

***** PUBLIC VERSION *****

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**CABLE & WIRELESS (CAYMAN ISLANDS) LIMITED
COMMENTS ON**

**ICT 2019-1 – CONSULTATION ON PROPOSED SECTION 23(2)
(REGULATORY NOTICE) AND ICT LICENSING TEMPLATE UPDATES**
(Launch Date: 7 June 2019)

16 August 2019

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I. INTRODUCTION

Cable and Wireless (Cayman Islands) Limited, d/b/a Flow (“**Flow**”) hereby provides its written response to ICT 2019-1 Consultation Document - Proposed Section 23(2) (Regulatory Notice) and ICT Licensing Template Updates, issued by the Utility Regulation and Competition Office of the Cayman Islands (“**Ofreg**”) on 7 June 2019 (“**Consultation Document**”).

The stated purpose of this proceeding is to streamline operators’ Licenses, “lower[] the regulatory burden” on Licensees (Consultation Document, par. 29), and “facilitate the continued development and deployment of appropriate, established and innovative communication technologies” (Consultation Document, par. 9). Flow supports these objectives, but does not agree that the reforms proposed by Ofreg will help achieve them. To the contrary, almost the entirety of the changes to the License Template proposed by Ofreg include the addition of *new* conditions or the *expansion* of existing requirements. The most profound example of this failure applies to the reforms to ICT Fees proposed by Ofreg. These fees include the regulatory, spectrum and license payment obligations specified in Annex 2 to each operator’s License. The ICT Fees Licensees pay today are excessive—they constitute almost 7 percent of an operator’s annual turnover and are over 6x as large as the ICT Fees paid, on average, in Flow’s other 14 markets in the Caribbean. For further analysis, see Table 1, which includes a benchmark analysis of ICT Fees across Flow’s 15 Caribbean markets, including the Cayman Islands.

We believe ICT Fees in the Cayman Islands demand reform and must be reduced to bring them in line with the ICT Fees operators pay elsewhere in the Caribbean. This is the most important and significant issue to be addressed in this proceeding. The exorbitant fees Licensees pay in the Cayman Islands are a barrier to entry, expansion, investment and competition. Flow had hoped Ofreg would acknowledge, and take significant and concrete steps to significantly reduce ICT Fees. Based on the changes to ICT Fees that Ofreg has proposed, this is clearly not the case, however. Ofreg has not introduced any reforms that will materially reduce ICT Fees or bring them in line with what regulators and governments charge elsewhere in the Caribbean. To the

contrary, as we will explain, most (3 out of 4) of the proposed changes will necessarily increase ICT Fees payable by Flow, while the one proposal (for Special License Zones or SLZs) intended to reduce fees would appear to exclude Flow and is so poorly specified, it is effectively impossible to determine its impact. We ask Ofreg to reconsider these proposals, recognize that substantial reductions to ICT Fees are a fundamental imperative, and introduce substantive proposals that will achieve this result.

We have significant concerns with the scope of the License Template proposed by Ofreg, and what Ofreg is attempting to shoehorn into it. These concerns include Ofreg's proposals to include complex, new regulations in the License Template, such as SLZs, net neutrality rules, Cyber Threat and Vulnerability reporting requirements, among others. We do not believe these proposals are sufficiently developed or articulated by Ofreg in the Consultation Document, or have received sufficient consideration by Licensees and the public. More fundamentally, we do not believe this proceeding provides a sufficient opportunity, or is the appropriate venue, to consider complex new policies. We ask Ofreg to remove these new policy proposals from this proceeding, and focus on developing a License Template that is limited in scope and focuses on fundamental ICT principles and operator requirements.

Flow's concerns with the scope of the proposed License Template apply equally to the inclusion of retail pricing regulations in Flow's License. In no market where Flow operates, other than the Cayman Islands, is an operator's price regulation regime conjoined with its license. The reason they are treated separately is because they have separate functions and are intended to accomplish different ends. Therefore, we ask Ofreg to separate Licensing from pricing regulations, and pursue separate arrangements for both that match their distinct objectives. Regardless of whether Ofreg chooses to decouple pricing regulations from operators' Licenses, however, we believe it is must introduce a well-defined process to review and deregulate/revise pricing regulations at a regular, recurring interval not exceeding every 4 years.

ICT Fees must not only be substantially reduced, but the inefficient system of paying ICT Fees specified in the License Template must also be improved.

We recommend replacing the quarterly payment and reporting system a more streamlined system that will allow Licensees the option to (1) make a single up-front payment at the inception of the License, which would cover funding for the life of the License, or (2) make three separate payments at 5-year intervals, which would cover the funding for the life of a 15-year License. These alternatives would be an improvement over the existing quarterly system, by reducing the administrative burden and providing Ofreg and government increased financial flexibility.

The remainder of this document is organized as follows. In Section II, we respond to Ofreg's proposed reforms to ICT Fees, which include proposed License Fee reforms, Regulatory Fee reforms and Authorized Frequencies Fee reforms; in Section III, we respond to Ofreg's proposed new net neutrality regulations; in Section IV, we respond to Ofreg's proposed new cyber Vulnerabilities and Threat reporting requirements; in Section V, we respond to Ofreg's Local Content requirements; and in Section VI, we present our concerns and objections on other issues proposed by Ofreg in this consultation.

II. PROPOSED REFORMS TO ICT FEES

There are three separate fees Licensees pay to Ofreg and the Cayman Islands government. These fees include: License Fees; Regulatory Fees; and Authorized Frequencies Fees (hereafter, collectively referred to as "ICT Fees"). Ofreg's proposal includes several reforms to these fees. In this section, we respond to each of these proposed reforms.

The changes to ICT Fees proposed by Ofreg include:

1. The elimination of an existing expense exclusion from the License Fees calculation, which would increase the amount of License Fees payable for Licensees that incur the excluded expense;

2. The elimination of an existing cap on Regulatory Fees, which would increase the amount of Regulatory Fees payable for Licensees that meet the cap;
3. The elimination of an existing cap on Authorized Frequencies Fees, which will increase the amount of Authorized Frequencies Fees for Licensees whose frequencies exceed the cap; and
4. The introduction of a “Special License Zone” (SLZ) License Fee discount, which may decrease License Fees by some amount to some Licensees—however the proposal is so poorly specified, the impact is largely unknown, but appears to be very small and more than offset by a substantial increase in compliance costs.

Before responding to these proposals, we provide context on the financial burden of ICT Fees in the Cayman Islands, in order to understand and motivate the type of ICT reforms we believe are necessary and appropriate. In Table 1, we present a benchmark comparison of ICT Fees in the Cayman Islands to ICT Fees in the 14 other markets in the Caribbean where Flow operates. Table 1 compares three figures: the relative size of the markets (as measured by Flow’s annual revenues); the absolute (dollar) amount ICT Fees paid by Flow in these markets; and relative (% of revenues) amount of ICT Fees paid by Flow in these markets. The 15 Flow markets, including the Cayman Islands, that are included in this benchmark analysis are identified in the notes to Table 1.

In 2018, Flow paid # [REDACTED] # in ICT Fees to Ofreg and the Cayman Islands government, which accounted for 6.8% of the company’s annual revenues for 2018. During this same period, Flow paid, on average, just # [REDACTED] # in ICT Fees in its other 14 Caribbean markets, which accounted, on average, for just 1.1% of annual revenues in those markets. Therefore, on an absolute (\$) basis, the ICT Fees paid by Flow Cayman Islands are almost 5x as large as the ICT Fees paid, on average, in Flow’s other 14 markets; and on a relative basis (controlling for differences in the size of these markets), the ICT Fees paid by Flow Cayman Islands are over 6x as large as the ICT Fees paid, on average, in Flow’s other 14 markets.

The ICT Fees paid by Flow in the Cayman Islands are by far the highest across Flow’s 15 Caribbean markets, even though Flow’s businesses outside of the Cayman Islands are, on average, substantially larger. This is demonstrated in Table 1 by comparing the annual revenues across

markets. It is further highlighted by, for example, comparing the ICT Fees paid by Flow Cayman Islands to the ICT Fees paid by Flow Jamaica—Flow’s largest market out of the 15 Flow Caribbean markets, with the largest ICT Fees, after Flow Cayman. While Flow Jamaica is the largest Flow market, with annual revenues 4x as large as Flow Cayman Islands, the ICT Fees paid by Flow Jamaica in 2018 were just # [REDACTED] #, or a little over half of the # [REDACTED] # in ICT Fees paid by Flow Cayman Islands in 2018.

Table 1: Annual (2018) ICT Fees* across 15 Flow markets**
(in US\$)

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We believe the excessive and disproportionate financial burden of ICT Fees on Licensees in the Cayman Islands is the most important and significant issue to be addressed in this proceeding. We had hoped Ofreg would acknowledge this acute problem—the substantial barriers to expansion, investment and competition produced by these exorbitant ICT Fees—and take concrete steps to reduce and bring ICT Fees in line with other Caribbean countries. Based on Ofreg’s proposed changes to ICT Fees, this is clearly not the case. Ofreg has not introduced any reforms that will materially reduce ICT Fees or bring them in line with what regulators and governments charge elsewhere in the Caribbean. To the contrary, most (3 out of 4) of the

proposed changes will necessarily increase ICT Fees payable by Flow, while the one proposal (for SLZs) intended to reduce fees would appear to exclude Flow and is so poorly specified, it is effectively impossible to determine its impact. However, even if one interprets the proposed SLZ License conditions most favorably, we believe the proposal is discriminatory (and hence anti-competitive); it will not provide any material relief in ICT Fees to Licensees that qualify for them; and it will substantially increase Licensees' cost of compliance.

A. License Fee reform

Under current Licensing requirements, License Fees are set "equal to six percent (6%) of [a Licensee's] Quarterly Revenue" and are paid in quarterly intervals "[n]ot later than fifteen (15) calendar days following the end of [each] Quarter," where Quarterly Revenue is defined to be a Licensee's Quarterly Turnover, less exclusions for certain expenses, including: interconnection, infrastructure sharing, wholesale services and settlement payments.

When submitting payment to Ofreg, each quarter Licensees must also provide "a licence fee report showing the amount of the Quarterly Turnover broken down in a manner prescribed by the Authority [Ofreg], Quarterly Revenue and all calculations applied, and Unaudited Financial Statements." This license fee report is also subject to audit and review by Ofreg on a quarterly basis, and Licensees must provide Ofreg all requested further information that Ofreg may deem necessary to substantiate and confirm a Licensee's quarterly payment.

Finally, current Licensing requirements require license fees to be applied in a uniform, non-discriminatory manner, using the same formula and specification for all Licensees. This requirement appears in Flow's existing license as Condition 3.2, and is intended to ensure the financial burden of regulation is share equally by all operators, and provides a level competitive playing field.

Ofreg has proposed three changes to these License Fee obligations: one, a geographic-specific "Special License Zone" (SLZ) License that would apply specifically to Licensees' broadband

Internet access services; two, eliminating Ofreg's existing non-discrimination obligation, condition 3.2; and three, increasing License Fees by eliminating settlement payments as an allowable exclusion to Quarterly Turnover. We have significant concerns with these proposals both for what they attempt to achieve, but also equally for what they choose to ignore.

1. Removal of existing License Fee Condition 3.2 on non-discrimination

Ofreg has proposed eliminating a condition that would require Ofreg to apply License Fees in a non-discriminatory fashion. This condition, Condition 3.2, appears in Section 3 to Flow's existing license, and is the third of five conditions applicable to License Fees. However, it is unclear if this proposed change is intentional, as the section of the Consultation Document intended to identify each proposed material modification to the License Template does not mention the proposed removal of this condition. The only indication of this change is found in Annex 2, which presents the proposed License Template, and was uncovered by Flow when comparing the proposed template to Flow's existing License. Section 3 of the proposed template now contains only four conditions; the condition on non-discrimination has been removed.

If this change to the License Template is intentional and Ofreg is in fact proposing to remove this condition, then we object to the way it has been proposed without notice or comment, and we ask Ofreg to provide an explanation and justification for why it is appropriate to remove this condition. Flow believes a non-discrimination condition is appropriate and necessary to insure License Fees are applied in an equal, competitively-neutral manner.

We can discern just one explanation for this change: the non-discrimination condition appears to confound Ofreg's proposal to introduce and implement new SLZ Licenses. However, as we explain in detail below, Ofreg's proposal is so poorly specified, we cannot confirm this is the case. To be clear, however, if the proposed SLZ Licenses are offered to only a subset of Licensees, and disqualify Flow, then this is clearly discriminatory and anti-competitive.

2. Special License Zones (SLZs)

Ofreg's SLZ policy proposal is a short document (just 7-pages long) that appears as Annex 3 to the proposed Regulatory Notice (RN) Template. In Section 1 to Annex 3 (Introduction), Ofreg states that Annex 3 is intended to "be a guide to persons intending to provide broadband services within the identified [Special License] Zones" (Annex 3, par. 1.5). In Section 2 to Annex 3 (Need for Broadband Access SLZ), Ofreg also acknowledges that existing licensing obligations and ICT Fees ("in particular the requirement to pay a 6% royalty fee on revenue") are a barrier to entry and investment that negatively impact a Licensee's return on investment and make the Cayman Islands less commercially attractive (Annex 3, par. 2.3). Based on these concerns, Ofreg concludes:

"In consideration of the above observations, in an attempt to lower the barriers to entry, the Office has determined that the incentives set out in [its SLZ proposal] are appropriate to achieve a competitive commercial rollout of broadband access" (Annex 3, par. 2.4).

We are in fundamental agreement with Ofreg on this point: excessive ICT Fees are a significant barrier to entry and investment, and reductions to ICT Fees are necessary to reduce barriers and promote greater availability of ICT services throughout the Cayman Islands. However, we do not believe Ofreg's proposal to introduce SLZ Licenses is sufficient, and as specified, we believe the proposal is much more likely to make the problem worse.

What Ofreg is attempting to achieve in its 7-page "guide" represents a significant change in regulatory policy in the Cayman Islands; it is a seemingly complex proposition that requires substantial thought and consideration. We do not believe this guide offers a sufficient basis for Licensees to provide useful comment. Much more fundamentally, we disagree with the process Ofreg has chosen to implement this new proposed policy (as an addendum to a license reform consultation), nor do we agree the License Template is where this new program belongs. The License is a long-standing agreement containing fundamental principles and requirements that are intended to remain largely static over the agreement's 15- to 20-year term. Ofreg's attempt

to shoehorn a new program that is untried and untested into this agreement is inappropriate. If Ofreg wishes to pursue its SLZ program, then it will require thorough consideration and vetting beforehand, but it will also require similar consideration and adjustment ex post, and the License Template is not the place to indoctrinate this type of a dynamic process.

While the SLZ program proposed by Ofreg is difficult to decipher, our best interpretation is that it is limited to Licensees providing broadband access services, whom are in breach of their License's network roll-out obligation—that is, they have not rolled-out their networks to all areas of the country, as required in Annex 1A to their License. This is a fundamental implication of this proposal that we believe must be explicit and addressed by Ofreg. Namely, the proposal provides a reward or incentive to Licensees that have failed to meet their Annex 1A network roll-out obligations, and are in breach of their License, while at the same time apparently denying this same incentive to Licensees that have rolled out their network and are complying with their License obligations.

This breach in network roll-out obligations has gone unaddressed and unenforced by Ofreg, and as a result Flow's competitors have been allowed to cherry pick and limit where they deploy their networks to the most lucrative areas of the country. Ofreg does not indicate how it plans to address this breach or hold non-compliant Licensees accountable for this failure. Instead, by default, the proposal appears to forgive the breach, eliminate existing roll-out obligations, and replace them with an incentive limited to non-compliant Licensees that provides them a reward if at some point in time they so choose to achieve compliance. Flow believes this proposal is fundamentally unfair, discriminatory and anticompetitive. If Ofreg chooses to implement this scheme, then Flow asks Ofreg to address this inequity by providing Flow with significant relief to its License Fee obligations, as a result of being the only operator to have met these roll-out demands and provide broadband access services across the country's three islands.

(a) Description of the SLZ proposal

The purpose of the proposal is to provide non-compliant Licensees a reduction in License Fees where they can demonstrate they have built out their network to a specific geography or SLZ and earned broadband access services revenues in that SLZ exceeding some pre-specified threshold. The proposal introduces five types of SLZ licenses that correspond to five different geographic areas. The default SLZ corresponds to the western half of Grand Cayman (up to Bodden Town) and activity within this SLZ does not qualify for a License Fee reduction; all broadband access services revenues earned in this default zone pay the standard 6% License Fee. However, in the four remaining SLZs—which include the eastern portion of Grand Cayman (starting from Bodden Town), and the sister islands (Cayman Brac and Little Cayman)—License Fees are capped based on a revenue threshold (i.e., broadband access services revenues earned by a Licensee in a zone that exceed the zone’s threshold are exempt from the 6% License Fee).

To receive an SLZ License and benefit from the SLZ incentives, it would appear, based on our best interpretation of the proposal, that a Licensee must satisfy the following requirements:

- It must be in breach of its current network build-out obligations, i.e., have not already built out its network to an SLZ, as it is required under its existing license;
- It must subsequently apply for an SLZ License and demonstrate it will introduce broadband access services in the SLZ per a pre-approved “Roll-out schedule”;
- After rolling out to the SLZ, it must then demonstrate it offers broadband access services to all areas in the SLZ;
- It must “identify and separate” broadband access services revenues (i.e., identify revenues earned within the SLZ and separate qualifying broadband revenues from non-qualifying revenues);
- It must earn broadband access services revenues in the SLZ that exceed the pre-specified threshold for that SLZ; and
- It must submit to an Accounting Separations process, whereby “all accounting for operations under, affiliated or benefitting from the zone license must be separate and reported as such from other regulated and unregulated operations.”

(b) Unspecified criteria in the SLZ proposal

We believe the SLZ proposal is fundamentally ambiguous and contains significant requirements that are unspecified. The aspects of Ofreg's proposal we believe require further explanation are the following:

Qualifying services. The document contains no definition or discussion of the services that qualify under this proposal. In several instances, the term broadband access is capitalized ("Broadband Access"), suggesting it is or was a defined term. However, we are unable to find any definition of this term in the Annex 3 proposal or anywhere else within the Consultation Document.

Qualifying networks. The document contains no definition or discussion of the networks or technologies that qualify under this proposal. The document contains a single word that appears to speak to network technology, "flexible," found in the row labelled "Technology" to a table in par. 3.3 to the proposal. While there is no description provided, we believe the word "flexible" implies all broadband access services are included in the proposal, regardless of the network technology employed to supply them (fixed wireline, fixed wireless and mobile wireless).

SLZ license duration. The document specifies a 15-year duration for SLZ licenses (see table in par. 3.3 to the proposal). Yet, elsewhere (see the License Template proposed by Ofreg) all reference is made to a 10-year license duration. This inconsistency causes confusion, as the section of the Consultation Document that identifies each of the proposed material modifications does not mention any modification to license duration. The duration of Flow's existing license is 15 years and we believe this 15-year duration, or even the maximum allowable duration of 20 years, as specified in section 28 of the ICT Law, is appropriate, as there is no need or value to renewing licenses at shorter intervals.

Network rollout. SLZ incentives are awarded based on qualifying criteria, one of which is that Licenses "rollout services in the defined SLZ" (see, Annex 3, par. 3.3). However, the document

contains no definition of the term “rollout.” We believe this term must be defined in a manner consistent with Ofreg’s existing non-discrimination obligations, which means all Licensees be capable of satisfying the rollout criteria. The criteria cannot be defined to exclude a Licensee, which means the criteria cannot exclude Licensees that have already taken steps to satisfy the requirement. Furthermore, it is worth clarifying that “rollout” in this context is not a binary concept, but a dynamic process that requires continuous rolling out of investments and upgrades to technology, and in this sense all Licensees must continuously achieve and maintain a “rollout” requirement.

Revenue Attribution. A second qualifying criteria to achieving an SLZ incentive is revenue, which the proposal indicates must be earned on specific types of services and within specific SLZ boundaries. We have already indicated the proposal does not define the qualifying service, broadband access, but setting that aside, the proposal is also silent on how to attribute revenues from this service to a specific SLZ. And this is a fundamental problem when the predominant mode of consuming broadband access services in the Cayman Islands is via a mobile smartphone device. There is also the problem of delineating qualifying revenues when the qualifying service is provided as part of single-price bundle.

Accounting Separation. The document requires “all accounting for operations under, affiliated or benefitting from the zone license must be separate and reported as such from other regulated and unregulated operations.” Setting aside the several fundamental problems, described above, that make a revenues separation difficult or even intractable, there is no explanation provided for why a complete Accounting Separation is required or necessary to implement this proposal. We believe it is unnecessary and would be extremely costly to comply with. For instance, Accounting Separations, where required in Flow’s other markets, can cost the company between US\$200,000-US\$400,000 per annum to complete, and where they are required to be audited by a third-party, these costs more than double. We have estimated, and present below, the maximum benefits this proposal might provide a Licensee, and determined the compliance costs

necessary to implement Accounting Separations represent over 10x this estimated maximum benefit.

(c) Potential reductions to License Fees offered by SLZ proposal

In order to estimate a range of possible benefits to Licensees from Ofreg's SLZ proposal, we must make several assumptions, some of which may not be consistent with how Ofreg proposes to implement this program. These assumptions include the following:

- Our analysis examines Flow's annual 2018 revenues from fixed-wireline broadband access services and separates these annual revenues into the five SLZ geographic zones based on household or business address.
- We assume that all broadband Internet access services offered by Flow today meet Ofreg's unstated definition, and qualify as a broadband access service under Ofreg's proposal.
- We limit the Flow broadband access services to those provided to fixed locations over Flow's fixed landline network. That is, we exclude broadband access services provided by Flow over a mobile wireless network, including smartphone mobile devices that currently provide broadband access services, as it is unclear on how to assign revenues from mobile services to a specific geographic location.
- We assigned broadband access services revenues provided on a bundled basis on a proportionate basis (based on each service's stand-alone price). However, we do not believe this assumption is determinative, as relatively few of Flow's fixed-line customers today purchase broadband access services on a bundled basis.
- We consider two scenarios—scenario 1 assumes a single SLZ Licensee and scenario 2 assumes two equal-size SLZ Licensees. To implement scenario 1, we assume Flow's 2018 revenues reflect the revenues a single SLZ Licensee will achieve in each SLZ; and to implement scenario 2, we assume that one-half of Flow's 2018 revenues reflect the revenues each of the (two, equally-sized) SLZ Licensees will achieve in each SLZ.

The License Fee reduction under scenario 1 represent the maximum benefit a Licensee can expect to achieve under this proposal. By contrast, the savings under scenario 2 represent an outcome that is probably closer to what we would expect and what we believe Ofreg would hope to achieve under this regime.

Scenario 1 (a single SLZ Licensee): The reduction in License Fees provided to a single SLZ Licensee is estimated to be # [REDACTED] #, which for comparison represents just 3% of Flow's total # [REDACTED] # in annual ICT Fees.

Scenario 2 (two, equally-sized SLZ Licensees): The reduction in License Fees provided to each of the two, equally-sized SLZ Licensees is estimated to be just # [REDACTED] #, which for comparison represents just 1% of Flow's total # [REDACTED] # in annual ICT Fees.

We note that adding to these results any reductions to Authorized Frequencies that this proposal may contemplate, will not materially change the results, as Authorized Frequencies Fees constitute a de minimis amount (1%) of Flow's total ICT Fees.

3. License Fee, allowable expenses

Ofreg has proposed to amend the types of expenses allowed to be deducted from the quarterly revenues used to calculate License Fees. These expenses are referred to as "allowable expenses." Ofreg explains this amendment as follows:

"While payments made to other licensees for interconnection, infrastructure sharing and certain wholesale services may be deducted, settlement payments made to international carriers for international traffic no longer would be"
(Consultation Document, par. 63).

Ofreg justifies this proposed change by arguing the settlements exclusion "protects" Licensees' profit margins and this "protection" creates a disincentive for Licensees to compete (i.e., negotiate more favorable settlement rates with international carriers). We have a few observations on this proposed amendment and Ofreg's rationale for implementing it. One, it will

necessarily increase the amount of License Fees paid by Licensees that provide international services. This is exactly the wrong direction Ofreg should be taking ICT Fees, as they are already excessive, and this amendment will only further confound the disproportionate burden Licensees in the Cayman Islands bear relative to what operators incur elsewhere in the Caribbean. Flow believes that Ofreg must recognize that reducing ICT Fees is a fundamental imperative and introduce substantive proposals that will achieve this result. Where Ofreg wishes to restructure a fee, without reducing it, as it is proposing here, then at a very minimum, that amendment must be cost-neutral, i.e., not increase the amount of the fee payable to any individual Licensee from what that Licensee would have paid without the amendment.

Two, we disagree with Ofreg's claim that it is the absence of a tax, or in this case the presence of a fee exclusion for international calls, that is the source of "protection" or a disincentive to compete. To the contrary, it is presence of that tax or fee that distorts incentives and creates deadweight-loss inefficiency. Therefore, if it is Ofreg objective to reduce incentive distortions caused by its exorbitant fees, then it must reduce, not increase, them.

Three, Ofreg's proposal to remove settlements as an allowable expense is inconsistent with its separate proposal to maintain wholesale services as an allowable expense, especially given the asymmetric nature in which wholesale services are provisioned. Flow, the incumbent, does not purchase any wholesale services, other than interconnection, from other Licensees, whereas many of the other Licensees purchase wholesale services from Flow. This means that—unlike the settlement fee exclusion or the interconnection fee exclusion, which are provided symmetrically to all Licensees—the wholesale services exclusion is provided to only a subset of Licensees, which excludes Flow. This is not only arguably discriminatory, but it encourages Licensees other than Flow to free ride on Flow's networks instead of building their own.

4. Quarterly reporting and payment obligations

Ofreg is unique both in the large number of quarterly reporting obligations and payment of fees on a quarterly basis, instead of on a less frequent basis. We believe that quarterly payments and

the corresponding paperwork demanded to substantiate these payments are inefficient and unnecessary. Each quarter, Flow must not only administer payment to Ofreg, but accompany each payment with a licence fee report showing the amount of Flow's quarterly revenues, broken down in a manner prescribed by Ofreg, including all formulas and calculations, and unaudited financial statements. Each of these submissions can and often do prompt Flow to respond to a set of questions or RFIs issued by Ofreg on the information submitted.

We believe that replacing a quarterly system with a system that applies fewer transactions would bring the Cayman Islands into line with best practice internationally. It would also reduce potential for disputes over reported revenue, if instead payments to Ofreg were based only on audited financial statements. We implore the Office to seriously consider the level of administrative burden its quarterly system places on all Licensees, and to examine whether such an approach is necessary at all. Arguably, reliance on audited financials, as occurs in almost every case around the region and indeed, the world, is a more reliable, more objective, easier, less fraught method of determining the levels of fees that should be paid. We urge the Office to consider the problems that have arisen in the past; to examine the potential savings that could be achieved to all parties involved, to reflect on that need for reducing the regulatory burden on licensees, and re-evaluate the need for the invasive, time-consuming and resource intensive process which currently obtains.

To address this problem, we propose replacing or adding to the existing system a more streamlined system that would allow Licensees the option to (1) make a single up-front payment at the inception of the License, which would cover funding for the life of the License, or (2) make three separate payments at 5-year intervals, which would cover the funding for the life of a 15-year License. The benefits of these alternative streamlined payment systems are that they would provide Ofreg and government funding immediately, at the inception or 5-year intervals of the License, allowing them to capitalize on the time value of money and the flexibility to employ these funds immediately or incrementally over the life of the License.

Under both of our proposals, the fee would be determined using an average annual revenue figure over the preceding 5 years. This figure would be multiplied over the relevant period--i.e., the life of the License, 15 years, under option (1), or 5 years, under option (2)--to arrive at revenues used to calculate the fee. Protections would also be provided to Licensees who choose option (1): at 5-year intervals, a refund would be provided to the Licensee if its actual revenues for the prior 5-year period were less than the estimated revenues for that period, based on the average-annual revenue figure used to determine the up-front, one-time fee.

Both options (one-time or 5-year payment) would be an improvement over the existing quarterly system, by reducing the administrative burden and providing Ofreg and government increased financial flexibility.

B. Regulatory Fee Reform

The Regulatory Fee is specified to recover the budgeted costs of the ICT section of Ofreg. It is charged to Licensees proportionately, based on each Licensee's revenues; and if that proportionate amount exceeds CI\$600,000, then the Licensee's Regulatory Fee is capped at CI\$600,000. Ofreg is proposing to remove this cap, and to allow Regulatory Fees to exceed the CI\$600,000 ceiling.

We oppose this amendment, as it will increase ICT Fees, not reduce them. This is exactly the wrong direction Ofreg should be taking ICT Fees, as they are already excessive, and this amendment will only further confound the disproportionate burden Licensees bear from ICT Fees in the Cayman Islands relative to other markets in the Caribbean. Ofreg must recognize that reducing ICT Fees is a fundamental imperative and introduce substantive proposals that will materially reduce them. Where Ofreg wishes to restructure a fee, without reducing it, as it is proposing here, then at a very minimum, that amendment must be cost-neutral, i.e., not increase the amount of the fee payable to any individual Licensee from what that Licensee would have paid without the amendment.

Flow also object to Ofreg's lack of transparency in determining the Regulatory Fee. Just as the mechanism or formula used by Ofreg to allocate this fee to Licensees is well-specified and transparent, so should the process of determining the fee. This would include providing Licensees a detailed, line-item breakdown of the ICT Section's proposed budget and the opportunity to consider, evaluate and critique this budget before it is approved, as is allowed by regulators elsewhere in the Caribbean.

C. Authorized Frequencies Fee reform

Today, the Authorized Frequencies Fee is set based on two criteria: (1) the fee is set at the same amount for all transmitter types, irrespective of the use of the transmitter or type of spectrum used by the transmitter; and (2) the per-transmitter fee is capped and cannot exceed CI\$90. Ofreg is proposing to remove both requirements and allow Ofreg to set the fee at any amount it chooses, without regard for a uniform rate or a rate capped at CI\$90 per transmitter.

Flow objects to these proposed amendments, as they provide no practical bounds on Ofreg's capacity to increase rates and no incentive for Ofreg to maintain budgetary discipline. The amount of money Ofreg and the Cayman Islands government already collect from Licensees is excessive and far more than what is required to fund the ICT Section of Ofreg or manage spectrum. Flow believes that Ofreg must recognize that reducing ICT Fees is a fundamental imperative and introduce substantive proposals that will materially reduce them. Where Ofreg wishes to restructure a fee, without reducing it, then at a very minimum, that amendment must be cost-neutral, i.e., not increase the amount of the fee payable to any individual Licensee from what that Licensee would have paid without the amendment.

III. PROPOSED NEW NET-NEUTRALITY RULES

Ofreg proposes adding new provisions to the license template that would help ensure net-neutrality. According to Ofreg:

“[T]he Office proposes that [but for restraints or prioritization applied for traffic management purposes] Licensees shall treat all Internet traffic equally when providing internet access services, without discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used.”

To achieve this end, Ofreg proposes adding two new net-neutrality rules, Conditions 24.1 and 24.2, to the license template. Ofreg states that it has previously considered and evaluated the issue of net neutrality in 2010, as reflected by a paragraph to ICTA Decision 2010-4, a decision that dealt with a separate issue, deep-packet inspection (DPI).

We do not believe that net-neutrality regulations belong in the license template. We believe that the scope of the license should be limited and restricted to well-established principles and rules. Net neutrality regulations do not meet this requirement; they are based on an unfounded, prospective concern and employ restrictions that, to our knowledge, are untried in the Caribbean and rarely tried elsewhere. However, if Ofreg chooses to add net-neutrality regulations to the license template, we believe the restriction it is proposing is overly-restrictive and anti-consumer, and would require much more consideration than what can be provided in this License Reform proceeding. While Ofreg contends it has already provided sufficient consideration to this issue, we do not believe Ofreg’s one-paragraph treatment of net neutrality in its 2010 proceeding on a separate issue (DPI) is sufficient, and if anything, the very limited consideration that was provided to this issue over nine years ago is now stale.

We also do not believe a blanket restriction on all traffic differentiation or prioritization, but for traffic management, is necessary or appropriate. Such a blanket restriction is premature and until there is demonstrated basis for implementing this restriction, it is unnecessary. To our knowledge there have been no instances of blocking or throttling of Internet traffic by a Licensee in the Cayman Islands that were not justified based on traffic management or anti-piracy. We believe there is a very limited instance of prioritization, provided by a single Licensee today—Digicel, who currently zero-rates Whatsapp messaging on certain plans—but we believe this is

an example of how prioritization can and more often does act to benefit consumers and promote consumer adoption of the Internet. These zero-rate offers are intended to bring people online and bridge the digital divide—motives Ofreg should be encouraging, if not directly facilitating.

Zero-Rating is frequently cited as a mechanism to stimulate demand, which is an especially important motivation in many Caribbean markets with relatively low levels of Internet adoption. According to legal scholar Christopher Yoo, an expert in the field of technology law and net neutrality, Zero-Rating is an example of service differentiation, which produces the following “demand-side” benefits:

On the demand side, service differentiation [such as Zero-Rating] addresses what surveys reveal is the major obstacle to adoption—that the majority of nonadopters do not see the value of an Internet connection—by providing preferential access to the content and services that particular users value the most. Service differentiation also reflects the growing heterogeneity of the demands that end users are placing on the network and can enable ISPs to create consumer value by providing offerings that are better tailored to what consumers want. As customer preferences become increasingly heterogeneous, ISPs naturally diversify their service offerings to meet that demand...[In addition] service differentiation promotes competition by broadening the ways that ISPs can compete. Offering service-specific plans that are targeted at key subsegments of the population can promote entry...Conversely, prohibiting service differentiation would limit the dimensions of competition.

See, Christopher Yoo, “Avoiding the Pitfalls of Net Uniformity,” available online at https://scholarship.law.upenn.edu/faculty_scholarship/1952/.

In the United States, the Federal Communications Commission (“FCC”), previously evaluated Zero-Rating on a case-by-case basis, but has since decided to cease investigations of Zero-Rated offers for two reasons: (1) the probability of harm is so low, it does not justify the FCC’s time and resources necessary to undertake an investigation, and (2) in the rare instances where there is a legitimate concern, there are laws and institutions already in place to police such conduct, just as there are in the Cayman Islands—namely, the allegation can be investigated by Ofreg under

the country's competition law and does not require regulation. In announcing this decision last year, the FCC's chairman, Ajit Pai, stated:

Today, the Wireless Telecommunications Bureau is closing its investigation into wireless carriers' free-data offerings. These free-data plans have proven to be popular among consumers, particularly low-income Americans, and have enhanced competition in the wireless marketplace. Going forward, the Federal Communications Commission will not focus on denying Americans free data. Instead, we will concentrate on expanding broadband deployment and encouraging innovative service offerings.

See, statement by Chairman Pai, available online at

https://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0203/DOC-343345A1.pdf.

We raise these points on net neutrality and traffic prioritization to emphasize that adopting and inserting regulation, especially regulations that apply to a rapidly changing market, such as the Internet, require substantial ex ante consideration. However, even after accomplishing this necessary first step and developing a well-considered policy, we maintain that if regulations are deemed necessary, then they do not belong within, and are better managed outside of, an operator's License.

IV. PROPOSED NEW CYBER VULNERABILITIES AND THREAT REPORTING REQUIREMENTS

Ofreg states it is aware "that the networks and services of Licensees are under constant pressure from such threats as hackers, malware distributors and other malicious actors," and therefore concludes that "it is necessary to request the provision of information specific to the Cyber Vulnerabilities and Threats as defined, which includes information separate from that which would be reported as part of the proposed Outage Reporting." The new reporting requirement Ofreg has proposed appears as Condition 23 to the License Template and would require, among other things, that Licensees provide the Office a report within 90 minutes after "the Licensee has experienced a Cyber Vulnerability or Threat."

We object to this new condition and corresponding reporting obligation on the grounds that it is redundant, poorly defined and not targeted to real, much more significant problem, which is threats and vulnerabilities to end-users. First, this condition is redundant. Ofreg already collects timely information on Cyber Vulnerabilities, under the Outage Reporting requirements, based on what we believe is a more clearly defined and identifiable parameter: an Outage.

Second, the triggering event, a Cyber Vulnerability or Threat, is not well defined and could conceivably impose a very frequent, burdensome and costly reporting obligations on Licensees. For instance, the terms “Vulnerability” and “Threat” are defined separately in the license template as a characteristic or event, respectively. However, these definitions provide no objective factors to indicate when a “threat” event has occurred, or a relevant “vulnerability” characteristic is present. Ofreg suggests these events are continuous when it states that Licensees’ networks are “under constant pressure from such threats.” And if not continuous, it is unclear what limiting criteria Ofreg intends to apply to produce a feasible and useful reporting requirement, assuming such an outcome is even attainable in this context.

Third, the target of these proposed reporting obligations is misdirected. Whereas attacks on a Licensee’s network (switches, nodes, etc.) are possible, they are much less common than attacks on end-users (bank accounts, email addresses, online browsing, etc.). The reality is that most hacking or cyber-security concerns are targeted directly at individuals, and the reporting obligation proposed by Ofreg does not draw any clear line between vulnerabilities to customers that happen to be transmitted over a Licensee’s network versus attacks that seek to hack directly into a Licensee’s network switches, nodes, etc.

Finally, we do not believe that housing specific reporting obligations in an operator’s License is appropriate. Even if these Cyber reporting requirements are subsequently vetted and properly specified, they do not belong in the License Template. This is because ICT Licenses are intended to be relatively static, longstanding agreements, limited in scope to fundamental ICT principles and operator requirements. Adding detailed Cyber reporting obligations to a License is contrary

to what the License is intended to achieve. Therefore, we ask Ofreg to remove this new policy proposal from this proceeding and focus instead on developing a License Template that is limited in scope to fundamental ICT principles and operator requirements.

V. LOCAL CONTENT OBLIGATIONS

The Local Content regulations proposed by Ofreg are specified in Condition 26 to the License Template. These regulations mandate all Licensed subscription television service providers include a Local Content channel, with each of the following specific requirements:

- The channel be provided to any subscriber that requests it, at no cost to the subscriber;
- The channel's programming include, at a minimum, 20% Local Content;
- The channel's programming be offered 24 hours a day, 7 days a week, 365 days a year; and
- Only programs produced within the Cayman Islands qualify as Local Content.

Flow objects to this heavy-handed treatment of Local Content for several reasons. First, these requirements impose a substantial and unnecessary cost on Licensed subscription television providers in the Cayman Islands, a market where the existing supply of content that meet Ofreg's narrow definition of Local Content is constrained. These limits on Local Content often require a Licensee to construct its own production facilities to meet the requirement, which is inefficient and creates a barrier to entry.

Second, Ofreg's Local Content obligations are not applied consistently, in an efficient manner that promotes competition. The Local Content obligations apply only to Licensed subscription television providers, and exempt unlicensed (OTT) subscription television providers. This asymmetry cannot be ignored by Ofreg; it is no longer justifiable or economically sustainable, as the rapidly growing demand for OTT content has transformed the market structure and competitive dynamics for subscription television. Ofreg has to acknowledge this problem and

take steps to accommodate, or at minimum not exacerbate, this transition. It is no longer feasible to passively advantage one set of operators, by imposing heavy-handed regulations on another.

Three, if Ofreg chooses to retain these Local Content obligations, Flow objects to the requirement that only content produced within the Cayman Islands can qualify as Local. We believe this requirement is too restrictive in scope and excludes content that is local in nature and of value to Cayman residents. This limitation excludes substantial content that speaks directly to local issues that impact the lives of Cayman Islands residents, but happen to be produced outside of the country. For instance, content produced in adjacent islands, such as Jamaica, frequently include local content, and we believe this content is relevant and should qualify as Local.

Finally, Flow objects to the requirement that the Local Content channel broadcast, at a minimum, 20% Local Content. We believe that this requirement, in conjunction with the narrow treatment of Local Content (i.e., produced exclusively within the Cayman Islands) disqualifies an array of locally-focused content, and we ask that Ofreg consider relaxing one or both of these requirements in the License Template.

VI. OTHER ISSUES

A. Scope of the License Template

We have significant concerns with the proposed scope of the License Template and the propriety of what Ofreg is attempting to shoehorn into it. These concerns include Ofreg's proposal to include complex, new regulations in the License Template, such as Special License Zones, net neutrality rules, Cyber Threat and Vulnerability reporting requirements, among others. The purpose of a license is not to address every potential ill or problem that arises in a market. It is a framework document that provides an authorization foundation for a Licensee to operate. It cannot be a substitute for the judgment of the regulatory authority and it should not seek to calcify or fossilize rules and or obligations that are better left to development via a careful and

iterative process that takes account of circumstances of the day. The danger of attempting to address every problem in a License document is that it imposes obligations for an extended period, which may well be superseded by events, which cannot be foreseen. Ofreg, in this particular case, appears to be using this proceeding to put Band-Aids in place to address certain regulatory problems that may have arisen during the term of an existing License, or to stem potential problems the Office fears may occur. We do not argue that such concerns by the Office are unwarranted. Rather, the point is that the license renewal process is not the place or time for such an exercise as this.

As we have already discussed, these new proposals must first, at a minimum, be developed, articulated with clarity and receive proper consideration by Licensees and the public. We do not believe these proposals are sufficiently developed or clearly articulated by Ofreg. We also do not believe these policies have received sufficient consideration by Licensees and the public, and we do not believe this proceeding provides a sufficient opportunity, or is the appropriate venue, to consider complex new policy reform. We ask Ofreg to, among other things, remove these new policy proposals from this proceeding, and focus on developing a License Template that is limited in scope and focuses on fundamental ICT principles and operator requirements.

B. Inclusion of price regulations in the License Template

Flow's concerns with the proposed scope of the License Template apply with equal force to the inclusion of retail pricing regulations in Flow's License, and Ofreg's decision to maintain a link between Flow's License and Ofreg's price regulations going forward. In no market where Flow operates, other than the Cayman Islands, is our price regulation regime conjoined with our license. The reason they are treated separately is because they are intended to have separate functions and achieve different outcomes. Pricing regulations are supposed to be dynamic and encourage and respond to changing market outcomes. To accommodate this process, price regulation regimes are short term agreements, subject to review and reform at intervals of 3-4 years. In contrast, ICT Licenses are intended to be relatively longstanding agreements that are

limited in scope to fundamental ICT principles and operator requirements. This is often achieved by establishing License agreements over extended periods of 15-20 years that remain largely static over their duration. Therefore, we ask Ofreg to separate Licensing from pricing regulations, and to pursue separate arrangements for both that match their objectives and intended outcomes. However, regardless of whether Ofreg chooses to decouple pricing regulations from operators' Licenses, we believe it is must introduce a well-defined process to review and revise pricing regulations at regular, recurring intervals not exceeding every 4 years.

C. Failure to streamline the License Template

Flow is also concerned that Ofreg has not proposed to remove or reduce any of the existing obligations or requirements in Flow's License. In particular, Ofreg states that an objective of its new proposed license template is to "lower[] the regulatory burden" on Licensees." However, we are not aware of an amendment Ofreg has proposed that achieves this objective. As we mentioned previously, one area that can be streamlined is the quarterly payment and reporting system, which we recommended be replaced with a one-time payment system or an annual payment system, and another necessary reform is to separate and decouple an operator's pricing regulations from License requirements.

Yet another requirement that we believe must be reformed or eliminated is the Development Plan and Compliance Plan requirements, collectively referred to as "the Plans" (see, Sections 8.3-8.4 of the License Template). The Plans impose a wide set of reporting requirements that must be reproduced and provided to Ofreg on 6-month intervals over the life of the License. We do not believe all the information provided in the Plans is useful or relevant, and the production of this extensive document every six months is unnecessary and burdensome. We ask Ofreg to reconsider the Plans' requirements, confirm they remain necessary, and to reform and remove those requirements that are no longer needed.

D. License duration

It appears Ofreg is considering reducing ICT Licenses from 15 years to a term of 10 years. However, from what Ofreg has presented in the Consultation Document, this is unclear and confusing. While Ofreg's SLZ proposal specifies a 15-year term for SLZ licenses (see table in par. 3.3 to the proposal), elsewhere in the Consultation Document (see, the License Template proposed by Ofreg), Ofreg refers to a 10-year term for ICT licenses. This inconsistency causes confusion, as the section of the Consultation Document intended to identify each proposed material modification to the License Template does not mention any modification to license duration. Flow objects to any reduction to the existing term of operators' Licenses. The duration of Flow's existing license is 15 years and we believe this 15-year term, or even the maximum allowable term of 20 years, as specified in section 28 of the ICT Law, is appropriate, as there is no need or value to renewing licenses at shorter intervals.

A proposal to reduce the License term is dangerous and regressive. The costs involved in the establishment and maintenance of facilities-based operations is substantial, often running into several hundreds of millions over an extended period of time. Even the routine investments required to maintain and operate networks, upgrade equipment, engage vendors, obtain new system-based licenses, train new staff, substitute new technology, ensure compliance with existing legal obligations, promote redundancy of networks, secure insurance and ensure that minimum standards of service can be met, means that the financial commitment of any single operator, on even a quarterly basis, is immense. In those circumstances, the duration of a license term is a key consideration in determining the extent to which such costs can be recouped. Reducing the duration of a license, in particular, of parties or operators already in market, fundamentally alters the assumptions on which long-term investments in market are made and radically increases levels of risk associated with operations. Every license renewal process, unless automatic, exposes an operator to a notional level of risk with respect to the continuity of that business. Sound regulatory policy should encourage certainty and predictability of outcomes for

new entrants and existing operators alike, and reduce levels of risk associated with operating in a market. The reduction of a license term is a significant matter.

Shorter intervals significantly increase the regulator's discretion as to whether an operator's license will be renewed; be amended with new and more onerous conditions; be renewed for very different terms, thereby lessening the value of the initial investments, or be revoked altogether. All these outcomes raise levels of investment risk and undermine confidence in the market. They also increase the likelihood of disputes between Licensees and regulatory authorities, as opposed to reducing them. Any regulator, seized with such power, will use it. But frequent and regular changes to license conditions are not inconsequential and do come with attendant costs for compliance, among other things. The opportunities for disagreements between licensees and a regulator in those circumstances will also be higher.

The proposal also raises questions about the motive of the regulator that seeks to reduce the duration of license terms. Ofreg already possesses several regulatory tools, as well as sufficient powers under the Law, to make necessary changes to Licenses where circumstances absolutely require. Moreover, the Office is fully empowered to regulate the sector for the benefit of customers into the long term. The capacity to intervene in the interests of the market or to address new circumstances that arise as changes in technology occur, remains clear and inherent in the structure and powers of the Office. There are, therefore, no compelling circumstances to reduce the duration of Licenses merely to allow Ofreg earlier opportunities to review conditions and or deal with changing circumstances. If anything, frequent and rapid changes in technology or markets, suggest the need for greater predictability and certainty in the long term, and suggest that an extension of the duration of licenses should be considered instead. In other words, Ofreg should be looking to promote greater certainty and encourage investment in the Cayman Islands, by extending the duration of licenses from 15 to 20 years. Still a further consideration, is that the Cayman Islands would be substantially out of step with international best practice in this regard. Certainly, from a regional point of view, the standard duration of most network-based licenses is

15 years, with few, if any exceptions. Ofreg’s proposals would mean that the Cayman Islands would be comparatively, less attractive for ICT investment, than a number of other similarly situated jurisdictions, in this hemisphere. Fundamentally, the proposal to reduce the period to 10 years, seems arbitrary and irrational – it is not as if Ofreg does not have the necessary tools to make changes as technology changes or to pursue remedies against licensees where material breaches occur. This proposal is dangerous and ill-conceived, and we implore Ofreg to reconsider it with urgency, and reverse it.

E. Application of the License Template

Flow believes that whatever requirements and obligations are included in the License Template used to *renew* an existing License must also, at a minimum, be included in the License Template used to issue a *new* License.

VII. CLOSING REMARKS

Kindly send any communication in relation to this consultation to:

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