

## Ministry of Home Affairs

30 Parliament Street  
Hamilton HM12 Bermuda

# Communications Operating License Policy

24<sup>th</sup> October 2019

## I. EXECUTIVE SUMMARY

### Purpose

1. The Minister of Home Affairs, the Hon. Walter Roban, JP, MP, as the Minister responsible for Electronic Communications (the “Minister”), is required by Section 13 of the Electronic Communications Act 2011 (the “ECA”) to make general policies and, as necessary, regulations for the electronic communications sector with regards to: (a) the limit on the number of public Communications Operating Licences (“COL”); (b) the scope and duration of such licences as well as any conditions that the Minister deems necessary as a matter of general policy; (c) any general limitations on eligibility for the grant of such licences; and (d) the timing and procedures involved for the award of such licences. .

2. The purpose of this Policy Statement (the “Policy”) is to provide the policies for the Regulatory Authority (the “Authority”) to implement going forward with respect to the issuance of any new public Communications Operating Licence (“COL”), including any new Integrated COL (“ICOL”). The effective date of the policies contained in this Statement is 24th October, 2019.

3. In this document, except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them by the Regulatory Authority Act 2011 (“RAA”), the ECA, and the Interpretation Act 1951.

## II. LEGISLATIVE CONTEXT

### A. Purposes of the ECA

4. In carrying out functions related to the issuance and administration of COLs, the Minister and the Authority are required to give regard to the purposes of the ECA. Section 5 of the ECA sets out the purposes, which include:

- (a) ensuring the availability of reliable and affordable access to quality electronic communications services in Bermuda;
- (b) encouraging sustainable domestic competition and Bermuda's competitiveness in the global marketplace;
- (c) the orderly development of, and innovation in, the communications sector;
- (d) promoting investment in the communications sector; and
- (e) the promotion of Bermudian ownership and employment in the provision of electronic communications networks and services.

5. According to ECA Section 5(2), where any of these purposes appear to be in conflict, the priorities shall be set or the conflict otherwise resolved in a way that best serves the public interest in the opinion of the Minister or the Authority, as the case may be.

### B. Delegation

6. RAA Section 9(1) provides that a Minister responsible for a regulated industry sector may, in writing, delegate to the Authority, either generally or for a particular occasion, any function of the Minister regarding the regulated industry sector for which he is responsible, provided that:

- (a) no delegation made under this section shall preclude the Minister from exercising or performing, at any time, any of the functions so delegated;

- (b) the Authority may not delegate to any person any function that the Minister has delegated to it under this section; and
- (c) the Minister may, in writing, revoke or modify such delegation at any time.

**C. Role of the Minister**

7. Section 13 of the ECA directs the Minister to establish general policies and, as necessary, regulations with regard to:
- (a) the limit, if any, on the number of public COLs that may be in effect at any given time for any particular type of individual licence and the timing of the grant of such licences;
  - (b) unless otherwise specified in the ECA, the scope and duration of such COLs and any conditions that the Minister deems to be necessary as a matter of general policy;
  - (c) any general limitations on eligibility for the grant of such licences; and
  - (d) the timing of and procedures for the award of such licences and provisions for renewal, if applicable.
8. Sections 4 and 5 of the RAA specify that when the Minister adopts a declaration or makes a regulation, the Minister must confer with the Authority and consult with sectoral participants. Section 9 of the RAA specifies the ability of the Minister to delegate functions to the Authority.
9. Section 18(2) of the ECA directs the Minister to, by regulations, establish the maximum number of ICOLs, if the number is limited, and the procedures pursuant to which the Authority may grant ICOLs.

**D. Role of the Authority**

10. Section 16 of the ECA empowers the Authority to grant individual COLs, including ICOLs, and to specify by General Determination ("GD") the "criteria, conditions, requirements and procedures that shall apply to the grant of individual COLs, class COLs and licence exemptions." One of these requirements is that the terms and conditions of each individual COL "be as homogenous as possible and not unreasonably discriminatory."
11. Section 17 of the ECA enumerates the terms and conditions that the Authority, through the GD required by the above-mentioned section 16, may include in individual COLs.
12. Various other provisions of the ECA address the terms and conditions of ICOLs. Section 18(3) addresses the term of an ICOL, while sections 18(4), 18(5) and 18(6) address the renewal, revocation, transfer and assignment of ICOLs, with section 18(6) also addressing the change of control of an ICOL holder.
13. Section 48 of the RAA, among other things, directs the Authority to establish the procedures and criteria pursuant to which it will grant individual licences.
14. Section 49(1) of the RAA directs the Authority to establish the procedures to be followed by applicants seeking to obtain, assign or transfer control of a licence, to include: "any application form used; any supporting information that must be provided; the criteria, in addition to any criteria specified by a Minister, the Authority will use to assess the request; the time frame within which the Authority will act on the application; and any additional standards or procedures specified in sectoral legislation."
15. Section 49(2) requires that when an application is filed in connection with an individual licence, the Authority shall "conduct a public consultation; if requested by the applicant, conduct an investigative hearing; and issue a decision and order."
16. Section 50 of the RAA addresses the conditions that the Authority may include in licences.

**III. BACKGROUND AND PROCEDURAL HISTORY**

**A. Background**

17. In 2013, at the Direction of the Minister, the Authority issued a decision and order modifying each of the licences held by the operators listed in Schedule 1 of the ECA, the effect of which was to convert their pre-existing licences into ICOLs. The form of ICOL was adopted by the Integrated Communications Operating Licence Regulation 2013, BR37/2013 (“ICOL Regulation”).

18. Section 75 of the ECA established a moratorium (the “Moratorium”), subject to narrow exceptions, on the award of additional ICOLs and public COLs, pending completion of a review by the Authority to “determine whether further liberalisation of the electronic communications sector would be in the public interest.” The purpose of the Moratorium was to ensure a degree of market stability for both sectoral participants and consumers during the implementation of the new regulatory regime and licensing structure created by the ECA.

19. On 29 November 2018, the Minister directed the Authority to conduct the review of the Moratorium established by section 75 of the ECA. On 29 January 2019, the Authority submitted a Final Report of the Electronic Communications Moratorium Review (the “Final Report”) to the Minister containing recommendations to lift the Moratorium and implement “an efficient ICOL and COL application process.” In the Final Report, the Authority concluded that the issuance of new ICOLs and COLs would “encourage increased competition in the electronic communications sector, incentivize current providers to compete on both price and customer service and lead to greater consumer benefits.” The Authority also recommended the development of a policy or legislative amendment to allow the Authority “to revoke any dormant ICOL or COL.”

20. Upon consideration of the Final Report and in accordance with section 75(3) of the ECA, the Minister released a decision in which he lifted the Moratorium and authorized the Authority to grant additional ICOLs and other public COLs. Recognizing that the “lifting of the moratorium can only be efficiently implemented once matters such as the form of application and any qualifying criteria have been established,” the Minister directed the Authority to commence a consultation to consider and, by General Determination, address such matters.

21. On 5 April 2019, the Minister issued the Delegation in the form of a letter delegating responsibility to the Authority to consult on the policies to be addressed in a regulation establishing the framework for the award of new ICOLs and other public COLs and make recommendations relating to same.

## **B. Procedural History**

22. The Authority initiated the consultation by publishing a Consultation Document on 5 April 2019 that invited responses from members of the public, including electronic communication sectoral participants and sectoral providers, as well as other interested parties. The purposes of the Authority’s Consultation Document were to:

- (a) Implement the decision of the Minister to end the Moratorium on the grant of ICOLs and other types of COLs, and pursuant to the Minister’s delegation of authority to the Authority (the “Delegation”), consult on and recommend post-Moratorium procedures for the grant of ICOLs and other types of COLs, to be adopted in accordance with section 18(2) of the ECA;

23. Pursuant to the aforementioned Delegation, to also consult on and make recommendations on a general policy which will be established in accordance with section 13 of the ECA; (c) Consult on the criteria, conditions, requirements and procedures for the grant of other public COLs as a basis for making a GD on the post-Moratorium licensing framework in accordance with section 16(2) of the ECA; and (d) Ensure a smooth, efficient transition to the new licensing regime for ICOLs and other types of COLs, so as to facilitate the opening of Bermuda’s electronic communications sector to new entrants and make the sector more competitive. The Consultation Document presented a suite of consultation questions, including, inter alia, the recommended ICOL selection procedure, recommended Basic Eligibility Requirements and minimum information requirements for new ICOLs, and as to whether there should be a limit on the number of new ICOLs granted in any given year. Responses to the Consultation Document were solicited from the public electronically through the Authority’s website during a response period which commenced on 5 April 2019 and concluded on 3 May 2019, after the Authority extended the original consultation deadline from 26 April 2019.

24. The Authority received six (6) written responses to the Consultation Document, from the following parties:

- (a) Bermuda Advocates for Safe Technology and Bermuda Environmental Sustainability Taskforce (“BAST/BEST”);
  - (b) Horizon Communications (“Horizon”);
  - (c) One Communication Limited (“OneComm”);
  - (d) Telecommunications (Bermuda & West Indies) Limited, Bermuda Telephone Company Limited, and Transact Limited (collectively known as “Digicel”);
  - (e) World on Wireless (“WOW”); and
  - (f) Mr Roderick Ferguson.
25. The written responses to the Consultation Document focused on a number of issues, namely:
- (a) Introduction of the RCOL Licence and the lifting of the Moratorium;
  - (b) The application process for ICOLs and RCOLs;
  - (c) Terms of the RCOL;
  - (d) Applicable taxation and fees; and
  - (e) Other issues, including health and safety concerns of 5G technology, the need to adopt a long-term strategy and best-practices guidelines, the need to introduce additional competition into the electronic communications market, and piracy regulation concerns.

26. The Authority carefully considered all comments received, and has set out its detailed responses in the Preliminary Report, Preliminary Decision and Order, issued on 21 June 2019. Much like with the Consultation Document, the Preliminary Report also invited responses from members of the public, including sectoral participants and providers. Public comments on the Preliminary Report were to be submitted by 5 July 2019. The Authority did not receive any written responses to the Preliminary Report, Preliminary Decision and Order. Furthermore, the Preliminary Report included eight (8) recommendations proposed by the Authority to the Minister to consider for the purposes of a Regulation on the Award of Public COLs, pursuant to section 12 of the ECA.

27. Subsequently, on 16 August 2019, the Authority published the Final Report and pursuant to the Consultation Document, made the General Determination.

#### **IV. COL ISSUANCE PROCEDURES**

28. The Minister hereby determines the following procedures for the issuance of new COLs, including ICOLs:

##### **A. Limit on the Number of ICOLs Issued Annually**

29. The Authority will have the discretion to decide the maximum number of new ICOLs to be awarded in any given time period, if any, by administration determination, after giving due consideration to current and forecast market conditions.

##### **B. Timing of Consideration of ICOL Applications**

30. Applications for new ICOLs will be accepted by the Authority during a pre-scheduled annual open application window, the timing of which will be determined by the Authority by administrative determination.

##### **C. ICOL Application Preference Factors**

31. If the Authority receives a greater number of qualified ICOL applications than the number specified by the Authority for award during the relevant period, the Authority will accord preference to otherwise satisfactory applications that demonstrate, by means of licence conditions that are enforceable in practice by the Authority, the greatest overall commitment to promoting Bermudian ownership and employment, providing technical and/or management training for

Bermudian employees, introducing enhanced or innovative electronic communications services and providing affordable service to consumers and/or otherwise making social contributions to Bermuda.

**D. Basic Eligibility Requirements for ICOL Applicants**

32. The following basic eligibility requirements will apply to applicants for ICOLs:

- (a) the applicant is a company that is registered with the Bermuda Registrar of Companies;
- (b) the applicant is eligible to engage in business in Bermuda;
- (c) the applicant has a certificate of compliance issued by the office of the Registrar of Companies;
- (d) the applicant certifies that it does not fall into any of the following categories, which would be grounds for automatic disqualification:
  - (i) an applicant that has a direct or indirect interest of ten per cent or more in an existing ICOL holder;
  - (ii) an applicant whose application raises substantial national security or public interest concerns, as determined by the Authority after consultation with the Minister;
  - (iii) an applicant that has previously operated Electronic Communications Networks or provided Electronic Communications Services in Bermuda and has been found to be in material non-compliance with any applicable laws, regulations or administrative decision of the Authority, including non-payment of Regulatory Authority or Government Authorization Fees; or
  - (iv) an applicant that has been:
    - A. the subject of insolvency proceedings in Bermuda or other jurisdictions within the past five years;
    - B. found guilty of an offence under the ECA or RAA or a serious criminal violation within the past ten years. For these purposes, a serious criminal violation shall be any indictable offence; or
    - C. otherwise found by the Authority to have been involved in unlawful activities or disreputable acts which would render the award of a licence contrary to the public interest under the circumstances.

33. The basic eligibility requirements set out in subsection (d) would also apply to all owners, beneficial owners, directors, controllers and senior executives of the applicant.

34. The Authority may, by administrative determination, establish additional eligibility criteria that must be met by applicants for ICOLs, provided that the same criteria apply to all applicants during the relevant open application window.

**E. Duration of COLs**

35. The term of any COL other than an ICOL will be no longer than fifteen years. COLs may be subject to renewal unless the licence holder has materially breached the terms of the licence or for good cause shown.

**F. Basic Eligibility Requirements for COL Applicants**

36. The following basic eligibility requirements will apply to applicants for COLs (other than ICOLs):

- (a) the applicant is a company that is registered with the Bermuda Registrar of Companies;
- (b) the applicant is eligible to engage in business in Bermuda;
- (c) the applicant has a certificate of compliance issued by the office of the Registrar of Companies;

- (d) the applicant certifies that it does not fall into any of the following categories, which would be grounds for automatic disqualification:
- (i) an applicant whose application raises substantial national security or public interest concerns, as determined by the Authority after consultation with the Minister;
  - (ii) an applicant that has previously operated Electronic Communications Networks or provided Electronic Communications Services in Bermuda and has been found to be in material non-compliance with any applicable laws, regulations or administrative decision of the Authority, including non-payment of Regulatory Authority or Government Authorization Fees; or
  - (iii) an applicant that has been:
    - A. the subject of insolvency proceedings in Bermuda or other jurisdictions within the past five years;
    - B. found guilty of an offence under the ECA or RAA or a serious criminal violation within the past ten years. For these purposes, a serious criminal violation shall be any indictable offence; or
    - C. otherwise found by the Authority to have been involved in unlawful activities or disreputable acts which would render the award of a licence contrary to the public interest under the circumstances.

37. The basic eligibility requirements set out in subsection (d) would also apply to all owners, beneficial owners, directors, controllers and senior executives of the applicant.

**G. Provision of Information for COL Applications**

38. Applicants for all COLs must provide financial, commercial and technical information, as required by the Authority and set out in a master application form to be issued by the Authority (as appropriate to the licence type).