

CABLE AND WIRELESS BERMUDA LTD.

**Reply comments regarding the Draft Regulatory Act 2010 and
Draft Electronic Communications Act 2010**

30th August 2010

Cable and Wireless Bermuda Limited (“C&W”) refers to the notice issued by the Minister of Energy, Telecommunications and E-Commerce (“METEC”) on the 27th July 2010 (Ref: DOT 206/201/1) inviting interested parties to submit reply comments on the responses submitted to the Consultation paper issued on 3 May 2010 on the Draft Regulatory Authority Act and Draft Electronic Communications Act 2010.

C&W welcomes this opportunity and notes that METEC has requested that comments should focus on points raised in the initial round of comments that the parties believe have not been adequately covered. Whilst C&W will endeavour to do this in what follows, it believes that it is first worth drawing METEC’s attention to a number of common themes emerging from the original submissions made by operators:

- *Fees* – all respondents, including C&W, are concerned over the possibility of significantly increased regulatory fees. In particular, all respondents have highlighted the lack of transparency over how Government Authorisation fees and Regulatory Authority (“RA”) fees will be calculated and several have noted that there now appears to be less of a direct link between the level of fees and the actual costs of regulation. This is a serious issue and must be addressed in an open and transparent way by METEC. METEC cannot assume that increased fees can simply be absorbed by operators; ultimately they will feed back into the prices that Bermuda consumers will pay for their communications services.
- *Timescales* – many respondents are concerned by the lack of timescales both for the regulatory reform process itself (see, for example, **Quantum’s** submission) and for making decisions under the Acts (see **BDA Cablevision’s** submission). C&W would add, however, that it is concerned that some respondents seem to be trying to delay the timetable for introducing regulatory reform. For example, whilst C&W may agree with some of the detailed comments made by **BTC**, it believes that its objections to some of the powers of METEC being transferred to the RA are at least partly motivated by an attempt to delay the reform process. C&W is surprised that BTC is raising objections now to the RA’s proposed role and responsibilities given that the extent to which the RA would be responsible for day to day regulation has been discussed openly by METEC and its consultants since at least 2007.
- *Discretion on Consultation* – C&W shares the concerns expressed by some - including **BTC** and **Digicel** - that the Ministry has discretion to make some policy decisions without consultation with industry members. C&W believes that the industry must have the opportunity to comment on major policy decisions that could have significant impacts on their businesses.
- *Level of expertise of Commissioners/Regulatory Authority staff* – a number of respondents, including **BTC**, **BDC**, **Cablevision** and **Transact** have raised concerns that the RA will not have the necessary level of knowledge and expertise to regulate the sector. C&W shares these concerns and believes they will be magnified if Commissioners are appointed on a part-time basis and are only

required to meet on an infrequent basis. Given the complexity of the issues that can arise in the sector, which will often require a mix of economic, accounting and legal expertise, it is absolutely crucial that the RA is appropriately staffed.

Other comments:

C&W believes that some of the comments made by some operators are a deliberate attempt to create further delay to the process of regulatory reform. For example, we note that **Transact** has asked for a complete reassessment of the need for fundamental reform to the Bermuda regulatory framework due to the competitiveness of the Bermuda market. C&W strongly disagrees with this view and believes that the current Class licensing system in Bermuda is limiting the degree of competitiveness, to the detriment of Bermuda customers. There is an urgent need for regulatory reform which will enable operators to expand their operations into new markets, which will increase their ability to benefit from economies of scale and scope, and bring greater choice to consumers.

C&W also believes that at least some of **BTC's** points and comments have been made in an attempt to slow down the process of reform and to protect its own market positions. As noted above, it cannot understand why BTC is raising such strong objections now to the functions that will lie with the RA, when the respective roles and responsibilities of the Ministry and RA as set out in the draft Acts have been known to industry members for at least the last three years.

C&W does not agree with BTC that it is necessary for primary draft legislation to include all the details of each policy that the Ministry wishes to implement. The reform process will never be completed if this approach is adopted. The draft Acts only need to include the basic policy framework and the details of individual policies and supporting regulations can be set out in secondary legislation.

Similarly, C&W does not believe it is necessary, and indeed it may not even be appropriate, for the primary legislation to include detailed definitions or discussion of concepts such as "cost". As BTC itself acknowledges, there are many different cost concepts. Even within communications markets, different cost concepts may be used for different issues and purposes, or when there is a need for proportionality. This means that the discussion of the appropriate measure of cost to use for specific issues is probably best left to supporting regulations, rather than needing to be made explicit in primary legislation. Similar considerations apply to concepts such as predatory pricing and exclusionary tying – what is actually meant by these terms and how they will be assessed can be described in secondary legislation and supporting regulations.

C&W agrees that any decisions made by METEC and/or the RA need to be backed up by sufficient facts and data (or be "scientifically rigorous" as BTC phrase it). However, it needs to be recognised that it may not always be possible to conduct some of the "scientific" tests suggested by BTC – such as the calculation of cross-price elasticities – due to lack of sufficient data. Indeed, this is a dilemma faced by many regulators, not just those located in smaller jurisdictions, so there will be a need for some degree of

pragmatism. Indeed, this reinforces the need for the RA to consider a whole range of factors before reaching any conclusions on market definitions or the extent to which an operator may have dominance in a relevant market. C&W does not believe, however, that the draft Acts are suggesting that the RA will try to do otherwise.

C&W notes that whilst BTC seems to be adamant that no regulatory decisions can be made without sufficient scientific rigour, it has suggested a redrafting of section 58 to say that wireless networks compete in the same relevant market as wireline networks. It has also included redrafting to the effect that private networks act as a constraint on market power in the supply of business services. It would, of course, be inappropriate for such amendments to be made to the draft Act without the necessary evidence and data to substantiate these conclusions. Further, in its comments on the draft Electronic Communications Act, BTC has boldly stated that mandatory unbundling is not justified in Bermuda today. C&W is not aware of any scientific analysis that has been done to substantiate this claim.

BTC has suggested that the definition of “dominant position” is the same as that for “significant market power”. C&W also suggested in its original submission that the two concepts should be defined in the same way, as has become the norm in many jurisdictions. C&W does not agree, however, with BTC’s proposed amendments to the definition of significant market power and in fact believes that the inclusion of the phrase “...provides the capability of acting profitably for a non-transitory period..” only serves to suggest that the mere holding of a position of SMP is anti-competitive.

BTC has suggested a definition for the concept of proportionality in terms of cost benefit analysis. This view is shared by its affiliate companies, **M3** and **Logic**. C&W agrees with this general principle but believes that care needs to be taken to ensure that cost benefit analysis does not introduce unnecessary delay into the regulatory reform process. For some issues, it may be relatively straightforward to determine that the costs of a particular policy will far outweigh the benefits (or vice versa) and there will be little to be gained from conducting a detailed cost benefit analysis first.

C&W agrees with BTC that caution must be used when using benchmark data. It disagrees, however, with the suggestion that this means that the Ministry/RA cannot use any benchmarks unless it has subjected the benchmarks to multiple regression analysis to see whether they would be useful. This seems to be taking the idea of scientific rigour too far and would increase the costs of regulation. Benchmarks will always have their shortcomings but they can be useful when used with care.

C&W notes that **Brasil Telecom** has suggested two different types of licence should be made available, with a distinction made where a licensee does not want to expand the scope of its services into Bermuda. C&W does not see why this is needed as it does not expect that it is intended that a unified licence will oblige an operator to provide services that it does not want to provide (beyond any universal service obligation that may be applied). It may be that this is being proposed in the hope that a reduced regulatory fee would apply. Indeed, in asking for greater transparency of fees, Brasil Telecom has

suggested that fees are not charged for any service that do not originate or terminate in Bermuda. This comment does reinforce the need for greater transparency and clarity over the methodology that will be used to calculate fees.

Both **Digicel** and **BDA** have described the proposed fines of 10% of turnover as “draconian”. C&W agrees that a fine of this level would indeed be significant but notes that this is intended to be the maximum possible fine and would assume that it would only apply in the case of the most serious of offences. C&W is supportive, however, of the suggestion that the RA be required to produce guidelines explaining how the size of any fines will be assessed and agrees that any decision on fines should be properly justified.

Finally, C&W endorses the comment made by **Quantum** that the legislation needs to ensure that a company that is found to have SMP in a relevant market cannot use affiliated companies to try to escape any ex ante regulation that is found to be necessary to address that SMP.