

The Bermuda Telephone Company
Reply Comments on Draft Telecommunications Regulatory Reform
Legislation

August 30, 2010

Francis R. Mussenden, President & CEO
The Bermuda Telephone Company Limited
30 Victoria Street
Hamilton, HM 12
Bermuda

TABLE OF CONTENTS

Executive Summary	3
Introduction	5
Eliminate the Regulatory Authority	6
Institute “Pay-As-You-Go” Administrative Tribunals	8
Abandon the Relevant Markets/ Significant Market Power/ Remedies Regulatory Approach	9
Remove Certain Provisions Pending Public Consultations	11
Create a Minister’s Advisory Council	12
Establish One Overarching Objective	13
Electronic Communications Act 2010	15

The Bermuda Telephone Company Limited
Reply Comments on Draft Telecommunications Regulatory Reform Legislation
August 30, 2010

EXECUTIVE SUMMARY

The Bermuda Telephone Company appreciates the opportunity provided by the Ministry of Energy, Telecommunications and E-Commerce to continue to discuss the Ministry's proposed May 2010 bills to implement regulatory reform because we found the initial proposals to be too broad, too vague, too costly, and too complex to be effective. In these reply comments, BTC offers a redrafted version of the original legislation, marrying the two proposed bills into one ELECTRONIC COMMUNICATIONS ACT 2010.

In our redrafted legislation, BTC proposes to eliminate the Regulatory Authority and place many of those functions in expert, ad hoc administrative tribunals coordinated by the Ministry; to abolish the relevant markets/significant market power/remedies regulatory regime and require wholesaling as the quid pro quo for entry into other markets; and to postpone the establishment of certain regulatory policies like universal service and private licensing pending public consultations.

We also propose the creation of a Minister's Advisory Council to provide policy advice and guidance to the Minister, and we recommend replacing the many objectives and purposes included in the two original bills with a single overarching objective that would focus both the industry and the Ministry on the important work at hand: promoting the long-term welfare of Bermuda's consumers by fostering incentives for firms to invest in innovation.

BTC's proposals are not as sweeping as they may appear at first blush. Indeed, we take many of the concepts contained in the original REGULATORY AUTHORITY ACT 2010 and make them applicable instead to the Ministry. Rather than fund a three person Board with its own staff, offices, and resources, we substitute administrative tribunals (which have the same professionalism and independence as the proposed Board but more substantive expertise) to be employed (and compensated) on an as needed basis. And, rather than have the Minister seek the advice of a generic Board, we have proposed the creation of a Minister's Advisory Council comprised of electronic communications industry professionals and persons with specific electronic communications experience to serve as a sounding board for Ministry initiatives.

Finally, rather than subject Bermuda's robust electronic communications industry to the unnecessary complexity, regulatory delay, and almost certain litigation generated by the relevant markets/significant market power/remedies approach to

governing Bermuda's markets, BTC proposes that we simply cut to the chase by requiring any carrier with facilities to make these available to others via wholesale as a quid pro quo for receiving an integrated license. Doing so, allows Bermuda to escape the contention, the extraordinary costs, and the suffocating delay that the implementation of the Ministry's original legislative proposals would surely entail. Most importantly, it would unshackle Bermuda's electronic communications market and allow it to flourish.

The Bermuda Telephone Company Limited
Reply Comments on Draft Telecommunications Regulatory Reform Legislation
August 30, 2010

INTRODUCTION

The Bermuda Telephone Company Limited (BTC) appreciates the opportunity presented by the Ministry of Energy, Telecommunications and E-Commerce (METEC or the Ministry) to offer reply comments on the proposed REGULATORY AUTHORITY ACT 2010 (RAA) and the ELECTRONIC COMMUNICATIONS ACT 2010 (ECA).

In our June 18, 2010 comments on the proposed bills, BTC focused on five major shortcomings. These shortcomings included:

- The broad and sweeping transfer of authority and power from the Minister to the Regulatory Authority (RA or Authority),¹ including the absence of a theoretical framework for determining what activities appropriately fall within the domain of the Minister vis-à-vis the Authority;
- The exorbitant costs of the legislation, including the direct costs associated with the RA, the indirect costs associated with regulatory delay and uncertainty, and the opportunity costs incurred in directing monies to regulatory structures and away from economically productive investments;
- The profusion of vague, imprecise, or incompletely specified provisions, including the lack of definitions for significant terms and the absence of any standard (i.e., rigorous scientific and economic analysis) for making regulatory determinations – all of which increase regulatory uncertainty, smother investment, and further drive up costs;
- The lack of a single, overarching principle to motivate regulatory reform, including the absence of a vision for Bermuda’s electronic communications future; and
- The Ministry’s continuing insistence on adopting outdated, heavy-handed regulations – developed in 1998 to govern the transition from government-owned monopolies to competition in newly privatized European markets –

¹ Transact, in its June 18, 2010 comments, referred to this situation as an “unfathomable leap of faith.”

which are incompatible with Bermuda's 21st Century technology, its competitive market, and its small economy.

In these reply comments, BTC puts forward solutions to the issues we identified above, and we offer a redrafted version of the legislation that incorporates our views as well as the suggestions of other parties who offered comments on June 18, 2010. In general, BTC proposes to revise the legislation to eliminate the Regulatory Authority and place many of those functions in expert, ad hoc administrative tribunals coordinated by the Ministry; to abolish the relevant markets/significant market power/remedies regulatory regime and require wholesaling as the quid pro quo for entry into other markets; and to postpone the establishment of certain regulatory policies like universal service and private licensing pending a public consultation that fully sets forth the problems documented to exist and the Ministry's proposed solutions.

In our redrafted version of the legislation, BTC also proposes the creation of a Minister's Advisory Council to provide policy advice and guidance to the Minister, and we attempt to streamline the legislation and tighten the language to eliminate uncertainty and ambiguity as to what is required, permitted or prohibited by whom and under what conditions. Finally, we propose to replace the many objectives and purposes included in the two bills with a single overarching objective to focus the industry and the Ministry on policy-making initiatives that ultimately benefit Bermuda's consumers.

In particular, BTC proposes to:

- **Eliminate the Regulatory Authority.** As an initial matter, BTC proposes that METEC abandon the establishment of a separate Regulatory Authority and place the functions that would have been handled by the proposed Authority in a newly reorganized Department or Office of Electronic Communications (OEC) within the Ministry. We make this recommendation for several reasons. First, we do not believe that Bermuda's consumers (or indeed the Bermuda economy) can afford the costs required to support the proposed Authority.² As we mentioned in our June 18, 2010 comments, the RA would cost BTC

² In their June 18, 2010 comments on the proposed bills, many carriers, in addition to BTC, voiced concern about fees and fee structure including Brasil Telecom, CableVision, CellularOne, C&W, Digicel, Logic, Transact, and Quantum. Quantum's and C&W's views reinforce our own, i.e., that regulatory fees can negatively impact business investment and, thus, any regulation must be appropriate to Bermuda and proportionate in its effect. Logic went a step further and urged the Ministry to provide impact assessments of its proposed regulations and burden reviews of existing regulation to ensure proportionality.

\$1.5M annually, at 3% of revenue, or the equivalent of 17 jobs at average salaries. Industry-wide costs could reach \$12M. Most importantly, dollars spent to support regulatory structures are dollars that are not available to invest in productive assets that grow Bermuda's economy and improve our quality of life.

We note especially that although the Ministry favourably compares its proposed Regulatory Authority with the Bermuda Monetary Authority (BMA), which governs multiple industry sectors in Bermuda, i.e., banking, insurance, and investment funds among others, BMA-regulated sectors pay *substantially* less for BMA's governance than Bermuda's electronic communications sector would pay for the RA. BMA's budget (\$32M in 2009 expenses) as a percentage of insurance sector revenues alone (\$124B in 2009 gross premiums) is 0.026%.³ An estimated RA budget of just \$2M as a percentage of electronic communications sector revenues of \$250M would be 0.8% -- meaning that the RA would be approximately 30 times more costly for electronic communications providers than the BMA is for its sectoral participants.

Second, we believe that the *Ministry* is Constitutionally-required to establish industry policies and regulations. These functions cannot be turned over to the RA. Under the Ministry's proposed bills, the industry would be required to fund Ministry staff to develop policies and regulations and to fund RA staff to implement and enforce these policies and regulations, incurring unnecessary transaction costs as well as the direct costs associated with duplicating staff, offices and other resources. In our view there is no need for a separate organization with separate administrative costs and budgets.⁴ Although this new Office of Electronic Communications may require additional staff or staff with different skill sets, BTC believes that these costs will be a fraction of the costs associated with a separate Authority.

Third, we do not believe that the RA is the answer to the problems that the Ministry hopes to solve by transferring Ministry responsibilities to a separate organization. At the end of the day, Ministry policies and regulations (as well

³ BMA figures sourced from BMA, *Report and Accounts 2009*, published July 2010.

⁴ As proposed in the original bills, the RA would be required to collect fees; establish and manage operating and reserve funds; establish and manage bank accounts and purchase financial instruments; maintain financial accounts subject to regular audits; prepare annual reports and budgets; and enter into leases for property, contracts for goods and services, and loan agreements with licensed financial institutions (RAA 38-47) – all of which would require RA staff support and all of which could be handled within the Ministry, if needed, using current staff.

as actions and decisions by the RA) must be subject to judicial appeal;⁵ Ministry staff (as well as RA staff) must be highly skilled and experienced and report to a strong, skilled and experienced manager; and Ministry actions and decisions (as well as RA actions and decisions) must be fully open and transparent in order for the Ministry and the Government to be seen as fair and credible.⁶ Indeed, the Ministry cannot escape responsibility for the vitality of Bermuda's electronic communications market by creating an independent organization.

- **Institute “pay as you go” administrative tribunals.** Although BTC cannot justify the establishment of a permanent Regulatory Authority, we believe that there will be occasions when a presiding officer may be required for an adjudication, when an arbitrator may be needed to resolve disputes between industry parties or when an administrative law judge may be necessary to rule on recurring matters like rates and tariffs or interconnection agreements. We believe that Bermuda would be well served by having specially trained professionals who are experienced and independent serve in these positions, and we propose that these individuals be *specifically* knowledgeable of electronic communications markets rather than generically competent as required by the RAA.

Thus, BTC recommends that the Ministry establish an arbitration function as well as a broader adjudicatory function than was proposed in the initial RAA that would serve on an “as needed” basis. Specifically, BTC proposes that the Ministry recruit domestic and international experts in relevant fields to comprise a pool of “certified experts” from which to draw an administrative tribunal of one or three persons, as needed, to preside over a given matter. The administrative tribunal would preside over enforcement hearings; disputes among service providers, between the Government and service providers, and between services providers and their customers; and matters relating to the application of legislation and regulation, including license authorizations and renewals, license conditions, rates and tariffs for both wholesale and retail services (as appropriate), and carrier interconnection agreements. The administrative tribunal would make recommended decisions over such matters, subject to a required review by the Minister, who would

⁵ Transact, in its June 18, 2010 comments, also makes this point, i.e., Ministerial determinations cannot escape a carrier's right to appeal.

⁶ Although CellularOne advocated speedy adoption of the original bills in its June 17, 2010 letter to the Ministry, it also urged the Ministry to consider additional measures to ensure fair and open administrative processes. BTC shares that concern, and in the attached redrafted legislation, we attempt to address these issues.

have the authority to affirm, reverse, or remand the tribunal's determinations. The Minister's decision becomes legally binding.

By establishing the capability to use arbitrators and administrative tribunals on an as needed basis, Bermuda can assure that its regulatory oversight and compliance are cost-effective yet credible.⁷ Importantly, costs would be incurred on a usage basis and, in some instances, paid by the individual parties involved.⁸ BTC believes that this ad hoc regulatory approach will provide the best of both worlds: independent, skilled, experienced, and objective expertise coupled with efficiency and cost effectiveness.

BTC envisions that Ministry staff would be responsible for policy, legislation, and regulation; for data collection and reporting; for conducting spectrum studies, sectoral reviews, impact assessments, and other required research; for monitoring and compliance; for ensuring enforcement; and for liaising with other governments and governmental organizations.

- **Abandon the relevant markets/significant market power/remedies regulatory approach.** BTC proposes to facilitate integrated licensing by significantly modifying the *ex ante* provisions in the ECA. We believe that determinations regarding relevant markets, significant market power, and remedies are too complex, too costly, too time-consuming, and too outmoded for a small market and a market as potentially competitive as Bermuda's.⁹ In addition, BTC finds the attempt to define relevant markets by relying on the current market structure -- which is itself a regulatory artifact -- irrational, and

⁷ Certified experts with experience in electronic communications can be recruited from international arbitration centers like the London Court of International Arbitration, the International Chamber of Commerce International Court of Arbitration, and the American Arbitration Association as well as from the Bermuda Chapter of the Chartered Institute of Arbitrators. Additionally, we recommend that the Minister consider for nomination to the pool of certified experts retired executives of telecommunications companies, former chief technology officers of telecommunications companies, current or former deans of law schools and business schools, former chief economists of regulatory agencies, former members of regulatory commissions, former members of the US Council of Economic Advisers, retired judges, and law professors and economics professors specializing in regulation.

⁸ For example, dispute resolution between two communications providers should be paid by the parties involved. Licensing, tariffing, and enforcement matters, however, are recurring functions, and compensation for tribunals involved in these matters should be included in the Ministry's budget.

⁹ Indeed, the Minister's August 5, 2010 letter advising Class A carriers of his intent to modify the Class A licenses to allow residential ISP services in advance of reform speaks volumes about the misfit between the elaborate regulatory structure recommended for Bermuda and the reality of Bermuda's electronic communications market.

we believe that the proposed criteria for determining significant market power are largely incorrect and insupportable.

Rather than continue further down this troublesome road, BTC recommends that METEC forego the exercise of identifying relevant markets, investigating possible significant market power, and imposing remedies (any and all of which are likely to be subject to further regulation and litigation, pushing the benefits of reform even further into the future) and simply require carriers with facilities to make those facilities available to others on a wholesale basis as a condition for receiving an integrated communications license. Carriers that have no facilities are exempt from this condition. Carriers that have facilities but do not want to make them available to others on a wholesale basis are eligible for a new communications operating license (COL) to continue doing what they do today, but they are not eligible for an integrated communications operating license (ICOL) which would allow them to provide any electronic communications service.¹⁰

We also recommend that prices for wholesale services be established initially by negotiation between buyers and sellers.¹¹ Where a price cannot be agreed within a reasonable period of time, the parties shall submit their positions to an administrative tribunal. All subsequent comers will receive the same price as agreed or determined via the tribunal until prices are renegotiated. Where

¹⁰ This is consistent with the June 18, 2010 comments of Brasil Telecom suggesting that carriers who do not choose to expand the scope of their services should have an opportunity to choose from other licensing options.

¹¹ BTC made a similar recommendation in its November 19, 2009 *Comments on Access and Interconnection in Bermuda*, page 19, where we said:

...BTC intends to offer interconnection on a non-discriminatory basis to all carrier customers and to engage in commercial negotiations for our copper access facilities with interested parties. We propose to negotiate interconnection and access agreements with the first comer and offer these terms to all carriers seeking the same services. Further, we propose that the negotiation process allow for a set time frame for initial negotiations and recourse to an expert panel of arbiters if parties fail to reach agreements among themselves. In this way, a) all carrier customers of BTC are guaranteed equal treatment and non-discriminatory terms and conditions in both interconnection and access services, and b) carriers that seek to acquire access services from BTC can negotiate with us on a case by case basis, with recourse to binding arbitration, as their individual business plans dictate. This approach eliminates unnecessary regulation and unwarranted regulatory costs, and it allows BTC to focus on real demands for service rather than spend valuable time and resources unbundling an outmoded network to meet hypothetical (and likely non-existent) demands for unbundled copper loops.

there are no interested buyers, the carrier can meet the obligation by providing a reference interconnection offer, which would be the basis for any future negotiations that might take place. Importantly, in any of the above scenarios, the wholesaler's retail operations will be required to pay the same price for the same wholesale services as all other unaffiliated parties, and these accounts will be subject to full and certified audits.

- **Remove certain provisions pending public consultations.** BTC suggests that policies like universal service and private network licensing be eliminated from the proposed legislation and taken up once the Ministry has had the opportunity, with the benefit of a fresh evidentiary record, to more fully consider its objectives, flesh out its proposals, and assess the costs and benefits of regulating.¹²

In the case of universal service, the Ministry should use this opportunity to promote its vision for Bermuda's electronic communications future, i.e., for the development of a next-generation network that provides wideband services to all business and residential premises. Rather than mimic other countries' outdated universal service policies, the Ministry should follow the lead of forward-looking governments that are revisiting their universal service policies in light of the availability of wideband technologies and are considering what technologies are crucial to support education, health care, public services, employment, and economic development in the 21st Century. Like progressive governments that are devising plans and strategies for ensuring the roll-out of fibre-to-the-premises, we suggest that universal service be taken up in a broader consultation that contemplates a national broadband plan for Bermuda.

To further cut costs, BTC recommends that legislative language pertaining to number administration, equipment certifications, and consumer protection be streamlined to include only those regulations that advance the long-term welfare of Bermuda's consumers and are shown to provide a positive cost-benefit trade-off. BTC does not support efforts to expand regulation and regulatory costs simply to dot every imaginable regulatory "i" and cross every "t." Rather, we assert that the Ministry must justify its reasons for imposing regulation on the electronic communications industry, and it must provide a cost-benefit or proportionality justification in every instance where

¹² Quantum and C&W were also concerned about the lack of consultation on policy issues like universal service and private licensing. In the case of private licensing, BTC agrees with Quantum that the Ministry should not encourage the circumvention of the licensing regime by establishing an unwarranted private licensing system.

it reviews or initiates regulatory policies.¹³ In most instances, BTC does not believe that regulation can be justified given the competitiveness of our market.

- **Create a Minister’s Advisory Council.** BTC believes that the promise of regulatory reform – integrated licenses that permit any carrier to provide any service – is long overdue. We believe this tragedy is due to the fact that the Ministry insulates itself from the industry, avoiding rather than embracing contact and input from those who know the Bermuda market best.

Although BTC sees no need for an expensive Regulatory Authority and Board, we do believe that the Minister and the industry would benefit greatly from the establishment of an unpaid Minister’s Advisory Council comprised of electronic communications industry professionals who would serve as a sounding board for proposed policies and regulations prior to the Ministry developing public consultations on these matters. BTC believes that such a body would help ensure that the Ministry is focused, measured, and ultimately successful in meeting the electronic communications objectives of Bermuda. BTC believes that such a Council would offer continuity when a Minister’s portfolio changes as well as provide a helpful and necessary diversity of viewpoints regarding the impact of any Ministerial policy.

Although we envision the Advisory Council to be a sounding board for the Minister, BTC strongly suggests that the Advisory Council have a substantive role in the recruitment of Ministry consultants, executive staff, and the certified experts that will populate the administrative tribunals because we believe that the Ministry can only be as expert and as effective as the people it

¹³ To ensure that the Ministry acts in a “reasonable, proportionate and consistent manner” (as initially required of the RA), the Ministry must incorporate the explicit cost-benefit requirement contained in the term, proportionate. This cost-benefit requirement is essential for containing the administrative costs of regulation—both in terms of the cost to firms to comply with the new regulation and the cost to the Government to implement the regulation. A cost-benefit analysis will show whether the benefits of a regulation exceed the costs of the regulation and whether alternatives to the regulation are more effective or less costly.

A cost-benefit analysis is an incremental analysis—it compares the costs and benefits of a regulation with a baseline of “no action,” which represents an assessment of the world absent the proposed regulation. Ultimately, a cost-benefit analysis will indicate which regulations are inefficient, ineffective, or an unsound use of Bermuda’s resources and, thus, should be reformulated or eliminated, ensuring that regulatory expenditures are allocated to those areas with the highest payoff to Bermuda’s consumers.

employs. Thus, we include language in our redrafted legislation to establish such an advisory group, and we bestow a special role for the Advisory Council with respect to the recruitment and vetting of professional candidates, keeping in mind that personnel decisions are ultimately the responsibility of the Minister.

- **Establish one overarching objective to motivate industry policy-making.** BTC suggests that the industry adopt one overarching objective to motivate reform,¹⁴ to inform the Ministry’s policy determinations, to increase regulatory certainty, to steer judges when they resolve disputes, and to guide companies in developing their market strategies and business plans. One overarching objective will eliminate policy and regulation controversies regarding competing objectives, and it will ensure that members of the industry and the Ministry are all focused on the same objective. BTC recommends that the industry adopt as its overarching objective “promoting the long-term welfare of Bermuda’s consumers by fostering incentives for firms to invest in innovation.”¹⁵ Not only is this objective consistent with the Ministry’s November 18, 2008 *Telecommunications Reform Policy* paper, but it will ensure that we keep our eye on the collective objective of governing Bermuda’s electronic communications industry in the interest of Bermuda’s consumers.

¹⁴ North Rock made a similar suggestion in its June 18, 2010 comments calling for the legislation to accord primacy to the objective “to promote the development of the Bermudian economy, Bermudian employment and Bermudian ownership.” Although we agree with North Rock’s initial clause, albeit framed differently, BTC does not believe that a focus on Bermudian ownership should take primacy in regulating the electronic communications sector.

¹⁵ In its June 18, 2010 comments, Digicel raised the point that innovation should be specifically noted in the objects of the bill to ensure that innovation attracts sufficient weighting among all the proposed purposes. We agree and include innovation in our proposed overarching purpose, i.e., promoting the long-term welfare of Bermuda’s consumers by fostering incentives for firms to invest in innovation.

We advocate long-term consumer welfare as the standard to be achieved in regulation and note that consumer welfare is advanced by competition rather than by the protection of any particular competitor’s interests. Consumer welfare accrues (1) in the short term from price competition among existing market producers—static competition—and (2) perhaps more fundamentally, in the long term from competition among firms to produce innovative new technologies over time—a process known as dynamic competition. Consumer welfare is influenced directly by lower prices in the short run generated by increased output, lower prices at higher qualities generated by innovative production methods, increased customer choice enabled by product differentiation, and higher quality or new products generated by innovative technologies. We define “consumer welfare” as the net benefit to consumers from the combination of these short- and long-term factors.

BTC recommends this objective as the overarching goal because this objective is directly linked to the creation of incentives for businesses to invest in new communications technologies. Moreover, promoting long-term consumer welfare by fostering incentives for firms to invest in innovation promotes dynamic competition. Thus, we create a virtuous cycle where investment driven innovation begets competition which, in turn, begets innovation. Bermuda's consumers win from continuous innovation, and Bermuda's economy benefits from a stronger electronic communications industry and a more robust electronic communications infrastructure.

BTC's proposals are not as sweeping as they may appear at first blush. Indeed, we take much of the language and many of the concepts contained in the Regulatory Authority Act and make them applicable instead to the Ministry. Rather than fund a three person Board with its own staff, offices and resources, we substitute administrative tribunals (which have the same professionalism and independence as the proposed Board but more substantive expertise) to be employed (and compensated) on an as needed basis, coordinated by Ministry staff. And, rather than have the Ministry seek the advice of a generic utility Board, we have proposed the creation of a Ministry's Advisory Council comprised of electronic communications industry professionals and persons with specific electronic communications experience to serve as a sounding board for Ministry initiatives.

In addition, rather than subject Bermuda's robust electronic communications industry to the unnecessary complexity, regulatory delay, and almost certain litigation generated by the relevant markets/significant market power/remedies approach to governing Bermuda's markets, BTC suggests we cut to the chase by requiring any carrier with facilities to make these available to others via wholesale as a quid pro quo for receiving an integrated license. Doing so, allows us to avoid the contention, the extraordinary costs, and the suffocating delay that the implementation of the Minister's proposed legislation would entail, and, most importantly, it unshackles Bermuda's electronic communications market and allows it to flourish.

In the pages that follow, BTC sets out a redrafted ELECTRONIC COMMUNICATIONS ACT 2010 that incorporates these proposals (but without recommendations for transitional provisions at this juncture). Readers will note that offences are included within the legislative text where they pertain and consolidated in Part XIV at the end of the document. Because our industry colleagues have not been privy to this redrafted legislation, BTC urges the Ministry to put this legislative proposal to the industry for further consultation prior to finalizing its reform legislation.

A BILL

entitled

ELECTRONIC COMMUNICATIONS ACT 2010

ARRANGEMENT OF SECTIONS

**PART I
PRELIMINARY**

1. Short Title and commencement
2. Interpretation
3. Application
4. Crown binding
5. Purpose of the Act

**PART II
POWERS AND FUNCTIONS
OF THE MINISTER**

*Division 1
Constitution*

6. Authority of the Minister
7. Limits on the authority of the Minister
8. Responsibilities, functions, and powers of the Minister
9. Governing principles
10. Sectoral review

*Division 2
The Office of Electronic
Communications*

11. Office of Electronic Communications
12. Director of the Office of Electronic Communications
13. Conflict of interest
14. Documentary procedures

*Division 3
Minister's Advisory Council*

15. Minister's Advisory Council

*Division 4
Adjudication and Arbitration Law
Functions*

16. Adjudication and arbitration law functions
17. Dispute resolution

*Division 5
Other Matters*

18. Liability
19. Confidentiality
20. Disclosure of confidential information by the Minister
21. Official website
22. Penalties

**PART III
PROVISION OF ELECTRONIC
COMMUNICATIONS**

*Division 1
Authorizations*

23. Licenses for operation or provision of electronic communications
24. Contravention of section 23
25. License and permit requirements
26. Communications operating licenses and integrated communications operating licenses
27. License conditions
28. Wholesale requirement as prerequisite for ICOL
29. Additional obligations of COL and ICOL holders
30. Modification, suspension or revocation of licenses

*Division 2
Fees*

- 31. Regulatory fees
- 32. Government Authorization fees
- 33. Spectrum fees
- 34. Failure to pay fees

*Division 3
Other Matters*

- 35. Reporting requirements
- 36. Failure to file reports
- 37. License and permit register

**PART IV
CONSUMER PROTECTION,
NETWORK SECURITY, AND PUBLIC
ACCESS TO PRIVATE
COMMUNICATIONS**

*Division 1
Consumer Protection*

- 38. Confidentiality of customer information
- 39. Unsolicited communications
- 40. Privacy of personal communications
- 41. Contravention of section 40
- 42. Contravention by communications providers, their directors, officers, and employees
- 43. Destruction of messages by a person other than a director, officer, or employee of a communications provider

*Division 2
Network and Services Security*

- 44. Security of customer data and reporting of data breaches
- 45. Contravention of section 44(1) or 44(3)

*Division 3
Access by Public Bodies*

- 46. Access by public bodies

- 47. Prohibition of transmission of messages in the public interest
- 48. Failure to comply with a warrant

**PART V
USE OF RADIO SPECTRUM AND
EQUIPMENT FOR ELECTRONIC
COMMUNICATIONS**

*Division 1
Spectrum Policy*

- 49. Spectrum policy and management
- 50. Spectrum policy implementation

*Division 2
Spectrum Authorizations*

- 51. Spectrum licenses, permits, and exemptions
- 52. Spectrum license conditions
- 53. Spectrum liberalization and trading
- 54. Spectrum fees
- 55. Measures to ensure the efficient use of spectrum

*Division 3
Other Matters*

- 56. Harmful interference
- 57. Contravention of section 56
- 58. Operation of radio sites and apparatus
- 59. Contravention of sections 51(1), 51(2), or 58
- 60. Provisions relating to foreign ships and aircraft
- 61. Contravention of section 60(2)
- 62. Emergency provisions

**PART VI
NUMBERING, ADDRESSING, AND
NAMING SYSTEMS FOR
ELECTRONIC COMMUNICATIONS**

- 63. Numbering policy
- 64. Numbering plan and assignment of numbers
- 65. Number portability
- 66. Emergency numbers
- 67. Management of domain names

PART VII
TYPE APPROVAL AND
HOMOLOGATION OF EQUIPMENT

- 68. Type approval
- 69. Contravention of section 68(1)

PART VIII
EMERGENCY POWERS

- 70. Emergency powers
- 71. Compensation for the exercise of emergency powers

PART IX
ADMINISTRATIVE PROCEDURES

Division 1
Administrative Determinations and
Advisory Guidelines

- 72. Informal fact finding
- 73. Selection of administrative procedures; use of evidence
- 74. General determinations
- 75. Orders
- 76. Directions
- 77. Decisions
- 78. Interim and emergency determinations
- 79. Effective date of administrative determinations
- 80. Advisory guidelines
- 81. Failure to comply with a direction of the Minister
- 82. Failure to comply with statutory duties or regulations
- 83. Failure to comply with general determinations

Division 2
Public Consultations

- 84. Request to initiate a consultation
- 85. Consultation document
- 86. Record
- 87. Preliminary and final reports, recommendations, and decisions
- 88. Restrictions on ex parte communications

Division 3
Private Right of Action

- 89. Establishment of a private right of action

Division 4
Administrative Tribunals

- 90. Establishment of the administrative tribunal
- 91. Purpose of the administrative tribunal
- 92. Jurisdiction of the administrative tribunal
- 93. Appointment to the pool of certified experts available to serve on an administrative tribunal
- 94. Funding for the administrative tribunal
- 95. Compensation for service as a judge on an administrative tribunal
- 96. Selection of administrative tribunal judges and the administrative tribunal chief judge
- 97. Intervention
- 98. Administrative tribunal hearing procedure
- 99. Administrative record
- 100. Recommended decisions
- 101. Ministerial review of administrative tribunal recommended decisions
- 102. Standard of review
- 103. Precedential effect of Ministerial decisions
- 104. Appeal of Ministerial decisions
- 105. Prohibitions on ex parte communications
- 106. Failure to comply with orders issued by an administrative tribunal judge

PART X
COMPLIANCE

- 107. Monopoly power
- 108. Prohibition on unreasonable restraints of trade

- 109. Violation of requirements and prohibitions regarding anticompetitive conduct
- 110. Merger or acquisition review

PART XI

INVESTIGATION AND ENFORCEMENT

- 111. Investigations
- 112. Investigative hearings
- 113. Failure to comply with orders issued by a presiding officer
- 114. Order to produce information
- 115. Failure to comply with information requests
- 116. Inspectors
- 117. Obstruction of the Ministry
- 118. Enforcement procedures
- 119. Financial penalties
- 120. Undertakings

PART XII

ACTIONS IN THE SUPREME COURT

- 121. Appeals to the Supreme Court

PART XIII

ILLEGAL USE OF ELECTRONIC COMMUNICATIONS SERVICES

- 122. Transmission of false messages
- 123. Obtaining public electronic communications service with intent to avoid charges
- 124. Improper use of public electronic communications service
- 125. Transmitting or receiving messages by unlicensed means of telecommunications
- 126. Damaging telecommunications apparatus with intent

PART XIV OFFENCES

- 127. Failure to comply with a direction of the Minister
- 128. Failure to comply with statutory duties or obligations
- 129. Failure to comply with general determinations
- 130. Failure to comply with orders issued by an administrative judge or presiding officer
- 131. Violation of requirements and prohibitions regarding anticompetitive conduct
- 132. Failure to file reports
- 133. Failure to comply with information requests
- 134. Obstruction of the Ministry
- 135. Disclosure of confidential information by the Minister
- 136. Liability where offense committed by a corporation
- 137. Liability where offense committed by an unincorporated entity
- 138. Repeat offenses
- 139. Contravention of section 23
- 140. Contravention of sections 51(1), 51(2), or 58
- 141. Failure to pay fees imposed in accordance with sections 31, 33, or 54
- 142. Contravention of section 56
- 143. Contravention of section 60(2)
- 144. Contravention by communications providers and their directors, officers, or employees
- 145. Destruction of messages by a person other than a director, officer, or employee of a communications provider
- 146. Contravention of section 40
- 147. Importation or sale of equipment in contravention of section 68(1)
- 148. Contravention of section 44(1) or 44(3)
- 149. Failure to comply with a warrant

**PART I
PRELIMINARY**

Short Title and commencement

1 (1) This Act may be cited as the Electronic Communications Act 2010.

(2) The provisions of this Act come into operation on the day or days that the Minister appoints by notice in the Gazette.

Interpretation

2 In this Act, unless the context otherwise requires—

“access” means the making available of facilities or services to another communications provider, under defined conditions, on either an exclusive or non-exclusive basis, for the purpose of providing electronic communications services, including when they are used for the provision of information services or subscription audiovisual services;

“access seeker” means a communications provider requesting access from another communications provider;

“adjudication” means a proceedings in an adversarial hearing context, including enforcement proceedings and disputes between sectoral providers, end users and sectoral providers, and the Government and sectoral providers, involving witness testimony and a written record of the decision and conducted in accordance with the rules of evidence and the standards and procedures specified in Part IX that establish the rights and obligations of the parties thereto;

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

“administrative judge” means a certified expert selected to serve on an administrative tribunal;

“administrative tribunal” means a panel of one or three administrative judges that presides over arbitration and adjudication matters;

“allocation of spectrum” means the designation of a given frequency or frequencies for use by one or more types of radio-communication service, under specified conditions where appropriate;

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

- “applicable regulatory framework” means this Act and any regulation, administrative determination, adjudicative decision, license, or other form of authorisation made or issued in accordance with this Act;
- “arbitration” means submission of a dispute between sectoral providers or between end users and sectoral providers to one or more impartial persons, who have been agreed on by the parties, for a decision resolving the dispute that is binding on the parties;
- “assignment of spectrum” means the grant of spectrum usage rights to a particular licensee;
- “associated facilities” means those associated services, physical infrastructures, and other facilities or elements associated with electronic communications that enable or support the provision of services via an electronic communications network or service or have the potential to do so, and include buildings or entries to buildings, building wiring, antennae, towers, and other supporting constructions, ducts, conduits, masts, manholes, cabinets, and such other facilities that may be specified by the Minister;
- “associated services” means those services associated with electronic communications which enable or support the provision of services by means of an electronic communications network or electronic communications service (or both) or have the potential to do so, including any such service that may be specified by the Minister;
- “authorisation” means a license, permit, or other type of permission that the Ministry may grant, including an individual license granted by administrative determination;
- “Bermuda Telephone Company Acts” means the Bermuda Telephone Company Acts of 1887, 1928 and 1929;
- “broadcasting” means the act of transmitting or re-transmitting a radio-communication intended for direct reception and use by any member of the public without charge, and cognate expressions shall be construed accordingly;
- “broadcasting station” means a radio station that is used for broadcasting;
- “cell ID” means the identity or location of the cell from which a mobile telephony call originated or in which it terminated;
- “certified expert” means a person appointed by the Minister to conduct adjudication, arbitration, and any other function designated for the administrative tribunal;
- “chief judge” means a person designated to chair an adjudication in an administrative tribunal;
- “co-location” means the provision of physical space and technical facilities necessary to reasonably accommodate and connect the relevant equipment of an access seeker;

- “communications operating license” or “COL” means an individual operating license that shall specify the particular electronic communications services that a communications provider is authorised to provide;
- “communications provider” means an entity that provides electronic communications;
- “competitive bidding procedures” means an auction process or a combined comparative selection process and auction;
- “computer” means a programmable electronic device that can store and process data and from which data can be retrieved;
- “consumer substitutability” means a consumer’s willingness to switch from one product to another in reaction to a change in the relative prices of the two products;
- “consumer welfare” means the benefits that consumers receive from the combination of lower quality-adjusted prices in the short term and from continued innovation that generates new products and services, lower prices, and higher quality, and increased customer choice in the long term;
- “content” means any information embodied in electronic form, regardless of whether it consists of words, symbols, numbers, data, images, or sounds;
- “control” means, in respect of a corporation, the power, whether held directly or indirectly, to exercise decisive influence over a body corporate, including by directing its management and policies through ownership of shares, stocks, or other securities or voting rights, or through an agreement or arrangement of any type, or otherwise, and “controls” and “controlled” shall be construed accordingly;
- “Convention” means the International Telecommunication Convention currently in force which is applicable to Bermuda or to which Bermuda is a party, and includes any modifications thereof, or any agreements or regulations made under it from time to time which are applicable to Bermuda;
- “cost” means the highest-valued opportunity necessarily forsaken with the provision of a product or service, and as circumstances require, may be measured in terms of—
- (a) “total cost,” which means the lowest total dollar expense needed to produce each level of output;
 - (b) “incremental cost,” which means the increase in the firm’s total cost when it expands its output of a particular product or products by some specified increment holding constant the amount of other products that the firm produces;
 - (c) “stand-alone cost,” which means expenditure that would be required for a firm to produce a particular service and no other service; or

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

“cost orientation” means giving due consideration to the incremental cost of producing a product or service and the sunk and common costs associated with the firm that produces the product or service;

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

“customer premises equipment” means equipment utilised by end users for the purpose of originating or receiving electronic communications;

“day” means calendar days, but shall mean the first business day following a weekend or national holiday in any case in which a deadline stipulated by this Act falls on other than a business day;

“decision” means an administrative determination instructing a sectoral participant to do, or not do, such things as are specified in the decision;

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

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

“electro-magnetic” means of or pertaining to electric waves propagated by an electrostatic and magnetic field of varying intensity covering the entire range of wavelengths of electro-magnetic waves, including all forms of radio-communication signals;

“effective competition” means not the preservation of all existing competitors but the maintenance of a sufficient number of competitors to assure that consumers can obtain a product of high quality at a low price;

“electronic communications” means electronic communications networks or electronic communications services, or both, as the context so requires;

“electronic communications network” means a transmission system and, where applicable, switching or routing equipment and other resources, which permit the conveyance of signals by wire, radio, optical, or other electro-magnetic means, irrespective of the type of information conveyed, including—

(a) satellite networks;

(b) fixed (circuit and packet-switched, including Internet Protocol) and mobile networks;

- (c) electricity cable systems to the extent used for the purpose of transmitting signals;
- (d) wireless networks outside the band allocated for broadcasting and wireline circuits used for the purpose of transmitting programming or other content to, or for the reception of same by, a broadcasting station; and
- (e) networks used for the distribution of subscription audiovisual services;

“electronic communications sector” means the regulated industry sector involving the supply and consumption of electronic communications;

“electronic communications service” means a service which consists wholly or mainly in the conveyance of signals by means of electronic communications networks, including the distribution and provision of subscription audiovisual services;

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

“enforcement action” means any of actions taken to ensure compliance with the law;

“excess capacity” means the condition that exists when a firm has the ability to use its factors of production to create more output than is demanded of it at the current market price for the foreseeable future, given normal volatility of demand;

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

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

“final action” means a decision and order issued by the Minister in making an administrative determination or concluding an adjudication that is subject to judicial review without any further administrative proceeding and does not include declarations, advisory guidelines or recommendations or reports;

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

“general determination” means a statutory instrument, established pursuant to public consultation, that is applicable to all sectoral participants, or to such sub-

category of sectoral participants as fall within the scope of the general determination;

“Government Authorisation fees” means the fees established in connection with the grant of a license authorisation;

“harmful interference” means an emission, radiation, induction, conduction, or other electro-magnetic effect which endangers the functioning of a radio navigation service or other safety services or seriously degrades, obstructs, or repeatedly interrupts any radio-communication service operating in accordance with applicable regulations or administrative determinations and the Convention, as determined by the Minister, but does not include interference from a radio transmitter operated on its allocated frequency in accordance with applicable regulations or administrative determinations and the Convention;

“integrated communications operating license” or “ICOL” means an individual operating license that permits an ICOL holder to provide any and all electronic communications services without delineating specifically authorised electronic communications services;

“information” means any pattern that can be recognised by a human being, an electronic system, or a mechanical device, including, but not limited to, signs, signals, writing, images, sounds, or intelligence of any nature.

“interconnection” means the physical and logical linking of public electronic communications networks to enable the users of one communications provider to communicate with users of the same or another communications provider or to access services provided by another communications provider;

“Internet” means the global information system that is able to support communications using the Transmission Control Protocol/Internet Protocol (TCP/IP) suite or its subsequent extensions or follow-ons, and/or other IP-compatible protocols;

“Internet access service” means an electronic communications service that provides an end-user with the ability to send information by means of the Internet;

“interoperability” means the technical features or functional capability of a group of interconnected systems, including equipment owned and operated by the customer that is attached to a public electronic communications network, which ensure end-to-end provision of a given service in a consistent and predictable manner;

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

“investigation” means an inquiry or examination to discover relevant information;

- “license exemption” means an administrative determination that no form of authorisation is required in order to undertake an activity that would otherwise require authorisation;
- “location data” means data processed in an electronic communications network indicating the geographical position of the terminal equipment of a user of a public electronic communications service, including data relating to—
- (a) the cell ID or the latitude, longitude, or altitude of the terminal equipment;
 - (b) the direction of travel of the user; or
 - (c) the time the location information was recorded;
- “loop” means the physical circuit connecting the network termination point to a distribution frame or equivalent facility in a fixed public electronic communications network;
- “Minister” means the Minister responsible for telecommunications, which includes electronic communications;
- “monopoly power” means a position of economic strength in a relevant market or markets that enables a firm to raise price above the competitive level or reduce output below the competitive level for a nontransitory period;
- “North American Numbering Plan” means an integrated telephone numbering plan serving 19 North American countries, including Bermuda, which shares its resources;
- “numbering system” or “numbering plan” means the system or plan that establishes a format of codes and subscriber numbers for routing public electronic communications services to specific locations in Bermuda and to facilitate switching to international destinations;
- “order” means an administrative determination instructing a sectoral participant to do, or not do, such things as are specified in the order;
- “personal data” means any information relating to an identified or identifiable natural person;
- “predatory pricing” means reducing prices below the appropriate measurement of cost to unprofitable levels for the purposes of driving competitors from the market or discouraging potential competitors to enter the market to maintain existing monopoly power, after which the firm is able to recoup the losses it incurred during the predation period through supracompetitive or monopoly prices;
- “price squeeze” means a practice in which a firm, having a preexisting duty to deal and possessing monopoly power in both the upstream market for inputs and the downstream market for finished products, charges anticompetitively high prices in the input market or charges predatory prices in the downstream

market, for the purpose of foreclosing rivals in the downstream market, such that its exclusionary refusal to deal or predatory pricing reduces consumer welfare;

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

(a) costs include private-sector compliance costs, Government administrative costs, losses in consumer or producer surplus, and loss of time; and

(b) benefits include benefits to businesses, wages, and economic growth;

“public COL” or “public ICOL” is a COL or ICOL held by a licensee that is authorised to provide one or more public electronic communications services;

“public consultation” means the procedure by which the Minister may establish rights and obligations of general applicability;

“public electronic communications” means a public electronic communications network or a public electronic communications service;

“public electronic communications network” means an electronic communications network that is used wholly or mainly for the provision of public electronic communications services;

“public electronic communications service” means an electronic communications service that is offered, and is generally available, to members of the public;

“public telecommunications license” means any public telecommunications license, including any subscription television license, subscription radio license, or any other form of authorisation allowing the provision of electronic communications, held in the name of any person listed in the First Schedule as at the date of commencement of this Act;

“radio apparatus” means any equipment, machinery, or device used for the transmission of radio signals utilising radio spectrum;

“radio apparatus permit” means an authorisation that the Minister may grant to a person operating a radio apparatus;

“radio-communication” means the transmission or reception of signals by means of radio spectrum;

“radio-communication service” means an electronic communications service that is transmitted or received by means of radio spectrum;

“radio-communication system” or “radio-communication equipment” means a system or equipment, as the case may be, that transmits or receives electronic communications by means of radio spectrum;

“radio spectrum” or “spectrum” means a radio frequency or frequencies of naturally propagated electro-magnetic waves that are used for the transmission and reception of electronic communications signals;

“radio site” or “radio station” means facilities for the transmission of radio signals;

“recognised spectrum usage rights” means rights to the use of radio spectrum that are enjoyed without a license or license exemption in accordance with the provisions of this Act and applicable regulations by—

- (a) a Government Department; or
- (b) a user to which spectrum rights have been transferred by a duly authorised spectrum licensee where permitted by any applicable regulations and the terms of the original license;

“regulation” means a statutory instrument, made by the Minister pursuant to the Statutory Instruments Act 1977, that is applicable to all sectoral participants, or to such sub-category of sectoral participants as fall within the scope of the regulation;

“relevant market” means the products and services among which significant substitution in consumption or production occurs, and may include unregulated products that consumers regard as substitutes for regulated products;

“relevant turnover” means, for the purposes of calculating applicable fees under this Act, the portion of a license holder’s total turnover minus specified payments to other COL or ICOL holders;

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

“retail” means a type of market or service that involves the provision of public electronic communications services to end-users;

“rule” means a rule of procedure or an internal rule applicable to the conduct of the Ministry’s activities or affairs;

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

“sectoral participant” means suppliers of electronic communications; consumers, users, and subscribers of such services; and any other persons who provide,

use, or seek to use a good or service in the electronic communications sector of Bermuda;

“sectoral provider” means a person, including an authorisation holder, who provides a good or service in the electronic communications sector;

“self-regulation” means a process by which a private sector body acts collectively to petition the Government or to voluntarily develop and announce policies with which its members will comply with immunity from any action by the Ministry or any other public or private party alleging a restraint of trade among the participants in the private sector body;

“social tariff” means a tariff which contains terms, conditions, and charges that are designed to assist or benefit a defined group or groups of disadvantaged users or persons with special needs, including provisions specifying any special services or facilities that may be covered by the tariff;

“staff” means the officers, servants, and agents of the Ministry;

“state aid” means aid granted by the Government or through Government resources in any form, including but not limited to—

- (a) an order of mandatory access to privately owned network elements or other assets, resources, or facilities at uncompensatory prices; or
- (b) the provision or access to Government-owned infrastructure or other assets, resources, or facilities at less than fair market value;

“subscriber” means any natural person or legal entity that is party to a contract with a communications provider for the supply of public electronic communications services or subscription audiovisual services;

“subscription audiovisual services” means programming, applications, electronic programming guides, and other services under common ownership and control that are provided on the basis of a subscription for a fee or some other form of prior individual permission, by means of electronic communications networks, and may include subscription radio services, subscription television services, or both;

“subscription radio service” means a service, under common ownership and control, providing programmes and other services to authorised subscribers for their instruction, information, and entertainment by means of visual images or sounds conveyed by radio-communication from a common centre but do not include any service for which—

- (a) no fee or charge is levied or made in respect thereof; or
- (b) the transmission includes only matter which is being simultaneously broadcast to the public in Bermuda by a broadcasting station;

“subscription television service” means a service, under common ownership and control, providing programmes and other services to persons for their instruction, information, and entertainment by means of visual images and sounds conveyed by wire or wireless communication from a common centre but does not include—

- (a) any such service that serves—
 - (i) fewer than five dwelling houses; or
 - (ii) persons in one or more contiguous multiple unit dwelling(s) under common ownership, control or management; and
- (b) any service for which—
 - (i) no fee or charge is levied or made in respect thereof; or
 - (ii) the transmission includes only content which is being simultaneously broadcast to the public in Bermuda by a broadcasting station;

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

“telecommunication” means any domestic or international transmission of signs, signals, writing, images, sounds, or intelligence of any nature by wire, radio waves, optical media, or other electro-magnetic systems, between and among points, including by means of the Internet;

“total turnover” means all revenue generated by or otherwise attributable to the provision of any and all electronic communications regardless of where the agreement for the provision of such services is executed or remuneration for the provision of such services is paid;

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

“unbundled access” means the provision to an access seeker of a network element, which is owned or controlled by an access provider;

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

“universal service” means the minimum set of electronic communications services the Government may require for persons residing in Bermuda or public organizations serving residents;

“user” means any natural person using a public electronic communications service, for residential or business purposes, whether or not the person has subscribed to such service;

“user ID” means a unique identifier allocated to persons when they subscribe to or register with an Internet access service;

“voice telephony” means the transmission of signals representing the human voice over a public electronic communications network, including transmissions using Internet Protocol technology that involves the origination and termination of voice transmissions over public switched telephone networks;

“wholesale” means a type of market or service that involves the provision of public electronic communications networks or public electronic communications services to other public COLs.

Application

3 (1) This Act shall apply to the electronic communications sector, including—

- (a) the establishment, construction, operation, provision, and use of electronic communications;
- (b) the use or exploitation of radio spectrum within the territorial limits of Bermuda for the transmission of electronic communications; and
- (c) associated facilities or services.

(2) Save as otherwise expressly provided, this Act shall not apply or have effect in relation to any electronic communications service operated by the Police or the Bermuda Regiment, except in so far as they relate to—

- (a) the establishment of radio stations or apparatus at permanent sites;
- (b) the allocation and assignment of frequencies;
- (c) the mode of transmission to be used in connection with radio stations and apparatus and the power to be radiated there from;
- (d) the prevention of harmful interference;
- (e) distress calls, distress messages, and distress signals; or
- (f) the manner of conveying radio-communications pursuant to the Convention.

(3) Subject to subsection (2), a Government Department or a Government Board may operate a radio-communication system, construct a radio station, and import and manufacture radio-communication equipment only under a permit granted by the Minister and in accordance with this Act and any administrative determinations made hereunder.

(4) Nothing in this Act shall prevent the Government from establishing and maintaining any means of electronic communications for official use, provided that, if the Government uses any means of electronic communications to provide services, with or without payment, that compete with privately supplied services, the Government shall, to that limited extent, be fully subject to this Act and shall, by virtue of offering or supplying such service, waive sovereign immunity with respect to claims by private parties for violations of this Act.

(5) Any aid granted by the Government or through Government resources in any form whatsoever, including but not limited to —

- (a) an order of mandatory access to privately owned network elements or other assets, resources, or facilities at non-compensatory prices; or
- (b) the provision of access to Government-owned infrastructure or other assets, resources, or facilities at less than fair market value;

shall constitute state aid and be incompatible with the purposes of this Act.

(6) Upon a complaint filed by any person in the Supreme Court and proven by a preponderance of the evidence, any firm receiving state aid shall be made to refund the fair market value of the state aid to the Government or to the private firm from which such aid has been appropriated by the Government as the case may be.

(7) Diplomatic or consular missions established in Bermuda may install and use radio stations and radio apparatus only with the consent of the Governor.

(8) This Act shall not apply to or have effect in relation to—

- (a) the broadcasting of audio or video services;
- (b) the use of radio stations and radio apparatus and associated spectrum for the broadcasting of audio or video services; or
- (c) broadcasting content.

(9) No provision in this Act will diminish any person's rights under the common law or equity, including but not limited to the person's right to petition for a writ of mandamus in any court of competent jurisdiction.

Crown Binding

4 This Act binds the Crown.

Purposes of the Act

5 The purpose of this Act shall be to promote the long-term welfare of Bermuda's consumers through the protection and enhancement of incentives for private investment in innovative technologies.

PART II POWERS AND FUNCTIONS OF THE MINISTER

Division 1 Constitution

Authority of the Minister

6 (1) The Minister shall have the power to establish general policies and regulations for the electronic communications sector, pursuant to a general determination,¹⁶ with respect to—

- (a) the licensing of public electronic communications;
- (b) the provision of universal services;
- (c) the management of the radio spectrum;
- (d) the management of the numbering system;
- (e) the management of electronic communications equipment, apparatus, and certifications;
- (f) mergers, acquisitions, and transfers of control of communications providers;
- (g) the assurance of consumer protections, including the privacy and security of customer communications, the security of customers proprietary information, and the prevention of consumer fraud; and
- (h) other matters of fundamental importance to the public interest.

(2) Unless this Act expressly provides to the contrary, any regulation made by the Minister pursuant to this Act shall be subject to the negative resolution procedure.

Limits on the authority of the Minister regarding freedom of expression via electronic communications

7 (1) Neither the Minister nor any other entity within the Government shall have the authority to regulate the content of electronic communications unless such

¹⁶ BTC agrees with Quantum, Digicel, C&W, and Transact comments regarding the necessity of public consultation with those impacted by the Ministry's policies. Thus, we modify the language to specifically require a general determination prior to establishing policies and regulations.

regulation advances a compelling governmental interest and is pursued by the least restrictive means.

(2) The Minister or the Government shall bear the burden of proving by a preponderance of the evidence, at the time that the regulation is being enforced, that the regulation serves a compelling governmental interest and that the regulation in question is the least restrictive means of advancing that compelling governmental interest. In weighing such evidence, the Supreme Court shall give greater weight to scientifically rigorous empirical evidence than to statutory preambles or statements of legislative intent.

Responsibilities, functions, and powers of the Minister

8 Insofar as the Minister is responsible for governing the electronic communications industry, the Ministry shall be responsible for—

- (a) protecting national security interests;
- (b) furthering relations with governments outside Bermuda;
- (c) negotiating and securing compliance with Bermuda's international obligations;
- (d) regulating and monitoring the electronic communications sector;
- (e) enforcing compliance with this Act and all applicable regulations;
- (f) prohibiting unfair trade practices by communications providers;
- (g) resolving disputes between communications providers and between communications providers and their customers;
- (h) making administrative determinations and regulations pertaining to the conduct of public electronic communications, including—
 - (i) the award, renewal, modification, suspension, termination, revocation or transfer of licenses for the provision of electronic communications;
 - (ii) classification of the various types of electronic communications services;
 - (iii) procedures and standards for the discontinuation of a public electronic communications service;
 - (iv) the assignment of spectrum and the establishment of conditions and requirements for the operation and use of radio sites and apparatus for the provision of electronic communications;
 - (v) transparency measures and notice requirements relating to the rates, charges, and other terms and conditions for the provision of public electronic communications services;

- (vi) procedures to be followed in transferring a customer from one communications provider to another to effectuate customer requests for a change of provider;
 - (vii) the establishment and supervision of technical standards for equipment used in connection with the provision of or use of public electronic communications services, including equipment used by communications providers and equipment to be connected to the electronic communications networks of communications providers;
 - (viii) the establishment and enforcement of procedures and technical standards for the interconnection of the facilities of communications providers;
 - (ix) the establishment and enforcement of procedures and technical standards for the use and sharing of support structures by electronic communications providers where such measures serve the public interest or enhance the long-term welfare of Bermuda's consumers;
 - (x) the reporting and publication of statistics relating to services, service plans, subscribers, subscriber usage, market penetration, market share, prices and price indices, revenue, and the quality of service of public electronic communication services offered by communications providers;
 - (xi) the production of documents and other information relevant to inspections or administrative proceedings;
 - (xii) mergers, acquisitions, and transfers of control of communications providers; and
 - (xiii) the establishment of any other terms, conditions, or requirements that are authorised or stipulated by this Act; and
- (i) taking any other action, not expressly prohibited by law, that is necessary and proper to perform his duties under this Act.

Governing principles

- 9 In performing his duties under this Act, the Minister shall—
- (a) act in a timely manner;
 - (b) rely on market forces where practicable;
 - (c) rely on self-regulation where practicable;
 - (d) act in a reasonable, proportionate and consistent manner;
 - (e) act only in cases in which action is needed;

- (f) operate transparently to the full extent practicable;
- (g) act without favouritism to any sectoral participant, including any sectoral participant in which the Government has a direct or indirect financial interest;
- (h) act in a non- discriminatory manner;
- (i) act free from political interference; and
- (j) rely on scientific evidence, scientific analysis and scientific methods.

Sectoral review

10 (1) The Minister shall periodically conduct a comprehensive, transparent, and scientifically rigorous review of the electronic communications sector, including all policies, legislation, regulations, and administrative determinations applicable to the sector.

(2) The Minister shall initiate the review process by publishing a consultation document, inviting comment regarding—

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

(3) Not later than six months after the date on which the Minister issues the initial consultation document, the Minister shall issue a preliminary report and, if appropriate, a preliminary decision.

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

(5) The Minister shall initiate the first sectoral review no later than three years after the date of coming into operation of this Act.

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

(7) Failure to complete a sectoral review as required by subsection (4) shall constitute sufficient reason for communications providers to postpone payment of any Government Authorisation fees until such time as the sectoral review is completed.

Division 2
The Office of Electronic Communications

Office of Electronic Communications

11 (1) There shall be an Office of Electronic Communications (OEC) within the Ministry responsible for telecommunications, which shall be responsible for assisting the Minister in the discharge of his duties and functions under this Act.

(2) Subject to section 61(5) of the Constitution and to the general direction and control of the Minister, the Office shall be under the supervision of a public officer who shall be known as the Director of the Office of Electronic Communications.

(3) The Office of Electronic Communications shall consist of the Director and such number of other public officers as may from time to time be authorised by the legislature.

(4) The Director of the Office of Electronic Communications and each professional staff member shall have substantial knowledge and experience in economic regulation of electronic communications industries and in one or more of the following areas: accounting, economics, engineering, finance, public policy, regulation, law or other fields related to the functions of the OEC.

Director of the Office of Electronic Communications

12 (1) There shall be a Director of the Office of Electronic Communications, (DOEC) who shall be appointed by the Minister.

(2) The DOEC shall serve as—

- (a) the Secretary of the Minister's Advisory Council, but may, with the written consent of the Minister, delegate this responsibility to another member of the staff; and
- (b) the Records Officer, but may, with the written consent of the Minister, delegate this responsibility to another member of the staff.

(3) The DOEC shall—

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

(4) The Minister may suspend or revoke the DOEC's appointment for serious misconduct or unsatisfactory performance.

(5) In any case in which—

- (a) the Minister has suspended or revoked the DOEC's appointment pursuant to subsection (4); or
- (b) the DOEC is unable to perform his duties for an extended period due to ill-health or absence from the country or other good cause,

the Minister shall appoint a member of the staff, or other qualified person, to serve as the interim DOEC, but in no case shall a member of the staff serve for an interim period longer than 6 months before the Minister shall appoint a permanent DOEC.

(6) Any person appointed pursuant to subsection (5), when acting within the scope of the appointment, shall exercise the full authority of the DOEC and shall be eligible for remuneration commensurate to the service provided.

Conflict of interest

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

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

(2) In any case in which a conflict of interest exists, the DOEC or member of the staff who has the conflict shall resign.¹⁷

(3) The DOEC and the staff shall not accept any gift or gratuity, either directly or indirectly, from any sectoral provider or from any other person who has or may directly benefit from any regulation or administrative determination made by the Ministry unless the Minister has granted a waiver pursuant to subsection (5).

(4) Contravention of the prohibition contained in subsection (3) shall provide a basis for removal or dismissal of a member of the staff.

(5) The Minister shall make rules specifying the circumstances and the procedures by which Director of the Office of Electronic Communications or member of the staff may be granted a waiver of the prohibition contained in subsection (3).

¹⁷ BTC largely agrees with North Rock's position, as articulated in its June 18, 2010 comments, that conflicts of interest should not be tolerated.

Documentary procedures

14 (1) Any notice to the Ministry shall be provided by service upon the Director of the Office of Electronic Communications.

(2) Copies of all official documents filed and deposited with the Director of the Office of Electronic Communications and certified by same shall be deemed to be true copies of the originals and shall be evidence in like manner as the originals in all courts.

Division 3 The Minister's Advisory Council

The Minister's Advisory Council

15 (1) There shall exist an advisory panel, known as The Minister's Advisory Council, consisting of persons from outside the Ministry knowledgeable about the electronic communications industry, to provide information and recommendations regarding any matter within the competence of the Minister.

(2) The Minister's Advisory Council shall consist of twelve members, nine of whom shall be persons employed by the electronic communications industry and three of whom shall be professionals with knowledge of the electronic communications industry.

(3) Members of the Minister's Advisory Council shall be appointed by the Minister to serve for two year terms, and—

(a) shall have substantial knowledge and experience in the electronic communications industry and in one or more of the following areas: accounting, economics, engineering, finance, public policy, sales and marketing, regulation, law or other fields related to the electronic communications industry and the functions of the OEC.

(4) Members of the Minister's Advisory Council may be reappointed by the Minister for two additional consecutive terms provided that the Minister appoints four new members every (two year) term.

(5) A member who fails to attend three successive meetings of the Minister's Advisory Council shall be removed by the Minister and shall be replaced by the Minister with a person who shall serve for the duration of the term.

(6) The Minister shall serve as Chairman of the Minister's Advisory Council and shall establish its agenda.

(a) The Director of the Office of Electronic Communications shall serve as the Secretary of the Minister's Advisory Council and shall be responsible for keeping the minutes of the meetings and publishing these minutes on the Ministry's official web site.

(b) The Ministry shall publish on its official website —

(i) the current and past membership of the Advisory Council including each individual's qualifications to serve;

- (ii) the upcoming calendar of meetings of the Advisory Council; and
- (iii) the minutes of the meetings of the Advisory Council, posted within 14 days of the meeting date, including an archive of the minutes.

(7) The Advisory Council shall meet at the invitation of the Minister but in no case less than once every six months.

(8) No discussions or considerations of the Advisory Council are binding on the Minister.

(9) Subsection (8) notwithstanding, the Minister shall consult with the Advisory Council on executive recruitment and vetting, including the recruitment of certified experts to serve on administrative tribunals or arbitration panels and the engagement of professional, contract, and consulting personnel.

Division 4
Adjudication and Arbitration Law Functions

Adjudication and arbitration law functions

16 (1) The Minister shall ensure that adjudication and arbitration functions are available to sectoral participants at all times.

(2) Adjudication, pursuant to the procedures set forth in Part IX, shall be applicable to licenses and license conditions; tariffs, rates, charges or terms and conditions of service; disputes among sectoral providers, sectoral providers and the Government, and sectoral providers and their customers; unfair trade practices; enforcement; any matter involving interpretation and implementation of the Act, regulations, and general and administrative determinations made by the Minister; and any other matter the Minister chooses to put before adjudication, provided that—

- (a) Disputes pertaining to wholesale rates and enforcement of applicable regulations may be resolved only through adjudication; and
- (b) Sectoral providers and end users shall have the option of resolving disputes among providers and between providers and end users through arbitration on matters that are deemed permissible for arbitration by the Act and the Minister and when agreed on by all parties.

Dispute resolution

17 (1) The Minister shall resolve disputes between providers and between providers and end users regarding the provision of covered services.

(2) Dispute resolution for end users shall require that—

- (a) an end user that has a dispute with a provider must first seek to resolve the dispute through the dispute resolution procedures required to be established by the service provider;
 - (b) if the parties are unable to resolve a dispute using the service provider's dispute resolution process, the end user may file a complaint with the Ministry, which shall contain all relevant information;
 - (c) if the Ministry is unable to facilitate an informal resolution of the dispute within sixty days after receiving the complaint, the Ministry shall—
 - (i) refer the matter to adjudication before the administrative tribunal pursuant to the procedures set forth in Part IX; or
 - (ii) refer the matter to arbitration, at the parties' expense, if the parties agree and the matter is not one for which arbitration is impermissible; or
 - (d) if the Ministry determines that the complaint is plainly without merit, issue a decision and order dismissing the complaint.
- (3) Dispute resolution procedures applicable to disputes between or among sectoral providers¹⁸ shall require that—
- (a) the sectoral provider file a complaint with the Ministry, which shall contain all relevant information;
 - (b) if the Ministry is unable to facilitate an informal resolution of the dispute within sixty days after receiving the complaint, the Minister shall—
 - (i) refer the matter to adjudication before the administrative tribunal, at the parties' expense, pursuant to Part IX; or
 - (ii) refer the matter to arbitration, at the parties' expense, if the parties agree and the matter is not one for which arbitration is impermissible; or
 - (c) if the Minister determines that the complaint is plainly without merit, issue a decision summarily dismissing the complaint.

¹⁸ BTC agrees with Digicel and C&W who argue that negotiations, in the first instance, are not expedient or helpful in sorting disputes between carriers. Thus, we recommend that disputes between carriers that cannot be refereed by the Ministry, be subject to adjudication or arbitration.

Division 5
Other matters

Liability

18 No action, suit, prosecution or other proceedings shall lie against any member of the staff or any person acting on behalf of the Ministry, including any member of the Minister's Advisory Council, in respect of any act done, or any omission made, in good faith in the execution or intended execution of any function under this Act.

Confidentiality

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

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

- (a) a trade secret;
- (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;
- (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 Ministry from receiving further similar information required by the Ministry to properly fulfil its functions; or
- (e) information the disclosure of which would constitute a breach of a duty of confidence provided for by a provision of law.

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

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

(4) Following receipt of any information submitted subject to a request for confidential treatment, the Minister shall issue a decision as to whether the justification

offered by the submitting party meets the standard for confidential treatment specified in subsection (2).

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

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

- (a) the Ministry staff;
- (b) a court or an arbitrator or administrative judge of competent jurisdiction; or
- (c) specific parties pursuant to a non-disclosure agreement or protective order in situations where it is necessary to conduct a public consultation, adjudication, or arbitration.

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

- (a) issue an order denying the request; and
- (b) return the information to the submitting party, and shall not consider or rely on the information.¹⁹

Disclosure of Confidential Information by the Minister

20 Any member of the staff who knowingly contravenes section 19 commits an offence which shall be punishable—

- (a) on summary conviction by imprisonment for one year or a fine of up to \$20,000, or both; or
- (b) on conviction on indictment by imprisonment for two years or a fine of up to \$50,000, or both.

Official website

21 (1) The Ministry shall maintain an official website, on which it shall publish—

- (a) a directory, which shall include the name, position, official telephone number and email address of each member of the staff;

¹⁹ BTC agrees with C&W and CableVision, as set forth in their June 18, 2010 comments, that carrier requests for confidentiality of information should be honored. Thus, we have eliminated the provision included in the original RAA that permitted the Ministry to publish information that a carrier had requested to be held in confidence if it thought disclosure would be in the public interest. We also eliminate, as C&W suggested, references to “other than the requestor” as contained in the original bill.

- (b) the membership of the Minister's Advisory Council, including terms of office;
- (c) the register of authorised license holders;
- (d) a list of each open adjudication, arbitration or public consultation including the full text of all participants' comments and reply comments and preliminary Ministry reports in the case of public consultations;
- (e) the full text of—
 - (i) this Act;
 - (ii) all regulations, policies and declarations and determinations made by the Minister pursuant to this Act;
 - (iii) the full text of all other administrative determinations and all adjudicative and arbitration decisions, with the exception of any portion of any such administrative determinations or adjudicative or arbitration decisions that contain information that the Ministry deems to be confidential; and
 - (iv) the reports regarding the Ministry's sectoral reviews.
- (f) an index of this Act and of all regulations and administrative determinations adopted pursuant to this Act;
- (g) Government Authorisation and regulatory fees due and paid by authorisation holders;
- (h) a detailed annual budget for the Office of Electronic Communications, including quarter by quarter expenses against budget;
- (i) the Ministry's current and past audited statement of accounts;
- (j) the Ministry's annual report, including a discussion of the activities and achievements of the Office of Electronic Communications; and
- (k) any additional information that the Ministry is required to publish on its official website pursuant to this Act.

(2) The Minister shall also prepare and publish on the Ministry's official website, not later than March 30 of each calendar year, an annual economic analysis of the electronic communications industry for the calendar year most recently ended that shall contain, at a minimum, the following information—

- (a) accurate and timely quarterly and annual statistics on prices, number of lines or subscribers, minutes of use, transmission speeds, and service quality for each category of service whose provision requires the grant of a license by the Minister;

- (b) quarterly and annual consumer price indices for each category of service whose provision requires the grant of a license by the Minister; and
- (c) a scientifically rigorous quantification of the effect on consumer welfare in the most recent calendar year of the policies previously adopted by the Ministry as a result of any final report, recommendation, or decision issued by the Ministry following a public consultation.

Penalties

22 Failure of the Ministry to comply with this Part shall be cause for removal of the Director of the Office of Electronic Communications, notwithstanding any other provision of this Act to the contrary.

PART III PROVISION OF ELECTRONIC COMMUNICATIONS

Division I Authorizations

Licenses for operation or provision of electronic communications

23 No person may construct, establish, maintain or operate a public electronic communications network or provide a public electronic communications service within the territorial limits of Bermuda or between Bermuda and another country, without a valid COL or ICOL authorising such activities, unless the Minister has made a general determination expressly authorising a license exemption for the provision of that particular electronic communications network or service.

Contravention of section 23

24 (1) Any person who contravenes any provision of section 23 or of any regulation or administrative determination concerning the provision of electronic communications commits an offence and is liable on conviction on indictment—

- (a) if an individual, to imprisonment for up to two years or a fine of up to \$50,000, or both; or
- (b) if a body corporate, to a fine of up to \$150,000; and
- (c) in either case, in the event of a continuing offence, a further fine of up to \$25,000 for every day during which the offence continues.

(2) Where any person is convicted of an offence under this section the court, where it is proved to its satisfaction that the contravention includes the illegal operation or possession of any apparatus, may order the confiscation of the apparatus.

License and permit requirements

25 (1) The Minister shall, by general determination and in accordance with procedures set forth in Part IX, establish the applicability, criteria, procedures, information requirements, decision-making standards, timelines,²⁰ and conditions pursuant to which he will grant, modify, renew, suspend, terminate or revoke—

- (a) individual licenses;
- (b) class licenses; or
- (c) license exemptions.

(2) The Minister shall, by general determination and in accordance with procedures set forth in Part IX, establish the applicability, criteria, procedures, information requirements, decision-making standards, timelines, and conditions pursuant to which he will grant the transfer of any license.

(3) The Minister shall, by general determination, establish licensing policies and, as necessary, regulations with regard to—

- (a) the scope and duration of any license;
- (b) the terms and conditions of any license;
- (c) the constraints on any license, if any exist;
- (d) the rights, duties and obligations of any authorised license holder;
- (e) applicable fees, if any;
- (f) procedures for monitoring and enforcing compliance with license terms and conditions;
- (g) penalties for failure to comply with license requirements; and
- (h) any other function to promote an efficient and effective licensing framework for the electronic communications sector.

(4) The Minister may grant—

- (a) COLs and ICOLs in the form of individual licenses;
- (b) class COLs; and
- (c) exemptions from the requirement to hold a COL.

²⁰ Many carriers, including CableVision and Quantum, agree with BTC's June 18, 2010 comments regarding the lack of specificity in the original proposals, especially with respect to timeframes for taking action. Thus, BTC recommends that timelines be explicit in the legislation and in any associated regulations, and we offer timeframes throughout this proposed legislation.

(5) The Minister may authorise the provision of public electronic communications services by means of a class license, with or without a registration or notification requirement, where the conditions can be applied generally to all members of the class and—

- (a) in cases in which electronic communications are provided on other than a commercial basis;
- (b) in cases in which electronic communications are self-provided by a natural or legal person whose principal line of business does not include the provision of electronic communications; or
- (c) in other circumstances in which the Minister deems the authorisation of a class license or the grant of a license exemption to be appropriate and administratively efficient.

(6) The Minister may grant license exemptions if—

- (a) no, or only limited, conditions apply to the exempted group of providers or to the provision of the exempted electronic communications services; and
- (b) no Government Authorisation or regulatory fees are required.

(7) The Minister may use an auction or comparative selection process to grant an individual license. In any case in which an auction process is used, the reserve price shall be established by the Minister of Finance pursuant to the Government Fees Act 1965.

(8) The Minister may grant a temporary authorisation to perform any act for which an individual authorisation is required. Any temporary authorisation granted shall be issued for a period not to exceed six months, and shall be subject to such conditions as the Minister determines to be necessary.

(9) The Minister's consent to the grant, assignment, or transfer of control of a license, permit, or other authorisation shall not be unreasonably withheld.

(10) If the Minister fails to take final action on any petition for the grant, assignment, or transfer of control of a license, permit, or other authorisation within the period allotted for Ministerial review after the administrative tribunal has issued its recommended decision regarding the petition, the petition shall be deemed granted, and the validity of that automatic grant shall be immune from judicial appeal.

Communications operating licenses and integrated communications operating licenses

26 (1) A COL or an ICOL shall authorise the license holder to operate and provide public electronic communications networks and public electronic communications services distributed by means of such networks within the territorial limits of Bermuda or between Bermuda and another country, subject to the terms and conditions of the individual licenses and subject to the availability of spectrum and the grant of any necessary spectrum licenses or permits.

(2) In any case in which an application is filed for a COL or an ICOL, the Minister shall—

- (a) refer the application to the administrative tribunal to make a recommended decision, pursuant to procedures set forth in Part IX; and
- (b) issue a decision and order pursuant to established regulations and timelines.

(3) Unless subsequently modified or revoked, every COL and ICOL shall be valid for a period of twenty years.

(4) A COL or an ICOL shall automatically be renewed for an additional term or twenty years if—

- (a) the license holder files an application requesting renewal no later than one year before the expiry date; and
- (b) the Minister has not determined, as a result of an adjudication, conducted pursuant to the procedures set forth in Part IX, commencing not more than 270 days and concluding not more than 180 days before the expiry date, that renewal of the license would disserve the public interest and the long-term welfare of Bermuda’s consumers.

(5) If the Minister does not commence an adjudication for renewal of a license on or before 270 days of its expiry date, the Minister will be conclusively deemed to have concluded that renewal of the license would serve the public interest and the long-term welfare of Bermuda’s consumers, and the license shall be renewed.

(6) At any time before the expiration of the license, a licensee shall have the option of petitioning the Minister to renew its license prematurely.

(7) A COL or an ICOL may be revoked by the Minister for cause or based on a determination that revocation is in the public interest or no longer serves the long-term welfare of Bermuda’s consumers, provided, however, that no such decision may be taken without an adjudication.

(8) A COL or an ICOL shall not be transferred or assigned, and may be terminated by the Minister in the event of any such transfer or assignment or in the event of a change of control over the licensed entity, unless the transfer, assignment, or change of control is authorised in advance by the Minister in accordance with established regulations and timelines.²¹

- (a) For the purposes of this section, “control” shall mean the power, whether held directly or indirectly, to exercise decisive influence over a COL or an ICOL holder, including by directing its management and

²¹ BTC agrees with North Rock that “heavy-handed” regulation in the case of a change of control or transfer of shares is not necessary, although we do believe that the Ministry’s authority extends to prior approval of licensees’ changes of control, especially as the Ministry extends the right to offer services in the first instance.

policies whether through ownership of shares, stocks, or other securities or voting rights; through an agreement or arrangement of any type; or otherwise. “Control” shall not mean the power conferred to a bondholder in the covenants typically found in an indenture agreement.

(9) Each COL or ICOL holder shall be responsible for securing any related spectrum licenses or permits for radio stations or apparatus that may be useful or necessary for the provision of any electronic communications to which the COL or ICOL applies.

- (a) Where feasible, the Minister shall coordinate the timing of the grant, the duration, and any relevant provisions of related spectrum licenses and radio apparatus permits; provided, however, that nothing in this section shall be construed as an entitlement on the part of a COL or ICOL holder to a spectrum license or a radio apparatus permit.

License conditions

27 (1) The Minister may include, as a condition of any license, permit or other authorisation a requirement that the authorisation holder—

- (a) pay any fees or penalties that may be imposed;
- (b) comply with any applicable legislation or regulation;
- (c) comply with any administrative determinations and adjudications; and
- (d) comply with any information request issued by the Minister.

(2) Any license condition imposed by the Minister shall be—

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

Wholesale requirement as prerequisite for ICOL

28 (1) Without prejudice to the Minister’s authority to impose conditions on any license pursuant to section 27, the Minister shall require a communications provider to offer wholesale services for resale purposes as a condition of receiving an ICOL.

(2) In any case in which the Minister imposes a condition on a communications provider to offer wholesale services, the Minister shall rely on the following criteria in making his determination—

- (a) the communications provider owns and operates access facilities that other authorised communications providers could use to provide services to end user customers;

- (b) the communications provider owns and operates infrastructure facilities like towers, ducts, or conduits with excess capacity that other authorised communications providers could use to provide services to end user customers; and
- (c) the communications provider's making of those facilities available to other licensed communications providers at wholesale rates would enhance the long-term welfare of Bermuda's consumers.

(3) In any case in which the Minister imposes a condition on a communications provider to offer wholesale services for resale purposes, the prices for these services shall be set by voluntary commercial negotiation between a willing buyer and a willing seller in the first instance. Commercial negotiations shall conclude within 60 days of the authorised communications provider's written request for wholesale use of specific access or infrastructure facilities.

- (a) If commercial negotiations fail to reach a mutually acceptable conclusion, the parties shall submit the matter to adjudication, pursuant to the procedures set forth in Part IX. The price determined in adjudication shall be set equal to the sum of:
 - (i) the communications provider's retail price less its avoided costs, calculated on the basis of the current costs of the communications provider's actual network; and
 - (ii) the net revenue foregone by the communications provider on sales of ancillary services that it would likely have made to the retail customers lost by virtue of its sale of wholesale services to a competing communications provider.
- (b) If commercial negotiations are successful, the wholesale carrier shall offer all subsequent resale carriers the same service at the same price and under the same terms and conditions until such time as the prices are renegotiated upon the expiry of the first such agreement.
- (c) Nothing in subsection (3) or any other section of this Act shall limit a communications provider's ability to price wholesale services differently on the basis of the duration of the agreement or the degree of commercial flexibility conferred on the wholesale customer through differentiation of termination provisions, security deposits, or other provisions.

(4) In any case in which the Minister imposes a condition on a communications provider to offer wholesale services for resale purposes, a reference access and interconnection offer shall serve as the condition precedent for the communications provider's receiving an ICOL in lieu of commercial negotiations if, after 30 days, no carrier has expressed an interest in negotiating wholesale services. A reference access and interconnection offer may serve as a basis for commercial negotiations at any time.

(5) In any case in which the Minister imposes a condition on a communications provider to offer wholesale services for resale purposes, the Minister shall require any

wholesale carrier to provide its own retail operations the same service, at the same price, and made available in the same timeframe as the wholesale services provided to other communications providers, and communications providers shall submit an independent annual audit of these practices and these charges to the Ministry within 90 days of the end of each wholesale carrier's fiscal year.

(6) Section 28 (1) notwithstanding, communications providers may meet reasonable requests for access to, and use of, specified network elements and associated facilities and services and to provide such access subject to voluntary commercial negotiation.

Additional obligations of authorized COL and ICOL holders

29 (1) In addition to the conditions set forth in sections 27 and 288, the following conditions shall be applicable to authorised holders of COLs and ICOLs—

- (a) the obligation to interconnect with the electronic communications networks of other COL and ICOL holders or registrants on reasonable terms;
- (b) obligations in respect of emergency call services;
- (c) the obligation to comply with requirements relating to cost recovery and the pricing of wholesale and retail services or facilities, if any, including obligations relating to the cost orientation of prices;
- (d) the obligation to establish and maintain a cost accounting system in accordance with cost allocation and separation rules that are stipulated by the Minister for the purpose of ensuring reasonable and non-discriminatory rates and to facilitate the detection of anti-competitive practices;
- (e) the obligation to publish audit information in a format that contributes to an open and competitive market; and
- (f) in exceptional cases, where the Minister has shown that other measures have not prevented or deterred anti-competitive effects, the obligation to offer specified access and interconnection facilities and services through a functionally separate and independently operated business entity, and to provide such services and facilities to competitor communications providers and its own retail business operators on the same terms and conditions including those relating to pricing, availability and service quality.

(2) Any obligations imposed in accordance with sections 27, 28, and 29 shall be shown to be proportionate and justified in light of the relevant circumstances and the objective set forth in section 5.

(3) For the purposes of assessing proportionality and the costs and benefits of imposing any condition, the burden of proof for demonstrating that a condition should be imposed shall rest with the Minister.

Modification, suspension or revocation of licenses

30 (1) The Minister, when authorised by legislation or at the request of an authorisation holder, shall submit to an administrative tribunal, pursuant to the procedures set forth in Part IX, a notice to modify or vary any term or condition of a license, permit, or other authorisation, for a recommended decision as to whether such modification or variation is necessary to preserve the public interest and serve the long-term welfare of Bermuda's consumers.

(2) The notice specified in subsection (1) shall include—

- (a) the action that the Minister proposes to take and the timeframe in which he intends to take it;
- (b) the basis on which the Minister proposes to take the action;
- (c) the timeframe within which the authorization holder may submit written comments regarding the proposed action; and
- (d) the actions that the authorisation holder must take to avoid suspension or revocation, and the timeframe in which such action must be taken.

(3) In issuing his final decision, the Minister may suspend or revoke any license, permit or other authorisation where the authorisation holder has—

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

(4) Before the Minister issues a final decision and order suspending or revoking a license, permit, or other authorisation, the Minister shall provide opportunity for the authorisation holder to comment on the recommended decision of the administrative tribunal, pursuant to the procedures set forth in Part IX.

(5) In any adjudication to suspend or revoke any license, permit, or other authorisation, the Ministry shall bear the burden of proving its allegations against the authorisation holder by clear and convincing evidence.

(6) Any decision or order by the Minister to suspend or revoke any license, permit, or other authorisation shall take effect 30 days after its issuance by the Minister and shall be automatically stayed upon the authorisation holder's filing of a notice of appeal in any court of competent jurisdiction.

Division 2

Fees

Regulatory Fees

31 (1) Regulatory fees, fee basis, and fee structures for the electronic communications sector, if any, shall be established by the Minister, pursuant to a general determination, and published on the Ministry's official website.

(2) In any instance in which regulatory fees are established, the amount of fees payable for the upcoming financial year shall be published six months before the start of the Government's financial year.

Government Authorisation Fees

32 (1) Government Authorisation fees payable in respect of any license, permit, or other authorisation granted by the Minister, unless otherwise provided by legislation, shall be established by the Minister of Finance pursuant to the Government Fees Act 1965 and published on the Ministry's official website.

(2) The Minister shall submit a recommendation to the Minister of Finance regarding the Government Authorisation fees to be adopted. Before submitting a recommendation on Government Authorisation fees to the Minister of Finance, the Minister shall consult with the Minister's Advisory Council.

(3) Government Authorisations fees shall be based on a percentage of each authorised license holder's total electronic communications revenues minus payments to other COLs or ICOLs, not to exceed 3%.

(a) The percentage of electronic communications revenues used to assess Government Authorisation fees may be modified pursuant to the Government Fees Act 1965.

(b) Government Authorisation fees paid by each authorisation holder shall be listed on the Ministry's official website within 30 days following the date due.

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

(5) The Ministry shall take all reasonable measures to collect all Government Authorisation fees, including the issuance of a direction and the initiation of enforcement action and shall pay them to the Consolidated Fund.

Spectrum Fees

33 Spectrum fees shall be assessed in accordance with Part V, Division 2.

Failure to pay fees

34 (1) Any person who fails to pay a fee established in accordance with the provisions of sections 31, 32, or 54 commits an offence and is liable on conviction on indictment—

- (a) to a fine of up to \$50,000 and a further fine of up to \$5,000 for every day during which the offence continues; and
- (b) to pay to the Authority a sum equal to 2 times the amount of any fee that would have been payable pursuant to the relevant section but for the commission of the offence.

(2) Consistent failure to pay undisputed Government Authorisation and regulatory fees shall result in a revocation of the carrier's license, pursuant to procedures set forth in Part IX.

Division 3 Other Matters

Reporting requirements

35 (1) The Minister may require an authorisation holder to submit, by such date as the Minister may direct—

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

(2) The Minister may require an authorisation holder to submit, at the time specified by the Minister, any additional reports or information that the authorisation holder may reasonably be expected to hold and that are—

- (a) specified pursuant to legislation; or
- (b) that the Ministry requires to be submitted pursuant to—
 - (i) an authorisation condition; or

- (ii) a regulation or administrative determination.

Failure to file reports

36 The secretary of a sectoral provider that is a body corporate and is required to submit a report required by the Minister pursuant to section 35, or by sectoral legislation, commits an offence in any case in which the secretary knowingly fails to submit the report at the specified time without prior written approval from the Minister, and the secretary is liable on summary conviction to a fine of up to \$20,000 or imprisonment for up to six months, or both.

License and Permit Register

37 (1) The Minister shall maintain a public register of all licenses, permits, or other authorisations that it grants, modifies, terminates, revokes, suspends, or transfers.

(2) The register shall contain—

- (a) the name of the authorisation holder;
- (b) the address of the authorisation holder;
- (c) a copy of the authorisation holder's license;
- (d) the spectrum held by the authorisation holder, if any;
- (e) any additional information required by legislation; and
- (f) any additional information that the Minister determines would be useful to the public.

(3) The Minister shall update the register on a timely basis, and in no case less than once every six months.

(4) The Minister shall make the register available for public inspection at its offices during normal office hours and shall publish a searchable electronic copy on its official website.

PART IV CONSUMER PROTECTION, NETWORK SECURITY AND PUBLIC ACCESS TO PRIVATE COMMUNICATIONS

Division 1 Consumer Protection

Confidentiality of customer information

38 The Minister may make general determinations governing the processing, disclosure, and use by communications providers of personal data and other customer proprietary data that they obtain from customers, subscribers, or users in

the course of business other than for the purpose of conveying communications, including—

- (a) disclosure of a customer's name, address and telephone number (including fixed and mobile numbers), including for purposes of inclusion in a printed or electronic directory;
- (b) use or disclosure of traffic or location data;
- (c) use or disclosure of subscription data provided when a customer orders a service; and
- (d) any other customer-related data, as defined for this purpose by the Minister, that is obtained by communications providers from users.

Unsolicited communications

39 The Minister may make general determinations governing the activities of communications providers and others when engaged in unsolicited direct marketing by means of electronic communications networks in order to minimize intrusion, annoyance, inconvenience, or anxiety to consumers.

Privacy of personal communications

40 (1) The privacy of personal communications shall be inviolable, subject to the provisions of subsections (6) and (7) and sections 46, 47, 62, and 70.

(2) No person who is not authorised by the sender or the addressee shall intercept any signal in the course of a telecommunication or wilfully divulge or publish the existence, content, substance, purport, effect, or meaning of such intercepted signal to any person.

(3) No person who is not entitled thereto shall receive, or assist in receiving, any such intercepted signal and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto.

(4) No person having received such intercepted signal or having become acquainted with the same (or any part thereof), knowing that such information was so obtained, shall divulge or publish the contents, substance, purport, effect, or meaning of the same (or any part thereof) or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto.

(5) Subsections (2), (3) and (4) shall not apply to the transmitting, receiving, divulging, publishing, or utilising of the contents of any radio message or communication broadcasted or transmitted by amateurs or others for the use of the general public or relating to ships or aircraft in distress.

(6) An officer, employee, or agent of any communications provider, the facilities of which are used in the transmission of a wire communication, may intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his services or the

protection of the rights or property of the communications provider transmitting such communication.

(7) No communications provider shall utilise a service for the observation or random monitoring of electronic communications except for mechanical, electronic, optical, or service quality control checks; provided, however, that an officer, employee, or agent of the Ministry, in the normal course of his employment and in discharge of the radio monitoring responsibilities exercised by the Ministry in the pursuance of its powers under section 50(2)(a), may intercept a communication transmitted by radio and disclose or use the information thereby obtained.

(8) No person who is not authorised by all the parties to any private signal shall tap any wire, cable, optical fibre, or wireless transmission medium, nor use any other device or arrangement to secretly overhear, intercept, or record such signal in the course of telecommunication.

(9) No person shall, in performing the act or acts prohibited in this section, knowingly possess any tape record, wire record, disc record, digital electronic copy, or any other such record, or copies thereof, of any communication or spoken word secured in a manner prohibited by this Act, or replay the same for any other person or persons, or communicate the contents thereof, either verbally, in writing, or otherwise, or furnish transcriptions thereof, whether complete or partial, to any other person.

Contravention of section 40

- 41 Any person who contravenes section 40 commits an offence and is liable—
- (a) if an individual—
 - (i) on summary conviction, to imprisonment for up to one year or a fine of up to \$25,000, or both; or
 - (ii) on conviction on indictment, to imprisonment for up to two years or a fine of up to \$50,000, or both; or
 - (b) if a body corporate, on conviction on indictment to a fine of up to \$150,000.

Contravention by communications providers and their directors, officers, or employees

- 42 Any communications provider and any director, officer, or employee of a communications provider who has official duties in connection with a public electronic communications service commits an offence if such person or persons—
- (a) wilfully destroy, secrete, or alter any message that they have received for transmission or delivery;
 - (b) forge any message, or utter or transmit any message that they know to be forged;

- (c) wilfully abstain from transmitting any message or wilfully intercepts or detains or delays any message, unless for legitimate service purposes; or
- (d) otherwise than in pursuance of their duty or as directed by the Governor or a court, copy any message or disclose any message or the purport of any message to any person other than the person to whom the message is addressed,

and is liable on summary conviction to imprisonment for up to two years or a fine of up to \$50,000, or both.

Destruction of messages by a person other than a director, officer or employee of a communications provider

43 Any person, not being a director, officer, or employee of a communications provider commits an offence if he—

- (a) wilfully destroys, secretes, detains, or delays a message intended for delivery to some other person;
- (b) having been required by a telecommunication officer to deliver up to him a message in the possession of that person and intended for delivery to some other person, refuses or neglects to do so; or
- (c) knowingly or negligently delivers a message or communication to any person not authorised to receive the same,

and is liable on summary conviction to imprisonment for up to one year or a fine of up to \$20,000, or both.

Division 2
Network and Services Security

Security of customer data and reporting of data breaches

44 (1) A provider of public electronic communications shall take adequate technical and organisational measures to protect the security of its services and networks, including measures to ensure that the personal or proprietary data of its customers or users that is stored or transmitted by it in connection with the provision of electronic communications—

- (a) can be accessed by authorised personnel for legally authorised purposes only; and
- (b) is protected against accidental or unlawful loss, destruction, or alteration and unauthorised or unlawful storage, processing, access, or disclosure.

(2) The provider of public electronic communications shall develop a security policy and processes designed to ensure compliance with subsection (1), which shall be subject to review, approval, and audit by the Ministry.

(3) If there is a breach of the security obligations set forth in subsection (1) or the policy approved pursuant to subsection (2), the communications provider shall, without undue delay, notify the breach to—

- (a) the Ministry pursuant to established regulations; and
- (b) any subscriber or individual affected by the breach if, in the view of the Ministry, the breach is likely to have an adverse effect on the subscribers or individuals concerned.

(4) The notification required under subsection (3) shall describe the nature and consequences of the breach, the measures that the communications provider has taken or proposes to take to address the breach and its effects, and any other information that the Minister may require.

(5) The Minister may make adjudicative decisions and orders requiring a communications provider to take specific measures to prevent data breaches from occurring or recurring and may impose appropriate sanctions, pursuant to established regulations, in cases where such obligations are not met.

(6) For the purposes of subsection (1), “processing” means any operation or set of operations that is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise, alignment or combination, blocking, erasure or destruction.

Contravention of sections 44(1) or 44(3)

45 Any person who contravenes section 44(1) or 44(3) commits an offence and is liable on summary conviction—

- (a) if an individual, to imprisonment for up to one year or a fine of up to \$25,000, or both; or
- (b) if a body corporate, to a fine of up to \$50,000.

Division 3 *Access by Public Bodies*

Access by public bodies

46 (1) Notwithstanding section 40(8), a police officer or officer of a communications provider acting with the consent of the person renting a wireless or wireline circuit may tap or trace such circuit, or use any other device secretly to overhear, intercept or record a communication passing over such circuit in order to detect an offence under section 41.

(2) Notwithstanding section 40, a police officer, or other person who is authorised by a written order of the Governor under the powers granted to him by section 70 or a person designated by him, may execute any of the acts declared to be unlawful in section 40, and subsection (3) shall not apply to evidence thus secured.

(3) Any message, communication or spoken word, or the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or any information therein contained, obtained or secured by any person in contravention of section 40, shall not be admissible in evidence in any judicial, quasi-judicial, legislative, or administrative hearing except for the purpose of proving the contravention of that section and for that purpose the person adjudicating shall make such order as he considers appropriate to preserve confidentiality.

Prohibition of transmission of messages in public interest

47 Where he is satisfied that the interests of defence, public safety, public order, or public morality so require, the Governor, acting in his discretion, may by warrant under his hand direct that any message or any class of messages intended for transmission by telecommunication shall not be transmitted or that any telephone call or message or any class of messages intended for transmission, or transmitted or received or being transmitted, by telecommunication shall be intercepted or detained and disclosed to the Governor or to the public officer specified in the warrant.

Failure to comply with a warrant

48 Any person who fails to comply with a warrant under section 47 commits an offence and is liable on summary conviction—

- (a) if an individual, to imprisonment for up to one year or a fine of up to \$25,000, or both; or
- (b) if a body corporate, to a fine of up to \$50,000.

PART V USE OF RADIO SPECTRUM AND EQUIPMENT FOR ELECTRONIC COMMUNICATIONS

Division 1 Spectrum Policy

Spectrum policy and management

49 (1) The Minister, giving due regard to the purposes and objectives of this Act and the importance of radio spectrum as a national resource and a public good of significant social, cultural, and economic value, shall make general policies and, as necessary, regulations via general determination with respect to—

- (a) the management and allocation of spectrum for particular or liberalised uses in accordance with the provisions of this Act; and
- (b) the applicability, criteria, procedures, information requirements, decision-making standards, timelines, and conditions to be followed pertaining to the assignment of spectrum for use in connection with the provision of electronic communications, whether by means of the grant

of an individual license, the designation of a class license, or the grant of a license exemption.

(2) The Minister shall confer and coordinate with any Government Department or agency that has recognized spectrum usage rights prior to adopting any policies or issuing any directions that could affect such rights.

(3) In exercising his powers under this Part, the Minister shall ensure that radio spectrum is managed in a manner that is compatible with the Convention and meets the radio-communications needs of Government Departments and agencies.

Spectrum policy implementation

50 (1) The Minister shall, by general determination, establish regulations with respect to—

- (a) specifying the applicability, criteria, procedures, information requirements, decision-making standards, timelines, and conditions for the assignment of radio frequencies and the award of individual spectrum licenses and grants of permits for radio sites and apparatus, including—
 - (i) establishing spectrum class licenses;
 - (ii) establishing licenses or permits for technical testing or non-commercial trials;
 - (iii) granting license exemptions; and
 - (iv) coordinating spectrum licensing procedures and conditions with associated operating licenses for the provision of electronic communications;
- (b) establishing the applicable license terms and conditions, including technical conditions and usage priorities and limitations for any class of license, which may include—
 - (i) establishing programs and certification or licensing of individual competency regarding the operation, maintenance, or repair of apparatus for radio-communication, including the fees payable in regard to any such programs, certification, or licensing;
 - (ii) specifying requirements for standby facilities to be maintained by radio stations for use in case of natural disasters or other emergencies;
 - (iii) prohibiting or regulating the sale or use of any apparatus or machinery causing or capable of causing harmful interference to radio reception; or

- (iv) prohibiting and controlling electrical or radiated interference with the working of apparatus for telecommunication;
 - (c) conducting comparative selection processes, auctions, or hybrid processes for the award of spectrum licenses and grants of permits for radio stations and apparatus in cases where demand for the right to use a specific portion of the radio spectrum is expected to exceed supply;
 - (d) setting the appropriate level and structure of fees for radio apparatus permits and the award of spectrum licenses, as well as the process for determining such fees and fee structures, if any;
 - (e) establishing procedures to consider complaints alleging harmful interference;
 - (f) regulating the operations of foreign registered or licensed mobile radio sites while in or over Bermuda or its territorial waters or in Bermudian air space; and
 - (g) regulating the operations of mobile radio sites licensed in Bermuda that are not for the time being in or over Bermuda, Bermudian air space, or its territorial waters.
- (2) The Minister shall also be responsible for—
- (a) monitoring and enforcing compliance with spectrum license and radio permit regulations including compliance with license and permit conditions;
 - (b) maintaining and publishing the Bermuda Frequency Allocation Table that shall detail, among other things, the purposes and priorities for which the Minister has allocated the frequencies;
 - (c) establishing, maintaining, and providing convenient access by the public to a frequency database and register that identifies spectrum license holders, relevant technical conditions, priorities of use, and any additional information that the Ministry deems helpful to actual and potential users of spectrum;
 - (d) conducting tests to monitor the use of frequencies and ensure compliance with technical requirements;
 - (e) conducting tests to check for harmful interference;
 - (f) undertaking studies, where appropriate, to evaluate the extent to which spectrum is available for use for radio-communications in Bermuda, to assess current and potential demand, and to consider any other factors relevant to formulating or modifying spectrum policies;
 - (g) regulating the importation, sale, trading in and demonstration of radio apparatus and radio receiving apparatus not excluded from the application of this Act;

- (h) the dismantling, sealing or confiscation of any radio site, radio apparatus and radio receiving apparatus, not excluded from the application of this Act; and
- (i) exercising such other functions as the Minister deems necessary to implement or facilitate the Ministry's policies with regard to radio spectrum.

Division 2
Spectrum Authorisations

Spectrum licenses, permits, and exemptions

51 (1) No person shall—

- (a) use the electro-magnetic spectrum within the territorial waters of Bermuda to transmit or receive any electronic communications without first obtaining a spectrum license; or
- (b) import, install, place in operation, repair, or maintain any radio site or radio apparatus without a permit issued by the Ministry;

unless the Ministry has granted the spectrum use and the radio site or apparatus a specific exemption by administrative determination.

(2) The holder of a spectrum license shall conform to the conditions and standards specified in such license including—

- (a) The frequencies assigned to that license holder;
- (b) The location, type, and specifications of radio stations and apparatus;
- (c) The geographical area covered by the license; and
- (d) Any other technical conditions that may assist in the efficient and effective use of the radio spectrum.

(3) Nothing in this section shall be construed to allow a communications provider to engage in any of the activities specified in section 23 without holding a duly authorised COL or ICOL or qualifying for a COL or ICOL exemption.

Spectrum license conditions

52 (1) The Minister may impose proportionate and non-discriminatory service or technology restrictions in a spectrum license or permit for radio stations or apparatus for a limited or indefinite period if the Minister determines that such restrictions are necessary to—

- (a) avoid harmful interference;
- (b) protect public health against electro-magnetic fields;

- (c) ensure technical service quality;
- (d) maximise radio frequency sharing;
- (e) provide for the efficient use of spectrum; or
- (f) otherwise advance the public interest and serve the long-term welfare of Bermuda's consumers.

(2) The term of a spectrum license or a permit for radio stations and apparatus shall be twenty years.²²

(3) A spectrum license shall automatically be renewed for an additional term of twenty years—

- (a) subject to any modifications that the Minister may deem necessary or appropriate to make at the time of renewal; and
- (b) if the license holder files an application requesting renewal no later than one year prior to the expiry date; and
- (c) if the Minister has not determined, as a result of an adjudication, conducted pursuant to the procedures set forth in Part IX, commencing not more than 270 days and concluding not more than 180 days before the expiry date, that renewal of the license would disserve the public interest or the long-term welfare of Bermuda's consumers.

(4) If the Minister does not commence an adjudication for renewal of a license on or before 270 days of its expiry date, the Minister will be conclusively deemed to have concluded that renewal of the license would serve the public interest and the long-term welfare of Bermuda's consumers, and the license shall be renewed.

(5) At any time before the expiration of the license, a licensee shall have the option of petitioning the Minister to renew its license prematurely.

Spectrum liberalisation and trading

53 (1) Spectrum licenses and permits shall, to the extent practicable, allow the radio frequencies to which they pertain to be used liberally with all types of technologies and for all types of electronic communications, subject to the prohibition against harmful interference in respect of any primary or co-primary spectrum usage rights held by other authorised users of the same frequencies.

(2) The Minister, following a public consultation, may propose the liberalisation of specific frequencies or frequency bands in any or all of the following ways—

²² BTC agrees with North Rock, in its June 18, 2010 comments, that spectrum licenses should also be issued for a period of twenty years.

- (a) with respect to the types of electronic communications that may be provided using the specified frequencies;
- (b) with regard to the technologies that may be utilised in providing electronic communications authorised in connection with the specified frequencies; or
- (c) by designating the specified frequencies as eligible for sublicensing or for one or more forms of spectrum trading, including the sale or lease of recognised spectrum usage rights under duly authorised spectrum licenses.

Spectrum Fees

54 (1) Government Authorisation fees for specified types of spectrum licenses and permits for radio stations and apparatus shall be established by general determination in accordance with the following criteria—

- (a) the fees applicable for the use of spectrum suitable for similar types of radio-communication services shall not be unduly discriminatory;
- (b) where spectrum licenses or permits for radio stations and apparatus are to be, or have been granted, other than on the basis of competitive bidding procedures, fees shall be imposed that reflect—
 - (i) a reasonable measure of the value of the spectrum assigned, based on an assessment of the opportunity costs of the current use and other potential uses of a particular frequency or frequency band; or
 - (ii) relevant benchmarks or other appropriate proxies where the information required to assess the value stipulated in subsection 54(1)(b)(i) is not reasonably available;
- (c) competitive bidding procedures may be subject to a minimum reserve price and may be used where practicable and, in particular, in circumstances where the level of demand for a particular frequency or band of frequencies is expected to exceed the spectrum available.

(2) In cases where a competitive bidding procedure is to be used—

- (a) the Minister with the consent of the Minister of Finance shall make a regulation, subject to the affirmative resolution procedure, specifying—
 - (i) the applicability, criteria, procedures, information requirements, decision-making standards, timelines, and conditions governing the bidding process;
 - (ii) the reserve price or minimum Government Authorisation fee that may be required of the winning bidder, if any;

- (iii) any applicable payment terms; and
 - (iv) procedures for promptly re-auctioning the spectrum of a winning bidder that defaults on payment or enters bankruptcy.
- (b) the Minister shall conduct the auction pursuant to established regulations;
 - (c) the Minister shall grant the license to the entity or entities, if any, that satisfy the selection requirements specified in the regulation; and
 - (d) in any case in which the Ministry grants a license pursuant to an auction process specified by regulation, the amount of the Government Authorisation fee shall be conclusively established through the auction process, provided that the amount equals or exceeds the reserve price established pursuant to subsection 2(a)(ii), if any.

Measures to ensure the efficient use of spectrum

55 (1) The Ministry may at any time, following an adjudication before the administrative tribunal, issue an order requiring a spectrum license holder to release or vacate any or all frequencies covered by its license in order to ensure efficient use of the spectrum and re-license it to others.

(2) The Minister shall make a general determination that shall establish—

- (a) the applicability, criteria, procedures, information requirements, decision-making standards, timelines, and conditions that shall be used to determine whether such measures are appropriate and proportionate; and
- (b) the applicability, criteria, procedures, information requirements, decision-making standards, timelines, and conditions that shall be used to determine whether and, if so, how much compensation shall be paid to the vacating licensee, the categories of costs that may be covered, and the source or sources of funding for any such compensation.

(3) The Minister's determination of compensation under subsection (2)(b) shall not bind the Supreme Court in any appeal from, or court action collateral to, such determination.

(4) The grant of a COL or ICOL or spectrum license shall not preclude the application of any regulation made in accordance with this section, and the license holder shall comply with any administrative determination duly issued by the Minister that mandates the vacation of a frequency or band of frequencies in accordance with this section.

(5) The Minister, having due regard to the objectives of promoting the efficient and effective use of spectrum and preventing or deterring the hoarding of spectrum, may impose spectrum license conditions that, among other things—

- (a) set out a fixed timetable, including the specification of milestones, for the effective exploitation of the rights granted to a spectrum license holder; and
- (b) in the event of material non-compliance with the prescribed timetable, provide for modification or revocation of the spectrum license and the imposition of financial penalties, including by means of performance bonds.

*Division 3
Other Matters*

Harmful interference

56 (1) No person may use communications equipment for the purpose, or having the effect, of causing harmful interference to the operation of an authorised radio apparatus or site or the use of spectrum by a duly licensed person conducting its activities in accordance with the rights granted by its spectrum license or permit and any applicable technical requirements or limitations.

(2) The Minister shall adjudicate any complaints alleging harmful interference in accordance with this Act, any applicable general determinations, and the respective rights and obligations of the license or permit holders involved.

(3) The Minister shall, by general determination, establish a framework governing the basic procedures, duties, rights and obligations applicable to spectrum license and permit holders for the purpose of minimising the risk of harmful interference.

Contravention of section 56

57 (1) Any person who wilfully contravenes any provision of section 56 commits an offence and is liable—

- (a) if an individual—
 - (i) on summary conviction, to imprisonment for up to two years or a fine of up to \$20,000, or both; or
 - (ii) on conviction on indictment, to imprisonment for up to five years or a fine of up to \$50,000, or both; or
- (b) if a body corporate, on conviction on indictment to a fine of up to \$150,000 and in the case of a continuing offence a further fine of up to \$5,000 for every day during which the offence continues.

(2) Where any person is convicted of an offence under this section, the court, where it is proved to its satisfaction that the contravention includes the illegal operation or possession of any apparatus, may order the confiscation of the apparatus and any antenna.

(3) Where the court finds that harmful interference has been caused, whether wilfully or not, it may direct that the person responsible shall bear the costs of any

technical investigation made in order to establish the existence and cause of such harmful interference.

Operation of radio sites and apparatus

- 58 (1) A radio site or apparatus shall not be used by any person to carry out—
- (a) unnecessary transmissions;
 - (b) the transmission of superfluous signals and correspondence;
 - (c) the transmission of false or misleading signals;
 - (d) the transmission of signals without identification except for—
 - (i) radio beacons or certain other radio navigation services where identification signals are removed in case of malfunction or other non-operational service as a means of warning that transmissions cannot safely be used for navigational purposes;
 - (ii) survival-craft stations transmitting distress signals automatically; or
 - (iii) emergency position-indicating radio beacons;
 - (e) the transmission of signals containing profane or obscene words or language; or
 - (f) trials or tests, except pursuant to a temporary authorisation and under circumstances that preclude the possibility of interference with other stations.
- (2) The operation of a radio site or apparatus shall be limited to the performance of such services as are specified in the relevant permit or spectrum license.
- (3) Radio sites and apparatus—
- (a) shall not radiate more power than is necessary to ensure a satisfactory service;
 - (b) shall be established and operated in such a manner as not to cause harmful interference with other radio installations and other electronic communications; and
 - (c) shall be maintained in a condition which complies with the Convention, the terms and conditions of the license, and any applicable regulations or administrative determinations.
- (4) A radio site or apparatus shall transmit only on frequencies or in frequency bands authorised by the Minister pursuant to regulations and frequency allocations established by the Minister and prescribed in the license or permit.

(5) A radio site or apparatus shall accept distress calls and messages with absolute priority regardless of their origin and shall immediately take such action with regard thereto as may be required by the Convention.

(6) A radio site or apparatus may, during a period of emergency in which normal communications facilities are disrupted as a result of a hurricane, flood, earthquake or similar natural disaster or force majeure event, be used for emergency communications and may be operated in a manner other than that provided in the Convention, the regulations or as specified in the license, and any such emergency use shall be discontinued as soon as substantially normal communication facilities are again available.

Contravention of sections 51(1), 51(2), or 58.

59 (1) Any person who contravenes any provision of sections 51(1), 51(2) or section 58 or of any regulation or administrative determination concerning radio spectrum, radio stations or radio apparatus commits an offence and is liable on conviction on indictment—

- (a) if an individual, to imprisonment for up to two years or a fine of up to \$50,000, or both; or
- (b) if a body corporate, to a fine of up to \$150,000; and
- (c) in either case, in the event of a continuing offence, a further fine of up to \$25,000 for every day during which the offence continues.

(2) Where any person is convicted of an offence under this section the court, where it is proved to its satisfaction that the contravention includes the illegal operation or possession of any apparatus, may order the confiscation of the apparatus and any antenna.

Provisions relating to foreign ships and aircraft

60 (1) Unless otherwise provided by regulation, mobile radio stations and apparatus on board foreign-registered aircraft or ships temporarily located within the territorial waters of Bermuda or in Bermuda air space shall not require a license or permit under section 51; however, the Convention and any relevant international agreements in respect of ships and aircraft shall apply to such radio sites.

(2) Mobile radio stations and apparatus located on foreign-registered aircraft and ships temporarily located in the territorial waters or airspace of Bermuda shall comply with section 56, as it relates to avoidance of harmful interference, and with relevant international regulations under the Convention and international agreements in respect of ships and aircraft.

(3) No radio apparatus on board an aircraft shall be used while the aircraft is in Bermuda air space or on the ground in Bermuda except for the purpose of communication with a licensed ground station, for operational and commercial control service, or for testing prior to flight of the apparatus used for air traffic control and air navigation purposes, notwithstanding that a license, whether granted under this Act or the law of any other country or territory, is in force in respect of such apparatus.

(4) At all times when an aircraft is in Bermuda air space or is on the ground in Bermuda in an operational state, a watch shall be maintained on the relevant traffic control service.

(5) The Minister may permit the use, on such occasions or for such periods as it specifies, of radio apparatus on board an aircraft that is in Bermuda air space or at an airport in Bermuda or on board a ship that is located in the territorial waters of Bermuda for purposes not specified in subsections (3) or (4).

Contravention of section 60(2)

61 In the event of a contravention of section 60(2) the master of the vessel or the captain of the aircraft, as the case may be, or the person at whose direction the radio apparatus was used, commits an offence and is liable on conviction on indictment to a fine of up to \$50,000.

Emergency provisions

62 In the event of a public emergency or natural disaster, the Governor may temporarily take over control of the transmission and reception of messages via radio sites or apparatus through directions to license or permit holders, or it may order the suspension of these activities as it deems necessary and in the public interest under the circumstances.

PART VI NUMBERING, ADDRESSING, AND NAMING SYSTEMS FOR ELECTRONIC COMMUNICATIONS

Numbering policy

63 The Minister shall make general policies and, as necessary, regulations with respect to the management of the national numbering system.

Numbering plan and assignment of numbers

64 (1) The Minister shall adopt, by general determination, and publish a national numbering plan for those categories of communications providers eligible for participation in the national numbering scheme.

(2) Eligible participants in the national numbering scheme shall include all COL and ICOL holders and may include other licensees.

(3) The Minister shall update the national numbering plan from time to time as the Minister deems appropriate, following a public consultation addressing any material revisions to the plan.

(4) The Minister shall make general determinations governing the assignment and use of numbers and the implementation of numbering conventions or schemes applicable to particular types of electronic communications services, and he may authorise or restrict the assignment of numbers to certain licensees or groups of licensees based on objectively justifiable criteria pursuant to established regulations.

(5) The numbering plan and any regulations or administrative determinations applicable to the assignment or use of numbers by communications providers shall—

- (a) be fair, objective, proportionate and not unduly favour or discriminate against any eligible communications provider;
- (b) take account of relevant international regulations, and in particular, the requirements of the North American Numbering Plan;
- (c) ensure that sufficient numbers are available for the current and reasonably anticipated future needs of eligible communications providers;
- (d) specify whether and under what conditions assigned numbers may be reclaimed or re-assigned;
- (e) assign particular blocks or series of numbers having regard to the role that numbers can play in conveying useful information to customers, including information about the type of service being used; and
- (f) promote the efficient use of numbers.

Number portability

65 The Minister may make a general determination governing the ability of subscribers to retain a fixed or mobile telephone number assigned to them by their existing communications provider when they elect to switch to another communications provider, provided that any general determination include—

- (a) an assessment of proportionality; and
- (b) an analysis of the long-term welfare of Bermuda's consumers.

Emergency numbers

66 The Minister, following a public consultation, may require communications providers to make available to users, free of charge, access to a national three-digit number for emergency purposes and may require communications providers to provide any user possessing a fixed or mobile terminal with automatic access to their networks for the purpose of making emergency calls by means of the national three-digit number, irrespective of whether such users are customers or subscribers.

Management of domain names

67 The Ministry shall coordinate the management, allocation, and assignment of all domain names under the country code top level domain of Bermuda.

PART VII
TYPE APPROVAL AND HOMOLOGATION OF EQUIPMENT

Type approval procedures

68 (1) No equipment or system used for the provision of electronic communications networks or any radio station or apparatus shall be imported into or sold in Bermuda by any person unless it meets the standards of—

- (a) the Federal Communications Commission of the United States of America;
- (b) the Canadian Standards Association International; or
- (c) the European Union.

(2) The Minister may—

- (a) by general determination, establish technical standards relating to electronic communications networks or apparatus and customer premises equipment or to any specified such network, apparatus or equipment; and
- (b) following an adjudication, prohibit the sale, supply or use of any electronic communications network, apparatus or customer premises equipment that does not comply with the requirements of any such standard.

Contravention of section 68(1), importation or sale of equipment

69 (1) A person commits an offense if he imports or sells any apparatus or equipment used for the provision of electronic communications networks or any radio site or apparatus in breach of section 68(1) and is liable on summary conviction—

- (a) If an individual, to imprisonment for up to one year or a fine of up to \$25,000, or both; or
- (b) If a body corporate, to a fine up to \$50,000.

(2) Where any person is convicted of an offense under this section, the court, where it is proved to its satisfaction that the contravention includes the illegal importation or sale of any apparatus or equipment used for the provision of electronic communications networks or any radio site or apparatus, may order the destruction of the apparatus or equipment.

**PART VIII
EMERGENCY POWERS**

Emergency Powers

70 (1) Notwithstanding anything in this or any other Act or regulation or administrative determination to the contrary, when Her Majesty is at war or there is in force a proclamation of emergency made or continued in force under section 14 of the Constitution [*title 2 item 1*] the Governor may, when the public interest so requires by warrant under his hand—

- (a) direct and cause any electronic communications system, or any part thereof, which is in Bermuda or the territorial waters thereof to be taken possession of in the name and on behalf of Her Majesty, to be used for Her Majesty's service and subject thereto for such ordinary service as the Governor may see fit, and in that event, any person authorised by the Governor may—
 - (i) enter upon the premises, ship, aircraft or vehicle where such telecommunication system, or any part thereof, is situated and take possession thereof; and
 - (ii) use the apparatus therein as stated in this paragraph;
- (b) direct and authorise such persons as he thinks fit to assume control of any electronic communications service within Bermuda either wholly or partly and in such manner as he may direct and such person may accordingly enter upon the premises of any person within Bermuda operating such electronic communications service and assume control of the whole or part thereof;
- (c) suspend or amend, for such time as he thinks fit, the laws, rules, and regulations applicable to any or all radio sites or devices capable of emitting electro-magnetic radiation within Bermuda or the territorial waters thereof and—
 - (i) cause the closing of any radio site or any part thereof, or any device capable of emitting electro-magnetic radiation that is suitable for use as a navigational aid beyond five miles, and the removal there from of its apparatus and equipment; or
 - (ii) authorise the use and control of any such radio site or device or its apparatus and equipment by any Government Department under such regulations as he may prescribe,

and direct and authorise such persons as he thinks fit to enter upon the premises, ship, aircraft, or vehicle where any radio station or device as aforesaid is located for the purposes of closing and sealing such radio station or device, and the removal of any apparatus or equipment or for the purpose of using or controlling any such radio station or device, as the case may be; and

- (d) direct any communications provider—
 - (i) to submit to him, or any person authorised by him, all messages tendered within Bermuda for transmission or arriving in Bermuda by the system of electronic communications of any communications provider or any class or classes of such messages;
 - (ii) to stop or delay the transmission of or delivery of any such messages or deliver the same to him or his agent or transmit any messages or class or classes of messages according to a priority to be prescribed by the Governor; and
 - (iii) to obey all such directions with reference to the public electronic communications services within Bermuda or between Bermuda and other countries as he may prescribe and any such person operating an electronic communications service in Bermuda shall obey and conform to all such directions.

(2) At any time during which a proclamation of emergency under section 14 of the Constitution [*title 2 item 1*] is in effect, the Minister may issue an order stating that the provisions of this Act and of the Convention relating to the matters specified in sections 3(2)(a) to 3(2)(f) shall not apply to the Police and the Bermuda Regiment until such time as the Minister may revoke the order or the proclamation of emergency ceases, whichever is the earlier.

Compensation for the exercise of emergency powers

71 (1) If the Governor exercises his powers under section 70 and a communications provider shows that as a result of the exercise of such powers, its receipts during the period of such exercise of powers from public electronic communications services with respect to which the said powers have been exercised, or from any other systems of electronic communications owned or operated by it, have been less than its receipts from the same source during the corresponding period (averaged over the three-year period immediately preceding the exercise of such powers) the communications provider shall, subject to subsection (2), be entitled to reasonable compensation.

(2) The communications provider shall not be entitled to compensation if and so far as the exercise of the Governor's powers under section 70 is made for the purpose of preventing direct communication with any of Her Majesty's enemies and save with the consent of the Governor, no such compensation shall be paid if and so far as those powers are exercised for the purpose of—

- (a) preventing indirect or suspected communication with any of Her Majesty's enemies; or
- (b) protecting the interests of Her Majesty under the apprehension of impending war.

(3) In the event of an adjudication pursuant to subsection (2), the administrative judge shall take into account all the circumstances of the case including not only such loss as described in subsection (1) but also any additional profit accruing to a communications provider by reason of the emergency that gave rise to the exercise of those powers whether from—

- (a) the use of the communications provider's electronic communications system on services so taken possession of or controlled; or
- (b) the use by it of any other system of electronic communication for the transmission of traffic that would normally have been handled by the communications provider's electronic communications services so taken possession of or controlled.

(4) A certificate signed by the Minister to the effect that an order under the terms of section 70 was made in time of war or during a proclamation of emergency and in the public interest shall be conclusive evidence of a state of war or the existence of a proclamation of emergency and that the order was made in the public interest.

PART IX ADMINISTRATIVE PROCEDURES

Division 1

Administrative determinations and advisory guidelines

Informal fact finding

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

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

Selection of administrative procedures; use of evidence

73 (1) Except where this Act expressly requires the use of a specific administrative procedure, the Minister may choose whether to conduct—

- (a) a public consultation; or
- (b) an adjudication.

(2) The Minister shall make regulations, consistent with the provisions of Part IX of this Act, setting out the procedures applicable to adjudications, arbitrations, administrative reviews and public consultations.

(3) In making any administrative determinations in accordance with this Act, the Minister shall base his conclusions on scientifically rigorous evidence and analysis.

- (4) In the absence of sufficient evidence that is specific to Bermuda—
 - (a) the Minister shall include objective consideration of the best practices, benchmarks, and data of countries in North America having a high level of economic development; and
 - (b) the Minister may consider—after a scientifically rigorous confirmation of the relevance of the information or data to Bermuda—best practices, benchmarks, and data from other countries.

General Determinations

74 (1) Except where this Act requires the Minister to make a regulation, the Minister may make general determinations to carry out the provisions and purposes of this Act or any legislation or regulation.

- (2) Any general determination—
 - (a) shall be made following a public consultation;
 - (b) shall constitute a statutory instrument, pursuant to the Statutory Instruments Act 1977;
 - (c) shall be subsidiary to this Act, legislation and any regulation; and
 - (d) may be revoked or modified by the Minister through the adoption of a subsequent general determination.

(3) In any case in which the Minister makes a general determination, the Minister shall issue a decision and order adopting the general determination and shall promptly forward the general determination to the Cabinet Secretary, who shall—

- (a) assign a number to the general determination, pursuant to the Computerisation and Revision of Laws Act 1989; and
- (b) cause it to be published in the Gazette.

Orders

- 75 (1) The Minister may issue orders that do any or all of the following—
- (a) granting or denying any application or request received from a sectoral participant;
 - (b) approving, modifying or disapproving any submission received from a sectoral participant;
 - (c) clarifying the application of any statutory provision, regulation or administrative determination to a specific factual situation; and

- (d) taking any other action within the scope of his authority, other than an action that may only be taken by the adoption of a general determination or an adjudicative decision.

(2) The Minister shall provide written notice of the order to any sectoral participant specified in an order.

(3) Any order shall be binding on any sectoral participant specified therein.

Directions

76 (1) In any case in which the Minister concludes that a sectoral participant is acting in a manner not in accord with its duties and obligations under this Act, sectoral legislation, any regulation, any administrative determination, an adjudicative decision, or any authorisation, the Minister may direct the sectoral participant to take, or refrain from taking, such actions as the Minister reasonably determines to be necessary to ensure that the sectoral participant acts in conformity with its duties and obligations.

(2) Before issuing a direction, the Minister shall give the sectoral participant notice and shall specify a reasonable period of time during which the sectoral provider may present its views or take action that would obviate the need for the direction so long as—

- (a) the sectoral provider has at least 30 days in which to present its views; and
- (b) the sectoral provider has at least 60 days to take action that would obviate the need for the direction; or
- (c) the sectoral provider agrees with the Ministry on the period of time necessary for it to take action that would obviate the need for the direction; or
- (d) if the parties fail to agree on the appropriate period of time necessary to take action, pursuant to subsection (2)(c), either party may seek adjudication, pursuant to Part IX.

(3) Any direction—

- (a) shall be binding on the sectoral participant to which it is addressed; and
- (b) may be modified or revoked by the Minister, after giving notice of the proposed modification or revocation and following the procedures specified in subsection (2), at any time.

(4) Notwithstanding subsection (3), a participant may seek to pursue an adjudication of the Minister's direction pursuant to Part IX.

Decisions

77 The Minister shall issue a written decision, incorporating scientifically rigorous evidence and methods of analysis, specifying the relevant facts and providing a reasoned explanation for its actions—

- (a) in connection with the adoption of any administrative determination, order or direction; and
- (b) in any other circumstances in which it is required to do so pursuant to this Act or sectoral legislation.

Interim and emergency determinations

78 (1) The Minister may make a general determination on an interim basis, pending the completion of the public consultation, provided that the Minister—

- (a) issues a statement explaining the basis on which he has issued the general determination on an interim basis; and
- (b) files the interim general determination with the Cabinet Secretary for publication in the Gazette, at which point it will become effective.

(2) The Minister may make a general determination on an emergency basis without complying with the public consultation procedures specified in this Act whenever the Minister concludes that the urgency of a particular case requires that it do so to further the public interest or to ensure the long-term welfare of Bermuda's consumers.

(3) The Minister shall promptly publish on its official website any general determination made pursuant to subsection (2).

(4) Any general determination made pursuant to subsection (2) shall be effective, as applied to a specific sectoral participant, at the earlier of the date on which—

- (a) the sectoral participant has actual notice of the general determination from the Minister; or
- (b) the general determination is published in two newspapers of general circulation in Bermuda.

(5) In any case in which the Minister makes a general determination pursuant to subsection (2), the Minister shall—

- (a) file the emergency general determination with the Cabinet Secretary for publication in the Gazette as promptly as possible; and
- (b) within fourteen days after the day on which the Minister makes the emergency general determination, or any longer period approved by the Minister, commence a public consultation.

(6) Any general determination adopted on an interim or emergency basis pursuant to this section shall remain in effect for no more than six months, unless the

Minister, with the approval of Cabinet, causes a notice to be published in the Gazette extending the effective period for up to an additional six months.

Effective date of administrative determinations

79 (1) Unless the Minister has granted confidential treatment, the Minister shall publish on its official website—

- (a) the administrative record of each public consultation; and
- (b) all administrative determinations, decisions, directions, and orders.

(2) A general determination shall become effective on the later of—

- (a) the date on which it is published in the Gazette; or
- (b) the date specified by the Minister in the general determination.

(3) Any administrative determination, other than a general determination, shall become effective on the later of—

- (a) the date on which it is published on the Ministry's official website; or
- (b) the date specified by the Minister in the administrative determination.

Advisory guidelines

80 (1) The Minister may issue advisory guidelines regarding any matter within the scope of his authority.

(2) Any advisory guideline—

- (a) may be adopted following a public consultation;
- (b) shall be published on the Ministry's official website;
- (c) shall provide the Ministry's reasoned views regarding the matter, but shall not impose legally binding obligations on the Ministry or on any person; and
- (d) may be modified or revoked by the Minister at any time.

Failure to comply with a direction of the Minister

81 Any sectoral participant that knowingly refuses or fails to comply with a direction issued to it by the Minister directing the sectoral participant to comply with its duties and obligations under this Act, sectoral legislation, any regulation, any general determination, or any authorisation condition commits an offence and, unless sectoral legislation provides otherwise, is liable on summary conviction to a fine of up to \$5,000 for each day during which the refusal or failure continues.

Failure to comply with statutory duties or regulations

82 Any sectoral participant that knowingly contravenes any statutory duty contained in this Act, or who contravenes any regulations made by the Minister pursuant to this Act or to sectoral legislation, commits an offence and, unless sectoral legislation provides otherwise, is liable on conviction on indictment to a fine of up to \$50,000 or imprisonment for up to two years, or both.

Failure to comply with general determinations

83 Any sectoral participant that knowingly fails to comply with any general determination commits an offence and, unless sectoral legislation provides otherwise, is liable on conviction on indictment to a fine of up to \$30,000 or imprisonment for up to one year, or both.

Division 2 *Public Consultations*

Request to initiate a consultation

84 (1) The Minister may initiate a public consultation in order to—

- (a) establish policy;
- (b) prepare a report; or
- (c) adopt an administrative determination.

(2) The Minister may initiate a public consultation—

- (a) on his own initiative; or
- (b) in response to a written request from any person.

(3) In any case in which a person submits a request to initiate a public consultation, but the Minister determines not to grant the request, the Minister, within 30 days, shall issue a decision and order denying the request.

Consultation document

85 (1) The Minister shall commence a public consultation by publishing a consultation document on its official website and by advising all sectoral participants and affected parties of that fact.

(2) The consultation document shall include—

- (a) the relevant factual and legal background;
- (b) the issues on which public comment is sought;
- (c) alternative ways of achieving the same objective;

- (d) any tentative conclusions that the Minister has reached including, where appropriate, proposed language for any regulation or any administrative determination that the Minister proposes to adopt;
- (e) any questions that the Minister may request interested parties to address;
- (f) the date by which responses must be filed; and
- (g) the name and contact information for the staff member who will serve as the principal point of contact for interested persons during the public consultation.

(3) The Minister shall provide the public with a reasonable period, but in no case less than 30 days, in which to file initial written comments to the consultation document.

(4) The Minister shall post all comments on the Ministry's official website within 10 days of receipt of comments, and the Minister shall provide the public with a reasonable period, but in no case less than 30 days, in which to file reply comments to the initial comments.

Record

86 The administrative record in a public consultation shall include—

- (a) the consultation document;
- (b) any public notices issued by the Minister;
- (c) any comments or reply comments submitted to the Minister;
- (d) the transcript of any hearing conducted by the Minister;
- (e) a record of any ex parte communications regarding the public consultation;
- (f) any additional material, not generally available to the public, on which the Minister relied;
- (g) any reports, recommendations or decisions, whether preliminary or final, adopted in the course of the public consultation; and
- (h) the decision and order adopting any administrative determination following a public consultation.

Preliminary and final reports, recommendations and decisions

87 (1) Within 30 days of the conclusion of the public consultation period, the Authority shall issue—

- (a) a preliminary report;

- (b) preliminary recommendation; or
- (c) a preliminary decision and order.

(2) The preliminary report, recommendation or decision and order shall—

- (a) summarise significant material in the administrative record;
- (b) provide a reasoned explanation of the basis on which the Minister made any significant factual finding, policy determination, and legal conclusion;
- (c) in the case of a preliminary report, state the Minister's preliminary conclusions;
- (d) in the case of a preliminary recommendation, state any policy or regulations that the Minister proposes to adopt;
- (e) in the case of a preliminary decision and order, state the proposed administrative determination that the Minister proposes to make; and
- (f) establish the procedures and timeframes for submitting responses regarding the preliminary report, recommendation or decision.

(3) The Minister shall provide the public with a reasonable period, but in no case less than 30 days, in which to file written responses to the Minister's preliminary report or decision.

(4) The Minister shall post all responses to the Ministry's preliminary report on the Ministry's official website within 10 days of receipt of responses, and the Minister shall provide the public with a reasonable period, but in no case less than 30 days, in which to file reply comments to the initial comments.

(5) Within 30 days after the close of the period pursuant to subsection (4), the Minister shall publish a final report, recommendation or decision, which shall—

- (a) summarise the responses received regarding the preliminary report, recommendation, or decision;
- (b) provide a reasoned and scientifically rigorous explanation of the basis on which the Minister revised any significant factual finding, policy determination, or legal conclusion contained in the preliminary report, recommendation, or decision;
- (c) in the case of a final report, state the Minister's final conclusions; and
- (d) in the case of a final decision and order, specify—
 - (i) any administrative determinations that the Minister has adopted; and

- (ii) the date on which such administrative determinations will become effective.

Restrictions on ex parte communications

88 (1) Any interested person may make an ex parte communication during the course of a public consultation.

(2) In any case in which a person makes an ex parte communication to the Minister or his staff during the course of a public consultation, within one business day after the date on which the ex parte communication occurred, the person who made the ex parte communication shall submit to the Director of the Office of Electronic Communications—

- (a) a written description of the issues discussed and the positions espoused; and
- (b) a copy of any written materials provided.

(3) The Minister or member of the staff to whom an ex parte communication is made shall take all reasonable measures to ensure that the party that made the ex parte communication complies with the obligation specified in subsection (2).

(4) Within one business day after the submission required pursuant to subsection (2) is submitted to the Director of the Office of Electronic Communications, the Director shall cause to be posted on the Ministry's official website—

- (a) a notice of the ex parte communication;
- (b) a copy of the submission specified in subsection (2); and
- (c) any written materials submitted pursuant to subsection (2), other than materials for which the Minister has granted confidential treatment.

Division 3 *Private right of action*

Establishment of a private right of action

89 (1) Subject to any limitation of liability imposed in accordance with this Act or sectoral legislation, a person who has sustained loss or damage as a result of any act or omission that is contrary to any provision of this Act, sectoral legislation or any regulation or general determination, shall bring his dispute before the administrative tribunal as set forth in Division 4.

(2) A person who suffered a loss as set forth in subsection (1) shall be entitled to recover an amount equal to the proven loss or damage from any person who engaged in, directed, authorised, consented to, or participated in the act of omission.

(3) Unless otherwise provided in sectoral legislation, an action may not be brought in respect of any loss or damage referred to in subsection (1) more than two years after the day on which the act or omission occurred.

(4) Any decision rendered under this Division shall be subject to Ministerial review and judicial appeal as provided in Division 4.

Division 4
Administrative Tribunals

Establishment of the administrative tribunal

90 (1) There shall be established an administrative tribunal.

(2) Members of the administrative tribunal shall be called judges.

(3) The function of the administrative tribunal shall be to conduct arbitration and adjudication on an as-needed basis and to conduct proceedings on other such matters as the Minister may deem necessary and expedient.

(4) The administrative tribunal shall consist of domestic and international experts in relevant fields, specified in section 93(3), who shall make a recommended decision for each matter.

(5) The recommended decision of the administrative tribunal on all matters, except arbitration, shall be subject to review by the Minister whose approval shall give the decision the force of law.

(6) The recommended decision of the administrative tribunal on an arbitration matter shall not be reviewed by the Minister.

Purpose of the administrative tribunal

91 The purposes of creating the administrative tribunal are to ensure that—

(a) regulatory oversight and compliance are non-political, cost-effective, efficient, and credible;

(b) the application of regulatory principles is conducted by persons with demonstrated expertise in the field; and

(c) the costs of implementing the Act are incurred on an as needed basis.

Jurisdiction of the administrative tribunal

92 (1) The subject matter jurisdiction of the administrative tribunal shall extend to—

(a) the issuance of licenses, license conditions, and license renewals;

(b) the approval and disapproval of rates and tariffs;

(c) the approval and disapproval of proposed mergers and acquisitions, including approval subject to conditions designed to reduce any adverse effect of the merger or acquisition on the long-term welfare of Bermuda's consumers;

(d) the resolution of—

- (i) challenges by a sectoral provider pertaining to any matter involving interpretation and implementation of the Act, regulations, and general and administrative determinations by the Minister;
 - (ii) enforcement proceedings by the Government to pursue alleged violations by sectoral providers of the Act and any regulation or determination issued pursuant to the Act;
 - (iii) disputes among sectoral providers;
 - (iv) disputes between customers and sectoral providers arising under a private cause of action under the Act after the customer has exhausted the dispute resolution procedures specified in the customer's service agreement with the sectoral provider;
 - (v) disputes arising under a private right of action established under Division 3 of this Part;
 - (vi) disputes between a sectoral provider and a wholesale customer that fail to agree on wholesale rates;
 - (vii) disputes pertaining to unfair trade practices alleged by a customers or sectoral provider; and
- (e) any other matter the Minister deems appropriate for resolution by the administrative tribunal.

(2) No language in this Division shall be interpreted to preclude two or more private parties from resorting to private arbitration or other forms of alternative dispute resolution.

Appointment to the pool of certified experts available to serve on the administrative tribunal

93 (1) The Minister shall establish a pool of certified experts, who shall be available to serve as judges on administrative tribunals.

(2) The Minister, after consulting with the Attorney General and the Ministry's Advisory Council, shall appoint certified experts.

(3) Certified experts shall be Bermudian citizens and non-Bermudian citizens of other countries who are experts in the areas of telecommunications regulation, competition law, engineering, economics, business, public policy, finance, or law.

(4) To qualify as an expert for purposes of this section, certified experts shall have—

- (a) a minimum of twenty years of experience in a relevant field;

- (b) the quality of such experience verifiable through professional accomplishments, including but not limited to—
 - (i) holding high positions in companies, government, or academia; and
 - (ii) if the certified expert is in academia, publications in peer reviewed journals in the relevant area.
 - (c) The requirements set forth in subsection 4 envision a pool of certified experts able to provide independent and skilled expertise to serve the long-term welfare of Bermuda’s consumers.
- (5) The pool shall initially be comprised of 12 certified experts.
- (a) Within the first 90 days of the year of enactment of the Act, the Minister shall appoint—
 - (i) 6 certified experts, each with a term of four years; and
 - (ii) 6 certified experts, each with a term of five years.
 - (b) After 90 days, the Minister may appoint additional numbers of certified experts, after consulting with the Attorney General and the Minister’s Advisory Council, if the Minister determines that additional certified experts are needed to manage the case load of the administrative tribunals. The Minister may reappoint a certified expert at the end of the certified expert’s term.
 - (c) All subsequent certified experts shall serve for a term of five years, unless—
 - (i) a certified expert submits his resignation to the Minister, providing a minimum of sixty days written notice of his intended resignation; or
 - (ii) a certified expert is removed by the Minister.
 - (d) A certified expert may be removed by the Minister only—
 - (i) for cause; and
 - (ii) with the approval of the Attorney General and after consultation with the Minister’s Advisory Council.
- (6) At any time, the Minister may appoint new certified experts to fill a vacancy created by the resignation, removal, death, or disability of an existing certified expert.
- (7) All certified experts will be required to be available to serve as judges on an administrative tribunal in Bermuda with sixty days advance notice.

- (a) Within fourteen days of receiving notice of requested service, a judge may recuse himself if unable to serve on the administrative tribunal specified.
- (b) Three such recusals in a 365 day period will result in removal from service as an administrative tribunal judge, absent extenuating circumstances.

Funding for the administrative tribunals

94 The system of administrative tribunals shall be funded by the parties involved in proceedings before the administrative tribunal.

- (a) In matters between the Government and a private sectoral provider pertaining to enforcement, licensing, tariffs, rates, and the application of any other regulation, legislation, or administrative determination, the Government shall pay 100 percent of the cost of each administrative tribunal convened.
- (b) In disputes among private sectoral providers, 50 percent of the cost of each administrative tribunal convened shall be paid by the complaining party or parties on a pro rata basis and 50 percent of the cost shall be paid by the responding party or parties on a pro rata basis.
- (c) In disputes between private sectoral providers and customers, the Government shall pay 100 percent of the cost of each administrative tribunal convened.
- (d) The Minister shall establish a reasonable fee for intervening parties, pursuant to the Government Fees Act, taking into consideration the intervenor's ability to pay.

Compensation for service as a judge on an administrative tribunal

95 Individuals selected as judges for a given administrative tribunal shall be paid a per diem fee, to be determined annually by the Minister, pursuant to the Government Fees Act, which shall be commensurate with the prevailing international rate for expert consultation.

Selection of administrative tribunal judges and the administrative tribunal chief judge

96 (1) Administrative tribunals shall consist of one or three judges, as follows—

- (a) in disputes among sectoral providers, the administrative tribunal shall consist of three judges unless the parties jointly agree to have their case heard by a single judge;
- (b) in disputes between a customer and a sectoral provider, it is within the discretion of the Minister to decide whether the administrative tribunal shall consist of one or three judges; and

- (c) in all other matters, the administrative tribunal shall consist of three judges.
- (2) In proceedings among sectoral providers, sectoral providers and the Government, and sectoral providers and a third party in which a three-judge administrative tribunal shall be convened—
- (a) each side shall select one judge from the pool of certified experts; and
 - (b) the two selected judges shall jointly select a third judge from the pool of certified experts, who shall serve as the chief judge of the administrative tribunal.
- (3) In matters relating to issues of rates, tariffs, and licensing—
- (a) the Minister shall select two judges from the pool of certified experts; and
 - (b) the two selected judges shall jointly select a third judge from the pool of certified experts, who shall serve as the chief judge of the administrative tribunal.
- (4) A judge serving on an administrative tribunal—
- (a) must not have had any prior private involvement in the matter that is the subject of the administrative hearing;
 - (b) must not have any conflict of interest or experience that would preclude him from being able to act, and be perceived as acting, in an impartial manner in regard to the matter for which he is serving as a judge;
 - (c) must not be a member of the Minister’s staff; and
 - (d) must not be an agent or legal representative of the Minister.

Intervention

- 97 (1) Any person who seeks to intervene in a proceeding before an administrative tribunal shall file a request with the chief judge stating the basis on which he seeks to intervene.
- (2) The chief judge shall grant a petition for intervention upon determining that the person seeking to intervene—
- (a) has a legal interest in the matter that is the subject of the proceeding that will be affected by the outcome of the proceeding; or
 - (b) has any other substantial interest that will be affected by the outcome of the proceeding; and

- (c) intervention by that person will not impair the orderly conduct of the proceedings.

(3) The chief judge may impose conditions or limitations upon an intervenor's participation in the proceedings, at any time.

Administrative tribunal hearing procedure

98 (1) The action before the administrative tribunal commences—

- (a) in arbitrations and adjudications, with the complaining party's filing of a complaint with the Minister setting forth the issue or issues in dispute;
- (b) in enforcement proceedings, with the Minister's filing of a complaint setting forth the alleged violation or an order to show cause why the Minister should not pursue the enforcement matter;
- (c) in tariffed rate and license authorisations, with the sectoral provider's filing of a rate or license petition with the Minister.

(2) The complainant or petitioner shall provide all responding parties with a copy of the complaint, order to show cause, or petition within three business days of filing the complaint, order to show cause, or petition with the Minister.

- (a) If the Minister determines that a complaint is plainly without merit, he shall issue a decision and order dismissing the complaint.

(3) The responding party or parties shall have thirty days from receipt of the complaint to file an answer. In tariffed rate and license authorisations, an answer is the Minister's confirmation of its receipt of the sectoral provider's petition.

(4) In disputes among sectoral providers, there shall be three judges selected to the administrative tribunal, who shall be designated as set forth in section 96(2), unless, within 10 days of the respondent's filing of its answer, the parties jointly file with the Minister an agreement to have their matter heard by a single judge, and—

- (a) if the parties agree to a single judge tribunal, they will jointly file with the Minister their selection for the chief judge; or
- (b) if the parties cannot agree on a chief judge, the Minister shall appoint the chief judge.

(5) In disputes between a customer and a sectoral provider in which the Minister decides that the administrative tribunal shall consist of one judge—

- (a) if the parties agree on a chief judge, they will jointly file with the Minister their selection for the chief judge; or
- (b) if the parties cannot agree on a chief judge, the Minister shall appoint the chief judge.

(6) In disputes between a customer and a sectoral provider in which the Minister decides that the administrative tribunal shall consist of one judge—

- (a) if the parties agree to a single judge tribunal, they will jointly file with the Minister their selection for the chief judge; or
- (b) if the parties cannot agree on the chief judge, the Minister shall appoint the chief judge.

(7) Within 5 days of the selection of the judge or judges, the parties must jointly file statements stating whether the matter can be resolved summarily or whether they believe that the matter will require hearings lasting over one day.

- (a) If the parties state that the hearing will last over one day, they must include in their joint filing their proposed procedural schedules.

(8) The chief judge shall manage the course of the proceedings in conformity with any applicable regulations issued by the Minister.

(9) The chief judge shall have the power to issue orders necessary for the conduct of the proceedings including, but not limited to, orders—

- (a) convening hearings;
- (b) summoning witnesses, including expert witnesses;
- (c) requiring the examination of witnesses under oath or otherwise; and
- (d) compelling the production of any document, record, or object relevant to the subject matter of the proceeding.

(8) The chief judge, at appropriate stages of the proceeding, shall give all parties full opportunity to submit and respond to pleadings, motions, objections, and offers of settlement.

Administrative record

99 The administrative record in an administrative tribunal hearing shall include—

- (a) notices of all proceedings;
- (b) any orders issued by the administrative tribunal;
- (c) any motions, pleadings, or stipulations filed by the parties;
- (d) all evidence submitted;
- (e) any intermediate rulings;
- (f) the record or transcript of any hearing; and

- (g) the written opinion of the administrative tribunal's recommended decision as set forth in section 100(5).

Recommended decisions

100 (1) The complainant shall bear the burden of proving, with scientifically rigorous evidence and analysis, all of the evidence of the prima facie case.

(2) The administrative tribunal shall hear the case and, based on the expertise of the administrative tribunal, issue a recommended decision that is subject to review by the Minister.

(3) The findings of the administrative tribunal shall be met by a preponderance of the evidence, except with respect to any action by the Government seeking criminal penalties, which shall be met by clear and convincing evidence.

(4) The recommended decision of the administrative tribunal shall be based on scientifically rigorous evidence and analysis.

(5) The administrative tribunal shall issue a written opinion of its recommended decision, which shall be published concurrently on the Minister's website. The recommended decision shall contain—

- (a) a summary of the positions of the parties;
- (b) proposed findings of fact and conclusions of law; and
- (c) the recommended decision of the matter, including any enforcement action to be taken or damages to be awarded.

(6) Any tariff rate approved by the administrative tribunal shall be just, reasonable, and promote the long-term welfare of Bermuda's consumers.

Ministerial review of administrative tribunal recommended decisions

101 (1) Parties may file comments on the validity of the recommended decision of the administrative tribunal within 15 days after the issuance of the recommended decision.

(2) The Minister shall review the administrative tribunal's recommended decision and the parties' comments on the recommended decision and issue a final decision within forty-five days after the conclusion of the period in which the parties may file comments on the administrative tribunal's recommended decision.

(3) The Minister shall—

- (a) affirm a recommended decision of the administrative tribunal in whole or in part;
- (b) reverse a recommended decision of the administrative tribunal in whole or in part; or

- (c) reverse and remand a recommended decision of the administrative tribunal in whole or in part with instructions to the administrative tribunal to conduct further investigations into the factual record for an entry of judgment in conformity with the decision of the Minister.
 - (i) The Minister may remand the matter to the administrative tribunal if there are materially changed circumstances not reflected in the original recommended decision of the administrative tribunal.

(4) If the Minister takes no action within the 45-day period set forth in subsection (2), the recommended decision of the administrative tribunal shall be adopted as the final decision of the Minister.

(5) The Minister shall issue a written opinion of his decision which shall be—

- (a) served on the parties; and
- (b) published concurrently on the Minister's official website.

(6) If the Minister has adopted the recommended decision of the administrative tribunal as the final decision of the Minister as set forth in subsection (4), the written opinion of the administrative tribunal shall constitute the written opinion of the Minister.

(7) Notwithstanding section 101(1) through 101(6), the Minister shall not review the recommended decision of an administrative tribunal on an arbitration matter.

Standard of review

102 (1) The Minister shall review the administrative tribunal's recommended decision to ensure that it is in conformity with the law and in conformity with the weight of the evidence under the applicable evidentiary standard.

(2) The Minister shall review the findings of fact and determinations of law under the following standards—

- (a) on questions of fact, the Minister shall uphold the findings of fact of the administrative tribunal unless he finds the recommended decision was clearly erroneous, provided that—
 - (i) if the administrative tribunal's findings of fact are supported by reasonable evidence such that they are plausible, then the administrative tribunal's findings shall be upheld; and
 - (ii) findings of clear error sufficient to reverse the recommended decision of the administrative tribunal include, but are not limited to—
 - (a) failure to consider relevant evidence;
 - (b) failure to consider a relevant factor that should have been given significant weight;

- (c) consideration and weight given to an irrelevant or improper factor; and
 - (d) when viewed in its totality, the overwhelming weight of the evidence is contrary to the decision of the administrative tribunal.
- (b) on questions of law, the Minister shall review questions of law de novo, and—
 - (i) the Minister need not accord deference to the administrative tribunal on questions of law when the facts are not in dispute; and
 - (ii) the Minister is free to substitute his judgment for that of the administrative tribunal as to questions of law.
- (c) on mixed questions of law and fact—
 - (i) if the question of law predominates, the Minister shall review the question de novo; or
 - (ii) if the question of fact predominates, the Minister shall review the question for clear error.

Precedential effect of Ministerial decisions

103 A final decision of the Minister shall constitute precedent in future cases under the doctrine of stare decisis.

Appeal of Ministerial decisions

104 Unsuccessful parties may petition the Supreme Court for review of a final decision of the Minister pursuant to Part XII.

Prohibitions on ex parte communications

105 (1) A judge may not initiate or receive an ex parte communication regarding any issue pertaining to the administrative tribunal on which he is serving.

(2) Notwithstanding subsection (1), a judge may receive aid from staff members who—

- (a) are subject to the judge's supervision;
- (b) have no conflict of interest in the matter before the administrative tribunal; and
- (c) have not had any prior direct involvement in the specific matter that is the subject of the matter before the tribunal.

(3) Notwithstanding subsection (1), a judge may—

- (a) provide information to persons employed by the Ministry regarding scheduling and administrative matters related to the matter before the administrative tribunal; and
- (b) conduct settlement negotiations with the parties.

(4) A judge who receives a prohibited ex parte communication shall, within one business day after receiving the communication, place a notice in the administrative record stating the substance of the communication received, and the identity of each person from whom the judge received such a communication.

(5) The administrative tribunal shall not consider any information provided as a result of a prohibited ex parte communication in making any decision regarding the matter before the administrative tribunal.

(6) Each person or corporate body submitting prohibited ex parte communications shall be fined \$5,000, payable immediately.

Failure to comply with orders issued by an administrative tribunal judge

106 Any sectoral participant that knowingly fails to comply with any order issued by an administrative judge in an adjudication, arbitration, or an investigative hearing commits an offence and is liable on summary conviction to a fine of up to \$20,000 or imprisonment for up to six months, or both.

PART X COMPLIANCE

Monopoly Power

107 (1) A communications provider that may occupy a monopoly position may abuse its position if the provider engages in—

- (a) predatory pricing;
- (b) a price squeeze;
- (c) unreasonable discrimination;
- (d) exclusionary refusals to deal; or
- (e) tying.

(2) In any case in which the Minister determines that a communications provider may occupy a monopoly position and has engaged in conduct described in subsection (1), the Minister shall—

- (a) direct the communications provider to cease the abusive conduct; and
- (b) initiate an adjudication.

Prohibition of unreasonable restraints of trade

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

(2) A communications provider contravenes subsection (1) if the communications provider agrees, expressly or tacitly, to—

- (a) fix prices;
- (b) restrict output;
- (c) co-ordinate separate bids;
- (d) allocate customers or geographic markets; or
- (e) not to do business with a specific supplier, sectoral participant, or customer.

(3) Not later than one year after the date of assent to this Act, the Minister, after giving due regard to international best practices, shall make a regulation establishing the applicability, criteria, procedures, information requirements, decision-making standards, timelines, and conditions to be used in determining whether a communications provider has entered into an agreement that falls within one of the categories specified in subsection (2).

(4) In any case in which a communications provider has entered into an agreement that falls within one of the categories specified in subsection (2), no assessment of the actual or likely effects on competition of the agreement need be made in order to conclude that the communications provider has contravened subsection (1).

(5) A communications provider has contravened subsection (1) if—

- (a) the communications provider agrees, expressly or tacitly, to perform an act that does not fall within one of the categories specified in subsection (2); and
- (b) the actual or likely effect of the agreement is to unreasonably restrict competition in any market.

(6) The Minister shall refer cases in which a communications provider is suspected to have entered into an agreement that has unreasonably restricted, or is likely to unreasonably restrict, competition in any market, to an administrative tribunal pursuant to Part IX, and the administrative tribunal shall issue a recommended decision, which may—

- (a) direct the communications provider to modify the agreement to remove the unreasonable restriction;
- (b) declare the agreement to be void, in whole or in part; and
- (c) take any other enforcement action, including the assessment of penalties.

(7) The Minister may make a regulation exempting all communications providers or specific classes of communications providers from the prohibitions contained in this section in connection with one or more categories of agreements.

Violation of requirements and prohibitions regarding anti-competitive conduct

109 Any sectoral provider that knowingly fails to comply with the requirements and prohibitions contained in this Part, or the regulations adopted pursuant to this Part, commits an offence and is liable on conviction on indictment to a fine of up to \$50,000 or imprisonment for up to two years, or both.

Merger or Acquisition review

110 (1) No person seeking to enter into a merger or acquisition shall close any transaction that would constitute a merger or acquisition without notifying the Minister and obtaining the Minister's prior written approval.

(2) A transaction shall be deemed to constitute a merger or acquisition if it results in—

- (a) a lasting change in control of a communications provider as a result of—
 - (i) a merger involving one or more previously independent communications providers; or
 - (ii) the acquisition of direct or indirect control of one or more communications providers; or
- (b) the creation of a joint venture involving one or more communications providers performing on a lasting basis all the functions of an autonomous economic entity.

(3) The notification required pursuant to subsection (1) shall contain—

- (a) a description of the proposed transaction;
- (b) an assessment of the likely impact of the proposed merger or acquisition on competition in any market within a regulated industry sector; and
- (c) any proposed undertakings or conditions which the entity created by the merger or acquisition would agree to accept in order to mitigate or eliminate potential anti-competitive effects.

(4) The Minister may require any person seeking to enter into a merger or acquisition to provide any information that the Minister reasonably requires in order to conduct his review.

(5) On receiving the completed notification, the Minister shall refer the merger or acquisition to an administrative tribunal, which shall produce a recommended decision, which may—

- (a) approve the proposed merger or acquisition;
 - (b) approve the proposed merger or acquisition, subject to conditions designed to reduce any adverse effect of the merger or acquisition on the long-term welfare of Bermuda's consumers; or
- (6) The Minister shall not approve a merger or acquisition where the Minister determines that the proposed merger or acquisition is likely to—
- (a) harm the long-term welfare of Bermuda's consumers; or
 - (b) harm the public interest.
- (7) The conditions that the Minister may impose include—
- (a) compliance with wholesale obligations;
 - (b) partial divestiture to a purchaser approved by the Minister; or
 - (c) any other condition that the Minister may adopt to enhance the long-term welfare of Bermuda's consumers.

PART XI INVESTIGATION AND ENFORCEMENT

Investigations

- 111 (1) The Minister may conduct an investigation, either on his own initiative or at the request of any person for any or all of the following purposes—
- (a) to gather information prior to, or as part of, a public consultation;
 - (b) to assess whether to initiate enforcement action against a sectoral participant;
 - (c) in any circumstance provided for by this Act or related legislation; or
 - (d) in other situations in which the Minister determines that doing so would be expedient.
- (2) In order to conduct an investigation, the Minister may do any or all of the following—
- (a) convene an investigative hearing pursuant to section 112;
 - (b) issue an order pursuant to section 114 requesting the production of information; and
 - (c) appoint inspectors to gather information pursuant to section 116.

Investigative hearings

112 (1) In any case in which the Minister chooses to conduct an investigative hearing, the Minister shall designate a presiding officer.

(2) A presiding officer—

(a) shall meet the standards specified in section 96(4); and

(b) shall have the authority specified in sections 98(8) and 98(9);

(3) The presiding officer shall cause the investigative hearing to be recorded or transcribed.

(4) At the conclusion of the hearing, the presiding officer shall submit a report to the Minister.

(5) The presiding officer's report shall—

(a) summarise the evidence gathered;

(b) state any factual findings; and

(c) make any appropriate recommendations.

Failure to comply with orders issued by a presiding officer

113 Any sectoral participant that knowingly fails to comply with any order issued by a presiding officer in an investigative hearing commits an offence and is liable on summary conviction to a fine of up to \$20,000 or imprisonment for up to six months, or both.

Order to produce information

114 (1) Where necessary to perform its obligations under this Act or under sectoral legislation, the Minister may issue an order requiring a sectoral participant to take any or all of the following actions—

(a) furnish such information as the Minister may reasonably require and the sectoral participant may reasonably be expected to hold;

(b) produce to the Minister any documents specified or described; or

(c) keep such records as may be specified or described.

(2) An order under subsection (1) may specify the means by which, and the period during which, it is to be complied with.

(3) The power under this section to require a person to produce documents includes the power—

- (a) if the documents are produced, to take copies of them or extracts from them; or
- (b) if the documents are not produced, to require the sectoral participant who was required to produce them to state, to the best of its knowledge and belief, where they are located.

Failure to comply with information requests

115 (1) Any sectoral provider that knowingly fails to comply with an order to produce information issued by the Minister pursuant to section 114 commits an offence and is liable on conviction on indictment to a fine of up to \$50,000 or imprisonment for up to two years, or both.

(2) Any individual who knowingly fails to comply with a notice to produce information issued by the Minister pursuant to section 114 commits an offence and is liable on summary conviction to a fine of up to \$20,000 or imprisonment for up to six months, or both.

Inspectors

116 (1) The Minister, when necessary to conduct an investigation, may designate any member of the staff, or any other qualified person, to be an inspector.

(2) The Minister may authorise the inspector to—

- (a) enter any premises during ordinary business hours;
- (b) search the premises; and
- (c) seize any document or object.

(3) In any case in which the Minister seeks to have an inspector enter the premises of, or seize any document or object from a person or a licensee, the Minister shall first obtain a warrant from a magistrate.

(4) A magistrate may issue a warrant under this subsection if satisfied on information given under oath by a representative of the Minister that there are reasonable grounds for suspecting that—

- (a) a party has contravened, or is about to contravene, this Act or relevant legislation, a regulation or a general determination; and
- (b) there is on the premises, specified in the warrant, recorded information relevant to whether that contravention has been, is being, or is about to be committed.

(5) The Minister shall provide every inspector with a written instrument of appointment, which shall specify the scope of the inspector's authority.

(6) An inspector shall, upon request, produce the instrument of appointment, and any warrant, when acting within the scope of his authority.

(7) All persons shall give the inspector all reasonable assistance in their power, and shall furnish him with such access and information as he may reasonably require.

Obstruction of the Ministry

117 Any person who wilfully obstructs any member of the staff or any Inspector appointed by the Minister in the exercise of any power conferred by this Act or by sectoral legislation commits an offence and is liable on summary conviction to or a fine of up to \$20,000, or imprisonment for up to six months, or both.

Enforcement procedures

118 (1) The Minister may initiate enforcement proceedings before the administrative tribunal in any case in which there is reason to believe that a sectoral participant has contravened any or all of the following—

- (a) this Act;
- (b) sectoral legislation;
- (c) any regulation;
- (d) any administrative determination;
- (e) any adjudicative decision and order; or
- (f) a condition contained in any authorisation.

(2) The Minister shall initiate the enforcement proceeding by sending a written notice to the sectoral participant that the Minister believes committed the contravention, which shall—

- (a) set forth the alleged facts;
- (b) state the statutory, administrative or authorisation provisions that the person allegedly contravened; and
- (c) state the timeframe and procedures by which the person must respond.

(3) The Minister shall determine whether a contravention has occurred by conducting an adjudication which shall be conducted by an administrative tribunal appointed in the manner specified in Part IX.

(4) If the Minister determines that a sectoral participant has committed a contravention, the Minister may take one or more of the following actions—

- (a) issue a warning;
- (b) direct the sectoral participant to take such actions as may be necessary to remedy the violation;

- (c) impose financial penalties in accordance with section 119;
- (d) require the sectoral participant to make restitution to any person directly injured as a result of the contravention; or
- (e) issue a decision and order modifying, suspending, or revoking any authorisation held by the sectoral participant.

(5) In lieu of taking enforcement action, the Minister may refer a matter that involves an offence specified in this Act or sectoral legislation to the Director of Public Prosecutions for appropriate judicial enforcement.

Financial penalties

119 (1) Upon finding that a sectoral provider has contravened—

- (a) this Act;
- (b) sectoral legislation;
- (c) any regulation;
- (d) any administrative determination; or
- (e) any condition contained in any authorisation held by the sectoral provider,

the Minister may impose a penalty of up to ten percent of total annual turnover, as defined by sectoral legislation.

(2) In determining the amount of any financial penalty, the Minister shall rely upon scientific methods and evidence and shall consider all relevant factors including, but not limited to—

- (a) the seriousness of the contravention;
- (b) the duration of the contravention;
- (c) whether the contravention resulted in harm to third parties;
- (d) whether the party acted wilfully, recklessly, or in a grossly negligent manner;
- (e) whether the party has a previous history of contraventions; and
- (f) whether the party disclosed or sought to conceal the contravention.

(3) The Ministry shall pay all penalties collected to the Consolidated Fund.

Undertakings

120 (1) In lieu of taking enforcement action pursuant to section 118, the Minister may issue a decision and order accepting, from any persons subject to enforcement action, an undertaking to take or not take specific actions.

(2) In considering whether to accept an undertaking in lieu of taking enforcement action, the Minister shall consider the need to achieve as comprehensive a solution as is reasonable and practicable to the adverse effect caused by the conduct that provided the basis for the enforcement action.

(3) An undertaking under this section—

- (a) may be varied or superseded by another undertaking made in accordance with subsection (1); or
- (b) may be released by the Minister.

PART XII ACTIONS IN THE SUPREME COURT

Appeals to the Supreme Court

121 (1) Any person aggrieved by a final action of the Minister having binding legal effect may appeal on that account to the Supreme Court.

(2) Except as provided in subsection (1), any appeal shall be limited to points of law or mixed fact and law. Notwithstanding any other provision in this Act to the contrary, appealable points of law or mixed fact and law shall include—

- (a) the definition of the market;
- (b) the determination of the presence or absence of monopoly power;
- (c) the abuse of monopoly power;
- (d) the economic defences to abuse of monopoly power;
- (e) the admissibility of any expert testimony; and
- (f) the calculation of any damages, restitution, penalty, fine, or other monetary punishment or relief.

(3) In any case in which a sectoral participant appeals from the imposition of an enforcement action pursuant to section 118, the appellant may seek a full rehearing before the Court.

(4) An appeal under subsection (1) shall be lodged in the Registry within twenty-one days after the effective date of any final Ministerial action, or such longer period as the Court may allow.

(5) On any such appeal the Court may make such order, including an order for costs, as it thinks fit.

(6) Section 62 of the Supreme Court Act 1905 [title 8 item 1] shall be deemed to extend to the making of rules to regulate the practice and procedure on an appeal under this section.

(7) An appeal under subsection (1) shall not result in a stay of the administrative determination of the Minister, unless the party seeking the stay can demonstrate to the court that it will suffer irreparable harm if the stay is not granted.

PART XIII ILLEGAL USE OF ELECTRONIC COMMUNICATIONS SERVICES

Transmission of false messages

122 Any person who transmits, or causes to be transmitted by telecommunication, a message that he knows to be false commits an offence and is liable on summary conviction to imprisonment for up to one year or a fine of up to \$20,000, or both.

Obtaining public electronic communications service with intent to avoid charges

123 Any person who obtains a public electronic communications service with intent to avoid payment of applicable charges for such service commits an offence and is liable—

- (a) if an individual—
 - (i) on summary conviction, to imprisonment for up to one year or a fine of up to \$20,000, or both; or
 - (ii) on conviction on indictment, to imprisonment for up to two years or a fine of up to \$50,000, or both; or
- (b) if a body corporate, on conviction on indictment to a fine of up to \$150,000.

Improper use of public electronic communications service

- 124 (1) Any person commits an offence if he—
- (a) sends, by means of a public electronic communications service, a message or other matter that is grossly offensive or of an indecent, obscene, or menacing character;
 - (b) sends by those means, for the purpose of causing annoyance, inconvenience, or needless anxiety to another, a message that he knows to be false or persistently makes use for that purpose of a public electronic communications service;
 - (c) by means of the telephone—

- (i) makes any comment, request, suggestion, or proposal which is obscene, lewd, lascivious, filthy, or indecent;
 - (ii) makes multiple telephone calls, whether or not conversation ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number;
 - (iii) makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number; or
 - (iv) makes repeated telephone calls, during which conversation ensues, solely to harass any person at the dialled number; or
- (d) knowingly permits any telecommunication apparatus under his control to be used for any purpose prohibited by this section,

and is liable on summary conviction to imprisonment for up to one year or a fine of up to \$25,000, or both.

(2) A person commits an offence if he by means of a public electronic communications service—

- (a) obtains information from a computer that he is not authorised by the owner of the computer and the owner of the information to possess; or
- (b) without the authority of the owner of the computer and the owner of the information changes information stored in a computer or in any way interferes with a programme on the computer,

and is liable—

- (c) if an individual—
 - (i) on summary conviction, to imprisonment for up to one year or a fine of up to \$20,000, or both; or
 - (ii) on conviction on indictment, to imprisonment for up to two years or a fine of up to \$50,000, or both; or
- (d) if a body corporate, on conviction on indictment to a fine of up to \$150,000.

(3) Every distinct contravention of either of subsection (1) or subsection (2) shall be a separate offence.

(4) Any person, be he a sectoral participant or not, who in the act or acts prohibited in subsection (1) knowingly possesses any tape record, wire record, disk record or any other record of any information secured in the manner prohibited by subsection (2), or replays the same to any person or communicates the contents thereof whether complete or partial, either verbally or in writing or in any other manner to any other person commits an offence and is liable—

- (a) if an individual—
 - (i) on summary conviction, to imprisonment for up to one year or a fine of up to \$20,000, or both; or
 - (ii) on conviction on indictment, to imprisonment for up to two years or a fine of up to \$50,000, or both; or
- (b) if a body corporate, on conviction on indictment to a fine of up to \$150,000, or both.

(5) For the purposes of subsection (2), “computer” means a programmable electronic device that can store and process data and from which data can be retrieved.

Transmitting or receiving messages by unlicensed means of telecommunication

125 Any person who, knowing or having reason to believe that a means of telecommunication is being maintained in contravention of this Act, transmits or receives any messages by such means of telecommunication or performs any service incidental to the transmission or reception of any such message or delivers any message for transmission by such means of telecommunication or takes delivery of any message sent thereby commits an offence and is liable on conviction on indictment to a fine of up to \$50,000.

Damaging telecommunication apparatus with intent

126 (1) Any person commits an offence if he damages, removes or interferes in any way whatsoever with a telecommunication apparatus or uses it with intent to—

- (a) prevent or obstruct the transmission or delivery of a message;
- (b) intercept or discover the contents of a message; or
- (c) defraud any person.

(2) Any person commits an offence if he, without authorisation, connects to or wilfully damages, removes, or interferes with any telecommunication apparatus including any apparatus which is designed or adapted for use in connection with the running of a cable television service and, in particular—

- (a) any line, that is to say, any wire, cable, tube, pipe, or other similar thing (including its casing or coating) which is so designed or adapted; or
- (b) any structure, pole, or other thing in, on, by, or from which any telecommunication apparatus is or may be installed, supported, carried, or suspended.

(3) A person guilty of an offence under this section is liable—

- (a) if an individual, for each offence—

- (i) on summary conviction, to a fine of up to \$20,000 or imprisonment for up to one year, or both, and in the case of a continuing offence a further fine of up to \$500 for every day during which the offence continues; or
 - (ii) on conviction on indictment, to imprisonment for up to five years or a fine of up to \$50,000, or both, and in the case of a continuing offence a further fine of up to \$1,000 for every day during which the offence continues; or
- (b) if a body corporate, for each offence, on conviction on indictment to a fine of up to \$150,000 and in the case of a continuing offence a further fine of up to \$5,000 for every day during which the offence continues.

PART XIV OFFENCES

Failure to comply with a direction of the Minister

127 Any sectoral participant that knowingly refuses or fails to comply with a direction issued to it by the Minister directing the sectoral participant to comply with its duties and obligations under this Act, sectoral legislation, any regulation, any general determination, or any authorisation condition commits an offence and, unless sectoral legislation provides otherwise, is liable on summary conviction to a fine of up to \$5,000 for each day during which the refusal or failure continues.

Failure to comply with statutory duties or regulations

128 Any sectoral participant that knowingly contravenes any statutory duty contained in this Act, or who contravenes any regulations made by the Minister pursuant to this Act or to sectoral legislation, commits an offence and, unless sectoral legislation provides otherwise, is liable on conviction on indictment to a fine of up to \$50,000 or imprisonment for up to two years, or both.

Failure to comply with general determinations

129 Any sectoral participant that knowingly fails to comply with any general determination commits an offence and, unless sectoral legislation provides otherwise, is liable on conviction on indictment to a fine of up to \$30,000 or imprisonment for up to one year, or both.

Failure to comply with orders issued by an administrative judge or presiding officer

130 Any sectoral participant that knowingly fails to comply with any order issued by an administrative judge or presiding officer in an adjudication or an investigative hearing commits an offence and is liable on summary conviction to a fine of up to \$20,000 or imprisonment for up to six months, or both.

Violation of requirements and prohibitions regarding anti-competitive conduct

131 Any sectoral provider that knowingly fails to comply with the requirements and prohibitions contained in Part X, or the regulations adopted pursuant to that Part, commits an offence and is liable on conviction on indictment to a fine of up to \$50,000 or imprisonment for up to two years, or both.

Failure to file reports

132 The secretary of a sectoral provider that is a body corporate and is required to submit a report required by the Minister pursuant to section 35, or by sectoral legislation, commits an offence in any case in which the secretary knowingly fails to submit the report at the specified time without prior written approval from the Minister, and the secretary is liable on summary conviction to a fine of up to \$20,000 or imprisonment for up to six months, or both.

Failure to comply with information requests

133 (1) Any sectoral provider that knowingly fails to comply with an order to produce information issued by the Minister pursuant to section 114 commits an offence and is liable on conviction on indictment to a fine of up to \$50,000 or imprisonment for up to two years, or both.

(2) Any individual who knowingly fails to comply with a notice to produce information issued by the Minister pursuant to section 116 commits an offence and is liable on summary conviction to a fine of up to \$20,000 or imprisonment for up to six months, or both.

Obstruction of the Ministry

134 Any person who wilfully obstructs any member of the staff or any Inspector appointed by the Minister in the exercise of any power conferred by this Act or by sectoral legislation commits an offence and is liable on summary conviction to or a fine of up to \$20,000, or imprisonment for up to six months, or both.

Disclosure of Confidential Information by the Minister

135 Any member of the staff who knowingly contravenes section 19 commits an offence which shall be punishable—

- (a) on summary conviction by imprisonment for one year or a fine of up to \$20,000, or both; or
- (b) on conviction on indictment by imprisonment for two years or a fine of up to \$50,000, or both.

Liability where offence committed by corporation

136 (1) Where an offence under this Act committed by a sectoral participant that is a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of any director,

manager, company secretary or other officer of the sectoral participant, he, as well as the body corporate, is guilty of an offence and is liable to be proceeded against and punished accordingly.

(2) Where the affairs of a body corporate are managed by its members, subsection (1) applies in relation to the acts and defaults of a member in connection with its functions of management as if he were a director of the body corporate.

Liability where offence committed by unincorporated entity

137 (1) Where a sectoral participant that is a partnership or other unincorporated entity is guilty of an offence under this Act, every partner, other than a partner who is proved to have been ignorant of or to have attempted to prevent the commission of the offence, is guilty of the offence and is liable to be proceeded against and punished accordingly.

(2) Where any other association, incorporated or not, is guilty of an offence under this section—

- (a) every officer of the association who is bound to fulfil any duty of which the breach is the offence; or
- (b) if there is no such officer, every member of the governing body other than a member who is proved to have been ignorant of or to have attempted to prevent the commission of the offence,

is guilty of the offence and is liable to be proceeded against and punished accordingly.

Repeat offences

138 Any penalty provided for in this Part—

- (a) may be doubled where the party has been convicted of the same offence on one previous occasion; and
- (b) may be trebled where the party has been convicted of the same offence on more than one previous occasion.

Contravention of section 23

139 (1) Any person who contravenes any provision of section 23 or of any regulation or administrative determination concerning the provision of electronic communications commits an offence and is liable on conviction on indictment—

- (a) if an individual, to imprisonment for up to two years or a fine of up to \$50,000, or both; or
- (b) if a body corporate, to a fine of up to \$150,000; and
- (c) in either case, in the event of a continuing offence, a further fine of up to \$25,000 for every day during which the offence continues.

(2) Where any person is convicted of an offence under this section, the court, where it is proved to its satisfaction that the contravention includes the illegal operation or possession of any apparatus, may order the confiscation of the apparatus.

Contravention of sections 51(1) or 51(2) or 58

140 (1) Any person who contravenes any provision of sections 51(1) or 51(2) or 58 of any regulation or administrative determination concerning radio spectrum, radio stations, or radio apparatus commits an offence and is liable on conviction on indictment—

- (a) if an individual, to imprisonment for up to two years or a fine of up to \$50,000, or both; or
- (b) if a body corporate, to a fine of up to \$150,000; and
- (c) in either case, in the event of a continuing offence, a further fine of up to \$25,000 for every day during which the offence continues.

(2) Where any person is convicted of an offence under this section the court, where it is proved to its satisfaction that the contravention includes the illegal operation or possession of any apparatus, may order the confiscation of the apparatus and any antenna.

Failure to pay fees imposed in accordance with sections 31, 32, or 54

141 Any person who fails to pay a fee established in accordance with the provisions of sections 31, 32, or 54 commits an offence and is liable on conviction on indictment—

- (a) to a fine of up to \$50,000 and a further fine of up to \$5,000 for every day during which the offence continues; and
- (b) to pay to the Authority a sum equal to 2 times the amount of any fee that would have been payable pursuant to the relevant section but for the commission of the offence.

Contravention of section 56

142 (1) Any person who wilfully contravenes any provision of section 56 commits an offence and is liable—

- (a) if an individual—
 - (i) on summary conviction, to imprisonment for up to two years or a fine of up to \$20,000, or both; or
 - (ii) on conviction on indictment, to imprisonment for up to five years or a fine of up to \$50,000, or both; or
- (b) if a body corporate, on conviction on indictment to a fine of up to \$150,000 and in the case of a continuing offence a further fine of up to \$5,000 for every day during which the offence continues.

(2) Where any person is convicted of an offence under this section, the court, where it is proved to its satisfaction that the contravention includes the illegal operation or possession of any apparatus, may order the confiscation of the apparatus and any antenna.

(3) Where the court finds that harmful interference has been caused, whether wilfully or not, it may direct that the person responsible shall bear the costs of any technical investigation made in order to establish the existence and cause of such harmful interference.

Contravention of section 60(2)

143 In the event of a contravention of section 60(2) the master of the vessel or the captain of the aircraft, as the case may be, or the person at whose direction the radio apparatus was used, commits an offence and is liable on conviction on indictment to a fine of up to \$50,000.

Contravention by communications providers and their directors, officers, or employees

144 Any communications provider and any director, officer or employee of a communications provider who has official duties in connection with a public electronic communications service commits an offence if such person or persons—

- (a) wilfully destroy, secrete or alter any message that they have received for transmission or delivery;
- (b) forge any message, or utter or transmit any message that they know to be forged;
- (c) wilfully abstain from transmitting any message or wilfully intercepts or detains or delays any message, unless for legitimate service purposes; or
- (d) otherwise than in pursuance of their duty or as directed by the Governor or a court, copy any message or disclose any message or the purport of any message to any person other than the person to whom the message is addressed,

and is liable on summary conviction to imprisonment for up to two years or a fine of up to \$50,000, or both.

Destruction of messages by a person other than a director, officer, or employee of a communications provider

145 Any person, not being a director, officer, or employee of a communications provider commits an offence if he—

- (a) wilfully destroys, secretes, detains or delays a message intended for delivery to some other person;

- (b) having been required by a telecommunication officer to deliver up to him a message in the possession of that person and intended for delivery to some other person, refuses or neglects to do so; or
- (c) knowingly or negligently delivers a message or communication to any person not authorised to receive the same,

and is liable on summary conviction to imprisonment for up to one year or a fine of up to \$20,000, or both.

Contravention of section 40

146 Any person who contravenes section 40 commits an offence and is liable—

- (a) if an individual—
 - (i) on summary conviction, to imprisonment for up to one year or a fine of up to \$25,000, or both; or
 - (ii) on conviction on indictment, to imprisonment for up to two years or a fine of up to \$50,000, or both; or
- (b) if a body corporate, on conviction on indictment to a fine of up to \$150,000.

Importation or sale of equipment in contravention of section 68(1)

147 (1) A person commits an offence if he imports or sells any apparatus or equipment used for the provision of electronic communications networks or any radio site or apparatus in breach of section 68(1) and is liable on summary conviction—

- (a) if an individual, to imprisonment for up to one year or a fine of up to \$25,000, or both; or
- (b) if a body corporate, to a fine up to \$50,000.

(2) Where any person is convicted of an offence under this section, the court, where it is proved to its satisfaction that the contravention includes the illegal importation or sale of any apparatus or equipment used for the provision of electronic communications networks or any radio site or apparatus, may order the destruction of the apparatus or equipment.

Contravention of sections 44(1) or 44(2)

148 Any person who contravenes section 44(1) or 44(3) commits an offence and is liable on summary conviction—

- (a) if an individual, to imprisonment for up to one year or a fine of up to \$25,000, or both; or
- (b) if a body corporate, to a fine of up to \$50,000.

Failure to comply with a warrant

149 Any person who fails to comply with a warrant under section 47 commits an offence and is liable on summary conviction—

- (a) if an individual, to imprisonment for up to one year or a fine of up to \$25,000, or both; or
- (b) if a body corporate, to a fine of up to \$50,000.