Response to
Revised Draft 10/10/15
Electronic Communication Bill

Initial Comments

Response from

Columbus Communications Limited

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1. INTRODUCTION

1.1 Columbus Communications Limited thanks the Eastern Caribbean Telecommunications Authority (ECTEL) for the opportunity to provide input to the Revised Draft Electronic Communication Bill. The views expressed herein are not exhaustive. Failure to address any issue in our response, does not in any way indicate acceptance, agreement or relinquishing of Flow's rights.

1.2 We support the broad objective of bringing the legislation in line with the converged nature of the industry, as well as the aims of enabling a robust competitive environment, which is underpinned by fairness, transparency, and accountability in the approach to regulating the sector.

1.3 The process to update the legislative framework started over four years ago in 2011. However it has been dormant for most of that period. Since the commencement of this process the sector has continued to evolve, and the issues that now face the sector are not the same at the start of this process. We are encouraged that ECTEL is now moving ahead with the review. Given the complexity of the current industry landscape it is important that the overarching legislative framework strike the appropriate balance in policy prescriptions to promote fair competition while encouraging continued investment in network expansion and new services. This is necessary for the robust and sustainable development of the sector.

1.4 The success of the sector is critical to the economic development of the countries. Notwithstanding the length of time that has elapsed since the commencement of this review, now that the process is moving forward we urge ECTEL to allow stakeholders reasonable time to provide considered input to the process. This will allow the best opportunity to put in place a framework that is fit for purpose. We do not believe that the time allowed for this consultation process is reasonable or sufficient to address the range and the gravity of the policy issues that are under consideration.

1.5 In general the Draft Bill tends to be prescriptive. There is also an imbalance of licensee rights and obligations that tend to favor over-regulation and in some cases unnecessary burdensome processes and requirements. In an industry that

is dynamic and continually changing, international best practice dictates that to achieve the goal of market efficiency and robust and sustainable competition, concepts and principles that underpin policy and enabling legislation and language of such legislation, should be flexible and allow the framework to evolve with market changes. Enabling legislation should therefore be reasonably broad and allow scope for regulations to dictate specifics as the market evolves.

1.6 Key objectives of effective regulations include transparency, accountability and predictability. Conducting public and industry consultations thus allowing stakeholders to provide input to decision making, is the primary tool to achieve these objectives. In some cases the Draft Bill can be improved by including consultations.

1.7 Our response focusses on the broad picture and the specific issues addressed below illustrate examples of the substantive issues with the Draft. Bill.

2.2

2. Part 1 (Clauses 1 to 7) – Preliminaries, Interpretation and Objects

2.1 The definition of access is very wide and prescriptive and does not ensure the necessary balance to encourage continued infrastructure investment in the markets. It also does not protect the proprietary competitive business approaches and investments that are undertaken with risk and business acumen distinguishing services providers in the market. The definition not suitable for umbrella legislation.

2.5 In object [3.1(d)] reference is made to ensuring compliance *"with the principle of net neutrality and that internet service providers should enable access to all content and applications regardless of the source and without favoring or blocking particular content or websites;"* This position supports the continuing unfettered access over the top providers (OTTs), both from outside of the jurisdiction and others operating from within our borders have providing voice, video and other services and applications over the internet to end users. These service providers operate illegally, and there is nothing in this Draft Bill that seeks to address these issues.

Locally licensed operators invest heavily in local economies. In addition to building networks, operators invest significantly in the people they employ, creating quality and sustainable opportunities to large numbers of people across a broad skillset. OTTs do not contribute to the development of local economies. They do not pay taxes or other fees. There is not even a minimal financial contribution to the well-being of the country. OTTs invest nothing in local communities, while their activities place existing employment and investment at risk as licensed networks revenues fall. OTTs do not comply with companion legislation dealing with national security and child protection issues for example. Object 3(1) is therefore inconsistent with several of the other objects; e.g. encourage, promote and facilitate and otherwise assist in the development of investment, innovation and competitiveness or ensuring national security and consumer protection interests are served.

2.6 Clause 7(1) (c) speaks to one role of the Minister as policy implementer and acting on recommendations of the Commission. This is a notable change in to the current Treaty arrangements aimed at achieving regional harmonization, where the Minister acts on ECTEL's recommendations. The goal of regional harmonization and attendant benefits such as cost efficiencies are less obtainable with this change.

3. Part 2 (Clauses 8 to 33) – The National Electronic Regulatory Commission

3.1 The change in the design of the Commission, i.e. establishing it as a corporate body, will tend to increase the cost of operations. At the same time the instructional design, for example the requirement to have public officers on the Board of Commissioners restricts the level of independence from political dictates. This, with the enhanced role of the Commission noted in paragraph 2.6, as well as the limited competencies available to the Commission (by virtue of size and staffing) underscores our real concerns about the effectiveness of this approach.

Clause 11(1) (e) gives the Commission very wide discretion to regulate the price of any service provided by a licensed operator, seemingly without the

appropriate guidelines. From our experience this causes lack of clarify and regulatory uncertainty.

3.2 In addressing anti-competitive practices, Clause 11(1) (k) makes a vague reference to the Commission liaising and consulting with national competition authority. Columbus is now aware of the existence a competition authority in any of the countries in the ECTEL regional grouping. Further, a pre-requisite for establishing such a body is the existence of competition laws in the individual jurisdictions.

3.3 Sustainable development of the market and promoting effective competition, is the most efficient way of ensuring customers benefit from a wide range of high quality and affordable services. In this way any need to reinforce quality of service standards can be targeted. Clause 11(1) (t) speaks to the duty of the Commission to specify quality of service indicators as a means of enforcing compliance with the stated quality of service standards. No reference is made to industry consultations in reaching appropriate decisions on these matters. With any regulatory intervention we believe the right balance needs to be struck to promote overall market efficiency. For quality of service, industry self-regulation should be encouraged.

3.4 Clause 11(2) states,

"In the performance of its functions the Commission shall, where necessary and in accordance with the Treaty, consult and liaise with ECA."

This gives the Commission very wide discretion. This will make it more difficult to achieve the aim of harmonization.

3.5 Clause 11(3) speaks to the commission determining rates for broadcasting services, and in doing so to consider content issues and to liaise with the national authority established for regulating content.. This Bill does not cover content [Clause 5]. This clause is at variance with this position and should be excluded. Further we are not aware of national authorities set up to regulate content in any of the markets.

3.6 In the clause on Oath of Secrecy and Confidentiality 18(2) (b) suggests that any

application summited to the Commission would be treated confidentially. We support this position, except it would improve transparency if the industry is made aware of the fact of an application, and in the case of spectrum, it would be useful to know what spectrum was applied for.

3.7 The budget and work plan of the Commission (Clause 28) should be subject to industry consultation. This helps to promote transparency, efficiency and accountability. This is the practice in other jurisdictions.

4. Part 3 (Clauses 34 to 50) - Licensing, Frequency Authorisation, Registration and Approval

4.1 The current market reality is that new players, particularly over the top providers (OTTs), both from outside of the jurisdiction and others operating from within our borders are providing voice, video and other services and applications over the internet to end users. These are commercial entities that gain access to end customers. They ride on the network infrastructure of licenced providers and compete directly with them in the service and applications layer. The revisions proposed do not specifically address these market players.

4.2 A key question facing the industry, in particular markets such as those in ECTEL states where per capita income is comparatively low, and investment to fund network development is scarce, is whether they can continue to turn a blind eye to new service providers who benefit from the investments of network providers, provide services to consumers, but do not abide by the licensing regime of the various countries.

4.3 The issues are complex and challenging, but as the countries are revisiting the legal frameworks, every efforts should be made to find appropriate policy and legal prescriptions to address the real issues facing the industry.

4.4 There seems to be a move away from the harmonized approach to regional industry policy and regulations. For example [Clause 40(3) in addressing modifications of license or frequency authorization, the clause seems to suggest

that the Commission is only required to consult with ECA. In the current framework and a previous Draft Bill such actions were based on ECTEL recommendations.

For transfer of licence or frequency distribution [Clause 41(4), we note network licences are evaluated by ECA while service based licences are evaluated by the Commission. Such changes will minimize the impact of the Treaty.

4.5 Clause 42(5) (c) seems to address content related issue which is not covered under this Bill. All matters related to the regulation of content should be excluded from the Draft Bill.

5. Part 4 (Clauses 51 to 72) – Rights and Obligations of Licencee and Frequency Authorisation Holder

5.1 The access obligations set out in the various sections, specifically Clauses 51, 52 and 53 are very onerous and do not ensure the necessary balance between promoting service based competition and encouraging continued infrastructure investment in the sector. It also does not protect the proprietary competitive business approaches and investments that are undertaken with risk and business acumen and serve to distinguish services providers in the market.

Of particular note is Clause 51(3) which provides that a breach of the relevant provisions is a breach of the licence.

5.2 Clause 56 makes allowance for equal access and indirect access. If there are no requirements for such facilities there is no need to oblige network providers to make such provisions.

5.3 There is no need to legislate the leasing of excess capacity [Clause 57]. Such arrangements should be should be the purview of business operators who are in the best position to gauge the commercial merits of such arrangements.

5.4 With the expansion of the scope of the legislation from telecommunications to electronic communications, the scope of numbering increases. Numbers would now include telephone numbers, IP addresses, domain names, customer premises equipment identifiers, MAC addresses and ENUM addresses, among other identifiers. Clause 67 should be amended to cover the range of identifiers.

5.5 The provisions for privacy and confidentiality need to be supported by appropriate companion legislation.

6. Part 5 (Clauses 73 to 82) – Competition

6.1 Clause 73(1) provides that the Commission shall have the exclusive competence to determine competition issues within the industry. We question the efficacy of this position as handling completion matters requires. specialized skills and competencies will normally do not reside within the Commission. .

6.2 Clause 73(7) (d) is not clear, we request clarification. We disagree with the position to include loyalty discounts as anti-competitive, with no qualifications such as economic tests to verify that the specific discount scheme is aimed at foreclosing competition. In normal circumstances such programmes are designed to benefit customers. This is essential applying ex ante approach when an ex post regulatory approach is more appropriate.

6.3 The explanation / application of the concept of non-discrimination [Clause 75], is not in keeping with general competition principles. It states that a service provider shall not discriminate between persons who acquire or make use of a service in the market in which the service provider operates in relation to; any fee or charge for the service provided; the performance characteristics of the service provided; any other term or condition on which the service is provided.

It is our considered view that this clause incorrectly applies the competition policy principle of non-discrimination. In competition law, non-discrimination has a very specific meaning. It refers to unjustifiable differentiation in pricing or other terms and conditions in the supply of services to similar situated consumers. The correct application is provided in Clause 76. The correct application should be used consistently in the document. Similar to the other

jurisdictions such as EU and Barbados, we suggests that dominance should be a precondition for discrimination. We also suggest that the definition of discrimination be revised to curtail abuses to situations where dissimilar conditions are applied to equivalent transactions of similarly situated customers.

7. Part 7 (Clauses 85 to 94) – Offences

Clause 93 speaks to the penalty for breaches of code of practice being a fine of 3% of total annual revenues for the previous year. We consider this to be very harsh. Penalties for breaches should be proportionate to the offence, as such there should be a graded list of remedies that is based on the severity of the impact of the breach. This may include warnings, fines, etc. Further, where a breach is alleged, the Act should set out a process which provides licensees the opportunity to present their views. Where appropriate, the licensee there could be allowed time to remedy the breach before final action is taken.

Concluding Comments

We look forward to providing further comments to this process. We also encourage ECTEL to allow stakeholders reasonable time to provide input. Kindly direct any communication in relation to this response to:

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