexible spectrum management regime. Some of the tools / solutions to address transitional issues and avoid any competition distortion entailed refarming of spectrum (acquiring – mandating spectrum release from existing holders and re-distributing spectrum to existing and new entrants), infrastructure sharing including Mobile Virtual operators, and sector specific regulation on downstream markets.

Accordingly, and as expressed by TBI, the move towards a flexible spectrum management regime may be an advantage to Bermuda and support innovation and investment in new technology and new wireless products and services. However, it is TBI's views that the DoT should take into account the transitional issues as it moves from the current regulatory structure to the proposed new structure. A failure to acknowledge these issues and mandate initiatives to remove some of the structural high entry barriers within the mobile market segment (i.e. mandating tower sharing, enabling resale of mobile services through MVOs, number portability and other regulation) will simply distort competition and provide the existing holders of spectrum, primarily within the mobile market with the opportunity to maintain their high entry barriers and adopt margin squeeze as it moves into the lower entry barrier markets through the new Communication License structure.

Thus, TBI strongly recommends to MTEC / DoT and Consultants the requirement to define the current holders of Spectrum, at a minimum through this three year period as jointly dominant for the reasons expressed above and as summarized below:-

- The current restrictions imposed on new towers will not enable or simply delay a new entrant to the mobile market
- The high penetration of mobile service within Bermuda and the fact that Bermuda is a captive market (i.e. the market size will not grow due to Bermuda's geographic limitations) does present a high entry barrier to the segment as existing mobile providers are able to benefit from economies of scale and scope. Furthermore, as MTEC / DoT are proposing to rely primarily on wholesale access remedies as opposed to retail price controls would mean that the mobile providers will be able to charge high rates in markets where they have significant market power (for example in voice and data roaming) and adopt predatory pricing in markets with lower entry barriers such as the long distance market segment.
- The unavailability of spectrum currently as well as during the three year period whilst the RA performs a review of the spectrum and works with the current holders to refarm spectrum does represent a barrier to any new entrant. Furthermore, and as stated above, with the advent of 3G and 4G services where there is a demand for more spectrum would simply force a new entrant to be able to service only the lower end of the mobile market (i.e. voice services) as a lack of spectrum would not allow an entrant to provide a similar quality of service to the higher end voice and data segment, primarily to the business market segment.

In this regards, TBI recognizes that it may be difficult to specifically state within the ACT that during this period the mobile sector we be defined as jointly dominant, prior to the RA conducting its market review and refarming of spectrum. However, TBI proposes that these factors identified above should be taken into consideration and determine that the current three mobile providers as jointly dominant.

Furthermore, and at a minimum, TBI would propose that the scope of subsection 76(c) be expanded to include, the following provisions provided below.

***Subsection 76(c)***

(c) direct the Authority to issue any associated spectrum licenses reflecting each such license holder's spectrum assignments as at the date of commencement of this Part, in accordance with section 39, provided that—

(i). any such spectrum licences shall have a duration of three years from the date of issue;

(ii). the holders of any such licences shall be subject to a requirement to pay any fees for use of the spectrum that may be imposed in accordance with section 41

(iii). all such licence holders that were responsible for paying, or for collecting and remitting, to the Minister any licence fees for the use of radiocommunications equipment as at the date of commencement of this Part in accordance with [Head 60, section (1) of the Government Fees Act Amendment Regulations 2010] shall continue to be required to pay such fees until a new schedule of fees is established in accordance with subparagraph 2(c)(ii)

(iv). *the holders of any such licenses shall not be permitted to trade, lease. sub-license all or any portion of assigned spectrum to another sectoral provider*

(v). *the holders of any such license may be subject to retail price controls including international voice and data roaming rates during the initial three year spectrum license period.*