August 16, 2019

Utility Regulation and Competition Office
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Dear Sir/Madam,

To: The Utility Regulation and Competition Office ("OfReg")

Re: ICT 2019-1 – Consultation – Information and Communication Technology Proposed Section 23(2) (Regulatory Notice) and ICT Licensing Template Updates (the "Consultation Document" or "CD")

We write in response to the Consultation Document issued 7 June 2019. For ease of reference, unless otherwise indicated herein, all defined terms are incorporated by reference from the CD.

Overview Comments

As the industry proceeds through the broader process of updating the Notice and renewing expiring licences, we agree with the intention to update and amend the previous standard form with a view to correcting references, modernizing definitions, fixing formatting, grammatical, typographical or similarly minor errors. We also suggest this process offers the opportunity for simplifying regulation of the industry with a view to facilitating efficient compliance and enforcement in the future.

Our comments are provided regarding the various proposed conditions regardless of whether they exist in current licences and are being carried over into the proposed template, or whether they are new to the Licensing Template. Our view is that this consultation provides an opportunity to improve all regulation, including matters carried over from existing licences.

In addition to the legislative provisions set out in the CD, we note the following additional sections that might help guide the effort to simplify, as well as provide context for our comments:

> Section 6(1)(b) of the URC Law states that one of the principal function of OfReg is to promote appropriate effective and fair competition.
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> Section 6(4) of the URC Law states that, in performing its functions and exercising its powers, OfReg shall (b) rely on self-regulation where appropriate and (c) act in a reasonable and proportionate manner.

Section 9(3)(a) of the ICT Law states that one of the principal functions of OfReg is to promote competition in the provision of ICT services and ICT networks where it is reasonable or necessary to do so.

In general, our main comment and concern regarding the proposals set out in the CD, 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.

The CD's proposals regarding the Licensing Template highlight a tendency to implement layers of overlapping and/or duplicative regulatory measures. While this approach may seem justifiable in the protection of consumers, it instead causes business uncertainty and economic inefficiency, with the net effect being harm to consumer welfare. Given the intentions set out in the CD, OfReg has an opportunity to eliminate needless overlap and duplication, and simplify the existing regulatory framework. This would result in clearer rules, better compliance, and facilitate OfReg's enforcement of regulatory obligations.

Overlapping and Duplicative Regulation – Example: Net Neutrality Rules in Statutes, Regulatory Decisions and Licence Conditions

To illustrate, we reference the mounting effort to regulate in support of so-called Net Neutrality. OfReg at paragraph 52 of the CD states the general rule from section 73 of the ICT Law:

> **Non-discrimination and continuity of supply**
>
> **73.** ICT service or ICT network providers may, subject to the rules and procedures established under section 72(4) —
>
> (a) refuse to provide an ICT service or an ICT network to a subscriber; or
>
> (b) discontinue or interrupt the provision of such an ICT service or ICT network to a subscriber pursuant to an agreement with that subscriber,
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> only on grounds which are reasonable and non-discriminatory, and where any such action is taken, the ICT service or ICT network provider shall, within seven days, provide in writing to the subscriber the reasons therefor.

The CD also highlights the related measure in section 75 of the ICT Law which prohibits the intentional interception, alteration, replication, monitoring or interruption by an ICT Licensee of any "message" except in limited circumstances.

In 2010, to further clarify the rules in respect of Net Neutrality, ICTA issued ICT Decision 2010-4 examining issues related to Deep Packet Inspection and Similar Technologies in the Cayman Islands. At paragraph 57 of that decision, the general rule was further interpreted as follows:

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> *Neutrality:* ISPs must ensure that their uses of DPI are not unjustly discriminatory nor unduly preferential. Internet users must be able to access the lawful Internet content of their choice, run applications and use services of their choice (subject to the needs of law enforcement) and connect their choice of legal devices that do not harm the network. Internet users must be allowed to benefit from enhanced competition among network providers, application and service providers, and content providers.

Coupled with this finding, ICTA stated its intention at the time was to seek statutory amendments to the ICT Law that would further detail related restrictions and obligations. To our knowledge, the Minister and the Government have not yet implemented any recommended statutory amendments in this respect.

The references above have been the state of the law in this respect since 2010. We are unaware of any triggering event highlighting the need for further regulation of these matters; nor are we aware of any recent tabling of draft legislation to seek the amendments thought necessary in 2010. Accordingly, we do not understand OfReg's position at paragraph 55 of the CD that "greater clarity and certainty" is needed, or that it must or should be provided as a condition of licence. If greater clarity or certainty is needed, advisory guidelines can be issued by OfReg to help existing and future licensees. In contrast, the proposals of paragraph 56 of the CD essentially repeat the current law as described above albeit with slightly different wording.

> 56. Therefore, as set out at proposed **Conditions 24.1** and **24.2**, the Office proposes that 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 supplement proposed Conditions 24.1 and 24.2, OfReg is proposing Conditions 9.1(b) and (d) whereby Licensees <u>are required to provide the User with information on any procedures put in place by the undertaking to measure and shape traffic so as to avoid filling or overfilling a network link, and information on how those procedures could impact on service quality</u>; and any restrictions imposed by the Licensee on the use of terminal equipment supplied, including access to applications. (emphasis added)

These supplementary obligations to provide such information to customers is then repeated in Annex 5 section 1.1(a) of the Licence Template where it states:

> The Licensee's ICT Services and the retail rates for such services are to be clearly described and be up to date in its marketing materials and on its website. Such information is not limited to, but <u>must include information on any procedures put in place by the Licensee to measure and shape traffic so as to avoid filling or overfilling a network link, and information on how those procedures could impact on service quality</u>. (emphasis added)

If implemented as proposed, the regulation of the issue would be repeated in various forms in legislation, regulatory decision and licence conditions. While that may not initially appear problematic,

it is unnecessary and introduces inefficiencies into the broader regulatory framework. For instance, if like the United States a significant change in policy were to occur, it would then have to be reflected in statutory change, which is particularly difficult, as well as modification of related regulations and amendments to all of the licences issued. The work to implement such change could be done, but it amounts to wasted time and resources because the licence condition was not necessary to accomplish the original regulatory goal in the first instance.

We do not propose to argue the merits of implementing new or additional net neutrality regulation in this response to the CD.[1] We see no evidence that adding net neutrality licence conditions will meaningfully advance OfReg's mandate. 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.

Not Everything Should or Must be a Licence Condition

We acknowledge the broad wording of section 23(6)(b) of the ICT Law that states:

> A licence may specify the conditions to which the licensee is subject, including but not limited to pricing, service standards, Universal Service provision, infrastructure sharing, interconnection and spectrum utilization.

We note, however, that the wording is "may" not "shall", which indicates the legislative intent was not to require or mandate licence conditions be used for all regulatory matters. We suggest that the licensing power in the ICT Law was to be exercised by OfReg as needed to perform its functions under the ICT Law (as per section 9(1)). By extension, where the legislation mandates a specific process or specifies a power to regulate, such process or power must be exercised and should be all that is needed to perform the related function under the ICT Law. 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. Using a screwdriver to bang in a nail might work, but it will not work well and may lead to other problems. Moreover, using 2 different tools for the same job makes little sense. Using a licence condition in addition to other regulatory measures aimed at the same issue is duplicative and unnecessary and should be avoided for the reasons discussed above.

With respect to net neutrality rules, we find no statutory requirement that licence conditions be used to regulate the issue. As described above, given the statutory rules in place, and the guidance of the 2010 decision, the new licence conditions are duplicative and unnecessary. We also note that OfReg's duty to consult under section 7 of the URC Law applies and requires a specified consultative process before issuing any written determination that establishes the legal rights and obligations of licensees. The current CD is part of the consultation process for the Licensing Template. This consultation does not

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[1] For the record, we dispute the need for additional regulation for such matters. Other jurisdictions, most notably the United States, are moving in the opposite direction on the issue by removing what are now considered to be unnecessary net neutrality regulations. See https://www.fcc.gov/restoring-internet-freedom where the FCC states: "The Internet wasn't broken in 2015, when the previous FCC imposed 1930s-era regulations (known as "Title II") on Internet service providers. And ironically, these regulations made things worse by limiting investment in high-speed networks and slowing broadband deployment."

satisfy the duty to consult for the purposes of determining new or additional rules supporting net neutrality.

In contrast, universal service is regulated under sections 59 to 64 of the ICT Law which specifically contemplate that OfReg "may" include licence conditions for the provision of universal service, and that OfReg "shall" include a condition that each licensee shall contribute to a Universal Service Fund that is established under section 60 for a service category specified under regulation pursuant to section 61. With respect to the former instance where licence conditions "may" be included, it makes sense that they should only be included to accomplish some statutory purpose not specified in those sections. Condition 16 simply requires compliance with sections 59 to 64 of the ICT Law. It remains unclear what additional regulatory benefit is obtained by having a licence condition require compliance with statute.

Significant market power ("SMP") is regulated under sections 44 and 45 of the URC Law which specify the powers and process for dealing with SMP. The statutory provisions provide a regimented process for assessing SMP, and detailed powers to mitigate its effects and remedy any abuse. The URC Law also provides investigation and enforcement powers to OfReg that apply to any non-compliance with orders or obligations under the SMP sections. Accordingly, it is not obvious what more is gained from a regulatory perspective by further regulating SMP conditions on licence in a template that will be used for both non-SMP and SMP holders. We also note OfReg's Guidelines on the Criteria for the Definition of Relevant Markets and the Assessment of Significant Market Power. This is an area subject to continuing specialized regulatory oversight for some but not all licence holders. In that oversight, OfReg is continuing through the process and the exercise of its related powers. It would therefore be prudent to finalize the process and substantive SMP findings before presuming that SMP conditions on licencees are needed in the Licensing Template.

Content standards and local programming are governed by sections 55 to 57 of the ICT Law which set out duties and power to set and revise standards in respect of local broadcasts. The regulations require OfReg to publish codes and standards for local broadcasts, as well as guidelines to support the implementation and enforcement of them. There is no explicit requirement or suggestion that such standards and codes be made a condition of licence. Aside from advisory guidelines, 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, similar to our comments above, we see no incremental regulatory benefit to making these matters a condition of licence as contemplated in Condition 25. The proposals in Condition 26 of the Licensing Template are more properly implemented as standards published in a code with the support of guidelines, and determined as an outcome of OfReg's duty to consult under section 7 of the URC Law.

With regard to proposed Conditions 9 – Information Services, 22 – Outage Reporting, 23 Cyber Vulnerabilities and Threat Reporting, we see no legislative requirement or intent that such matters must be regulated as conditions of licence. Like the comments above, this is not a statement regarding OfReg's remit in these matters. Our comments only relate to the choice of regulatory tool being used by OfReg. The governing statutes provide specific processes and mechanisms for the regulation of these matters. In particular, OfReg has clear statutory guidance about the use of industry codes and consumer codes of practice under sections 55 to 57 of the URC Law to deal with consumer protections. Instead of requiring licence conditions, these provisions set out OfReg's ability to authorize, adopt and manage codes of practice in respect of a broad range of issues which would include all matters referenced in the

proposed conditions 9, 22 and 23 and "any additional consumer protection requirements" as per Part 9 of the URC Law. Such codes may "serve as the minimum guidelines to govern the relationship between sectoral providers and their customers." In essence, the URC Law provides a specific tool for consumer protections which should be used as intended, rather than resorting to licence conditions instead.

Meaningful Incentives for Broadband Access Zones

We support the concept of providing regulatory incentives for the rollout of broadband services to underserved households. The normal business model for fibre deployment is significantly challenged for households in the East End and the Sister Islands given the population density and the backhaul options available. Accordingly, new technologies and/or incentives need to be considered to facilitate service deployment and reduce the higher costs to serve. In that regard, we appreciate the concept of the incentives proposed. We note, however, for Zones D (East End) and E (Sister Islands) in particular, the magnitude of the incentives is not meaningful enough to accomplish their goal. We ask OfReg to consider waiving the royalty fee on all households in Zones D and E for the Licence Duration recognizing the high fixed costs required to serve these relatively low-density zones.

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In summary, we ask OfReg to consider this Consultation an opportunity to reduce and simplify the myriad of rules that have accumulated from the incremental nature of the regulatory process. Where there is a statutory mechanism to deal with an issue, we ask that it be used without repetition in licence conditions. Where the statutes provide a power to direct, establish a code of practice, enforce a remedy, etc., that power and related process should be used as per the statute. To be enforceable, regulations do not need to be conditions of licence.

Repeating existing law as conditions of licence is especially unnecessary when we consider Condition 5 – Compliance (found in existing licences and the proposed Licensing Template) which already requires Licensees comply with "any obligation imposed on it by any law, regulation or rule of the Cayman Islands" and "any administrative determination, decision, determination, direction, order, regulation, resolution or rule duly issued by the Office under the ICT Law, the Licence, or any law, regulation or rule of the Cayman Islands."

Sincerely,

Rob McNabb
Logic CEO
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