



BERMUDA
**REGULATORY
AUTHORITY**

**Bermuda Telephone Company
Model Access and
Interconnection Agreement**

Interim Decision and Order

Matter: AI-1044

Date: 12 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 “Access and Interconnection Agreement” proposed by Bermuda Telephone Company (“BTC”) and submitted to the RA on 21 October 2013 (the “Draft MAIA”), in response to the Authority’s General Determination on Obligations for Operators with Significant Market Power, RM01/13-1040 (“Remedies GD” or “SMP Order”).¹
2. The Authority acknowledges the efforts expended thus far by BTC and potential Access Seekers to develop a draft Model Access and Interconnection Agreement (“MAIA”).² The Authority has reviewed the comments and objections raised by potential Access Seekers as well as the position paper submitted by BTC on 21 October 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”),³ the Authority has determined that the Draft MAIA submitted by BTC is deficient in material respects and falls short of compliance with the requirements set out in the Remedies GD.
3. As a result, 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 BTC a reasonable amount of time in which to develop the required terms and conditions of the MAIA in conformity with the Authority’s Interim Decision and Order. It is also intended to provide potential Access Seekers an opportunity to review BTC’s further revisions to the MAIA and provide any “fatal flaw” comments before the Authority issues a 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 concerning the unresolved issues that have been identified by the Authority and interested parties relating to the Draft MAIA. In particular, it identifies those relevant Wholesale services that the Draft MAIA produced by BTC either has not addressed or has failed to cover in adequate detail. It also addresses the key concerns raised by interested parties.
5. The Authority notes that the proposed MAIA requires considerable work and that there are a number of important outstanding issues that can and should be resolved – or at least narrowed -- through discussions between the parties. This will require all sides to work together to identify and negotiate the resolution of priority issues that must be resolved in the near term in order to enable Access Seekers to make effective use of BTC’s wholesale services without further delay. The Authority stands ready to assist the parties through informal mediation as necessary.

¹ The Remedies GD was issued on 7 August 2013 and took effect on 28 August 2013.

² The Authority notes that BTC has referred to the MAIA as an “Access and 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, it 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 template adopted by BTC should be entitled and referenced accordingly, whereas the bilateral agreements between the parties are referred to herein as “A&I Agreements”.

³ 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.

6. The Authority is aware that any further delays in the model access and interconnection ("A&I") approval process, or implementation of the actual A&I Agreements thereafter, will be harmful to both Access Seekers and the consumers of Bermuda. The Authority therefore strongly encourages BTC to cooperate fully with potential Access Seekers and devote the resources necessary to improve its proposal and develop an MAIA template that is complete and fully in line with the Remedies GD, as set forth in this Interim Decision and Order.

2 PROCEDURAL HISTORY

2.1 Background

7. On 6 October 2009, the then Ministry of Energy, Telecommunications, and E-Commerce ("METEC") issued a Consultation paper on "Access and Interconnection in Bermuda".⁴
8. On 28 January 2012, the Regulatory Authority issued the following consultation documents:
 - (a) "Market Review Process (Part A) - Market Definition"⁵ released 8 February 2012; and
 - (b) "Market Review Process (Part B) - Significant Market Power"⁶ released 8 February 2012.
9. 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";⁷ and
 - (b) "Market Review Process (Part B) – Significant Market Power".⁸
10. 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.⁹
11. On 21 June 2013, written responses to the Initial Remedies Consultation were provided by various parties.¹⁰ The Regulatory Authority posted these responses on its website.¹¹

⁴ See

http://www.gov.bm/portal/server.pt/gateway/PTARGS_0_2_7286_330_1813_43/http%3B/ptpublisher.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

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

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

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

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

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

¹⁰ 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".

12. On 15 July 2013, the Regulatory Authority issued the Consultation Document entitled “Further Consultation: Obligations for Operators with Significant Market Power – Final Draft General Determination”, again inviting comments from all interested parties.¹²
13. On 7 August 2013, the Authority issued its Final Decision and Remedies GD.¹³
14. On 28 August 2013, the Final Decision and Remedies GD was Gazetted and became effective on this date.
15. Section 5.1.1 of the Remedies GD provides for a model access and interconnection 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.
16. Section 5.1.1, paragraphs 65 through 70, of the Remedies GD established the following schedule for this process¹⁴:
 - (a) by 7 September 2013, the first Draft MAIA was to be published on the SMP Operator’s website for each relevant Wholesale service to be provided by the SMP Operator in the markets enumerated in paragraph 15, above and notice concerning this is to be sent to all Integrated Communications Operating Licence (“ICOL”) holders;
 - (b) by 19 September 2013, comments from all Access Seekers concerning the Draft MAIA were due;
 - (c) by 27 September 2013, the SMP Operator’s best and final MAIA and position paper concerning outstanding issues was to be submitted to the Authority, posted on the SMP Operator’s website, and notice concerning this sent to all ICOL holders; and
 - (d) by 7 October 2013, comments from all Access Seekers concerning the SMP Operator’s best and final MAIA and position paper concerning outstanding issues were to be submitted to the Authority.
17. 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, issue a final decision accepting or modifying the MAIA.
18. Due to various circumstances, on 15 October 2013, the Authority issued a Notice¹⁵ setting out a revised schedule for the model A&I approval process referenced.¹⁶ According to this revised schedule:

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

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

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

¹⁴ Dates presented below are calculated from 28 August 2013, the effective date of the Remedies GD.

¹⁵ See <http://rab.bm/images/PDF/Public%20Notice%20-%20A&I%20Agreement%20DeadlinesFF.pdf>

¹⁶ See <http://rab.bm/images/PDF/130807-Remedies-Order-vFINAL.pdf>

- (a) by 21 October 2013, BTC was to submit its best and final Draft MAIA and position paper concerning outstanding issues to the Authority, post the same on its website, and send out notice of same to all ICOL holders; and
 - (b) by 31 October, all interested Access Seekers were to submit their final comments concerning the BTC documents listed in subpart (a) above.
- 19. In order to ensure that the MAIA that is ultimately approved by the Authority fully reflects the Authority's resolution of:
 - (a) the unresolved issues between the parties, and
 - (b) the issues raised by BTC's failure to cover at all, or to adequately address, certain relevant Wholesale services as required by the Remedies GD,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

- 20. Given the circumstances described more fully in Section 4 below, the Authority has determined that it is necessary to further modify the model A&I approval process as it applies to BTC. Accordingly, BTC will be required to follow the revised process set out below. BTC must:
 - (a) Develop an MAIA for the provision of wholesale access services for the residential SMP services covered by Market Nos. 10 and 12 and the residential segment of Market Nos. 11 and 13 (collectively referred to as the "Residential Markets"). The development of an MAIA for the Residential Markets shall be referred to herein as the "Residential Workstream" and shall culminate in the approval by the RA of what is referred to herein as the "Core/Residential MAIA".
 - (i) BTC must modify its Draft MAIA as instructed by the Authority in this Interim Decision and Order for the Residential Markets and produce a new draft (the "Core/Residential Compliance MAIA"). This Core/Residential Compliance MAIA should be structured as follows: (1) the main body, containing all of the generally applicable provisions relevant to both the Residential Markets and the Business Markets; (2) service annexes for the services covered by the Residential Markets (each separate annex to contain relevant service-specific terms and conditions including price, service level commitments/guarantees/credits, etc.); and (3) technical annexes, including product manual, ordering/provisioning procedures, etc.
 - (ii) The Core/Residential Compliance MAIA shall, if required, be subject to further modification by the Authority, culminating in an approved Core/Residential MAIA.
 - (b) Develop relevant service-specific and technical annexes for the provision of business services covered by Market Nos. 11 and 13, and for the provision of leased line services in Market Nos. 18 through 20 (collectively referred to as the "Business Markets"). The development of these annexes for the Business Markets is referred to herein as the "Business Workstream" and will culminate in the approval by the RA of what is referred to herein as the "Business Annexes". These annexes shall be structured as follows: (1) service annexes for the

services covered by the Business Markets (each separate annex to contain relevant service-specific terms and conditions including price, service level commitments/guarantees/credits, etc.); and (2) technical annexes, including product manual, ordering/provisioning procedures, etc. The Business Workstream shall culminate in the approval by the RA of what is referred to herein as the "Business Annexes".

21. Both workstreams will be subject to an approval process during which interested parties may submit comments, and following which the Regulatory Authority may require BTC to make amendments to the relevant draft of the Core/Residential MAIA and Business Annexes.
22. At the culmination of this approval process, the Core/Residential MAIA and the Business Annexes shall be integrated in order to develop a single (and final) integrated MAIA (the "Integrated MAIA"). The Integrated MAIA must be fully compliant with paragraph 65 of the Remedies GD and enable the provision of wholesale access for all services covered by the Residential Markets and the Business Markets.
23. The schedule for the Residential Workstream of the revised model A&I approval process shall be as follows:
 - (a) **Step 1**¹⁷ - within one week of the issuance of this Interim Decision and Order, BTC shall modify its Draft MAIA to conform to the Authority's interim determinations as set forth below. BTC shall deliver a copy of the resultant Core/Residential Compliance MAIA to the Authority (a clean version along with a comparison against the Draft MAIA) no later than 5:00 p.m. on 18 November 2013. BTC shall also post a copy of the Core/Residential Compliance MAIA on its website and notify all ICOL holders of its publication;
 - (b) **Step 2** - Interested parties will have until 5:00 p.m. on 25 November 2013 to file any remaining "fatal flaw" objections concerning the Core/Residential Compliance MAIA ("Core/Residential Compliance Comments").
 - (i) Parties shall confine their Core/Residential Compliance Comments to the compatibility of the Core/Residential Compliance MAIA with this Interim Decision and Order and should address those aspects 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.¹⁸ All Core/Residential Compliance Comments submitted to the Authority by the parties must conform to the following format:
 - (ii) Parties must reference the particular document, section, and clause of the Core/Residential Compliance MAIA they find

¹⁷ References to "Step" in this Section relate to the specific step referred to in the relevant workstream in the Process Diagram (set out at paragraph 25 below)

¹⁸ In preparing their comments parties should keep in mind the fact that Core/Residential Compliance MAIA only provides for the provision of wholesale access services to the residential segments of Market Nos. 10 through 13 and for this reason is not compliant with the Remedies GD: a fact that the Authority is fully aware of. If there are other aspects of the Core/Residential Compliance MAIA that parties believe cause the document to be out of compliance with the Remedies GD, these should, of course, be brought to the Authority's attention.

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

(iii) Parties must provide a redline marked-up¹⁹ 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).

(a) **Step 3** - The Authority will review BTC's Core/Residential Compliance MAIA, the comments submitted and proposed alternative text. After accepting or modifying the Core/Residential Compliance MAIA as is necessary, the Authority will then issue a Final Decision and Order approving the Core/Residential MAIA for the purpose of enabling the provision of wholesale access services in the Residential Markets ("Final Decision and Order (Core/Residential)").²⁰

24. The schedule for the Business Workstream shall be as follows:

(a) **Step 1** – no later than 17 calendar days following the issuance of this Interim Decision and Order, BTC shall prepare Business Compliance Annexes²¹ to cover the Business Markets for the purpose of integrating the approved version with the Core/Residential MAIA. BTC shall deliver a copy of the Business Compliance Annexes to the Authority no later than 5:00 p.m. on 29 November 2013, post a copy on its website and notify all ICOL holders of its publication;

(b) **Step 2** - interested parties shall be given 10 calendar days to provide their comments on any material concerns they believe are critical to resolve within the time frame of the revised model A&I approval process ("Business Compliance Comments"). These comments must be submitted to BTC and the Authority by 5:00 p.m. on 9 December 2013 in accordance with the format set out in paragraph 23 of this Interim Decision and Order.²²

(c) **Step 3A** - within 10 days of receiving the Business Compliance Comments from interested Access Seekers on its Business Compliance Annexes, BTC shall provide a copy of a revised draft of the Business Compliance Annexes (the "Draft Final Business Annexes") to the Authority along with a position paper setting forth:

(i) a list of all material objections to the proposed agreements that have been raised by Access Seekers and not resolved, and

¹⁹ The redline version shall include the verbatim text from the Core/Residential Compliance MAIA and use ~~strikethrough~~ format for proposed deletions and **redline** format for proposed insertions.

²⁰ 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

²¹ To the extent that any supplements to the main body of the Core/Residential Compliance MAIA are needed to accommodate the missing wholesale business services, these changes should be indicated by means of tracked changes to the Core/Residential Compliance MAIA draft.

²² The redline version shall include the verbatim text from the Business Compliance Annexes and use ~~strikethrough~~ format for proposed deletions and **redline** format for proposed insertions.

- (ii) a justification for the positions taken by BTC in response to the unresolved objections, if any, referenced in subpart (i).

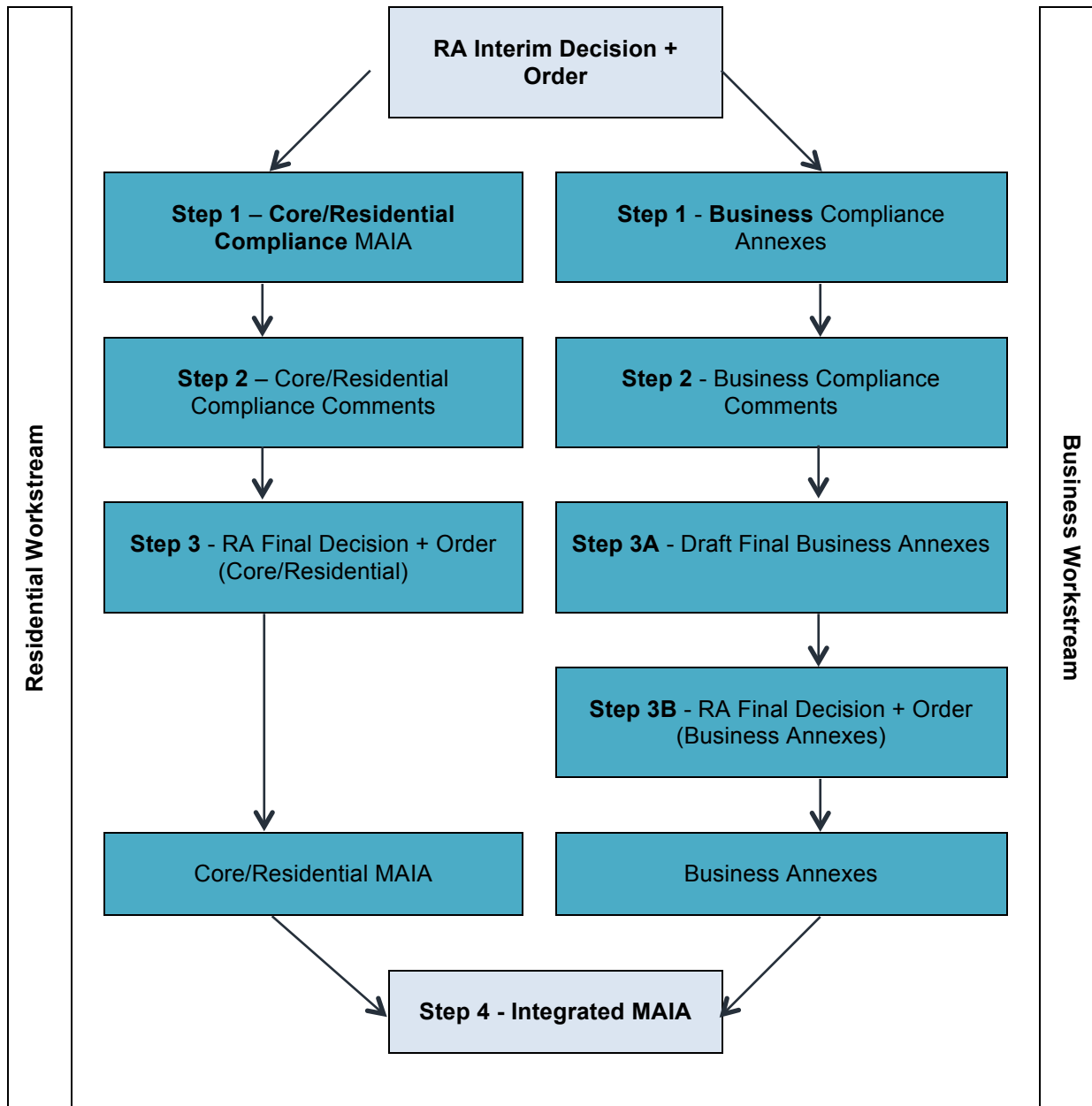
BTC shall deliver both a clean and compare²³ version of the Draft Final Business Annexes to the Authority along with its position paper no later than 5:00 p.m. on 19 December 2013. BTC shall publish copies of both clean and compare versions on its website, and shall also notify all ICOL holders of its publication;

- (d) **Step 3B** - The Authority will review BTC's Draft Final Business Annexes, the position paper and comments submitted and, in due course, issue a Final Decision and Order accepting or modifying the Draft Final Business Annexes ("Final Decision and Order (Business Annexes)").

- (e) **Step 4** – The approved Draft Final Business Annexes (the Business Annexes) shall then be combined with the approved Core/Residential MAIA to create the Integrated MAIA for all of BTC's SMP wholesale services.

25. These steps are illustrated in the process diagram overleaf:

²³ The compare version shall be a comparison between the Draft Final Business Annexes and the Business Compliance Annexes.



26. BTC shall be required to publish the approved Core/Residential MAIA on the business day following the effective date of the Final Decision and Order (Core/Residential). BTC must then 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 approved Core/Residential MAIA. Any and all pre-existing access and interconnection agreements between BTC and ICOL holders that correspond to the SMP wholesale services covered by the Core/Residential MAIA must be replaced by an agreement conforming to the Core/Residential MAIA template within five business days following the effective date of the Authority’s Final Decision and Order (Residential/Core).

27. All stakeholders should recognize the importance of the revised model A&I approval process for the further development of BTC's MAIA. Having an approved MAIA in place covering *all* of BTC's relevant SMP wholesale services is pivotal to the transition from the old regulatory framework to the new framework established by the ECA and the RAA.
28. The Authority is aware that the timelines proposed above are ambitious and that there will be some overlap between the two workstreams. However, the Authority also is fully aware that BTC has had many months in which to prepare to meet its SMP obligations, including the provision of the A&I services in question pursuant to a non-discriminatory template A&I agreement that is available to all Access Seekers. BTC's delay in preparing a minimally compliant draft MAIA is frankly disappointing. In order to accelerate the approval process, the Authority strongly encourages BTC to now turn its full attention to the tasks at hand. The Authority likewise urges all Access Seeker that are serious about introducing competitive fixed line services to come forward with their own MAIA templates if BTC's revised drafts, as required herein, do not show substantial improvement in the coming weeks.
29. We wish to make clear that we are not striving to achieve perfection in the development of BTC's MAIA. Rather, we are seeking to achieve a minimally acceptable template that can be used for the purpose of ordering, provisioning and ensuring acceptable repair and maintenance of BTC's wholesale SMP A&I services in a reasonably efficient and non-discriminatory way. It is very important for BTC's wholesale customers to be in a position to begin providing services to End-Users – both business and residential customers – as soon as possible using the A&I products offered under an approved MAIA.
30. If, following issuance of a 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 Integrated MAIA are warranted under the circumstances (and bearing in mind that the development of a comprehensive reference access and interconnection offer ("RAIO") may be a more efficient alternative) as part of the approval process. Alternatively, modifications may result over time following the resolution of any disputes that may arise under the A&I Agreements that are executed in conformity with the Integrated MAIA.

2.3 Timing of Implementation of Retail-Minus Pricing Remedy for SMP Services

31. With regard to the implementation of the applicable Retail Minus pricing requirements for BTC's SMP wholesale services, Section 65(d) of the Remedies GD requires that each SMP Operator designated with SMP in Market Nos. 10 through 13 and 18 through 20 publish a model A& I Agreement for each relevant wholesale service that:

65(d) incorporates the applicable Retail Minus pricing requirements set forth in this General Determination are implemented as at the effective date for each specific service and any related fees;

Although the phrasing of this provision is not a model of clarity, reference to the "effective date" should be understood as the effective date of the A&I Agreement that is concluded between BTC and an Access seeker pursuant to the final Core/Residential MAIA that is approved by the RA.²⁴

32. It is our understanding that the residential wholesale services in question are not yet available on the market (and will not be available until the model A&I approval process has

²⁴ See Process Diagram at paragraph 25 above.

been completed). Therefore, the effective date of the Retail-Minus price control that will apply to BTC's residential wholesale services shall be the day on which the approved MAIA takes effect, i.e., the day after the RA issues its Final Decision and Order (Core/Residential) approving the final Core/Residential MAIA.²⁵

33. With respect to the business wholesale services in question, BTC is currently providing equivalent services under commercial agreements that pre-date the new legal and regulatory framework. Because BTC has neglected to cover business wholesale services in its Draft MAIA, the Authority proposes to impose a transitional obligation on BTC requiring it to make the mandated Retail-Minus prices available under its existing commercial agreements to any ICOL holder that so requests. All other commercial terms contained in BTC's pre-existing agreements for the provision of the equivalent of the wholesale business services in question (i.e., business voice, business broadband and leased lines) would remain in effect until the Business Annexes have been approved by the RA and incorporated into the Integrated MAIA. The transitional pricing obligation for BTC's wholesale business services referred to above would take effect on the first business day following the date of the Authority's Final Decision and Order approving BTC's Core/Residential MAIA. Parties are invited to comment on this proposed approach which, if considered a workable interim solution, will be adopted in the RA's Final Decision and Order (Core/Residential) approving the Core/Residential MAIA.

2.4 Consultation on Reference Access and Interconnection Offer

34. 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 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
if it is determined that the establishment of a RAIO is necessary:
 - (b) propose a set of comprehensive RAIO Guidelines, using those presented in Annex A of the Remedies GD as a basic framework; and
 - (c) develop a RAIO approval process.
35. To the extent that interested parties have additional concerns with the approved version of BTC's MAIA and believe those concerns to be sufficiently grave as to require the establishment of a RAIO to supersede BTC's MAIA, parties may present those issues to the Authority during the aforementioned RAIO consultation.

²⁵ As a practical matter, the new Retail Minus pricing requirements set forth in the Remedies GD will only become applicable once a new A&I Agreement is signed between BTC and an ICOL holder for the provision of any of the relevant residential wholesale services by BTC (which must be within 5 business days of any request being made) following approval by the RA of the Residential MAIA.

3 LEGISLATIVE FRAMEWORK

36. As background for the determinations set out in this Interim Decision and Order, the Authority wishes to draw the attention of BTC and interested parties to various provisions of the RAA, the ECA and the ICOL that are relevant to A&I agreements involving ICOL holders with SMP in a relevant market.
37. 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.
38. 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.
39. 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 in order 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).
40. 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 obligation²⁶ is supplying A&I, but applying different terms and conditions when offering the same services to different

²⁶ 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.

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.

41. The Integrated 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 Integrated MAIA that must be resolved. The Integrated MAIA that is ultimately approved by the Authority will serve as the template for any bilateral A&I Agreements entered into between BTC and Access Seekers that cover BTC's relevant SMP wholesale service offerings. When entering into A&I Agreements with Access Seekers, there should be no deviation from the Integrated 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).
42. In order to facilitate review of any deviations from the MAIA template that is ultimately approved by the Authority, BTC 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 A&I Agreements 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.
43. BTC shall be required to publish the approved Core/Residential MAIA on the first business day following the effective date of the Final Decision and Order (Core/Residential). BTC must then 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 approved Core/Residential MAIA. Any and all pre-existing A&I Agreements between BTC and ICOL holders that relate to the provision of the SMP wholesale services covered by the Core/Residential MAIA must be replaced by an agreement conforming to the Core/Residential MAIA template within five business days following the effective date of the Authority's Final Decision and Order (Residential/Core).
44. The Authority wishes to make clear that, contrary to BTC's apparent misunderstanding, the process established by the Remedies GD for the development and approval of model A&I Agreements may not be unilaterally modified by BTC. Following a lengthy and detailed consultation process, the Authority has concluded that BTC has SMP over the wholesale services covered by Market Nos. 10-13 and 18-20. The approval of the commercial and technical arrangements relating to these services is, and remains subject to, the procedures established in the Remedies GD and this Interim Decision and Order, including final approval by the Authority of a template MAIA. BTC is not free to alter the MAIA development process without seeking the Authority's prior approval and showing good cause for any proposed changes; nor may BTC negotiate divergent commercial arrangements with different Access Seekers as it sees fit. As noted above, any deviations from the MAIA template must be notified to – and will be carefully scrutinized by – the

Authority to ensure that they are not unduly discriminatory or otherwise contrary to Access Seekers' or End-Users' interests.

45. BTC has had ample time to prepare for the provision and roll-out of these mandatory services and to learn from the experience of fixed-line incumbents in countless other countries where very similar regulation and A&I Agreements (including published referenced offers) have been in place for at least a decade. The Authority recognizes that a reasonable amount of time must be allowed for the transition but also that time is of the essence in completing this process, so that real competition can develop in Bermuda.
46. BTC has been afforded a reasonable degree of flexibility thus far in the MAIA development process in recognition of the complexity of some of the issues that must be resolved. However, the "best and final" Draft MAIA proffered by BTC, as required by the Remedies GD, was incomplete and otherwise seriously deficient in many respects. We expect the next draft of the Core/Residential Compliance MAIA and, in parallel, the Business Compliance MAIA, to show substantial improvement.
47. We invite all potential Access Seekers who wish to avail of BTC's wholesale SMP offerings to continue to play an active role in the process by fully articulating and justifying their concerns and proposing specific, reasonable solutions along with proposed MAIA text (or textual changes) for implementing them.
48. Finally, the Authority notes that the RAA provides it with a number of tools of which it can avail to address instances of failure by an SMP designated operator to comply with its obligations under the Remedies GD, or to address any bad faith on the part of such operator in this regard. These tools allow the Authority to take immediate action if required to ensure compliance with or performance of the applicable SMP obligations. The Authority is also vested with enforcement powers under the RAA, including the power to impose financial or other sanctions. Provision is also made under the ECA and the RAA for criminal proceedings to be initiated for specified violations, including the failure to comply with the Authority's general determinations and directions.
49. The Authority will not hesitate to use all of the powers granted to it under the new legislative framework in the case of unnecessary delay or bad faith in the process of making the required wholesale services available to Access Seekers.

4 CONCERNING THE NEED FOR A REVISED MODEL A&I APPROVAL PROCESS

50. The Authority's Remedies GD, pursuant to RAA Section 62(1) and ECA Section 74(b)(ii), and in compliance with the principles and objectives set out in ECA Sections 21, 23(7) and 24, imposed on BTC the obligation to provide Wholesale access services, and to develop an MAIA for the provision of those services, for each of the markets set out in Table 1, below.

Table 1: Relevant Wholesale Markets

| Market No. | Relevant Markets |
|-------------------|---|
| 10 | A Wholesale market for the supply of fixed narrowband access and local calls in the City of Hamilton and contiguous suburbs (Residential Market Only) |
| 11 | A Wholesale market for the supply of fixed narrowband access and local calls in areas outside of Southside and the City of Hamilton and contiguous suburbs (Residential and Business Markets) |
| 12 | A Wholesale market for the supply of fixed Broadband Access Services ²⁷ in the City of Hamilton and contiguous suburbs (Residential Market Only) |
| 13 | A Wholesale market for the supply of fixed Broadband Access Services in areas outside of Southside and the City of Hamilton and contiguous suburbs (Residential and Business Markets) |
| 18 | A market for the Wholesale supply of low speed Leased Lines in the City of Hamilton and contiguous suburbs |
| 19 | A market for the Wholesale supply of low speed Leased Lines outside of Southside and the City of Hamilton and contiguous suburbs |
| 20 | A market for the Wholesale supply of high speed Leased Lines outside of Southside and the City of Hamilton and contiguous suburbs |

51. Per paragraph 65 of the Remedies GD, BTC was required, by 7 October 2013 to submit to the Authority its Draft MAIA covering each of the relevant Wholesale services provided in the relevant markets depicted in Table 1, above. The Authority's Notice of 15 October 2013 extended this deadline to 21 October 2013. Despite the additional time it was granted, and without any explanation, BTC has submitted what can at best be described

²⁷ The Remedies GD defines this term as follows: "**Broadband Access Service**" refers to the legacy service provided by a Class B provider such as The Bermuda Telephone Company Limited which linked an End-User to a provider of ISP Services.

as an incomplete and otherwise deficient Draft MAIA, which provides no mention of, or documentation concerning, wholesale access for:

- (a) the provision of business services in Market Nos. 11 and 13; and
 - (b) the provision of leased line services in Market Nos. 18-20.
52. Our review further indicates that the document that BTC has submitted to the Regulatory Authority addresses only wholesale access services for the residential segments of Market Nos. 10 through 13, and that even those limited provisions contain substantial deficiencies.
53. Based on the record before us, serious questions are raised about whether BTC has complied in good faith to the Authority's Remedies GD, which has the force of law. The Authority prefers to give BTC the benefit of the doubt at this juncture. However, we expect BTC to make it a top priority to deliver — without further delay -- a complete MAIA covering services in all of the above-referenced relevant markets and provide reasonable terms and conditions – including protocols and Service Level Agreements covering ordering, provisioning, repair and maintenance of these services, supported by effective penalties or service credits.

5 DISCUSSION OF UNRESOLVED ISSUES AND INTERIM DETERMINATIONS

54. The discussion that follows addresses the comments and submissions provided by BTC and potential Access Seekers in connection with the Draft MAIA, including those provided in response to the Authority's Notice²⁸ 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.²⁹ According to this revised schedule:
- (a) by 21 October 2013, BTC was to submit its best and final Draft MAIA and position paper concerning outstanding issues to the Authority, post the same on its website, and send out notice of same to all ICOL holders; and
 - (b) by 31 October, all interested Access Seekers were to submit their final comments concerning the BTC documents listed in subpart (a) above.
55. Comments on the Draft MAIA and Position Paper were submitted by LinkBermuda/Quantum ("Link"). Comments on the Draft MAIA were submitted by TBI. 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 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 resultant Core/Residential Compliance MAIA and the ultimate Integrated MAIA comport with the ECA, the RAA and the Remedies GD.
56. 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, and addressed in non-sequential order, because the issues being discussed are common to multiple clauses.

5.1 Concerning Treatment of Other A&I Agreements

57. In the Final Decision accompanying the Remedies GD, the Authority determined that:
- 454. The required model A&I agreements shall meet all of the following conditions:
 - (a) where an SMP operator that is subject to this obligation³⁰ 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;
58. Paragraph 65(c) of the Remedies GD itself reinforces the above principle by stating that the MAIA shall incorporate:
- 65(c) ...the most favourable terms and conditions to counterparties (including Affiliates of the SMP Operator and members of the

²⁸ See <http://rab.bm/images/PDF/Public%20Notice%20-%20A&I%20Agreement%20DeadlinesFF.pdf>

²⁹ See <http://rab.bm/images/PDF/130807-Remedies-Order-vFINAL.pdf>

³⁰ 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.

KeyTech Group) of the corresponding A&I agreements relevant to each Wholesale service that were entered into prior to the effective date of this General Determination.

59. Concerning this issue, BTC has argued that under the Remedies GD, the process for developing a model A&I Agreement is not intended to suddenly provide all carriers with significantly better interconnection terms and conditions than they have previously obtained. BTC believes the process is aimed at confirming that all Access Seekers are obtaining such services on equal contractual footing, and that no abuse of market power is occurring.
60. In response to this, Link agrees with BTC that Section 5.1.1, paragraph 65 “is aimed at confirming that all access seekers are obtaining [interconnection and access] services on equal contractual footing.” However, Link goes on to point out that paragraph 65(c) expressly requires that this footing be founded on “...the most favourable terms and conditions to counterparties...” currently available under BTC’s existing (a) interconnection contracts and (b) access service agreements.
61. Link thus contends that although paragraph 65 does not require BTC “suddenly provide all carriers with significantly better interconnection terms and conditions than they have previously obtained” from BTC, it does clearly require that all access seekers should enjoy the “most favourable” interconnection and access terms that BTC offers to any individual ICOL holder – including any of its affiliates -- under existing contracts or other arrangements, including informal agreements or custom.

5.1.1 Interim Determination

62. The MAIA that is to result from the MAIA approval process established by the Remedies GD need only apply to those markets (and their associated SMP Products) in which BTC has been found to have SMP, and upon which wholesale access service obligations have been imposed, i.e., those that are covered by paragraph 65 of the Remedies GD. Pertaining to BTC, these relevant markets are: Market Nos. 10 through 13 and 18 through 20. Regarding the issue of how existing A&I Agreements are to be treated, the Authority determines as follows:
 - (a) To the extent that any existing A&I Agreements currently in force between BTC and any other counterparties may reasonably be determined to be relevant to the provision of SMP Products in the relevant markets referenced above, the most favourable terms and conditions from those agreements are to be incorporated into the relevant MAIA(s) governing the provision of those services; and
 - (b) To the extent that any existing A&I Agreements currently in force between BTC and any other counterparties may reasonably be determined to not be relevant to the provision of SMP Products in the relevant markets referenced above, they are not applicable to the model A&I approval process, are not affected by it and so remain in force for the non-SMP Products and services that they cover.
63. The Authority expects BTC to carefully review all of its existing agreements and arrangements that are relevant to the provision of any service that is the effective equivalent of the wholesale SMP services at issue in this proceeding. BTC should identify the terms that are most favourable in all aspects – technical, economic and legal – and commit to Access Seekers and the Authority that the MAIA incorporate the most favourable provisions. If Access Seekers have evidence that BTC has in place relevant agreements with more favourable terms on any particular point (legal, commercial,

technical, etc.) the Authority invites them to provide such evidence as part of the compliance process in either or both workstreams.

64. To that end, when submitting the next draft of the Core/Residential MAIA and/or Business Annexes to the Authority for review under the model A&I approval process, BTC should provide an accompanying certification signed by a member of its senior management. The certification should attest that: (1) BTC has duly reviewed all relevant agreements or arrangements; and (2) the draft in fact includes the most favourable terms and conditions in effect, at present or over the past six months, relating to the same or the effective equivalent of the relevant SMP services covered by the MAIA. This shall be irrespective of whether such terms are (or were) included in a written agreement or offered as a matter of custom or practice by means of informal arrangements with ICOL holders, including any of BTC's affiliates.
65. Finally, the Authority has reviewed the A&I Agreement furnished by Link and to which it refers in its comments as the "I&S Agreement". Our review of this agreement suggests that many of the services covered by it may reasonably be determined to be relevant to the provision of those SMP Products that BTC is obligated to provide on a wholesale basis under the Remedies GD. For example, it would appear that the description of the national extension of the International Dedicated Analogue Leased Line provided by BTC to Link under the terms of this agreement covers the effective equivalent of the wholesale leased line SMP product that BTC is obligated to provide under the Remedies GD. Unless BTC knows of more favourable terms and conditions in effect now or during the past six months, it should incorporate in its Core/Residential MAIA and Business Annexes any relevant terms from the I&S Agreement that are more favourable to Access Seekers than those presently contained in the Draft MAIA. Link and other interested parties are invited to provide BTC with specific proposals for replacement terms and conditions in this regard, in order to expedite the modification process.

5.2 Recitals

66. TBI requested clarification in the Recitals section that the Integrated MAIA will apply and be administered on common terms to all communications providers.

5.2.1 Interim Determination

67. We agree in principle with TBI's request for "common terms" but note that paragraph 72 of the Remedies GD states that:
 72. 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.
68. However, and in order to ensure compliance with the non-discrimination obligation, the RA's position is that, when negotiating bilateral A&I Agreements in line with the Integrated MAIA, only non-material changes should be permitted (such as name/address of counterparty, etc.). Any deviation from this requirement must be objectively justified and the effect must not be unduly discriminatory. Furthermore, any such deviation must be notified and fully explained to the Authority and is subject to approval by the Authority pursuant to ECA Section 24(3)(a).

69. BTC is therefore instructed to add to the Recitals section of its Draft MAIA a section clearly reflecting the principle set out in the preceding paragraph.

5.3 “Compliance with the Law” provisions

70. Link proposed the addition of “Compliance with Law” provisions to the Draft MAIA. Link believes that, the proposed “Compliance with Law” provisions would provide an important and meaningful incentive for the parties to perform their obligations in full compliance with all applicable laws and regulations. In this context, Link argues that the threat of contractual damages is a more compelling deterrence against potential non-compliant conduct than the risk of regulatory action. Link believes adoption of its proposed approach will more quickly and effectively advance Bermuda’s reform objectives and ultimately minimize enforcement resource demands on the RA.

71. BTC’s response to this is that Clause 10.2 of the Draft MAIA requires that BTC comply with all applicable laws, rules and regulations relating to or affecting the performance of its obligations under the Agreement. BTC expresses the view that, given the existence of this Clause and the normal expectation that any corporate entity must abide by applicable laws and regulations, there is no need to specify in the Draft MAIA that BTC has and/or will comply with any particular law, rule or regulations.

5.3.1 Interim Determination

72. The Authority considers that, in addition to the specific “Compliance with Law” provisions contained in Clause 10 of the Draft MAIA, the inclusion of an additional Clause immediately following the “Definitions” section would provide further clarity to all parties. This new “Introduction” Clause would clarify the purpose of the agreement, establish its regulatory context, and contain an explicit statement that the agreement satisfies paragraph 65 of the SMP Order. However, the parties are reminded, as discussed at paragraph 39, that 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 covering SMP Products to which an SMP operator is a party. Accordingly, BTC is instructed to add the following language to its Draft MAIA immediately following the “Definitions” section.³¹

5.3.1.1 Required language³²

1 INTRODUCTION

WHEREAS:

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

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

³¹ In this Section 5, 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 BTC and a Carrier and not the template MAIA.

³² Where “Required MAIA Language’ has been provided the Authority acknowledges that the interim determinations provided throughout this document may require BTC to propose slight modifications to the provided language to resolve conflicts.

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 BTC 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"). BTC 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.

5.4 Clause 1 “DEFINITIONS”

5.4.1 Generally

73. TBI argues that BTC’s “general terms and conditions” (for BTC retail customers) are not relevant for the Draft MAIA, and should not therefore apply. TBI also argues that the proposition that BTC order acceptance is subject to “credit review” from time to time is not appropriate and should be deleted. According to TBI, BTC has rights of termination for payment default which can be relied upon. The Draft MAIA should not, therefore, permit BTC to reject an order relying on an undefined “credit review” process.

5.4.1.1 Interim Determination

74. We agree with TBI that BTC’s general terms for its retail customers are not, as a whole, applicable in a wholesale environment or appropriate for application to the retail customer of a Carrier. As such, the definition of, and all references, to “General Conditions” should be removed from BTC’s Draft MAIA. If BTC believes that portions of its General Conditions are reasonably applicable in the wholesale environment, BTC should include that text in its Core/Residential Compliance MAIA for review and approval by the Authority.
75. We have considered the concerns expressed by TBI with regard to BTC’s proposal that order acceptance should be subject to “credit review” from time to time. The Authority is of the view that, in the current context, it would not be appropriate to subject order acceptance (and ultimately the provision of the relevant wholesale access service) to a credit review that could be carried out by BTC at its discretion. We consider that any risk regarding the creditworthiness of an Access Seeker may adequately be addressed through a requirement that, where justified, such Access Seeker provide financial security in the form of a security deposit. However, BTC may only reasonably require the provision of a security deposit from an Access Seeker if the Access Seeker is found to lack creditworthiness on the basis of reasonable credit criteria, or if a payment default occurs.
76. The Authority recently addressed the provision of financial security in the BCV MAIA Order (Section 4.6.1.1). We are of the view that, in the interests of consistency, BTC’s Core/Compliance MAIA should contain provisions that are the same or similar in relevant respect. Accordingly, in the absence of a sound justification for adopting an alternative approach, BTC should insert the following or equivalent text in its Draft MAIA:

SECURITY DEPOSIT

Unless otherwise agreed to by BTC in writing, it is a condition precedent to this Agreement and to the provision of the Services, that the Carrier shall provide to BTC such financial security as in the opinion of BTC is appropriate as security against the Carrier’s non-compliance with or non-observance of any of the provisions of this Agreement (including without limitation the failure to pay Charges).

Without prejudice to the above, BTC may, at any time, require the Carrier 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 non-compliance with or - of any of the provisions hereof (including failure to pay

charges due under this Agreement), provided that BTC 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 Agreement by the Carrier. Any security deposit required under this Section shall be held in trust by BTC in an interest bearing account payable to the Carrier upon termination of this Agreement or earlier if mutually agreed by the Parties.

A reasonable guarantee/deposit may be held until:

(a) termination of this Agreement; and/or

(b) all of the Carrier's liabilities to BTC in respect of the Service are discharged.

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

77. For the avoidance of doubt, the term "payment default" in this context should be defined to exclude any lack of payment due to a disputed bill or portion thereof.
78. If any Access Seeker wishes to dispute a claim that it is not creditworthy, it has the option to bring the issue before the Regulatory Authority so that the Authority may resolve the dispute and rule on the reasonableness of imposing a security deposit and/or the required amount. BTC should revise the language currently included in the Draft MAIA to explicitly include this option.

5.5 Clause 2 "PROVISION OF SERVICE"

5.5.1 Generally

79. TBI claims that the agreement could benefit from some clarification on how the relationship with the End-User will be managed, including the extent to which BTC will be allowed to have any direct contact and agreements with the End-User.

5.5.1.1 Interim Determination

80. While we find TBI's comment reasonable, we consider that it may not be best addressed in Clause 2, which does not appear to relate to dealings with End-Users. BTC's Draft MAIA neglects to address this important issue, including the circumstances in which BTC will be permitted to have direct contact with the retail customer being served by a Carrier using the wholesale services provided by BTC.
81. The Authority is of the view that BTC should not be permitted to have any contact with an Access Seeker's End-User in connection with the provision of an SMP services, unless expressly permitted by the Access Seeker. Alternatively, such contact would be permissible 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. An example would be if such contact were determined to be necessary to avoid disruption of the provision of retail services if the wholesale customer

Access Seeker were going out of business. The Authority adopted a similar approach when addressing a similar issue with respect to the proposed BCV MAIA.³³

Furthermore, in the event that BTC terminates the Integrated MAIA, it may, with the prior written approval of the CEO or other duly authorized representative of its wholesale customer, and acting in conformity with ECA Section 31, communicate directly with the customer to inform them of the termination and how this may affect the communications services they receive from the Access Seeker and/or BTC.

82. The Authority also wishes to remind the parties of their respective obligations under ECA Section 31 and Condition 13 of the ICOL in this regard.
83. Accordingly, in the absence of a sound justification for adopting an alternative approach, BTC should include the following or equivalent text at the end of Clause 2 of the Draft MAIA:

2.4 *Termination or expiry of this MAIA or any Service shall not relieve either Party of its obligations under Clause 13 especially in respect of Confidential Information and in particular protecting against the unauthorized access and use of the Carrier's end user Confidential Information.*

2.5 *If BTC terminates this MAIA, BTC may:*

(a) *if and to the extent permitted in advance by the RA in writing in the event that the Carrier 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 Carrier, 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 Carrier and/or BTC 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.

5.5.2 Clause 2.1

84. Link states that BTC should be required to provide Access Seekers with a minimum prior notice period in advance of any service disruption that is caused as a result of the carrying out by BTC of remedial or preventative maintenance work. Link further states that the current reference to “reasonable prior notice” as contained under Clause 2.1 is simply too vague. The point is also made that the provision of appropriate and reasonable notice would allow the Access Seeker to make appropriate plans to deal with such service disruption, and to provide its End-Users with adequate notice. Link has thus proposed various textual changes to Clause 2.1.
85. The Authority is of the opinion that the text of the Draft MAIA is indeed too ambiguous on this issue, and that reference to the requirement to give “reasonable prior notice” does not adequately safeguard the position of Access Seeker in the case of a disruption to service. It is clear that most remedial or preventative maintenance work carried out on a network is

³³ See Sections 4.2.4.1, 4.2.6.1.1 of the BCV MAIA Order.

planned well in advance of the associated service disruption. BTC will, therefore, have notice of the work to be undertaken sufficiently in advance to be able to alert or inform Access Seekers of any associated service disruption. The Authority regards the minimum notice period of no less than 10 business days as proposed by Link as reasonable, and considers that this amount of time would reasonably be required in order to allow Access Seekers make adequate preparation for the service disruption, and to inform their End-Users accordingly. The Authority acknowledges, however, that not all remedial or preventative maintenance work is planned in advance, and that such work is sometimes undertaken at short notice in response to an emergency situation. The Authority considers that, in such instances, the requirement that BTC provide notice “as soon as reasonably possible following such event” is sufficient.

5.5.2.1 Interim Determination

86. Accordingly, in the absence of a sound justification for adopting an alternative minimum notice period, BTC should amend Clause 2.1 of the Draft MAIA as follows:

2.1 *During the term of this Agreement, BTC hereby agrees, subject to the terms and conditions contained herein, including without limitation, the applicable provisions of the Tariffs, to provide the Carrier with access to its Service, ~~however,~~ BTC reserves the right to disrupt the Service, with reasonable prior notice for the purposes of remedial or preventative maintenance, save for an emergency situation in which case notice is to be provided as soon as reasonably possible following ~~such commencement of such event~~ For the purposes of this Clause, reasonable prior notice shall be understood to be at least 10 working days prior notice. In the event of a conflict, this Agreement shall take precedence over the General Conditions of Service.*

87. The Authority also determines that BTC should insert the text below, or equivalent text, as new Clauses 2.6 and 2.7 in order that the suspension of the supply of services under the Core/Residential MAIA in instances other than the undertaking of remedial or preventative maintenance is adequately addressed:

2.6 *Without prior notice to the Carrier, BTC 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 BTC, 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 BTC Network; or*
- iv is likely to impede the activities of authorised persons responding to an Emergency;*

(b) *the Carrier:*

- 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 Carrier 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 Carrier'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 Carrier 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.*

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

5.5.3 Clause 2.3

88. TBI contends that the references to “tariffs” upon which the “Charges” are set should include language requiring compliance with the Remedies GD.

5.5.3.1 Interim Determination

89. Clause 2.3 of the Draft MAIA states: “In consideration of BTC’s agreement to supply the Services during the Term, the Carrier agrees to pay BTC the Charges”. “Charges” is defined as: “means the charges payable by the Carrier to BTC for the provision of the Service subject to the Tariffs as amended from time to time.” And “Tariffs” is defined as: “means BTC’s rates or Charges, terms and conditions for the Services as filed with the Regulatory Authority.”

90. Given that the tariff notification filing requirements imposed on BTC and BCV by the Remedies GD³⁴ are for retail tariffs only and not wholesale prices, the RA determines that the definition of the term “Tariff” as it currently stands in the Draft MAIA is ambiguous and requires a definition that is more consistent with the Retail Minus pricing obligations imposed by Section 4.2.2.1 of the Remedies GD.

91. Furthermore, the current definition of “Charges” under Clause 7 of the Draft MAIA, with its reference to periodic amendments by BTC, is also inapplicable to the pricing of the wholesale services that are to be provided according to the terms and conditions of the Draft MAIA in compliance with the Remedies GD.

92. For the reasons stated above, BTC should revise the definitions of “Tariffs” and “Charges” (or use different terminology, such as “wholesale rates”) to make it clear that the prices for the wholesale services being provided under the MAIA are in full compliance with paragraph 65(d) of the Remedies GD.

93. Additionally, BTC should include in Clause 2, or in its revised definition of “Charges”, the following, or equivalent language:

³⁴ See Section 4.1.3 of the Remedies GD

BTC may 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 Carrier; provided that BTC may not increase the Charges for a Service offered to any particular wholesale customer during the term of a Service Order agreed with that customer.

5.5.4 Clause 3 “TERM OF THE AGREEMENT”

5.5.4.1 Clause 3.1

94. Clause 3.1 of the Draft MAIA reads as follows:

3.1 This Agreement shall commence on the Effective Date and remain in full force and effect until terminated as provided hereunder, or until one year after all orders for Services hereunder have been terminated. With respect to individual orders for Services, unless otherwise agreed in the applicable Schedule, such Services shall be provided for the specified Initial Term and shall automatically renew for successive terms equal to the service period of the Initial Term (“Renewal Term”), unless either Party gives the other at least one month’s written notice before the expiry of any Term of its intention not to renew.

95. Link expresses the view that BTC should not be permitted to deny a Renewal Term for any wholesale service that it is mandated to provide under the SMP Order. It proposes edits to Clause 3.1 to only allow the Access Seeker the right not to renew prior to the end of an initial term.

5.5.4.1.1 Interim Determination

96. The Authority considers that, on expiry of individual orders for services, there are valid situations in which the service may not be renewed by BTC. For example, in respect of wholesale broadband services, if BTC’s retail broadband service offerings change, then the wholesale service offerings would also need to be altered so as to allow replication by the Carrier of BTC’s retail pricing. This means that, at the expiry of the Initial Term, there would be cases where a wholesale service is no longer available because the retail offering upon which the wholesale service is based is no longer offered. However, it seems reasonable to limit BTC’s ability to deny renewals at the end of the Initial Term to those particular circumstances.

97. BTC should therefore insert a sentence at the end of Clause 3.1 clarifying this limitation, as follows:

3.1 *This Agreement shall commence on the Effective Date and remain in full force and effect until terminated as provided hereunder, or until one year after all orders for Services hereunder have been terminated. With respect to individual orders for Services, unless otherwise agreed in the applicable Schedule, such Services shall be provided for the specified Initial Term [to be defined in MAIA] and shall automatically renew for successive terms equal to the service period of the Initial Term (“Renewal Term”), unless either Party gives the other at least one month’s written notice before the expiry of any Term of its intention not to renew.*
BTC may only opt not to renew services if the services are resale services with

pricing set at Retail Minus Avoidable Costs and the corresponding retail service is no longer provided by BTC.

98. The Authority is concerned that “Initial Term” has not been defined. BTC should provide an appropriate definition in the Draft MAIA.

5.5.5 Clause 4 “EARLY CANCELLATION OF SERVICE”

5.5.5.1 Clause 4.1

99. Link strongly objects to any requirement that Access Seekers pay BTC an Early Cancellation Charge, and proposes the following mark-up of Clause 4.1:

Where the Carrier terminates a Schedule or Service prior to the end of the Initial Term, the Carrier agrees to pay to BTC an early cancellation charge equal to 75% of the Charges payable in respect of the remainder of the Initial Term (the “Early Cancellation Charge”) provided that this Early Cancellation Charge is not payable if Carrier, ~~after engaging in dispute resolution procedure as set out in Section 17, terminates this Agreement for breach by BTC,~~ **where BTC is in breach of this Agreement or is insolvent or where BTC has declared a force majeure event and has been unable to provide a Service for more than fourteen (14) days.**

100. TBI seems to agree in principle with the concept of an early termination charge, but argues that BTC’s proposed early termination charge of 75% of the total charges seems arbitrary, excessive, and not a genuine calculation of damage inflicted on BTC.

5.5.5.1.1 Interim Determination

101. The Authority agrees with Link that BTC should not be permitted to require the Carrier to pay an Early Cancellation Charge in the situations identified by Link in its proposed mark-up inserted above. BTC should therefore amend Clause 4.1 in order to reflect the language set out in paragraph 103 below.
102. The Authority also agrees with TBI. The amount of BTC’s proposed early termination charge is unjustified on any objective basis and appears to be both arbitrary and excessive.³⁵ The Authority acknowledges that BTC should be permitted to recover unreasonably incurred one-time and non-recurring costs associated with the provision of a regulated wholesale service in the case of the early cancellation of such service. However, such recovery should be limited to the associated one-time and non-recurring costs that are actually incurred by BTC in such a case, or a reasonable estimate thereof. The Authority is of the view that the methodology for calculating the Early Cancellation Charge proposed by BTC in the Draft MAIA lacks objective justification and appears to be aimed at penalising early cancellation, as opposed to the recovery of the one time and non-recurring costs involved in the provision of a particular mandated wholesale service.
103. This lack of objectivity is evident from the considerable difference in an Early Cancellation Charge that would be payable one month out from the Commencement Date, and one that would be payable within one month of the termination of the Initial Term. The Authority is of the view that the amount of the Early Cancellation Charge levied by BTC under Clause

³⁵ The Authority recently addressed a similar issue when considering the proposed BCV MAIA (see Sections and is of the view that the decision reached there should also apply to BTC in the current context. See Sections paragraphs 61 through 64.

4 of the Draft MAIA should be fixed, irrespective of the time that such early cancellation occurs. The Authority determines that, unless BTC can establish that another fixed amount more adequately reflects the one-time and non-recurring costs associated with the provision of a regulated wholesale service, this fixed amount should be equal to the sum of the Access Seeker's most recent month's invoice from BTC. Accordingly, BTC should revise Clause 4.1 as follows:

- 4.1 *Where the Carrier terminates a Schedule or Service prior to the end of the Initial Term, the Carrier agrees to pay to BTC an early cancellation charge equal to ~~75% of the Charges payable in respect of the remainder of the Initial Term~~ the Carrier's most recent month's invoice from BTC (the "Early Cancellation Charge") provided that this Early Cancellation Charge is not payable if Carrier, after engaging in dispute resolution procedure as set out in Section 17, terminates this Agreement for breach by BTC, or in instances where BTC is declared insolvent or where BTC has declared a force majeure event and has been unable to provide a Service for more than fourteen (14) days.*

104. This decision also addresses TBI's concern regarding Clauses 6.8 and 7.2.

5.5.6 Clause 5 "TAXES AND GOVERNMENT CHARGES"

5.5.6.1 Clause 5.1

105. The relevant portion of Clause 5.1 of the Draft MAIA provides as follows:

- 5.1 All fees and Charges in this Agreement or any Change Orders or Schedules, are exclusive of applicable local and foreign sales, value added and other taxes, tax-like charges, and tax-related and other surcharges ("Taxes"), which Carrier shall pay. Taxes will be separately stated on an invoice. If Carrier provides BTC with a duly executed exemption certificate, BTC will exempt Carrier in accordance with law, effective on the date BTC receives the certificate.

106. No definition of the term "fees" is provided (which would be helpful), but the term "Charges" is defined in Clause 1 of the Draft MAIA as:

[...] the charges payable by the Carrier to BTC for the provision of the Service subject to the Tariffs as amended from time to time.

107. TBI has raised the concern in its comments that the text as worded could be construed to "operate to pass all BTC tax liabilities over to carriers," which it views as neither reasonable nor appropriate.

5.5.6.1.1 Interim Determination

108. The Authority agrees with TBI that the proposed wording is unclear and requires modification. It may well be the case that references to value added and sales taxes payable by BTC's Carrier-customers do not have any present relevance in Bermuda because no such taxes currently apply. However, the clause itself need not be removed as long as it is appropriately conditioned to make clear that this Clause is referring to any taxes that BTC's Carrier-customer (and not BTC itself) may (someday) be required by law to pay.

109. BTC also should define the term “fees” and should focus the scope of the definition of “Taxes” by excluding ambiguous references to “tax-like charges, and tax-related and other surcharges.”
110. BTC should therefore amend the first three sentences of Clause 5.1 as follows (or in a similar manner) to properly clarify the provision:

5.1 Taxes. All Fees [to be defined] and Charges in this Agreement or any Change Orders or Schedules, are exclusive of any applicable local and foreign sales, value added and other taxes, ~~tax-like charges, and tax-related and other surcharges~~ ("Taxes") to which the Carrier is subject under applicable law, which Carrier shall be responsible for paying. Where relevant, Taxes will be separately stated on an invoice. If Carrier ~~provides BTC with a duly executed exemption certification,~~ is liable under applicable law to remit Tax payments to BTC and an exemption regime applies, BTC will exempt Carrier in accordance with law if Carrier provides BTC with a duly executed exemption certificate, effective on the date BTC receives the certificate.

5.5.7 Clause 6 “CHARGES, BILLING, PAYMENT AND DISPUTES”

5.5.7.1 Clause 6.2

111. TBI questions why Charges should be paid in advance.
112. Link requests the following amendments to Clause 6.2 of the Draft MAIA:
- 6.2 Invoices for Charges shall be issued by BTC monthly in advance. Payment is required to be made in cleared funds within thirty (30) days of receipt of the invoice date (“Due Date”). A late payment fee of 1% (minimum charge \$4) of the outstanding balance, whichever is greater, will be levied against the Carrier where invoices are not paid within the Due Date and the account shall be considered by BTC to be in default save for amounts subject to a billing dispute. BTC will submit monthly statements to Carriers to facilitate the Parties’ tracking and reconciliation of invoices.*
113. BTC states that the commercial terms proposed under Clause 6.2 (and 6.6) relating to the time period available to an Access Seeker to: (1) dispute Charges; and (2) pay undisputed amounts, are reasonable in that they reflect a standard that is accepted by the rest of the industry. BTC makes the point that the model A&I approval process is not a tool for Access Seekers to seek contractual benefits beyond an industry standard that seems to have caused no apparent competitive concerns. BTC has not, however, provided any evidence or proof that the industry standard it refers to has caused no apparent competitive concerns.

5.5.7.1.1 Interim Determination

114. The Authority considers that Link’s suggested amendments are reasonable in respect of: (1) a billing dispute; and (2) requiring BTC to submit monthly statements to Carriers. The Authority considers that there are practical difficulties in respect of establishing a Due Date that is based on the date of receipt of the invoice and therefore considers it sufficient for the Due Date to remain at 30 days after the invoice date.

115. Accordingly, BTC should adopt the following text for Clause 6.2 of its Draft MAIA:

6.2 Invoices for Charges shall be issued by BTC monthly in advance. Payment is required to be made in cleared funds within thirty (30) days of the invoice date ("Due Date"). A late payment fee of 1% (minimum charge \$4) of the outstanding balance, whichever is greater, will be levied against the Carrier where invoices are not paid within the Due Date and the account shall be considered by BTC to be in default, save for amounts subject to a billing dispute. BTC will submit monthly statements to Carriers to facilitate the Parties' tracking and reconciliation of invoices.

5.5.7.2 Clause 6.6

116. TBI states that the period of 45 days provided for under Clause 6.6 is too short for disputing an invoice, particularly if services are to be invoiced monthly in advance. TBI argues that the inclusion of an automatic acceptance of charges outside of this period is "inappropriate".

117. Link also requests additional time under Clause 6.6 regarding the billing dispute notice period on the basis that 45 days is too short to accommodate reasonable, good faith Access Seeker End-User billing and dispute processes. Link notes that it proposed 120 days as a counter start point for further discussion with BTC. Link also notes that under Section 8.1.1 of the I&S Agreement, BTC agreed to a 12 month notice period to challenge an invoiced amount. Link therefore considered that 120 days would be a mutually acceptable compromise.

5.5.7.2.1 Interim Determination

118. Both TBI and Link request additional time to dispute a charge, which we find reasonable, particularly in light of Section 8.1.1 of the I&S Agreement and our disposition of a similar issue in the BCV MAIA Order.³⁶ Accordingly, in the absence of a sound justification for adopting an alternative approach, BTC should change the time period from "45 days" to "24 months" in order to promote consistency between both the BTC and BCV Model A&I Agreements.

5.5.7.3 Clause 6.7

119. TBI questions whether BTC's proposed 75% Early Cancellation Charge represents a "genuine" estimate of any loss that would potentially be incurred by BTC in the event of a termination for default. TBI also states that there should be no interruption of service if charges in default are the subject of a dispute.

5.5.7.3.1 Interim Determination

120. The Authority resolved BTC's proposed 75% Early Cancellation Charge above with respect to Clause 4, and considers it unnecessary to repeat the discussion here. Although TBI expresses concern that disputed charges could result in default and service interruption we note that Clause 6.6 prevents such an outcome as it provides that:

³⁶ See BCV MAIA Order at paragraph 153. We note that Clause 5.1 of Annex 2 to the BCV MAIA addresses billing disputes within the context of that agreement. According to the aforementioned provision, a dispute regarding any invoice submitted under the BCV MAIA may be raised by written notice at any time up to twenty four (24) months after the date of the relevant invoice.

[The] Carrier is permitted to withhold only amounts disputed in good faith, and such withholding shall not constitute a default or breach by the Carrier under this Agreement.

5.5.7.4 Clause 6.8

121. TBI argues that an Access Seeker should be entitled to the right to set-off in the event that it is owed money by BTC.

5.5.7.4.1 Interim Determination

122. We do not consider TBI's proposal to include the possibility of net-settlement under Clause 6 to be reasonable as it may unnecessarily complicate payment processes in the future. The Authority also notes that, on a practical level, the requirement to "unwind" various net-settlement arrangements risks making future data collection and market reviews difficult to conduct. While the parties are certainly free to enter into commercial arrangements that involve the netting out of charges and fees, such a possibility must be made available by BTC to all Access Seekers on a non-discriminatory basis. The Authority does not, however, see any justification for imposing such a requirement on BTC under the MAIA. The Authority addressed a similar issue in the BCV MAIA Order.³⁷

5.5.8 Clause 7 "TERMINATION"

5.5.8.1 Clause 7.1.1

123. TBI claims that the term "material" should be defined as a particular monetary amount in this clause given that the provision triggers a termination right. TBI did not propose a value to include as a particular monetary amount.

5.5.8.1.1 Interim Determination

124. We agree with TBI that the language in Clause 7.1.1 is vague, a weakness would be rectified by replacing the term "material" with a specific monetary amount. Therefore, BTC should include the following revisions for Clause 7.1.1:

*7.1.1 if the Carrier fails to pay any ~~material~~ undisputed Charge or other ~~material~~ undisputed amount due hereunder **that is equal to or greater than \$1000**; or*

5.5.8.2 Clause 7.6

125. TBI argues that BTC should not have a right to terminate the service in relation to an individual Carrier. According to TBI, the agreement should only be terminated with respect to an individual Carrier in the event of a general cessation of business. TBI asserts that this situation is already provided for in Clause 7.5 and that Clause 7.6 should therefore be deleted.

³⁷ In the BCV MAIA Order, the Authority rejected TBI's net-settlement proposal on the grounds that 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 (paragraph 70). These same considerations are pertinent to BTC as well.

5.5.8.2.1 Interim Determination

126. We find TBI's argument with respect to Clause 7.6 misplaced as we interpret this clause to apply only to situations where BTC is no longer required to provide a service, as opposed to situations where BTC is seeking to unilaterally terminate the provision of a mandated service to a specific Carrier. In this regard, we note the inclusion by BTC of the clause "if BTC ceases to provide the Service" in Clause 7.6.
127. However, we find Clause 7.6 to be unreasonable insofar as an operator may not abruptly cease to provide a wholesale SMP service unilaterally once the operator is no longer found to have SMP in the relevant market. A reasonable transition period will be required and its length will need to be determined by the Authority taking account of all of the relevant circumstances. Because the reasonableness of the notice period for termination in such circumstances cannot be determined in a vacuum, the Core/Residential Compliance MAIA should 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. The Authority recently addressed this issue in its BCV MAIA Order (paragraph 68) and reached the same conclusion.
128. Accordingly, BTC should revise the proposed Clause 7.6 of the Draft MAIA to read as follows:

7.6 ~~Either Party may terminate this Agreement immediately by giving notice in writing to the other Party if BTC ceases to provide the Service.~~ *If the RA issues a General Determination concluding that BTC 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 BTC is no longer obliged to provide the Service, BTC 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.*

129. Link requests that provision be made for 4 additional days of time under Clause 7.2 which allows BTC to terminate the agreement in the event an Access Seeker fails to make timely payment. Link submitted that an additional 4 days (i.e. an extension from 10 to 14 days) is justified so that Carriers have sufficient time to pursue all appropriate legal and regulatory recourse before BTC can avail of the "ultimate" option of terminating service. Link noted that, in accordance with Section 16.4.1 of the I&S Agreement, BTC has previously agreed that a full 60 days must elapse in a payment default context before the agreement may be terminated for default.

5.5.8.2.2 Interim Determination

130. This request appears reasonable, particularly in light of Section 16.4.1 of the I&S Agreement. The Authority therefore requires that Clause 7.2 of the Draft MAIA be amended to reflect Link's request for a 14 day period to remedy default, as opposed to the currently proposed 10 days.

5.5.9 Clause 9 "RESPONSIBILITIES"

5.5.9.1 New Clause 9.3

131. Link proposes the insertion of a new Clause 9.3 which would require the parties to designate specific individuals within their respective organizations to address issues arising in the following critical areas:

- 9.3 The parties shall each appoint at least one representative to the following working groups within thirty (30) days of the Effective Date:
- Management Group – responsible for the overall relationship;
 - Technical Group – responsible for interconnection and technical issues, ordering and provisioning, operator and quality assurance; and
 - Bill Group – responsible for billing and settlement issues.
- Either party may request a group meeting upon written notice.

5.5.9.1.1 Interim Determination

132. The Authority considers Link’s request to be reasonable and therefore requires that BTC insert the text proposed by Link (and inserted above) into the Core/Residential Compliance MAIA as a new Clause 9.3.

5.5.10 Clause 10 “COMPLIANCE WITH LAWS AND GOVERNMENT REGULATIONS”

5.5.10.1 Clause 10.1

133. TBI argues that BTC, and not the Carriers, should be responsible for the registration or filing of the agreement with the Regulatory Authority.

5.5.10.1.1 Interim Determination

134. Section 24(3) of the ECA requires that “any access or interconnection agreement entered into by a communications provider with significant market power” be filed with the Authority by “*that communications provider*”. BTC should therefore implement the following amendments to Clause 10.1:

10.1 At all times during the Term of this Agreement, Carrier shall comply with all applicable laws, rules and regulations relating to or affecting the performance of its obligations under this Agreement. Carrier shall secure and maintain, at its sole expense, all licenses and authorizations from the Regulatory Authority and/or all governmental agencies necessary for the performance of its obligations under this Agreement, including without limitation, registering or filing this Agreement, if required, with the appropriate governmental agency. BTC makes no representation as to whether any license, regulatory or other approvals required by Carrier to use the Service will be granted. BTC shall be responsible for registering or filing a full and complete copy of this Agreement with the Regulatory Authority within three (3) business days of its execution.

5.5.11 Clause 11 “LIMITATION OF LIABILITY”

5.5.11.1 Clauses 11.1 and 11.2

135. Link rejects BTC’s position that only BTC will: (1) be exempt from the requirement to pay consequential damages under Clause 11.1; and (2) benefit from a cap on total liability under Clause 11.2. Link also expresses the view that a liability cap set at three months of service fees is inadequate to incentivise compliance, and recommended a cap set at 12 months of service. Link further states that it is commercially unreasonable and decidedly

non-industry standard practice to take a non-reciprocal approach on these provisions. The following changes to Clauses 11.1 and 11.2 are therefore suggested by Link.

“11.1 To the maximum extent permitted by law, **neither party** BTC,—its affiliates, shareholders, directors, officers, employees, agents and subcontractors shall ~~not~~ be liable to the **other party** ~~Carrier~~ for any, direct, special, exemplary, indirect, incidental, reliance, punitive, consequential or any other damages, or for any loss, cost or expense of any kind or nature whatsoever, whether arising under contract, tort or otherwise, regardless of the foreseeability thereof and even if the **other party** ~~Carrier~~ has been advised of the possibility thereof, or for loss of profits, loss of business opportunity, loss of goodwill, loss of revenue, loss of data, loss or damage resulting from fraudulent use or intrusion of BTC’s ~~Services~~ or other economic loss.

11.2 Without limiting the provisions of this Section, ~~BTC’s~~ **the** maximum aggregate liability, for all claims or actions in connection with this Agreement or the performance thereof arising during its entire term shall be limited to the Charges paid to BTC under this Agreement for the ~~three (3)~~ **twelve (12)** month period immediately preceding the date the on which the latest claim(s) or action(s) first arose.”

136. TBI argues that Clause 11.1 needs better definition and asks if this clause is intended to serve as an exclusion of liability provision where there is fraudulent use of BTC services by third parties.

137. TBI claims that Clause 11.2 will operate to ensure that BTC has little practical liability in the event it breaches the interconnection agreement. TBI argues that this is not appropriate in the context of this required interconnection obligation.

5.5.11.1.1 Interim Determination

138. The Authority agrees with TBI that the proposed Clause 11.1 is unclear and finds the entire Clause 11 to be unreasonably biased in favour of BTC and reflective of BTC’s market power. In this regard, the Authority sees no compelling reason why different limitation of liability caps should apply with respect to the access provider and Access Seeker. The Authority agrees with Link that both BTC and the Carrier should be treated equally in terms of the placing of a cap on liability. We therefore consider that any limitation of liability should, in these circumstances, be reciprocal, absent objective reasons justifying a deviation.³⁸

139. Considering the above, and absent compelling reasons for doing otherwise, BTC should amend the text of Clause 11 in the Draft MAIA as follows:

*11.1 To the maximum extent permitted by law, ~~BTC~~ **neither party**, its affiliates, shareholders, directors, officers, employees, agents and subcontractors shall be liable to the ~~Carrier~~ **other party** for any, direct, special, exemplary, indirect, incidental, reliance, punitive, consequential or any other*

³⁸ The Authority considered the question of the limitation of liability in Section 4.10.1. of the BCV MAIA Order and determined that aggregate liability should be capped at \$1 million for loss of, or, damage to physical property, and the greater of (1) the Amounts due under the BCV MAIA; and (2) an amount equal to the most recent three (3) months’ payments made by an Access Seeker to BCV under the MAIA; and (3) \$100,000.

damages, or for any loss, cost or expense of any kind or nature whatsoever, whether arising under contract, tort or otherwise, regardless of the foreseeability thereof and even if Carrier ~~the other party~~ has been advised of the possibility thereof, or for loss of profits, loss of business opportunity, loss of goodwill, loss of revenue, loss of data, loss or damage resulting from fraudulent use or intrusion of ~~BTC's s-Services~~ or other economic loss.

11.2 Without limiting the provisions of this Section, ~~BTC's~~ *the* maximum aggregate liability, for all claims or actions in connection with this Agreement or the performance thereof arising during its entire term shall be limited to ~~the Charges paid to BTC under this agreement for the three (3) month period immediately preceding the date the on which the latest claim(s) or action(s) first arose:~~

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

5.5.12 Clause 12 “WARRANTY“

5.5.12.1 Clause 12.2

140. TBI points out that this provision appears to “exclude the warranties and undertakings specifically set out in this Agreement here.” TBI failed to explain why this clause should be deleted.

5.5.12.1.1 Interim Determination

141. The Authority finds the language of Clause 12.2 to be inconsistent with the requirement in paragraph 65(b) of the Remedies GD that the Integrated MAIA include service level commitments and guarantees. Therefore, BTC should delete Clause 12.2 from the Draft MAIA and should include service level agreements and specify penalties or service credits that are sufficient to adequately address the sub-optimal provision of service.

5.5.13 Clause 13 “CONFIDENTIALITY”

5.5.13.1 Clause 13.1

142. TBI proposes that BTC should specifically undertake not to use the carrier confidential information for the purposes of soliciting business from the carrier customers, both during the agreement and for a period two years from termination of the agreement.

5.5.13.1.1 Interim Determination

143. We agree with TBI. The Authority recently addressed similar issues in its BCV MAIA Order. At paragraph 93, it considered the scope of the confidentiality restrictions proposed by BCV for inclusion in its MAIA, and concluded that they were satisfactory. The Authority

considers that the issue of the confidentiality of carrier information should be addressed in the same manner in the BTC Integrated MAIA.

144. We find that BTC should incorporate the same or similar provisions relating to the use of customer data in the Draft MAIA. Accordingly, BTC should replace Clause 13 with the following text:

13 CONFIDENTIALITY

13.1 *Subject to the following provisions of this Clause 13, a receiving party shall keep in confidence Confidential Information and will not (and will use its best efforts to ensure that its directors, employees, agents, representatives, affiliates and professional advisors will not) disclose such information to any third party. The Parties shall not without the written consent of the other Party disclose Confidential Information to any person other than:*

(a) their employees, third party sub-contractors or supplies, or professional advisers with a need to know in connection with this MAIA or the Services provided hereunder:

(b) the employees of Carrier's group companies or its or their sub-contractors or suppliers.

Disclosure under sub-clauses 13.1(a) or (b) above can only be made to the extent necessary in order for the Party to fulfil its obligations under this MAIA and for no other purpose. BTC agrees that in no event shall it provide the Carrier's Confidential Information including end user information to any employee, officer, director or advisor of any Key Tech Group Affiliate, other than employees, officers, directors or advisors of BTC and of the Carrier itself if the Carrier is also a KeyTech Group Affiliate.

13.2 *The receiving Party shall exercise no less security or degree of care than that Party applies to its own Confidential Information of an equivalent nature.*

13.3 *A receiving Party shall restrict disclosure of Confidential Information relating to the other Party to those persons who have a reasonable need to know and Confidential Information shall be used solely for the purposes for which it was disclosed.*

13.4 *Disclosure of the following shall not be a breach of this clause:*

(a) any information which is in the public domain other than through a breach of this MAIA;

(b) information lawfully in the possession of the receiving Party before the disclosure under this MAIA took place;

(c) information obtained from a third party who is free to disclose it;

(d) information which is lawfully demanded or required to be disclosed by any governmental or judicial authority

(including the RA) provided that (if reasonable and lawful to do so) the receiving Party informs the disclosing Party in writing of the extent of the disclosure, sufficiently in advance of such disclosure (if such advance notice may lawfully be undertaken by the receiving Party) to reasonably allow the disclosing Party to seek a protective order in respect of such information, or if not, as soon as reasonably practicable after such disclosure;

(e) any information which has been replicated independently by someone without access or knowledge of the information; and

(f) a disclosure properly and reasonably made to the RA.

13.5 *This clause shall remain in effect for two (2) years after the termination of this MAIA.*

13.6 *All Confidential Information is acknowledged by the receiving party to be the property of the disclosing party and the disclosure of the Confidential Information shall not be deemed to confer any rights to that Confidential Information on the receiving party.*

13.7 *The disclosing party may request in writing at any time any written Confidential Information (and/or Confidential Information in machine readable form) disclosed pursuant to the terms and conditions of this Clause 13 and any copies thereof be returned with a written statement to the effect that upon such return the receiving party has not knowingly retained in its possession or under its control, either directly or indirectly, any Confidential Information or copies thereof and the Receiving Party shall comply with any such request within seven (7) business days of receipt of such request.*

13.8 *Unless otherwise agreed in writing, a receiving party shall not use the other Party's Confidential Information to provide commercial advantage to its customer facing divisions.*

5.5.14 Clause 19 "MISCELLANEOUS"

5.5.14.1 Clause 19.2

145. TBI asserts that BTC's right of assignment to affiliates should be limited to affiliates which are capable of performing BTC's obligations under the Agreement.

5.5.14.1.1 Interim Determination

146. The Authority regards the point raised by TBI regarding assignment as a reasonable concern, particularly in light of the obligations established under the Remedies GD and the importance of ensuring continued and effective access and interconnection for the

market.³⁹ Accordingly, BTC should amend current Clause 19.2 of the Draft MAIA as indicated below:

19.2 Assignment

*Neither Party shall transfer or assign all or part of its interest under this Agreement without the written consent of the other Party, **which consent shall not be unreasonably withheld**. Any attempt to assign or transfer this Agreement by a Party without the written consent of the other Party shall be void. Notwithstanding the above limitation, either Party may assign this Agreement in whole or in part to any of its affiliates, any person that purchases all or substantially all of the Party's assets, or any other person formed by or surviving the merger or consolidation of that Party and any other person. **BTC may only avail of this exception to the consent requirement in the case that the party to whom it is assigning or transferring this Agreement is capable of performing the obligations herein to at least the same level as BTC**. This Agreement shall be binding upon and ensure the benefit of the Parties and their respective successors and permitted assigns.*

5.5.15 Schedule 3

5.5.16 Generally

147. Link expresses numerous concerns with Schedule 3, including the following:

- (a) It does not believe “the wholesale services offered to Carrier by BTC in respect of residential end users” listed under Schedule 3 to the Draft MAIA complies with all provisions of the SMP Order. Link gives the example that the requirement to provide wholesale services in the BTC SMP Markets 12 and 13 includes “local access, backhaul, and data stream aggregation, terminating at a Wholesale Operator’s premises.” There is no mention of several of these elements in Schedule 3 of the Draft MAIA.
- (b) Link states that it is not possible to comment on “business services” listed under Schedule 4 to the Draft MAIA at this point as there is no information yet listed in the current revision.
- (c) Link highlights that BTC has proposed some discounts over the 15% mandatory obligation in exchange for lesser discounts for other SMP wholesale services. Link is of the view that this approach has no basis in regulation and therefore is *per se* not compliant with the SMP Order. Link objects to any SMP wholesale service price on Schedule 3 that provides for less than a 15% discount off retail, including without limitation all “Premium” installation service pricing.
- (d) Link also objects to BTC’s position that the BTC box on the outside of the home should serve as the demarc point instead of the DSL modem specified and supplied by BTC. Link does not believe BTC’s position is defensible given BTC’s assertion of control over the DSL modem equipment.

³⁹ The Regulatory Authority recently addressed the issue of assignment in its BCV MAIA Order (paragraphs 131 and 132).

- (e) Link states that it stands by its original comments to BTC's draft model A&I agreement redline and objects to BTC reserving the right to unilaterally amend the rates set out in Schedule 3 to the Draft MAIA (and in any future Schedule 4) on "reasonable written notice." Link expresses the view that contractual stability is necessary to market and sell services to End-User customers.

5.5.16.1 Interim Determination

148. The Authority considers that there are numerous deficiencies with Schedule 3 and requires that it be revised.
149. In respect of point (a) above raised by Link, the Authority points parties to the definition of Broadband Access Services in the Final Decision and Remedies GD:
- "Broadband Access Services"** refer to the legacy service provided by a Class B provider such as The Bermuda Telephone Company Limited which linked an End-User to a provider of ISP Services. The link in question comprised local access, backhaul, and data stream aggregation, terminating at an ISP's premises.
150. The Authority agrees with the concern expressed by Link in point (c) above. BTC expresses the view that 15% is an estimate based on international benchmarks and that avoidable cost will be varied to the extent that the Authority is presented with reasonable data on actual avoidable costs in Bermuda. This is a flawed interpretation of the Remedies GD, which makes clear that BTC is subject to a price control that obligates it to set the price of the relevant SMP wholesale services at a level that is 15% less than the equivalent retail service.
151. If BTC wishes to petition for a modification to the Remedies GD, it may do so. However, the Authority would expect to see persuasive evidence based on cost justification showing that a figure less than 15% is justified. If such a showing were made, the Authority would consider initiating a consultation to determine whether it is reasonable to modify this obligation by issuing a new general determination changing this price control.
152. Additionally, the Authority notes that Schedule 3's reference to "Premium" and "Basic" wholesale data services does not appear to be justified as BTC currently provides no underlying retail "Premium" and "Basic" data services to which these wholesale services can be tied.
153. In respect of point (d) raised by Link, the Authority agrees with Link's view and considers that as the wholesale service must mirror the retail service, the demarcation point should be the DSL modem.

More generally Schedule 3 does not meet the requirements of paragraph 65 of the Remedies GD and requires further detail on: Technical access and interconnection terms; Forecasting requirements; Ordering Requirements and Procedures; Provisioning requirements and procedures; Network alterations and maintenance; Fault Reporting; Repair and Maintenance procedures and response times; and Performance and Service Level Commitments (SLAs). In the current Schedule 3, for example, SLAs are not properly defined in a way that allows for objective measurement and verification. For example, a service level of 85% for basic services is provided for; however there is no description of how the 85% is to be interpreted and applied in practice. There is also no description in the current version of Schedule 3 as to the penalties applicable where SLAs are not reached.

6 INTERIM DECISION AND ORDER

154. In accordance with RAA Section 63(1)(d) and Section 5.1.1 of the Remedies GD, BTC is hereby required to revise its Draft MAIA to conform to the requirements set out in this Interim Decision and Order and produce:
 - (a) a Core/Residential Compliance MAIA that is structured as follows: (1) the main body, containing all of the generally applicable provisions relevant to both the Residential Markets and the Business Markets; (2) service annexes (each separate annex to contain relevant service-specific terms and conditions including price, service level commitments/guarantees/credits, etc.); and (3) technical annexes, including product manual, ordering/provisioning procedures, etc. The Core/Residential Compliance MAIA shall, if required, be subject to further modification by the Authority, culminating in the Residential MAIA; and
 - (b) Business Compliance Annexes that are structured as follows: (1) service annexes for the services covered by the Business Markets (each separate annex to contain relevant service-specific terms and conditions including price, service level commitments/guarantees/credits, etc.); and (2) technical annexes, including product manual, ordering/provisioning procedures, etc.
155. BTC shall deliver a copy of the Core/Residential Compliance MAIA to the Authority (a clean version along with a comparison against the Draft MAIA) no later than 5:00 p.m. on 18 November 2013. BTC shall also post a copy of the Core/Residential Compliance MAIA on its website and notify all ICOL holders of its publication.
156. Interested parties will have until 5:00 p.m. on 25 November 2013 to file any Core/Residential Compliance Comments. All Core/Residential Compliance Comments submitted to the Authority by the parties must conform to the format set out in paragraph 23(b) of this Interim Decision and Order.
157. BTC shall deliver a copy of the Business Compliance Annexes to the Authority no later than 5:00 p.m. on 29 November 2013, post a copy on its website and notify all ICOL holders of its publication.
158. Interested parties will have 10 calendar days in which to provide their Business Compliance Comments, i.e., by 5:00 p.m. on 9 December 2013.
159. BTC shall deliver a copy of the Draft Final Business Annexes to the Authority (a clean version along with a comparison against the Business Compliance Annexes) together with a position paper no later than 5:00 p.m. on 19 December 2013, conforming to the format established under paragraph 24(c) of this Interim Decision and Order. BTC shall also post a copy on its website and notify all ICOL holders of its publication.
160. This Interim Decision and Order shall become effective on the date set forth below; and
161. So ordered this 12th day of November 2013.