24 May 2018

Ms. Monique Lister
Regulatory Authority
1st Floor Craig Appin House
3 Wesley Street, Hamilton HM11
Bermuda

Dear Ms. Lister,

Re: Response to Preliminary Report: Comments on Electronic Communications Sectoral Review dated 17 April 2018 (the "Report")

On behalf of One Communications Ltd. and its affiliates Bermuda Digital Communications Ltd. ("BDC") and Logic Communications Ltd. ("Logic") (collectively trading as, and referenced herein as, "One Communications" or the "Company"), we are writing to respond to the preliminary Report.

By way of general comment on the Report, we note the lack of clarity regarding what the Regulatory Authority (the "RA") considers to be within the remit of the market review (which we understand is ongoing) as opposed to the sectoral review discussed in the Report. As many of the issues in the Report depend to some degree on a study of the current market state in combination with an assessment of sectoral problems, the diverging timelines are difficult to reconcile. At paragraph 17, the RA makes it clear that the sectoral review was delayed for 2 years in January 2016 "due to the value of the expected results of the... market review." This seems contrary to the later statement regarding a "divergence of the issues" at paragraph 23. Based on the Consultation Document issued 17 October 2017, we assumed the original belief was that the 2 reviews were inter-dependent to some degree and overlapped significantly, now it appears the RA is treating them as separate and distinct. While not explicitly stated, this change of approach seems to be driven simply by the 17 July 2018 deadline referenced in the Report rather than any substantive reasons.

When examining sectoral matters, it is clear that the relevant market economics need to be understood before sectoral change or status quo can be recommended. Without a proper and current market review completed, the sectoral review suffers from a theoretical bias towards protection and regulation based on outdated market analyses and the mere perception of risk. As a result, the Report appears to be a compilation of disparate theoretical concerns with little attention paid to the facts of the market and the statutory principles of the RA, including in particular the duty to rely on market forces, where practicable. The Report suggests that theoretical concerns may be used to justify the implementation of invasive regulation where no market problems have been evident. That regulatory approach runs the high risk of causing inefficiency in a currently functioning market, or in the worst case, causing ICOL holders to stop investing and/or exit a line of business.

We further note that the Report touches upon a wide variety of matters, some which appear "sectoral" in nature, and some that are clearly not of that kind and scale. In the latter grouping, we believe that certain issues raised, and the corresponding recommendations made, are properly handled in their own

specific consultation given their microeconomic market impact, rather than a "sectoral" review that we believe is statutorily intended to address the macro issues affecting the industry.

Our final general comment relates to the procedural requirements referenced in paragraph 20 of the Report. In particular, we highlight the requirement under section 72 of the RAA that a preliminary report shall "provide a reasoned explanation of the basis on which the Authority made any significant factual finding, policy determination and legal conclusion" and "state the Authority's preliminary conclusions". The Report does not satisfy these requirements on the majority of issues. Issues or concerns are raised without a reasoned explanation of the factual, policy, or legal basis for them. Describing a concern and proposing possible regulatory solutions to address it does not provide the reasoned basis for that particular concern. Similarly, the RA does not provide its preliminary conclusions as required by statute. Instead, the Report "invites comments"[1] on the need for regulations of various kinds, but stops short of actually articulating a preliminary conclusion or a preliminary recommendation. From a process and substantive perspective, it is both important and required that the RA clearly state its preliminary conclusions and recommendations, and any factual finding, policy determination and legal conclusions that form the reasoned basis for them.

Below, we provide further comments specific to the matters raised in the Report.

A. Service Continuity – Submarine Cable Infrastructure

Submarine cable infrastructure is a complicated business built with long term capital investment and multi-party planning and construction. Initial investments are made based on financial and operating assumptions that span multiple decades. Intervention in this business runs the very high risk of unbalancing the commercial arrangements negotiated at the outset, and will likely dampen future investment.

All providers of connectivity in Bermuda need to have subsea capacity in place to take traffic off-island. A prudent provider will also have arrangements for diverse redundant (or restoration) capacity in case of outages on their primary subsea capacity. Although subsea outages are quite rare, they do occur, and a provider's redundant or restoration capacity arrangement ("Secondary Capacity") acts as a kind of insurance against primary subsea faults. Based on our own commercial planning, and not on regulation, One Communications has put in place sufficient Secondary Capacity to backstop our primary subsea capacity needs. There is no need to regulate what is already being done as a part of proper business planning. Secondary Capacity is costly but necessary for us to ensure proper operations for our customers. That cost is a significant component of the cost base and pricing for home and business connectivity in Bermuda.

At paragraph 3, the RA states concerns regarding damage to subsea infrastructure, "including simultaneous damage to more than one cable." The question raised is whether regulation should be

[1] See paragraph 49 where the RA "invites comments on the need for". Similar invitations to comment on proposals or "provide views on the recommendations" can be found in paragraphs 56, 75, 79 and 81. We note at paragraph 83 there is a reference to the "preliminary recommendations... as set out in section 5" of the Report, but that section of the Report is not consistent with that word choice.

used to mitigate the effects. It should be noted that requiring additional layers of redundancy for subsea capacity will not guarantee 100% uptime for internet to customer homes or businesses. Regulation will not mitigate the effects and is more likely to discourage future investment in this segment. Subsea cables run at greater than 99% reliability. The occurrence of multiple simultaneous cable faults is a highly improbable outcome. For more than one cable to suffer a fault at the same time, a very serious force majeure event (e.g. hurricane, tsunami or other similar catastrophe) would have had to have occurred. The RA should consider that a catastrophic event of that magnitude will also have likely damaged all on-island telecom networks and the power grid that supports them. Additional subsea connections will not likely matter in those improbable scenarios, and forcing carriers to make such arrangements will add significant cost and drive regular prices higher for every customer.

These are very technical issues that are not well understood except by subject matter experts. We suggest this matter be properly handled in a specific industry consultation where the proper details of this market segment can be addressed, and expert advice can be obtained. Existing industry dynamics and the true costs of potential regulation need to be better understood.

B. Service Continuity – Insolvency of an ICOL Holder

Insolvency is unfortunately a natural commercial event that triggers a legal process for financially weak competitors to exit a market or reorganize with their creditors' involvement, often through receivership. A normal outcome would be that other commercial interests would buy out the assets (e.g. the customer accounts) or the business as a whole with the price being commensurate with the future viability of those assets.

Unless they willingly contract otherwise, customers are free to switch to other providers on relatively short notice, and competing providers should be free to make proactive offers to those customers. While switching may cause some disruption[2] to a customer's service, that is a normal free market outcome in most countries around the world. Moreover, when choosing a service provider, a customer can and should consider the financial strength and operating performance of a particular provider before making a simple decision based on short term promotions and pricing. Customers are proactive decision makers regarding their telecom services, rather than simple observers and possible victims of an insolvent ICOL holder. The RA should consider customers' freedom to choose before trying to implement market-distorting protections.

Further Monitoring or Notice Requirements

One Communications is a public company required to give public disclosure of its financials on an annual basis (audited), and on a 6-month basis (unaudited). This disclosure is made available to all

[2] For fixed services, One Communications can usually provision services to a customer within 3-4 days (sometimes less) provided the infrastructure to the home or business is in reasonably good shape, and the field resources are available. For wireless, mobile services can be changed over as quickly as obtaining a new sim. Assuming the porting process is working properly, customers can port their number in 1-2 days depending on the time of request. The porting process has already been regulated by the RA so additional 'in case of insolvency' requirements are not necessary.

shareholders proactively under the BSX rules, and is made publicly available at http://bsx.com/company_details.php?CompanyID=126. As a consequence, our financial statements and operating performance are readily knowable by the RA, our customers and other stakeholders. We, like all other ICOL holders, also file frequent financial reporting with the RA (revenues and cost of goods sold). Requiring us to file additional financial information with the RA is duplicative and wasteful of resources. We note that our competitors are not publicly traded and have no public disclosure requirements. We make no comment in respect of additional obligations being placed on them.

As a final comment on this particular proposal, we note the RA's suggestion that it might use financial information to warn consumers that "their service is at risk" when the RA believes the ICOL holder may become insolvent. This kind of regulatory action may cause ICOL holders who are close to insolvency to actually become insolvent, as their customers will be encouraged (by the regulator) to proactively switch to another provider to ensure continuity of service.

Disconnection Authorisation

In the current market, there is no evidence of a need to further regulate "disconnection" more than it is currently. We refer the RA to the following:

Section 3.12 of the FibreWire Model Access and Interconnection Agreement (an agreement reviewed and approved by the RA) states:

> Without prior notice to the CP, OneComm may, after notifying the RA, immediately suspend the supply of the Service, in whole or in part, if... the CP is determined by a competent authority to be Insolvent, and the RA has given its prior written approval and shall take reasonable endeavors 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.

Section A2.1 of Annex A of every ICOL states:

> **A2.1** The Licensee shall comply with the provisions of Sections 21 and 23A of the Telecommunications Act 1986, which are reproduced in Annex B, until the later of the following events:
>
> (a) the Authority determines that the Licensee does not possess Significant Market Power in one or more relevant markets, or
>
> (b) if the Authority determines that the Licensee possesses Significant Market Power, the Authority determines that the Licensee has complied with any Ex Ante Remedies imposed on the Licensee by the Authority.
>
> For purposes of this Transitional Condition, references in Annex B to "Carrier" shall mean the Licensee and references to "the Commission," "the Department" and "the Minister" shall mean the Authority.

Section 21 of Annex B of every ICOL states:

(8) No Carrier may disconnect another Carrier without the consent in writing of that Carrier or the Minister.

(9) A Carrier may only seek the permission of the Minister to disconnect another Carrier if—

(a) that Carrier fails to settle its accounts due within a period of thirty days after receipt of a written warning notice and within a further period of thirty days after receipt of a written notice of intention to seek permission for disconnection;

(b) that Carrier fails to comply with any term of the contract or agreement for the provision of the service;

(c) that Carrier fails to conform to the agreed technical specification for the provision and operation of the service; or

(d) there is other just and reasonable cause for disconnection.

(10) A Carrier which seeks the Minister's permission to disconnect another Carrier shall give notice to the Minister in writing not less than thirty days before the date of the proposed disconnection, informing the Minister of the reasons for the proposed disconnection, and the Minister shall forthwith refer the matter to the Commission for enquiry and report.

The suggestion that mechanisms dating back to the original Telecommunications Act of 1986 should be re-regulated suggests a degree of uncertainty regarding the operating validity of the provisions set out above. On a straight legal reading of A2.1 of Annex A and Section 21 of Annex B, the provisions set out above addressing the issue of disconnection appear to be still in force. Paragraph 47 of the Report seems to imply that these provisions are no longer operable. As a part of this Sectoral Review, we ask that the RA clarify its interpretation of the law.

Service Provider of Last Resort

As stated above, customers can proactively choose to switch service providers before insolvency, or afterward, in a relatively short timeframe. There is no need to create additional rules to designate a service provider of last resort. Customers should be able to choose their next service provider rather than the RA regulating an outcome that the customer may not want.

Finally, in terms of this section of the Report, we are supportive of the views expressed in paragraphs 42 and 43 of the Report. Although some disruption of service might occur, individual customers and business customers are sufficiently empowered to deal with the possible insolvency of an ICOL holder. There is no evidence to the contrary and therefore, a market outcome is preferred to a regulated outcome. We caution the RA before implementing regulation that protects customers where no protection is needed. This kind of over-regulation has unintended consequences and leads to an inefficient market that will not serve customers well in the longer run. By over-regulating, the RA may change the competitive dynamic to favour certain firms over others, rather than allowing the market place to properly work itself out.

C. Tiered Fee Structure

The proposal to implement a tiered fee structure appears to be based on the commentary in paragraph 55 of the Report where it states:

> By implementing a tiered fee structure, sectoral providers with lower revenues could be assessed on a smaller percentage of revenue than those with higher revenues. This differentiation between ICOL holders on the basis of turnover would be justifiable because of the disproportionate impact that the Regulatory Authority fees at their current level may have on smaller operators. This is so because of the high level of fixed costs relative to turnover involved in operating an electronic communications service in Bermuda.

With respect, the proposed tiered fee structure is neither objective nor reasonable. While we do not agree with the level or degree of current taxation, the percentage mechanism for taxation works properly to apportion tax by revenue dollar. A small firm that makes $100,000 of taxable revenue will pay $5,250 of government and RA authorization fees. A large firm that makes $100 million of taxable revenue will pay $5.25 million in taxes and fees. The proportionality issue is properly addressed by the differences in revenue and the application of a percentage tax, rather than a flat nominal amount. All firms should bear the costs of regulation in proportion, and it is our position that they currently do. A flat percentage is not regressive in the manner implied by the Report.

If small firms pay less than the 5.25%, larger firms will essentially be subsidizing the cost of regulation and government policy for small firms. All other firms would have to pick up the rest of the RA fees as the RA's budget recommendations determine the percentage of tax charged, and the RA is not proposing to reduce its budget to cover the shortfall caused by lower rates for small firms. Every budgetary dollar not charged to a small firm must be raised from the larger firms. This approach is discriminatory. It institutionalizes a regulatory bias to supporting certain firms at the cost of others and, as a consequence, fosters smaller, financially weak competition. The statutory framework of the RA was not enacted to systematically favour some firms (that are arbitrarily designated as small) at the expense of all other firms. The regulatory goal should be effective competition on a level playing field, not regulated cross-subsidization between firms.

The high fixed costs of the industry are a natural barrier to entry in this market, but they are a reality of the business. All firms face that competitive reality equally and should have to invest capital and pay the fees necessary to compete in the sector. Moreover, we note that regulation has already been used to try and remediate the issue of high fixed costs. Most of the smaller firms who might benefit from the tiered fee approach have already avoided the largest fixed costs of the sector by availing themselves of wholesale options historically mandated by the RA. The very high costs of market entry (i.e. building a network) are not part of their chosen business model. Accordingly, those same costs should not now be used to justify discriminatory taxation, if in fact discriminatory taxation can be justified at all.

D. Review of Governing Legislation – Enforcement Process

The RA wishes to change the legislation to correct difficulties in enforcement actions because they are "very lengthy and complex" and "difficult to implement". The RA also points to conceptual problems where it brings a case for enforcement and then also must "consider and determine any (effective)

appeal against the adjudication." We agree that this conflicted role is conceptually and practically problematic, but for different reasons than those referenced by the RA. We do not support the notion that eliminating the role of the independent adjudicator is the answer to the problem. That solution will simply lead to other, more severe enforcement problems with sectoral implications.

It is increasingly clear that perceived difficulties in the enforcement process have caused the RA to take an overly expansive view of its power to issue administrative orders under Part 6 of the RAA. Section 63 orders were explicitly intended to address administrative matters only, and not matters that may only be taken by the adoption of a general determination or an adjudicative decision and order. If incorrectly applied to enforcement related actions, this use of the administrative power avoids the due process of Part 8 of the RAA governing investigation and enforcement.

In particular, the use of section 63 administrative orders as an enforcement tool avoids the obligation to appoint an independent presiding officer to conduct an adjudication. Setting aside the legal impropriety of this approach, the key procedural problem is that the only real independent oversight or avenue of appeal from these quasi-enforcement "administrative" actions appears to be judicial review or appeal under Part 9 of the RAA. As all sectoral participants are aware, the judicial process is a very costly and time-consuming process for both the appellant/applicant and the RA. In practical terms, that process only really offers relief when the implications of an incorrect RA action are far-reaching or very damaging. In the majority of instances, where the negative implications of a problematic RA action are of lesser scale, appeals under Part 9 and judicial review are economically unjustifiable. The unfortunate result is that small to medium scale regulatory errors go unchallenged, creating bad precedents that are later built on in future actions, administrative or otherwise.

Given the above, we cannot be supportive of efforts to remove the only check and balance on the RA's enforcement powers, short of judicial review or appeal. The role of an independent presiding officer was intended to bring objectivity and independence to the process of enforcement. Eliminating that role would mean that targets of an enforcement process will be left with the same problem that is unfolding in the context of administrative orders. In all but the most severe cases, the RA would be unchecked as a combined policing, prosecuting and adjudicating body. As noted above, judicial review and appeal would not provide practical relief in small to medium scale issues where errors are made or the RA's powers are misused.

If any change is to be recommended in this area, we would suggest that an independent presiding officer be used as an arbitration-like option for actions taken by the RA through its administrative powers. By allowing an appeal to an arbitrator-like presiding officer, firms would have a cost-efficient avenue for ensuring the correctness of the RA's administrative/quasi-enforcement activities. This would ultimately enhance regulatory decision-making and efficiently address any errors that are made.

E. Review of Governing Legislation – Use of Surplus Funds

We are supportive of any effort that will reduce the growing tax burden placed on our sector. The RA's proposal to use surplus funds from prior years to fund current and future years is welcome provided this results in an actual decrease in the tax burden for all sectoral participants. We would not support

surplus funds being used to benefit some but not all participants, nor would we welcome the use of surplus funds for discretionary or over spending by the RA beyond its approved budget.

We would like to note, however, a number of continuing problems with the process and implementation of the RA's budgetary and audit process, beyond simply the use of surplus funds. While we cannot cover all of the issues in this response, we do want to highlight the lack of public accountability in the RA's financial process. Budgets are put forth for consultation on an annual basis without review of actuals from the prior period. Delays in the audit process are blamed for the lack of timely public disclosure, but no attempts to remediate the situation seem evident.

As well, budgetary items like consultations are regularly carried over from year to year as they are not completed in the period. The same activities are used to justify funds each year, while no public answer is given as to why those same matters were paid for but not completed in the prior period. Market review provides the best example of a consultation that has been budgeted for in multiple years without being completed. Based on the brief public references made over the years regarding foreign consultant contracts for market review, it is our belief that budgetary funds have been used to pay for multiple market review attempts without a final report ever being issued.

Returning to the point of surplus funds, the RA continues to not disclose the financial details of its Reserve Fund, and the retained surpluses that have funded it. Audit issues aside, the unaudited numbers could have been used to properly inform the budgetary process each year. Paragraph 64 of the Report is the first public admission from the RA that "it is not unusual for a surplus to be generated" because the RA is "inclined to err on the side of generating a surplus." This inclination towards surplus is not a good outcome for the sector, especially given the continuing rise in tax rates on ICOL holders, and the RA's attempt to expand the tax base by eliminating historical deductions and exemptions.

Paragraph 65 of the Report seems to suggest that the RA is not permitted to use a surplus in one year to fund the following year. We note that this is only partially true as 25% of a budgetary surplus in any year is contributed to the Reserve Fund. The RA may recoup losses in any year from the Reserve Fund under section 40(4). Accordingly, it is possible to set a budget with a planned loss that is intended to be covered by the Reserve Fund, as was done in the final Work Plan for 2017-2018.

In terms of the remaining 75% of any budgetary surplus, we support statutory change to allow these funds to be used in future years to alleviate costs for the sector. The RA's practice of erring on the side of generating a budget surplus is unnecessarily draining funds from the sector. Those same funds could have been used to build networks, provide services or improve pricing. The current statutory mechanisms implicitly encourage overbudgeting and are particularly concerning in the absence of stringent audit practices and timely public disclosure.

F. Moratorium Review

As a regulated entity in the sector, we welcome competition from current ICOL holders and new entrants. We firmly believe that competition improves our own services and offerings, and those of any other player in the sector. If a firm is willing to invest in a network and compete in the market based on the same rules, there is no reason why they should not be allowed to enter the market. It is

contradictory to put regulations in place that are supposed to foster competition, and yet in the same framework prevent new entrants from obtaining an ICOL.

G. Consumer Protection

Section 5.5 of the Report is a disparate compilation of regulatory initiatives that were at one time or another the subject of a consultation or a planned (but not completed) consultation in one of the RA's Work Plans. Rather than now addressing these issues under the umbrella of a sectoral review, they should follow their own proper consultation process.

Mandated Service Credits for Outages

As the RA is aware, residential broadband is a best efforts type service. Service providers use their best efforts to serve the residential customer but there is no guaranteed service level. Service level agreements (known as SLAs) and outage credits are provided as part of business services but not residential services. A key difference between business and residential services is price. Business service pricing is significantly higher than more affordable residential services. If the RA wants to mandate SLAs and outage credit schemes for residential services, it will result in higher costs and by extension, higher prices.

We have many small and medium sized business customers who would prefer to buy residential services (without the SLA and outage credit scheme) because of the lower pricing. Similarly, residential customers are free to buy business services for their home if they are willing to pay business prices. We believe this is a decision that each and every customer can make for themselves. The RA should let customers decide what level of service and pricing they want, rather than forcing a regulated outcome.

Protections for Low Incomes

This kind of "protection" is really a social policy issue that is properly addressed by the Government rather than the telecommunications regulator. If the Government wants to help low income households obtain telecom services, there are a myriad of governmental programs that could be implemented to accomplish that social policy. The RA is not an elected body with a social policy mandate, and should avoid efforts that go beyond the economic boundaries of telecommunications regulation.

Providing Specific Services to Assist Consumers with Disabilities

Similar to the above point, the Government's social service organizations are the appropriate body to determine if public resources should be used to fund or enable special services for consumers with disabilities.

Mandated Email Forwarding

In late 2015, the RA held an Email Mobility Consultation and issued a preliminary decision that was never finalized and implemented. We refer the RA to our comments in that consultation available on

the RA's website at http://rab.bm/index.php/consultation-responses-2/ra-email-mobility-consultation/email-mobility-responses.

We also note the helpful submission of Mr. Iain Grant of the SeaBoard Group found at http://rab.bm/index.php/consultation-responses-2/ra-email-mobility-consultation/email-mobility-responses/1367-bermuda-email-consulation-v3/file.

At paragraph 18 of his submission, he states:

> Changing from one address to another, from one provider to another, the focus of the proposed Determination, is not a major hurdle. While some Bermudian consumers may have considered it a problem as recently as 2013, the world (and Bermuda) has moved on. It may be a minor inconvenience, but it is difficult to grasp how that should trigger regulatory intervention and statutory action. An email sent to one's list of friends and recipients will suffice to enable consumers to "move on" from their ex-IASP to their new IASP. There is no set-up cost: There is no transaction cost. It is not hard to do!

Mr Grant's comments were compelling in 2015 when they were submitted, and they are even more convincing today. Moreover, the lack of action on this matter since 2015 underscores the conclusion that regulatory intervention is not truly warranted.

H. Licence Management

As per our comments above in F. regarding the moratorium, we believe that competition is enhanced by new facilities-based entry into the sector. If, however, the Government decides to maintain or remove the moratorium, we do not believe the RA should use other means (e.g. reissuance and forfeiture) to circumvent or bypass the moratorium.

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If you have any questions regarding the matters set out above, please feel free to contact me directly.

Regards,

Michael Tanglao
General Counsel
One Communications