



# Telecommunications Competition Guidelines

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# 1 Introduction

## 1.1 Objective and Purpose of the Guidelines

1. Pursuant to the *Telecommunications Policy 2013* (the "Policy") and the *Telecommunications Ordinance 2009* (the "Ordinance"), the Turks and Caicos Islands ("TCI") Telecommunications Commission (the "Commission") hereby issues the following Telecommunications Competition Guidelines 2017 (the "Guidelines"). With the issuance of these Guidelines, the Commission is furthering the overall objective of the Policy, namely to "ensure that all consumers and businesses in TCI have access to quality telecommunication services at reasonable rates, in a fully competitive marketplace".<sup>1</sup>
2. The purpose of these Guidelines is to describe the Commission's general approach to exercising its jurisdiction over competition-related matters in telecommunications markets in TCI. They complement existing competition-related provisions set out in the Ordinance, associated Regulations as well as the Telecommunications and Spectrum Licences ("Licences") issued pursuant to the Ordinance. These Guidelines develop the conceptual framework and criteria that the Commission will use in any future application of the above-noted competition-related provisions. As Guidelines, however, they are solely intended to provide indicative guidance as to how such matters would be addressed in the future. They are not legally binding on the Commission or licensees. They do not constitute a binding statement of how the Commission will exercise its discretion in a particular situation. The Commission may apply methodologies other than noted in these Guidelines.
3. The Commission notes that the issuance of competition guidelines is a common practice followed by regulatory authorities and competition agencies worldwide. They are intended to provide regulatory clarity, certainty and transparency.
4. The Commission developed these Guidelines so that they comply with the legal and administrative framework in TCI generally and existing competition-related provisions specifically, are proportionate to TCI's relatively modest size, and are consistent with current internationally-accepted competition principles. The Commission therefore expects that they will be generally applicable to the majority of competition-related matters in TCI. However, given the wide variety of factual circumstances that may be encountered in the future, the Commission will deal with each specific competition-related matter on a case-by-case basis, and may substitute or complement some of the concepts and criteria included in these Guidelines, as necessary. Lastly, the Commission may review and amend the Guidelines in the future as appropriate.

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<sup>1</sup> Turks and Caicos Islands, Telecommunication & Broadcasting Policy, Update April 9, 2013, page 5.

## 1.2 Legal and Regulatory Background

5. The existing competition-related provisions, including the Commission's authority to issue these Guidelines, are included in the Ordinance, Regulations and Licences.
6. Section 4 of the Ordinance describes the functions of the Commission in supervising the provision of telecommunications services in TCI. As part of its supervisory role, the Commission is mandated to address the competitive environment for telecommunications services:
  - (d) to facilitate, maintain and promote effective and sustainable competition in telecommunications;*
  - (f) to promote the interests of consumers and to encourage licensees to operate efficiently;*
  - (g) to publish information, reports or other documents;*
  - (h) to carry out investigations and hold enquiries with respect to any matter in relation to its functions or duties under this Ordinance;*
  - (i) to give advice and directions to a licensee with respect to anti-competitive practice or behaviour;*
  - (k) to instruct the Director General to conduct research into the quality and standard of service of a licensee, and into tariffs or any anti-competitive behaviour; and*
  - (m) to carry out such other functions as may be necessary for the purpose of discharging its functions under this Ordinance.*
7. The Ordinance includes a number of competition-related provisions, including with respect to dominance (section 16), ex-ante remedies<sup>2</sup> applied to dominant licensees (sections 17 generally, sections 22-25 in relation to interconnection and section 28 on retail prices), and forbearance from such ex-ante remedies (section 29).
8. The interconnection and retail price-related competition provisions are further developed in the *Telecommunications (Interconnection and Access to Telecommunications Facilities) Regulations* (the "Interconnection Regulations") and the *Telecommunications (Pricing) Regulations* (the "Pricing Regulations"), respectively.

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<sup>2</sup> "Ex-ante" remedies refer to regulatory measures that the Commission applies to a licensee "before the fact". They are intended to counter, prevent or neutralize the impact of dominance and thereby deter possible anti-competitive practices that might occur in the future. Ex-ante remedies can originate in conditions of license or they can be imposed by the Commission pursuant to the Ordinance or Regulations.

9. Additional competition-related provisions that generally relate to ex-post matters<sup>3</sup> are also included in the Licences. By way of example, Cable & Wireless (TCI) Ltd.'s ("C&W")<sup>4</sup> 2006 Licence includes the following conditions:<sup>5</sup>

*13.4 The Licensee shall not engage in anti-competitive pricing and other similar practices or any other activities, whether by act or omission, which have; or are intended to or likely to have, the effect of unfairly preventing, restricting or distorting competition in any market for the Licensed Services, as may be further specified in Regulations and, in particular, the Licensee shall refrain from using revenues or resources from a Licensed Network or Licensed Service in respect of which the Licensee is dominant to cross-subsidise unfairly any other telecommunications network or telecommunications service, without the prior written approval of the Commission.*

*13.5 Without limiting the generality of Clause 13.4 above, any act or omission which leads, or is likely to lead, to a substantial lessening of competition in the market for any telecommunications network or telecommunications service is prohibited. The Commission will issue Guidelines describing, or may otherwise determine, what constitutes a substantial lessening of competition and the procedures for assessing it.*

10. In summary, the competition-related provisions in the Ordinance tend to focus on the determination of dominance and the application of and forbearance from ex-ante remedies. The Interconnection and Pricing Regulations further develop these provisions. In contrast, the competition-related provisions in the Licences tend to focus on anti-competitive practices that are the subject of ex-post analysis and remedy.
11. Notably, the competition-related sections of the Ordinance, Regulations and Licences do not include provisions on the conceptual framework or criteria that the Commission would use in a decision-making process relating to such matters.
12. Taking the foregoing into account, therefore, these Guidelines provide the conceptual framework and criteria that the Commission will use in assessing the following competition-related matters:
- Making a determination that a licensee is dominant or non-dominant in a relevant market (addressed in **Chapter 2**).
  - Imposing or forbearing from applying ex-ante remedies on a dominant licensee (addressed in **Chapter 3**).

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<sup>3</sup> "Ex-post" measures arise "after the fact". Ex-post measures are intended to address and punish anti-competitive conduct that a licensee is found to have actually engaged in.

<sup>4</sup> C&W currently operates under the trade name Flow in TCI; however, for the purpose of these Guidelines it is referred to as C&W.

<sup>5</sup> Similar provisions are included in the Licences of certain other licensed operators, including the other two large operators: Digicel (Turks & Caicos) Limited and Andrews Communications Ltd.

- Identifying and addressing anti-competitive practices and agreements that prevent or substantially lessen competition (addressed in **Chapter 4**).

## 2 Dominance Determination

### 2.1 Legal and Regulatory Background

13. The term dominance<sup>6</sup> or, more specifically, “dominant” licensee is defined in section 2(d) of the Ordinance:

*“dominant” means that a licensee enjoys, either individually or jointly with others, a position of economic strength that enables it to behave independently of competitors and customers in any relevant market for telecommunications products.*

14. Where a licensee is designated as dominant, the Ordinance and the Interconnection Regulations set out a number of possible ex-ante remedies the Commission may implement to protect consumers and competitors from the potential abuse of that dominance.
15. Section 16 of the Ordinance sets out the Commission’s authority to make or to review a dominance determination and includes some related procedural matters:

*(1) The Commission may make a determination that a licensee is dominant in relation to the establishment, operation or maintenance of a telecommunications network or service.*

*(2) Before making a determination under subsection (1), the Commission shall*

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*(a) hold a meeting to consider the status of the licensee under this section;*

*(b) provide reasonable notice of the meeting to the licensee;*

*(c) provide the licensee with the opportunity to make submissions to the Commission regarding its status under this section; and*

*(d) provide the licensee with the reasons for any determination made with respect to that licensee under subsection (1).*

*(3) Where a licensee has been declared dominant by the Commission under subsection (1), the licensee may subsequently apply to the Commission to be classified as not dominant.*

16. Past Government actions have led to two sets of dominance designations. First, C&W was designated as dominant in the provision of domestic and international fixed telephone and leased line services and, more generally, with respect to its domestic fixed public telephone network in 2006 when C&W’s conditions of licence were issued. Those dominance

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<sup>6</sup> It should be noted that the economic terms “market dominance” and “market power” can be used interchangeably; however, for the purpose of these Guidelines, the term “market dominance” (and the related term “dominant”) will be employed.

designations were given legal effect via the C&W Licence.<sup>7</sup> Second, the Interconnection Regulations initially designated all mobile network operators as dominant with respect to wholesale mobile network call termination services. The Interconnection Regulations were subsequently amended so that all licensed fixed network operators were also designated as dominant with respect to wholesale fixed network call termination and, in Cable & Wireless' case, also wholesale fixed/mobile network call transit. Schedule 1 provides a listing of dominance designations in TCI as of the date of issue of these Guidelines.

17. As noted, the dominance provisions included in the Ordinance, the Licenses and the Interconnection Regulations do not provide a conceptual framework or criteria for the Commission to use in making a new dominance determination or revoking an existing designation.<sup>8</sup> The Commission has, however, addressed dominance issues in two recent proceedings. The first relates to C&W's 2012 application, filed pursuant to section 16(3) of the Ordinance, requesting that the Commission re-classify C&W as non-dominant with respect to its fixed network and services. C&W's application led to a public consultation to review the pricing regulations applicable to C&W's fixed network services and resulted in Telecommunications Decision 2013-3 ("Decision 2013-3").<sup>9</sup> In that case, the consultation process considered issues relating to dominance assessment, but ultimately the Commission decided not to review or revise C&W's dominance designations. Instead, the Commission considered the application under the forbearance provisions in section 29 of the Ordinance and, based on its analysis of the evidence at the time, decided to revise the price caps framework applicable to C&W's fixed services. Second, in Telecommunications Decision 2014-4 ("Decision 2014-4"),<sup>10</sup> the Commission determined that all fixed network operators were dominant with respect to the provision of wholesale fixed call termination services and that C&W is also dominant in wholesale fixed/mobile network call transit. Both of these TCI precedents provide useful guidance as to an appropriate dominance assessment framework.
18. Taking the foregoing into account, the Commission sets out the following conceptual framework and criteria that the Commission will use in making a new dominance determination or revoking an existing designation.

## 2.2 Dominance

### 2.2.1 Initiation of a Dominance Review

19. There are two avenues by which the Commission may initiate a dominance review:

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<sup>7</sup> Cable & Wireless (TCI) Ltd. Telecommunications and Spectrum Licence 2006, Annexes A and B.

<sup>8</sup> See C&W License section 9.2 for the Commission's authority to revoke a Licensed-imposed dominance determination for C&W. See section 19(1) of the Interconnection Regulations for the Commission's authority to revoke the dominance presumption for mobile operators.

<sup>9</sup> Telecommunications Decision 2013-3, *Fixed Services Price Regulation Review Decision*, May 27, 2013.

<sup>10</sup> Telecommunications Decision 2014-4, *Decision on the Review of Interconnection Rates*, June 20, 2014.

- i) *Commission Initiated*: Under section 16(1) of the Ordinance, the Commission is authorized to make a dominance determination. The Commission could initiate the review process on the Commission's own motion if market developments and trends suggest that one or more licensees may be dominant in a relevant market. Or, the Commission could initiate the process in response to concerns raised by a third-party, where the concerns are adequately supported by appropriate market evidence. The Commission could also initiate a review to revoke a dominance designation.
- ii) *Dominant Licensee Initiated*: Under section 16(3) of the Ordinance, section 19(1) of the Interconnection Regulations, or the applicable Licence clause,<sup>11</sup> a dominant licensee may request that its dominance designation be reviewed. Any such application should be supported with appropriate market evidence.

### **2.2.2 Dominance Assessment Framework**

- 20. To determine whether a licensee is dominant with respect to one or more relevant markets, the Commission will generally rely on a two-part dominance assessment framework:
  - i) definition of the relevant market for the product<sup>12</sup> under consideration; and
  - ii) an assessment of the nature and extent of competition in that relevant market.
- 21. For the avoidance of doubt, the Commission would generally apply this dominance assessment framework to consider both whether a licensee is dominant or is no longer dominant.

### **2.2.3 Relevant Market Definition**

- 22. As noted, the first part of the dominance assessment framework would consist of defining the relevant market. The term “relevant market” is mentioned in the Ordinance, but is not defined or developed there or in the Regulations or Licences. However, the “relevant market” concept is well developed and understood in competition analysis and the Commission proposes to apply it in these Guidelines.
- 23. The definition of a relevant market would typically take into account:
  - i) the products in the market;
  - ii) the users of the products (e.g., retail versus wholesale, residential versus business); and
  - iii) the geographic scope of the market (e.g., local, regional or national).

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<sup>11</sup> See Licence clause 9(2) in C&W's case and clause 11(2) in Digicel's and ACL's cases.

<sup>12</sup> Note that in what follows the terms "product(s)" and "service(s)" are used interchangeably in these Guidelines.



24. In defining a relevant market, the Commission would, as may be applicable, consider the following factors:
- i) demand-side substitutability in order to determine the extent to which users may substitute other available products for the those under specific consideration; and
  - ii) supply-side substitutability in order to determine the extent to which suppliers are in a position to supply products, in the short term or potentially in the medium to long term, that would be considered by users as potential substitutes to those under consideration.<sup>13</sup>
25. In an assessment of substitutability, the Commission may also consider any factor that, in its opinion, reasonably affects market definition, including consideration of the smallest group of products and the smallest geographic area in relation to which a provider could potentially impose and profitably maintain a small but significant non-transitory increase in price (i.e., a "SSNIP" test). The Commission would generally consider a 5% price increase as "significant" and a period of one year or more as "non-transitory".
26. Where appropriate, the Commission may consider telecommunications sector market analysis experience in other jurisdictions as a basis for defining relevant markets in TCI. Schedule 1 provides a listing of defined relevant markets in TCI as of the date of issue of these Guidelines.

#### **2.2.4 Competitive Assessment of the Relevant Market**

27. In assessing the nature and extent of competition in a relevant market and determining whether a licensee is dominant in that relevant market, the Commission would typically consider the following competition-related factors:
- i) market-specific data pertaining to the relevant market, including product price, volumes and revenue levels and trends, financial resources and profitability;
  - ii) availability of existing and potential competitive alternatives, including those using different technologies and also their scale of operation in terms of supply capacity and geographic coverage;
  - iii) market shares or concentration levels and trends as determined by reference to revenues, subscribers or other relevant metrics;
  - iv) evidence of rivalrous behaviour in the form of declining prices, vigorous sales and marketing promotions and expanding scope of marketing activities;
  - v) consumer and technological trends affecting the nature and scope of existing and potential competition in the relevant market;

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<sup>13</sup> For the avoidance of doubt, "short term" refers to a period of up to one year, "medium term" refers to a period of one to two years and "long term" refers to a period of two years or more.

- vi) barriers to entry, including those of a financial, technical, regulatory nature that may have the effect of limiting entry or expansion in the relevant market; and
  - vii) any other factors that the Commission considers appropriate.
28. Where the weight of the evidence shows that a licensee holds a position of economic strength that enables it to behave independently of competitors and customers in the relevant market, then the Commission would designate the licensee as dominant in that relevant market.
  29. In the case of an evaluation of where two or more operators may be dominant in the same relevant market, the Commission would take into account the same general criteria listed above, while considering the extent to which, as a group, two or more licensees may jointly hold a position of economic strength that enables them to behave independently of competitors and customers in the relevant market. Where the weight of the evidence shows this to be the case, the Commission would designate the group of licensees as jointly dominant in the relevant market.
  30. Similarly, in the case of a review of an existing dominance designation in a specific relevant market, where the weight of the evidence shows that a licensee no longer holds a position of economic strength that enables it to behave independently of competitors and customers in the relevant market, then the Commission would reclassify the licensee as non-dominant in that relevant market.

#### **2.2.5 Dominance Review Process**

31. As noted above, the Commission may initiate a review to determine if a licensee is dominant either on its own motion or at the request of another person. The Commission can also review if an existing dominance designation should be revoked, either on its own motion or at the request of the dominant licensee.
32. A request submitted to the Commission for a dominance review, whether to determine dominance or to revoke an existing designation, should include supporting evidence that addresses the relevant market definition and competitive assessment described above. The Commission will determine whether such a proceeding is warranted based on the supporting evidence submitted. It will notify, as may be applicable, the licensee and/or other requesting party within forty-five (45) calendar days of receiving the request with an explanation of its ruling and, where warranted, issue directions on the procedures for the proceeding.
33. When conducting a dominance-related proceeding, the Commission will generally follow the public consultation procedures set out in the *Telecommunications (Administrative Procedures) Regulations* (the "Administrative Procedures Regulations") where relevant and appropriate, and with such modifications as the Commission considers appropriate, and may include the following procedural steps:

- i) a request for information process through which the Commission collects market data relating to the products under consideration which, where necessary, may include a follow-up process to clarify and/or seek additional information;
- ii) issuance of a consultation document summarizing the Commission's preliminary determinations, and their rationale;
- iii) issuance of a final decision, with supporting rationale, taking into account interested parties' responses to the consultation document, including any further market data and information provided by interested parties.

## 3 Ex-ante Remedies

### 3.1 Legal and Regulatory Background

- 34. Where a licensee is designated as dominant in a relevant market, the Ordinance provides the Commission with the authority to apply a range of ex-ante remedies to protect consumers and competitors from potential anti-competitive conduct by that licensee.
- 35. For example, section 17 of the Ordinance authorizes the Commission to include in the licence conditions of a dominant licensee a series of conditions, including those pertaining to:
  - (a) regulating the operations of the licensee;*
  - (b) regulating the rates which may be charged by that licensee for telecommunications services or a telecommunications network in accordance with section 28;*
  - (c) requiring the licensee to publish its rates for telecommunications services or in relation to a telecommunications network, in the market in which the licensee is dominant;*
  - (d) that rates for services, or in relation to a telecommunications network provided, to all users shall not be discriminatory; and*
  - (e) with respect to the provision of international services and the settling of accounts with respect to those services.*
- 36. Pursuant to sections 22 to 25 of the Ordinance, the Commission may direct a dominant licensee to provide interconnection services to other licensees on a timely basis and, moreover, to set the terms and conditions for interconnection services, including prices. The Interconnection Regulations provide further ex-ante remedy powers to the Commission in this regard, covering both wholesale interconnection services as well as network unbundling obligations.

37. With regard to retail services, section 28 of the Ordinance provides the Commission with the authority to, among other things, regulate the rates, terms and conditions for services offered by a dominant licensee:

*(2) The Commission may establish rates regulation regimes, which may be prescribed and which may include setting, reviewing and approving rates in any case where—*

*(a) there is only one licensee operating a telecommunications network or providing telecommunication service, or where one or more licensees have been determined to have a dominant position in the relevant market in accordance with section 16;*

*(b) a sole or dominant licensee operating a telecommunications system, network or providing a telecommunications service cross-subsidises another telecommunications service provided by such licensee; or*

*(c) the Commission is satisfied that there is evidence of anticompetitive pricing or acts of unfair competition.*

*(12) A service provider shall publish the rates, terms and conditions for its telecommunications services at such times and in such manner as the Commission shall specify and such rates, terms and conditions shall thereafter, subject to this Ordinance and the conditions of any licence, be the lawful rates, terms and conditions for such services.*

38. The Pricing Regulations further develop the price cap regime that may be applied to a dominant licensee pursuant to section 28 of the Ordinance.
39. Lastly, section 29 of the Ordinance authorizes the Commission to forbear from the exercise of any regulatory power or requirement, including any ex-ante remedies, pursuant to an existing dominance designation.
40. As noted, the competition-related sections of the Ordinance do not include provisions relating to the conceptual framework or criteria that the Commission would use in deciding whether to impose and, where applicable, the nature of any such ex-ante remedies or to decide to forbear from the application of any or all such remedies. The Commission addressed matters relating to the determination of ex-ante remedies and forbearance matters in the proceeding that led to Decision 2013-3, which provides useful guidance as to appropriate ex-ante remedy and forbearance assessment frameworks.
41. Taking the foregoing into account, the Commission sets out the following conceptual framework and criteria that the Commission will use when addressing ex-ante remedy or forbearance matters.

## 3.2 Ex-Ante Remedies

### 3.2.1 Criteria for the Application of Ex-Ante Remedies

42. The Commission may determine to impose ex-ante remedies on a dominant licensee. When determining whether, and the extent to which, to impose ex-ante remedies, the Commission may consider the following:
- i) existence of high and non-transitory barriers to entry;
  - ii) whether the relevant market under consideration would naturally tend, in the short or medium term, toward sufficient competition to protect the interests of customers, even without Commission action;<sup>14</sup>
  - iii) whether harm to customers or to competition has occurred or is likely to occur as a result of the licensee's dominance absent ex-ante remedies;
  - iv) whether ex-post remedies alone would likely be sufficient to address concerns related to dominance; and
  - v) any other factors that the Commission considers appropriate.

### 3.2.2 Determination of Ex-Ante Remedies to be Imposed

43. Where the Commission finds that ex-ante remedies are necessary to address competition issues, the Commission will have regard to the provisions in sections 17 and 28 of the Ordinance, sections 14 to 19 of the Interconnection Regulations and the Pricing Regulations, as may be relevant, to determine the appropriate ex-ante remedies to be imposed, which may include:
- i) constraints on price levels or pricing flexibility;
  - ii) mandating terms and conditions for the service(s) under consideration;
  - iii) mandating the provision of wholesale services on fair and reasonable terms and conditions; and/or
  - iv) other requirements that the Commission considers appropriate.
44. Where ex-ante remedies are imposed on a dominant licensee, the Commission will provide the supporting rationale for its determination. In addition, the Commission expects that it would indicate that it will review the continued need for and nature of the ex-ante remedies after a period of time such as three (3) to six (6) years.

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<sup>14</sup> For the avoidance of doubt, “short term” refers to a period of up to one year and “medium term” refers to a period of one to two years.

### **3.2.3 Ex-Ante Remedy Review Process**

45. A review of any existing ex-ante remedies may be initiated by the Commission on its own motion or based on a prescribed review timeframe set out in the decision establishing existing ex-ante remedies.
46. In addition, a dominant licensee or any other person may file an application requesting a review of the continued need for and/or nature of any existing ex-ante remedies. An application should include supporting evidence that addresses the criteria set out above. The Commission will determine whether a proceeding is warranted, based on the supporting evidence submitted, and will notify the licensee or person within forty-five (45) calendar days of receiving the request with an explanation of its ruling and, where warranted, issue directions on the procedures for the proceeding.
47. Where the Commission commences a review of existing ex-ante remedies, it may include an assessment of the licensee's dominance designation in the relevant market and/or consideration of whether or not forbearance may be appropriate for services offered by the dominant licensee in the relevant market (further discussed below).
48. When conducting an ex-ante remedies-related proceeding, the Commission will generally follow the procedures described in paragraph 33 above, with such modifications as the Commission considers appropriate.

## **3.3 Forbearance**

### **3.3.1 Forbearance Framework**

49. Section 29 of the Ordinance authorizes the Commission to forbear from the exercise of any regulatory power or requirement, including any ex-ante remedies, pursuant to an existing dominance designation:

*(1) The Commission may make a determination to refrain in whole or in part and conditionally or unconditionally, from the exercise of any power or the performance of any duty under this Part to a telecommunications service provided by a licensee, where the Commission finds as a question of fact that to refrain would be consistent with the telecommunications policy objectives of the Islands.*

*(2) Where the Commission finds as a question of fact that a telecommunications service provided by a licensee is or will be subject to competition sufficient to protect the interest of users, the Commission shall make a determination to refrain, to the extent that it considers appropriate, conditionally or unconditionally, from the exercise of any power or the performance of any duty under this Part in relation to the service.*

*(3) The Commission shall not make a determination to refrain under this section in relation to a telecommunications service if the Commission finds as a question of fact that to refrain would be likely to impair unduly the establishment or continuance of a competitive market for that service.*

50. This section of the Ordinance allows the Commission to proceed in two ways. Section 29(1) provides the Commission with a policy basis for a forbearance determination – i.e., any decision to forbear must be consistent with the objectives included in the Policy. Section 29(2) provides a market-competition basis for a forbearance determination – i.e., sufficient competition to protect the interests of users must be found to exist for the service(s) in question. In both cases, section 29(3) requires that forbearance must not be likely to impair unduly the establishment or continuance of a competitive market for the service(s) in question. Forbearance can be in whole or part and conditional or unconditional.
51. As noted above, in Decision 2013-3 the Commission decided to forbear unconditionally from regulating some of C&W's fixed services, while forbearing from others on a conditional basis. The Commission otherwise maintained C&W's dominance designation with respect to these same services. As this decision shows, the Commission may decide to forbear while maintaining a dominance designation. Therefore, a revocation of dominance is not a pre-requisite for forbearance.
52. Where forbearance is granted, whether on a full or partial basis and/or conditionally or unconditionally, the Commission may decide to undertake to review the continued need for and nature of the forbearance determination after a period of time such as three (3) to six (6) years.

### **3.3.2 Policy-Related Forbearance Framework**

53. In a proceeding under section 29(1), the Commission will assess whether forbearance would be consistent with the TCI policy objectives. The Commission will take into account the Policy and other Government or Commission policy pronouncements, international best practices and the following objectives that are referenced in section 4 of the Ordinance:
  - to respect the principle of technological neutrality;
  - to facilitate, maintain and promote effective and sustainable competition; and
  - to promote the interests of consumers and to encourage licensees to operate efficiently.

### **3.3.3 Market Competition-Related Forbearance Framework**

54. In a forbearance proceeding under section 29(2), the Commission would assess if competition is sufficient to protect the interest of users. In a proceeding under section 29(1) or (2), the Commission will assess under section 29(3) whether or not forbearance would be likely to unduly impair the establishment or continuance of a competitive market for the service(s) in question. Thus, competition issues will be examined in forbearance reviews under both section 29(1) and (2). The Commission will take into account the future prospects for competition for the service(s) under consideration, including market factors such as existing and potential near term alternative sources of supply, barriers to entry and technological trends.

55. Subject to the discussion below, the Commission expects that it would adopt a two-part assessment framework. The first part would define the relevant market under consideration and would involve similar considerations as discussed in the “Relevant Market Definition” section above. The second part would consist of a competitive assessment of the relevant market and would consider similar considerations as discussed in the “Competitive Assessment of the Relevant Market” section above.

#### 3.3.4 Forbearance versus Non-Dominance

56. As noted previously, the Ordinance includes provisions to allow for a finding that a licensee is no longer dominant and provisions to allow for forbearance. This dual approach is not common in legislation in other countries the Commission has reviewed. The more usual approach is to include only one of these provisions, typically based on the concept of a licensee being found as no longer dominant.

57. As a practical matter therefore, a determination under section 16(3) that a licensee is no longer dominant can achieve similar results as a forbearance determination under section 29(2). Indeed, both assessments would include the definition of relevant market(s) and a competitive assessment of the defined market(s) under consideration. That said, the Commission would consider the following general factors in determining whether to pursue a forbearance or a non-dominance approach:

- i) **A forbearance approach provides greater flexibility:** Section 29 allows the Commission to take into account both sector policy considerations and market conditions when considering whether to forbear. These provisions also allow the Commission to forbear in whole or part and/or conditionally or unconditionally depending on the circumstances at hand. In contrast, section 16 is effectively “all or nothing” – i.e., the licensee must be found to be dominant or non-dominant in the relevant market in question. If non-dominant, no ex-ante remedies would apply. Consequently, the forbearance approach provides the Commission with flexibility in terms of the nature and extent of necessary ex-ante remedies and includes the option of applying no ex-ante remedies. It also provides greater leeway to review and revise any applicable ex-ante remedies in the event market competition does not develop as expected.
- ii) **A non-dominance approach raises ex-post safeguard concerns:** The fact that the section 16 approach is effectively “all or nothing” in terms of outcome implies, as a practical matter, that adequate ex-post safeguards should exist to protect against the potential for anti-competitive behaviour following a non-dominance determination. Under an ideal best-practice scenario, a regulatory authority would be able to rely on a well-defined ex-post competition regime to ensure that there remained a clear legal recourse in this regard. In the past, the Commission has been concerned that this scenario does not hold in TCI due to the absence of economy-wide or sector-specific competition legislation in TCI *and* that the fact that neither Competition Regulations nor Guidelines existed. This risk is somewhat mitigated now with the issuance of these Guidelines. Given the indicative nature of these Guidelines, however, the fact remains that there is no economy-wide or sector-specific competition legislation in TCI. Further, the



Commission's powers to sanction a licensee who engages in anti-competitive conduct is relatively limited under the Ordinance. Therefore, the Commission remains concerned about the efficacy and deterrence power of existing legal framework governing anti-competitive practices.

iii) Any other factors that the Commission considers appropriate.

58. In addition to the above-noted general factors, in selecting between a forbearance and a non-dominance approach, the Commission would also take into account the specifics of the case at hand, including the following considerations:

i) Market Data Availability: A non-dominance review will generally require the availability of comprehensive market data as input to the competitive assessment analysis, including historical, current and forward-looking information (as per section 2.2.4 above). The more comprehensive the data which is available for the specific case at hand, the greater the likelihood a non-dominance rather than forbearance approach could be followed.

ii) Expected Market Trends: A competitive assessment will look at, among other things, future expected market developments that could limit market power or otherwise protect the interests of consumers. If the evidence for the specific case at hand shows that adequate competition is likely to develop rapidly (i.e., in the short to medium term), and with a high degree of certainty, then the greater the likelihood that a non-dominance rather than forbearance approach could be followed.

iii) Any other considerations that the Commission considers appropriate.

### **3.3.5 Forbearance Review Process**

59. A forbearance review proceeding may be initiated by the Commission on its own motion, or on an application by a licensee requesting a forbearance review, or based on a prescribed review timeframe set out in a previous decision.

60. Any application by a licensee should include sufficient supporting evidence. The Commission will determine whether such a proceeding is warranted, based on the supporting evidence submitted, and would notify the licensee within forty-five (45) calendar days of receiving the request with an explanation of its determination and, where warranted, issuing directions on the procedures for the proceeding.

61. Where a dominant licensee applies to be declared non-dominant in relation to one or more relevant markets, the Commission may decide to proceed by way of a proceeding under section 29 of the Ordinance. In making such a procedural determination, the Commission will take into account the considerations and factors included in section 3.3.4 above, with such modifications as the Commission considers appropriate.

62. When conducting a forbearance-related proceeding, the Commission will generally follow the procedures described in paragraph 33 above, with such modifications as the Commission considers appropriate.

## 4 Anti-competitive Practices and Agreements

### 4.1 Legal and Regulatory Background

63. As noted above, all Licences contain specific prohibitions against anti-competitive practices and agreements. The relevant language in C&W's License states:

*13.4 The Licensee shall not engage in anti-competitive pricing and other similar practices or any other activities, whether by act or omission, which have; or are intended to or likely to have, the effect of unfairly preventing, restricting or distorting competition in any market for the Licensed Services, ...*

*13.5 Without limiting the generality of Clause 13.4 above, any act or omission which leads, or is likely to lead, to a substantial lessening of competition in the market for any telecommunications network or telecommunications service is prohibited. The Commission will issue Guidelines describing, or may otherwise determine, what constitutes a substantial lessening of competition and the procedures for assessing it.*

64. The Ordinance authorizes the Commission to investigate and, as necessary, remedy anti-competitive conduct on an ex-post basis. Section 4 of the Ordinance authorises the Commission to undertake the functions, as necessary:

*(h) to carry out investigations and hold enquiries with respect to any matter in relation to its functions or duties under this Ordinance;*

*(i) to give advice and directions to a licensee with respect to anticompetitive practice or behaviour;*

*(k) to instruct the Director General to conduct research into the quality and standard of service of a licensee, and into tariffs or any anti-competitive behaviour;*

*(m) to carry out such other functions as may be necessary for the purpose of discharging its functions under this Ordinance.*

65. Section 28(2) of the Ordinance states that the Commission may establish rate regulation of a licensee where the Commission is satisfied that there is evidence of “anti-competitive pricing” or “acts of unfair competition”. When a licensee contravenes a Licence condition, or other regulatory provision, section 52 of the Ordinance empowers the Commission to impose specific sanctions, including fines where warranted.

66. As noted, the competition-related sections of the Ordinance and Licences do not include provisions related to the conceptual framework or criteria that the Commission would use

in deciding what may constitute “anti-competitive behaviour” or what practices or agreements may constitute a “substantial lessening of competition”. Indeed, the Licences indicate that the Commission shall issue Guidelines in this respect.

67. Taking the foregoing into account, the Commission sets out the following conceptual framework and criteria that the Commission will use when addressing anti-competitive practices and agreements.

## 4.2 Abuse of Dominance

68. An abuse of dominant position would be considered to have occurred when a dominant licensee engages in anti-competitive conduct which has had, is having or is likely to have the effect of substantially lessening competition in one or more markets. The types of anti-competitive conduct that would trigger concerns in this regard include, but are not necessarily limited to, the following:
- i) squeezing the profit margin available to a competitor that requires a wholesale product from the dominant licensee, by increasing the price for the wholesale product in question and/or decreasing the prices of the retail product dependent on the wholesale product as an input for the purpose of impeding or preventing a competitor's entry into, or participation or expansion in, a market;
  - ii) supplying products at prices for which the licensee has been designated as dominant below long run incremental cost or such other cost standard as may be established by the Commission;
  - iii) cross-subsidizing a product in a competitive market by another product for which the licensee has been designated as dominant with the objective of lessening competition, except where such cross subsidy is specifically approved by the Commission or by approval of tariffs for relevant products;
  - iv) supplying bundled products that include one or more competitive market products together along with one or more other products for which the licensee has been designated as dominant with the objective of lessening competition;
  - v) any other conduct that, in the opinion of the Commission, prevents or lessens or is likely to prevent or lessen competition substantially in a market.
69. When investigating concerns regarding potential abuse of dominance, the Commission would take into account the nature, timeframe, extent and intent of the conduct in question and also assess the likely impact of the conduct on competition in the affected market(s). In doing so, the Commission would consider the following:
- i) market definition and dominance assessment criteria considerations (as set out in Chapter 2 above);
  - ii) the likely impact of the anti-competitive conduct (e.g., prices, market shares and market entry/exit); and

- iii) the extent to which the anti-competitive conduct maintains or enhances the licensee's dominance.

### 4.3 Other Anti-Competitive Conduct

70. There are a range of other activities that if engaged in by a licensee (whether dominant or non-dominant) would likely be considered by the Commission to be anti-competitive or otherwise having the effect of preventing or substantially lessening competition. What follows is a non-exhaustive list of such practices.

#### 4.3.1 Price Fixing

71. Price fixing among competitors can arise where a licensee conspires, colludes, agrees or arranges with a competitor (other than an affiliate<sup>15</sup>):
- i) to fix, maintain, increase or control the price<sup>16</sup> for the supply of a product;
  - ii) to allocate sales, territories, customers or markets for the production or supply of a product; or
  - iii) to fix, maintain, control, prevent, lessen or eliminate the production or supply of a product.
72. For the avoidance of doubt, price-fixing concerns would not likely arise if, to the satisfaction of the Commission, the licensee establishes that the conduct:
- i) is ancillary to a broader or separate joint venture agreement or arrangement that includes the same parties, and
  - ii) is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate joint venture agreement or arrangement; and
  - iii) the broader or separate joint venture agreement or arrangement, considered alone, does not raise price fixing concerns.

#### 4.3.2 Bid-Rigging

73. Bid rigging can arise where a licensee enters an agreement or arrangement with one or more or more others parties whereby one or more of those parties agrees or undertakes (i) not to submit a bid or tender in response to a call or request for bids or tenders, or (ii) agrees or undertakes to withdraw a bid or tender submitted in response to such a call or

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<sup>15</sup> "Affiliate" includes in relation to another company, a company which directly or indirectly controls, is controlled by or is under common control with, another company. See Ordinance, section 2. Further, "control" means control in any manner that results in control in fact, whether directly through ownership of shares or indirectly through an agreement, arrangement or otherwise, or indirectly through an agreement or arrangement involving next of kin.

<sup>16</sup> "Price" means an amount of money or other consideration and includes a charge, fare, rate, rental, toll or other compensation payable to a licensee for the use of its products, and also includes any discount, rebate, allowance, price concession or other advantage in relation to the supply of the products. Also see "rate" as defined in section 2 of the Ordinance.

request, or (iii) the submission, in response to a call or request for bids or tenders, of bids or tenders that are arrived at by agreement or arrangement between or among two or more bidders or tenderers, and where the agreement or arrangement is not made known to the person calling for or requesting the bids or tenders at or before the time when any bid or tender is submitted or withdrawn, as the case may be. Bid-rigging concerns would not likely arise where all the parties are affiliates of each other.

### 4.3.3 Restrictive Agreements

74. An agreement among competitors that is not price-fixing or bid rigging may or may not be anti-competitive. The Commission may assess such an agreement to determine whether it prevents or lessens or is likely to prevent or lessen competition substantially in a market. Restrictive-agreement concerns would not likely arise where the agreement or arrangement is entered into only by parties that are affiliates of each other.
75. In determining whether or not the agreement or arrangement will prevent or lessen, or is likely to prevent or lessen, competition substantially in a market, the Commission may consider the following factors:
- i) market definition (as set out in Chapter 2 above);
  - ii) the extent to which acceptable substitutes for products supplied by the parties to the agreement or arrangement are or are likely to be available;
  - iii) the extent to which effective competition remains or would remain in a market that is or would be affected by the agreement or arrangement; and
  - iv) any other factor that is relevant to competition in a market that is or would be affected by the agreement or arrangement.

## 4.4 Anti-Competitive Conduct Review Process

76. As noted above, the Commission may initiate an investigation or proceeding to consider whether a conduct raises anti-competitive concerns either on its own motion or at the request of another person.
77. A request submitted to the Commission for an anti-competitive conduct review should include supporting information and rationale for its complaint. Schedule 2 sets out the nature of the information that should be provided by a complainant. Where the Commission receives a complaint:
- i) the Commission may determine that a proceeding is not warranted, whether due to the likely *de minimis* impact on competition or for any other reason – in such case, the Commission will notify the complainant within forty-five (45) days of receiving the request with an explanation of its ruling; or
  - ii) if the Commission determines that the complaint justifies further consideration, the Commission will initiate a proceeding to investigate the matter and the

Commission will notify the complainant, and the affected licensee, within forty-five (45) days of receiving the request, and issue directions on the procedures for the proceeding.

78. When conducting an anti-competitive conduct-related proceeding, the Commission will generally follow the procedures described in paragraph 33 above, with such modifications as the Commission considers appropriate.

#### **4.5 Remedies and/or Penalties**

79. Consistent with the authority granted to the Commission under section 52 of the Ordinance, if the Commission determines as a result of an anti-competitive conduct-related proceeding that a licensee has engaged in anti-competitive conduct having the effect of substantially lessening competition, the Commission may issue one or more directions:
- i) requiring the licensee to cease the actions or activities specified in the direction, immediately or at such time prescribed in the direction, and subject to such conditions as may be prescribed in the direction;
  - ii) requiring the licensee to make specific changes in its conduct to remedy the conduct in question, and to reduce the likelihood of any further incidence thereof;
  - iii) requiring the licensee to provide periodic reports to the Commission to assist in determining whether the actions or practices are continuing and to determine their impact on communications markets, competing licensees and consumers; or
  - iv) requiring any other remedial action that the Commissions considers necessary or appropriate.
80. Where a licensee fails to comply with the Commission's directions, section 52(5) of the Ordinance sets out further enforcement powers of the Commission, including the imposition of fines and enforcing remedies under the Licence, including suspension and revocation.
81. At any time in the course of an anti-competitive conduct-related proceeding, where the Commission considers it in the public interest to do so, the Commission may issue an interim order authorizing, requiring or forbidding anything to be done that the Commission is empowered to authorize, require or forbid, and subject to such conditions as may be prescribed in the order.

## Schedule 1: Existing Relevant Market and Dominance Designations

<b>Relevant Market</b>	<b>Dominant Licensee(s)</b>	<b>Source of Designation</b>
Residential Access at a Fixed Location	Cable & Wireless (TCI) Limited (dba Flow)	Licence and Telecommunications Decision 2013-3
Business Access at a Fixed Location	Cable & Wireless (TCI) Limited (dba Flow)	Licence and Telecommunications Decision 2013-3
Domestic Calling from a Fixed Location	Cable & Wireless (TCI) Limited (dba Flow)	Licence and Telecommunications Decision 2013-3
International Calling from a Fixed Location	Cable & Wireless (TCI) Limited (dba Flow)	Licence and Telecommunications Decision 2013-3
Domestic Private Leased Circuits	Cable & Wireless (TCI) Limited (dba Flow)	Licence and Telecommunications Decision 2013-3
International Private Leased Circuits	Cable & Wireless (TCI) Limited (dba Flow)	Licence and Telecommunications Decision 2013-3
Wholesale Mobile Network Call Termination	All licensed Mobile Network Operators	Interconnection Regulations * and Telecommunications Decision 2014-4
Wholesale Fixed Network Call Termination	All licensed Fixed Network Operators	Interconnection Regulations * and Telecommunications Decision 2014-4
Wholesale Fixed/Mobile Network Call Transit	Cable & Wireless (TCI) Limited (dba Flow)	Interconnection Regulations * and Telecommunications Decision 2014-4

\* Telecommunications (Interconnection and Access to Telecommunications Facilities) Regulations

## **Schedule 2: Form for Anti-Competitive Conduct Complaints**

1. Name of Complainant and Contact Information
2. Name of Licensee and Contact Information
3. Other Concerned Persons and Contact Information
4. Description of the Complaint
5. The Applicable Provisions in the Ordinance, Regulations, License or Guidelines that Relate to the Complaint
6. Facts Supporting the Complaint (attach relevant documents and correspondence)
7. If Applicable, description of any attempts to resolve the Complaint (attach relevant documents and correspondence)
8. Relief Sought (what does the Complainant want the Commission to do?)