



BERMUDA

REGULATORY AUTHORITY

Fairness ~ Innovation ~ Integrity

RAA Section 87 Concentration Application

Proposed Change of Control pursuant to Section 87 of the Regulatory Authority Act 2011

A transaction concerning the proposed acquisition of control of Bermuda Digital Communications Ltd. (BDC) and KeyTech Limited (KeyTech), including its subsidiaries Logic Communications Ltd. (Logic) and Cable Co. Ltd. (Cable Co.), by Atlantic Tele-Network, Inc. (ATN)

FINAL DECISION

Date: 27 April 2016

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1 Definitions

(1) In this Final Decision, unless the context otherwise requires:

“**ATN**” means Atlantic Tele-Network, Inc.;

“**Authority**” means the Regulatory Authority of Bermuda;

“**BCV**” and “**Logic**” means Bermuda Cablevision Limited, a wholly-owned subsidiary of KeyTech, which legally changed its name to Logic Communications Ltd. effective 11 December 2015;

“**BDB**” means BDB, Ltd.;

“**BDC**” means Bermuda Digital Communications Ltd. (doing business as CellOne);

“**BTC**” means The Bermuda Telephone Company Limited, a wholly owned subsidiary of Digicel;

“**Cable Co.**” means Cable Co. Ltd., a wholly owned subsidiary of KeyTech;

“**CB-1**” means the Challenger Bermuda-1 submarine cable which links Bermuda to the US;

“**CBUS**” means the Caribbean Bermuda US submarine cable;

“**CellOne**” means the trading name under which BDC does business;

“**CEO**” means Chief Executive Officer;

“**CWC**” means Cable & Wireless Communications;

“**Digicel**” means Wireless Holdings (Bermuda) Limited;

“**Digicel Group**” means Digicel and all of the subsidiaries and affiliates over which it exercises control;

“**ECA**” means the Electronic Communications Act 2011;

“**HDS-1**” means the first consultation conducted by the Authority for the award of High Demand Spectrum pursuant to the ECA;

“**Gemini**” means Gemini Submarine Cable System Limited;

“**GlobeNet**” means a subsea cable system linking the US, Bermuda, Colombia, Venezuela, and Brazil;

“**Government**” means the Government of Bermuda;

“**ICOL**” means an Integrated Communications Operating Licence;

“**IPTV**” means Internet Protocol television;

“**ISP**” means an Internet Service Provider;

“**KeyTech**” means KeyTech Limited;

“**KeyTech Group**” means KeyTech and its Bermuda subsidiaries and affiliates;

“**Link Bermuda**” means LinkBermuda Limited;

“**LTE**” means Long Term Evolution;

“**Market Review Consultation**” means a Market Review that will be initiated by the Authority pursuant to ECA Section 23 following the issuance of this Final Decision;

“**Merged Entities**” means KeyTech Limited and all corporate entities under its control following the close of the Proposed Transaction, as described in paragraph 10 of this Final Decision, including BDC/CellOne, Logic and Cable Co.;

“**Merged Entity**” means KeyTech as constituted following completion of the Proposed Transaction and the acquisition of control by ATN;

“**Minister**” means the Minister of the Government responsible for the electronic communications sector;

“**MVNO**” means mobile virtual network operator;

“**NewCo**” means the successor in interest to BDC, which will be a wholly-owned subsidiary of KeyTech following completion of the Proposed Transaction;

“**Notification**” means the notification of a proposed concentration submitted to the Authority by ATN and KeyTech on 13 October 2015;

“**Proposed Transaction**” means the series of transactions pursuant to which ATN will acquire control of KeyTech, and pursuant to which BDC will become NewCo;

“**PSTN**” means public switched telephone network;

“**RAA**” means the Regulatory Authority Act 2011;

“**Regulated Bundle**” means a bundle of services as defined in Annex 2;

“**Remedies General Determination**” means the General Determination, Obligations for Operators with Significant Market Power, dated 7 August 2013, Matter: RM01/13-1040;

“**Representations**” means the representations and commitments made by ATN or KeyTech (or both) as set forth in Section 10 of this Final Decision;

“**SMP**” means significant market power;

“**TBI**” means TeleBermuda International Limited;

“**Parties**” means ATN and KeyTech; and

“**WOW**” means World on Wireless Limited.

- (2) All other terms, words or expressions shall, except insofar as the context otherwise requires, have the meaning, if any, assigned to them by the RAA, the ECA, the Interpretation Act 1951, and the Remedies General Determination.

2 Executive Summary

1. ATN and KeyTech have sought the Authority’s approval of a proposed concentration pursuant to RAA Section 87(3). Through a series of related transactions, ATN would become the ultimate majority shareholder (51%) of KeyTech and its subsidiaries and affiliates, including Cable Co., Logic, BDB and BDC. At the same time, KeyTech would acquire sole ownership of BDC, in which KeyTech and ATN both currently own significant shareholdings.
2. The Authority has conducted a thorough assessment of the Proposed Transaction in line with the criteria set out in RAA Section 87(10). In evaluating the Proposed Transaction, the Authority has given careful consideration to the information, representations and commitments provided by ATN and KeyTech as well as to the comments provided by various third parties.
3. The Proposed Transaction will involve a change of control in the various ICOL holders that form part of the KeyTech Group, several of which also hold spectrum licences. Pursuant to ECA Section 18(6) and the terms of the relevant licences, the proposed changes in control of the licensees in question must also be approved by the Authority, acting with the written consent of the Minister.
4. Following review of the Proposed Transaction, the Authority has concluded that it is compatible with RAA Section 87(10) insofar as the concentration is not likely to have the effect of creating or enhancing a dominant position on any relevant market; nor is it likely to substantially lessen competition.
5. Furthermore, the Authority has determined that the Proposed Transaction is not likely to harm the public interest. On the contrary, the Authority is of the view that completion of the Proposed Transaction is likely to produce positive synergies and should help achieve a number of important policy objectives consistent with ECA Section 5. Among other things, the Proposed Transaction is likely to strengthen KeyTech financially and enable it to significantly improve its fixed line infrastructure and offer its new and improved services to residential and business customers more efficiently. The Proposed Transaction can therefore be expected to encourage sustainable competition, innovation and development of the sector in ways that will positively benefit consumers, with important likely multiplier effects for the overall economy of Bermuda.
6. Concerns related to the Proposed Transaction can be addressed by the conditions that the Authority has decided to impose as transitional measures, along with the existing *ex ante* regulations that will continue to apply to the

KeyTech Group post-completion for as long as necessary to safeguard competition.

7. For all of these reasons, the Authority has decided to clear the Proposed Transaction subject to several conditions, and has obtained the Minister's consent to certain of these conditions as required under the RAA and ECA and to approve a change of control in the holder of, or the transfer of, the relevant ICOLs and spectrum licences as set forth below.

3 Introduction and Background

8. On 13 October 2015, ATN and KeyTech jointly submitted a confidential Notification to the Authority advising that they had entered into an agreement pursuant to which ATN would acquire a controlling interest in KeyTech as part of a proposed business combination of KeyTech with BDC. Through a series of related transactions described in the Notification, ATN would become the ultimate majority shareholder (51%) of KeyTech and its subsidiaries, Cable Co., Logic and BDC, with KeyTech acquiring sole ownership of BDC (in which KeyTech and ATN both currently own significant shareholding). The various transaction steps forming part of the concentration are depicted in Annex 1.
9. The Parties sought the Authority's approval of the transaction in accordance with the Concentration Review provisions of RAA Section 87.

4 The Parties

10. KeyTech, the vendor, is incorporated in Bermuda and its shares are publicly traded on the Bermuda Stock Exchange. The shares in KeyTech are widely held, with a majority of the shares (56.7%) being held by the general public and no single individual or legal entity holding more than 26%. KeyTech, directly or indirectly, owns 100% of two ICOL holders, being Logic and Cable Co. KeyTech is also the indirect owner of approximately 42.49% of BDC, together with ATN and other shareholders. BDC, in turn, owns 40% of BDB (an ICOL holder that is non-operational).
11. The KeyTech Group is a major participant in Bermuda's electronic communications sector insofar as its affiliates include one of the island's two mobile network operators (BDC), one of three subsea cable landing station and subsea cable owners (Cable Co.) serving the island, and a major cable television/broadband network and internet provider (Logic).
12. ATN, the acquiring party, is incorporated in the U.S. state of Delaware, and its shares are publicly traded on the NASDAQ exchange in the United States. ATN currently owns approximately 42.79% of BDC. ATN and its portfolio of companies invest, own and operate communications companies and renewable energy assets in the United States and internationally. Apart from its existing ownership interest in BDC, ATN does not participate in the electronic communications sector of Bermuda.

5 Relevant Legal Framework

5.1 RAA Section 87

13. RAA Section 87(3) stipulates that:
- “No specified sectoral provider [...] shall close any transaction that would constitute a concentration without notifying the Authority and obtaining the Authority’s prior written approval.”*
14. RAA Section 87(4) states that:
- “A transaction shall be deemed to constitute a concentration if it results in – (a) a lasting change in control of a sectoral provider as a result of:*
- (i) a merger involving one or more previously independent sectoral providers; or*
- (ii) the acquisition of direct or indirect control of one or more sectoral providers [...].”*
15. RAA Section 87(10) directs the Authority to review and analyse any proposed concentration to ensure that it will not likely result in “one or more” of the following effects:
- (a) create an entity with a dominant position or enhance an existing dominant position in any relevant market;
 - (b) substantially lessen competition in any relevant market; or
 - (c) harm the public interest.
16. In analysing a proposed concentration under subsections (a) and (b) of RAA Section 87(10), the Authority conducts an economic assessment of the likely effects of the proposed concentration.
17. In applying the public interest test under RAA Section 87(10)(c), the Authority may take into account the factors that it deems relevant at the time, given the particular circumstances of each transaction. In doing so, the Authority is guided by the Government’s policies and the objectives established by ECA Section 5, which sets out the basic purposes of the regulatory framework, i.e., to:
- (a) ensure access to reliable and affordable electronic communications services (ECA Section 5(1)(a));
 - (b) enhance Bermuda’s competitiveness globally (ECA Section 5(1)(b));
 - (c) encourage development of the sector, consumer choice and innovative services (ECA Section 5(1)(c));
 - (d) encourage development and rapid migration of innovative electronic communications services (ECA Section 5(1)(d));
 - (e) promote orderly development of the electronic communications sector (ECA Section 5(1)(e));

- (f) encourage sustainable competition in the sector (ECA Section 5(1)(f));
 - (g) encourage development and maintenance of resilient and fault-tolerant communications infrastructures (ECA Section 5(1)(g));
 - (h) promote investment in the sector to stimulate the economy and employment (ECA Section 5(1)(h)); and
 - (i) promote Bermudian ownership and Bermudian employment at all levels of the sector (ECA Section 5(1)(i)).
18. The Authority will consider these and other relevant public interest factors when evaluating a proposed concentration for the purposes of RAA Section 87(10)(c). The Authority will take similar public interest considerations into account when examining a proposed change of control under ECA Section 18(6) and ICOL Clause 20 (see below), but may also consider a broader range of issues relevant to promoting the public interest as well as preventing harm to it.

5.2 Relevant ECA Provisions

19. ECA Section 12 requires all operators of electronic communications networks and providers of electronic communications services to secure a licence, of which ICOLs are a particular type granted to entities identified in Schedule 1 of the ECA.
20. Pursuant to ECA Section 18(6), any transfer or assignment of an ICOL or change of control in the holder of an ICOL, within the meaning of ECA Section 18(7), must be approved by the Authority in advance, in writing, acting with the written consent of the Minister. ICOL Condition 20 imposes a similar requirement by prohibiting a change in control in the holder of an ICOL without prior written authorization of the Authority, acting with the written consent of the Minister.
21. Further, Condition 11 of each Spectrum Licence of BDC provides that the licensee shall not transfer or assign the licence to any third party without the prior written authorization of the Authority acting with the written consent of the Minister and the term "assignment" thereunder includes a change of control of the licensee.

5.3 Imposition of conditions on the Parties to a proposed concentration

22. RAA Section 87(11) provides that the Authority may, when necessary to prevent a concentration from having any of the effects listed in RAA Section 87(10), approve a concentration subject to one or more of the following conditions:
- (a) compliance with any of the *ex ante* remedies specified in sectoral legislation (RAA Section 87(11)(a));
 - (b) partial divestiture to a purchaser approved by the Authority (RAA Section 87(11)(b)); or

- (c) any other condition that the Authority, with the approval of the Minister, may adopt (RAA Section 87(11)(c)).
23. Further, in accordance with ECA Section 18(6) and Clause 20 of the ICOL held by the company to be acquired, authorization of a change in control in the licence holder may be withheld unless the Authority is satisfied that the transaction is compatible with the ECA.
24. RAA Section 87(11)(a) allows the Authority to impose, in the context of a concentration review, any of the types of conditions listed as *ex ante* remedies in sectoral legislation (i.e., the ECA), without the Minister's approval if justified by the Authority's economic assessment of the competition effects identified in RAA Section 87(10)(a) and (b).
25. ECA Section 24(1) sets out the types of *ex ante* remedies that can be imposed by the Authority in the electronic communications sector, which include, by way of example:
- (a) an obligation to establish and maintain a cost accounting system in accordance with cost allocation and separation rules that are stipulated or approved by the Authority (ECA Section 24(1)(i));
 - (b) an obligation not to unreasonably bundle other services with a service that is subject to *ex ante* regulation (ECA Section 24(1)(k)); and
 - (c) an obligation to offer specified access and interconnection facilities and services through a functionally separate and independently operated business (ECA Section 24(1)(m)).
26. Likewise, RAA Section 87(11)(b) allows the Authority to impose a condition requiring the Parties to a proposed concentration to partially divest certain assets without the Minister's approval.
27. If the condition does not concern a type of *ex ante* remedy that is identified in ECA Section 24(1), or is not a divestiture remedy, it may be imposed by the Authority provided that the Minister gives his written approval pursuant to RAA Section 87(11)(c).
28. Further, any condition that the Authority intends to impose pursuant to ECA Section 18(6) and ICOL Clause 20 requires the Minister's approval.
29. In considering whether to approve a proposed concentration, with or without conditions, or to decline such approval, the Authority is guided by the relevant regulatory principles set out in RAA Section 16. Without detracting from the importance of any of these, the Authority is particularly mindful in this context of its obligations to rely on market forces where practicable and to act in a reasonable, proportionate and consistent manner, without favouritism or unreasonable discrimination in regard to any sectoral participant.

6 Change of Control

30. ATN's Notification acknowledges that "[t]he Proposed Transaction would constitute a concentration under section 87(4) of the Act as it would result in a

change in control . . . (as a result of the acquisition of direct or indirect control)” of four existing ICOL holders in Bermuda: Logic, BDB, BDC and Cable Co.

31. Following the Proposed Transaction, ATN would acquire control of KeyTech by purchasing (indirectly) at least 51% of KeyTech’s shares, thus giving ATN indirect control over KeyTech’s existing wholly owned subsidiaries, including Logic and CableCo. At the same time, through a series of related transactions, KeyTech would become the sole owner (indirectly) of BDC and BDB.
32. With regard to BDC, ATN currently owns approximately 42.79% of the company, and KeyTech owns approximately 42.29%. The remaining shares of BDC are held by various minority shareholders.
33. Having considered the respective shareholdings and rights exercised by ATN and KeyTech in the governance and strategic management of BDC, the Authority is of the view that these two shareholders currently exercise joint control over BDC’s affairs within the meaning of RAA Section 2. “Control” is there defined as follows:

“the power, whether held directly or indirectly, to exercise decisive influence over a body corporate, including by directing its management and policies through ownership of shares, stock or other securities or voting rights, or through an agreement or arrangement of any type, or otherwise.”

34. “Decisive influence” in this context generally is interpreted to mean the power to block actions which determine the strategy and commercial behaviour of the company.¹ The Authority considers that both ATN and KeyTech jointly exercise such power at present. If BDC becomes a wholly owned subsidiary of KeyTech, in which ATN acquires a 51% ownership following completion of the Proposed Transaction, BDC will undergo a change of control -- that is, from (indirect) joint control by ATN and KeyTech, to (indirect) sole control by ATN.

7 The Authority’s Review Process

35. Following receipt of the Notification and the Authority’s review of the documentation provided in support of the Proposed Transaction, the Authority sought further information from the Parties in order to complete the Notification process.
36. Follow-up questions were submitted by the Authority to both Parties on 10 November 2015, to which they responded on 26 November 2015. At the same time, the Authority informally sought the views of potentially interested third parties. Preliminary comments were provided by Link Bermuda Ltd. and Quantum Communications Limited on 2 December 2015. They had “no concern regarding the proportionate change in ownership proposed by ATN and KeyTech,” but requested assurances that the existing *ex ante* SMP

¹ See *EU Commission Consolidated Jurisdictional Notice Under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings*, [2008] OJ C95/1, p.17 [*Decisive influence “normally means the power to block actions which determine the strategic commercial behavior of an undertaking”*]; OECD Competition Committee’s Working Party No. 3 on Co-operation and Enforcement, Definition of Transaction for the purpose of Merger Control Review, 18 June 2013 (DAF/COMP/WP3/WD(2013)10, p.6.

obligations applicable to KeyTech (in particular, those relating to the Mandatory Access and Interconnection Agreement) would remain in place. They also urged the Authority to review the terms and conditions to prevent anticompetitive price squeeze.

37. Following from the Authority's review of the Parties' responses and the preliminary comments submitted by third parties, the Authority determined that the Notification was complete. Accordingly, on 29 January 2016, the Authority published a formal notice of the Proposed Transaction and issued an invitation to the general public to provide any comments by 12 February 2016.

8 Comments from Interested Parties in Response to the Notification

38. Comments in response to the Authority's formal notice of the Proposed Transaction were submitted on 12 February 2016 by Digicel and three individual commenters.

8.1 Individual Commenters

39. The brief comments submitted by the three individuals focussed on concerns related to the foreign ownership of KeyTech following the Proposed Transaction, the potential loss of jobs, and the impact on the price and quality of electronic communications services. One of the commenters also speculated that the Merged Entity would engage in various commercial practices that could be harmful to consumers, and questioned whether KeyTech would provide LTE services and devices post-transaction. The individual commenters provided no evidence or analysis in support of their claims. The Authority has nonetheless considered the concerns they have raised and, to the extent feasible in line with its statutory duties under Section 87 of the RAA, has addressed the relevant issues in the public interest assessment set out in Section 10 below.

8.2 Digicel's Comments

40. The Authority notes that Digicel is the main competitor of the KeyTech Group and, like KeyTech, provides various types of electronic communications networks and services, including, mobile voice and data, fixed broadband, and internet services. Digicel's addition of fixed voice and broadband networks and services to its mobile and internet portfolio took place in mid-2015, following the Authority's 11 May 2015 decision approving Digicel's acquisition of the incumbent fixed-line operator, BTC, from Barrie Holdings Limited (which had itself acquired BTC from KeyTech in 2014). The Digicel-BTC acquisition was cleared by the Authority and the Minister subject to a number of conditions to address various competition and public interest concerns.
41. In its comments, Digicel raised various concerns about the competitive effects of the Proposed Transaction. These are further discussed in Section 9 below, together with the Authority's own assessment of the Proposed Transaction.
42. Digicel also contends that the Proposed Transaction will be contrary to the public interest because it:
 - fails to promote sustained competition,

- does not promote Bermudian ownership and employment,
 - does not encourage the deployment of innovative and affordable services, and
 - is contrary to the ECA's objectives of ensuring access to affordable and reliable electronic communications services, and of promoting consumer choice and innovative services.
43. Digicel urges the Authority to conduct a "second-stage" review of the concentration that would entail a detailed assessment of all of the markets identified by Digicel as the focus of its concern. Digicel's comments also outline the types of conditions that it believes should be incorporated in any decision by the Authority approving the Proposed Transaction. These include:
- the same remedies imposed by the Authority as a condition to its approval of Digicel's acquisition of BTC (including hold separate obligations, prohibitions on asset stripping, cost accounting, accounting separation, transfer charging, prohibition on unreasonable bundling, continuation of SMP obligations and reporting obligations on various representations made by Digicel in regard to employment and investment);
 - divestment of duplicative physical network infrastructure (ducts, poles, fibre and cable) as between Logic's TV distribution network and "the telecommunications network";
 - divestment of CB-1 or, alternatively, the imposition of a wholesale access obligation on Cable Co. to provide submarine cable capacity as well as on-island cable on a cost basis (or on a non-discriminatory basis);
 - in connection with a hold separate obligation, obligating the provision of wholesale access to "bill distribution and marketing channels should these be used by the Merged Entity to market other telecommunications services";
 - prior written approval of bundles by the Authority for all service bundles, and a prohibition against the bundling of TV services with other services;
 - provision of wholesale access to all SMP products comprising a bundle and to the bundle itself;
 - prior approval by the Authority of the transfer of any ownership right or interest in any of the components making up the KeyTech business; and
 - incorporation of all conditions into the ICOL and the imposition of a quarterly reporting obligation consisting of a written certification by the Merged Entity's CEO personally certifying that all of these conditions have been met.

9 Evaluation of the Competitive Effects of the Proposed Transaction

9.1 Issues Raised

44. As set out above, RAA Section 87(10) directs the Authority to review and analyse any proposed concentration to ensure it, amongst others, does not:
- (a) create an entity with a dominant position or enhances an existing dominant position in any relevant market; or
 - (b) substantially lessen competition in any relevant market.
45. As part of its response to the Authority's invitation to comment in the Proposed Transaction, Digicel has raised concerns under both of these criteria.
46. With regard to the first, Digicel acknowledges that members of the KeyTech Group already hold a dominant position in a number of markets, but argues that the position will be enhanced in various markets on the basis that:
- (a) First, there would be an "*enhancement of the existing dominant position of Logic on the market for broadband services.*"² According to Digicel, Logic currently holds a market share of approximately 65% in this market, which would increase to approximately 75% due to "*the addition of Cablevision and CellOne*".³
 - (b) Second, the new entity would hold an enhanced dominant position in "*all affected downstream markets [i.e., the market for fixed internet, mobile services and subscription TV services] as a result of their control of off-island submarine fibre capacity*".⁴
47. Digicel further argues that the Proposed Transaction would also substantially lessen competition, for two reasons:
- (a) Vertical effects: Digicel argues that the concentration would lead to the creation of a vertically integrated entity across key upstream and downstream markets (including off-island capacity, retail pay TV services, retail broadband services and retail mobile services). According to Digicel, this means the Proposed Transaction would result in the Merged Entity having a heightened incentive to withhold capacity in the upstream market for off-island capacity, which in turn forms an input to most downstream markets. In particular, Digicel claims that the Proposed Transaction would provide the Merged Entity with greater incentives to withhold capacity on the CB-1 sub-sea cable system landing in Bermuda, which is owned by Cable Co. on the Bermuda end. Digicel further argues that it would not be able to gain access to the CBUS and Gemini subsea cable systems owned by CWC, which also land in Bermuda, because Digicel is a direct competitor to CWC in several regional markets.

² Page 10

³ Page 10

⁴ Page 10

According to Digicel, this would make it more difficult to compete with BDC and other licensees following the transaction.

- (b) Conglomerate effects: Digicel claims that the Merged Entity will have increased market power in the downstream markets for pay TV, broadband and mobile services. It further argues that the Merged Entity will be the only ICOL holder that can offer fixed voice, broadband, pay TV and mobile services. Digicel contends that this may result in a lessening of competition in those downstream markets because the Merged Entity could be able to offer non-replicable bundles to consumers. According to Digicel a further conglomerate effect may be direct foreclosure (*i.e.*, the Merged Entity foreclosing access to Yellow Pages⁵ and other services).

9.2 Assessment of Potential Competitive Effects

48. Based on the evidence before it, the Authority does not consider it necessary to undertake a detailed market review of each individual relevant market identified by Digicel in order properly to assess the potential competitive effects of the Proposed Transaction. This is a “conglomerate merger” which will, in the Authority’s view, not result in a significant change in any entity’s position within any relevant market.
49. Furthermore, KeyTech currently exercises joint control, with ATN, over BDC. This joint control gives KeyTech the ability to exercise decisive influence (within the meaning of RAA Section 2) over BDC’s behaviour in ways that benefit members of the KeyTech Group. The Authority notes that BDC is (and, pending further review, will remain) subject to the affiliate transaction rules that currently apply to all ICOL holders that are considered to be members of the KeyTech Group and have been found to have SMP in a relevant market.
50. Although the Proposed Transaction will change the current position of joint control to one of sole control by the ultimate parent, ATN, this will not result in a material change in the nature of the affiliate relationships between BDC and other ICOL holders that are members of the KeyTech Group (given its current position of joint control), nor give rise to a conglomerate effect that does not already exist. The change, moreover, will not materially alter the structure of the electronic communications sector of Bermuda. This finding is important because the change in the relationship between BDC and the other KeyTech affiliates, by virtue of the Proposed Transaction, is the basis for most of the competition issues alleged by Digicel.
51. In order to respond more fully to the points raised by Digicel, however, the Authority sets out its assessment of the Proposed Transaction’s potential impact on the competitive dynamics in potentially relevant markets. The Authority further notes that it plans to undertake a Market Review Consultation, which will take into account developments in the sector including the recent acquisition of BTC by Digicel and the Proposed Transaction. In assessing the effects of the Proposed Transaction, the Authority has considered the remedial measures that the Parties have agreed to accept as a condition of clearance,

⁵ Although the Authority need not reach this issue for the purposes of its competition assessment in this proceeding, it is at least arguable that Yellow Pages fall outside the scope of the ECA and the RAA, including the concentration review provisions.

which include competitive safeguards that will remain in effect at least until the conclusion of the Market Review Consultation.

52. Upon completion of the Market Review Consultation, as required by ECA Section 23(6), the Authority will consider if other remedies should also be put in place, or indeed, if some of the “safeguard” conditions can be removed. The Authority does not, however, accept that it would be necessary or proportionate to delay approval of the Proposed Transaction until the completion of future market review assessments. In light of the relatively small risk of any competitive harm resulting from the Proposed Transaction, it would be unreasonable to impose such a delay on the Parties, which would create a significant period of uncertainty for all stakeholders in the sector, including consumers and employees of the merging Parties. In addition, the Authority notes that any remedies it may impose on the Merged Entity (with the possible exception of divestiture, for which there is no justification, as discussed below) may also be imposed as *ex ante* obligations following completion of the Market Review Consultation.

The Proposed Transaction will neither create an entity with a dominant position nor enhance an existing dominant position.

53. Based on the evidence available, the Authority is of the view that the Proposed Transaction will not create an entity with a dominant position or enhance an existing dominant position in any relevant market. This is due to there being no competitive (horizontal) overlaps between the Parties involved in this transaction and due to KeyTech Group already, pre-merger, exercising some control over BDC.
- (a) As with the Digicel/BTC transaction (and as recognized by Digicel in its submission), this is a “conglomerate merger”. That is, with the exception of their joint participation in mobile markets via BDC (where KeyTech holds a minority interest), the merging parties do not currently operate in the same relevant markets. Thus, there is no direct change in market structure (i.e. the number of providers in each market or the market share of each provider in each market) from the Proposed Transaction. Unlike the Digicel/BTC transaction, however, the Proposed Transaction does not involve two completely unrelated undertakings but is, rather, a change in the shareholding of an entity of which ATN and KeyTech are the major shareholders, and in which KeyTech is able to exert control jointly with ATN.
- (b) The Proposed Transaction would only result in market concentration if:
- (i) KeyTech did not already have joint control over BDC; and
- (ii) BDC competed in the same economic market as another member of the KeyTech Group.
- (c) Neither of these circumstances holds true. As discussed above, KeyTech is already able to influence BDC because it has joint control over BDC/CellOne. In any event, there is also no cross-over between the markets in which BDC/CellOne operates and the markets in which Logic and CableCo. operate. This would only *not* be the case if mobile services

were defined to form part of the same relevant market as fixed line services (i.e., that mobile and fixed broadband were part of the same economic market). In its previous market review, the Authority concluded that these services are complements rather than substitutes and therefore do not form part of the same relevant product market. Furthermore, on page 6 of its submission, Digicel has argued that, “*it is very clear that fixed internet and mobile broadband are not substitutes*”. If services are not substitutes, they cannot be part of the same economic market.

The Authority notes that, in its submission, Digicel has raised a number of issues that appear to be linked to the recent merger of Logic Communications Ltd. with and into BCV, with BCV being the surviving company, effective 16 July 2015. BCV legally changed its name to Logic Communications Ltd. effective 11 December 2015. For example, Digicel claims that the Proposed Transaction will increase Logic’s market share in broadband services from approximately 65% to approximately 75% due to “*the addition of Cablevision and CellOne*”.⁶ However, the addition of BDC to the Merged Entity will not increase its share of the fixed broadband market, as neither BDC, nor its subsidiary, BDB, is active in this market. Furthermore, the merger of Logic Communications Ltd. with and into BCV has already taken place. Although a competition review under RAA Section 87 was not required in that case, the Authority concluded that the integration of the two KeyTech affiliates constituted the transfer of an ICOL which required the Authority’s approval, with the written consent of the Minister⁷, pursuant to ECA Section 18(6).

- (d) Digicel has pointed out that KeyTech currently holds a dominant position in a number of downstream markets (i.e., in the market for fixed broadband access services and ISP services for residential customers, and subscription TV services), and associated upstream markets (i.e., in the market for wholesale broadband access services – outside of Hamilton, wholesale access to facilities used to construct fixed local access networks and wholesale transmission facilities used to delivered subscription TV services to end users); however, none of these positions will be affected by the Proposed Transaction.

The Proposed Transaction will not substantially lessen competition.

- 54. The Authority has also considered whether the Proposed Transaction could substantially lessen competition in some relevant markets, or if there are any other ways in which the Proposed Transaction may have such an impact.
- 55. Based on the evidence before it and the analysis presented below, the Authority does not consider that the Proposed Transaction will substantially lessen competition in any relevant product market. The Authority acknowledges, however, that the Proposed Transaction could potentially have

⁶ Page 10

⁷ The Minister gave conditional written consent of the transfer of Logic’s ICOL to BCV on 26 April 2016.

some effect on the market incentives and behaviours of the Merged Entity as a whole, as compared to those of the relevant undertakings (i.e., ATN, KeyTech Group and BDC) today. However, the Authority does not consider these matters to be significant, especially given that KeyTech Group already exercises decisive influence over BDC (jointly with ATN) and is therefore already in a position to bundle CellOne and KeyTech's services and able to influence CellOne's business strategy to support its overall objectives for the market.

56. Nonetheless, for the reasons discussed in Section 9.3 of this Final Decision, the Authority will require the Merged Entity to adhere to a number of transitional "safeguard remedies" which shall remain in place for a period of time, and at a minimum pending completion of the upcoming Market Review Consultation that the Authority plans to initiate.

(a) Replicability of bundles

57. The Merged Entity will become, at least for a period of time, the only party that operates in all downstream markets, including the markets for fixed voice, fixed broadband, ISP services, mobile services and subscription TV services. This will enable it to offer a bundle of services which currently no other party could replicate. For example, Digicel could replicate a bundle of fixed and mobile voice and broadband services, but could not, at this time, offer a bundle including subscription TV services. Other providers such as WOW could replicate the subscription TV, voice and data aspects of a bundle, but not the mobile element.

58. This in turn may allow the Merged Entity to leverage its market power from the subscription TV and/or mobile service market into other downstream markets. However, the Authority does not consider that this raises any significant concerns, for the reasons set out below. In addition, the Proposed Transaction could enhance competition for bundled offers, by enabling the Merged Entity to offer fixed and mobile bundles more efficiently, thus introducing competition to Digicel in the provision of such bundles.

59. First, a number of other parties can already offer particular combinations of bundled services. For example, BTC and TBI offer bundles of fixed broadband access, ISP services and fixed voice services and Logic offers fixed broadband access, ISP service and subscription TV bundles.⁸ In addition, WOW offers bundles of subscription TV services, fixed voice and fixed Internet services (the latter via TBI).

60. Second, the Proposed Transaction should enable the KeyTech Group to offer bundles, which can only arise from the KeyTech Group being able to offer quad-play bundles (including mobile services). The Authority is of the view that this is unlikely to have the potential to significantly lessen competition; on the contrary, it is likely to increase competition and therefore benefit consumers by incentivizing innovation and offering lower prices.

61. As discussed above, Digicel is already able to offer fixed and mobile bundles. The "new element" of any KeyTech bundle therefore will enable KeyTech to

⁸ Both providers offer discounts to customers when subscribing to multiple products.

replicate Digicel's fixed and mobile bundles, thus creating competition in an area where Digicel was the only provider.

62. The Authority is not aware of any reasons that would prevent the Digicel Group from replicating KeyTech's subscription TV services by launching a subscription television service using IPTV technology (and thus being in a position to offer a quad play bundle). The Authority understands that both the KeyTech Group and Digicel Group have access to (premium) content⁹ and has no evidence of any impediments to competition in these upstream markets.

63. Based on the evidence of record and the Authority's assessment of the impact of the Proposed Transaction on the relevant markets, the Authority does not consider that the Proposed Transaction is likely to substantially lessen competition through the Merged Entity's ability to offer quad-play bundles. The Authority will, however, not hesitate to review the competitive dynamics as necessary by using its *ex ante* regulatory powers, under ECA Sections 23-24 should any unforeseen issues arise that warrant a market review.

(b) Access to capacity in upstream markets

64. The Authority recognizes that the Merged Entity will be competing with Digicel in all key downstream markets (excluding, for now, subscription TV services). It further owns a key input to downstream markets in terms of one of the two subsea landing stations and CB-1, connecting Bermuda with the United States.

65. Digicel argues that the Proposed Transaction may lessen the Merged Entity's incentive to provide Digicel access to its CB-1 system. This is presumably because, in Digicel's view, the gain from restricting access is now greater than pre-merger, due to the Merged Entity also competing with Digicel in mobile markets. That is, post-merger, the gains to the Merged Entity, in terms of enhancing its position in the Bermuda communications sector, are greater than the gains for the KeyTech Group, pre-merger, from restricting Digicel's ability to compete in downstream markets, because the Merged Entity will make gains across the fixed voice, broadband and mobile markets, rather than only across the fixed voice and broadband markets. However, this also means that this incentive for KeyTech would also have existed pre-merger, given that KeyTech already controlled this subsea cable system prior to the merger and already competed in some downstream markets with Digicel. Therefore, in considering the impact of the merger on this incentive, the Authority is considering only the incremental impact of the merger on the incentives of the Merged Entity to restrict access to the cable.

66. However, given that KeyTech Group already exercises joint control with ATN over BDC, it does not appear that its incentives to offer Digicel access will change to any appreciable degree following completion of the Proposed Transaction. This is because it would already have taken into account the impact of offering capacity to Digicel on the mobile business from which it has

⁹ Logic currently offers premium sports and movie channels as part of its subscription TV packages. The Authority further understands that the Digicel Group has access to premium content, in particular live sports events.

benefitted as a major shareholder. Indeed, as set out below, the Authority understands that Digicel currently does access capacity on CB-1.

67. Regardless of the current link between KeyTech and BDC, the Authority does not consider that there is a significant risk to Digicel from KeyTech ownership of CB-1. This is because the Merged Entity may not withhold capacity from Digicel if it knew that Digicel may be able to purchase equivalent capacity on reasonable terms from other sources. By doing so, it would reduce the revenues that it (the Merged Entity) could earn from international capacity but without harming Digicel's ability to compete in downstream markets. That is, withholding capacity on the international cable would not be a profit maximizing strategy for the Merged Entity, regardless of the closeness of competition between it and Digicel in downstream Bermuda markets.
68. As a result, the Authority does not consider that the Proposed Transaction would substantially lessen competition by way of the Merged Entity restricting Digicel's access to CB-1. This is because there appears to be a number of alternative options for Digicel to acquire subsea capacity to the United States. Linked to this, the Authority does not agree with Digicel that CB-1 should be defined in a distinct market for access to international connectivity via ICOL holders as this does not reflect properly demand-side substitution between cable systems and hence the accepted approach to defining economic markets. For example:
- (1) In addition to CB-1, CBUS and Gemini, there is a fourth subsea cable system landing in Bermuda: GlobeNet landing at the St David's landing station and connecting Bermuda to the United States and Latin America. GlobeNet is an independently owned system with no link to the Merged Entity. The Authority understands that TBI and KeyTech have purchased capacity on this system. As such, there is no apparent reason why Digicel should not be able to gain access to this system which allows access to the United States, amongst other countries.
 - (2) It is in any event unclear how the Proposed Transaction would impact Digicel's ability to purchase capacity on the 'CBUS' and/or 'Gemini' cable systems. Whilst CWC owns these cable systems, Link Bermuda has purchased capacity on these systems. This should allow Digicel to acquire capacity from TBI or Link Bermuda, both of which are fully independent from CWC and the Merged Entity. Whilst these licensees are direct competitors to Digicel in the fixed voice and broadband markets, the Proposed Transaction will not change their incentives to offer Digicel capacity.
69. Digicel has provided no evidence of any anticompetitive conduct on the part of Cable Co. to date, and there is no reason to assume that ATN's acquisition of a controlling interest in KeyTech will facilitate or instigate such conduct. The Authority therefore does not consider that there is material risk that the Proposed Transaction would substantially lessen competition in any downstream markets by preventing licensees from accessing, on reasonable terms, international capacity to the United States required to deliver services in the relevant downstream markets. The Authority will, however, further review the competitive dynamics in all relevant markets as and when necessary in

accordance with ECA Section 23, and will impose relevant regulatory remedies if needed to address any potential competition concerns.

70. Furthermore, if the Authority receives evidence-based complaints from other license holders over any alleged refusal by the Merged Entity to supply access to the CB-1 system or unduly discriminatory behaviour, the Authority will not hesitate to launch a competition investigation under RAA Section 85, which may result in further remedies and/or fines being imposed if the evidence establishes an abuse of dominance or other anticompetitive behaviour.

(c) Risk of coordinated behaviour

71. In addition to the concerns raised by Digicel, the Authority has also considered whether the merger could lead to an increased risk of coordinated behaviour in relevant markets, such that it would have the impact of substantially lessening competition. The Authority considers that, post-merger there will be two horizontally and vertically integrated entities (the KeyTech Group and the Digicel Group) which between them serve the vast majority of all customers in each market and which are able to both offer fixed voice, fixed broadband and mobile services and which in time, will also both be able to offer TV services (i.e., following the potential launch by Digicel of its IPTV service).
72. The potential for coordinated behaviour was already raised as a concern in the fixed broadband and mobile markets as part of the previous market review (with the Authority finding BTC and BCV jointly dominant in the fixed broadband market and CellOne and Digicel jointly dominant in the mobile market)¹⁰.
73. Despite this, the Authority considers the increased risk of coordinated behaviour to be unlikely. This is because, with the exception of the mobile market, Digicel Group and KeyTech Group have significantly different market shares and cost structures in other relevant markets. As a result, it is unlikely that, post-transaction, Digicel Group and KeyTech Group would need to reach a tacitly collusive outcome in a broader set of communications markets. The incentives of the competing parties in these markets are unlikely to be aligned. In addition, these other markets are characterised by a large number of tariff plans targeting different customer segments, with targeted marketing and discounts offered to specific customers or customer groups.
74. The Authority will, however, further review the competitive dynamics and the potential for coordinated behaviour in all relevant downstream markets as part of future market reviews and will impose relevant regulatory remedies where necessary to address any potential concerns identified during this process.

9.3 Remedies to address potentially adverse Competitive Effects

75. The Authority has set out in the preceding section why it does not consider, on the basis of the evidence before it, that the Proposed Transaction will create a dominant entity, enhance a dominant position, or substantially lessen

¹⁰ Bermuda Regulatory Authority, Consultation: Obligations for Operators with Significant Market Power, 17 May 2013, p.49 and p.56; <http://www.rab.bm/index.php/consultation-responses-2/ra-smp-obligations-market-power-consultation/1215-rab-consultation-obligations-for-operators-smp-5-17-13/file>

competition in a relevant market. On the contrary, the Authority considers that the Proposed Transaction could promote competition between KeyTech Group and Digicel Group for fixed-mobile bundles.

76. The Authority has decided, however, that it is necessary and prudent to impose a number of conditions on the Merged Entity as a condition of clearing the concentration, to ensure that competition and the public interest are adequately protected given the many changes that are affecting this dynamic sector. Some of these conditions are time-bound, and others may be removed or modified following the Market Review Consultation, which will consider, among other issues, the need to retain the current restrictions pertaining to affiliate transactions, between and among ICOL holders that are members of the same corporate group. In particular, pursuant to ECA Section 25, the Authority will evaluate whether it remains necessary and proportionate to continue to impose “hold separate” requirements and related SMP obligations that limit the ability of affiliates within each of the KeyTech and Digicel groups to integrate their respective operations within each group.
77. The KeyTech “affiliate transaction” restrictions were imposed in line with the original ICOLs granted to each KeyTech affiliate and the applicable SMP remedies that were adopted by the Authority in Remedies General Determination.
78. The Authority has concluded that its approval of the Proposed Transaction should be subject to a number of conditions to resolve the potential competition concerns associated with the concentration. These are set out in two groups: (i) the continued application of the (existing) SMP Obligations; and (ii) the introduction of certain additional obligations.
 - (a) Continued application of SMP Obligations
79. Pending the outcome of the Market Review Consultation, the Merged Entity must honour all the existing SMP obligations imposed on the KeyTech Group (including all subsidiaries) and on BDC, in accordance with the Remedies General Determination, as follows:
 - (1) Obligation to continue offering existing retail products;
 - (2) Retail price regulation and replicability requirements for new bundled tariffs imposed on Logic in the market for retail broadband access services;
 - (3) Quarterly reporting requirements for traffic flows and subscriber trends imposed on BDC in the market for retail mobile services;
 - (4) Price regulation and reference offer requirements for Logic on wholesale broadband access services;
 - (5) Non-discriminatory MNVO access for BDC (if it launches fixed and mobile bundles or in the event that the HDS-1 Mandatory Conditions apply in the future);

- (6) Zero rating of wholesale call origination services (international outbound calls only) for BDC;
- (7) Price regulation and reference offer requirements for Logic for the supply of access to facilities used to construct fixed local access networks;
- (8) Price regulation and reference offer requirements for Logic on wholesale subscription TV services to deliver broadcasting content to end users; and
- (9) KeyTech Group Remedies: The Merged Entity (and its subsidiaries) must abide by the provisional remedies imposed on the KeyTech Group, as set out in Section 6 of the Authority's General Determination, BR79 / 2013.

(b) Additional Obligations on Retail Service Offerings

80. Pending the outcome of the upcoming Market Review Consultation, the Merged Entity must also abide by the following additional obligations:

- (1) **Replicability requirements for bundled offerings:** Further to the replicability requirements forming part of the current SMP obligations, the following additional requirements will apply to the Merged Entity:
 - (a) Any new service bundles consisting of mobile voice and/or data services bundled together with fixed (PSTN) voice, fixed broadband, ISP services and/or subscription TV services require prior approval by the Authority.
 - (b) Service bundles consisting of subscription TV services together with fixed voice, fixed broadband, ISP services and/or mobile services require prior approval by the Authority. In particular, such bundles may only be launched if the Merged Entity can demonstrate that at least one other service provider can technically and economically replicate the proposed bundle.
 - (c) A process for the approval of such bundles is set out in Annex 2.
- (2) **Regular reporting requirements on bundles:** The Merged Entity is required to submit to the Authority on a quarterly basis, information on the total number of subscribers and associated revenues of any triple-play and/or quad-play bundle (which includes subscription TV and/or mobile services) it offers.

(c) Reporting Obligations

81. To promote transparency and facilitate the Authority's decision making, the Merged Entity is required to honour its existing financial and operational reporting for each of its subsidiaries. For the avoidance of doubt, in line with Condition 7.3 of the ICOL, each individual ICOL holder within the KeyTech Group post-transaction should continue to maintain separate books of accounts and report revenues and costs independently. The Merged Entity also shall abide by the "Hold Separate" obligations set out below in Section 12.1.1.

10 Public Interest Assessment

10.1 Issues Raised

82. RAA Section 87(10)(c) requires the Authority to ensure that the Proposed Transaction does not harm the public interest. As noted above, the Authority's investigation has taken into consideration the objectives set out in ECA Section 5 when determining whether or not the Proposed Transaction is likely to harm the public interest.
83. The Authority concludes that the Proposed Transaction will not harm the public interest provided that certain conditions are met. These are discussed in Section 10.1.1 below. On the contrary, the Authority considers that the Proposed Transaction is fully compatible with the objectives of the ECA and will in fact advance the public interest in a number of important ways.
84. As discussed in Section 9, the Authority does not expect the Proposed Transaction to lead to a weakening of competition in Bermuda's electronic communications sector.

10.1.1 The Public is Likely to Experience Significant Benefits as a Result of the Significant Investment Planned following Completion of the Proposed Transaction

85. As part of the transaction, ATN is proposing to make a significant capital infusion to strengthen KeyTech's balance sheet and enable the company to invest in continued upgrades [REDACTED]. More specifically, KeyTech currently has a plan to upgrade [REDACTED]. The overall budget for this [REDACTED].
86. ATN has stated that it understands that KeyTech does not currently have sufficient financial resources to complete this upgrade. ATN has committed that, subject to no material adverse events occurring that may severely affect the operations and/or financial condition of the combined entities following the consummation of the proposed Transaction, KeyTech will have sufficient financial resources to fund the implementation of [REDACTED]. Without the financial resources due from the transaction, it is unlikely that KeyTech's current financial situation would enable it to secure the financial resources needed to complete these much-needed upgrades.
87. If the proposed upgrades are completed, they can be expected to deliver [REDACTED]. And, as experience elsewhere has demonstrated, these positive impacts are likely to have a multiplier effect on the wider economy by stimulating, among other things, jobs creation, enhanced business operations and consumer welfare, e.g., by enabling [REDACTED].
88. ATN's financial backing is also likely to have a positive effect on competition and innovation in the sector by providing strong incentives to the Digicel Group and other ICOL holders to initiate or accelerate their own network investment plans.

89. Finally, because the Merged Entity will be able to bundle fixed and mobile services more efficiently, competition in the provision of these services -- as between the KeyTech and Digicel groups -- should be enhanced, which also will benefit consumers. The Proposed Transaction is also expected to promote innovation by intensifying competition in the provision of bundled services, including bundles consisting of television services and other audiovisual content.

10.1.2 Impact of the Proposed Transaction on Bermudian Ownership and Employment

90. With regard to the impact of the Proposed Transaction on Bermudian ownership, the Authority has been assured by ATN that immediately following the closing of the Proposed Transaction, an application will be made by the Merged Entity to list all KeyTech shares issued under the Proposed Transaction (including those issued to the BDC minority shareholders) on the Bermuda Stock Exchange. Thus, even though the proposed change of control will result in the acquisition of KeyTech by a majority shareholder that is incorporated in the United States, the Merged Entity will continue to be a company that is publicly traded in Bermuda.
91. With regard to the impact of the Proposed Transaction on employment in Bermuda, ATN has made Representations to the Authority confirming that no redundancies are expected to be made by the Merged Entity following completion of the Proposed Transaction.
92. In any case, ATN and KeyTech are aware that the following ICOL Conditions are pertinent and will remain applicable to the relevant affiliates of the Merged Entity:
- (a) ICOL Condition A5.1 provides that neither assets (that were located in Bermuda as at the date of the licence) nor personal data can be moved abroad without first obtaining the permission of the Authority and the Minister; nor can the licence be transferred to another legal entity without the Authority's and the Minister's approval;¹¹
 - (b) ICOL Condition 7.4 requires that the individual licensee shall:
 - (i) maintain in Bermuda the original files of all personal data relating to the provision of the authorized electronic communications service; and
 - (ii) ensure that all such personal data are capable of being accessed by the Government in real time; and
 - (c) ICOL Condition A5.2 provides that until such time as the Authority makes a General Determination to the contrary, the Licensee must provide the Authority with no less than 120 days advance notice, or such other notice as the Authority may determine, before employing outside of Bermuda any personnel, Electronic Communications Network facilities, Associated

¹¹ ICOL Conditions 19 and 20.

Facilities and Associated Services relating to the provision of the Electronic Communications Services authorized by the ICOL.

10.2 Public Interest Conditions

93. As discussed in Section 10.1, the Parties have made a number of Representations to the Authority in connection with the Proposed Transaction. These Representations have been taken into account by the Authority in evaluating the Proposed Transaction and were critical to its analysis in considering whether to approve the concentration. The Authority considers these Representations to be very important to its assessment of the impact of the Proposed Transaction on the public interest and compliance with the objectives of the ECA.
94. The Representations described in Section 10.1 may be summarized as follows:
- (1) ATN will ensure that, immediately following completion of the Proposed Transaction, application will be made by the Merged Entity to list all KeyTech shares issued under the Proposed Transaction (including those issued to the minority BDC shareholders) on the Bermuda Stock Exchange; furthermore, the Merged Entity will make reasonable efforts to achieve the listing of these shares no later than 90 days following the effective date of this Final Decision.
 - (2) The Merged Entity does not expect any redundancies at any of its affiliates in Bermuda to result upon completion of the Proposed Transaction.
 - (3) Subject to completion of the final business and technical plan (estimated to be finalized two to four months after completion of the Proposed Transaction), and assuming no material adverse events occur that severely affect the operations or financial condition of the Merged Entity, KeyTech will invest in the order of [REDACTED] over the next [REDACTED] months to fund the full implementation costs of [REDACTED] Bermuda and upgrading the [REDACTED], with the objective of delivering increased reliability, performance and [REDACTED] availability.
 - (4) ATN will ensure compliance of the KeyTech Group with ICOL Conditions 7.4, A5.1 and A5.2 regarding transfers to points outside Bermuda of any personnel, facilities, associated services, or the original files containing personal data relating to the provision of electronic communications in Bermuda by affiliates controlled the Merged Entity.

Obligations

95. In line with these Representations, ATN shall regularly collect the information set out below and report to the Authority on the progress of the Merged Entity towards fulfilling each representation, as follows:
- (a) No later than ninety (90) days following completion of the Proposed Transaction, ATN shall ensure that the Merged Entity submits to the Authority the following information, which shall be attested to in writing by the CEO of the Merged Entity, who shall confirm that the information reported is true and complete:

- (i) Employment figures and projections, including any planned hiring, redundancies or terminations in the Merged Entity, including any of its subsidiaries or affiliates in Bermuda (including but not limited to employees of Key Management Services Limited), and a full explanation of any changes in senior management positions;
 - (ii) Confirmation that application was promptly made by the Merged Entity to list all KeyTech shares issued under the Proposed Transaction (including those issued to the minority BDC shareholders) on the Bermuda Stock Exchange, to achieve the listing of these shares within 90 days of the effective date of this Final Decision;
 - (iii) Confirmation that KeyTech's shares remain listed on the Bermuda Stock Exchange; and
 - (iv) A complete copy of the business and technical plan showing the geographic deployment plan and timetable for [REDACTED].
- (b) Thereafter, unless specifically waived in writing by the Authority, these reports shall be submitted to the Authority every six months (or at such other intervals as may be approved by the Authority). These reports shall provide updated information on:
- (i) items (a)(i), (a)(ii) (if applicable, due to delay) and (a)(iv) above; and
 - (ii) the amount of relevant investments under (a)(iv) above actually made to date, broken down by reporting period (or as otherwise agreed with the Authority).

96. These conditions have been approved in writing by the Minister in accordance with RAA Section 87(11)(c) and/or ECA Section 18(6) (and ICOL Condition 20).

11 Transfer of Licences

- (1) Transfer of ICOLs
97. The Parties have requested that the ICOL awarded to BDC be transferred to a newly established company, NewCo.
- (2) Transfer of Spectrum Licences
98. The Parties have proposed the transfer of three spectrum licences from BDC to NewCo in connection with the Proposed Transaction: (1) Microwave Point-to-Point (003-MMP-01); (2) Fixed Wireless Access (003-FWA-01); and (3) Commercial Mobile Radio Service (003-CMR-01).
99. The requested transfers are hereby approved, subject to the consent of the Minister.

12 Final Decision

100. This Final Decision is made on the basis of the information provided by the Parties to the Authority and/or the Representations made by them, which were critical to the Authority's analysis and decision. This Final Decision is subject to change (without limitation), before or after completion of the Proposed Transaction, in the event the information provided and/or Representations made are found to be materially inaccurate or incorrect, or if there is a material change in any respect. In particular, the Authority reserves the right to withdraw its approval, or modify the conditions of its approval, in the event the final terms and conditions of the underlying agreement to the Proposed Transaction or any information and/or Representations provided by the Parties is materially different to that originally presented to the Authority by the Parties, or if the information and/or Representations made by ATN on KeyTech are determined to have been false.
101. Based on the analysis presented above, and after taking into account the various comments received by the Parties and interested members of the public as well as the Representations made (identified in Section 10.1 and 10.2 above), the Authority has decided to approve:
- (a) ATN's acquisition of a controlling interest in KeyTech and the acquisition of sole ownership by KeyTech of BDC, subject to the conditions imposed pursuant to RAA Section 87(10) and RAA Section 87(11)(a) and (c), which are set out in Section 12.1 below; and
 - (b) The change of control in BDC, BDB, Logic/BCV and Cable Co., as ICOL holders, subject to the conditions imposed pursuant to ECA Section 18(6) and ICOL Condition 20, which are set out in Section 12.2 below.
102. These conditions, which are being imposed pursuant to RAA Section 87(8)(b) and ECA Section 18(6), are intended to address potential adverse effects that the Proposed Transaction would otherwise have on the competitive process and the public interest.
103. The conditions established by this Final Decision are divided into two parts: (1) those addressing competition concerns, and (2) those that address public interest concerns. A copy of the Minister's written approval of the relevant conditions, pursuant to RAA Section 87(11)(c) and/or ECA Section 18 (6) (and ICOL Condition 20), is provided for reference at Annex 3 to this Final Decision.

12.1 Conditions addressing competition concerns

104. The following conditions are imposed on the Parties pending the conclusion of the upcoming Market Review Consultation:

12.1.1 Hold Separate Condition

105. The Merged Entities shall ensure and procure that the core, fixed network business of each entity that comprises the Merged Entity shall be carried on by a standalone legal entity separately from the other entities that comprise the Merged Entity.

106. The obligations contained in the ICOLs of Logic/BCV, BDC and Cable Co. at Condition 11.2 shall continue to apply in respect of each individual ICOL holder controlled by KeyTech following completion of the Proposed Transaction, as follows:

"With regard to any fixed-line market in which the ICOL holder has been determined to possess Significant Market Power, the ICOL holder shall comply with the following requirements unless they are specifically waived by an Administrative Determination of the Authority:

- (a) *not to unduly discriminate in relation to the provision of Interconnection or Access, in particular, by applying equivalent conditions in equivalent circumstances to Other Licensees providing equivalent services, and providing them with services and information (including technical specifications and network-related information) under the same conditions and of the same quality as it provides for its own services or those of its Affiliates, subsidiaries, other business units (including the mobile business operations) and partners; and*
- (b) *not to adopt any technical specifications that would unreasonably or unnecessarily obstruct or impede the ability of Other Licensees to interconnect with the ICOL holder's facilities or Access parts of the network that are subject to Ex Ante Remedies previously imposed on the ICOL holder pursuant to Sections 23 and 24 of the ECA."*

107. Save in the ordinary course of business, the Merged Entities shall be prohibited from transferring, by whatever means, any ownership right or interest of whatever nature in any of the fixed network assets (whether tangible or intangible), or functions (including by means of outsourcing or service agreements or arrangement) of any entity that comprises the Merged Entity, that were under the ownership, control or operation of such entity prior to the completion of the Proposed Transaction, from the relevant entity to any other KeyTech affiliate without the prior written approval of the Authority.

108. The Merged Entities shall maintain the entities that comprise the Merged Entity as viable and functioning going concerns, and ensure that sufficient resources are made available to it for the development of their businesses.

12.1.2 Cost Accounting and Accounting Separation Obligation

109. All relevant affiliates in the KeyTech Group shall retain and continue to use their respective, existing financial and product accounting principles and methodology pending completion of the upcoming Market Review Consultation. ICOL holders shall not use any portion or aspect of the accounting principles and methodology utilized by any others, or any other KeyTech affiliate. These accounting principles and methodologies shall not be

merged with the KeyTech Group pending the conclusion of the Market Review Consultation, or without first obtaining the prior written approval of the Authority.

110. Transfer charges between the KeyTech ICOL holders for internal use shall be the same as the price that would be charged for the product and service if it were being sold to an unrelated third party.
111. To the extent to which there are costs common among the KeyTech affiliates, these costs shall be split between the affiliates based on relative use. Documentation should be developed and retained that shows the basis for common cost assignment. For example, to the extent that an officer works for different KeyTech affiliates, the officer's fully loaded salary will be split between the affiliates based on relative hours spent working for each entity. Documentation should be developed and retained that tracks time spent on each business.

12.1.3 Obligation Not to Unreasonably Bundle

112. The Merged Entities shall obtain the Authority's prior review of certain service bundles it proposes to offer in accordance with the requirements and procedures set out in Annex 2 to this Final Decision.

12.1.4 Continued Application of SMP Obligations

113. The ICOL holders controlled by KeyTech shall comply with all SMP obligations imposed on them (or their predecessor companies) in the Remedies General Determination following completion of the Proposed Transaction.

12.2 Conditions addressing public interest concerns

12.2.1 Obligations on Representations Made by ATN and KeyTech

(a) Representations made by the Parties

114. ATN and KeyTech have made a number of Representations to the Authority, which have been taken into account, and were critical to the analysis in considering whether to approve the Proposed Transaction. The Authority considers these Representations to be very important to its assessment of the impact of the Proposed Transaction on the public interest and the objectives of the ECA.
115. The Representations made to the Authority in relation to the Proposed Transaction are summarized below:
 - (1) ATN will ensure that, immediately following completion of the Proposed Transaction, application will be made by the Merged Entity to list all KeyTech shares issued under the Proposed Transaction (including those issued to the minority BDC shareholders) on the Bermuda Stock Exchange; furthermore, the Merged Entity will make reasonable efforts to achieve the listing of these shares no later than 90 days following the effective date of this Final Decision.

- (2) The Merged Entity does not expect any redundancies at any of its affiliates in Bermuda to result upon completion of the Proposed Transaction.
- (3) Subject to completion of the final business and technical plan (estimated to be finalized two to four months after completion of the Proposed Transaction), and assuming no material adverse events occur that severely affect the operations or financial condition of the Merged Entity, KeyTech will invest in the order of [REDACTED] over the next [REDACTED] months to fund the full implementation costs of [REDACTED] Bermuda and upgrading the [REDACTED], with the objective of delivering increased reliability, performance and [REDACTED] availability.
- (4) ATN will ensure compliance of the KeyTech Group with ICOL Conditions 7.4, A5.1 and A5.2 regarding transfers to points outside Bermuda of any personnel, facilities, associated services, or the original files containing personal data relating to the provision of electronic communications in Bermuda by affiliates controlled the Merged Entity.

(b) Obligations on Representations

116. The Parties have accepted the following reporting obligations as a condition of obtaining clearance of the Proposed Transaction:

- (1) No later than ninety (90) days following completion of the Proposed Transaction, ATN shall ensure that the Merged Entity submits to the Authority the following information, which shall be attested to in writing by the CEO of the Merged Entity, who shall confirm that the information reported is true and complete:
 - (a) Employment figures and projections, including any planned hiring, redundancies or terminations in the Merged Entity, including any of its subsidiaries or affiliates in Bermuda (including but not limited to employees of Key Management Services Limited), and a full explanation of any changes in senior management positions;
 - (b) Confirmation that application was promptly made by the Merged Entity to list all KeyTech shares issued under the Proposed Transaction (including those issued to the minority BDC shareholders) on the Bermuda Stock Exchange, and to achieve the listing of these shares within 90 days of the effective date of this Final Decision;
 - (c) Confirmation that KeyTech's shares remain listed on the Bermuda Stock Exchange; and
 - (d) A complete copy of the business and technical plan showing the geographic deployment plan and timetable [REDACTED]
- (2) Thereafter, unless specifically waived in writing by the Authority, these reports shall be submitted to the Authority every six months (or at such

other intervals as may be approved by the Authority). These reports shall provide updated information on:

- (a) the items in 12.2.1 (b)(1)(a), (b)(1)(b) (if applicable, due to delay) and (b)(1)(d) above; and
 - (b) the amount of relevant investments under 12.2.1 (b)(1)(d) actually made to date, broken down by reporting period (or as otherwise agreed with the Authority).
- (3) By 31 March 2020, KeyTech shall file with the Authority and the Minister a comprehensive report, which contains a full accounting of the achievements of the Merged Entities in fulfilling the Representations to date and a full explanation of any failure to fulfil the Representations. The report shall also identify any investments in the Merged Entities approved by the ATN and KeyTech and committed for the period covering 1 April 2020 through 31 March 2021. The reported information shall be confirmed as true and complete by the CEO of the Merged Entity.

Annex 1 — Proposed Transaction Steps

Redacted

Annex 2 — No Unreasonable Bundling Obligation

Pending the conclusion of the Market Review Consultation that the Authority will initiate following the issuance of this Final Decision:

117. The Merged Entities shall not advertise, sell, offer or provide a package of services consisting of fixed (PSTN) voice and/or fixed broadband services bundled together with (1) mobile voice, and/or (2) mobile data, and/or (3) ISP services, and/or (4) subscription TV services (a “Regulated Bundle”) unless:
- (a) the Regulated Bundle was already being provided by Logic or BDC as of 31 March 2016; or
 - (b) the Merged Entities obtain the Authority’s approval in writing prior to implementing:
 - (i) any change in the terms and conditions (including price) of a Regulated Bundle falling within Section 1(a) above; or
 - (ii) the advertisement, sale, offer or provision of any new Regulated Bundle, i.e., one that does not fall within Section 1(a) above.
118. In the case of Section 1(b) above, the Merged Entities must, [REDACTED] in advance of the proposed effective date of any change in the existing terms or conditions (including price) of a Regulated Bundle or the offer of a new Regulated Bundle, provide supporting evidence to the Authority sufficient to demonstrate that:
- (a) the proposed price of the Regulated Bundle fully recovers the cost of the services contained within the bundle plus a reasonable margin in accordance with the principles set out in paragraph 56(c) of the Remedies General Determination (“Cost Data”);
 - (b) the incremental price of any component of the Regulated Bundle fully recovers the incremental cost of providing that services plus a reasonable margin; and
 - (c) the terms and conditions of the offer are not otherwise anticompetitive.
119. The Cost Data shall be provided in an auditable format and contain an explanation of the methodology and assumptions utilized in developing the associated Retail costs of the bundle as well as the non-SMP Product related costs;
120. In considering the evidence provided in conformity with Section 2 above:
- (a) the Authority will consider, among other factors, the amount by which the price of the Regulated Bundle deviates from the sum of the stand-alone prices of the bundle’s individual components; and

- (b) the burden shall be on the Merged Entities to prove their case, based, among other things, on credible accounting data and/or relevant price benchmarks as determined by the Authority.
- 121. In accordance with paragraph 56(c) of the Remedies General Determination, the Cost Data submitted pursuant to Section 2 above must demonstrate that:
 - (a) for any Regulated Bundle composed solely of SMP Products, the difference between the Retail and Wholesale price of the bundle is not less than the Retail price multiplied by the Avoidable Cost discount factor of 15%; and
 - (b) for any bundle containing SMP and non-SMP Products in the same bundle:
 - (i) the Retail price of the bundle is not less than the sum of the Wholesale prices of any SMP Products contained in the bundle; and
 - (ii) the difference between the Retail price of the bundle and the sum of the Wholesale prices of any SMP Products contained in the bundle is such that it recovers the cost of providing the non-SMP Products contained in the bundle, as well as the associated Retail costs of the bundle.
- 122. If the price of the Regulated Bundle is less than the sum of the prices of the stand-alone components, the Merged Entities must identify and measure the cost savings achieved (and realized by the Merged Entities) through bundling, as well as the additional costs incurred through the provision of the Regulated Bundle.
- 123. If mobile voice and/or data services are included in a Regulated Bundle, the relevant component cost for the mobile service is the retail price of the equivalent mobile service. This cost proxy can be reduced to the extent that the Merged Entities can identify savings associated with bundling.
- 124. The Authority may, on its own initiative or following a timely objection raised by any interested party, issue a direction to the Merged Entities in connection with a notification pursuant to Section 2 of this Annex 2, requiring the Merged Entities to suspend the proposed effective date of (i) any change in the existing terms or conditions (including price) of a Regulated Bundle, or (ii) the offer of a new Regulated Bundle, until the Authority has investigated any relevant concerns raised and issued an administrative determination approving, modifying or rejecting the proposal of the Merged Entities. The Merged Entities shall immediately comply with any such direction issued by the Authority. For good cause shown, the Authority may elect to issue an administrative decision allowing (or allowing with modifications) a proposed change in the existing terms or conditions (including price) of a Regulated Bundle to come into effect or allowing the Merged Entities to offer a new Regulated Bundle without reviewing the Cost Data.

Annex 3 — Written Consent of the Minister



Government of Bermuda
Ministry of Economic Development

April 22, 2016

Mrs. Angela Berry, Chair - The Regulatory Authority of Bermuda
3rd Floor, Cumberland House
1 Victoria Street, Hamilton HM11

Dear Madam Chair,

Re: Proposed acquisition of control of KeyTech Limited (KeyTech) by Atlantic Tele-Network, Inc. (ATN)

In reference to the ministerial consents and approvals required to effectuate the proposed concentration, and taking into account the RA's Final Decision Condition ("12.1.1 Hold Separate Condition") that the relevant ICOL holders [namely Logic/BCV, BDC, BDB and Cable Co.] must continue to be operated and reported separately, I hereby authorize the following:¹

1. Change of Control of KeyTech

Having reviewed the Authority's decision to approve the referenced acquisition of control subject to certain relevant conditions, and having considered the proposed conditions pursuant to RAA Section 87(11)(c), I hereby approve the conditions imposed by the Authority.

2. Change of Control of ICOL Holders

Having considered the purposes set out in ECA Section 5, I hereby consent to the consequent change of control of the following ICOL holders pursuant to ECA Section 18(6): BDB, BDC, Cable Co. and Logic.

3. Transfer of ICOL

In accordance with Condition 20 of the ICOL granted to BDC, upon completion of the Proposed Transaction, I hereby consent to the transfer of ICOL201303Rev1-752 from BDC to the successor legal entity (NewCo), which will be (indirectly) a wholly owned subsidiary of KeyTech.

4. Transfer of Spectrum Licences

In accordance with Condition 11 of the spectrum licences granted to BDC, upon completion of the Proposed Transaction, I hereby consent to the transfer of the following spectrum licences from BDC to NewCo.:

- Microwave Point-to-Point (003-MMP-01);
- Fixed Wireless Access (003-FWA-01); and
- Commercial Mobile Radio Service (003-CMR-01).

Sincerely,

Dr. the Hon. E. Grant Gibbons, JP, MP
Minister of Economic Development

¹ The terms used in this letter incorporate the definitions set out in Section 1 of the Authority's Final Decision on the Proposed Transaction.