

REPLY Comments on Draft Telecommunications Regulatory Reform Legislation

**Submitted by Transact Limited to the
Ministry of Energy, Telecommunications and E-Commerce**

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EXECUTIVE SUMMARY

Transact Limited (“Transact Ltd. or Transact”) applauds the Ministry of Energy, Telecommunications and E-Commerce (“METEC”) for extending an invitation to industry to submit reply comments,¹ and it takes this opportunity to respond to many of the thought-provoking comments presented in response to the draft Regulatory Authority Act (“RAA”) and draft Electronic Communications Act (“ECA”).

In Part I, Transact addresses the sweeping comments submitted by the Bermuda Telephone Company (“BTC”), noting in particular that BTC’s comments are apparently designed to undermine the bills altogether or, alternatively, to transform them into legislation that would serve the interests of market dominant entities like BTC itself. In Part II, Transact offers its wholehearted support for comments suggesting that METEC should undertake a public consultation to assess market dominance and appropriate remedies pertaining to significant market power (“SMP”) *before* the proposed bills become law. Finally, in Part III, Transact discusses a variety of specific proposals that commenters have made related to various provisions of the draft RAA and draft ECA.

I. METEC SHOULD NOT DILUTE THE DRAFT BILLS TO BENEFIT MARKET DOMINANT ENTITIES LIKE BTC

While ostensibly commending METEC for its effort to establish an independent Regulatory Authority (“RA”), BTC’s comments appear to be designed to sink the draft bills before they can become law or, barring that, to bog them down in a blizzard of suggestions that

¹ See METEC, Invitation to Submit Reply Comments Regarding the Draft Regulatory Authority Act 2010 and Draft Electronic Communications Act 2010 (July 27, 2010).

would alter the proposed legislation at its core. BTC's comments cover 245 pages, and they include literally hundreds of recommended alterations – some clerical, some foundationally substantive – that BTC admits would “completely revamp[]” the bills.² While many of BTC's comments are justified and sensible,³ the majority generally appear intended to enable market dominant entities like BTC itself to operate with less regulatory oversight.

BTC's comments are far too voluminous for Transact to address each suggestion, but reviewing a representative sample demonstrates that BTC hopes to convince METEC to reorient the draft bills in at least three fundamental respects: substance, definitions, and purpose. First, BTC undertakes a strategy to revamp and undermine the substance of the bills' provisions that empower the RA to combat market dominance. BTC suggests, for instance, reducing the list of remedies from which the RA can choose to address significant market power,⁴ going so far as to suggest deleting the “catch all” remedy in draft ECA § 23(n) that would allow the RA to apply a tailored remedy other than those listed in the bill if necessary to combat market power.⁵ In hopes of discouraging METEC and the RA from fully leveling the playing field for non-dominant entities, BTC argues further that applying too many remedial measures on market dominant entities would be more harmful than imposing too few⁶ – though it neglects to acknowledge that “too few” remedies could result in the immediate demise of non-dominant providers. In similar

² BTC Comments at 12.

³ *See, e.g., id.* at 6-7 (warning METEC that the drafts as written would generate debilitating uncertainty for the industry); 3, 7, 11, 172-173 (warning that the new bills would generate enormous and unjustified new fees); 132-133 (suggesting that judicial review should extend to all actions undertaken by either the RA or METEC that have binding legal effect).

⁴ *See id.* at 61-62.

⁵ *See id.* at 195.

⁶ *See id.* at 101-102.

fashion, BTC argues that neither the RA nor METEC should have the power to require dominant entities to provide access to their facilities.⁷ On the whole, BTC's substantive attacks would materially weaken METEC's and the RA's power to combat market dominance, which (of course) would directly serve the interests of market dominant entities like BTC.⁸

Second, BTC employs a definitional strategy, in which it suggests altering many of the definitions currently included in the drafts and adding several others, presumably with the goal of giving BTC more free rein to take advantage of its marketplace position. For instance, BTC questions the draft RAA's definition of "significant market power" and suggests revisions that would substantially narrow the definition and, accordingly, give BTC greater latitude to assert its market dominance.⁹ BTC similarly suggests definitions for "competition," "sustainable competition," "anti-competitive," "cost" and other key economic terms that are favorable to entities in market dominating positions.¹⁰ In a particularly aggressive suggestion, BTC proposes that the definition of the term "cost" include "all opportunity costs," such as end-user revenues that a market dominant firm may lose to competitors after giving them wholesale access to network elements.¹¹ This definition of "cost" appears to be an attempt to ensure that BTC gains the value of its market dominant position even if the law requires it to provide access to competitors.

⁷ *See id.* at 193-194.

⁸ *See, e.g., id.* at 104, 122, 166-170, 175-176.

⁹ *See id.* at 50.

¹⁰ *See id.* at 28-52, 145-158.

¹¹ *See id.* at 35.

Third, BTC attempts to reorient the primary purpose of the draft bills away from the promotion of competition. Possibly fearing that legislation designed to encourage competition would complicate its exercise of bottleneck control, BTC suggests that METEC revise the bills so that the primary objective of both is serving consumers' interests, not promoting competition.¹² Well established economic research proves that competition does serve consumers' interest, so BTC's suggestion is unwarranted in any event. BTC contends further that more competition does not necessarily benefit consumers, and it argues that exclusive servicing arrangements (*i.e.*, arrangements that lack competition) can in some situations produce consumer friendly results.¹³ In short, BTC is apparently trying to reset the ground rules so that the bills are more friendly to market dominance and less likely to result in *ex ante* regulations that encourage competition, even if the bills drive some providers out of the market as a result.

BTC's supposed focus on consumer welfare (even at the expense of competition) obscures the fact that it seeks changes that would restrict METEC's and the RA's ability to combat market dominance. BTC tips its hand too far, however, by proposing the elimination of every word in the consumer protection and universal service sections of the proposed bills, revealing that it supports purportedly consumer-friendly provisions only as long as those provisions serve BTC's interests as well.¹⁴

In a separate line of argument, BTC (like Transact) contends that the draft bills should more clearly delineate and distinguish the Minister's authority and the proposed RA's

¹² See *id.* at 8-9, 59.

¹³ See *id.* at 33, 35.

¹⁴ See *id.* at 198-200, 203-206.

authority.¹⁵ BTC then argues (in contrast to Transact) that METEC should employ a philosophically complex analytical tool for apportioning rule-making authority between the two entities.¹⁶ In a detailed 15-page discourse on the “Institutional Analysis and Development framework,” BTC presents a scholarly overview of rulemaking authority that may be more appropriate for a graduate course on administrative theory than comments on proposed legislation. It seems that BTC’s highly detailed discussion – including a “theoretical framework that includes the biophysical and material world”¹⁷ – is designed to stall the bills completely before they are tabled in Parliament.

II. METEC SHOULD ANALYZE MARKET DOMINANCE AND ENGAGE IN A PUBLIC CONSULTATION PERTAINING TO REMEDIES *BEFORE* THE BILLS BECOME LAW

Several commenters have made important suggestions related to METEC’s and the proposed RA’s approach to market dominance. Most importantly, both Bermuda Digital Communications Limited (“BDC”) and North Rock Communications Ltd. (“North Rock”) urge METEC to conduct its analysis of market dominance and present proposed remedies for public comment *before* the bills are enacted into law.¹⁸ Waiting until after the bills are in force would generate debilitating uncertainty for the industry, as providers would be forced to accept the prospect of a new regulatory regime without knowing precisely what METEC and the RA would do to promote competition once all providers have access to integrated licenses. To eliminate this uncertainty and to ensure a transparent regulatory process, Transact fully supports the

¹⁵ See *id.* at 7.

¹⁶ See *id.* at 11-24.

¹⁷ *Id.* at 14.

¹⁸ See BDC comments at 3; North Rock comments at 22.

suggestion that METEC undertake its market dominance analysis and assessment of remedies *prior* to tabling the draft bills in Parliament.

III. TRANSACT’S REACTIONS TO COMMENTS ON SPECIFIC SECTIONS OF THE DRAFT RAA AND DRAFT ECA

The comments submitted in response to specific provisions in METEC’s proposed bills contain an impressive collection of creative, thoughtful and generally sound suggestions. As indicated in the section-by-section discussion that follows, Transact generally endorses most of the suggestions offered by other licensees, yet it believes that certain suggestions may lead to counterproductive results.

A. Reply to Comments on the Draft RAA

Draft RAA § 16. Regulatory principles. Addressing the regulatory principles set forth in draft RAA § 16 and similar provisions elsewhere in the draft bills, North Rock argues that phrases like “unreasonably discriminatory” are inappropriate because any kind of discrimination is problematic and unconstitutional.¹⁹ This is an understandable reaction, but it reflects a mistaken understanding of the use of the word “discrimination” in the regulatory context. In this context, discrimination does not mean prejudicial treatment of a particular group of people; rather, it means differential treatment, which can be perfectly legitimate, necessary and broadly beneficial when not exercised unreasonably.²⁰ For instance, a cable system owner may reserve the majority of its transmission capacity for the delivery of television programming, making only

¹⁹ See, e.g., North Rock comments at 9; see also C&W comments at 19.

²⁰ The U.S. Communications Act includes multiple provisions prohibiting only “unreasonable” or “undue” discrimination, as do the regulations promulgated by the U.S. Federal Communications Commission. See, e.g., 47 U.S.C. §§ 160(a)(1), 202(a), 251(b)(1), 251(c)(4), 332; 47 C.F.R. §§ 3.10, 20.12(d), 76.1504, 76.1512.

a minority available for third-party Internet content. This discriminates against the providers of IP content, but it is reasonable and perfectly legitimate. Similarly, a mobile operator may prioritize – discriminate in favor of – voice bits over data consistent with Quality of Service guarantees, given the challenge of managing latency and throughput in a highly dynamic environment where the number of users in a cell site and their proximity to the site is constantly changing. Prohibiting any kind of discrimination – including legitimate differentiation of the kind described above – would upend consumers’ expectations and the industry’s existing (reasonable) practices. Accordingly, Transact urges METEC to retain the qualifiers – such as “unreasonable” and “undue” – that currently appear in the drafts.

Draft RAA § 19. Compensation and function. Logic Communications Ltd. (“Logic”) argues in its comments that the Commissioners should serve terms lasting only a single year, rather than the staggered three-year terms identified in draft RAA §§ 19(3) and 112(3).²¹ Transact believes that a one-year term is far too short, as it would risk dangerous instability and the possibility of novice commissioners filling all the positions on the Board, year after year. Transact therefore opposes this proposal.

Draft RAA § 33. Confidentiality. Cable & Wireless Bermuda Ltd. (“C&W”) suggests revising provisions in draft RAA § 33 indicating that confidential treatment of information does not apply to trade secrets and information submitted by the same entity requesting confidentiality.²² This is a very important comment, and Transact supports it wholeheartedly. Absent the revisions C&W has proposed, licensees will be fearful of submitting any of their own

²¹ See Logic comments at 5.

²² See C&W comments at 11.

information to the regulator as they would apparently have no assurance that the information would not be released to competitors or the public.

Draft RAA § 44 and 52. Regulatory Authority fees; Government authorization fees. In addition to preserving the fee that the Bermudian Government currently collects from licensees (referred to as “Government authorisation fees” in draft RAA § 52), the draft RAA would also subject licensees to an entirely *new* fee designed to fund the operations of the proposed RA (referred to as “Regulatory Authority fees” in § 44). Virtually every commenter has objected strongly to this proposal, explaining that increasing aggregate fees dramatically as proposed would sap innovation and cost jobs.²³ Moreover, METEC’s inability to predict the size of the potential increase – while acknowledging at the June 2010 Workshop that it could be substantial – undermines licensees’ ability to budget for future periods and requires them to reserve funds that might otherwise have been used for salaries, network upgrades, or service enhancements. Transact shares these concerns wholeheartedly, and it therefore urges METEC to limit the fee collection provisions to those necessary to fund the RA. The rest of the Bermudian Government’s operations should be financed from general contributions to the Consolidated Fund, not fees levied on communications licensees for the privilege of holding a license.

Draft RAA § 59. Resolution of disputes involving sectoral providers with significant market power. Transact has two reply comments related to draft RAA § 59. First, Telecommunications (Bermuda & West Indies) Ltd. (“Digicel”) argues persuasively in its comments that draft RAA § 59 should provide a more certain and quicker path to intervention

²³ See BTC Comments at 3, 7, 11, 172-173; Logic Comments at 1; Brasil Telecom Comments at 3; C&W Comments at 4, 12; BDC Comments at 2; Quantum Communications Comments at 3.

from the RA in the event of an unresolved dispute related to the conduct of a provider with SMP.²⁴ As Digicel observes, the current draft contains no deadline or timetable dictating when mandatory negotiations must end and RA dispute resolution begins. This omission creates the potential for protracted but fruitless negotiations that fail to address the allegedly offending conduct, to the detriment of the complaining provider and the public. Transact therefore supports Digicel's proposed revisions establishing a fixed timeline for RA intervention.

Second, C&W observes in its comments that draft RAA § 59 appears to allow for a privately negotiated resolution, even when the conduct at issue may entail violations of statute, regulations, license conditions or other legal requirements.²⁵ As C&W explains, violations of legal obligations designed to promote competition and the bills' other purposes should not be subject to back-room settlements between private entities. Accordingly, Transact suggests that METEC revise draft RAA § 59(a)(3) to require the RA to review and approve any negotiated agreement before the agreement takes effect.

Draft RAA § 96. Action for damages in the Supreme Court. Transact has three reply comments related to draft RAA § 96. First, Bermuda CableVision ("CableVision") and Logic observe correctly that the overly broad private right of action contained in this provision could invite burdensome and tactical civil litigation, and they suggest adding limits to prevent abuse.²⁶ Transact shares their concern and agrees that the bill should be revised to provide that the exercise of due care and reasonable diligence constitutes a defense to suits under draft RAA § 96. Transact does not agree, however, that the bill should permit suits to proceed only with the

²⁴ See Digicel comments at 8.

²⁵ See C&W comments at 13.

²⁶ See CableVision comments at 1; Logic comments at 2.

consent of the RA, as both CableVision and Logic propose. Moreover, Transact suggests that METEC limit liability under draft RAA § 96 to the corporate licensees themselves, enabling suits against individual officers and directors only in cases of willful misconduct or bad faith.

Second, Transact supports expanding the statute of limitations under draft RAA § 96 as North Rock suggests.²⁷ As currently drafted, draft RAA § 96 provides that an action must be commenced within two years of the date on which the alleged violation occurred. As North Rock explains, this limitation would prejudice a complainant who was unaware of a violation despite reasonable diligence because the violation was concealed in some manner. Accordingly, Transact suggests revising draft RAA § 96(2) as follows:

“Unless provided otherwise in sectoral legislation, an action may not be brought in respect of any loss or damage referred to in subsection (1) more than (a) two years after the day on which the act or omission occurred, or (b) one year after the date on which the complainant discovered or reasonably should have discovered the act or omission, whichever is later.”

Finally, Transact suggests that METEC clarify the interrelationship among draft RAA § 57 (which requires end users to pursue complaints through an RA dispute process), draft RAA § 59 (which requires licensees complaining about the behavior of dominant providers to proceed through an RA dispute process), and draft RAA § 96 (which authorizes actions for damages in the Supreme Court). As currently drafted, nothing appears to limit a complaining entity to relief pursuant to draft RAA §§ 57 or 59 when those sections apply, as opposed to seeking damages in court under draft RAA § 96. Transact suggests that METEC revise draft RAA §§ 57, 59 and 96 as necessary to clarify whether complainants pursuing disputes covered by draft RAA §§ 57 and

²⁷ See North Rock comments at 13.

59 must follow the procedures of those sections or whether they may alternatively bring suit under draft RAA § 96.

Draft RAA Part X, Draft ECA Part XII. Offences. CableVision and BDC both explain that the penalties listed in the offences sections of the draft bills are too draconian and should be reduced.²⁸ Transact fully agrees, most notably because the fines and prison terms included in the current version of the bills could scare providers to a paralytic degree, stifling innovation and service offerings. In addition to supporting the proposals for reduced penalties, Transact also endorses BDC's suggestion that the offences sections of both bills state expressly that the listed penalties apply *only* in the case of willful misconduct.

B. Reply to Comments on the Draft ECA

Draft ECA § 17. Integrated communications operating licenses. Brasil Telecom Subsea Cable Systems (Bermuda) Ltd. ("Brasil Telecom") argues that METEC should not limit itself to issuing integrated licenses authorizing service in all sectors, but should also issue sector specific licenses for providers like Brasil Telecom that do not intend to branch out into new services.²⁹ Transact has no objection to this proposal in principle, but only as long as the limited license Brasil Telecom describes is not exclusive. In other words, Transact does not oppose Brasil Telecom's suggestion provided that other providers with integrated licenses could compete in all sectors notwithstanding the issuance of sector specific licenses to certain licensees.

Draft ECA § 22. Market Power Procedures. Digicel proposes adding an analytical requirement to the current SMP review process set forth in the draft ECA. In particular, Digicel

²⁸ See CableVision comments at 2; BDC comments at 3.

²⁹ See Brasil Telecom comments at 3.

suggests that the market review procedures in draft ECA § 22 require the RA to assesses the potential for demand-side and supply-side substitution.³⁰ Transact supports this suggestion as it will ensure that the RA assesses and, where necessary, addresses the bottleneck control that facilities-based carriers have over the rest of the industry.

Draft ECA § 23. Imposition of *Ex Ante* Remedies. With respect to the market dominance remedies identified in draft ECA § 23, North Rock suggests that METEC should broaden the draft bill to ensure that the RA can employ the remedies when appropriate to promote greater competition.³¹ As currently drafted, the bill empowers the RA to employ remedies only when “necessary” to prevent or deter anti-competitive effects. Transact agrees with North Rock that the current language is too restrictive and creates a substantial risk that the RA will be unable to apply remedies that would serve competition and consumers. Transact therefore supports North Rock’s proposal to expand the text of draft ECA § 23.

Also with respect to draft ECA § 23, Logic suggests that METEC add a requirement that the RA prepare “impact assessments” before imposing any *ex ante* remedy.³² While Transact understands the desire to ensure that the RA only impose remedies in appropriate circumstances, Logic’s proposal could slow the regulatory process to a crawl. Requiring the RA to prepare impact assessments would draw out the *ex ante* remedy process to a substantial degree, and it risks creating an incentive for the RA to decline to impose remedies that have merit (simply to avoid the burden of preparing the assessments). Transact accordingly opposes adding an “impact assessment” requirement.

³⁰ See Digicel comments at 12.

³¹ See North Rock comments at 18.

³² See Logic comments at 4.

Draft ECA § 24. Withdrawal of *ex ante* remedies. Digicel suggests that the RA should implement phase-out periods when removing *ex ante* remedies it has previously imposed to address market power. As Digicel explains, a phase-out period would help ensure a smooth transition to an operating environment without the remedy in place, rather than a shock to providers and the public that could result from withdrawing a remedy overnight.³³ This is a thoughtful and reasonable suggestion, and Transact supports it.

Draft ECA § 49. Number portability. BDC argues that the bill should obligate the RA to implement number portability requirements, rather than simply allowing it to do so.³⁴ Transact fully supports this proposal. Requiring and facilitating number portability will spur competition and provide an immediate benefit to end users, as it will eliminate one of the primary barriers to consumers' ability to change service providers.

C. Reply to Comments Unrelated to Specific Sections of the Draft Bills

More consultations. Digicel argues in its comments that the RA and METEC should engage in public consultations during all decision-making processes.³⁵ Transact supports this proposal, as it would ensure providers and the public have an opportunity to be heard with respect to every decision-making process that could impact their rights and interests.

Accountability. Logic suggests that the bills require the RA to prepare an annual report detailing its operations and achievements over the course of the previous year.³⁶ This proposal directly serves the goal of transparent regulatory operations, and Transact supports it.

³³ See Digicel comments at 13.

³⁴ See BDC comments at 3.

³⁵ See Digicel comments at 4.

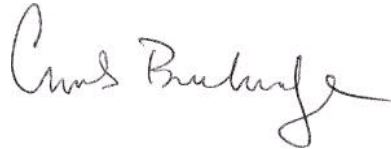
³⁶ See Logic comments at 4.

CONCLUSION

Transact urges METEC to assess each of the commenters' suggestions carefully, noting in particular the strengths and shortcomings of those various suggestions as described above. Transact looks forward to discussing the draft bills and the comments that have been submitted during the one-on-one consultations that METEC has indicated it will hold in September.

Respectfully submitted,

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