



BERMUDA  
**REGULATORY  
AUTHORITY**

**Bermuda CableVision Limited  
Model Access and  
Interconnection Agreement**

Interim Decision and Order

Matter: AI-1043

Date: 1 November 2013

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## 1 EXECUTIVE SUMMARY AND INTRODUCTION

1. The Regulatory Authority (the “RA” or “Authority”) hereby issues this Interim Decision and Order concerning the draft “Master Interconnection Agreement” proposed by Bermuda CableVision Limited (“BCV”) dated 27 September 2013 (the “Draft MAIA”), in line with the framework established by the Authority’s General Determination on Obligations for Operators with Significant Market Power, RM01/13-1040 (“Remedies GD”).<sup>1</sup>
2. The Authority wishes to thank BCV and potential access seekers for their cooperation in developing a draft Model Access and Interconnection Agreement (“MAIA”).<sup>2</sup> The Authority has reviewed the comments and objections raised by potential access seekers as well as the position paper submitted by BCV on 27 September 2013 (“Position Paper”). Having considered the views of the various stakeholders together with the relevant provisions of the Electronic Communications Act 2011 (“ECA”) and the Regulatory Authority Act 2011 (“RAA”),<sup>3</sup> the Authority has determined that certain modifications are required to the Draft MAIA as set out below.
3. In order to ensure that the approved fully reflects the Authority’s resolution of the unresolved issues between the parties, the Authority has decided to issue an Interim Decision and Order prior to issuing a Final Decision on the MAIA. This is intended to give BCV a reasonable amount of time in which to prepare a further amended MAIA in conformity with the Authority’s Interim Decision and Order. It is also intended to allow potential access seekers one last opportunity to review BCV’s amendments to the MAIA and provide any “fatal flaw” comments before the Authority issues its Final Decision. The remaining procedural steps are set out in Section 2.2 below.
4. This Interim Decision consists of the Authority’s assessment and determinations of the unresolved issues that have been identified by the parties relating to the Draft MAIA, and incorporates an Interim Order directing BCV to modify the Draft MAIA in accordance with the Authority’s interim determinations.

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<sup>1</sup> The Remedies GD was issued on 7 August 2013 and took effect on 28 August 2013.

<sup>2</sup> The Authority notes that BCV has referred to the MAIA as a “Master Interconnection Agreement”. In order to ensure that there is no confusion as to the nature of the template agreement that is ultimately approved by the Authority, if is referred to herein as a “Model Access and Interconnection Agreement” in accordance with Section 5.1.1 of the Authority’s Remedies GD. The final version of the agreement adopted by BCV should be entitled and referenced accordingly, whereas the bilateral agreements between the parties are referred to herein as “A&I Agreements”.

<sup>3</sup> In this Interim Decision and Order, except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them by the RAA, the ECA and the Interpretation Act 1951.

## 2 PROCEDURAL HISTORY

### 2.1 Background

5. On 6 October 2009, the then Ministry of Energy, Telecommunications, and E-Commerce (“METEC”) issued a Consultation paper on “Access and Interconnection in Bermuda”.<sup>4</sup>
6. On 28 January 2012, the Regulatory Authority issued the following consultation documents:
  - (a) “Market Review Process (Part A) - Market Definition”<sup>5</sup> released 8 February 2012; and
  - (b) “Market Review Process (Part B) - Significant Market Power”<sup>6</sup> released 8 February 2012.
7. On 29 April 2013, the Regulatory Authority issued the following Consultation Summary, Final Decision, Order and General Determination:
  - (a) “Market Review Process (Part A) – Market Definitions”;<sup>7</sup> and
  - (b) “Market Review Process (Part B) – Significant Market Power”.<sup>8</sup>
8. On 17 May 2013, the Regulatory Authority issued the Consultation Document entitled “Obligations for Operators with Significant Market Power”, and invited comments from all interested parties.<sup>9</sup>
9. On 21 June 2013, written responses to the Initial Remedies Consultation were provided by various parties.<sup>10</sup> The Regulatory Authority posted these responses on its website.<sup>11</sup>
10. On 15 July 2013, the Regulatory Authority issued the Consultation Document entitled “Further Consultation: Obligations for Operators with Significant Market

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<sup>4</sup> See [http://www.gov.bm/portal/server.pt/gateway/PTARGS\\_0\\_2\\_7286\\_330\\_1813\\_43/http%3B%2Fpublisher.gov.bm%3B7087/publishedcontent/publish/min\\_telecom\\_and\\_e\\_commerce/telecommunications/telecommunication\\_regulatory\\_reform/access\\_and\\_interconnection\\_in\\_bermuda\\_consultation\\_october\\_6\\_2009\\_0.pdf](http://www.gov.bm/portal/server.pt/gateway/PTARGS_0_2_7286_330_1813_43/http%3B%2Fpublisher.gov.bm%3B7087/publishedcontent/publish/min_telecom_and_e_commerce/telecommunications/telecommunication_regulatory_reform/access_and_interconnection_in_bermuda_consultation_october_6_2009_0.pdf)

<sup>5</sup> See <http://rab.bm/images/PDF/Market%20Review--Part%20A%20Market%20Definition%20130208%20.pdf>

<sup>6</sup> See <http://rab.bm/images/PDF/Market%20Review%20-%20Part%20B%20SMP%20130208.pdf>

<sup>7</sup> See <http://rab.bm/images/PDF/861.pdf>

<sup>8</sup> See <http://rab.bm/images/PDF/862.pdf>

<sup>9</sup> Hereafter: “Initial Remedies Consultation”. See <http://www.rab.bm/images/PDF/130517%20RM01-13-900%20vfinal%5B2%5D.pdf>

<sup>10</sup> In this document references to each respondent’s written response is in the form of “[Respondent] Comments”. For example, with respect to BCV, a citation to their response to the Initial Remedies Consultation will read – “BCV Comments”.

<sup>11</sup> See <http://www.rab.bm/consultations-responses> Then click on “Obligations for Operators with Significant Market Power”.

Power – Final Draft General Determination”, again inviting comments from all interested parties.<sup>12</sup>

11. On 7 August 2013, the Authority issued its Final Decision and Remedies GD.<sup>13</sup>
12. Section 5.1.1 of this Remedies GD provides for a model access and interconnection ("A&I") approval process to be followed by each SMP Operator having SMP in Market Nos. 10 through 13, 18 through 20, and 23 (as per paragraph 43 of the Remedies GD) prior to its adoption of an approved MAIA.
13. Paragraph 71 of the Remedies GD provides that once the SMP Operator has submitted to the Authority their best and final MAIA, the Authority will consider the position papers of the SMP Operators, as well as comments submitted, and will, in due course, issued a final decision accepting or modifying the MAIA.
14. In order to ensure that the approved MAIA fully reflects the Authority's resolution of the unresolved issues between the parties, the Authority has decided to issue this Interim Decision and Order prior to issuing its Final Decision. .

## **2.2 Procedures Leading to Issuance of the Final Decision and Order and Subsequent Amendments**

15. Following issuance of this Interim Decision and Order, BCV will be given one week to revise the Draft MAIA to conform to the Authority's interim determinations as set forth below. BCV shall deliver a copy of the modified MAIA ("Compliance MAIA") to the Authority (a clean version along with a comparison against the Draft MAIA) no later than 5:00 p.m. on 8 November 2013. Interested parties will have until 5:00 p.m. on 15 November 2013 to file any remaining "fatal flaw" objections concerning the Compliance MAIA ("Compliance Comments"). Parties shall confine their Compliance Comments to the Compliance MAIA's conformity with this Interim Decision and Order and should address those aspects of the Compliance MAIA that, in their view, would seriously hamper competitive entry by a wholesale access provider, would be detrimental to the public interest, or are in contravention of the RAA, ECA or the Remedies GD. All Compliance Comments submitted to the Authority by the parties shall conform to the following format:
  - (a) Parties must reference the particular document, section, and clause of the Compliance MAIA they find objectionable, provide a narrative presenting the nature of those objections, and provide support for any changes they believe ought to be made to the language of the section and clause in question; and
  - (b) Parties must provide a redline marked-up<sup>14</sup> version of the above referenced clause that contains their proposed alternative language for that clause (deletion of the clause entirely, if that is a party's preferred alternative, is also acceptable as a form of mark-up).
16. The Authority will review BCV's Compliance MAIA, the Compliance Comments and proposed alternative language, and after accepting or modifying the Compliance

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<sup>12</sup> Hereafter: "Further Remedies Consultation". See <http://rab.bm/images/PDF/130715Draft-GD-Interim-Remedies.pdf>

<sup>13</sup> See <http://www.rab.bm/images/PDF/130807-Remedies-Order-vFINAL.pdf>

<sup>14</sup> The redline version shall include the verbatim text from the Compliance MAIA and use ~~strikethrough~~ format for proposed deletions and **redline** format for proposed insertions.

MAIA as necessary, the Authority will then issue its Final Decision and Order adopting BCV's approved MAIA.<sup>15</sup>

17. The Regulatory Authority will publish the approved version of BCV's MAIA on its web page on the effective date of the Final Decision and Order.
18. BCV shall be required to enter into A&I Agreements with any eligible access seeker that so requests no later than five business days following receipt of a written request for A&I pursuant to the MAIA. Any and all pre-existing A&I agreements between BCV and ICOL holders that correspond to the SMP wholesale services covered by the MAIA must be replaced by an agreement conforming to the MAIA template within five business days following the effective date of the Authority's Final Decision, absent approval of a deferral by the Authority for good cause shown.
19. It is important for all stakeholders to recognize the complexity of this MAIA approval process, which is pivotal to the transition from the old regulatory framework to the new framework established by the ECA and the RAA. The Authority is aware that the time has been short for interested parties to consider the Draft MAIA, but we are also cognizant that perfection in this area is elusive and must be balanced against the need for BCV's wholesale customers to be in a position to begin providing services to End Users using the A&I products offered under an approved MAIA. If, following issuance of the Final Decision, new material issues emerge that are identified by any party or by the Authority itself, the Authority will confer with all interested parties and determine whether any amendments to the MAIA are warranted under the circumstances (and bearing in mind that the development of a comprehensive RAIO may be a more efficient alternative). Alternatively, modifications may result from the resolution of any disputes that may arise under the A&I Agreements that are executed in conformity with the approved MAIA.

### **2.3 Consultation on Reference Access and Interconnection Offer**

20. As set out in paragraph 75 of the Remedies GD, following the completion of the "model A&I approval process" a consultation on the establishment of reference access and interconnection offers ("RAIOs") will, in due course, be initiated by the Regulatory Authority to:
  - (a) evaluate the merits of undertaking a RAIO proceeding in light of the results achieved by this model A&I process; and
  - (b) if it is determined that the establishment of a RAIO is necessary:
    - (i) propose a set of comprehensive RAIO Guidelines, using those presented in Annex A of the Remedies GD as a basic framework; and
    - (ii) develop a RAIO approval process.
21. To the extent that interested parties have additional concerns with the approved version of BCV's MAIA and believe those concerns to be sufficiently grave as to require the establishment of a RAIO to supersede BCV's MAIA, parties may present those issues to the Authority during the aforementioned RAIO consultation.

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<sup>15</sup> The Authority notes that it has revised the procedure described in Section 5.1.1 of the Remedies GD pursuant to Section 13(z) of the Regulatory Authority Act 2013

### 3 LEGAL FRAMEWORK AND IMPLEMENTATION OF THE MAIA

22. As background for the determinations set out in this Interim Decision and Order, the Authority wishes to draw the attention of BCV and interested parties to various provisions of the RAA, the ECA and the Integrated Communications Operating Licence (“ICOL”) that are relevant to A&I agreements involving ICOL holders with SMP in a relevant market.
23. The basis for the Authority’s Remedies GD is found in ECA Sections 24 and 74(b)(ii). In accordance with the transitional provisions of ECA Section 74(b) and pursuant to ECA Section 24(1)(e), SMP operators may be required to provide access and interconnection obligations subject to terms and conditions that are “transparent, including the publication of reference interconnection and access offers, pursuant to a framework approved by the Authority.” Moreover, pursuant to ECA Section 24(1)(f)(ii), SMP operators may also be required to provide wholesale services, facilities and information to other parties “under the same conditions and of the same quality as it provides for its own internal purposes or to those of its divisions, subsidiaries, partners or affiliates.” This non-discrimination or equivalency of access obligation is reinforced by Clause 11.2 of the ICOL.
24. ECA Section 24(3)(a) requires a full and complete copy of any access or interconnection agreement entered into with an SMP operator and relating to SMP services to be filed with the Authority within three business days following its execution, after which the Authority shall have 60 days to object to any provision that it concludes is unreasonably discriminatory or contrary to the interests of consumers, and initiate adjudication procedures to resolve the matter.
25. ECA Section 24(3)(b), together with RAA Section 58, establishes the Authority as the competent authority in the first instance to resolve any disputes relating to an access and interconnection agreement to which an SMP operator is a party. Because such agreements and any modifications to them are subject to regulation by the Authority in the public interest and to ensure that the SMP operator’s non-discrimination obligations are met in relation to all access seekers, the independent arbitration of disputes between the parties to any such agreement is prohibited by ECA Section 24(3)(b).
26. In the Final Decision accompanying the Remedies GD, the Authority determined that:
  453. ... the development of comprehensive RAIOS should be achieved in two steps. Under Step 1, the satisfactory completion of which is a pre-condition for ICOL liberalization under ECA Section 73(5)(a), the Authority concludes that SMP operators should use their existing interconnection agreements as a starting point to develop model A&I agreements.
  454. The required model A&I agreements shall meet all of the following conditions:

- (a) where an SMP operator that is subject to this obligation<sup>16</sup> is supplying A&I, but applying different terms and conditions when offering the same services to different Access Seekers, the most favourable provisions relevant to a particular A&I service shall be offered to all Access Seekers on a non-discriminatory basis;
  - (b) the applicable retail-minus pricing requirements set forth in the General Determination must be implemented as of the effective date; and
  - (c) any material terms and conditions that the Authority determines are inherently unfair or anticompetitive must be removed or modified by the SMP operator.
27. The MAIA will serve as a prototype reference offer that will eventually be replaced by a comprehensive RAIO if the Authority determines, following consultation with stakeholders, that there are significant shortcomings in the MAIA that must be resolved. The MAIA that is ultimately approved by the Authority will serve as the template for any bilateral A&I Agreements between BCV and access seekers that cover BCV's relevant SMP wholesale service offerings. When entering into A&I Agreements with access seekers, there should be no deviation from the MAIA template approved by the Authority unless there is an objective justification for doing so and the effect is not unduly discriminatory. Any such deviation would be subject to objection by the Authority pursuant to ECA Section 24(3)(a).
28. In order to facilitate review of any deviations from the MAIA template that is ultimately approved by the Authority, BCV shall be required to provide a statement that identifies and fully explains any such deviations when it files with the Authority the required copy of the relevant bilateral access and interconnection agreement in accordance with ECA Section 24(3)(a). Pursuant to the Authority's powers under ECA Section 33(3), these procedural requirements shall apply to all of the terms and conditions contained in the MAIA and the related A&I Agreements between the parties, regardless of whether they fall within the scope of the Authority's SMP finding.
29. BCV shall be required to enter into A&I Agreements with any eligible access seeker that so requests no later than five business days following receipt of a written request for A&I pursuant to the MAIA. Any and all pre-existing access and interconnection agreements between BCV and ICOL holders that correspond to the SMP wholesale services covered by the MAIA must be replaced by an agreement conforming to the MAIA template within five business days following the effective date of the Authority's Final Decision, absent approval of a deferral by the Authority for good cause shown.

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<sup>16</sup> We note that only BTC and BCV will be subject to this obligation unless Digicel or BDC elect to provide wholesale mobile services and, therefore, trigger this obligation. All references to "SMP operator" in Section 5.1 [of the Remedies GD] shall be interpreted accordingly.

## 4 DISCUSSION OF UNRESOLVED ISSUES AND INTERIM DETERMINATIONS

30. This discussion that follows addresses the comments submitted by BCV and potential access seekers in connection with the Draft MAIA, including those provided in response to the Authority's Notice<sup>17</sup> issued on 15 October 2013, which set out a revised schedule for the model A&I approval process provided for in Section 5.1.1 of the Remedies GD.<sup>18</sup> The Notice invited all parties to submit final comments by 21 October 2013 on:
- (a) BCV's Draft MAIA (dated 27 September 2013); and
  - (b) BCV's position paper (dated 27 September 2013) setting forth:
    - (i) a list of all material objections to the proposed agreements that have been raised by access seekers and not resolved, and
    - (ii) a justification for the positions taken by the SMP Operator in response to the unresolved objections, if any, referenced above.
31. Comments on the Draft MAIA and Position Paper were submitted by Cellone ("BDC"), TBI, and LinkBermuda/Quantum ("Link"). The Authority's assessments of the unresolved issues and its interim determination in respect of these issues focus on the concerns and objections identified by BDC, TBI, and Link in their comments regarding the Draft MAIA and Position Paper, and those issues the Regulatory Authority believes should be addressed as a matter of public interest or to ensure that the proposed MAIA comports with the ECA, the RAA and the Remedies GD.
32. The unresolved issues discussed below are generally set out in the order of their appearance in the Draft MAIA. However, in some cases unresolved issues have been grouped, or addressed in non-sequential order, because the issues being discussed are common to multiple clauses.

### 4.1 Clause 1 "INTRODUCTION"

#### 4.1.1 Generally

33. TBI requests inclusion of a statement that the agreed form of MAIA will apply and be administered on common terms to all communications providers to whom BCV is required to offer interconnection services so it is clear that consistent treatment will apply.
34. Link proposes the addition of "Compliance with Law" provisions as they claim these are an integral part of commercial agreements and the MAIA should be no different. According to Link, with a thinly staffed RA office, "Compliance with Law" provisions provide an important and meaningful incentive for the parties to perform their obligations in full compliance of all applicable laws and regulations. In this context Link argues that the threat of contract damages are a more compelling preventive deterrence against potential non-compliant conduct than the risk of regulatory action that depends upon the Authority's uncertain and potentially lengthy discovery, investigation and enforcement procedures. Link believes adoption of our proposed approach will more quickly and effectively advance Bermuda's reform objectives and

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<sup>17</sup> See <http://rab.bm/images/PDF/Public%20Notice%20-%20A&I%20Agreement%20DeadlinesFF.pdf>

<sup>18</sup> See <http://rab.bm/images/PDF/130807-Remedies-Order-vFINAL.pdf>

ultimately minimize enforcement resource demands on the RA. Link's proposed language follows.

## 1 INTRODUCTION

### WHEREAS:

BCV has been designated by the RA as having a significant market power in certain markets; BCV is in possession of an ICOL pursuant to the provisions of the ECA.

The CP is in possession of an ICOL pursuant to the provisions of the ECA.

The Parties have agreed to interconnect their respective networks, in accordance with the principles set out in the ECA and applicable legislation, and to supply related services and facilities on the terms and conditions laid down in this Master Interconnection Agreement for the Provision of BCV Wholesale Products and Services ("Master Interconnection Agreement" or "MIA").

The Parties acknowledge and agree that this Master Interconnection Agreement is the result of Section 5.1.1 of the Regulatory Authority "Order: Obligations for Operators with Significant Market Power Matter: RM01/13-1040" effective as of August 28, 2013 ("SMP Order"). BCV hereby warrants that it has complied in full with its obligations under Section 5.1.1 of the SMP Order in respect of this MIA including without limitation:

paragraph 65(c) thereof, that this MIA "incorporates the most favourable terms and conditions to counterparties ... (including Affiliates of the SMP Operator and members of the KeyTech Group) of the corresponding A&I agreements relevant to each Wholesale Service that were entered into prior to the effective date" of the SMP Order;

paragraph 65(d) thereof, that the Charges for Services under this MIA "incorporates the applicable Retail Minus pricing requirements set forth [in the SMP Order] as at the effective date for each specific service and any related fees;" and

paragraph 65(e) thereof, that this MIA "modifies or eliminates any material terms or conditions that are incompatible with the new regulatory framework, including the RAIO Guidelines set out in Annex A" of the SMP Order.

The Parties further acknowledge and agree that this MIA is "subject to modification in accordance with the terms of a fair and reasonable RAIO that shall comply with the Guidelines set out in Annex 5" that shall be developed by BCV after the Commencement Date in accordance with the paragraph 65(f) of the SMP Order.

The Parties entering into this Master Interconnection Agreement recognize the necessity of effective interconnection and access to wholesale services in the provision of quality telecommunications services to End User pursuant to terms and conditions that comply with the RA mandated "fundamental regulatory principles of reasonableness, transparency and non-discrimination" in accordance with Section 1, paragraph 2 and Section 2.1, paragraph 4 of the RAIO Guidelines, Annex A of the SMP Order.

The Parties believe that the following broad principles should apply to such interconnection, namely that:

- (a) interconnection should not be unnecessarily constrained by technical obstacles or limitations which have no justifiable objective basis;
- (b) the quality of interconnection services should be optimised to bring benefits to End Users and the Parties should aim continuously to improve the quality of service, operations and maintenance, provisioning and network performance in interconnection;
- (c) the Parties should at all times act so as to facilitate the speedy and effective operation of this Master Interconnection Agreement to the benefit of End Users;
- (d) the Parties should exchange technical information in order to make such interconnection effective, subject to commercial confidentiality and the terms of this Master Interconnection Agreement;
- (e) in implementing services and facilities under this Master Interconnection Agreement, both Parties should endeavour to minimise the attendant costs, provided that this does not result in additional cost attribution to other products and services provided by either Party and is consistent with agreed quality standards.

35. BCV asserts that it is not prepared to incorporate into the MAIA (or a RAIO) warranties of compliance with all statutory obligations. While BCV claims it is, and will always be, compliant, it adds that the RA is the enforcer of BCV's statutory obligations and that this function should not be passed to access seekers. BCV also objects to the proposal because it would mean that BCV is liable to contractual damages claims, as assessed by the courts, rather than to fines/penalties as assessed by the RA. BCV claims that this is a recipe for private litigation and would effectively render the RA a bye-stander rather than regulator. BCV notes that the legislature wanted the RA to be enforcer of the statute and BCV prefers to keep it that way.

#### **4.1.1.1 Interim Determination**

36. BCV urges the Regulatory Authority to reject Link's "Compliance with Law" proposal because the Regulatory Authority, not the courts, should address interconnection and access to regulated services. As noted by BCV, the legislature provided for the Regulatory Authority to be responsible for enforcement of the ECA, and the Regulatory Authority was given the ability to assess penalties as a means of enforcement.
37. TBI made a request for a similar provision to be inserted in Clause 2.2 which would include the express obligation to provide services that comply in all respects with the ECA and any directions of the RA made under that Act in relation to BCV. TBI offered no justification or support for this request but such a provision is included in TBI's existing A&I agreement (dated 7 May 2013) with BCV, which has the following language:

##### **12.5 Compliance with Laws**

Each Party represents that it is now and will remain in compliance with all laws, regulations, and orders applicable to its performance of its obligations

under this Agreement. Each Party shall promptly notify the other Party in writing of any governmental or regulatory action that suspends, cancels, withdraws, limits or otherwise materially affects its ability to perform its obligations under this Agreement.

38. Because paragraph 65(c) of the Remedies GD requires the MAIA to incorporate “the most favourable terms and conditions to counterparties...of the corresponding A&I agreements relevant to each Wholesale service”, it is necessary that BCV shall include the “Compliance with Law” provisions requested by TBI and Link.
39. We also note that the Authority has the power to object to any provisions of an access or interconnection agreement (ECA Section 24(3)(a)) and is the only competent authority able to resolve disputes relating to such agreements in the first instance (see paragraph 25 above), irrespective of whether compliance with the ECA or RAA is required by the terms of the MAIA.
40. We find the language proposed by Link for Clause 1 generally acceptable, but decline to accept the proposed revisions that follow sub-part (c). We also require the term “telecommunications services” to be replaced by “electronic communications services” in this clause, and throughout the MAIA, as it is more consistent with the ECA. As such the Authority requires BCV to revise Clause 1 as shown in Section 4.1.1.1.1.<sup>19</sup>

#### **4.1.1.1.1 Required MAIA Language<sup>20</sup>**

##### *1 INTRODUCTION*

##### *WHEREAS:*

*BCV has been designated by the RA as having a significant market power in certain markets; BCV is in possession of an ICOL pursuant to the provisions of the ECA.*

*The CP is in possession of an ICOL pursuant to the provisions of the ECA.*

*The Parties have agreed to interconnect their respective networks, in accordance with the principles set out in the ECA and applicable legislation, and to supply related services and facilities on the terms and conditions laid down in this Model Access and Interconnection Agreement for the Provision of BCV Wholesale Products and Services (“Model Access and Interconnection Agreement” or “MAIA”).*

*The Parties acknowledge and agree that this Model and Access Interconnection Agreement is the result of Section 5.1.1 of the Regulatory Authority “Order: Obligations for Operators with Significant Market Power Matter: RM01/13-1040” effective as of August 28, 2013 (“SMP Order”). BCV*

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<sup>19</sup> In this Section 4, where the Authority stipulates text to be included in the MAIA, the terms “MAIA” and “Model Access and Interconnection Agreement” should be replaced by the term “A&I Agreement” where the context relates to a bilateral agreement between BCV and an access seeker and not the template MAIA.

<sup>20</sup> Where “Required MAIA Language” has been provided the Authority acknowledges that the interim determinations provided throughout this document may require BCV to propose slight modifications to the provided language to resolve conflicts.

hereby warrants that it has complied in full with its obligations under Section 5.1.1 of the SMP Order in respect of this MAIA including without limitation:

(a) paragraph 65(c) thereof, that this MAIA “incorporates the most favourable terms and conditions to counterparties ... (including Affiliates of the SMP Operator and members of the KeyTech Group) of the corresponding A&I agreements relevant to each Wholesale Service that were entered into prior to the effective date” of the SMP Order;

(b) paragraph 65(d) thereof, that the Charges for Services under this MAIA “incorporates the applicable Retail Minus pricing requirements set forth [in the SMP Order] as at the effective date for each specific service and any related fees;” and

(c) paragraph 65(e) thereof, that this MAIA “modifies or eliminates any material terms or conditions that are incompatible with the new regulatory framework, including the RAIO Guidelines set out in Annex A” of the SMP Order.

The Parties entering into this Model Access and Interconnection Agreement recognize the necessity of effective interconnection in the provision of quality electronic communications services to End Users.

The Parties believe that the following broad principles should apply to such interconnection, namely that:

(a) interconnection should not be unnecessarily constrained by technical obstacles or limitations which have no justifiable objective basis;

(b) the quality of interconnection services should be optimised to bring benefits to End Users and the Parties should aim continuously to improve the quality of service, operations and maintenance, provisioning and network performance in interconnection;

(c) the Parties should at all times act so as to facilitate the speedy and effective operation of this Model Access and Interconnection Agreement to the benefit of End Users;

(d) the Parties should exchange technical information in order to make such interconnection effective, subject to commercial confidentiality and the terms of this Model Access and Interconnection Agreement;

(e) in implementing services and facilities under this Model Access Interconnection Agreement, both Parties should endeavour to minimise the attendant costs, provided that this does not result in additional cost attribution to other products and services provided by either Party and is consistent with agreed quality standards.

41. The Authority’s determination above is also applicable to the following Link proposal regarding warrants in Clause 9. We find Link’s proposed additions to be reasonable; however, cable video services are electronic communications services and should not be singled out. As such, the Authority requires BCV to revise Clause 9 to read as follows.

## 9. QUALITY OF SERVICE

*BCV warrants that it shall provide Services under this MAIA in compliance with the ECA and other relevant legislation, and using all —reasonable skill and care of a competent provider of electronic communication services.*

42. TBI requested a statement that the agreed form of MAIA will apply and be administered on common terms to all communications providers. We agree in principle with TBI's request for 'common terms' but note that paragraph 72 of the Remedies GD states that:

The Authority reserves the right to allow minor variations from the model agreement in the case of modifications to pre-existing agreements where these are justified by the circumstances and not unduly discriminatory vis-à-vis other Access Seekers. These approved, model A&I agreements shall be made available to all Access Seekers on a Non-Discriminatory basis.

43. However, to ensure that the non-discrimination obligation is met, we find that when negotiating bilateral access and interconnection agreements in line with the MAIA, only non-material changes may be made (such as name/address of counterparty, etc.). Any such deviation must be objectively justified and the effect must not be unduly discriminatory. Any such deviation must be filed with and fully explained to the Authority and may be subject to objection by the Authority pursuant to ECA Section 24(3)(a).

### 4.2 Clause 3 “COMMENCEMENT, DURATION & TERM”

#### 4.2.1 Generally

44. TBI claims that the drafting of the termination events “needs some tidying up.” According to TBI, some of the termination events are loosely defined and leave BCV with wide powers to frustrate the service. For example, TBI argues that force majeure events should only result in a termination for BCV where the event has the result that BCV is no longer capable of providing the relevant service. Further, TBI claims that BCV should not have the right to terminate service where it has made a voluntary modification in its services / facilities.

##### 4.2.1.1 Interim Determination

45. We agree with TBI's general claim regarding Clause 3 and direct BCV to revise Clause 3 accordingly as provided below in Section 4.2.6.1.1.
46. We also agree with TBI's argument that force majeure events should only result in the termination of service by BCV only where the event results in BCV no longer being capable of providing the relevant service. The language in the MAIA must also expressly state that BCV does not have the right to terminate service(s) in situations where the inability to provide a service was the result of BCV making a voluntary modification in its services and/or facilities. This precise text remains to be drafted by BCV and provided in its compliance filing.

#### 4.2.2 Clause 3.5

47. TBI argues that there should be a reasonable period of notice required if BCV has a right to terminate service where it has ceased to have significant market power. TBI

asserts that the notice period should be sufficient to enable TBI to make alternative interconnection arrangements. TBI states that a period of six months would be appropriate.

48. Link asserts that it is seeking A&I on a wholesale basis in order to resell like services to its End User customers in direct competition with BCV. As a predicate to engaging in such resale business, Link claims it requires a measure of predictability and stability in its contract terms in order that Link can plan its business and structure appropriate terms with its End User customers. Link argues that this must include reasonable termination rights for Link and its End User customers, which will not accept a service contract that allows Link to terminate without a reasonable period of notice. Link proposed the following revisions in lieu of deleting Clause 3.5 as originally proposed:

3.5 If the RA or any other relevant regulatory body directs or notifies that BCV ~~does not have SMP in relation to the market to which the Service relates and as a result of that, or any other, direction or notification~~ BCV is no longer obliged to provide ~~the~~ Service, BCV may terminate ~~the~~ such Service **as of the greater of the following periods: (a) fulfillment of the term requirement under existing Service Orders and (b) on reasonable nine (9) months prior written notice; and further provided to the extent that such termination is otherwise consistent with any relevant direction by the RA.**

49. Whether characterized as a “minimum term” or alternatively suitable notice prior to termination of the A&I Agreement or Service termination by BCV, Link believes that it is commercially necessary that the parties contractually commit to a reasonable, defined termination notice period to end any Service or terminate the A&I Agreement. Link argues that the impact to BCV’s wholesale customers and their End User customers in turn is simply far too great to not provide for an orderly transition period.

#### 4.2.2.1 Interim Determination

50. Because the reasonableness of the notice period for termination in such circumstances cannot be determined in a vacuum, BCV should modify the MAIA to indicate that the Regulatory Authority will address the appropriate notice and transition period for Service termination in SMP designated markets on a case-by-case basis. This is opposed to establishing a single fixed time period as requested by the CPs. We have provided revisions to Clause 3.5 below in Section 4.2.6.1.1. Additionally, BCV must clearly designate which services are regulated SMP services (and thus subject to the proposed special restrictions) and which are not.

#### 4.2.3 Clause 3.6

51. TBI asserts that it is not appropriate, in the context of this agreement, to enable BCV to terminate the agreement without cause and for no reason upon six months prior notice.
52. BDC requests that CPs only be required to provide 60 days prior notice for termination because BCV can increase rates on CPs with 90 days prior written notice, and CPs have no right to terminate in that case.

#### 4.2.3.1 Interim Determination

53. TBI's argument regarding Clause 3.6 seems misplaced as this clause addresses the terms of the CP terminating the A&I Agreement, not BCV. We note that Link did not protest the requirement of six months prior notice but BDC did because it wanted the opportunity to cancel the A&I Agreement prior to the imposition of a price change. We agree with BDC's proposal for the reasons given by BDC. BCV should revise Clause 3.6 as shown below in Section 4.2.6.1.1. The MAIA must be non-discriminatory. Therefore, "such other period as may be agreed by the Parties" may only apply to non-SMP services.

#### 4.2.4 Clause 3.7

54. TBI argues that any communication with end users who are TBI customers, following the termination of service, should be dealt with solely by TBI. TBI adds that generally, the agreement could benefit from some clarification as to how the relationship with the end users will be managed – that is, will TBI manage the entire relationship with its End Users (which is preferred) or will BCV itself have direct agreements with the end users?
55. BDC would like to make sure BCV requires the CP's consent prior to contacting the CP's former retail customer.
56. Link objects to this clause and asserts that it will not provide information on its End User customer base to BCV at the termination of the A&I Agreement or any Service. Link argues that only the CP, as the owner of the Customer Information are authorized access to, and use of, that valuable data. For these reasons Link maintains that only Link is entitled to communicate with its End User customers as it sees fit; BCV emphatically is not. Further, Link asserts that at the expiry of its arrangement BCV should not be permitted access to our Customer Information nor should it be granted an advantage over other competitive resellers of the service as Link's communications with End User customers will likely include an alternative service offering from Link, whether provided directly or through arrangements with another wholesale service provider. Link therefore requests inclusion of the following additional clauses to the MAIA to ensure strict adherence of terms that protect the owner's rights to its' End User customer Confidential Information.

Amend Annex 1 (Interpretation & Definitions) as follows (in red font):

**5.2.5** "Confidential Information" any information of a confidential nature including but not limited to:

any know how, trade secret, information of a sensitive or proprietary nature; or

any other information and data (of whatever nature and however recorded or preserved), relating to either Party, its business or activities, and whether or not marked as confidential;

**For purposes of this definition, all End User information shall be deemed the Confidential Information of CP;**

57. Link also proposes that BCV insert as new provisions following language as Clause 3.17:

**3.17 Termination or expiry of this MIA or any Service shall not relieve either Party of its obligations under Clauses 11 and 14 especially in**

respect of Confidential Information and in particular protecting against the unauthorized access and use of CP's End User customer Confidential Information.

58. BCV claims Clause 3.7 provides important protection for End Users, ensuring that End Users are kept informed if Service is terminated because, for example, a CP becomes insolvent and all contact with End Users has ceased.
59. BCV maintains that this clause is not designed to provide BCV with easy access to End Users, nor will it result in such an outcome because the clause expressly provides that the RA can place limits on any contact.

#### **4.2.4.1 Interim Determination**

60. BCV should implement the language proposed by Link above for Annex 1 and Clause 3.17. BCV should not be permitted to have any contact with CP retail customers unless expressly permitted by the CP, or if an exception is granted by the Regulatory Authority in advance and in writing for access to customer data and contact with a specific customer, or group of customers under certain circumstances (for example, if the CP goes out of business). The Authority also wishes to remind the parties of their respective obligations under ECA Section 31 and Clause 13 of the ICOL in this regard. The text consistent with this determination is provided below for Clause 3.7 in Section 4.2.6.1.1.

#### **4.2.5 Clause 3.8**

61. TBI claims that it is not appropriate to seek to impose early termination charges.
62. BDC commented on this issue but did not provide a specific complaint or proposal.
63. BCV maintains that there are costs associated with CPs terminating the Service other than in accordance with the MAIA. BCV argues that it is unfair for BCV, and by extension other CPs, to have to pay for costs of setting up a wholesale service structure which is then (for example) abandoned.

#### **4.2.5.1 Interim Determination**

64. BCV's proposed Early Termination Charge(s), equal to the sum of the CP's most recent month's invoice from BCV does not appear to have an objective justification. However, BCV must be permitted to recover reasonably incurred one-time and non-recurring costs associated with regulated wholesale services. Lacking an alternative proposal, and hearing no well-reasoned objections from Link, we approve the language provided by BCV.

#### **4.2.6 Clause 3.12**

65. TBI asserts that it should be stated that suspension powers will be applied consistently by BCV as between communication providers.
66. BDC requests that it receive prior notice from BCV before service is suspending if the CP is insolvent. BDC also argues it should receive prior notice if BCV seeks to suspend service because BCV is no longer eligible to provide the service.

#### 4.2.6.1 Interim Determination

67. The limited defined circumstances in which BCV seeks to be permitted to suspend service without prior notice appears to be reasonable. BCV's proposed language is therefore approved. BDC's argument that Clause 3.12 applies to situations where BCV is no longer eligible to provide the service is misplaced as this clause addresses situations in which the CP is no longer eligible to receive the service. We find BCV's language requiring "reasonable endeavours" to provide prior notice reasonable under the limited circumstances addressed in this clause. Furthermore, we do not believe it is necessary to grant TBI's request to insert language stating that suspension powers will be applied consistently as between BCV and CPs.
68. We also require BCV to clarify that the MAIA (i.e., the model) will become effective ("commence") the day after the effective date of the Authority's Final Decision and Order. The Commencement Date of the bilateral agreements entered into in line with the MAIA will be as agreed between the parties; however, that date should not be any later than 5 days after the date on which a CP submits a request for access and interconnection under the MAIA.

##### 4.2.6.1.1 Required MAIA Language

#### 3. COMMENCEMENT, DURATION & TERM

3.1 *This MAIA commences on the Commencement Date and continues until terminated in accordance with these General Terms & Conditions.*

3.2 *A Party may, acting reasonably having regard to the circumstances, terminate by written notice to the other Party this MAIA immediately if:*

*(a) the other Party is determined to be Insolvent by a competent authority;*

*(b) the other Party ceases to be eligible at law and/or under regulation to receive or provide the Service;*

*(c) the other Party ceases to carry on business; or*

*(d) a right of termination arises for an event of Force Majeure affecting the Service.*

3.3 *BCV may by 14 days written notice to the CP terminate this MAIA immediately if the CP has failed to order any Service within twelve (12) months of the Commencement Date; provided that such failure to order has not resulted from any delay caused by BCV. Any such termination by BCV is without prejudice to CP's right to obtain wholesale services from BCV under a subsequent model access and interconnection agreement.*

3.4 *A Party may, acting reasonably having regard to the circumstances, terminate by written notice to the other Party a Service in whole or in part, subject to prior notice to and written approval by the Regulatory Authority in cases where termination is by BCV:*

*(a) immediately if*

*i. the other Party ceases to be eligible at law and/or under regulation to receive or provide the relevant Service;*

ii. *the other Party has breached a material term of this Agreement and the breach is not capable of being remedied;*

iii. *the other Party commits a material breach of this Agreement, which is capable of remedy, and fails to remedy the breach within the following periods from the date of the notice of breach:*

(A) *14 days, where there is a failure to pay a sum due under this MAIA other than a failure to pay a sum which is subject to a Billing Dispute; or*

(B) *30 days; or*

(C) *a shorter time, reasonably specified in the notice, in the case of an Emergency;*

iv. *the other Party ceases to carry on business; or*

v. *a right of termination arises for an event of Force Majeure affecting that Service; or*

vi. *modification by BCV of service or facilities results in a material deterioration in quality of the Service; or*

*(b) on 30 days written notice if the other Party is repeatedly in breach of these General Terms & Conditions (and where the breach being repeated is the same, related or significantly similar to the previous breaches) such that the repeated breaches constitute a material breach.*

3.5 *If the RA issues a General Determination concluding that BCV does not have SMP in relation to the market to which the Service relates and as a result of that, or any other, direction or notification BCV is no longer obliged to provide the Service, BCV may terminate the Service on reasonable notice or in conformity with the minimum transitional period(s) specified by the RA in its General Determination removing the relevant SMP obligations.*

3.6 *The CP may terminate this MAIA without penalty by giving BCV not less than 60 days written notice, or in the case of non-SMP services such other period as may be agreed by the Parties, unless the CP has been granted a wholesale price discount linked to a retail discount that has a longer minimum period, in which case the CP must compensate BCV for the completion of the minimum period.”*

3.7 *If BCV terminates this MAIA, BCV may:*

*(a) if and to the extent permitted in advance by the RA in writing in the event that the CP becomes insolvent or otherwise incapable of serving its customers; or*

*(b) with the prior written approval of the CEO or other duly authorized representative of the CP, acting in conformity with ECA Section 31;*

*communicate directly with End Users to inform them of the termination of the Service and how this may affect the communications services they receive from the CP and/or BCV including the options available to End Users in order to avoid disconnection or interruption to existing communications services. This sub-clause survives termination of the MAIA.*

3.8 If the CP terminates the MAIA during the minimum notice period as set out in Clause 3.6 other than where:

(a) the CP terminates in accordance with the provisions of Clause 3.2 or 3.4 or with BCV's agreement; or

(b) this MAIA is terminated for Force Majeure, the CP must pay BCV an Early Termination Charge(s) equal to the sum of the CP's most recent month's invoice from BCV.

3.9 If the MAIA is terminated by the CP under Clause 3.2 or 3.4 or 3.6, BCV agrees to credit or repay the CP within a reasonable period (not to exceed 60 days) with the appropriate proportion of any Charges paid in advance (other than if Early Termination Charges are payable under the MAIA) for the period after the termination date.

3.10 For the avoidance of doubt, in the event either Party has a right to terminate the MAIA or to suspend the Service, the dispute resolution process in Clause 12 of this MAIA will not operate to extinguish, override or otherwise hinder the exercise of that right save for a determination issued by the RA or by the courts on appeal from such determination in accordance with Clause 12.2 (a) or (c).

3.11 Termination or expiry of this MAIA shall not be deemed a waiver of a breach of any term or condition of this MAIA and shall be without prejudice to a Party's rights, liabilities or obligations that have accrued prior to such termination or expiry.

3.12 Without prior notice to the CP, BCV may, after notifying the Regulatory Authority, immediately suspend the supply of the Service, in whole or in part if:

(a) in the reasonable good faith view of BCV, and, the Service:

i. poses a threat to the safety of persons;

ii. poses a hazard which would impair or prevent the operation of equipment;

iii. poses a threat to the proper operation, access, integrity and/or security of the BCV Network; or

iv is likely to impede the activities of authorised persons responding to an Emergency;

(b) the CP:

i ceases to be eligible at law and/or under regulation to receive the Service, and the Authority has given its prior written approval;

(c) the CP is determined to be Insolvent by a competent authority, and the Authority has given its prior written approval and shall take reasonable endeavours to advise the CP's relevant Contact of prior to the suspension in respect to subclause (a) and attempt prompt resolution and otherwise at or around the time of the suspension and shall give the CP written confirmation of any such suspension under this clause as soon as is reasonably possible (and no later than the Working Day following the suspension), including reasons for such suspension.

*To the extent that BCV suspends the Service for more than 12 consecutive hours, the CP shall be released to the equivalent extent from its obligations to pay Charges for such Services, unless BCV reasonably believes the suspension was attributable (in whole or in part) to the CP's action or inaction in which event BCV shall notify CP in writing with sufficient detail to support such belief. The CP may initiate a Billing Dispute in connection with any such Charges.*

**3.13 If the CP:**

*(a) fails to pay a sum due under this Agreement within 30 days from the date of the written notice of breach (other than a failure to pay a sum which is subject to a Billing Dispute);*

*(b) within 30 days written notice of breach based on repeatedly breaches of this Agreement such that the repeated breaches can be considered to constitute a material breach, and as a result of which BCV has a right to immediately terminate the MAIA, then BCV may, acting reasonably having regard to the circumstances and having obtained the prior written approval of the RA, on 5 Working Days written notice to the CP, suspend the Service.*

**3.14** *If BCV elects to suspend the Service, BCV does not waive its rights to terminate the Service.*

**3.15** *Subject to specific provisions of this clause, BCV is not obliged to suspend the Service or give a notice of suspension before exercising its right to terminate the Service and/or this MAIA.*

**3.16** *If BCV suspends the Service then, subject to any contrary terms of this MAIA, BCV shall use reasonable endeavours to resume the provision of the Service as soon as the grounds for suspension of the Service no longer exist, and will liaise with the CP as appropriate prior to any such resumption of the Service and notify the RA of the time and date on which the suspended service has been restored.*

## **4.3 Clause 5 “CHARGING FOR SERVICES”**

### **4.3.1 Generally**

69. TBI claims that it should have a right of set-off against liabilities to BCV under the A&I Agreement, to the extent that BCV has liabilities to TBI.

#### **4.3.1.1 Interim Determination**

70. We reject TBI's net-settlement proposal as the BCV language does not result in significantly greater administrative burden for BCV or the CPs. Furthermore, using BCV's preferred approach will provide an easier to follow data trail which in turn will make future data collection and market reviews easier to conduct without having to first unwind net settlements.

### **4.3.2 Clause 5.2**

71. TBI argues that any amendment to the BCV price list should be made by agreement with TBI, subject to approval of the Regulatory Authority.

72. Link asserts that in supplier arrangements under which it acquires a service it is fundamental that Link agrees to fixed material terms and conditions upon which it can rely absent changes (a) required by law (e.g., RA regulation) or (b) with Link's prior written consent. Link maintains that this, in turn, provides it the contractual stability to market and sell services to its End User customers.
73. Link notes that BCV's pricing activity is currently constrained by regulation and requests an express contractual statement to that effect in Clause 5.2 to establish an affirmative contractual obligation on BCV to comply with the law in regards to pricing generally. Link argues that it is insufficient to remain silent on this point and simply trust in a regulatory solution. Link claims that the CPs and the Regulatory Authority are ill-positioned to "discover" any non-compliance until well after the damage is done. For this reason among others, Link believes that contractual liability for non-compliance with law becomes a very important tool in the regulatory enforcement arsenal. Link proposed the following:
- 5.2 "BCV may from time to time vary the Charge by amending the Price List **only as permitted under the ECA** and such new Charge shall take effect on the effective date, being a date not less than ~~28~~90 calendar days after the date of notification to the CP **provided that BCV may not increase the Charges for a Service during the term of any existing Service Order.**"

#### 4.3.2.1 Interim Determination

74. Clause 5.2 raises two issues; first, "compliance with law" language, and second, price changes during Service Order. The first issue here has already been addressed in the 'Compliance with Law' discussion presented with respect to Clause 1 and must be applied consistently here. Furthermore, RAA Section 38 addresses disputes between sectoral providers and expressly states that RA can resolve disputes involving violations of the RAA or ECA, regulations made by Minister or any administrative decision issued by the RA. Therefore, requiring adherence to laws, though potentially overly broad, does not result in the courts having jurisdiction over disputes in the first instance.
75. The second issue regarding price changes is addressed in detail below in the discussion of Clause 16.1. However, since there is no applicable provision of the ECA regarding price changes (it is the Remedies GD that imposes the tariff filing obligations) we require that the reference in Clause 5.2 be revised as follows.
- 5.2 *BCV may from time to time vary the Charge only as permitted in Section 4.1.3 of the Remedies GD and such new Charge shall take effect on the effective date, being a date not less than 90 calendar days after the date of notification to the CP provided that BCV may not increase the Charges for a Service during the term of any existing Service Order.*"

#### 4.3.3 Clause 5.3

76. BDC claims that the late penalty is usually agreed to be 1.5% in total, not HSBC rate + 4% per annum as proposed by BCV.
77. Link does not object per se to the imposition of reasonable "excessive User charges." However, in order to agree to any such charges, Link requests BCV provide a fee schedule that shows the amount of such charges and the circumstances under which they will be imposed. Once agreed, Link asserts that it

will then be able, should Link deem it appropriate, to communicate to its End User customers all applicable service fees payable in respect of their specific service needs.

#### **4.3.3.1 Interim Determination**

78. We find that the late penalty should be based on the rate proposed by BCV. We find the argument provided by BDC misleading as our review of a prior BDC interconnection agreement with The Bermuda Telephone Company (“BTC”) indicates these firms agreed to a monthly compounded rate of 1% (12.68% per year) on overdue amounts. This is far in excess of “1.5% in total”.
79. Although the CPs did not object to the imposition of “excessive User charges” Link did protest the fact that the terms and conditions of such charges are unknown. While we believe that the concept of an “excessive User charge” may be reasonable BCV is not permitted to assess this type of charge on wholesale customers unless it also applies the same terms and conditions to its own End Users. Therefore, until such time as the Regulatory Authority has approved ““excessive User charges” for BCV to levy on its retail customers, no such charges are permitted on the wholesale level.

#### **4.4 Clause 11 “PROVISION OF INFORMATION”**

##### **4.4.1 Clause 11.1**

80. TBI argues that CPs should only be required to provide customer information to BCV to the extent necessary for the provision of the service and BCV should commit to use that customer information solely for that purpose (see comments on Clause 14 below also).
81. Consistent with its arguments provided above with respect to Clause 3.7, Link recommends the following additions to Clause 11.1 to protect the confidentiality of CP End User information:

11.1 “Subject to Clause 14 confidentiality obligations **including without limitation the protection of CP’s End User Confidential Information**, either Party shall provide appropriate information including, but not limited to, information regarding network control and management, as is reasonably required by the other Party for interconnection and provision of the Service, provided that such information is held by the Party requested to provide it.”

##### **4.4.1.1 Interim Determination**

82. TBI failed to identify a specific portion of the proposed wording that it found objectionable. BCV’s proposed language for Clause 11.1 is arguably sufficient to address TBI’s concern. However, we require BCV to include the revision proposed by Link (shown above) as it more clearly, and completely, protects the confidentiality of CP End User information. BCV is also reminded of its obligations under Clause 13 of its ICOL.

## 4.5 Clause 12 “RESOLUTION OF DISPUTES”

### 4.5.1 Clause 12.4

83. TBI requests further definition of the proposed ‘mediation’ process for disputes.

#### 4.5.1.1 Interim Determination

84. We agree with TBI’s argument regarding further definition and address their concern by requiring that BCV revise the MAIA using the language provided below in Section 4.5.1.1.1.

85. Regarding Clause 12.3 we note that:

(a) RAA Section 58(3) allows for referral of the dispute to the RA “if the parties are unable to resolve the dispute after 90 days of direct negotiation”; and

(b) arbitration of A&I Agreement disputes is expressly prohibited by ECA Section 24(3)(b) because of the consumer impacts that need to be taken into account and can only be dealt with by the RA in the first instance. Final RA decisions can be appealed to the Supreme Court pursuant to RAA Section 96.

86. We also find the need for BCV to provide a definition of Mediate or Mediation in Annex 1 of its MAIA. As such, BCV should revise its Draft MAIA along the following lines:

*Unless otherwise mutually agreed between the parties, “Mediate” or “Mediation” means that each Party shall within five business days from commencement of the Mediation period agree on the appointment to a Mediation Panel of a senior executive from that Party’s respective management team who has significant demonstrable experience in the type of issue in dispute (e.g., technical, financial, legal, etc.). Within five business days following their appointment, the two members of the Mediation Panel shall agree on a third independent party to chair the Mediation Panel. If the Parties are unable to agree on appointment of the chair, the RA shall be informed by a communication from one or both of the Parties requesting the RA to appoint the chair of the Mediation Panel. The Mediation Panel will hear and consider the evidence and arguments put forward by both parties and attempt to resolve the dispute or narrow the issues. Its findings and conclusions will be non-binding. If and only if both Parties mutually agree, the findings and conclusions of the Mediation Panel may be made available to the RA if there is a need to refer the dispute to the RA for resolution.*

#### 4.5.1.1.1 Required MAIA Language

87. The following language is required in Clause 12 of BCV’s MAIA:

12. RESOLUTION OF DISPUTES

12.1 The Parties agree to use their reasonable endeavours to resolve disputes without the requirement for escalation and/or the involvement of the Regulatory Authority by making use of the dispute resolution procedure set out in this clause unless the dispute is one to which the Billing Dispute provisions apply in which case those Billing Dispute resolution provisions shall apply.

12.2 *Nothing in this dispute resolution procedure shall prevent either Party:*

*(a) exercising any rights and remedies that may be available in respect of a breach of the provisions of this MAIA; or*

*(b) referring a dispute to the RA.*

12.3 *A Party to the MAIA must initiate an MAIA Dispute by notifying the commercial representative of the other Party in writing. The written dispute notice shall contain a description of the dispute in sufficient detail to reasonably allow the other Party to understand and, if applicable, investigate the situation giving rise to the dispute. Following such notice the Parties will use their reasonable endeavours to resolve the dispute within 30 days following the notification, involving where necessary the Management Group.*

12.4 *If the dispute remains unresolved after 30 days following the notification, the Parties agree to Mediate such dispute and in the event that Mediation fails to resolve the dispute within 60 days following commencement of the Mediation process, for the matter to be referred to the RA through submission of a complaint, in accordance with Section 58 of the Regulatory Authority Act 2011.*

12.5 *Any administrative charges payable to the RA for costs incurred in resolving the dispute shall be shared equally by the Parties unless the RA determines otherwise.*

#### **4.6 Clause 13 “SECURITY DEPOSIT”**

##### **4.6.1 Generally**

88. TBI claims that it is not appropriate to include provision for a security deposit in an interconnection agreement of this nature.
89. Link objects to the imposition of Clause 13 (Security Deposit) on existing or new ICOL holders because it claims that, as drafted, it grants BCV complete discretion to set the financial terms to procure Service and could effectively be used to prevent an operator from entering into an A&I Agreement and/or obtaining Service thereunder. Whilst Link agrees that there are circumstances in which a reasonable security deposit may be justified, Link claims it should be conditioned on BCV setting out with some particularity the circumstances and deposit amount which would give rise to this requirement. Finally, Link notes that BCV has expressed its intention not to invoke Clause 13 against “any current ISP.” Link requests that all ICOL holders be treated comparably and formalized in writing as part of the final MAIA.

##### **13. SECURITY DEPOSIT**

**If the CP lacks creditworthiness using reasonable credit criteria or if a payment default occurs, Unless otherwise agreed to by BCV in writing, it is a condition precedent to the MIA and to the provision of the Services, that the CP shall provide to BCV such financial security equivalent to one month of forecast average spend by the CP over the ensuing period of 12 months (to be reviewed annually) as in the opinion of BCV is appropriate as security against the CP's non-compliance with or non-observance of any of**

the provisions of this MIA (including without limitation the failure to pay Charges).

~~Without prejudice to clause 13.1 above, BCV may, at any time, require the CP to enter into bank or other guarantees (or to provide some other form of financial security, for example a deposit) which is/are appropriate as security following actual CP non-compliance with or non-observance of any of the material provisions hereof (including failure to pay charges due under this MIA), provided that BCV shall only use the said remedy contemplated in this clause as a last resort bearing in mind the seriousness of the breach in question. Refusal to provide such security or failure to provide such security within thirty (30) days (or such longer period as either party may reasonably allow) of the date of request shall be deemed to be a breach of the MIA by the CP.~~

**13.3 Any security deposit required under this Section 13 shall be held in trust by BCV in an interest bearing account payable to the CP upon termination of this MIA or earlier if mutually agreed by the Parties.**

13.4 A reasonable guarantee/deposit may be held until:

13.4.1 termination of the MIA; and/or

13.4.2 all of the CP's liabilities to BCV in respect of the Service are discharged.

13.4.2 A guarantee/deposit does not relieve the CP from its obligation to pay amounts to the BCV as they become due and payable, nor does it enable the CP to make allowance by way of set-off, deduction or withholding from any such amount. The deposit will not affect any right of BCV to suspend, cancel or terminate the MIA for non-payment.

90. BCV asserts that this is an important protection in the event that an access seeker without any track record or financial history signs an A&I Agreement in line with the MAIA. BCV claims it does not intend to invoke Clause 13 in relation to any current ISP. BCV argues that the wording is reasonable and based on similar language in a RAIO model currently in use in the EU.

#### **4.6.1.1 Interim Determination**

91. We agree with the CPs that BCV should not be permitted to require a security deposit from any current ICOL holders unless the CP is found to lack creditworthiness using reasonable credit criteria, or if a payment default occurs. BCV should therefore adopt the language proposed by Link for Clause 13. However, we note that similar agreements usually require three to four months forecast average spend to account for billing and payment cycles so the access provider is not at risk, rather than one month as proposed in Clause 13.1. Where a security deposit is justified, BCV should therefore revise Clause 13.1 to require three months forecast average spend. The term payment default in Clause 13.1 must also be defined to exclude lack of payment due to a disputed bill or portion thereof. Lastly, we note that if the CP wishes to dispute BTC's claim that the CP is not

creditworthy, the CP has the option bring the issue before the Regulatory Authority so that the Authority may rule on the imposition of a security deposit and/or the required amount. BCV should revise the language of the MAIA to explicitly include said option.

#### **4.7 Clause 14 “CONFIDENTIALITY”**

##### **4.7.1 Generally**

92. Concerning this Clause, it is TBI’s position that the confidentiality restrictions presented here should be extended so as to provide for a restriction against solicitation of TBI’s customers by BCV through use of TBI’s confidential information; this restriction should apply during the agreement term and for two years following its termination.

##### **4.7.1.1 Interim Determination**

93. Our reading of Clause 14 has persuaded us that the protections sought by TBI are currently contained within the language of the clause itself. Clause 14.8 prohibits the use of a CP’s confidential information by BCV to provide commercial advantage to BCV’s retail operations, unless a CP provides express written permission to do so. Moreover, the language contained in the Clause 14 confidentiality restrictions is such that it creates a strong fence around TBI’s confidential information, thereby restricting the use of this information solely for the purposes for which it was disclosed, thereby effectively barring its use for the solicitation of TBI’s customers. Finally, Clause 14.5 states that the provisions of Clause 14 shall remain in effect for two years after the termination of the A&I Agreement.
94. For these reasons we conclude that the additional language sought by TBI is not necessary.

##### **4.7.2 Clause 14.1**

95. In regards to Clause 14.1, BDC expresses the concern that “we’re not allowed to share confidential information with any employee, officer, director or advisor of any Key Tech Group Affiliate.”

##### **4.7.2.1 Interim Determination**

96. The language of Clause 14.1 in reference to the KeyTech Group could be interpreted as prohibiting BCV from providing BDC’s confidential information to BDC itself. Accordingly, BCV should change the wording of Clause 14.1 so as to account for the fact that a CP seeking to utilize BCV’s MAIA may also be a KeyTech Group Affiliate. Moreover, BCV should add to the MAIA a definition of the term “KeyTech Group Affiliate”, conforming to the definition of that term provided in the RA’s Remedies GD.

##### **4.7.3 Clause 14.4**

97. Concerning this Clause, BDC argues that before BCV provides its confidential information to the Authority, or any other government authority, it should be permitted the chance to obtain a protective order to safeguard that information.

#### 4.7.3.1 Interim Determination

98. While, on its surface, BDC's request seems reasonable, we are reluctant to modify BCV's MAIA to fully accommodate that request. Much would depend on the context of the situation. For this reason we believe that it would be unreasonable to insert the overly broad language sought by BDC into this Clause.
99. However, the proposed language of Clause 14.4(d) could be strengthened by inserting language to the effect that any Party receiving the type of request contemplated by Clause 14.4(d) should, to the extent it is lawfully permitted to do so, inform the disclosing party of the nature of the request and, where possible, allow time for said party to obtain any protective order that party deems necessary to safeguard the information being sought. BCV should modify the language of Clause 14.4(d) accordingly.

#### 4.8 Clause 15 "INTELLECTUAL PROPERTY RIGHTS"

##### 4.8.1 Clause 15.8(a)

100. TBI argues that it is not appropriate to require TBI's customers to sign agreements directly indemnifying BCV in respect of intellectual property rights ("IPR").
101. LinkBermuda argues that, based on its experience to date, it believes the following amendments (red font and black strikeout) to Clause 15.8 are appropriate and necessary in order for other ICOL holders to efficiently and cost-effectively obtain and deploy third party IPR (content distribution rights) over BCV's network:

15.8 The CP shall obtain all IPR from third parties required for the CP to offer its CP services, and, except as expressly provided herein, BCV shall have no obligation to obtain any such IPR for or on behalf of the CP. Without limiting the generality of the foregoing:

(a) to the extent only that a third party owner of IPR requires BCV to serve in a capacity to protect such owner's interests and/or collect royalty payments on its behalf, then the CP agrees to sign, and to require any End User to sign, any agreement mutually agreed by CP and such required by a third party owner. ~~of applicable IPR to protect the owner's interest in its IPR, In connection with such arrangement CP shall agree including the obligation~~ to reimburse BCV, through BCV's Charges, for any payments for such IPR that BCV pays to the third-party owner of such rights.

(b) With respect to video programming, the CP shall, in advance of offering any such services to End Users by means of BCV's network or equipment, provide BCV with written evidence reasonably sufficient to show that the CP is authorized by the holder of the rights in such programming to distribute it in Bermuda by means of BCV's network or equipment.

(c) BCV agrees not to hinder, obstruct, prevent the CP from obtaining programming distribution rights in Bermuda, including without limitation using its influence or position as a member of the Caribbean Cooperative to delay or prevent the CP from joining that organization as a means of securing access to programming rights in Bermuda.

102. BCV argues that the amendments to this clause suggested by TBI and LinkBermuda are mainly technical in nature and BCV does not agree to limit BCV's exposure to copyright infringement.
103. BCV goes on to argue that Link's proposed subpart (c) addition to Clause 15.8 is unnecessary and a guarantee of endless future contractual disputes. BCV goes on to opine that if it ever sought to act in an anti-competitive fashion, this could and should be taken up with the RA.

#### **4.8.1.1 Interim Determination**

104. We do not see how the modifications Link proposes to Clause 15.8(a) opens up BCV to greater exposure from potential copyright infringement. It appears to us that what Link's language does is to make explicit that, only in those instances where a third party owner of IPR desires to have BCV act as its agent and, in that capacity, to protect said owners IPR and/or collect royalty payments on its behalf, will a CP be obligated to sign (and, if necessary, require its End Users to sign) an agreement mutually agreed upon by the third party IPR owner and the CP and that under this arrangement the CP will agree to pay to BCV any royalty payments that have been agreed upon by the CP and third party IPR owner. Beyond this specific instance, as the language at the beginning of Clause 15.8 states, obtaining IPR from third parties to offer the content the CP wishes to provide is the responsibility of the CP, who then (according to subpart (b) of this clause) has to provide BCV with proof that the CP has proper authorization by the IPR holder to provide that content in Bermuda. It is our opinion that this language, properly adhered to, adequately protects BCV from any potential copyright infringement charges. For these reasons, BCV should modify Clause 15.8(a) in the manner proposed by Link.
105. BCV disagrees with Link's proposed addition of subpart (c) to Clause 15.8 on the grounds that, in BCV's view, such language is "...unnecessary and a guarantee of endless future contractual disputes." BCV goes on to argue that if it ever sought to engage in the type of anti-competitive behaviour described in the proposed Clause 15.8(c), then that type of behaviour can and should be addressed by the RA.
106. We note that as part of the obligation to provide wholesale access service that has been imposed on BCV by the Remedies GD, paragraph 41(e)(iii) stipulates that:

BCV shall not engage in any type of behaviour that has or is likely to have the effect of impeding an Access Seeker's efforts to obtain content resale, retransmission, and/or access rights (or permissions) from a content provider.
107. Given the similarity of this language to that proposed by Link for Clause 15.8(c) we are not convinced that the addition of Clause 15.8(c) will provide Link any more protection than what is being already provided under Remedies GD paragraph 41(e)(iii). BCV is in any event subject to the competition provisions of Part 7 of the RAA. For this reason we decline to order the adoption of Link's proposed subpart (c) to Clause 15.8.
108. In conclusion, BCV should replace the current Clause 15.8(a) of its MAIA with the following:

15.8 The CP shall obtain all IPR from third parties required for the CP to offer CP's services, and, except as expressly provided herein, BCV shall have no obligation to obtain any such IPR for or on behalf of the CP. Without limiting the generality of the foregoing:

(a) To the extent only that a third party owner of IPR requires BCV to serve in a capacity to protect such owner's interests and/or collect royalty payments on its behalf, then the CP agrees to sign, and to require any End User to sign, an agreement mutually agreed by CP and such third party owner. In connection with such arrangement CP shall agree to reimburse BCV, through BCV's Charges, for any payments for such IPR that BCV pays to the third-party owner of such rights.

## 4.9 Clause 16 "REVIEW"

### 4.9.1 Generally

109. TBI argues that any amendments to the agreement during its term should be made by mutual agreement, including RA approval where required. It is not appropriate or workable to have amendments of the agreement resolved by mediation or arbitration.
110. Link argues that in supplier arrangements under which Link acquires a service it is fundamental that Link agree to fixed material terms and conditions upon which it can rely absent changes (a) required by law (e.g., RA regulation) or (b) with its prior written consent. This, in turn, provides it the contractual stability to market and sell services to its End User customers.
111. According to Link, all of the terms and conditions materially impact the provision of service to it and in turn, the company's End User customers. It is therefore critical, Link goes on to assert, that these elements be formalized into a contract that appropriately constrains any unilateral changes by one party that are not otherwise required or permitted by law. To address these concerns Link proposes the following changes to Clause 16.4 (in red font and black strikeout):
- 16.4 "Without prejudice to anything contained in this clause, BCV may amend the Price List or add new charges thereto at any time in its sole discretion, subject to any applicable regulatory obligations, provided that such new charges and/or amendments will (unless regulatory obligations otherwise require) only become effective on the lapse of ~~six (6) weeks~~ **ninety (90) calendar days** from the date on which BCV notified the other Party **in writing** of such amendments and/or new charges; **and in any event BCV may not increase the Charges for a Service during the term of any existing Service Order.**"
112. BCV argues that the suggestions made by Link are based on a misunderstanding of BCV's pricing structure. BCV goes on to point out that it cannot amend the Price List without the prior approval of the RA. BCV states that its prices are regulated and will remain so and goes on to point out that it must provide services at retail less 15% and cannot increase retail prices without RA approval. And so, BCV concludes, CPs are therefore fully protected against unilateral changes in wholesale prices.
113. Furthermore, BCV goes on to argue, if BCV is permitted by the RA to increase its retail rates, thus automatically increasing wholesale rates, it is nonsensical for BCV (before being able to charge the new wholesale rates) to obtain agreement from each CP before being allowed to make the approved change.
114. BCV concludes by stating that if there ever was an issue of any change in pricing, CPs can raise the issue with the RA.

#### 4.9.1.1 Interim Determination

115. In response to the concerns expressed by TBI, our review of the language of this section indicates that it calls for the parties to work together to achieve a mutual agreement concerning any proposed amendments to the agreement proposed by either party. Resolution by mediation or the dispute resolution procedures presented in Clause 12 only becomes necessary as a last resort in the event that a mutual agreement cannot be reached.
116. Concerning the changes proposed by Link, we find that:
- (a) the proposed change to Clause 16.4 from six weeks to 90 days to be reasonable and appropriate as it would bring the language of Clause 16.4 into alignment with the language of Clause 5.2 whose language states that amendments to the price list made by BCV will become effective 90 days after the CP has been notified of said amendments;
  - (b) the proposal that parties be notified in writing of any proposed amendments or changes is currently in the language of 16.4 and so need not be addressed;
  - (c) the proposal that BCV may not increase the charges for a Service during the term of any existing Service Order is overly broad.
117. To begin with, as BCV correctly points out, BCV's SMP wholesale prices are regulated and may not be changed (beyond those inflationary adjustments to price contemplated in the price cap formula at paragraphs 21 through 25 of the Remedies GD) without prior approval from the Authority.
118. The Remedies GD expressly contemplates and allows for<sup>21</sup> an SMP Operator to petition the Authority for permission to increase prices on those retail services subject to the GD's retail price cap obligations if, in the Operator's opinion, the price capped price for a service either does not allow the Operator to recover its historical costs, or does not enable the Operator to earn a reasonable return on its investment. In the event the Authority approves an SMP Operator's petition for a price increase, under paragraph 46(b) of the Remedies GD this price increase must be reflected in the wholesale retail minus avoidable cost price of the equivalent wholesale product or service, within the timeframe established by the Authority.<sup>22</sup>
119. However, we are mindful of the fact that the MAIA under consideration here also applies to products and services, such as basic interconnection service, that are not subject to the retail and wholesale pricing obligations imposed by the Remedies GD and so are not regulated as SMP services by the Authority. The language proposed by Link seems reasonable and standard, when applied to any agreed upon term length for service agreements governing the pricing and delivery of products and services such as these.
120. Additionally, per paragraph 47 of the Remedies GD, "...where volume discounts or loyalty (term) discounts are available, the Retail Minus Avoidable Cost calculation shall apply to the discounted price as long as the Wholesale customer can satisfy the conditions of the discount." Where those conditions involve a commitment by a

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<sup>21</sup> See, for example, paragraph 29.

<sup>22</sup> We should note that any petition for an increase in the price of an SMP Product or service would be reviewed by the RA during the course of a consultation open to participation by all affected parties.

wholesale provider to a long-term contract, the language proposed by Link is also applicable.

121. For the reasons stated above, we find Link's proposed language to the effect that "...BCV may not increase the Charges for a Service during the term of any existing Service Order" to be overly broad. BCV should adopt Link's proposed text for Clause 16.4 but in modified form so as to:

- (a) allow for any price increases that are permissible under the Remedies GD;
- (b) ensure that BCV may not unilaterally increase prices on any products and services not subject to the retail and wholesale pricing obligations imposed by the Remedies GD, such as basic interconnection service, during the term of any existing service order governing the provisioning of said products and services; and
- (c) ensure that BCV may not unilaterally increase prices on any products and services being provided on a volume or loyalty discounted basis under a long-term contract during the term of that contract.

122. In conclusion, BCV should therefore modify Clause 16.4 of its MAIA such that:

- (a) the phrase "lapse of six (6) weeks" is changed to read "lapse of ninety (90) calendar days";
- (b) the modifications ordered in paragraph 121, above, are made and added to the clause.

#### **4.10 Clause 18 "LIMITATION OF LIABILITY"**

##### **4.10.1 Clause 18.8 / 18.3**

123. According to TBI, the limitations of liability expressed in Clause 18 (particularly limiting the BCV liability to three months service payments) means that effectively there is little real economic consequence to BCV of a breach of the agreement. This does not seem to be reasonable or consistent with the interconnection requirements. So, TBI goes on to argue, if breaches of the agreement by BCV resulted in the loss of customers to TBI, or the solicitation by BCV of customers of TBI, TBI's rights to claim compensation should not be unreasonably limited.

124. LinkBermuda states that, save for breach of confidentiality obligations, it fully agrees with BCV that a "reasonable limitation of monetary liability is essential in a contract of this sort." Link's disagreement lies in the application of this principle. Link argues that, in place of the differentiated Limitation of Liability ("LOL") caps proposed by BCV for Clause 18.2, there should only be one such cap that applies equally regardless of the offending party and whether Service is actually provided and this cap should be high enough to serve as a disincentive to cause harm or damage. Link goes on to assert that, in its opinion, a LOL cap is not appropriate in the context of any harm caused by a breach of Clause 14 Confidential Information (e.g., CP's End User customer Information). According to Link, their proposed exemption of Clause 14 breaches is similar to and consistent with BCV's desire to exempt breaches of Clause 15 Intellectual Property Rights from the LOL cap. Accordingly, Link proposes the following changes to Clauses 18.2, 18.3 and 18.5:

18.2 **Save for breach of Clauses 14 and 15 as per Clause 18.5 below,**  
Unless this MIA expressly states otherwise, either Party's liability to the

other under or in connection with a breach of this MIA for direct loss or damage arising from any one incident or series of connected incidents is limited to:

- (a) \$1 million for loss of, or, damage to physical property; and
- (b) **The greater of:**
  - i. Amounts due under this MIA, ~~if the liable Party is the CP; and~~
  - ii. An amount equal to the most recent three (3) months' payments made by the CP to BCV hereunder; ~~and, if the liable Party is BCV.~~
  - iii. **\$100,000.**

18.3 Neither Party shall be liable to the other, (whether in contract, tort, under statute, misrepresentation or otherwise (including in each case negligence) and whether or not the Party concerned was advised in advance of the possibility of such loss or damage), for:

(a) any of the following types of loss or damage whether direct, indirect or consequential howsoever arising under or in relation to this MIA or any part of it: loss of profit, loss of revenue, anticipated savings, opportunity, business, business interruption, loss of contracts, liability to third parties, goodwill or wasted expenditure, except to the extent permitted by Clause 18.2(b) or

(b) any indirect or consequential loss or damage whatsoever.”

18.5 “The limitations of liability set out in this clause shall not apply in respect of claims brought under clauses 14 and 15.

#### 4.10.1.1 Interim Determination

125. The modifications proposed by Link to the language of Clauses 18.2, 18.3 and 18.5 are reasonable and appropriate. We can think of no compelling reason why there should be two different LOL caps; one applicable to BCV and another one applicable to the CP. It makes more sense to have only one such cap that is applied equally to an offending party, regardless of whom that offending party might be. Furthermore, we agree with Link that any harm which may potentially arise from a breach of Clause 14 could be just as damaging to a CP as the potential harm that could arise from a breach of Clause 15 could be to BCV and so should be similarly exempt from the Limited Liability cap. Finally, we believe the modifications proposed by Link would also serve to alleviate the concerns expressed by TBI on this matter.

126. For the reasons stated above we hereby direct BCV to replace the current versions of Clauses 18.2, 18.3 and 18.5 in the MAIA with the following:

18.2 Save for breach of Clauses 14 and 15 as per Clause 18.5 below, unless this MAIA expressly states otherwise, either Party's liability to the other under or in connection with a breach of this MAIA for direct loss or damage arising from any one incident or series of connected incidents is limited to:

- (a) \$1 million for loss of, or, damage to physical property; and
- (b) The greater of:
  - i. Amounts due under this MAIA; and

- ii. An amount equal to the most recent three (3) months' payments made by the CP to BCV hereunder; and
- iii. \$100,000.

18.3 Neither Party shall be liable to the other, (whether in contract, tort, under statute, misrepresentation or otherwise (including in each case negligence) and whether or not the Party concerned was advised in advance of the possibility of such loss or damage), for:

- (a) any of the following types of loss or damage whether direct, indirect or consequential howsoever arising under or in relation to this MAIA or any part of it: loss of profit, loss of revenue, anticipated savings, opportunity, business, business interruption, loss of contracts, liability to third parties, goodwill or wasted expenditure, except to the extent permitted by Clause 18.2(b) or
- (b) any indirect or consequential loss or damage whatsoever.

18.5 The limitations of liability set out in this clause shall not apply in respect of claims brought under clauses 14 and 15.

#### **4.10.2 Clause 18.7**

127. TBI asks that the language of Clause 18.7 be clarified in a manner that makes it clear that TBI is not required to insure against defaults by BCV.

##### **4.10.2.1 Interim Determination**

128. We agree with TBI that the language of this clause requires greater clarification. To that end BCV should modify the language of Clause 18.7 in a manner that makes it clear that a CP is not required to obtain insurance to protect against defaults by BCV.

#### **4.11 Clause 19 "ASSIGNMENT"**

##### **4.11.1 Generally**

- 129. TBI argues that there should be no possibility of assignment of the agreement by either party, without consent and that either party should be entitled to withhold that consent.
- 130. BDC suggests that the concluding language of Clause 19.1 should be changed to say "...without the prior written consent of the other party, which consent shall not be **unreasonably** withheld."

##### **4.11.1.1 Interim Determination**

- 131. We agree with BDC's suggestion regarding their proposed change to the concluding language of Clause 19.1 and assume that the word "reasonably" was a typographical error. Accordingly, BCV should modify the concluding language of Clause 19.1 to read "...without the prior written consent of the other party, which consent shall not be unreasonably withheld."
- 132. The concerns expressed by TBI appear to be addressed by Clause 19.1, which states that "...no rights, benefits or obligations under this agreement may be

assigned, sub-contracted or transferred, in whole or in part, by a Party without the prior written consent of the other Party...”.

#### **4.12 Clause 21 “WORKS & EQUIPMENT”**

##### **4.12.1 Generally**

133. TBI argues that the provisions of Clause 21 should be reciprocal and apply equally to TBI’s equipment.

##### **4.12.2 Interim Determination**

134. There does not appear to be a sound basis that the provisions of Clause 21 should be reciprocal. Much of the language of Clause 21 appears to assume that BCV would, on a CP’s behalf, be installing equipment owned by BCV, which equipment would then be used by the CP to provide End User services via one or more of BCV’s wholesale product and service offerings. If a CP chooses to utilize its own equipment to provide these services then, presumably, it would utilize its own personnel to install and maintain that equipment, or contract that work to another party of its choosing.

135. In the event a CP chooses to contract with BCV to install and maintain the CP’s own equipment, it appears that the language of Clause 21.9 provides adequate protection for that equipment.

136. We therefore decline to require the provisions of Clause 21 to be made reciprocal and equally applicable to a CP’s equipment.

137. We do believe, however, that Clause 21 would be strengthened by the addition of a “no disparagement” clause requiring BCV personnel to explain clearly on whose behalf they are working (the CP’s) and committing that such personnel should be trained and instructed not make any disparaging remarks about the CP as a competitor or supplier. BCV should include add language to this effect to Clause 21.7 as subpart (d) of that clause.

##### **4.12.3 Clause 21.4**

138. BDC asserts, in relation to the language of Clause 21.4, that it is unfair of BCV to require CPs to pay a 10% premium on the replacement cost of any damaged BCV equipment.

##### **4.12.3.1 Interim Determination**

139. BDC’s assertion here appears to stem from a misreading of the language of Clause 21.4, which states that a CP must compensate BCV’s equipment costs when it is replaced or repaired at an unusually high rate. This “unusually high rate” is defined as follows: any BCV Equipment in the possession of an End User that is repaired or replaced at a rate that is 10% greater than the average repair and replacement rate of that same equipment for BCV’s own retail customers shall be deemed to be an unusually high rate of repair and replacement.

140. Greater clarity would, however, be helpful in regard to BCV’s definition of what constitutes an “unusually high rate” of equipment replacement or repair. It is unclear what the term “rate” as used by BCV in the definition means, and this should be

clarified. Additionally, BCV should also include in this clause more detail concerning how the 10% above average benchmark value will be calculated.

141. In conclusion, BCV should modify Clause 21.4 in a manner that addresses the concerns expressed in the preceding paragraph.

#### **4.12.4 Clause 21.3 / 21.9**

142. TBI argues that, with respect to the language of Clauses 21.3 through 21.9, it would only be appropriate for TBI to take responsibility for damage to BCV equipment at an End User's home to the extent that it is agreed that TBI will have sole control over the End-User relationship.

##### **4.12.4.1 Interim Determination**

143. Nothing in the language of Clauses 21.3 through 21.9 suggests that the access seeker would be responsible where it does not have sole control over the customer relationship, in the circumstances to which Clauses 21.3 through 21.9 apply. Therefore, no change is required.

#### **4.13 Clause 24 "AMENDMENTS"**

##### **4.13.1 Clause 24.2**

144. BDC disagrees with the language of Clause 24.2 enabling BCV to amend the agreement, if directed to do so by the RA, without BDC's consent. BDC argues that it should be given the opportunity to consent to any amendment, or terminate without penalty.

##### **4.13.1.1 Interim Determination**

145. The language of Clause 24.2 relates only to those instances in which the RA expressly instructs BCV to modify the MAIA. The circumstances under which the RA would require modifications to BCV's MAIA are strictly governed by the Remedies GD and, in the majority of cases, require the Authority to seek comments from any parties that may be affected by the modifications being proposed. However, in the interests of clarity, and to avoid confusion, BCV should modify the language of Clause 24.2 to make this clearer. Clause 24.3 also should be modified to ensure that any changes concerning SMP products are made available to all eligible CPs on a non-discriminatory basis in conformity with the Remedies GD and the ECA.
146. For the reasons set forth in paragraph 19 above, the Authority is of the view that the MAIA should make clear that either party may request the Authority to consider the need for a material modification of any material provision of the MAIA that comes to light after the Authority issues its Final Decision and Order.
147. To these ends, BCV should replace Clauses 24.2 and 24.3 with the following:

*24.2 BCV may amend this MAIA without the CP's consent if directed to do so by the Regulatory Authority, following appropriate consultation with all stakeholders and any notice period shall be as directed by the RA or, if no notice period is directed such period shall be no less than 30 days. For the avoidance of doubt, either party may at any time request the RA to consider the need for a proposed modification to the MAIA if the*

*proposed change is material to the commercial arrangements between the parties.*

*24.3 Nothing in this Clause prevents BCV from offering optional improvements or optional modifications to the Service provided that (1) any modification to an SMP service provided under the MAIA are made available to all eligible CP's on non-discriminatory basis, and (2) the CP has no obligation to accept any optional improvement or modification and the CP incurs no additional cost or degradation of Service as a result of rejecting such improvement or modification.*

148. The parties are reminded that the A&I Agreement executed by the parties in conformity with the MAIA must conform to ECA Section 24(3), which requires such agreements to be filed with the RA within three business days of execution by the parties. The RA then has 60 days within which to review the agreement and notify the parties of any objections it may have. BCV should include language to this effect in the MAIA.

#### **4.14 Annex 2 Clause 4 “PAYMENT”**

##### **4.14.1 Clause 4.2**

149. TBI argues, in reference to Clause 4.2, that it is not reasonable to ask TBI to waive rights to challenge invoices under an arbitrary level.

##### **4.14.1.1 Interim Determination**

150. The concern expressed by TBI appears to be in regards to the language contained in subpart (a) of Clause 4.2. In our opinion, even when read in context with the language preceding it, the language of subpart(a) may be interpreted as suggesting that any dispute involving “a sum less than \$25,000 and less than 5 per cent of the total amount of the relevant invoice...” would no longer be considered in dispute once the total amount invoiced is paid on the Due Date as stipulated.
151. BCV should modify the language of Clause 4.2(a) to make it clear that the action called for in this section does not constitute a waiver of a CP's rights to continue seeking resolution of any disputed invoice involving an amount whose sum is sum less than \$25,000 and less than five per cent of the total amount of the relevant invoice.

#### **4.15 Annex 2 - Clause 5 “DISPUTES”**

152. As noted above, ECA Section 24(3)(b), together with RAA Section 58, establishes the Authority as the competent authority in the first instance to resolve any disputes relating to an access and interconnection agreement to which an SMP operator is a party, and the independent arbitration of disputes between the parties to any such agreement is prohibited by ECA Section 24(3)(b). This includes billing disputes relating to SMP services.
153. BCV therefore should replace Clause 5 in Annex 2 in its entirety with the following:

*5.1 Each Party shall use its reasonable endeavours to resolve disputes with the other. If either Party (“the disputing Party”) disputes the accuracy of an invoice delivered under this MAIA the disputing Party shall, as soon*

*as practicable, notify in writing the other Party's billing liaison contact of the nature and extent of the problem. If the problem remains unresolved on the last but one Working Day before the date when the relevant invoice is due for payment, the disputing Party may invoke the formal billing dispute procedures set out in clause 5.2 by written notification to the other, such notification to be given not later than five Working Days after the Due Date of the relevant invoice. Notwithstanding the foregoing a Party may by written notice raise a dispute regarding any invoice delivered under this MAIA at any time following five (5) Working Days after the Due Date, save that no such notice shall be given more than 24 months after the date of the relevant invoice. In either event, a "Billing Dispute." The disputing Party shall include with such notice all details reasonably necessary to substantiate its claim, which details shall be reasonably capable of being verified by the other Party.*

*5.2 Following a notification made under clause 5.1 that either Party wishes to invoke the formal billing dispute procedures, the Parties shall consult and endeavour to resolve the dispute at level 1 of consultation and if agreement cannot be reached within 15 Working Days, shall escalate the disagreement to level 2. If agreement cannot be reached within 10 Working Days at level 2, the matter shall be escalated to level 3. Each Party shall inform the other in writing of the name of its representative at each level of consultation. Subject to clause 5.7, each Party shall use the above dispute resolution procedure for any dispute under this Annex to the fullest extent to try to resolve such dispute. The Parties may agree in writing to extend the above timescales.*

*5.3 Notwithstanding the provisions of clause 5.1, if the Parties fail to resolve any dispute within three months following notification of the Billing Dispute, and if the dispute relates to the accurate assessment of charges involving SMP services in accordance with the terms of this MAIA rather than the interpretation or meaning of such terms (in which case the dispute resolution provisions of clause 12 will apply), either Party may (by written notice to the other to such effect) refer the dispute for investigation and resolution by the RA. The Parties shall co-operate in such investigation and, if any sums are found to be due or overpaid in respect of the disputed invoice such sum shall be paid or refunded (with interest payable or paid as applicable under this Annex), as the case may be, within ten (10) Working Days from the date of resolution or earlier settlement between the Parties.*

*5.4 Any administrative charges payable to the RA for costs incurred in resolving the dispute shall be shared equally by the Parties unless the RA determines otherwise.*

*5.5 [reserved]*

*5.6 The above procedures are without prejudice to any other rights and remedies that may be available in respect of any breach of any provision of this MAIA.*

*5.7 For avoidance of doubt, the parties agree that CP's obligation to pay invoices from BCV shall not be affected by, or in any way whatsoever contingent upon, the receipt by CP of payments from its own End Users*

*except in cases where the failure of the End User to pay is directly related to a service outage or other service problem for which BCV is directly responsible. The parties otherwise agree that failure for any reason by CP to collect funds from its End Users sufficient to pay invoices from BCV, in whole or in part, shall not constitute a permissible basis for CP to dispute any invoices that CP receives from BCV under this MAIA provided that BCV provides Billing Information reasonably sufficient to enable CP to accurately charge its End Users in connection with Services provided to CP in accordance with this MAIA.*

154. In the event a dispute subject to the provisions of Clause 5 reaches the stage where it is referred to the Authority per Clause 5.3, the Authority will consider appointing a chartered accountant as the presiding officer to resolve the dispute. If BCV is of the view that there may be a significant number of billing disputes under these agreements that do not involve any SMP services, the resolution of disputes by expert arbitration of such disputes may be provided for.

#### **4.15.1 Clause 5.4**

155. TBI argues that it is not appropriate for it to pay all dispute resolution costs in the circumstances provided here. TBI proposes that the costs associated with dispute resolution should be recovered from each of the parties based on the determination of the expert.

##### **4.15.1.1 Interim Determination**

156. TBI's objections concerning this matter are addressed by Clause 5.4 of the modified Clause 5, as set forth above.

#### **4.15.2 Clause 5.8**

157. TBI argues that Clause 5.8 should not apply where the failure to collect from a retail customer was caused by a service default by BCV.

##### **4.15.2.1 Interim Determination**

158. TBI's objections concerning this matter are addressed by Clause 5.7 of the modified changes to Clause 5, as set forth above.

#### **4.16 Annex 3A - Clause 2 "Service Description"**

##### **4.16.1 Generally**

159. TBI argues that the references to "customers conveniently making telephone calls to each other" in paragraph 2.1 is not relevant and should be deleted.

##### **4.16.1.1 Interim Determination**

160. The reference to "customers conveniently making telephone calls to each other" in paragraph 2.1 appears to be relevant to the subject matter of this Clause. As this phrasing does not appear to cause any disadvantage to a CP, we decline to require modification of this provision.

#### **4.17 Annex 3A - Clause 3 “Service Constraints”**

##### **4.17.1 Clause 3.1 / 3.2**

161. In Clause 3.2, TBI argues that BCV should commit to use all reasonable efforts to resolve any technical limitations to interconnection.

##### **4.17.1.1 Interim Determination**

162. The language proposed by TBI for inclusion in Clause 3.2 appears to be more germane to Clause 3.1. Given that Clause 3.1 applies equally to both parties to the A&I Agreement, TBI's proposed modification should apply equally to both parties to the Agreement. Accordingly, BCV should modify the language of Clause 3.1 to include the following text: *“...the Parties will advise each other of any limitations affecting the provision of Interconnection and shall work together to resolve those limitations, if such resolution is technically possible and reasonably feasible.”*

#### **4.18 Annex 3B (2.4)**

##### **4.18.1 Interim Determination**

163. During the course of its review of BCV's MAIA, the Authority has discovered a discrepancy between the service description provided in Clause 2.4 and the language of the Remedies GD paragraphs 41(b) and 41(c).

164. Currently Clause 2.4 states that wholesale data services are only available to customers outside the City of Hamilton. The Remedies GD paragraphs cited above obligate BCV to make this service available on a wholesale basis to residential and business customers outside of Hamilton, and to residential customers only within the City of Hamilton. BCV should modify Clause 2.4 accordingly.

#### **4.19 Annex 3A and 3B**

165. During the course of its review of BCV's MAIA, the Authority has discovered a discrepancy between the terms of interconnection offered in Annexes 3A (Section's 2.2 and 2.3) and 3B (Section's 2.1 and 2.3) of the MAIA and those available under some of BCV's existing A&I Agreements.

166. Under the proposed MAIA the point of interconnection between BCV and a CP is limited to In-Building Handover (IBH) to a CP's Point of Presence (POP) located in a nominated BCV building. However, under some of BCV's existing A&I Agreements BCV permits the point of interconnection to be located at a CP's POP located in a building designated by the CP.

##### **4.19.1 Interim Determination**

167. Remedies GD paragraph 65(c) requires BCV to incorporate into the MAIA the most favourable terms and conditions available under any corresponding A&I Agreements entered into prior to the effective date of the Remedies GD. Accordingly, BCV should modify Annexes 3A (Section's 2.2 and 2.3) and 3B (Section's 2.1 and 2.3) of the MAIA to allow a CP the option of choosing a Point of Handover that is different from the In-Building Handover required in these Annexes.

## **4.20 Annex 3C - Clause 2 “Service Description”**

### **4.20.1 Clause 2.1**

168. TBI argues that it is not appropriate to include the limitation in relation to IPTV services in the context of this interconnection agreement.

#### **4.20.1.1 Interim Determination**

169. The Remedies GD (paragraph 41(e)) states that for “...the Wholesale market for the transmission facilities used to deliver Subscription Television Services to End-Users...” (the subject of Annex 3C), BCV is required to supply only “...a Wholesale resale service....that is fit for the purpose of replicating (in content and quality of service) the Retail Subscription Television Services made available by BCV via its various Retail Subscription Television Service tier offerings.” Therefore, no modification is required.

170. However, the Authority notes that the text of the Remedies GD cited above requires BCV to replicate at the wholesale level any network or systems modifications it makes to facilitate its own provision of retail video service offerings including IPTV.

## **4.21 Product Handbook**

### **4.21.1 Generally—The Product Handbook itself**

171. Before consideration is given to the specific concerns listed by LinkBermuda<sup>23</sup> in regards to BCV’s Product Handbook, the Authority needs to determine how this Handbook, and its contents should be treated in the context of the MAIA. In their comments Link and other parties argue that the Handbook ought to be included as an Annex to the MAIA.

172. BCV, in its Position Paper on outstanding issues, argued against this position on the grounds that:

- (a) The Product Handbook is a handbook, a technical document/ guide to be used by technical personnel.
- (b) It must also be subject to revision as technology or processes change - otherwise, whenever a technical change needs to be made, BCV must negotiate a formal contractual amendment with multiple CPs.
- (c) The Draft MAIA has been modified (Clauses 2.6 and 16.3) to provide that, while remaining a non-contractual document, no amendment to the Product Handbook will be effective unless approved by the RA.

173. While the Authority recognizes, and applauds, BCV’s conciliatory behaviour in this regard, the fact remains, as pointed out by Link in its comments, that many of the terms and conditions set out in BCV’s Product Handbook should form an integral part of the final MAIA. Included in this list of material terms and conditions are the following matters, most of which the RA expressly mandated for inclusion in the MAIA under Section 5.1.1, paragraph 65 (a) and (b) of the SMP Order:

- (a) Technical access and interconnection terms

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<sup>23</sup> Link is the only party to have voiced objections to specific sections of the Handbook.

- (b) Forecasting requirements
- (c) Provisioning requirements
- (d) Network alterations and maintenance
- (e) Fault Reporting
- (f) Performance and Service Level Commitments ("SLAs").

#### **4.21.1.1 Interim Determination**

174. Because the Product Handbook incorporates material provisions that should be covered in the MAIA itself, BCV's argument against its inclusion on the grounds that it is merely a technical document is not persuasive. To begin with, all the MAIA Annex 3 Product Schedules having to do with those wholesale products that BCV is obligated to provide in accordance with the Remedies GD constantly refer a CP to the Product Handbook for information on key matters such as the process to follow in reporting faults and service problems on BCV's network, operational procedures for the provision and maintenance of in-building handover Links, and service restoration procedures. Furthermore, our review of the Handbook itself has persuaded us that the majority of the information contained in it is directly related to the requirements stipulated by paragraph 65 (a) and (b) for inclusion in the MAIA.
175. Accordingly, BCV should modify Clause 2.6 to provide that all terms and conditions of the Product Handbook are incorporated by reference in the MAIA, and that if there is any inconsistency between the two, the MAIA shall prevail.
176. Additionally, BCV should modify the MAIA such that copies of all sections relating to Service Level Agreements and associated Service Level Credits appearing in the Product Handbook also appear in the MAIA.

#### **4.21.2 Product Handbook—Specific Sections**

##### **4.21.2.1 Product Handbook—Missing Diagrams**

177. LinkBermuda states that it reserves comment on all applicable sections pending receipt of a draft inclusive of the missing diagrams.

##### **4.21.2.1.1 Interim Determination**

178. Concerning the missing diagrams referenced by Link, our review of the Product Handbook posted by BCV on 27 September found that the Handbook contained no missing diagrams.

##### **4.21.2.2 Product Handbook—Forecasting (Section 5)**

179. LinkBermuda argues that an initial forecast per interconnection followed by annual forecasts are appropriate and anything shorter (e.g., quarterly) is unnecessarily burdensome. Link goes on to point out that annual forecasts were accepted by BCV in Annexes 3A and 3B.

##### **4.21.2.2.1 Interim Determination**

180. Link's assertion that annual forecasts were accepted by BCV in Annexes 3A and 3B of the MAIA suggests to us that annual capacity forecasts are not unacceptable to BCV. Accordingly BCV should modify the forecasting requirements of Section 5 of

the Handbook to conform to the forecasting requirements appearing in Annexes 3A and 3B of its MAIA.

#### 4.21.2.3 Product Handbook—Provisioning Guidelines (Section 6.1)

181. Link proposed extensive and very detailed modifications to this section. In support of these Link states that, while the steps depicted in the Table appearing at Section 6.1 are agreeable the lead times stated appearing there are not commercially reasonable. As an alternative Link proposes the following:

Acknowledgements should be within 1-2 business days.

##### **Scenario 1:**

If there is an existing interconnect suitable for the service being offered, and there is an active BCV service at the location in question – we would expect no more than 5 days for installation of service.

##### **Scenario 2:**

If there is an existing interconnect suitable for the service being offered, and there is no active BCV service at the location in question but there is a BCV facility existing at the premise - we would expect no more than 10 days for installation of service.

##### **Scenario 3:**

If there is an existing interconnect suitable for the service being offered, and there is no BCV service or facility at the location in question - we would expect there to be a pre-sales assessment with a response with committed RFS date within 5 business days.

##### **Scenario 4:**

New Interconnection required (standard interface type) - forecast and with fibre facilities available from initial build out. Lead time should be no longer than 30 days RFS date should be confirmed within 5 days of order.

##### **Scenario 5:**

New Interconnection required (standard interface type) - not forecast but with fibre facilities available from initial build out. Lead time should be no longer than 60 days. RFS date should be confirmed within 10 days of order.

##### **Scenario 6:**

New Interconnection request (standard interface type) - not forecast and new fibre facilities required. Acknowledgement within 5 business days. Joint planning session within 10 business days. RFS to be agreed at that point. Assuming reasonable interconnection points - should be no longer than 90 days.

182. BCV, in an *ex parte* exchange with the Authority concerning the above proposal made by Link, replied as follows:

Concerning Scenarios 1 and 2, BCV accepts Link's request for change, but it must be understood that BCV has no understanding of what the take rates for their products and services will be from the community, and timetables could be shifted above 5 days due to possible brisk sales in the initial term.

Concerning Scenarios 3 through 4, BCV states that for the vast majority of cases, all that should be required, in terms of work, will be a cable drop. For simple cable drops, the service level will be 5 business days. However, this assumes that all that is required is a cable drop. The Price List sets out the cost for such simple installs.

If work over and beyond a simple install is required, then this is not covered by the Price List. Thus, a capital investment will be required and BCV will need to meet the Access Seeker to discuss their requirements, with such discussions taking place in the context of Technical Group meetings to communicate the capital cost of installing such infrastructure or facilities with payment required in advance.

It should be noted also that it is not possible to predict what the result of such discussions would be - since we do not know the magnitude of the capital project and whether such projects are financially viable.

183. It is our understanding that Link's proposal in paragraph 181, above, were made in response to the assertion made by BCV in Step 5(i) of the Table of Provisioning Guidelines appearing in Section 6.1 of the Handbook, to the effect that "In the case of any Service contemplated, except the provisioning of an Interconnection Link..." implementation of a service request will require 35 working days from the date on which BCV receives the finalized written order for service as depicted in Step 4 of the Table.

#### **4.21.2.3.1 Interim Determination**

184. The Authority agrees that the lead times for service provisioning for the scenarios presented in paragraph 181, above, are more reasonable than the 35 working days proposed by BCV for the provisioning of any Service aside from that of an Interconnection Link. However, we find that the concerns and caveats expressed by BCV regarding the various circumstances and conditions that could render service provisioning within the scope of the proposed lead times difficult to impossible are also reasonable and should be considered in the development of the provisioning guidelines for any and all services delivered under the scenarios depicted in paragraph 181, above.
185. For the reasons stated above BCV should amend the Table appearing at Section 6.1 of the Product Handbook such that the service provisioning scenarios and proposed lead times depicted at paragraph 181, above are included as part of that Table. BCV may, in the course of making these modifications, incorporate language concerning those terms and conditions under which delays in service provisioning within the proposed lead times would be considered reasonable and so not actionable.

**4.21.2.4 Product Handbook—Service Credits (Section 7.5.1.2)**

- 186. Link argues that the service credits established by BCV in this section of the Handbook are too low at the upper level of cumulative service outage time.
- 187. BCV argues that the current level of service credits contained in the Handbook are sufficient to meet the RA’s requirements in respect of service quality.

**4.21.2.4.1 Interim Determination**

- 188. Our comparison of the service credit levels contained in the tables presented in Section 7.5.1.2 against published benchmarks indicates that, for the higher levels of cumulative outage times, the service credits are too low and should be adjusted upward. However, we are not persuaded that they need to be as high as those suggested by Link. Accordingly, BCV should make the adjustments contained in the tables below (recommended changes are depicted in red) to these tables:

Wholesale IP Ethernet	
Cumulative Service Outage Time (in hrs : mins : secs)	Service Level Credit HFC System
00:00:01 – 00:45:00	No credit
00:45:01 – 04:00:00	5%
04:00:01 – 08:00:00	10%
08:00:01 – 12:00:00	15%
12:00:01 or more	<del>25%</del> 20%

Wholesale IP Ethernet	
Cumulative Service Outage Time (in hrs : mins : secs)	Service Level Credit Fibre only System
00:00:01 – 00:01:00	No credit
00:01:01 – 02:00:00	5%
02:00:01 – 08:00:00	10%
08:00:01 – 12:00:00	<del>20%</del> 15
12:00:01 or more	<del>40%</del> 20

Wholesale IP Ethernet	
Packet Delivery	Service Level Credit
99.5 – 99.949%	No credit
99 – 99.49%	<del>15%</del> 10%
98.99 or less	<del>20%</del> 15%

- 189. In addition, BCV should provide greater clarification as to just what charge the Service Level Credit percentages depicted in the tables above will be applied to and the manner in which they will be applied. For example, are these Service Level Credits to be applied to a CP’s monthly rental fee on a prorated basis, or to some other charge and in a different manner?

**4.21.2.5 Product Handbook—Service Credits (Generally)**

- 190. Among the items that the RA expressly mandated for inclusion in the MAIA under Section 5.1.1, paragraph 65 (b) of the SMP Order are appropriate service level

guarantees supported by penalties that will be paid to the aggrieved party for failure to meet the established guarantees.

191. The Authority has been surprised at the lack of these penalties in BCV's MAIA and Product Handbook in regards to the following two important items: (1) failure to provision a service within the time frames established for the provisioning of that service; and (2) failure to provide repairs within the time frames established for service related repairs. The Authority finds itself even more surprised that no party to these proceedings has commented on this issue.
192. Our review of A&I Agreement from other jurisdictions suggests to us that the inclusion of penalties for these two items is considered standard and their absence from BCV's MAIA is a source of serious concern to us. An example of the types of penalties imposed for late provisioning and late repair is presented below as something for the parties to consider when it comes time to comment on the revised MAIA that BCV will submit in response to this Decision:

**Table 1: Late Provisioning Penalties<sup>24</sup>**

Number of Working Days beyond Contractual Delivery Date	Amount = Percentage of Connection Charge for the circuit to be credited to the CP
1-10	5%
11-15	10%
16-20	15%
More than 20	20%

**Table 2: Late Repair Penalties**

Number of eligible failures in a year (12 months cycle) in the circuit	Amount = Percentage of annual rental for the circuit to be credited to the CP
1-3	10%
4	25%
5	50%
6 or more	100%

#### **4.21.2.6 Product Handbook—Service Credit Exclusions (Section 7.7)**

193. This section has to do with the list of items that BCV believes ought to be excluded from any measurement calculations of Service Outages or other levels of service level deficits. Concerning this section Link states that it reaffirms its previously recommended changes.
194. Our comparison of the changes recommended by Link in their marked-up version of BCV's earlier Handbook to the language contained in the current version indicates that only one of Link's recommended changes was not accepted by BCV: the recommendation that *Item 7.7.7—Trouble tickets associated within 30 days of a*

<sup>24</sup> The tables presented here are taken from: *BT Master Services Agreement For The Provision Of Products & Services Service Schedule: Ethernet Multi-Service Interconnect Links (MSIL) Appendix 4: Service Level Agreement.*

*New Installation* be removed from the list of excluded items depicted in Section 7.7. BCV provided no reason for declining to remove this item.

#### **4.21.2.6.1 Interim Determination**

195. In our opinion, for a CP just entering a new market, any troubles associated with New Installations arguably carries considerable risk. For this reason, BCV should remove Item 7.7.7—*Trouble tickets associated within 30 days of a New Installation* from the list of excluded items and measurements associated with this type of activity should be integrated into the measurement calculations associated with Service Outages or other levels of service deficits in the Product Handbook's credit structure associated with service level commitments.

## **5 INTERIM DECISION AND ORDER**

196. In accordance with RAA Section 63(1)(d) and Section 5.1.1 of the Remedies GD, BCV shall revise the Draft MAIA to conform to the requirements set out in this Interim Decision and Order and deliver a copy of the Compliance MAIA to the Authority (a clean version along with a comparison against the Draft MAIA) no later than 5:00 p.m. on 8 November 2013.
197. Interested parties will have until 5:00 p.m. on 15 November 2013 to file any remaining “fatal flaw” objections concerning the Compliance MAIA. Parties shall confine their Compliance Comments to the Compliance MAIA's conformity with this Interim Decision and Order and should address those aspects of the Compliance MAIA that, in their view, would seriously hamper competitive entry by a wholesale access provider, would be detrimental to the public interest, or are in contravention of the RAA, ECA, or the Remedies GD.
198. This Interim Decision and Order shall become effective on the date set forth below.
199. So ordered this 1<sup>st</sup> day of November 2013.