



**REGULATORY
AUTHORITY
OF BERMUDA**

Consumer Rights: Residential Contracts

Decision and Order

Date: 3 October 2014

This Decision is made in accordance with the Regulatory Authority Act 2011 (RAA) section 65(a). Words and phrases used within this decision, unless otherwise stated, have the same meaning as set out in Section 1 “Definitions” of the Regulatory Authority’s (Authority) Consultation dated 9 May 2014 entitled *Consumer Rights: Contracts 14/1615* (‘Consultation’).

Introduction

On 9 May 2014, the Authority issued a public consultation on the issue of Consumer Contracts. The Consultation was split into two main parts. Part I proposed decisions relating to Contracts between Consumer s and Service Providers. Part II addressed and proposed decisions relating to the top concerns raised by Consumer s with the Authority during its first year in operation.

The Consultation proposed eight (8) distinct Decisions relating to Contracts. Six (6) of those Decisions were proposed in to Part I of the Consultation. The last two (2) were proposed in Part II.

The Authority employed two forms of engagement with potential respondents. In addition to being invited to respond in writing directly to the Authority with their thoughts on the decisions proposed in the Consultation, persons wishing to respond to the Consultation were also given the opportunity to respond to an online survey, which asked questions designed to garner feedback on the proposed decisions. The survey was not made or administered under scientific conditions and is not relied upon as such. In coming to its decision, however, the Authority did take the responses into account using them to assist in gaining a general sense of the sentiment towards the decisions proposed held by respondents to the survey.

Respondents could be placed broadly into two categories; Service Providers licensed by the Authority to offer electronic communications services to the general public; and Consumer s themselves. A review of the responses to the survey revealed that, for the most part, Consumer s responded to the survey while the Service Providers responded in writing responding to each proposed decision on a point-by-point basis. There were a total of 43 respondents to the survey (37 completed surveys) and 7 responses from Service Providers in the traditional format.

Having considered the views put forward by the responding parties together with the relevant provisions of the ECA and the RAA, the Authority provides the following explanation for its determination that the Order connected with this decision dated 3 October 2014 is adopted by the Authority.

PART 1

Proposed Decision 1

1. All of the responding Service Providers and the majority of Consumer s (72% of respondents to the survey) agreed with the Authority's proposal to require that all terms and conditions applicable to service contracts and general terms and conditions should be readily available to Consumer s. This included the requirement that those terms and conditions be available on the websites of Service Providers and at all retail outlets where the Service Providers sell products and services or where Consumer s can deal with their account matters and be available to Consumer s in a form that allows them to take it away to review it at their own leisure.
2. The Authority has decided to implement this decision in the form proposed.

Proposed Decision 2

1. The Authority proposed, in summary, that, Contracts offered to Consumer s must either be in a physical or electronic form with both affording Consumer s the opportunity to review the terms of the Contract before agreeing to them.
2. Of the seven (7) responding Service Providers, four (4) specifically responded to this decision. Three of those responses represented positions that would not be considered complete agreement with the Authority's Proposed Decision.
3. Bermuda Digital Communications Limited (CellOne) wanted to ensure that contracts signed by electronic means should also be included within the definition of Physical Contracts. The kind of Contracts being described by CellOne could fall into either Electronic or Physical Contract category. They appear to be Physical Contracts signed by electronic means. The Authority is less concerned with how the Contracts are described than it is with whether or not there is a clear indication to the Consumer about what they are agreeing to and that the Consumer is given a fair opportunity to understand what it is they are agreeing to before signing off to accept. In these circumstances, Service Providers are invited to ensure, whatever means they choose to categorize their Contracts, that they meet the requirements for that category of Contract.
4. Digicel Bermuda Limited (Digicel) suggested that, in the case of an Electronic Contract, so long as the terms and conditions are clearly stated on the invoice and that the customer service agent "went over them" (we assume with the Consumer) this will meet the customer needs. The purpose of the Authority's proposal that Consumer s be required to give an indication that they accept the terms and conditions of an Electronic Contract before completing the transaction was to ensure that a Consumer understands what terms he or she would be bound by upon completion. Digicel's suggestion would assist an Consumer only after the sale has been completed.

5. Electronic Communications Limited (ECL) and QuoVadis Limited (QuoVadis) both had suggestions as to how a Service Provider could be sure that a 's agreement to the terms and conditions of an Electronic Contract is clear and unequivocal. QuoVadis pointed to the Electronic Communications Act 1999. ECL argued that the making of a payment for services implied agreement to the terms. The latter of these two suggestions is problematic. Implied Contracts, in the best of circumstances, can be imprecise and create opportunities for confusion.
6. The Authority, taking into account the varied ranges of suggestions for the consummation of an electronic contract, determines that it would be administratively efficient and provide sufficient protection to Consumers if, rather than mandating the form consent an Electronic Contract must offer, the Authority simply sets out guidelines. The Authority has decided, therefore, that an Electronic Contract will not be considered complete (in the sense that the Authority will not consider that a Consumer has agreed to the terms and conditions in such a Contract) unless the Consumer has made a clear and unequivocal expression of their agreement to the terms of the contract in a form that is readily understood as a confirmation of an agreement by both parties and is recordable by the Service Provider. For the avoidance of doubt, an implied agreement by way of acceptance of service, tendering payment or the like, is not satisfactory.

Proposed Decision 3

1. The Authority proposed that any Contract longer than two (2) pages must be accompanied by a one (1) page Contract Summary setting out the "most pertinent" terms of the Contract.
2. Of the respondents to the Survey who completed the question relating to this proposed decision, 100% of them agreed that there should be contract summaries for contract longer than 2 pages.
3. Of the seven (7) Service Providers who provided responses to the Consultation, six (6) responded to this proposed decision. Bermuda Telephone Company (BTC) and ECL both noted that providing a summary of the Contract terms could discourage Consumers from reading the entire Contract. This is a point worth noting, however, the risk of Consumers not reading the entire Contract at all is outweighed by the benefit of ensuring that, even if they only read the Contract Summary, they will be informed of the pertinent details.
4. Digicel pointed out that, if the Contract Summary is required, it should also clearly inform the Consumer that they are bound by the terms of the entire Contract and not just the Summary. This is a sensible position to take. It would be clear to the Consumer, upon signing the Contract, that they will be bound by the terms and conditions of the entire Contract upon signature (or clear indication of agreement in the case of an Electronic Contract). In the circumstances, whilst Digicel's suggestion is a good one and one that Service Providers should seriously consider taking on board; the Authority is not minded to make it a requirement.

5. Link Bermuda Limited (Link) pushed against the inclusion of the price charged for the service provided in a Contract Summary. The reason for Link's objection to the inclusion of this term appears to be its concern that, because of its large range of services and the various combinations an Consumer would have to choose from in signing up for Link's service, this requirement would create "... *impossible challenges for compliance...*". The Authority does not accept this point. What is being required is that a Consumer be told, in the Contract Summary, what price they are paying for their service with a Service Provider. Link's position concerning the various permutations of the combinations of services misses this point. The Authority is concerned that Consumer s are entitled to know how much their service is costing them. This is a total price. The various elements making up that price can be included jointly or separately, in the Contract summary or in the Contract its self, this is a matter for the Service Provider.
6. Other Service Providers recommended that the threshold for the length of a contract requiring a Summary be increased from two (2) pages to three (3) or four (4) pages. In balancing the need to ensure that Consumer s have every opportunity to be informed of the important terms of their Contracts, together with the cost burden the production of an additional page for a Contract Summary, the Authority considers it reasonable to adjust the requirements to only require that Contracts longer than 3 pages (i.e. 4 pages or longer) must be accompanied by a Contract Summary.
7. CellOne made two requests for clarification;

First, it wished to ensure that Consumer s would not be required to execute a new Contract for price increases or decreases for the same service. The procedure for variation of the terms of a Contract must be set out in the Contract (not required in the Summary). This would include whether or not a new contract needs to be signed. The Authority has not required a new Contract to be signed in these instances. In instances where there is an increase in price or other change in the terms and conditions of the service in a manner that is materially adverse to the Consumer, the provisions of the Service Providers' ICOL allowing for notice and termination without penalty must be adhered to.

Second, CellOne queried whether it would be possible to continue the separation of Contracts for service from Contracts for devices. The Authority agrees with this observation and does not intend the General Determination on this matter to interfere with this business practice of any Service Provider.

Proposed Decision 4

1. The Authority proposed a requirement that certain standard terms and conditions be included within the terms of a Contract. This list was an extension of the matters currently required under the terms of an ICOL.
2. Most respondents to the survey agreed that the matters listed under proposed decision 4 should be included in the General Terms and Conditions of Contracts signed by the Consumer when taking service form a Service Provider. The Service

Providers agreed for the most part, but took issue with the number of matters that were required to be addressed in the Contract. Digicel and BTC both pointed out that the more issues the Authority requires a Contract to address, the longer Contracts will be. Digicel noted that there is a need to balance completeness with ease of understanding. In the circumstances, the Authority has decided that the following changes be made to the requirements;

- a. **Complaint Resolution Procedure:** The Authority has determined that the current requirements under section 14 of the ICOL in relation to the dispute resolution procedures will remain, namely, the procedures for initiating and resolving disputes in respect of the Contract must be included in the Contract.
 - b. **Delivery, Installation and/or Activation:** Instead of requiring Service providers to place all terms and conditions concerning these matters in the contract, Service Providers will be required to provide the means by which up-to date information on these matters can be obtained.
3. Link and CellOne both took issue with the requirement to include the prices, tariffs and charges for a Service within a Contract. Link proposed, as an alternative, that Service Providers be allowed to refer to a standard table of charges in the Contract. CellOne suggested that a minimum service rate plan be included in the terms of the Contract. The Authority notes that to comply with the terms of the proposed decision literally there would need to be notice of every single rate that could be incurred during a service by a Consumer. It is agreed, this is not the most practical way of ensuring Consumers are informed. In the circumstances, the Authority will modify the requirement concerning prices, tariffs and charges in a manner that only requires the minimum service rate to be set out in the terms of the Contract, together with the standard late payment fees and any other standard charges. The location of variable charges such as roaming rates and overage rates should be drawn to the Consumers attention by reference to the means by which up-to date information on these matters can be obtained, such means to include, at a minimum, access to it on the Service Provider's website.
4. Link disagreed that the commencement date of the Contract should be included as a standard term and suggested that reference to the first invoice date or should be made instead. This is a relatively simple issue to remedy. The Commencement date should be referred to in the Contract, not least because it will allow the length of a Contract to be settled at the outset for notice and renewal periods to be calculated. If Link's intention is for its Contracts to commence from the date of the first invoice, it need only to set this out explicitly in the terms of the Contract. The Authority makes no change to this requirement.

Proposed Decision 5

1. The Authority proposed to require that Service Providers to include minimum standards for speed of service(s) (where applicable), availability and uptime of service, installation times, maintenance times and repair times in Consumer Contracts. The majority of the Service Providers took issue with some or most of

the items listed as being requirements. The majority of Consumers agreed with the inclusion of the terms.

2. Link argued that such matters should not be mandated at all. Instead, Link suggested that such matters should be left to be addressed by market forces. In other words, Link appeared to be arguing that Service Providers who provided a low level of service in one of the proposed areas would be “punished” by the market place as a result of Consumers choosing to seek service from providers who performed better in that particular area. The Authority is not minded to allow market forces to be the main driver behind Consumer standards in Bermuda for the time being. It may well be that in time competition will be such that the need for regulatory intervention in this space can be relaxed. That time however, has not arrived. This is evidenced chiefly by the fact that most of the minimum standards called for in this decision have not been implemented by any Service Provider to a great degree.
3. Digicel agreed with the Authority’s proposed decision, but asked for careful consideration as to how speed and availability and up-time standards could be implemented suggesting further discussions before implementing these requirements. Digicel and CellOne cited the challenge of guaranteeing up-time and availability of a mobile service because of mobile’s reliance on radio frequency to deliver service to Consumers.
4. BTC agreed with the proposed decision, but sought to ensure that there were sufficient allowances for “unforeseen circumstances” as well as required maintenance windows. ECL also sought carve- outs for unforeseen circumstances specifically relating to uptime and repair and maintenance time.
5. The Authority has decided to exclude the issues of Availability and Up-time and Speed from the requirements under proposed decision 5. These two issues will be included in the discussion proposed under proposed decision 7. The balance of the matters must be addressed by Service Providers within the context of their service Contracts.

Proposed Decision 6

1. There was no serious objection to the Authority’s proposed decision to ensure automatic renewals be limited to renewal on a month to month basis. BTC sought to allow for consent to a longer automatic renewal period to be given by a Consumer at the start of a contract. The Authority does not agree with this suggestion. The purpose of the decision is to prevent consumers being “caught out” by auto renewal clauses because of a failure to give notice. Service Providers should have no automatic renewal clauses that result in the renewal of a contract for longer than a month-to-month basis unless the Consumer has signed a new Contract agreeing to a longer period.

PART II

Proposed Decision 7

1. All of the respondents to the survey agreed that a collaborative approach to the issues connected to broadband quality of service would be beneficial. All of the Service Providers did not.
2. CellOne generally agreed with the decision to enter into a dialogue to discuss various issues affecting broadband quality in Bermuda. BTC also expressed that it was open to such a dialogue.
3. Digicel indicated that it too would be open to dialogue but suggested that speed should not be a topic of discussion. The Authority disagrees. It is at too early a stage to determine whether or not certain issues should be excluded from the dialogue. All matters should be placed on the table with a view to working through these issues in an open and honest way for the betterment of Bermuda's electronic communications sector and its users.
4. Link argued that market forces should be the determining factor in quality of service. The Authority disagrees with this reasoning. Market forces work best in an already competitive market. This includes vigorous competition on issues of price as well as service. Based on the consumer response to this issue, Broadband quality, and responsiveness are two major issues facing consumers regardless of which Service Provider they have service with.
5. The Authority has chosen to implement the decision as proposed with the addition of adding minimum speed and availability and up-time guarantees to the points for discussion. As a result, the discussions will likely take longer than the 90 days suggested. The aim will be to come up with a final document reporting on these issues within 120 days.

Proposed Decision 8

1. The strongest opinions related to the Authority's proposed decision to require Service Providers to request that Consumers 'opt in' to receive SMS messages, emails and phone calls mainly concerned with marketing or promotional purposes came from the two mobile providers. CellOne agreed that an 'opt in' requirement was best. Digicel, on the other hand, argued that an 'opt in' requirement would add "friction to the wheels of commerce" citing the fact that the messages would likely be received by the Service Provider's own customers. Digicel petitioned for an 'opt out' approach.
2. The common ground between all parties was that, however the consent to receive messages is given by Consumers (opt in or opt out), Consumers must always be given the opportunity to unsubscribe from the contact each time they are contacted.

3. Consumers agreed with both the ability to opt in and opt out with 95% of respondents agreeing that both options should be available.
4. There is no clear winner here. The Authority's main concern is to ensure that the annoyance of Consumers by unsolicited SMS messages, phone calls and emails is kept to a minimum, whilst at the same time, staying out of the way of commerce and progress. In the circumstances, the Authority has determined that it will place no requirements on Service Providers at the start of a contract as to how they can confirm the consent of their customers ('opt in' or 'opt out') to deliver unsolicited marketing and promotional material. Instead, the Authority will require that, each time an unsolicited communication is made by a Service Provider, Consumers must also be informed of the manner in which they can unsubscribe from the service and be given the opportunity to do so.

Implementation Timeline

1. In the Consultation, the Authority proposed that *"all new Contracts offered by Service Providers be required to incorporate the Proposed Decisions within 6 months of the effective date of a General Determination on these matters and that all existing Contracts be amended insofar as is necessary to become compliant with any terms and conditions within 6 months thereafter."*
2. This timeline gives an effective compliance date of 6 months from the effective date of the General Determination connected with this decision and a final compliance date of 12 months from the effective date of the General Determination connected with this decision. The Authority has received no responses from the Service Providers or Consumers that have caused it to reconsider this timeline.

Order

Taking into account the comments of all the Respondents to the Consultation, the Authority Orders as follows;

- a. The Authority hereby adopts the General Determination entitled "Consumer Rights: Contracts".
- b. Service Providers shall, within 6 months of the effective date of the General Determination, ensure that all new Contracts offered to Consumers on a residential basis are offered in and contain terms in compliance with the General Determination;
- c. Service Providers shall ensure that all existing Contracts not made in compliance with the General Determination are amended insofar as is necessary to become compliant with the General Determination within 12 months of the effective date of the General Determination.