



BERMUDA  
**REGULATORY  
AUTHORITY**

**Bermuda CableVision Limited  
Model Access and  
Interconnection Agreement**

Addendum to Decision and Order

Matter: AI-1045

Date: 12 December 2013

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This Addendum discusses and contains the reasons for the Regulatory Authority's decision to adopt the final Bermuda Cablevision Model Access and Interconnect Agreement (MAIA). It deals with the changes ordered by the RA to the last version of the MAIA and the reasons for those changes.

## 1 EXECUTIVE SUMMARY AND INTRODUCTION

1. The Regulatory Authority (the “RA” or “Authority”) hereby issues this Final Decision and Order (“Decision”) modifying the Compliance Model Access and Interconnection Agreement (“Compliance MAIA”)<sup>1</sup> submitted by Bermuda CableVision Limited (“BCV”) on 8 November 2013 in compliance with Section 2.2 of the Authority’s Interim Decision and Order in the matter of Bermuda CableVision Limited Model Access and Interconnection Agreement (“Interim Decision”), Matter No. AI-1043, Issue Date: 1 November 2013. The modified Compliance MAIA adopted and approved here shall be referred to hereafter as the Final BCV MAIA, or BCV MAIA.
2. The Authority is appreciative of the efforts made by BCV as well as the other stakeholders throughout this MAIA process. The Authority would like to specifically acknowledge BCV’s timely and diligent efforts in the production of the various drafts of the MAIA. BCV’s efforts in this regard have assisted the Authority in meeting its own mandate, on behalf of the public of Bermuda, to develop a modern and relevant electronic communications regulatory framework.
3. Pursuant to its responsibility as set out in paragraph 16 of the Interim Decision, the Authority has reviewed the Compliance MAIA submitted by BCV on 8 November 2013 as well as BCV’s cover letter (“Cover Letter”) which drew the Authority’s attention to several amendments made to the Compliance MAIA concerning which BCV requested the Authority’s guidance. The Authority has also reviewed the comments and proposed alternative language regarding the Compliance MAIA that were filed by LinkBermuda Limited (“Link”) and TeleBermuda International Limited (“TBI”) on 15 November 2013 (“Compliance Comments”).
4. In consideration of the fact that parties were asked to confine their Compliance Comments to the Compliance MAIA’s conformity with the Interim Decision or to those aspects of the Compliance MAIA that, in their view, would “seriously hamper competitive entry by a wholesale access provider, would be detrimental to the public interest, or, were in contravention of the RAA, ECA or the Remedies GD”<sup>2</sup> the Authority has determined that it will specifically address only those Compliance Comments which meet those criteria in this Final Determination and Order.
5. The Authority’s review of the Compliance Comments found that many of the comments, and much of the alternative language proposed by the parties, did not reach the threshold of a “fatal flaw” as defined by the Interim Decision and repeated in the preceding paragraph. Such inputs are not considered here for incorporation into BCV’s Final MAIA.<sup>3</sup> In the event a party believes that any comment or proposed alternative language not considered by the RA is, in fact, sufficiently important as to

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<sup>1</sup> In order to ensure that there is no confusion as to the nature of the template agreement that is approved

<sup>2</sup> See paragraph 15 of the Interim Decision.

<sup>3</sup> The Authority notes that neither TBI nor Link expressly defined a proposed change as being a fatal flaw and that many of the proposed changes were either grammatical corrections, or changes the parties appeared to have wished they had made during the first round of comments. Accordingly, the RA read through the submissions and considered the marked-up versions of the MAIA provided and determined, to the best of its ability, which of the proposed changes did, indeed, constitute flaws serious enough to merit further modification of the Compliance MAIA.

require the establishment of a RAIO to supersede the MAIA approved here, that party may present those issues to the Authority during the RAIO consultation referenced at paragraph 26, below.

6. Having considered the views of the various stakeholders together with the relevant provisions of the Electronic Communications Act 2011 (“ECA”) and the Regulatory Authority Act 2011 (“RAA”),<sup>4</sup> the Authority has determined that the Compliance MAIA required modification as described in greater detail below, and as summarised in the table appearing in the attached Schedule 1.5. With these modifications BCV’s Compliance MAIA is brought into compliance with the Remedies GD, the Interim Decision, the ECA, and the RAA, and as such is approved by the Regulatory Authority as representing BCV’s final and approved Model Access and Interconnection Agreement. This MAIA, along with its associated Product Handbook, is attached here and shall also be posted on BCV’s website on the first business day following the effective date of this Final Decision and Order as per paragraph 72 of the Remedies GD.

## **2 PROCEDURAL HISTORY**

### **2.1 Background**

7. On 6 October 2009, the then Ministry of Energy, Telecommunications, and E-Commerce (“METEC”) issued a Consultation paper on “Access and Interconnection in Bermuda”.<sup>6</sup>
8. On 28 January 2012, the Regulatory Authority issued the following consultation documents:
  - (a) “Market Review Process (Part A) - Market Definition”<sup>7</sup> released 8 February 2012; and
  - (b) “Market Review Process (Part B) - Significant Market Power”<sup>8</sup> released 8 February 2012.
9. On 29 April 2013, the Regulatory Authority issued the following Consultation Summary, Final Decision, Order and General Determination:
  - (a) “Market Review Process (Part A) – Market Definitions”;<sup>9</sup> and

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<sup>4</sup> In this Final Decision and Order, except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them by the RAA, the ECA and the Interpretation Act 1951.

<sup>5</sup> If there is any conflict between the modifications presented in Schedule 1 and those presented in the body of the Final Decision and Order, the language contained in the Final Decision and Order shall prevail.

<sup>6</sup> See

[http://www.gov.bm/portal/server.pt/gateway/PTARGS\\_0\\_2\\_7286\\_330\\_1813\\_43/http%3B/ptpublisher.gov.bm%3B7087/publishedcontent/publish/min\\_telecom\\_and\\_e\\_commerce/telecommunications/telecommunication\\_regulatory\\_reform/access\\_and\\_interconnection\\_in\\_bermuda\\_consultation\\_october\\_6\\_2009\\_0.pdf](http://www.gov.bm/portal/server.pt/gateway/PTARGS_0_2_7286_330_1813_43/http%3B/ptpublisher.gov.bm%3B7087/publishedcontent/publish/min_telecom_and_e_commerce/telecommunications/telecommunication_regulatory_reform/access_and_interconnection_in_bermuda_consultation_october_6_2009_0.pdf)

<sup>7</sup> See <http://rab.bm/images/PDF/Market%20Review--Part%20A%20Market%20Definition%20130208%20.pdf>

<sup>8</sup> See <http://rab.bm/images/PDF/Market%20Review%20-%20Part%20B%20SMP%20130208.pdf>

- (b) “Market Review Process (Part B) – Significant Market Power”.<sup>10</sup>
10. On 17 May 2013, the Regulatory Authority issued the Consultation Document entitled “Obligations for Operators with Significant Market Power”, and invited comments from all interested parties.<sup>11</sup>
  11. On 21 June 2013, written responses to the Initial Remedies Consultation were provided by various parties. The Regulatory Authority posted these responses on its website.<sup>12</sup>
  12. On 15 July 2013, the Regulatory Authority issued the Consultation Document entitled “Further Consultation: Obligations for Operators with Significant Market Power – Final Draft General Determination”, again inviting comments from all interested parties.<sup>13</sup>
  13. On 7 August 2013, the Authority issued its Final Decision and Remedies GD.<sup>14</sup>
  14. Section 5.1.1 of this Remedies GD provides for a model access and interconnection (“A&I”) approval process to be followed by each SMP Operator having SMP is Market Nos. 10 through 13, 18 through 20, and 23 (as per paragraph 43 of the Remedies GD) prior to its adoption of an approved MAIA.
  15. Paragraph 71 of the Remedies GD provides that once the SMP Operator has submitted to the Authority their best and final MAIA, the Authority will consider the position papers of the SMP Operators, as well as comments submitted, and will, in due course, issue a final decision accepting or modifying the MAIA.
  16. On 27 September 2013 BCV submitted its best and final MAIA, referred hereafter as the “Draft MAIA” along with its position paper concerning all unresolved material objections to the Draft MAIA that had been raised by access seekers.
  17. In order to ensure that the approved MAIA fully reflected the Authority’s resolution of the unresolved issues between the parties, the Authority issued a Notice<sup>15</sup> on 15 October 2013, which set out a revised schedule for the model A&I approval process provided for in Section 5.1.1 of the Remedies GD.<sup>16</sup> The Notice invited all parties to submit final comments by 21 October 2013 on:
    - (a) BCV’s Draft MAIA (dated 27 September 2013); and
    - (b) BCV’s Position Paper (dated 27 September 2013).

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<sup>9</sup> See <http://rab.bm/images/PDF/861.pdf>

<sup>10</sup> See <http://rab.bm/images/PDF/862.pdf>

<sup>11</sup> Hereafter: “Initial Remedies Consultation”. See <http://www.rab.bm/images/PDF/130517%20RM01-13-900%20vfinal%5B2%5D.pdf>

<sup>12</sup> See <http://www.rab.bm/consultations-responses> Then click on “Obligations for Operators with Significant Market Power”.

<sup>13</sup> Hereafter: “Further Remedies Consultation”. See <http://rab.bm/images/PDF/130715Draft-GD-Interim-Remedies.pdf>

<sup>14</sup> See <http://www.rab.bm/images/PDF/130807-Remedies-Order-vFINAL.pdf>

<sup>15</sup> See <http://rab.bm/images/PDF/Public%20Notice%20-%20A&I%20Agreement%20DeadlinesFF.pdf>

<sup>16</sup> See <http://rab.bm/images/PDF/130807-Remedies-Order-vFINAL.pdf>

18. On 21 October 2013 comments on the Draft MAIA and Position Paper were submitted to the Authority by Cellone (“BDC”), TBI, and LinkBermuda/Quantum (“Link”).
19. On 1 November 2013, the Authority issued its Interim Decision requesting BCV to revise the Draft MAIA according to the requirements set out in the Interim Decision and to submit a copy of the revised document, the “Compliance MAIA”, to the Authority on 8 November 2013. Interested parties were directed to submit any final “fatal flaw” objections to the Compliance MAIA by 15 November 2013.
20. On 8 November 2013, BCV submitted its Compliance MAIA as directed.
21. On 15 November 2013 comments concerning BCV’s Compliance MAIA were submitted by TBI and Link.
22. On 11 Decemberr 2013, the Authority issued its Final Determination and Order in the matter of Bermuda CableVision Limited’s Model Access and Interconnection Agreement (“Final Decision”), Matter No. AI-1045 modifying BCV’s Compliance MAIA and approving the modified document as constituting the Final BCV MAIA, or BCV MAIA.

## **2.2 Procedures Concerning BCV’s Approved MAIA**

23. On the first business day following the effective date of this Final Decision and Order, as per paragraph 72 of the Remedies GD, BCV shall post on its website the Final BCV MAIA and associated Product Handbook approved and attached here. These documents will also be posted on the Authority’s website.
24. BCV shall be required to enter into A&I Agreements with any eligible access seeker that so requests no later than five business days following receipt of a written request for A&I pursuant to the BCV MAIA. Any and all pre-existing A&I agreements between BCV and ICOL holders that correspond to the SMP wholesale services covered by the BCV MAIA must be replaced by an agreement conforming to the BCV MAIA template within five business days following the effective date of the Authority’s Final Decision, absent approval of a deferral by the Authority for good cause shown.
25. It is important for all stakeholders to recognize the complexity of this MAIA approval process, which is pivotal to the transition from the old regulatory framework to the new framework established by the ECA and the RAA. The Authority is aware that the time has been short for interested parties to consider the Draft and Compliance MAIAs, but we are also cognizant that perfection in this area is elusive and must be balanced against the need for BCV’s wholesale customers to be in a position to begin providing services to End Users using the A&I products offered under an approved MAIA. If, following issuance of the Final Decision, new material issues emerge that are identified by any party or by the Authority itself, the Authority will confer with all interested parties and determine whether any amendments to the BCV MAIA are warranted under the circumstances (and bearing in mind that the development of a comprehensive RAIO may be a more efficient alternative). Alternatively, modifications may result from the resolution of any disputes that may arise under the A&I Agreements that are executed in conformity with the approved BCV MAIA.

### **2.3 Consultation on Reference Access and Interconnection Offer**

26. As set out in paragraph 75 of the Remedies GD, following the completion of the “model A&I approval process” a consultation on the establishment of reference access and interconnection offers (“RAIOs”) will, in due course, be initiated by the Regulatory Authority to:
  - (a) evaluate the merits of undertaking a RAIO proceeding in light of the results achieved by this model A&I process; and
  - (b) if it is determined that the establishment of a RAIO is necessary:
    - (i) propose a set of comprehensive RAIO Guidelines, using those presented in Annex A of the Remedies GD as a basic framework; and
    - (ii) develop a RAIO approval process.
27. To the extent that interested parties have additional concerns with the approved BCV MAIA and believe those concerns to be sufficiently grave as to require the establishment of a RAIO to supersede the BCV MAIA, parties may present those issues to the Authority during the aforementioned RAIO consultation

### 3 LEGAL FRAMEWORK AND IMPLEMENTATION OF THE MAIA

28. As background for the determinations set out in this Final Decision and Order, the Authority wishes to draw the attention of BCV and interested parties to various provisions of the RAA, the ECA and the Integrated Communications Operating Licence (“ICOL”) that are relevant to A&I agreements involving ICOL holders with SMP in a relevant market.
29. The basis for the Authority’s Remedies GD is found in ECA Sections 24 and 74(b)(ii). In accordance with the transitional provisions of ECA Section 74(b) and pursuant to ECA Section 24(1)(e), SMP operators may be required to provide access and interconnection obligations subject to terms and conditions that are “transparent, including the publication of reference interconnection and access offers, pursuant to a framework approved by the Authority.” Moreover, pursuant to ECA Section 24(1)(f)(ii), SMP operators may also be required to provide wholesale services, facilities and information to other parties “under the same conditions and of the same quality as it provides for its own internal purposes or to those of its divisions, subsidiaries, partners or affiliates.” This non-discrimination or equivalency of access obligation is reinforced by Clause 11.2 of the ICOL.
30. ECA Section 24(3)(a) requires a full and complete copy of any access or interconnection agreement entered into with an SMP operator and relating to SMP services to be filed with the Authority within three business days following its execution, after which the Authority shall have 60 days to object to any provision that it concludes is unreasonably discriminatory or contrary to the interests of consumers, and initiate adjudication procedures to resolve the matter.
31. ECA Section 24(3)(b), together with RAA Section 58, establishes the Authority as the competent authority in the first instance to resolve any disputes relating to an access and interconnection agreement to which an SMP operator is a party. Because such agreements and any modifications to them are subject to regulation by the Authority in the public interest and to ensure that the SMP operator’s non-discrimination obligations are met in relation to all access seekers, the independent arbitration of disputes between the parties to any such agreement is prohibited by ECA Section 24(3)(b).
32. In the Final Decision accompanying the Remedies GD, the Authority determined that:
  453. ... the development of comprehensive RAIOS should be achieved in two steps. Under Step 1, the satisfactory completion of which is a pre-condition for ICOL liberalization under ECA Section 73(5)(a), the Authority concludes that SMP operators should use their existing interconnection agreements as a starting point to develop model A&I agreements.
  454. The required model A&I agreements shall meet all of the following conditions:

- (a) where an SMP operator that is subject to this obligation<sup>17</sup> is supplying A&I, but applying different terms and conditions when offering the same services to different Access Seekers, the most favourable provisions relevant to a particular A&I service shall be offered to all Access Seekers on a non-discriminatory basis;
  - (b) the applicable retail-minus pricing requirements set forth in the General Determination must be implemented as of the effective date; and
  - (c) any material terms and conditions that the Authority determines are inherently unfair or anticompetitive must be removed or modified by the SMP operator.
33. The BCV MAIA will serve as a prototype reference offer that may eventually be replaced by a comprehensive RAIO if the Authority determines, following consultation with stakeholders, that there are significant shortcomings in the BCV MAIA that must be resolved. The MAIA approved by the Authority here will serve as the template for any bilateral A&I Agreements between BCV and access seekers that cover BCV's relevant SMP wholesale service offerings. When entering into A&I Agreements with access seekers, there should be no deviation from the MAIA template approved by the Authority here unless there is an objective justification for doing so and the effect is not unduly discriminatory. Any such deviation would be subject to objection by the Authority pursuant to ECA Section 24(3)(a).
34. In order to facilitate review of any deviations from the MAIA template approved of here, BCV shall be required to provide a statement that identifies and fully explains any such deviations when it files with the Authority the required copy of any relevant bilateral access and interconnection agreement entered into by the company and an access seeker in accordance with ECA Section 24(3)(a). Pursuant to the Authority's powers under ECA Section 33(3), these procedural requirements shall apply to all of the terms and conditions contained in the BCV MAIA and the related A&I Agreements between the parties, regardless of whether they fall within the scope of the Authority's SMP finding.
35. BCV shall be required to enter into A&I Agreements with any eligible access seeker that so requests no later than five business days following receipt of a written request for A&I pursuant to the BCV MAIA. Any and all pre-existing access and interconnection agreements between BCV and ICOL holders that correspond to the SMP wholesale services covered by the MAIA must be replaced by an agreement conforming to the MAIA template within five business days following the effective date of this Final Decision, absent approval of a deferral by the Authority for good cause shown.

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<sup>17</sup> We note that only BTC and BCV will be subject to this obligation unless Digicel or BDC elect to provide wholesale mobile services and, therefore, trigger this obligation. All references to "SMP operator" in Section 5.1 [of the Remedies GD] shall be interpreted accordingly.

## **4 DISCUSSION OF ISSUES RAISED BY PARTIES CONCERNING BCV'S COMPLIANCE MAIA**

36. The discussion that follows addresses the comments submitted by BCV and potential access seekers in connection with BCV's Compliance MAIA.
37. In consideration of the fact that parties were instructed to confine their Compliance Comments to the Compliance MAIA's conformity with the Interim Decision or to those aspects of the Compliance MAIA that, in their view, would "seriously hamper competitive entry by a wholesale access provider, would be detrimental to the public interest, or, were in contravention of the RAA, ECA or the Remedies GD" the Authority has determined that it will specifically address only those Compliance Comments which meet those criteria in this Final Determination and Order.
38. The Authority's review of the Compliance Comments found that many of the comments, and much of the alternative language proposed by the parties, did not reach the threshold of a "fatal flaw" as defined by the Interim Decision and repeated in the preceding paragraph. Such inputs are not addressed below and thus were not considered for incorporation into BCV's Final MAIA.
39. The issues discussed below are generally set out in the order of their appearance in the Draft MAIA. However, in some cases issues have been grouped, or addressed in non-sequential order, because the issues being discussed are common to multiple clauses.

### **4.1 Clause 2 Definitions and Interpretation**

#### **4.1.1 Generally**

40. According to Link, Section 4.21.1.1 of the Interim Decision requires BCV to incorporate all material provisions of the Product Handbook in the MAIA. Link also understands Paragraph 65 of the RA's "General Determination on Obligations for Operators with Significant Market Power, RM01/13-1040 ("Remedies GD") as requiring the prices for Services also be incorporate in the MAIA. To ensure that the MAIA incorporates all required paragraph 65 of the Remedies GD terms and conditions in a manner that is clearly set out in the MAIA itself, Link requests that both the Product Handbook and Price Lists be physically attached to the MAIA. Link asserts that this will eliminate any doubt, uncertainty or confusion between the parties regarding these material issues. Link believes this approach will not inhibit BCV's right to make changes to these Annexes on the terms permitted under the MAIA. Importantly, Link claims this approach will give the CP assurance that it has in writing all of the material terms and conditions to which it is subject and on what basis they can be changed. Otherwise, Link claims the CP will have no knowledge of changes to these material documents.
41. Previously, BCV offered a Price Lists attachment to the MAIA materials and Link requests that schedule be appended as Annex 5 to the MAIA. The Final MAIA contains the Annex 5 which includes BCV's approved Price List.
42. With respect to the Product Handbook, Link acknowledges BCV's comment that the handbook contains product descriptions and other information that is not required for inclusion in the MAIA pursuant to Paragraph 65 of the Remedies GD ("Non-Paragraph 65 Provisions"). Link agrees with this observation. However, Link does not agree that this should cause the exclusion of material terms and conditions

directly in the MAIA. Link therefore proposes that BCV be required to either (a) strip out the Non-Paragraph 65 Provisions from the Product Handbook, thus leaving only the material terms and conditions mandated for inclusion in Paragraph 65 of the Remedies GD (“Paragraph 65 Provisions”), or (b) strip out the Paragraph 65 Provisions from the Product Handbook and directly incorporate them elsewhere in the MAIA.

43. Based on the foregoing, Link requests the following revisions in the Index at the beginning of the MAIA:

ANNEXES

ANNEX 1: INTERPRETATION & DEFINITIONS

ANNEX 2: BILLING & PAYMENT

ANNEX 3: PRODUCT SCHEDULE(S): INTERCONNECTION;  
DATA SERVICES; VIDEO

SERVICES AND ALL ATTACHED APPENDICES;

ANNEX 4: SERVICE LEVEL AGREEMENT

**ANNEX 5: PRICE LIST**

**ANNEX 6: PRODUCT HANDBOOK**

44. Similarly, Link requests the following revisions in Sections 2.5, 2.6, and 2.7:

2.5 This MAIA comprises the following contractual documents:

(a) General Terms & Conditions, comprising these general terms and conditions;

(b) Annexes:

i. Annex 1: Interpretation & Definitions;

ii. Annex 2: Billing & Payment;

iii. Annex 3: Details of Service, including Planning and Operations Appendices;

iii. Annex 4: Service Level Agreement;

**iv. Annex 5: Price List; and**

**v. Annex 6: Product Handbook.**

(c) relevant Order (as accepted by BCV and signed by the Parties);

~~(d) Product Handbook.~~

2.6 Unless specifically stated otherwise in this MAIA the following documents (if applicable) do not contractually form part of the MAIA:

(a) Product and Service Manuals; ~~and~~

~~(b) Price Lists~~

2.7 Unless expressly stated otherwise if there is a conflict between the following, the order of precedence shall be, in descending order, the:

- (a) General Terms & Conditions;
- (b) Annexes to the General Terms & Conditions;
- (c) Order (as accepted by BCV and signed by the Parties).;
- and
- ~~(d) Product Handbook.~~

#### 4.1.1.1 Determination

- 45. We agree that it is essential for the MAIA, and any resulting A&I agreement, to include the price list for the products and services being provided. Therefore, we revise Clause 2.5 (b) to include sub-clause “iv. Annex 5: Price List” and require BCV to attach its approved retail price list, along with associated wholesale prices at retail minus 15% as part of its MAIA and in all A&I agreements. Upon closer examination of the SMP General determination, the RA takes the view that the price cap requirement placed on BCV in the Broadband Market can be altered upon an affirmative showing that prices are not recovering historical costs (4.1.2.1 para 26(a)). For this reason the indication made in the footnote at paragraph 118 of the Interim Decision in this matter that a price increase will only be made after consultation open to all parties is incorrect.
- 46. We do not agree with Link’s proposal to include the Product Handbook as Annex 6 to the MAIA. We find the current treatment of the Product Handbook to be sufficient and consistent with the Interim Decision.
- 47. For the reasons stated in the preceding paragraphs, we have chosen to modify the Index at the beginning of the Compliance MAIA to read as follows:

*ANNEXES*

*ANNEX 1: INTERPRETATION & DEFINITIONS*

*ANNEX 2: BILLING & PAYMENT*

*ANNEX 3: PRODUCT SCHEDULE(S): INTERCONNECTION;  
DATA SERVICES; VIDEO*

*SERVICES AND ALL ATTACHED APPENDICES;*

*ANNEX 4: SERVICE LEVEL AGREEMENT*

*ANNEX 5: PRICE LIST*

- 48. For similar reasons we have chosen to modify Clauses 2.5, 2.6, and 2.7 of the Compliance MAIA to read as follows:

*2.5 This MAIA comprises the following contractual documents:*

- (a) General Terms & Conditions, comprising these general terms and conditions;*
- (b) Annexes:*
  - i. Annex 1: Interpretation & Definitions;*

- ii. *Annex 2: Billing & Payment;*
  - iii. *Annex 3: Details of Service, including Planning and Operations Appendices;*
  - iii. *Annex 4: Service Level Agreement; and*
  - iv. *Annex 5: Price List.*
- (c) *relevant Order (as accepted by BCV and signed by the Parties);*
- (d) *Product Handbook.*

2.6 *Unless specifically stated otherwise in this MAIA the following documents (if applicable) do not contractually form part of the MAIA:*

- (a) *Product and Service Manuals.*

2.7 *Unless expressly stated otherwise if there is a conflict between the following, the order of precedence shall be, in descending order, the:*

- (a) *General Terms & Conditions;*
- (b) *Annexes to the General Terms & Conditions;*
- (c) *Order (as accepted by BCV and signed by the Parties);*  
*and*
- (d) *Product Handbook.*

## **4.2 Clause 3 Commencement, Duration & Term**

### **4.2.1 Clause 3.2(d)**

49. TBI seeks to clarify the meaning of this clause by including a reference to the force majeure defined termination right in clause 17.4.

50. Specifically, TBI has proposed the following revision:

3.2 A Party may, acting reasonably having regard to the circumstances, terminate by written notice to the other Party this MAIA immediately if:

- (a) the other Party is determined to be Insolvent by a competent authority;
- (b) the other Party ceases to be eligible at law and/or under regulation to receive or provide the Service;
- (c) the other Party ceases to carry on business; or
- (d) a right of termination **under clause 17.4** arises for an event of Force Majeure affecting the Service.

#### 4.2.1.1 Determination

51. We agree with TBI's proposal as the clarity of this clause is improved with the addition of the proposed language and we modify the Compliance MAIA to adopt the wording proposed by TBI for clause 3.2(d) as it appears in paragraph 50.

#### 4.2.2 Clause 3.4(a)(vi)

52. TBI argues that BCV should not have a right to terminate a service by reason of its own action in modifying its services and/or facilities. TBI argues that such a right should be limited to the CP.
53. Consistent with this argument TBI proposed the following revision:

3.4 A Party may, acting reasonably having regard to the circumstances, terminate by written notice to the other Party a Service in whole or in part, subject to prior notice to and written approval by the RA in cases where termination is by BCV:

(a) immediately if

...

vi. modification by BCV of service or facilities results in a material deterioration in quality of the Service (provided that only the CP may terminate for this reason); or

...

#### 4.2.2.1 Determination

54. We agree with TBI that only the CP should be permitted to terminate a service if BCV's modification of its service or facilities causes a material deterioration in the quality of Service. To allow BCV such a right of termination could permit anticompetitive practices on the part of the wholesale access provider.
55. We amend clause 3.4(a) (iv) to adopt the wording proposed by TBI as reflected in paragraph 53.

#### 4.2.3 Clause 3.5

56. TBI proposed the following revision:

3.5 If the RA issues a General Determination concluding that BCV does not have SMP in relation to the market to which the Service relates and as a result of that, or any other, direction or notification of the RA, BCV is no longer obliged to provide the Service, BCV may terminate the Service on reasonable notice or in conformity with the minimum transitional period(s) specified by the RA in its General Determination removing the relevant SMP obligations.

#### 4.2.3.1 Determination

57. Although TBI did not explain why it proposed to revise Clause 3.5 we find that the reason is self-explanatory and the inserted text is necessary to provide clarity. As such, we modify Clause 3.5 as proposed by TBI in paragraph 56.

#### 4.2.4 Clause 3.7

58. TBI claims that BCV's communication with CP customers should only be permitted where the CP has ceased to carry on business. TBI notes that a situation of technical insolvency could arise, including where a scheme of arrangement or other compromise with creditors is proposed by the CP, where the CP continues to carry on business and provide the service to end users. TBI argues that in such circumstances it would be inappropriate for BCV to communicate with a CP's customers.
59. TBI proposed the following revisions:
- 3.7 If BCV terminates this MAIA, BCV may:
- (a) if and to the extent permitted in advance by the RA in writing in the event that the CP ~~becomes insolvent~~ **ceases to carry on business or becomes** otherwise incapable of serving its customers; or
- (b) with the written approval of the CEO or other duly authorized representative of the CP, acting in conformity with ECA Section 31;
- communicate directly with End Users to inform them **only** of the termination of the Service and how this may affect the communications services they receive from the CP and/or BCV including the options available to End Users in order to avoid disconnection or interruption to existing communications services. This sub-clause survives termination of the MAIA.
60. Link proposes the insertion of "electronic" before "communications services" in the second to last sentence in Section 3.7. Link maintains that this change is consistent with the Interim Decision, including the general instruction appearing at Footnote 20 thereof.<sup>18</sup>

##### 4.2.4.1 Determination

61. We agree with the revisions proposed by TBI and Link. We believe that a CP should be given the opportunity to satisfy its creditors in the event it becomes insolvent and is otherwise capable of carrying on its business. Allowing BCV to contact the CP's customer at the moment the CP becomes insolvent, without regard to any agreement the CP has, or will reach, with its creditors while it is still a going concern, would undermine the ability of the CP to resolve its insolvency and could result in confusion as the retail customer receives communications from both the CP and BCV.
62. Thus, for the purposes of Clause 3.7(a) insolvency of the CP should not permit BCV to contact the customers of a CP unless said CP ceases to carry on business or becomes otherwise incapable of serving its customers. Therefore, we adopt the revisions proposed by TBI in paragraph 59, and furthermore, for the reasons stated by Link, we also insert the word "electronic" before "communications services" in the penultimate sentence of Clause 3.7(a).

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<sup>18</sup> In footnote 20 the Authority acknowledged that the interim determinations it provided could require BCV to propose slight modifications to the provided language to resolve conflicts.

#### 4.2.5 Clause 3.10

63. Clause 3.10 of the Compliance MAIA provided by BCV included a reference to “Clause 12.2 (a) or (c)”. TBI, in its redline version of this clause, proposed eliminating the reference to 12.2(a).

##### 4.2.5.1 Determination

64. We reject TBO’s proposal as Clause 12.2 as provided in BCV’s Compliance MAIA and as approved in this Order does not contain a sub-clause (c). We find that the appropriate reference should be to Clause 12.2 (a) and (b). As such we revise Clause 3.10 to read as follows:

3.10 For the avoidance of doubt, in the event either Party has a right to terminate the MAIA or to suspend the Service, the dispute resolution process in Clause 12 of this MAIA will not operate to extinguish, override or otherwise hinder the exercise of that right save for a determination issued by the RA or by the courts on appeal from such determination in accordance with Clause 12.2 (a) or (b).

#### 4.2.6 Clause 3.12(c)

65. TBI maintains that this clause should, as in Clause 3.2, confer the suspension right to an objective determination of insolvency by a competent authority. TBI also argues that an objective standard should be applied in the last paragraph of this clause, rather than a judgment by BCV alone.

66. TBI proposed the following revision:

3.12 Without prior notice to the CP, BCV may, after notifying the RA, immediately suspend the supply of the Service, in whole or in part, if:

...

(c) the CP is determined **by a competent authority** to be Insolvent, and the RA has given its prior written approval

and shall take reasonable endeavours to advise the CP's relevant Contact prior to the suspension in respect to subclause (a) and attempt prompt resolution and otherwise at or around the time of the suspension and shall give the CP written confirmation of any such suspension under this clause as soon as is reasonably possible (and no later than the Working Day following the suspension), including reasons for such suspension.

To the extent that BCV suspends the Service for more than 12 consecutive hours, the CP shall be released to the equivalent extent from its obligations to pay Charges for such Services, unless ~~BCV reasonably believes~~ the suspension was attributable (in whole or in part) to the CP's action or inaction in which event BCV shall notify CP in writing with sufficient detail to support such belief. The CP may initiate a Billing Dispute in connection with any such Charges.

#### 4.2.6.1 Determination

67. We agree with TBI's arguments for the reasons it provided and modify Clause 3.12 as proposed by TBI in paragraph 66.

### 4.3 Clause 5 Charging For Services

#### 4.3.1 Clause 5.2

68. BCV expressed concern with a change it was required to introduce in relation to price changes.<sup>19</sup> BCV maintains that the Interim Decision directed BCV to agree not to change prices during an Order. However, BCV notes that an Order is for a Service, and a Service can last indefinitely. Accordingly, BCV is concerned that the language required by the Interim Decision means BCV can never change prices during the entire term of the MAIA. BCV does not think this was the RA's intention as BCV claims it contradicts the provisions permitting price changes when and if permitted, for example, by the RA.
69. BCV proposed language that it believes is consistent with the Regulatory Authority's intention; however, BCV requested clarification from the RA. BCV accepts that the MAIA should provide that there can be no changes in price during any billing cycle but it challenges the concept that there can be no price changes for the entire time period that a Service is being provided.
70. BCV proposed the following revisions to Clause 5.2:
- 5.2 BCV may from time to time vary the Charge only as permitted in Section 4.1.3 of the Remedies GD and such new Charge shall take effect on the effective date, being a date not less than 90 calendar days after the date of notification to the CP **provided that BCV may not increase the Charges for a Service during the term of any existing Order that embodies a specific price commitment from BCV in exchange for a volume, term or other loyalty commitment from the CP.**
71. Link disagrees with BCV's proposed revision and argues that the RA's decision in Section 4.3.2.1 (para 75) of the Interim Decision requires that Clause 5.2 of the MAIA read as follows:
- 5.2 BCV may from time to time vary the Charge only as permitted in Section 4.1.3 of the Remedies GD and such new Charge shall take effect on the effective date, being a date not less than 90 calendar days after the date of notification to the CP. ~~[provided that BCV may not increase the Charges for a Service during the term of any existing Order that embodies a specific price commitment from BCV in exchange for a volume, term or other loyalty commitment from the CP.]~~
72. We note that the issue raised by the parties with respect to Clause 5.2 is also relevant to Clause 16.4. For that Clause BCV also proposed new language to clarify its ability to implement price changes.

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<sup>19</sup> See BCV Cover Letter Item (4).

73. Regarding BCV's proposed modifications to Clause 16.4, Link deferred comment pending the RA's review. However, Link noted that as currently drafted Clause 16.4 is difficult to parse and may cause some confusion and controversy going forward.

#### 4.3.1.1 Determination

74. We agree with BCV that the language the RA provided for Clause 5.2 at paragraph 75 of the Interim Decision could result in BCV being unable to change prices during the full term of any A&I Agreement that utilized the MAIA template. BCV is correct in suggesting that this was not the intent of the RA, and that such an outcome contradicts the provisions permitting price changes, for example, when approved by the RA. Given the similarities between Clauses 5.2 and 16.4, and the resulting confusion caused by the existing language, the Regulatory Authority has decided to address both issues with the addition of identical sub-clauses in Clauses 5.2 and 16.4.
75. Clause 5.2 is revised as follows:

5.2 BCV may amend the Price List or add new charges thereto at any time at its sole discretion, subject to any applicable regulatory obligations, provided that such new charges and/or amendments will (unless regulatory obligations otherwise require) only become effective on the lapse of 90 calendar days from the date on which BCV notified the other Party in writing of such amendments and/or new charges; and in any event, with the exception of price increases for Services for which BCV has been determined by the RA to have SMP (which prices may be modified in accordance with the RA's "Remedies Determination" issued on August 7, 2013), BCV may not increase the Charges for a Service:

- (a) during the term of any existing Order that embodies a specific price commitment from BCV in exchange for a volume, loyalty, or other term commitment from the CP; and
- (b) mid-way through a billing cycle.

76. Clause 16.4 is revised as follows:

16.4 Without prejudice to anything contained in this clause, BCV may amend the Price List or add new charges thereto at any time at its sole discretion, subject to any applicable regulatory obligations, provided that such new charges and/or amendments will (unless regulatory obligations otherwise require) only become effective on the lapse of 90 calendar days from the date on which BCV notified the other Party in writing of such amendments and/or new charges; and in any event, with the exception of price increases for Services for which BCV has been determined by the RA to have SMP (which prices may be modified in accordance with the RA's "Remedies Determination" issued on August 7, 2013), BCV may not increase the Charges for a Service:

- (a) during the term of any existing Order that embodies a specific price commitment from BCV in exchange for a volume, loyalty, or other term commitment from the CP; and

(b) mid-way through a billing cycle.

77. We find these revisions consistent with, and clarify, our intentions with respect to Clauses 5.2 and 16.4, and the whole of the Interim Decision.

#### 4.3.2 Clause 12.5

78. As pointed out by Link in its Compliance Comments, BCV's Compliance MAIA does not contain Clause 12.5 as required per Section 4.5.1.1.1 of the Interim Decision.

##### 4.3.2.1 Determination

79. We require that the following Clause 12.5 be included in BCV's Final MAIA:

*12.5 Any administrative charges payable to the RA for costs incurred in resolving the dispute shall be shared equally by the Parties unless the RA determines otherwise.*

#### 4.4 Clause 18 Limitation Of Liability

##### 4.4.1 Clauses 18.2 and 18.13

80. TBI argues that clarification of Clause 18.2 subpart (b) is required so as to make it plain that the limitation of liability being referred is a limitation to forms of loss other than damage to physical property. To that end TBI proposes that Clause 18.2 subpart (b) be modified as follows:

18.2(b) ~~The~~ For all other forms of loss, the greater of:

81. TBI goes on to argue that BCV's addition of subpart (c) to this clause, is not appropriate as it is in reference to the service level credits provided for in Annex 4, which are an operational/ordinary course of service compensation mechanism, and are not relevant or appropriate to loss limitation for breach of the MAIA terms.

82. Link points out that BCV's addition of subpart (c) to Clause 18.2 was not required by paragraph 124 of the RA's Interim Decision and is a new modification to the Compliance MAIA proposed by BCV. Link argues, with respect to BCV's proposed modification, that the following additional language should be added to ensure a CP is able to trigger other contractual rights beyond Service Level credits where appropriate:

18.2(c) The amount provided for in connection with a Service Level Agreement and/or Service Level Credit pursuant to Annex 4 without prejudice to a Party's right to claim breach of this MAIA under Clause 3.4 based on repeated breaches of the Service Level Agreement and/or Service Level Credit such that the repeated breaches can be considered to constitute a material breach.

83. Link goes on to argue that its proposed modification is fair and otherwise consistent with BCV's rights under Clause 3.13(b) and that if its proposed modification is adopted, then it would have no other objections to BCV's proposed insertion of subpart (c) to Clause 18.2.

#### 4.4.1.1 Determination

84. Our review of the modifications made by BCV to Clause 18—Limitation of Liability indicates, as noted by Link, that BCV had made the following additions to this Clause, which additions were not required by our Interim Decision:

18.2(c) The amount provided for in connection with a Service Level Agreement and/or Service Level Credit pursuant to Annex 4;  
and

18.13 Notwithstanding any other provision of this MAIA, BCV's liability to a CP for any service outage covered by the Service Level Agreement set out in Annex 4 shall be limited to the Service Level Credits associated with such service outage as provided for in Annex 4.

85. BCV provided no discussion in support of these modifications nor any explanation as to their intent in placing them within Clause 18. We suspect BCV's intent in making these modifications was to take into account any potential liability impact that could arise due to the Interim Decision's requirement that copies of all sections relating to Service Level Agreements and associated Service Level Credits appearing in the Product Handbook also appear in the MAIA. Taking this assumption as the start of our analysis, we must then determine whether BCV's proposed addition of Clauses 18.2(c) and 18.13 is appropriate or not.
86. To begin with, we find ourselves in agreement with TBI concerning Clause 18.2(c). Clause 18.2 concerns loss limitations for a Party's breach of the terms of the MAIA, while the reference in BCV's proposed Clause 18.2(c) is more concerned with compensation/penalties for failure to meet various service level provisioning commitments and so is more appropriately associated with the more everyday operational business procedures and practices having to do with service level agreement compensation mechanisms. As such, as TBI correctly points out, BCV's proposed Clause 18.2(c) is neither relevant nor appropriate to loss limitation for breach of the MAIA terms.
87. Furthermore, we believe that Clause 18.2(c) is redundant and unnecessary given that Clause 18.2 expressly states that either Party's liability to the other under or in connection with a breach of this MAIA for direct loss or damage arising from any one incident or series of connected incidents is subject at all times to Clause 18.13, which states that BCV's "liability to a CP for any service outage covered by the Service Level Agreement set out in Annex 4 shall be limited to the Service Level Credits associated with such service outage as provided for in Annex 4."
88. Accordingly, we have chosen to modify the Compliance MAIA by removing Clause 18.2(c). Additionally, we find merit in TBI's proposed modification to Clause 18.2(b) and so have chosen to modify the Compliance MAIA by revising Clause 18.2(b) as proposed by TBI. As a result of these modifications, we replace Clause 18.2 of the Compliance MAIA with the following:

*18.2 Save for breach of Clauses 14 and 15 as per Clause 18.5 below, and subject at all times to Clause 18.13 below, unless this MAIA expressly states otherwise, either Party's liability to the other under or in connection with a breach of this MAIA for direct loss or damage arising from any one incident or series of connected incidents is limited to:*

- (a) \$1 million for loss of, or, damage to physical property;
- (b) For all other forms of loss, the greater of:
  - i. Amounts due under this MAIA; and
  - ii. An amount equal to the most recent three (3) months' payments made by the CP to BCV hereunder; and
  - iii. \$100,000.

89. Turning our attention to Clause 18.13, we note that neither TBI nor Link objected to its placement in Clause 18, nor do we have any objection to its placement there. However, we believe that the amendment to Clause 18.2(c) proposed by Link ought to be added to the end of Clause 18.13. We propose this modification because we believe a CP ought to have the right to claim that a breach of the MAIA has occurred if it experiences repeated breaches of the Service Level Agreement and/or Service Level Credit such that the repeated breaches can be considered to constitute a material breach.
90. Accordingly, we have chosen to modify the Compliance MAIA by revising Clause 18.13 to read as follows:

*18.13 Notwithstanding any other provision of this MAIA, BCV's liability to a CP for any service outage covered by the Service Level Agreement set out in Annex 4 shall be limited to the Service Level Credits associated with such service outage as provided for in Annex 4. The foregoing is without prejudice to a Party's right to claim breach of this MAIA under Clause 3.4 based on repeated breaches of the Service Level Agreement and/or Service Level Credit such that the repeated breaches can be considered to constitute a material breach.*

#### **4.4.2 Clause 18.7**

91. TBI argues that Clause 18.7 ought to be modified as follows:
- ~~18.7 The CP is advised to obtain its own business continuity insurance to provide protection with respect to harm from business interruptions outside the scope of BCV's potential liability under this MAIA, and in consideration of the fact that in any given case, even if BCV might ultimately be held liable to CP in accordance herewith, for some period of time CP and BCV may reasonably and in good faith disagree with respect to whether BCV is liable to CP at all. Each Party warrants to the other that they shall insure against property owners and general liability (including public liability) in an amount not less \$1 million~~
92. TBI asserts that its proposed deletion is necessary as its inclusion in this clause would suggest that BCV would not be liable in respect of periods of default during which a dispute remains unresolved. TBI goes on to point out that if BCV is ultimately found liable, the liability for default will apply, subject to the agreed upon liability limitations, for the entire default period.
93. Link also proposes modifications to Clause 18.7, which are as follows:

18.7 The CP is advised to obtain its own business continuity insurance **as it deems appropriate under the circumstances and in any event, CP has no obligation to insure against defaults by BCV.** ~~to provide protection with respect to harm from business interruptions outside the scope of BCV's potential liability under this MAIA, and in consideration of the fact that in any given case, even if BCV might ultimately be held liable to CP in accordance herewith, for some period of time CP and BCV may reasonably and in good faith disagree with respect to whether BCV is liable to CP at all.~~ Each Party warrants to the other that they shall insure against property owners and general liability (including public liability) in an amount not less \$1 million.

94. Link argues that the modifications proposed above better reflects the RA's position as set out in Section 4.10.2.1 of the Interim Decision.

#### **4.4.2.1 Determination**

95. At Section 4.10.2.1 of our Interim Decision we directed BCV to "...modify the language of Clause 18.7 in a manner that makes it clear that a CP is not required to obtain insurance to protect against defaults by BCV." The modification to this clause proposed by BCV in response to the direction provided by our Interim Decision, while a worthy effort, is, in our opinion, somewhat more confusing and less concise than it ought to be.
96. We find the modification to this clause proposed by TBI to be sensible for the reasons supplied by TBI and also because the language TBI proposes deleting does nothing to make "...it clear that a CP is not required to obtain insurance to protect against defaults by BCV."
97. We also find merit in some of the additional language proposed by Link as it clearly makes the point that a "...CP has no obligation to insure against defaults by BCV" just as our Interim Decision directs.
98. For the reasons given above, we have chosen to modify the Compliance MAIA by replacing the version of Clause 18.7 contained therein with the following:

*18.7 While the CP is under no obligation to insure against defaults by BCV, it is nevertheless advised to obtain its own business continuity insurance to provide protection with respect to harm from business interruptions outside the scope of BCV's potential liability, as it deems appropriate under the circumstances. Each Party warrants to the other that they shall insure against property owners and general liability (including public liability) in an amount not less \$1 million*

#### **4.5 Clause 21 Works & Equipment**

##### **4.5.1 Clause 21.7(d)**

99. Link argues that while Clause 21.7(d) does express the literal language of Section 4.12.2 of the Interim Decision, Link is of the opinion that the RA did not intend to restrict the scope of the anti-disparagement clause the RA proposed in this section in such a literal fashion. Accordingly, Link suggest the following modification to Clause 21.7(d):

21.7(d) be trained and instructed to not make any disparaging remarks about the CP ~~as a competitor or supplier.~~

#### 4.5.1.1 Determination

100. At Section 4.12.2, paragraph 137, of our Interim Decision, we stated:

137. We do believe, however, that Clause 21 would be strengthened by the addition of a “no disparagement” clause requiring BCV personnel to explain clearly on whose behalf they are working (the CP’s) and committing that such personnel should be trained and instructed not make any disparaging remarks about the CP as a competitor or supplier. BCV should include add language to this effect to Clause 21.7 as subpart (d) of that clause.

101. While BCV’s addition of subpart (d) to Clause 21.7 complies in part to what we required at paragraph 137 of the Interim Decision, we find that it does not comply as fully as we would like. Additionally, on further reflection, we find that we are in agreement with Link that our original language in paragraph 137 to the effect that “...personnel should be trained and instructed not make any disparaging remarks about the CP as a competitor or supplier.” is unnecessarily restrictive and ought to be changed. Accordingly, we have chosen to modify the Compliance MAIA by replacing the version of Clause 21.7(d) contained therein with the following:

*21.7(d) trained and instructed to explain clearly that they are working on behalf of the CP whose service and/or equipment they are installing, troubleshooting, repairing or otherwise attending to and to not make any disparaging remarks concerning the CP on whose behalf they are working.*

## 4.6 Annex 1: Interpretation & Definitions

### 4.6.1 Clause 2.1

#### 4.6.2 “Confidential Information”

102. Link points out that the definition for “Confidential Information” provided in Annex 1, Clause 2.1 of the Compliance MAIA is not in compliance with the modifications required by the RA at Section 4.2.4.1 of its Interim Decision in that the definition does not contain the following concluding sentence required by that section:

**For purposes of this definition, all End User information shall be deemed the Confidential Information of the CP.**

#### 4.6.2.1 Determination

103. For purposes of compliance with Section 4.2.4.1 of the RA’s Interim Decision, the following concluding sentence has been added to the definition of “Confidential Information” contained in the Compliance MAIA:

*For purposes of this definition, all End User information shall be deemed the Confidential Information of the CP*

#### 4.6.3 “Early Termination Charge”

104. Link argues that for consistency with Section 4.2.5.1 of the Interim Decision, and for purposes of internal consistence within the MAIA, the definition for “Early Termination Charge” ought to be modified to include the amount of the early termination charge specified at Clause 3.8. Accordingly, Link proposes the following definition for “Early Termination Charge”:

**“Early Termination Charge”** a termination charge payable by the CP under the MAIA **equal to CP’s most recent month’s invoice from BCV** ~~as specified in any applicable price list for the premature termination of the Service.~~

##### 4.6.3.1 Determination

105. We find the modification proposed by Link to be a sensible one and one which does serve the purpose of making BCV’s MAIA more consistent in all its parts. For this reason we chosen to alter the definition of “Early Termination Charge” contained in the Compliance MAIA as follows:

**“Early Termination Charge”** *a termination charge payable by the CP under the MAIA equal to CP’s most recent month’s invoice from BCV.*

#### 4.6.4 “Mediation”

106. Link takes issue with the mediation process described in the definition for the terms “Mediate” and “Mediation” found in Annex I of the Compliance MAIA. According to Link, the last sentence of the definition provided for these terms should be struck from that definition. The sentence in question reads as follows:

If and only if both Parties mutually agree, the findings and conclusions of the Mediation Panel may be made available to the RA if there is a need to refer the dispute to the RA for resolution.

107. In support of its request Link points out that the mediation process proposed by BCV here will require parties to expend considerable time and expense to engage in mediation once they have chosen to do so. Given this, Link argues, it seems sensible that any findings and conclusions resulting from the mediation should be shared with the RA if any party, being dissatisfied with the results of the mediation, feels the need to refer the dispute to the RA for resolution. And it is for this reason asks for the removal of the last sentence from the definition.

108. Alternatively, Link proposes dispensing with BCV’s recommendation to form a Mediation Panel altogether.

##### 4.6.4.1 Determination

109. The mediation process described in Annex I of the Compliance MAIA in the definition for the terms “Mediate” and “Mediation” was originally devised by the RA in response to TBI’s contention that the mediation process contained in BCV’s Draft MAIA needed further definition. The RA agreed with TBI that further definition of this process was required and so, at paragraph 86 of its Interim Decision and Order, the RA required BCV to provide the definition of “Mediate” and “Mediation” that now appears in Annex 1 of the Compliance MAIA.

110. The last sentence of this definition was put there because the results of mediations typically remain confidential in order to encourage the parties to negotiate in good faith to reach a settlement subject to a mediator's guidance/oversight. If the parties think that a possible compromise that they put on the table for discussion will later be held against them by the RA, then the mediation process will be a waste of time. Thus mediation procedures/processes typically include a clause prohibiting the findings and conclusions of the mediation from being released or discussed unless all parties to the mediation are in mutual agreement that this may be done. This is the standard procedure adopted in most jurisdictions in order to promote settlement. The concept of negotiation "without prejudice" derives from this.
111. Of course, and as is allowed under the mediation process the RA required BCV to add to Annex I, if the mediation serves to narrow the issues and both parties are happy for the RA to have sight of part or all of the mediator's recommendations, then they are free to present the findings and conclusions of the Mediation Panel to the RA for its consideration.
112. For the reasons stated above, the RA declines Link's request to change the definition given for the terms "Mediate" and "Mediation" by removing the last sentence from that definition. Accordingly, the definition for these terms shall remain as it is currently found in Annex I of the Compliance MAIA.

## **4.7 Annex 2: Billing & Payment**

### **4.7.1 Clause 4.2(a)**

113. TBI argues that additional wording is required to clearly establish that the obligation on the CP to pay on the due date here, irrespective of the dispute, does not affect the right of the CP to dispute the amount in question. To that end, TBI proposes the following modification to Clause 4.2(a):

4.2(a) a sum less than \$25,000 and less than 5 per cent of the total amount of the relevant invoice, the total amount invoiced shall be due and payable on the Due Date, **but without limitation to the right of the CP to dispute the amount concerned and** with a refund later to be made by BCV, if the dispute is resolved in CP's favour; or

#### **4.7.1.1 Determination**

114. Clause 4.2 is only applicable if either party has filed a billing dispute notification under Clause 5.1 of the Compliance MAIA. Clause 4.2 addresses the matter of how payments involving an invoice in dispute ought to be treated in the event the dispute concerning the invoice has not been resolved before the date on which payment is due.
115. The language of Clauses 5.1 and 4.2, when read in conjunction, clearly state that the payments which are the subject of Clause 4.2(a) are payments involving disputed invoices, which payments shall be refunded if the dispute is resolved in a CP's favour. We see nothing in the language of these two clauses that could be construed as, or utilized for, limiting a CP's right to dispute the amount concerned. Notwithstanding this observation, we nevertheless are of the opinion that the additional wording proposed by TBI should be added to Clause 4.2(a) as it does, in fact, provide even greater clarity on this point. Accordingly, we have chosen to

modify the Compliance MAIA by replacing the version of Clause 4.2(a) contained therein with the following:

*4.2(a) a sum less than \$25,000 and less than 5 per cent of the total amount of the relevant invoice, the total amount invoiced shall be due and payable on the Due Date, but without limitation to the right of the CP to dispute the amount concerned and with a refund later to be made by BCV, if the dispute is resolved in the CP's favour; or*

## **4.8 Annex 4: Service Level Agreement**

### **4.8.1 Generally**

116. Link suggests that, pursuant to Section 4.21.1.1 of the Interim Decision, its proposed amendments to Annex 4—Service Level Agreements of the Compliance MAIA should be adopted as, according to Link, the changes it proposes more accurately reflect the RA's intent as discussed in the Interim Decision, including the general direction that copies of all sections relating to Service Level Agreements and associated Service Level Credits appearing in the Product Handbook also appear in the MAIA.
117. For the reasons stated above Link proposes adding the following sections from BCV's Product Handbook to Annex 4 of the Compliance MAIA:
- (a) Section 7.5.1.1;
  - (b) the last two paragraphs of Section 7.5.1.2; and
  - (c) Section 7.7 in its entirety.

#### **4.8.1.1 Determination**

118. Paragraph 176 of the Authority's Interim Decision directed BCV to:
- ... modify the MAIA such that copies of all sections relating to Service Level Agreements and associated Service Level Credits appearing in the Product Handbook also appear in the MAIA.
119. The sections of the Product Handbook that Link proposes adding to Annex 4 are all sections having to do with Service Level Agreements and associated Service Level Credits which were not originally included in Annex 4 by BCV as they ought to have been pursuant to paragraph 176 of the Interim Decision. This being the case, we have chosen to modify Annex 4 as Link proposed and as is described in paragraph 117, above. In addition, we have chosen to further modify Annex 4 by changing the formatting of the language contained therein so as to make it more compatible with the other sections of the MAIA as well as easier to follow.

## **4.9 Product Handbook**

### **4.9.1 Generally**

120. Link states that, further to the RA's comments in Section 4.21.1 of the Interim Decision, it has proposed amending the Product Handbook as per the redlined version of BCV's Product Handbook Link submitted to the RA, along with its Compliance Comments, on 15 November 2013. According to Link, the changes

proposed more accurately reflect the RA's intent as discussed in the Interim Decision.

121. In addition to various minor editorial changes, Link proposes substantive modifications to the following sections of the Product Handbook:
  - (a) Section 5—Forecasting;
  - (b) Section 6.1—Provisioning Guidelines;
  - (c) Section 7.5—Performance; and
  - (d) Section 7.7—Exclusions.
122. Section 4.21.1 of the Interim Decision, which Link relies upon as supporting its changes to the Product Handbook sections referenced in the foregoing paragraph, concluded at paragraphs 175 and 176 of the Interim Decision by requesting BCV to:
  - (a) modify Clause 2.6 to provide that all terms and conditions of the Product Handbook are incorporated by reference in the MAIA, and that if there is any inconsistency between the two, the MAIA shall prevail; and
  - (b) modify the MAIA such that copies of all sections relating to Service Level Agreements and associated Service Level Credits appearing in the Product Handbook also appear in the MAIA.

This is all Section 4.21.1 directs BCV to do. This section makes no mention of, nor does it require, any other modifications to the Product Handbook.

#### **4.9.1.1 Determination**

123. Except for the relatively minor omissions noted at Section 4.8, above, BCV has complied with paragraphs 175 and 176 of our Interim Decision as requested. Accordingly, Link's request that Sections 7.5 and 7.7 be deleted from the Product Handbook are denied as our express direction to BCV was to copy all sections relating to Service Level Agreements and associated Service Level Credits appearing in the Product Handbook into the MAIA (which BCV has done with the addition of Annex 4), not delete them from the Handbook itself.
124. Link's proposed modifications to Sections 5 and 6.1 shall be discussed at greater length in the following sections.

#### **4.9.2 Section 5—Forecasting**

125. With regard to forecasting, BCV argues that the Interim Decision<sup>20</sup> requires it to harmonize the forecasting arrangements in the Product Handbook with the language of Annexes 3A and 3B, which require a CP to provide a forecast of "expected Capacity needs over the following 12-month period".
126. BCV informs the RA that it has made the changes requested, but goes on to alert the RA to the fact that BCV will still need forecasts for 3, 6 and 9 months out (as well as 12 months) and will need these forecast to be updated quarterly. BCV goes on to argue that the reason for this is that the company may potentially be required to meet the needs of several CPs at the same time and quarterly estimates and updates are

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<sup>20</sup> At paragraphs 179-180.

crucial for ensuring that these needs are met, especially in the new, competitive market environment that is developing.

#### **4.9.2.1 Determination**

127. Our Interim Determination on this issue may be found at paragraph 180 of the Interim Decision, which states:

Link’s assertion that annual forecasts were accepted by BCV in Annexes 3A and 3B of the MAIA suggests to us that annual capacity forecasts are not unacceptable to BCV. Accordingly BCV should modify the forecasting requirements of Section 5 of the Handbook to conform to the forecasting requirements appearing in Annexes 3A and 3B of its MAIA.

128. Our initial intent here had been to address Link’s comments to the effect that “...an initial forecast per interconnection followed by annual forecasts are appropriate and anything shorter (e.g., quarterly) is unnecessarily burdensome”<sup>21</sup> by requiring BCV to change the language of Section 5 of the Product Handbook so that a CP only need submit forecasts on an annual basis instead of quarterly. Be that as it may, BCV presents a strong case for requiring rolling quarterly updates to a CP’s forecast of “expected Capacity needs over the following 12-month period”. Additionally, neither Link nor TBI supplied a counter argument to BCV’s contention that quarterly forecasts are necessary for enabling BCV to better anticipate and plan for the service provisioning requirements of CPs on a going forward basis.

129. For the reasons stated above, we have chosen to accept the majority of the modifications to Section 5 proposed by BCV. The single exception to this is that we have chosen to retain the column headings of the two tables appearing in Section 5.2 of the Product Handbook as striking them as BCV has done renders the tables less intelligible.

130. We have chosen to reject the modifications proposed by Link in the redlined version of the Product Handbook the company submitted as the company provided no discussion in support of its proposed modifications nor did it provide any counter arguments to the arguments presented by BCV in defence of its position that rolling quarterly updates to a CP’s forecast of “expected Capacity needs over the following 12-month period” constitutes a necessary part of BCV’s planning for the service provisioning requirements of CPs on a going forward basis.

#### **4.9.3 Section 6.1—Provisioning Guidelines**

131. Link has proposed extensive and substantive modifications to Section 6.1 of the Product Handbook. These modifications were presented by Link in the redlined version of BCV’s Product Handbook it submitted to the RA. Link provided no discussion in support of its proposed modifications other than to assert that they more accurately reflected the RA’s intent as discussed in the Interim Decision.

132. Paragraphs 184 and 185 of the Interim Decision required BCV to make substantial modifications to the provisioning guidelines contained in Section 6.1 of the Product Handbook. The modifications the RA required BCV to make were developed by

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<sup>21</sup> See paragraph 179 of the Interim Decision.

Link<sup>22</sup> in response to the assertion made by BCV in the earlier version of the Provisioning Guidelines to the effect that the implementation of any service, other than the provisioning of an Interconnection Link, would require 35 working days from the date on which BCV received the finalized written order for service. The Authority determined<sup>23</sup> that BCV's proposed 35 working days lead time was unreasonable and found the lead times proposed by Link for the scenarios depicted in paragraph 181 of the Interim Decision to be more so.

133. The modifications Link proposes to the Provisioning Guidelines contained in the Compliance MAIA have a motivation similar to the one described in the preceding paragraph. Step 3 of the Section 6.1 Provisioning Guidelines states that once BCV receives a written request from a CP for the provisioning of a particular service it can take up to 90 working days to finalize all the commercial and technical details involved in the provisioning of the service being requested.
134. Link's proposed modifications to this section are primarily based around the contention that it should not take 90 working days to finalize all the commercial and technical details involved in provisioning a service when the service being requested is one of the standard services depicted in Step 5 of the Section 6.1 Provisioning Guidelines. Accordingly, Link proposes that Step 3 be modified such that the current version of that step, as presented in Table 1 below,

**Table 1: Compliance MAIA Version of Step 3**

3	The Parties shall discuss and agree on all technical and commercial issues, including details of the level of protection, if any, to be adopted should BCV require enhanced transmission protection.	These discussions should be finalised within ninety (90) Working Days from the date of receipt of the acknowledgement referred to in Step 2 above.
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be revised as presented in Table 2, below, splitting the process depicted at Step 3 into two parts: Part one depicting the process and steps involved in processing a Standard Order; Part two depicting the process and steps involved processing a non-Standard Order.

<sup>22</sup> And subsequently modified by BCV per paragraphs 184 and 185 of the Interim Decision.

<sup>23</sup> See paragraph 184 of the Interim Decision.

**Table 2: Modified Version of Step 3**

3	BCV will examine the Request for the particular Service and investigate what is required to provide the Service.	<p>If the Request is standard in nature, BCV will respond to the CP within two (2) working days from the completion of Step 2 above indicating that the Standard Order Processing Timelines depicted in Table 2, below, will be followed along with any follow up clarification questions that may be required.</p> <p>If the Request is non-standard in nature, the Parties shall meet within ten (10) business days and agree to all technical and commercial issues (including lead time) within forty-five (45) Working Days from the date of receipt of the acknowledgement referred to in Step 2 above. Additional time for investigation may be mutually agreed upon between the Parties if the complexity and scope warrant.</p>
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135. All other Section 6.1 modifications proposed by Link are primarily designed to account for the modifications proposed to Step 3. One exception being that Link proposes changing the lead time within which BCV must acknowledge the receipt of a CP's written request for service provisioning from five (5) working days to two (2) working days. Another one being Link's proposed reduction in the number of working days required to agree to all technical and commercial issues involving the provisioning of non-standard service from ninety (90) working days to forty-five (45) working days.

**4.9.3.1 Determination**

136. The Authority finds BCV's proposed lead time of up to ninety (90) working days to finalize all the commercial and technical details involved in provisioning a service, even when the service being requested is one of the standard services depicted in Step 5 of the Section 6.1 Provisioning Guidelines, to be excessive. The Authority also finds the ninety (90) working day lead time to be excessive in finalizing all the commercial and technical details involved in provisioning a non-standard service. Additionally, the Authority finds a two (2) working day lead time for acknowledging the receipt of a CP's written request for service provisioning to be more reasonable than BCV's proposed five (5) working days.

137. For the reasons given above, the Authority has chosen to modify Section 6.1 of BCV's Product Handbook as proposed by Link.

