

7 October 2019

Mr. Alee Fa'amoe  
Executive Director ICT  
Utility Regulation and Competition Office  
85 North Sound Rd  
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P.O Box 2502  
Grand Cayman KY1-1104  
Cayman Islands

Dear Mr. Fa'amoe,

**Re: FLOW reply comments in ICT 2019-1 - Consultation on License reform**

Cable and Wireless (Cayman Islands) Limited, dba "FLOW", hereby submits our reply comments in the public consultation ICT 2019-1 on License reform.

Ofreg received six sets of opening comments in this consultation, including comments from FLOW. All six of the respondents are ICT Licensees and include:

- FLOW;
- Digicel;
- Logic;
- Datalink;
- DMS; and
- Hurley's TV.

Notably, ICT Licensee, C3, did not submit comments in this consultation. However, among those that did submit comments, there is significant correspondence in the issues addressed and critiques of Ofreg's proposed changes. In what follows, we will highlight and comment on these common issues and arguments, as well as further clarify the proposals presented in our opening comments.

Across these six sets of comments, we have identified seven significant issues that are common to at least two submissions. They include the following:

1. Special License Zones (SLZs) – Ofreg proposes to restructure License Fees based on the geographic deployment of broadband services: Several respondents expressed concern with this proposal for various reasons.

2. Local content obligations – Ofreg seeks to require a threshold of local production of content by subscription television Licensees: Several respondents object to these obligations, and ask Ofreg to remove the proposed local content obligations from the License and/or take a different approach to ensure local content availability.
3. Simplify/reduce regulatory burden – Ofreg’s stated objective is to update the Template to “reduce the regulatory burden” on Licensees: Several respondents indicate that Ofreg achieves just the opposite; many of Ofreg’s proposals add to Licensees’ regulatory burden, yet none of Ofreg’s proposals reduce regulatory burden.
4. Network Neutrality – Ofreg proposes adding new Net Neutrality regulations to the License Template: Several respondents argue that these new regulations are unwarranted, and do not belong in operators’ Licenses without further consideration and deliberation.
5. Sufficient consideration and deliberation – Ofreg proposes to add significant, new and often complex regulations to the License Template: Several respondents argue that these new regulations are introduced without due process, i.e., without appropriate or sufficient consideration or public deliberation.
6. License duration – Ofreg proposes to reduce the duration of ICT Licenses from 15 years to 10 years: At least two respondents object to this proposal, as it creates unnecessary risk and uncertainty that is especially harmful to ICT operators who must commit to substantial long-term investments.
7. License fees and structure – Other than the SLZ proposal, Ofreg does not offer any proposals to reduce License fees or restructure/streamline the payment process: At least two respondents identify shortcomings with the magnitude of Fees or structure of the payment process.

The following table identifies these seven issues and the respondents that addressed each issue in their opening comments.

Licensee	License Fees and SLZs	Local content	Simplify /reduce regulatory burden	Network Neutrality	Sufficient consideration and deliberation	License duration	License structure
FLOW	X	X	X	X	X	X	X
Digicel	X		X	X	X	X	
Logic	X	X	X	X	X		
Datalink	X						
DMS							X
Hurley’s TV		X					

In the remainder of this document, we discuss each of these seven common issues in turn; we identify the specific arguments made by respondents on that issue and, where necessary, elaborate and clarify FLOW's position on that issue.

### ***I. License Fees and Special License Zones (SLZs)***

There is common agreement by respondents that reducing License Fees to encourage investment and network deployment is long overdue and good policy. However, a common concern is that Ofreg's proposal does not go far enough, and much more significant reductions to License Fees will be required to achieve these twin objective--investment and network deployment. According to Logic "the magnitude of the incentives is not meaningful enough to accomplish [its] goal." FLOW makes a similar argument and in fact demonstrates that the costs to comply with Ofreg's SLZ requirements will more than offset the small potential reduction in License Fees from this proposal. Until Ofreg finds a way to meaningfully reduce License Fees, they will continue to hinder investment and impede deployment. To help Ofreg identify the magnitude of reduction that is required, we present in our opening comments a benchmark analysis that identifies the ICT Fees imposed by regulators in other markets in the Caribbean. We believe that, at minimum, License Fees must be reduced to levels that are comparable to Cayman's Caribbean benchmarks.

FLOW's concerns with Ofreg's SLZ proposal go beyond just the magnitude of the proposed fee reductions, however. We also find the proposal poorly specified, difficult to administer and costly for Licensees to comply with. Likewise, Datalink makes a similar point and indicates that without further clarity on how the proposal will be implemented and enforced, it is unable to understand and assess how this proposal will impact its business.

Datalink also indicates that this proposal is achieved by removing Ofreg's obligation to impose License Fees in a non-discriminatory, competitively-neutral manner, and asks that this obligation be restored. FLOW agrees with Datalink on this point. Ofreg must retain its non-discrimination obligation and insure all Licensees bear an equal, proportionate burden with respect to License Fees. Any incentives or reforms to License Fees cannot be exclusive and must apply to all Licensees.

Digicel indicates that Ofreg's SLZ proposal is a significant change in policy and therefore must be given proper consideration and deliberation. Digicel asks "the Office [to] defer finalising this scheme until it conducts a separate consultation on what regulatory supports might be most effective in achieving the desired rollout." We agree, in part, with Digicel on this point. We do not believe Ofreg's SLZ proposal is good policy. If the purpose is to lower barriers and encourage investment, then License fees should be reduced by a material amount, across-the-board to all Licensees, to all geographic areas, and be applicable to all types of services, without any discrimination or attempt by Ofreg to pick winners and losers. However, if Ofreg decides to pursue the SLZ proposal further, then more information and clarity from Ofreg on how it intends to implement and enforce this policy must be forthcoming, and a separate, stand-alone consultation that addresses these issues is an appropriate and necessary starting point.

## **II. Local content**

Logic, Hurley's TV and FLOW each comment on Ofreg's proposed local content obligations. Logic, like Flow, is a subscription TV provider, whereas Hurley's TV is a local content producer and owner of the local news station, Cayman 27, which recently shut down.

Logic states that "[t]here is no explicit requirement or suggestion that such standards and codes [on local tv content, articulated in the ICT Law] be made a condition of licence." To the contrary, "the URC Law makes clear that the duties, standards and codes published by OfReg in this area would be enforceable, without reliance on conditions of licence." Accordingly, Logic concludes there is no need or regulatory benefit to inserting these requirements in the License. FLOW agrees with Logic on this issue. We add, however, that not only is their no incremental regulatory benefit to including local content regulations in the License, but it is contrary to Ofreg's stated objective to simplify and reduce the regulatory burdens contained in operators' Licenses.

Hurley's TV contends "the current playing field is not fair," and places blame for the shut-down of Cayman 27 on two factors: subscription TV Licensees are not (1) meeting their local content requirements and (2) providing sufficient financial support to local content producers.

FLOW does not necessarily agree with this explanation, but we do believe there is a fairly simple policy mechanism that can address Hurley's TV's concerns, i.e., promote the production and availability of local content in an economically sustainable manner, and without requiring subscription TV providers to engage in protracted commercial negotiations with local content producers or get into the business of producing local content themselves. While we do not believe imposing a local content obligation on subscription TV providers is necessary or good policy, if an obligation is pursued, then a must-carry obligation is an appropriate and sufficient solution. A must-carry obligation would require all subscription TV providers to carry local content stations, subject to minimum content quality standards, technology standards (e.g., regarding how the feed is provided to the subscription tv provider), and a reasonable cap of three stations.

Subscription TV providers, such as FLOW, Logic and C3, would have an obligation to provide a platform to producers of local content, but not be obligated to produce content themselves or negotiate payment to receive a producer's local content. On the other hand, local content producers would be insured that if they produce a local content station, they will be provided a platform that includes all subscription TV customers in the Cayman Islands, and an opportunity to advertise and monetize access to this platform. In sum, a must-carry obligation provides assurances to content producers that will encourage the production of local content and provide an ad-based market structure that should allow local content producers to be financially viable.

## **III. Simplify/reduce regulatory burden**

We applaud Ofreg for acknowledging the regulatory burden borne by Licensees and deciding to reduce this burden. However, we are disappointed that none the proposals introduced by Ofreg achieve this objective and, to the contrary, most of Ofreg's proposals achieve the

opposite—they substantially increase Licensees’ regulatory burden. Several respondents agree with FLOW on this issue. Logic states:

*“[O]ur main comment and concern regarding the proposals set out in the [Consultation Document] is that the level of complexity in regulation of the sector is clearly increasing. This trend is inconsistent as competitive forces, enabled by technology, provide an increasing level of market discipline which ought to result in less or lighter regulation of the sector.”*

Logic goes on to explain that this expansion of regulatory obligations is bad economics and a misuse of Ofreg’s regulatory authority. According to Logic:

*“Regulating through a licence condition rather than a specified process or other power is a misuse of the licensing power. It amounts to using the wrong tool when the statute provides the right tool.”*

We agree with Logic on both points and refer Ofreg to our initial comments, Section VI A and VI C, where we articulate concerns with the expanded scope of Licensing and the failure to streamline or remove unnecessary Licensing obligations.

Both Logic and Digicel object to Ofreg’s proposal to add Cyber Vulnerabilities and Threat Reporting obligations to operators’ Licenses, as does FLOW. Digicel explains that the addition of these reporting requirements is excessive and counter to Ofreg’s objective to streamline Licenses. According to Digicel:

*“Digicel believes that this is not good procedural practice and runs the risk of the imposition of unworkable or un-necessarily expensive regulatory overhead on the Industry. In Digicel’s view the proposed reporting requirements are excessive.”*

We agree with Digicel’s critique that this new reporting requirement is excessive and poorly defined. We also believe this ambiguity could burden operators with substantial compliance costs.

#### **IV. Network Neutrality**

Logic, Digicel and FLOW all object to the addition of new net neutrality regulations in the License. Logic explains that there is no demonstrative need for net neutrality regulation and even if there were, this regulation should not be contained in operators’ Licenses. According to Logic:

*“We are unaware of any triggering event highlighting the need for further regulation of these matters [on net neutrality]...or that it [net neutrality regulation] must or should be provided as a condition of licence.”*

Digicel makes a related argument; namely that Ofreg has failed to follow due process or allow for proper and sufficient consideration of this complex issue. According to Digicel:

*“The Office should take an evidence based approach to considering the issues...The Office should adopt a cautious approach to net neutrality and not*

*intervene until there has been a full and careful consideration of what is appropriate for the specific circumstances of the Caymanian economy.”*

We agree with these points made by Logic and Digicel, and refer Ofreg to FLOW’s discussion of net neutrality in Section III of FLOW’s initial comments.

#### **V. Sufficient consideration and deliberation**

A fundamental objection expressed by FLOW in our initial comments is that many of the proposals offered by Ofreg espouse *new* policy and *complex* regulation. We do not believe this consultation is the appropriate venue for these matters, nor do we believe this consultation is sufficient to properly ventilate and deliberate these matters. These points are made in several sections of FLOW’s initial comments, see, for example Section II A 2 (SLZs), Section III (Net Neutrality), and Section IV (New cyber vulnerabilities and threat reporting requirements). Both Logic and Digicel agree with FLOW on these points. For instance, by reference to the new net neutrality regulations, Logic states:

*“If further regulation is required in this area, a specific consultation pursuant to the duty to consult under section 7 of the URC Law should be carried out to ensure due process, rather than embedding net neutrality conditions in a consultation regarding the Licensing Template.”*

...

*“The current [Consultation Document] is part of the consultation process for the Licensing Template. This consultation does not satisfy the duty to consult for the purposes of determining new or additional rules supporting net neutrality.”*

Likewise, Digicel states more generally:

*“[T]hese documents [included in the Consultation Document] contain a number of proposals which encapsulate deep fundamental approaches to the structure and direction of regulation within the Caymanian market. A number of these would ordinarily merit standalone consultation on the underlying principles before a proposed detailed text was drafted.”*

#### **VI. License duration**

As FLOW explained in our initial comments, Ofreg’s proposal to reduce the License term from 15 years to 10 years is dangerous and regressive, due to the up-front (ex ante), long-term fixed investments required by Licensees, coupled with regulator’s (ex post) discretion and motivations. We refer Ofreg to Section VI D of FLOW’s initial comments for a discussion of this issue. On this issue, Digicel raises similar concerns. Digicel states:

*“Digicel has significant concerns regarding the proposal to limit Facilities Based licenses to a term of 10 year. By their very nature much the provision of facilities under such licenses requires a significant level of investment both in the network itself and in the wider business including brand and marketing. This investment must be recovered.”*

...

*“Typical License durations in the region are 15 or 20 years and when considering where to invest the regulatory certainty that these longer duration licenses give is an important factor. A move to shorter term licenses (coupled with a trend towards increased regulatory burden) runs the risk that Cayman becomes a less attractive investment option.”*

## **VII. License Structure**

DMS is concerned with the quarterly payment requirements, and asks that Ofreg change the payment requirements from within 15-days after the end of a quarter to within 30-days after the end of a quarter.

FLOW too is seeking to improve the existing quarterly payment structure. We believe the volume of payments must be reduced, and Licensees should be provided an option to pay License Fees over an extended period, exceeding a year (e.g., every 2 years, 3 years, 4 years, etc.). We also believe that License Fee payments should only be evaluated, based on audited financial statements; unaudited financial statements, such as interim, unaudited quarterly financial statements, should no longer be relied upon to evaluate payments. Relying 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 believe that longer-term payment options (exceeding 1-year) should be considered, in addition to or instead of the standard and more frequent payment process. As we explained in our initial comments, these extended payment alternatives would provide benefits to both Licensees and Ofreg. They will reduce the administrative burden to both Ofreg and Licensees; allow Licensees to capitalize License Fee payments (which can only be achieved if the payment period exceeds 1-year); and provide Ofreg and government increased financial flexibility.

In sum, there are tangible improvements to the payment process that can be achieved and should be pursued. These improvements should include a substantial reduction in the volume of payments and a reliance on audited financial statements.

We appreciate the Ofreg’s consideration of these reply comments. Please do not hesitate to contact me should you have any questions or concerns.

Yours sincerely,  
Cable and Wireless (Cayman Islands) Limited, trading as FLOW



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